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# Criminal Justice Solutions: Model State Legislation

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By Priya Raghavan

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# Table of Contents

|                                                                           |           |
|---------------------------------------------------------------------------|-----------|
| <b>Introduction</b> .....                                                 | <b>1</b>  |
| <b>Enact Comprehensive Sentencing Reform</b>                              |           |
| 1. Eliminate Imprisonment for Lower-Level Crimes. ....                    | <b>4</b>  |
| 2. Make Sentences Proportional to Crimes .....                            | <b>8</b>  |
| <b>Eliminate Financial Incentives for Incarceration</b>                   |           |
| 1. Abolish Cash Bail .....                                                | <b>14</b> |
| 2. Calibrate Fines to Defendants' Ability to Pay and Eliminate Fees ..... | <b>18</b> |
| <b>Reform Prosecutor Incentives</b> .....                                 | <b>26</b> |
| <b>Pass Sensible Marijuana Reform</b> .....                               | <b>30</b> |
| <b>Respond to the Opioid Crisis</b> .....                                 | <b>31</b> |
| <b>Reduce Female Incarceration</b> .....                                  | <b>32</b> |
| <b>Endnotes</b> .....                                                     | <b>33</b> |

## Introduction

America's criminal justice system is in crisis. It is both inequitable, placing a disproportionate burden on communities of color, and extremely expensive, costing \$270 billion a year.<sup>1</sup>

What's more, our current approach is not necessary to protect public safety. Research conclusively shows that high levels of imprisonment are simply not necessary to protect communities. The Brennan Center has found that around 40 percent of America's prison population is incarcerated with little public safety justification — in other words, they are behind bars unnecessarily.<sup>2</sup>

Understandably, voters across the political spectrum have lost faith in the fair administration of justice, and the urgency of criminal justice reform continues to be a rare point of bipartisan agreement. Despite this voter consensus — and with some notable exceptions — policymakers generally have been slow to respond.

This report offers state lawmakers model legislation based on smart, bold policy solutions that would keep crime low while reducing mass incarceration. These model bills are based on the policy solutions put forth in our March 2018 publication *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators* (“*Criminal Justice Agenda*”).<sup>3</sup> More background on the impact and motivation for these policies can be found in that report.

This report provides the blueprint to make those policy solutions achievable. In some cases, the report spotlights robust and useful examples of state legislation already introduced or in effect. In others, the Brennan Center created original model legislation that can be easily adapted to the needs of different jurisdictions.

Notably, if every state passed the Alternative to Prison Act and the Proportional Sentencing Act, two new and original policy proposals, the national prison population could safely be reduced by nearly 40 percent.<sup>4</sup>

The report includes model and example legislation to:

- **Eliminate Imprisonment for Lower-Level Crimes.** Incarceration is too often the punishment of first resort. It can be especially counterproductive for people convicted of lower-level crimes who could be better sanctioned by alternatives to incarceration, such as treatment, community service, or probation. Our model bill would eliminate imprisonment for certain qualifying lower-level offenses and instead require diversion into various alternatives to incarceration.
- **Make Sentences Proportional to Crimes.** State prison sentences are excessively long. A growing body of research shows that there is little or no relationship between length of incarceration and recidivism. Our model bill would reduce sentences by 25 percent for those offenses that make up the largest share of the prison population.
- **Abolish Cash Bail.** The decision of whether a defendant should be jailed while awaiting trial is often based on a defendant's wealth and not on public safety considerations. This

report highlights a model bill developed by Civil Rights Corps that would end the use of money bail.

- **Reform Prosecutor Incentives.** Our model bill incentivizes local prosecutors to change their practices by providing bonus dollars to their offices if they reduce incarceration while keeping recidivism rates low.
- **Reform Marijuana Laws.** Jail and prison spaces are expensive, and beds in these facilities should not be used for people convicted of low-level marijuana offenses. This report highlights a ballot initiative that legalized marijuana possession in California and legislation that decriminalized marijuana possession in Delaware, serving as useful models for lawmakers to enact as legislation in other states.
- **Calibrate Fines to Defendants' Ability to Pay and Eliminate Fees.** Courts continue to levy fees and fines on defendants convicted of crimes and civil violations without considering whether they are financially able to pay them. This leads to never-ending cycles of criminal justice debt and even modern-day debtors' prisons. Our model bill would calibrate criminal fines (monetary sanctions prescribed by courts as punishment for committing a crime) to a defendant's ability to pay and eliminate the assessment of court fees (flat fees intended to offset court costs) on criminal defendants. It would mandate that fines are calculated with reference to the number of days of income a person must forego to pay them — called "day fines."
- **Reduce Opioid Deaths.** The over-prescription of legal opioids, such as oxycodone and codeine, contributes significantly to America's opioid crisis. This report highlights legislation in New Jersey that limits when and how doctors can prescribe opioids. It also highlights a Vermont bill that increases access to drugs that can neutralize the effects of opioid overdoses.
- **Curb the Number of Women Entering State Prisons.** The best way to help incarcerated women is to significantly reduce the female prison population. Additionally, incarcerated women have unique needs, and reforms aimed at conditions of confinement can help meet them. This report provides summaries of legislation in New Jersey and Oklahoma that encourage diversion and improve conditions of confinement and reentry services for women and primary caretakers of children.

# Enact Comprehensive Sentencing Reform

## 1. Eliminate Imprisonment for Lower-Level Crimes

The “Alternative to Prison Act” (page 4) was developed based on a recommendation from a 2016 Brennan Center report *How Many Americans Are Unnecessarily Incarcerated?* to eliminate imprisonment for certain lower-level crimes. The report found that 25 percent of those in prison nationwide — roughly 364,000 people — would be better sanctioned by alternatives to prison.<sup>5</sup> The model legislation requires diversion into various alternatives to incarceration as the default sanction for certain lower-level offenses and allows judges to sentence people convicted of these lower-level offenses to prison in special circumstances. This model bill would work to reduce unnecessary incarceration, improve public health, and save tax payer dollars — all without jeopardizing public safety.

The Alternative to Prison Act corresponds to the section of the Brennan Center’s *Criminal Justice Agenda* entitled “Eliminate State Imprisonment for Lower-Level Crimes.”

## 2. Make Sentences Proportional to Crimes

The “Proportional Sentencing Act” (page 8) requires that sentences for the six categories of offenses that make up the largest share of the prison population — aggravated assault, nonviolent weapon possession, robbery, serious burglary, serious drug trafficking, and murder — be reduced by 25 percent. Jurisdictions can apply this sentence reduction to other crimes as well. The Brennan Center report *How Many Americans Are Unnecessarily Incarcerated?* found that, in addition to the quarter of the prison population that would be better served by alternative sanctions, at least 58 percent of those in prison are serving sentences that can be safely shortened.<sup>6</sup>

The Proportional Sentencing Act corresponds to the section of the Brennan Center’s *Criminal Justice Agenda* entitled “Make State Sentences Proportional to Crimes.”

The Proportional Sentencing Act and the Alternative to Prison Act together, if enacted by all states and the federal government, would reduce the nationwide prison population by 40 percent.

## THE ALTERNATIVE TO PRISON ACT

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To significantly and safely reduce the prison population by eliminating prison sentences for certain lower-level crimes that would be better served by alternatives to incarceration.

