

Winnable criminal justice reforms

A Prison Policy Initiative briefing on promising state reform issues for 2020

PRISON
POLICY INITIATIVE
<https://www.prisonpolicy.org/>
(413) 527-0845

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REDUCING THE SIZE OF THE PRISON POPULATION

Reducing pretrial detention

Problem: Many people who face criminal charges are unnecessarily detained before trial. Often the sole criteria for release is access to money for bail. This puts more pressure on defendants to accept plea bargains, and destabilizes the life of the person who is incarcerated, which can result in the loss of an apartment, a job, and even custody of children. It also leads to jail overcrowding which drives the need for more and bigger jails, thus wasting taxpayer dollars.

Solutions: States are addressing this problem with a variety of approaches, including bail reform, ending money bail, pretrial services including monitoring and curfews, drug testing and treatment, and postcard or phone reminders to appear in court.

More information: Pretrial Justice Institute: <https://www.pretrial.org>, Massachusetts Women's Justice Network: *Moving Beyond Incarceration for Women in Massachusetts: The Necessity of Bail/Pretrial Reform* http://www.wcwonline.org/images/PolicyBrief3.15.Bail.Pretrial_Reform.pdf, and Criminal Justice Policy Program at Harvard Law School *Primer on Bail Reform*: <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>

Decreasing state incarceration rates by reducing jail populations

Problem: One out of every three people behind bars is being held in a local jail. Jails are ostensibly locally controlled, but the people held there are generally accused of violating state law, and all too often state policymakers ignore jails. Spending time in jail leads to a number of collateral consequences and other financial roadblocks to successful reentry, and higher recidivism rates that lead to higher state prison populations.

Solutions: States should address *state* causes of growing local jail populations