**Whereas**, the prison population in the United States has increased dramatically over the last 40 years;

**Whereas**, increases in incarceration yield diminishing returns with respect to crime reduction;

**Whereas**, incarceration, particularly for lower-level crimes, has been shown to increase recidivism by removing people from their social support networks, limiting their access to rehabilitative programming, and reducing their chances of finding employment;

**Whereas**, high levels of incarceration disproportionately affect and undermine the stability of marginalized communities; and

**Whereas**, sanctions other than incarceration can be imposed for certain crimes without jeopardizing public safety;

Therefore, the following shall be enacted:

### Section 1. Definitions.

As used in this Act, the following terms shall have the meanings set forth herein:

- (a) “Alternative Sentence.” A sentence imposed in place of incarceration, which includes one or more of the following penalties:
  - (1) Probation;
  - (2) Participation in a diversionary or similar program;<sup>a</sup>
  - (3) Community service;
  - (4) Monetary penalties that are calibrated to a defendant’s ability to pay;<sup>b</sup> or
  - (5) Other non-carceral penalties, provided they are structured to minimize unnecessary intrusion on liberty.
- (b) “Alternative to Prison Act Oversight Board.” The body created within the court system of the enacting jurisdiction tasked with the responsibilities enumerated in Section 3 of this Act. Such body shall be composed of four (4) civil servants who serve in a supervisory capacity in other parts of the administration of the courts of the State and shall be chaired by a fifth (5th) member, who shall be the chief justice of the highest court of the State.<sup>c</sup>
- (c) “Qualifying Offense.”<sup>d</sup>



- (1) Offenses falling within the following categories:
  - (A) Drug possession;
  - (B) Minor trafficking of serious drugs, defined as lower-level roles in trafficking, such as street dealers or those acting as a courier;
  - (C) Minor larceny, defined as taking another's property worth less than \$10,000 without consent, and other minor property crimes;
  - (D) Minor fraud and forgery, defined as a knowing misrepresentation causing financial or material loss less than \$10,000;
  - (E) Unlawful entry and reentry to the country;
  - (F) Lesser burglary, defined as entering an unoccupied structure with intent to commit any crime inside;
  - (G) Simple assault, defined as knowingly or recklessly causing minor injury to another, or causing fear of injury;
  - (H) Minor trafficking of marijuana, defined as a lower-level role in selling marijuana, such as street deals or acting as a courier;
  - (I) Other minor drug offenses, including crimes such as possessing drug paraphernalia; and
  - (J) Other minor crimes, including prostitution, gambling, obscenity, traffic offenses, and first-time offenses for driving under the influence.
- (2) Jurisdictions are encouraged to determine additional offenses that can be Qualifying Offenses using the following criteria: all misdemeanors and felonies, as currently defined in the criminal code, any amendments thereto, or any successor statutes, excluding those:
  - (A) For which a defendant would be eligible for a sentence of incarceration of at least six (6) years;
  - (B) That result in the destruction or theft of property valued in excess of ten thousand dollars (\$10,000);
  - (C) That pose a serious danger to human life;
  - (D) That involve lewd acts with a minor which would constitute statutory rape under the laws of this jurisdiction;
  - (E) That involve sexual acts with a nonconsenting individual; or
  - (F) That involve the oversight or control of a large-scale drug importation or distribution scheme.

## **Section 2. Imposition of Alternative Sentences.<sup>a</sup>**

- (a) For a Qualifying Offense, the court shall impose an Alternative Sentence,<sup>b</sup> the duration of which shall not exceed three (3) years or the maximum term of incarceration otherwise permitted for that offense, whichever is the lesser.
- (b) Notwithstanding any other provision of this Act, a court may in its discretion impose a sentence of incarceration<sup>c</sup> not to exceed that otherwise allowable by law based on the specifics of the crime committed.
  - (1) If a sentence of incarceration is imposed pursuant to this subsection, the court shall state on the record its basis for declining to impose an Alternative Sentence, the cost of such sentence of incarceration to the State's taxpayers (based on the average cost of incarceration in the State), and the basis for the court's determination that this sentence is more consistent with public safety than an Alternative Sentence.
  - (2) In each such case, the court shall report the imposition of a sentence of incarceration — and the factors set on the record pursuant to the previous subsection — to the Alternatives to Prison Oversight Board, which shall in turn make this data available consistent with Section 3 of this Act.

## **Section 3. Data Collection and Publication.**

The Alternative to Prison Act Oversight Board shall collect and make publicly available data related to all sentences imposed under this Act. Such data collection and publication shall include, but is not limited to, the number of people sentenced under this Act; the number of people who could receive an Alternative Sentence under this Act but who are incarcerated instead; and demographic information and its relation to Alternative Sentences imposed under this Act.

## **Section 4. Funding for Alternative Sentences.**

This Act shall provide for funding for the administration and imposition of Alternative Sentences in accordance with this Act in the following manner:

- (a) In the first three (3) years after the passage of this Act, the State shall annually appropriate to its programs administering alternative services an amount of money equal to fifteen percent (15%) of the budget of the department of corrections of the State for the purpose of administering and imposing sentences under the criminal laws of the State.
- (b) In the fourth (4th) and subsequent years, the State shall annually appropriate to its programs administering alternative services an amount recommended by the Alternative to Prison Act Oversight Board based on the number of people eligible for Alternative Sentences under this Act.

## **COMMENTARY**

### **Section 1.**

*Comment a:* Diversionary programs that offer substance abuse or mental health treatment should be available to anyone who commits an offense because of an underlying problem, not just those who commit low-level

offenses. Jurisdictions are encouraged to utilize diversionary programs as alternatives to incarceration whenever possible. A 2013 report by the Vera Institute showed that mental health treatment is less expensive and more effective than incarceration.<sup>7</sup> Law Enforcement Assisted Diversion in Seattle, Washington, a successful drug treatment program, has reduced rearrests by 58 percent compared to prison.<sup>8</sup>

*Comment b:* Any monetary penalties should be calibrated to a defendant's ability to pay, consistent with the Model Proportional Fines and Fee Elimination Act.

*Comment c:* The Alternative to Prison Act Oversight Board is meant to collect and make publicly available data about the effectiveness of a state's alternative sentencing program. Therefore, while it is envisioned that the Alternative to Prison Act Oversight Board is itself small, it will rely on the staff of the courts responsible for imposing and administering any Alternative Sentence. The Alternative to Prison Act Oversight Board is composed of higher-level civil servants who act in a managerial capacity in their full-time jobs, though the particular members of the Alternative to Prison Act Oversight Board will vary by jurisdiction.

*Comment d:* Jurisdictions must determine which crimes in their respective penal codes fall within these categories and replace these categories with specific crimes when drafting their legislation. Both the definition of Qualifying Offense and the definitions of the crime categories intended to be encompassed by this concept will vary by jurisdiction (for example, what constitutes a low-level drug offense and what quantity of a controlled substance constitutes "minor trafficking").

In addition, jurisdictions are encouraged to include crimes in additional categories not included in this list. It is important to consider the seriousness of the crime, victim impact, intent, and likelihood of recidivism in deciding whether to add other crimes.<sup>9</sup>

## Section 2.

*Comment a:* Jurisdictions are encouraged to allow people currently incarcerated to petition judges for retroactive application of these reforms.

*Comment b:* States should develop diversionary programs for addiction and poverty-related crimes. Some states have such programs in place, most commonly for low-level drug offenses and DWIs. Effective implementation of these programs is essential to reaping the benefits of sentencing reform, but the diversity of local schemes and the cost and complexity of developing new initiatives puts that undertaking outside the scope of this legislation.

*Comment c:* Mitigating factors are not necessary because the Act does not impose a minimum sentence for Qualifying Offenses. Requiring courts to make a record of these sentences will ensure sentences of incarceration are used only when appropriate.

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## THE PROPORTIONAL SENTENCING ACT

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To significantly reduce the prison population by reducing unnecessarily long sentences that can be safely shortened.

**Whereas**, criminal defendants are increasingly sentenced to disproportionately long prison terms;

**Whereas**, many people remain incarcerated without a public safety or rehabilitative justification, and certain crimes have an outsized impact on the number of Americans incarcerated without such justification;

**Whereas**, evidence and experience suggest that long prison sentences have a criminogenic effect, increasing the likelihood of recidivism upon release;

**Whereas**, long prison sentences disrupt family and community relationships, decreasing the likelihood of rehabilitation;

**Whereas**, long prison sentences contribute to mass incarceration;

**Whereas**, the effects of mass incarceration disproportionately harm minority communities; and

**Whereas**, reductions to prison sentences have been correlated with decreases in both crime rates and incarceration rates in other jurisdictions within the United States;

Therefore, the following shall be enacted:

### Section 1. Definitions.

As used in this Act, the following terms shall have the meanings set forth herein:

- (a) “Base Years.” The three (3) year period preceding the enactment of this legislation.
- (b) “Modified Years.” The three (3) year period following the enactment of this legislation.
- (c) “Modified Years Report.” The report described in Section 5(b) of this legislation.
- (d) “Convicted Person.” A person who has been convicted of a Specified Offense and sentenced to either a Term of Incarceration or Supervised Release.
- (e) “Specified Offense.”<sup>a</sup> Offenses falling within the following categories:
  - (1) Aggravated assault;
  - (2) Nonviolent weapon possession offense;
  - (3) Robbery;

- (4) Serious burglary;<sup>b</sup>
- (5) Serious drug trafficking;<sup>c</sup> and
- (6) Murder.
- (f) “Supervised Release.” Any status where an individual is not held in a prison, jail, or other correctional facility but is still subject to a correctional sentence under the authority of the department of corrections,<sup>d</sup> such as probation, parole, or other similar programs.<sup>e</sup>
- (g) “Term of Incarceration.” The term of a Convicted Person’s sentence during which the Convicted Person is incarcerated or otherwise detained in jail or prison.
- (h) “Term of Supervised Release.” The term of a Convicted Person’s sentence exclusive of the Term of Incarceration.<sup>f</sup>

## **Section 2. Term of Incarceration Reduction.**

- (a) The permitted Term of Incarceration for any Specified Offense defined in this State’s criminal code shall hereby be reduced by twenty-five percent (25%).<sup>a</sup> In the event an indeterminate Term of Incarceration is authorized by the criminal code, the total reduction under this subsection shall be applied to both the minimum and maximum terms contemplated for an indeterminate Term of Incarceration.
- (b) Notwithstanding the reduction in Terms of Incarceration authorized in subsection (a) of this section, judges have discretion to depart from the reduced Terms of Incarceration in special circumstances, which can be determined based on criteria such as a defendant’s criminal history or specifics of the crime committed.
- (c) This section shall apply both prospectively to future Convicted Persons and retroactively, pursuant to Section 4 of this legislation, to all Convicted Persons sentenced to a Term of Incarceration.

## **Section 3. Term of Supervised Release Reduction.**

- (a) The permitted Term of Supervised Release for any offense defined in this State’s criminal code shall hereby be reduced by twenty-five percent (25%). In the event an indeterminate Term of Supervised Release is authorized by the criminal code, the total reduction under this subsection shall be applied to both the minimum and maximum terms contemplated under the indeterminate Term of Supervised Release.
- (b) Judges have discretion to depart from the reduced Terms of Incarceration in special circumstances, which can be determined based on criteria such as a defendant’s criminal history or specifics of the crime committed.
- (c) This section shall apply both prospectively to future Convicted Persons and retroactively to all Convicted Persons sentenced to a Term of Supervised Release.

## **Section 4. Retroactive Sentence Modification.**

- (a) No later than when a Convicted Person has served fifty percent (50%) of their Term of Incarceration,<sup>a</sup> or sixty (60) days after the passage of this Act if the Convicted Person has

already served fifty percent (50%) of their Terms of Incarceration, the department of corrections shall submit the Convicted Person's file to the sentencing court for sentence modification.

- (b) Notwithstanding subsection (a) of this section, a Convicted Person may petition a court for sentence modification under this section upon completing fifty percent (50%) of their Term of Incarceration.<sup>b</sup>
- (c) Upon application of the department of corrections or Convicted Person, no later than the date upon which the Convicted Person will have served sixty percent (60%) of their Term of Incarceration, the court shall reduce the Term of Incarceration and the Term of Supervised Release of the Convicted Person each by twenty-five percent (25%).
- (d) A person may not waive sentence modifications authorized under this section as part of a plea agreement. Any purported waiver of sentence modification authorized under this section is invalid and unenforceable as against public policy. To the extent that previous legislation has been interpreted by courts of this State to permit waiver of any sentencing challenge, those determinations are superseded as applied to the rights created by this Act.
- (e) For purposes of this Section, "Term of Incarceration" means the minimum term of imprisonment authorized in an indeterminate sentence.

#### **Section 5. Reinvestment.**

- (a) Within thirty (30) days of the enactment of this legislation, the department of corrections shall report to the legislature the yearly average of expenditures on items relating to incarceration and supervision of all Convicted Persons within the State during the Base Years.
- (b) On the third anniversary of the enactment of this legislation, the department of corrections shall report to the legislature the yearly average of expenditures on items relating to incarceration and supervision of all Convicted Persons within the State during the Modified Years.
- (c) Every year following delivery of the report described in subsection (b) of this Section, the legislature shall apply the difference between the yearly average expenditures during the Modified Years and Base Years to one of the following categories of expenditures:
  - (1) Evidence-based programs which encourage or implement alternatives to incarceration, including but not limited to drug and mental health treatment; and/or
  - (2) Reentry programs for Convicted Persons.<sup>a</sup>

## COMMENTARY

### Section 1.

*Comment a:* This legislation contemplates a complete rewrite of criminal penalties for the Specified Offenses. As a result, to prevent unnecessary vagueness, any enacting legislation should itemize the crimes affected and the sentence reductions to be made to these crimes.

Jurisdictions must determine which crimes in their respective penal codes fall within these categories and replace these categories with specific crimes when drafting their legislation. Both the definition of Specified Offense and the definitions of the crime categories intended to be encompassed by this concept will vary by jurisdiction. The purpose of the concept of Specified Offense is to target offenses that make up the largest share of the prison population, and the Specified Offense crime categories in this model legislation are by no means exhaustive.<sup>10</sup>

Jurisdictions are encouraged to include crimes in additional categories not in this list. It is important to consider relative rates of recidivism, costs of incarceration, and unique physical, social, and psychological harms that these crimes cause in deciding whether to add other crimes.

*Comment b:* Serious burglary encompasses burglaries that involve either: a deadly weapon, intent to commit a serious or violent felony, or entering a home or non-residential structure when occupants are present.

*Comment c:* Serious drug trafficking encompasses crimes in which individuals play a managerial or high-level role in producing, importing, selling, or otherwise supplying illegal substances other than marijuana, including cocaine, heroin, and methamphetamine.

*Comment d:* “Department of corrections,” as used throughout this legislation, is a stand-in for the relevant authority tasked with managing a state’s correctional facilities and supervised release programs.

*Comment e:* Provisions referring to “parole” or indeterminate sentencing should only be included in jurisdictions where a parole board exists. While there are a wide range of parole systems, this legislation seeks to ensure that individuals receive a parole hearing relatively early in their sentence without affecting systems that already provide for earlier parole hearings. This legislation is not intended to create a parole system in states that do not have one.

*Comment f:* This legislation was partially modeled on Nebraska Legislative Bill 191 (2011), Section 1, subsection 2(a) of which provides that: “The department shall reduce the term of a committed offender by six months for each year of the offender’s term and pro rata for any part thereof which is less than a year.” Subsection 3 provides that “[w]hile the offender is in the custody of the department, reductions of terms granted pursuant to subdivision (2)(a) of this section may be forfeited, withheld, and restored by the chief executive officer of the facility with the approval of the director after the offender has been notified regarding the charges of misconduct.”<sup>11</sup> Together, these subsections create a permissive scheme of sentence reductions. This model legislation, however, seeks to create a scheme of mandatory sentence reductions, while providing judicial discretion to depart from these sentence reductions in some cases.

### Section 2.

*Comment a:* Jurisdictions are encouraged to analyze other crimes for which prison may be warranted to determine whether sentences can be safely shortened; see Section 1, Comment a.

### Section 4.

*Comment a:* The timing requirements of this section are designed to ensure that the court will have sufficient time to review an application for sentence modification in advance of when an individual will have served 75 percent of their sentence. Given that most incarcerated people are not required to serve the full amount of

their prison sentences, the application for sentence modification must be submitted well before the 75 percent mark.

*Comment b:* A Convicted Person should be able to petition for sentence modification without having to rely on the initiative of the department of corrections. This helps prevent injury from delays by the department of corrections and allows Convicted Persons to prepare petitions themselves, possibly with the assistance of counsel, instead of relying solely on the department of corrections. In the event that the department of corrections does file a petition, the Convicted Person should still have the opportunity to file additional papers in support of his early release.

Section 5.

*Comment a:* Jurisdictions are encouraged to expand the categories of expenditures for reinvestment to additional programs for Convicted Persons and affected communities as they see fit.



# Eliminate Financial Incentives for Incarceration

## 1. Abolish Cash Bail

The “Pretrial Release and Detention Act” (page 14), soon-to-be-released model legislation developed by Civil Rights Corps, eliminates the use of money bail, which ties pretrial release to a person’s ability to pay for it. This system disproportionately burdens the poor and does little to protect public safety. Effective and equitable pretrial systems should adhere to these principles:

- Elimination of cash bail;
- Creation of a presumption of release without conditions for defendants awaiting trial for misdemeanors and non-serious felonies, with limited exceptions;
- For those limited offenses for which release conditions or pretrial detention may be appropriate, provision for hearings that include robust procedural safeguards for defendants, a presumption of release without conditions, and a requirement that decisions to impose release conditions or detain defendants are grounded in public safety.

The Pretrial Release and Detention Act follows these principles. Included in this report from the Act are Section 1 and portions of Sections 2 and 4, along with a summary of other key provisions. For the full text of the legislation, visit the “Policy Resources” section of the Civil Rights Corps [website](#).<sup>12</sup> This model legislation corresponds to the policy recommendations in the section of the Brennan Center’s *Criminal Justice Agenda* entitled “Abolish State Cash Bail.”

## 2. Calibrate Fines to Defendants’ Ability to Pay and Eliminate Fees

The “Proportional Fines and Fee Elimination Act” (page 19) calibrates criminal fines (which are monetary sanctions prescribed by courts as punishment for committing a crime) to a defendant’s ability to pay them and eliminates the assessment of court fees (which are flat fees intended to offset court costs) on criminal defendants.<sup>13</sup> It seeks to end the reliance of the criminal justice system — and the courts specifically — on funding from fines and fees collected from defendants. These fines and fees harm criminal defendants, their families, and communities, especially since nonpayment can result in incarceration. The legislation requires that fines be assessed as a percentage of a defendant’s income and with reference to the number of days of income a person must forego to pay them. This kind of calibration is commonly referred to as a “day fine.”

The Proportional Fines and Fee Elimination Act corresponds to the section of the Brennan Center’s *Criminal Justice Agenda* entitled “Calibrate State Fines to Defendants’ Ability to Pay.”

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## PRETRIAL RELEASE AND DETENTION ACT

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To abolish money bail, require the “least restrictive” conditions of pretrial release, and limit pretrial detention to narrowly defined, rare circumstances.

### Section 1. Financial Conditions Prohibited.

\_\_\_\_\_ is amended by adding the following as a new subsection:

- (a) Prohibition. No financial condition on an arrestee’s pretrial release shall be imposed. No financial condition on an arrestee’s release pending sentencing, pending appeal, or pending a probation or parole violation, shall be imposed. No fee shall be required for any condition that is associated with pretrial or post-trial release, supervision, or detention.

### Section 2. Pretrial Release for Misdemeanor and Felony Offenses.

\_\_\_\_\_ is amended by adding the following as a new subsection:

- (a) Misdemeanor offenses.
  - (1) General. The court, sheriff, peace officer, or other designee of the State possessing custody of an arrestee shall release every misdemeanor arrestee, except as provided in subsection (a)(2), on recognizance. [See Civil Rights Corps model legislation for conditions of release.]
  - (2) Special cases. [See Civil Rights Corps model legislation for special cases where court may impose additional conditions.]
- (b) Felony offenses other than extremely serious offenses.
  - (1) Application. This section shall apply to those misdemeanors that are described in subsection (a)(2) and to all felonies, excluding those enumerated in subsection (c).
  - (2) General. In those situations that are described in subsection (1), arrestees may be ordered conditions of pretrial release if the court holds a hearing (“pretrial release hearing”) following the procedures and presumptions outlined in Section 4.
- (c) Extremely serious felony offenses.
  - (1) Application. This section shall apply to those “extremely serious offenses” enumerated in [insert relevant sections from State code connoting the “most serious” of felony offenses] that have, as an element of the offense charged: [See Civil Rights Corps model legislation for definition of “extremely serious offenses.”]
  - (2) General. In those situations that are described in subsection (1), arrestees may be ordered conditions of pretrial release or, in extreme cases, detention, if the court

holds a pretrial release hearing following the procedures and presumptions outlined in Section 4.

\* \* \*

#### **Section 4. Pretrial Release Hearing.**

(a) Pretrial release hearing.

- (1) Procedural requirements. In all cases where the State seeks any conditions other than those that are outlined in subsection (a)(1), the court must promptly hold a pretrial release hearing to determine what additional conditions may be appropriate.

\* \* \*

(F) Presumptions and findings.

(i) Felony offenses other than extremely serious felony offenses.

- a. Presumption. For those charges that are defined in Section 2(b)(1), the judicial officer shall apply at the pretrial release hearing a rebuttable presumption that—

- i. The arrestee will be released without conditions except those that are delineated in Section 2(a)(1); and
- ii. The conditions of drug testing, inpatient treatment, outpatient treatment, travel restrictions, curfew, home confinement, electronic monitoring, and [insert any other conditions currently authorized under State law that similarly infringe on a person's liberty interest] are not necessary conditions of release.

- b. Overcoming the presumption. For those charges that are defined in Section 2(b), the State may overcome the presumptions in subsection (b)(2) if the court finds by clear and convincing evidence that the person is a high risk of nonappearance or of seriously physically harming another person during the adjudication period. In these cases, the court may impose additional, nonmonetary conditions of pretrial release, provided that—

- i. There is a pretrial release hearing utilizing the procedures set forth in this section;
- ii. The conditions are justified in writing, on the record; and
- iii. The State meets its burden of providing clear and convincing evidence that the conditions are the least restrictive necessary to reasonably mitigate the risk or risks identified, while preserving the ability of the accused individual to confer with counsel and to prepare a defense.

- (ii) Extremely serious felonies.
  - a. Presumption. For those charges that are defined in Section 2(c)(1), the court shall apply at the pretrial release hearing a rebuttable presumption that—
    - i. The arrestee will be released without conditions except those that are outlined in Section 2(a)(1); and
    - ii. The conditions of drug testing, inpatient treatment, outpatient treatment, travel restrictions, curfew, home confinement, electronic monitoring, and [insert any other conditions currently authorized under State law that similarly infringe on a person’s liberty interest] are not necessary conditions of release.
  - b. Overcoming the presumption. For those charges that are defined in Section 2(c)(1), the State may overcome the presumptions in subsection (a) and order pretrial detention only if it proves by clear and convincing evidence that no condition or combination of conditions, short of complete incapacitation, could sufficiently mitigate a high risk of intentional flight or a specifically identified risk of serious physical harm against another person or persons. In these cases, the court may impose pretrial detention, provided that—
    - i. There is a pretrial release hearing utilizing the procedures set forth in this section;
    - ii. The conditions are justified in writing, on the record; and
    - iii. The State meets its burden of providing clear and convincing evidence that no condition or combination of conditions, short of complete incapacitation, could protect against a specifically identified risk of serious physical harm against another person or persons, and that the condition imposed is the least restrictive necessary to reasonably mitigate the risk or risks identified.

(G) Statement in writing.

- (i) Release conditions. If the court orders any conditions beyond those that are enumerated in Section 2(a)(1), the judicial officer must issue in writing a statement of reasons explaining why the conditions are the least restrictive necessary to reasonably mitigate a high risk of nonappearance or protect the safety of the public.

- (ii) Detention order. If the court enters an order of detention, the judicial officer must issue in writing a statement of reasons explaining the specific risks posed by the arrested person and specific findings of fact by clear and convincing evidence concerning why no condition or combination of conditions could reasonably mitigate those risks. Findings of fact must be individualized and case-specific, and the judicial officer may not enter findings resulting in pretrial detention using a standard form or standard oral recitation.

\* \* \*

The remaining key provisions of the bill accomplish the following:

- Establish cite and release programs that authorize law enforcement officers to, after making an initial arrest, release individuals prior to their first appearance;
- Allow limited temporary detention only in special circumstances, or where an individual violates any condition of release;
- Provide the following robust procedural protections for pretrial release hearings:
  - Require a hearing within 48 hours of arrest;
  - Provide arrestees with the right to: an attorney, see all evidence or information favorable to them, testify, present witnesses, cross-examine witnesses, and present evidence.

## THE PROPORTIONAL FINES AND FEE ELIMINATION ACT

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To establish a proportional fines program and eliminate fees to more fairly dispense justice.

**Whereas,** many criminal defendants are assessed fines as part of their punishment for committing an offense;

**Whereas,** many criminal defendants are assessed “user fees” by the State and local governments to fund the criminal justice system;

**Whereas,** fines are often imposed without regard to a defendant’s ability to pay;

**Whereas,** this current system forces defendants to face negative collateral consequences, such as incarceration, for failure to pay fines that are not calibrated to their financial status;

**Whereas,** fixed fines undermine the principle of proportionality in sentencing;

**Whereas,** fines should be proportionate to the severity of the offense while also taking into account individual circumstances, such as a defendant’s financial resources;

**Whereas,** the criminal justice system should be funded by the State and local governments’ general taxation system and not by user fees;

Therefore, the following shall be enacted:

### Section 1. Definitions.

As used in this section, the following terms shall have the meanings set forth herein:

(a) “Net Income.”

- (1) The defendant’s self-reported income after taxes,<sup>a</sup> from whatever source derived, whether lawful or unlawful, supported by a sworn affidavit, for the one (1) year period immediately preceding the date on which the offense was committed, minus Deductions.<sup>b</sup> This value may be adjusted upward or downward by the court, at its discretion, based on clear and convincing evidence that the defendant earned income of a different amount. The court may also, at its discretion, adjust this value downward to reflect a change in circumstances that would affect or otherwise cause past income to inaccurately represent the defendant’s average income.<sup>c</sup>
- (2) For individuals with no, *de minimis*, or unascertainable<sup>d</sup> income, Net Income shall be calculated using the defendant’s self-reported amount of benefits received for the one (1) year period immediately preceding the date on which the offense was committed, minus Deductions. The Court may, in its discretion, adjust this value

downward to reflect circumstances that would cause a defendant's benefit amount to inaccurately represent the defendant's income.

(b) "Deductions."<sup>e</sup> The following deductions shall be applied when calculating Net Income:<sup>f</sup>

- (1) Any Debt Payments, provided that a sworn affidavit or other comparable proof of such Payments is provided.
- (2) Fifteen percent (15%) of the defendant's after-tax income for self-support;
- (3) Fifteen percent (15%) of the defendant's after-tax income for the needs of a dependent spouse;
- (4) Fifteen percent (15%) of the defendant's after-tax income for the needs of the first non-spouse dependent;
- (5) Ten percent (10%) of the defendant's after-tax income for the needs of the second dependent and ten percent (10%) of the defendant's after-tax income for the needs of the third dependent;
- (6) Five percent (5%) of the defendant's after-tax income for the needs of each additional dependent;
- (7) After applying all other deductions:
  - (A) From that portion of an individual's remaining income that is below the Federal poverty line, sixty percent (60%) shall be deducted.
  - (B) From that portion of an individual's remaining income that is above the Federal poverty line but is below two hundred percent (200%) of the Federal poverty line, forty percent (40%) shall be deducted.
  - (C) From that portion of an individual's remaining income that is above two hundred percent (200%) of the Federal poverty line but below four hundred percent (400%) of the Federal poverty line, twenty percent (20%) shall be deducted.<sup>g</sup>

(c) "Debt Payments."

- (1) Any payments, including other criminal justice debt, but with the exception of mortgages, in the preceding one (1) year period, calculated from the date on which the fine is assessed, made to service or pay down a debt, or that are otherwise required by any debt instrument.
- (2) In the event that a defendant has a preexisting debt, has not serviced or otherwise paid down such debt, but will, by the terms of the debt instrument, be required to make payments in the one (1) year period following the date on which the fine is assessed, such mandatory payments qualify as Debt Payments.<sup>h</sup>

(d) "Commission." The Proportional Fine Commission, as defined in Section 2.

- (e) “Offense.” This section shall apply to the unlawful acts specified herein:
  - (1) All misdemeanors and felonies, as currently defined in the criminal code, any amendments thereto, or any successor statutes.<sup>i</sup>
  - (2) All violations, citations, or any other unlawful act categorized as less severe than a misdemeanor or felony.
- (f) “Offense Unit.” An integer between one (1) and one hundred and twenty (120).
- (g) “Proportional Fine.” The Proportional Fine shall be equal to the product of:
  - (1) The applicable Offense Unit;<sup>j</sup> and
  - (2) The quotient of
    - (A) The Net Income of the defendant and
    - (B) Three hundred sixty-five (365).

## **Section 2. The Proportional Fine Commission.**

- (a) The Proportional Fine Commission shall be tasked with assigning Offense Units to all Offenses and implementing proportional fines systems throughout the State.<sup>a</sup>
- (b) The Commission shall be appointed by the Governor, with the advice and consent of the State Senate, and shall consist of a group of stakeholders that endeavors to include the following:
  - (1) A judge;
  - (2) A prosecutor;
  - (3) A member of the public defense bar;
  - (4) A member of the private defense bar;
  - (5) A director, executive, or other high-level officer of a pretrial services agency;
  - (6) A probation officer;
  - (7) A director, executive, or other high-level officer of a public aid, welfare, or other organization serving low-income communities;
  - (8) An expert or professor of law specializing in a field relevant to the work of the Commission, such as sentencing or criminology;<sup>b</sup> and
  - (9) Research staff to collect, review, and make publicly available all data related to fines assessed under this Act.
- (c) Each member of the Commission shall be appointed to a term of five (5) years, and may be reappointed for one additional term.



- (d) The Commission shall make available to the public a list of all Offenses to which this section applies and the number of Offense Units assigned to each Offense.
- (e) The Commission shall convene no less than every two (2) years to review and, if necessary, revise, the number of Offense Units assigned to each Offense. If the legislature creates a new Offense, the Commission shall convene within forty-five (45) days to assign Offense Units to that Offense, and must publish a revised list of Offenses and Offense Units within seventy-five (75) days of the enactment of the law that created the new Offense, including such new Offense on the revised list.
- (f) The Commission shall collect and make publicly available data related to all fines assessed under this Act, including data broken down by the demographic variables of race and income. Such data collection and publication shall include, but is not limited to, rates at which defendants pay fines; average and median fine amounts for each Offense; and demographic information and its relation to fines assessed and payment rates.
- (g) Members of the Commission shall not receive any form of compensation for their service on the Commission.

### **Section 3. Assessing the Proportional Fine.**

- (a) For a qualifying Offense, the court shall assess a Proportional Fine.
  - (1) The court may, in its discretion, increase or decrease the number of Offense Units used to calculate the Proportional Fine, according to the totality of the circumstances of the case before the court, but in no event shall the court increase the number of Offense Units by more than ten percent (10%) of the Offense Units assigned to the Offense by the Commission. Where the number of offense units is adjusted by the Court, the Court shall document the reasons for this adjustment.
  - (2) The Court must make any adjustment to Offense Units prior to and separately from assessment of the Proportional Fine.
  - (3) Any defendant can apply to convert their Proportional Fine to programmatic participation or community service hours.
- (b) Separate and apart from the procedure described in Section 3(a), if the court finds that imposition of a Proportional Fine would be grossly disproportionate to a defendant's ability to pay, based on the totality of the circumstances, then the court may assess a lower fine.
- (c) All fines assessed under this section must be paid within two (2) years, or, if a defendant is incarcerated when the fine is assessed, within two (2) year of release from a correctional facility, unless application is made to the court by the defendant and good cause for an extension is shown. The court may, in its discretion, extend the date by which the fine must be paid. The court may authorize payment in installments. The court shall not require court appearances for applications for extensions.
  - (1) Notice must be provided no less than thirty (30) days and again no less than fifteen (15) days before payment is due if payment has not yet been made. In no event shall

a court appearance be required to make a payment. In no event shall payment be due unless notice has been provided at least twice.

- (2) In addition to any other authorized form of payment, payment of all fines assessed under this section by mail, in-person, and through an electronic payment system must be permitted. No surcharge or other additional fees may be assessed for using a particular form of authorized payment.<sup>a</sup>
- (d) For any defendant whose Net Income is calculated under Section 1(a)(2), and any defendant who applies to convert their Proportional Fine to programmatic participation or community service hours pursuant to Section 3(a)(3), the court shall, in lieu of any other fine assessed under this section, order a number of hours of programmatic participation or community service equal to the quotient of (a) half the Proportional Fine and (b) an imputed wage of twenty (20) dollars per hour. Community service or programmatic participation ordered under this section must be imposed to be proportionate to the offense and so as not to unreasonably interfere with any other employment, travel restrictions, or family care responsibilities. Judges can, in their discretion, determine which type of programmatic participation or community service to assign to a given defendant. Programmatic participation includes, but is not limited to, participation in the following:
  - (1) drug treatment programs;
  - (2) mental health treatment programs;
  - (3) educational programs;
  - (4) job training or readiness programs; or
  - (5) appointments or coaching with social workers, including for the purposes of discussing access to public benefits.
- (e) For defendants who fail to report their income, or who deliberately mislead the court as to their income, the court may, in its discretion, apply the maximum allowable fine for the applicable Offense, without deduction or adjustment, unless the defendant demonstrates by a preponderance of the evidence why she is unable to report her income to the court.
- (f) All revenues from Proportional Fines should be deposited in the State's general revenue fund.

#### **Section 4. Repeal of Other Fines.**

For all Offenses, the provisions of this section shall govern as to the assessment of fines. All other provisions related to the assessment of fines in relation to any Offense are hereby repealed.

#### **Section 5. Repeal of Fees.**

Any provisions related to the assessment of criminal justice fees, surcharges, or costs are hereby repealed. The State's criminal justice system shall be funded by the State's general taxation system and Proportional Fine revenues, not by user fees, surcharges, or costs.

## COMMENTARY

### Section 1.

*Comment a:* Jurisdictions are encouraged to use a standardized form with guided questions as the basis for identifying self-reported income. Defendants should not be required to provide tax returns, although may provide tax returns in lieu of the standardized form.

*Comment b:* Given that defendants may not have tax returns, and may only have recent paystubs, Defendants may use self-reported income after taxes for the one (1) month period, rather than one (1) year period, immediately preceding the date on which the offense was committed, and this amount can be multiplied by twelve to calculate net income.

*Comment c:* A change in circumstances includes, but is not limited to, the loss of a job, a temporary disability or medical event that limits one's ability to work, or other similar events.

*Comment d:* "Unascertainable" includes individuals for whom there is no unreported or misreported income. This is intended to apply to individuals who do not report any income and are unable to or otherwise do not provide evidence of hidden or underreported income. Net Income should not be calculated pursuant to subsection (a)(2) for individuals with substantial hidden assets.

*Comment e:* "Dependent," "dependent spouse," and related terms left undefined here should be interpreted consistently with applicable State or Federal law.

#### Sample Deduction Calculation:

Assuming a verified, self-reported gross income of \$60,000; \$2,000 in debt at the time of the Offense, a dependent spouse and no dependent children, and, for simplicity's sake, an applicable Federal poverty line of \$10,000, Net Income would be calculated as follows:

For deductions in clause (b)(1):  $\$60,000 - (\$2,000) = \$58,000$

For deductions in clauses (b)(2) and (b)(3):  $\$58,000 - (30\% * \$58,000) = \$40,600$

For deductions in clause (b)(7):  $\$40,600 - (60\% * \$10,000) - (40\% * \$10,000) - (20\% * \$20,000) = \$26,600$ .

The first deduction under clause (b)(7),  $60\% * \$10,000$ , is for the portion of the income, after deductions in clauses (b)(1), (b)(2) and (b)(3), that is below the Federal poverty line. The second deduction,  $40\% * \$10,000$ , is for the portion of the income between the Federal poverty and twice the Federal poverty line (i.e. 200% of the Federal poverty line). The third deduction,  $20\% * \$20,000$ , is for the portion of the income between twice the Federal poverty line and four times the Federal poverty line. Because this individual's income, after deductions in clauses (b)(1) through (b)(6), exceeds \$40,000, and continuing to assume a Federal poverty line of \$10,000, no additional deductions would be permitted on post-deduction income above \$40,000.

*Comment f:* Jurisdictions, especially those with high costs of living, are encouraged to consider applying additional deductions for expenditures on basic needs.

*Comment g:* The Federal poverty line varies with family size, and so its use in this model is intentional. However, the Federal poverty line does not reflect local income levels or variations in local purchasing power, which could lead to inequitable outcomes. This could be addressed by considering per-capita incomes in a given jurisdiction. Alternatively, if a state- or local-level poverty line exists, legislators are encouraged to use this measure of calculation in lieu of the Federal poverty line. If legislators decide to use a more targeted metric for establishing poverty deductions, they should ensure that the metric takes into account family size.

*Comment h:* The "debt payments" provision is primarily meant to apply to student debt and/or other structured debts. For example, in the case of student debt, a student may incur debt but will not be required

to pay off their loans until he or she has graduated. Absent this provision, a recent graduate who commits an Offense would not be able to deduct the payments he or she would necessarily make on student loans following graduation because he or she would not have made any payments in the preceding year. Therefore, this provision enables individuals in this or other similar situations to deduct required, but not yet paid, debt payments.

*Comment i:* Jurisdictions may deem it appropriate to exclude certain offenses, such as violent felonies, from this legislation. However, legislators should be cognizant of the tension between the goals of this legislation and the detrimental consequences of penalizing people who have already served a lengthy prison sentence and will likely be unable to pay a substantial fine after a period of prolonged unemployment.

*Comment j:* Sample Proportional Fine Calculation:

Assuming Net Income of \$20,000 per year, and the Offense committed is assigned 50 Offense Units, then the Proportional Fine calculation would proceed as follows:

$$\text{\$20,000} / 365 \text{ days} = \text{\$54.79 per day}$$

$$\text{\$54.79} * 50 \text{ Offense Units} = \text{\$2,739 day-fine assessment}$$

## Section 2.

*Comment a:* To the extent that a commission resembling the Proportional Fine Commission exists within a jurisdiction, such as a sentencing commission, such jurisdiction should not task that existing commission with the responsibilities set forth under Section 2.

*Comment b:* If implemented at the municipal or county level, the highest executive officer of the state will be responsible for appointments, and the county board, city council, or equivalent body will approve such appointments. Similarly, the titles for the members of the Fine Commission should be adjusted for the specific jurisdiction.

## Section 3.

*Comment a:* Jurisdictions are encouraged to permit payment by cash, check, money order, debit card, and credit card.

# Reform Prosecutor Incentives

The “Prosecutorial Incentives Reform Act” (page 27) was developed based on recommendations from a 2014 Brennan Center report, *Federal Prosecution for the 21<sup>st</sup> Century*.<sup>14</sup> It applies these recommendations to local prosecutor offices. The model legislation reorients prosecutorial incentives to encourage decarceration while reducing or holding constant recidivism rates. This encourages prosecutors to opt, whenever appropriate, for lower charges or incarceration alternatives, while preserving public safety. The bill is intentionally open-ended to encourage innovation in prosecutors’ offices.

The Prosecutorial Incentives Reform Act corresponds to the section of the Brennan Center’s *Criminal Justice Agenda* entitled “Reform State Prosecutor Incentives.”

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## PROSECUTORIAL INCENTIVES REFORM ACT

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To incentivize the reduction of crime and imprisonment in tandem.

**Whereas**, the State has an obligation to exercise its police power judiciously in order to keep its citizens safe while minimizing excessively harsh penalties;

**Whereas**, mass incarceration and longer prison stays often produce higher recidivism rates and result in diminishing returns in enhanced public safety;

**Whereas**, high levels of incarceration disproportionately affect and undermine the stability of marginalized communities;

**Whereas**, improved policies can reduce incarceration, better align the incentives of states and localities, and minimize unnecessary expenditures on prisons and related administration;

Therefore, the following shall be enacted:

### Section 1. Definitions.

- (a) “Commission.” For purposes of this Act, “Commission” shall refer to the Prosecutorial Funding Commission, established pursuant to Section 2.
- (b) “New Post-Conviction Incarceration Rate.” The quotient of (i) the total number of new individuals incarcerated post-conviction in the last calendar year, in prison or jail, as a result of prosecutions undertaken by a county’s prosecutor’s office and (ii) the population within that county.
- (c) “Recidivism Rate.” Of the population of individuals charged as a result of prosecutions undertaken by a county’s prosecutor’s office and released within the calendar year two years prior to the measurement of this rate, the quotient of (i) the number of individuals who were arrested for a New Crime within one year of release and (ii) the total number of individuals released.
- (d) “New Crime.” Any misdemeanor or felony, excluding any violation of probation or parole that is not by itself a criminal offense.

### Section 2. Prosecutorial Funding Commission.

- (a) A Prosecutorial Funding Commission shall be established within this State. The Commission shall consist of nine Commissioners, and must include:
  - (1) One (1) judge;
  - (2) Two (2) heads of prosecutorial offices;

- (A) One Commissioner appointed pursuant to this subsection must represent a county with a population of at least 250,000.
- (3) One (1) representative of a county board or similar county-level executive body representing a county with a population of at least 250,000;
- (4) The State Attorney General or deputy Attorney General;
- (5) Two (2) public defenders with at least ten (10) years of experience;
- (6) An expert in the field of criminology or criminal law associated with a university within the State; and
- (7) An expert in the field of economics or local governance associated with a university within the State.
- (b) Commissioners shall be supported by a research staff tasked with collecting, reviewing, and making public all data related to funding awarded under this Act.
- (c) Commissioners must reside or be employed in the State.
- (d) Commissioners shall be appointed by the Chief Judge of the State's highest court to a term of two (2) years, and may be reappointed for two (2) additional terms.
- (e) The Commission shall meet annually to review the performance of all prosecutor's offices within the State and decide whether to award additional funds to that Office in accordance with Section 3.
- (f) The Commission shall have the authority to lawfully obtain any records from the department of corrections, local jails, courts, and county prosecutors offices necessary to conduct its review.
- (g) The Commission shall collect and make publicly available data related to all compensation awarded under this Act annually.

### **Section 3. Award of Additional Funds.<sup>a</sup>**

- (a) Authorization of funding:
  - (1) Each fiscal year, the State shall appropriate from the budget funding necessary for the awards described in subsection (b).
  - (2) At the end of each fiscal year, unused funds from this appropriation shall be returned to the state operating budget.
- (b) Award of additional funding:
  - (1) A prosecutor's office shall receive an award of additional funds if the Commission finds that, averaged over the three (3) year period preceding the application for funding under this section, the Office has achieved both of the following goals:

- (A) Reduced the county's New Post-Conviction Incarceration Rate by seven (7) percent or more;<sup>b</sup> and
  - (B) Not allowed the county's Recidivism Rate to rise by more than three (3) percent.
- (2) The Commission shall determine the amount of any award of additional funding. The amount of any award of additional funding shall fall between two (2) and seven (7) percent of the prosecutor's office's yearly budget.<sup>c</sup> In determining award amounts, the Commission shall consider the following factors:
  - (A) The population of the jurisdiction; and
  - (B) Decreases in racial disparities such as in charging or among the incarcerated or recidivating populations.
- (3) After a prosecutor's office has received an award of additional funds, the Commission shall determine the percentage by which that office must reduce its New Post-Conviction Incarceration Rate for any second or subsequent award, and any percentage determined by the Commission must be greater than or equal to three (3) percent.
- (4) The Commission shall make public its findings supporting any award of additional funds annually.
- (c) Prosecutor's offices are encouraged to consider the following practices to reduce their New Post-Conviction Incarceration Rate:
  - (1) Increase use of deflection/diversion and alternatives to prison;
  - (2) Increase community outreach and measurements of community trust;
  - (3) Adopt practices to support successful reentry;
  - (4) Adopt internal performance metrics beyond indictments, trials or convictions statistics, including, but not limited to, recognizing staff's community involvement or referrals to diversion programs; and
  - (5) Release prosecutorial data to support community-led study and innovation.

## COMMENTARY

### Section 3.

*Comment a:* Jurisdictions should consider providing funding or grants where necessary that would help prosecutors offices collect the data necessary for the Commission to determine whether the office qualifies for an award of additional funding.

*Comment b:* A 7 percent reduction in the New Post-Conviction Incarceration Rate is recommended as it is slightly higher than the average rate at which states that have reduced their prison populations have done so in recent years.<sup>15</sup>



*Comment c:* A range between 2 and 7 percent is recommended to provide sufficient incentive for prosecutor's offices to reduce their New Post-Conviction Incarceration Rates. Jurisdictions can change this range as they see fit.

# Pass Sensible Marijuana Reform

## Example: Delaware House Bill 39 and California Adult Use of Marijuana Act

States can either decriminalize (meaning possession remains a criminal act but is no longer subject to prosecution) or legalize (meaning personal use is legal).

Enacted in 2015, Delaware's House Bill 39, which can be found [here](#),<sup>16</sup> serves as a useful example of decriminalization legislation. Delaware's House Bill 39 includes the following key components:

- Decriminalizes the possession of one ounce or less of marijuana by those over the age of 18, making it a civil violation punishable by a fine of \$100;
- Decriminalizes the possession of one ounce or less of marijuana by those under the age of 18, making it an unclassified misdemeanor punishable by a fine of \$100.

States should be aware that decriminalization carries certain risks that should be minimized. Any civil fines imposed by decriminalization legislation can become burdensome criminal justice debt and should be calibrated to a defendant's ability to pay. Another risk to be aware of is that tickets for possession can convert into arrest warrants when court dates are missed, leading to unnecessary arrests and incarceration. These arrest warrants are even more troubling when one considers that marijuana laws are disproportionately enforced against people of color despite similar usage rates across racial groups.<sup>17</sup>

California's ballot initiative to legalize marijuana serves as a useful example of legalization legislation. In 2016, Californians voted "Yes" on Proposition 64, the Adult Use of Marijuana Act, which can be found [here](#),<sup>18</sup> to legalize personal use of marijuana. The provisions of this ballot initiative serve as a useful guide for states looking to legalize.

The Adult Use of Marijuana Act includes the following key criminal justice components:

- Legalizes recreational marijuana possession for those over the age of 21;
- Decriminalizes recreational marijuana possession and eliminates civil penalties for recreational possession for those under the age of 18, requiring instead participation in a drug education or counseling program;<sup>19</sup>
- Allows for those serving sentences for now-legalized marijuana crimes to be resentenced under the new law;
- Creates a pathway to seal marijuana-related convictions from criminal records;
- Requires community reinvestment of marijuana tax revenue into: reentry services for people convicted of drug offenses, including job placement, mental health treatment, substance abuse treatment; and programs to combat youth drug addiction.

This example legislation corresponds to the section of the Brennan Center's *Criminal Justice Agenda* entitled "Reform State Marijuana Laws."

# Respond to the Opioid Crisis

## Examples: New Jersey Senate Bill No. 3 (2017) and Vermont Act 75 (2013)

Enacted in 2017, New Jersey’s Senate Bill No. 3 serves as a useful example of an effective approach to the opioid epidemic. It expands medical insurance coverage for substance abuse programs and places reasonable restrictions on opioid prescriptions.

Preliminary research finds a correlation between the rate of opioid prescriptions and the rate of overdose deaths in states.<sup>20</sup> The Center for Disease Control reports that more than 40 percent of all U.S. opioid overdoses in 2016 involved a prescription opioid.<sup>21</sup> The New Jersey law addresses this problem by placing limits on when and how doctors can prescribe opioids for pain management. While the legislation is a good start, it is not a panacea.

The full text of New Jersey’s Senate Bill No. 3 can be found [here](#).<sup>22</sup> The key provisions of the bill are described below:

- Reduces the maximum allowable initial opioid prescription for acute pain to the “lowest effective dose,” and from a thirty-day to a five-day supply. This limit does not apply to those suffering from serious chronic conditions.
- Creates new procedures that medical practitioners must adhere to, such as documenting a thorough patient medical history, using a Prescription Monitoring Program, informing patients of addictive properties of opioids, and requiring patients to sign agreements that outline the risks associated with opioid use.
- Requires all state-regulated health insurers to provide unlimited drug addiction treatment benefits on every plan. Mandates that the first six months of addiction treatment will not require prior authorization.

States can also reduce opioid deaths by increasing access to opioid “antagonists” — drugs that can neutralize the effects of an overdose. In 2013, Vermont passed a law allowing healthcare providers to prescribe naloxone to people at risk of overdosing or third parties who may witness people overdosing. The full text of this law can be found [here](#).<sup>23</sup> The same year the state also passed a robust Good Samaritan Law, which ensures that those who call in an overdose cannot be prosecuted for any drug offense, face property seizure, or be punished for parole or probation violations.<sup>24</sup>

This example legislation corresponds to the section of the Brennan Center’s *Criminal Justice Agenda* entitled “Reduce Opioid Deaths.”

# Reduce Female Incarceration

## **Examples: Alternative to Prison Act, Proportional Sentencing Act, New Jersey Dignity for Incarcerated Primary Caretaker Parents Act, and Oklahoma H.B. 2998 (2010)**

Between 1980 and 2014, the number of incarcerated women rose by more than 700 percent.<sup>25</sup> While the U.S. population is made up of less than 5 percent of the world's women, it is home to one-third of the world's incarcerated women.<sup>26</sup> The best way to curb this exponential growth in female incarceration is to implement reforms that significantly reduce the general prison population through legislation outlined earlier in this report, including the Alternative to Prison and Proportional Sentencing Acts.

In addition, diversionary programs targeted to women and primary caregivers of minor children can help reduce the female incarcerated population. An example is H.B. 2998 (which can be found [here](#)<sup>27</sup>), a law enacted in Oklahoma in 2010 which established pilot diversionary programs that provide comprehensive services to primary caregivers of minor children. The language is simple and open-ended, which has allowed for flexibility and innovation among government agencies and non-profit partners during implementation. In Oklahoma, ReMerge, a diversion program that offers two years of therapy and vocational training, developed out of the law and reduced the recidivism rate for participants to less than half of the state average.<sup>28</sup> States can implement such programs on a large scale instead of limiting them to pilots.

Additional reforms that improve conditions of confinement and reentry for women can also be helpful. An estimated one in four women are pregnant or have a child under the age of one when they enter prison.<sup>29</sup> A bill introduced this year in New Jersey, the Dignity for Incarcerated Primary Caretaker Parents Act (which can be found [here](#)<sup>30</sup>), based on the federal Dignity for Incarcerated Women Act, helps incarcerated women and primary caretakers in several key ways, including:

- Prohibiting the solitary confinement and shackling of pregnant women;
- Appointing an ombudsman to monitor allegations by incarcerated people of sexual abuse and sexual assault;
- Establishing policies that encourage and promote visitation;
- Providing parenting classes to primary caretaker parents;
- Requiring feminine hygiene products to be provided free of charge to incarcerated women;
- Prohibiting charging incarcerated people for telephone calls and making video conferencing available at every facility free of charge;
- Placing incarcerated people with children in a correctional facility as close as possible to the child's place of residence.

This example legislation corresponds to the section of the Brennan Center's *Criminal Justice Agenda* entitled "Curb the Number of Women Entering State Prisons."

## Endnotes

<sup>1</sup> Council of Economic Advisers, Executive Office of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System*, 2016, 43, <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf>.

<sup>2</sup> James Austin and Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, [https://www.brennancenter.org/sites/default/files/publications/Unnecessarily\\_Incarcerated\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf).

<sup>3</sup> Lauren-Brooke Eisen and Inimai Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, [https://www.brennancenter.org/sites/default/files/publications/2018\\_05\\_Agendas\\_CriminalJustice\\_pdf\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_CriminalJustice_pdf_0.pdf).

<sup>4</sup> James Austin and Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated>.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> David Cloud & Chelsea Davis, *Treatment Alternatives to Incarceration for People with Mental Health Needs in the Criminal Justice System: The Cost-Savings Implications*, The Vera Institute for Justice, 2013, <https://www.vera.org/publications/treatment-alternatives-to-incarceration-for-people-with-mental-health-needs-in-the-criminal-justice-system-the-cost-savings-implications>.

<sup>8</sup> See Susan E. Collins et al., *LEAD Evaluation Team, LEAD Program Evaluation: Recidivism Report*, Univ. of Wash., 2015, 3, [http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD\\_EVALUATION\\_4-7-15.pdf?token=xTmZUgmkb4HTY3bnogXuOI8Uows%3D](http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf?token=xTmZUgmkb4HTY3bnogXuOI8Uows%3D).

<sup>9</sup> James Austin and Lauren-Brooke Eisen, *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated>.

<sup>10</sup> See Ibid.

<sup>11</sup> LB 191, 102nd Leg., 1st Sess. (Neb 2011), <https://nebraskalegislature.gov/FloorDocs/102/PDF/Slip/LB191.pdf>.

<sup>12</sup> “Policy Resources,” Civil Rights Corps, <https://www.civilrightscorps.org/resources>.

<sup>13</sup> Fines are prescribed by courts as a punishment for committing a crime. Defendants face other sanctions, most commonly flat fees intended to offset court costs. Unlike fines, “fees” do not scale according to the severity of the crime, meaning that individuals charged with relatively minor crimes can still end up with onerous debt.

<sup>14</sup> Lauren-Brook Eisen, Nicole Fortier, and Inimai Chettiar, *Federal Prosecution for the 21<sup>st</sup> Century*, Brennan Center for Justice, 2014, [https://www.brennancenter.org/sites/default/files/publications/Federal\\_Prosecution\\_For\\_21st\\_Century.pdf](https://www.brennancenter.org/sites/default/files/publications/Federal_Prosecution_For_21st_Century.pdf).

<sup>15</sup> Lauren-Brooke Eisen and Inimai Chettiar, *The Reverse Mass Incarceration Act*, Brennan Center for Justice, 2015, [https://www.brennancenter.org/sites/default/files/publications/The\\_Reverse\\_Mass\\_Incarceration\\_Act%20.pdf](https://www.brennancenter.org/sites/default/files/publications/The_Reverse_Mass_Incarceration_Act%20.pdf).

<sup>16</sup> H.B. 39, 148th Gen. Assemb., Reg. Sess. (Del. 2015), <https://legis.delaware.gov/json/BillDetail/GetHtmlDocument?fileAttachmentId=48324>.

<sup>17</sup> See *The War on Marijuana in Black and White*, ACLU, 2013, [www.aclu.org/report/report-war-marijuana-black-and-white?redirect](http://www.aclu.org/report/report-war-marijuana-black-and-white?redirect).

<sup>18</sup> Control, Regulate and Tax Adult Use of Marijuana Act, , Proposition 64 (Cal. 2016), [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)\\_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf).

<sup>19</sup> States interested in decriminalizing, but not legalizing, marijuana possession should eliminate monetary penalties for marijuana possession wherever possible.

<sup>20</sup> Amy S. B. Bohnert, PhD, Marcia Valenstein, M.D. and Matthew J. Bair, M.D., “Association Between Opioid Prescribing Patterns and Opioid Overdose-Related Deaths,” *Journal of the American Medical Association Network*, 2011, <https://jamanetwork.com/journals/jama/fullarticle/896182>.

<sup>21</sup> Puja Seth et al., “Overdose Deaths Involving Opioids, Cocaine, and Psychostimulants—United States, 2015-2016,” *Morbidity and Mortality Weekly Report* 67, 2018, 349-358, <https://www.cdc.gov/mmwr/volumes/67/wr/mm6712a1.htm>.

<sup>22</sup> S.B. 3, 2016-2017 Sess. (N.J. 2017), <https://www.njconsumeraffairs.gov/prescribing-for-pain/Documents/Opioid-Law.pdf>.

<sup>23</sup> H.522, 2013-2014 Sess. (Vt. 2013), <https://legislature.vermont.gov/assets/Documents/2014/Docs/ACTS/ACT075/ACT075%20As%20Enacted.pdf>.

<sup>24</sup> 18 V.S.A. § 4254, <https://legislature.vermont.gov/statutes/section/18/084/04254>.

<sup>25</sup> The Sentencing Project, *Incarcerated Women and Girls*, 2015, <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

<sup>26</sup> For general population data see World Bank Data, last accessed December 14, 2018, <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.IN?locations=US-1W>. For female imprisonment data see Roy Walmsley, *World Female Imprisonment List*, Institute for Criminal Policy Research, Fourth Edition, 2017, 5, <http://www.prisonstudies.org/news/world-female-imprisonment-list-fourth-edition>.

<sup>27</sup> H.B. 2998, 56th Leg., 2nd Sess. (Okla. 2010), [http://www.oklegislature.gov/cf\\_pdf/2009-10%20ENR/hb/hb2998%20enr.pdf](http://www.oklegislature.gov/cf_pdf/2009-10%20ENR/hb/hb2998%20enr.pdf).

<sup>28</sup> Rebecca Beitsch, *Breaking the Cycle of Incarceration by Keeping Mothers and Children Together*, Pew Charitable Trusts, 2017, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/09/13/breaking-the-cycle-of-incarceration-by-keeping-mothers-and-children-together>.

<sup>29</sup> Sarah Yager, “Prison Born,” *The Atlantic*, July/August, 2015, <https://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297/>.

<sup>30</sup> Dignity for Incarcerated Primary Caretaker Parents Act, S.B. 2540, 218 Leg. (N.J. 2018), [https://www.njleg.state.nj.us/2018/Bills/S3000/2540\\_11.htm](https://www.njleg.state.nj.us/2018/Bills/S3000/2540_11.htm).

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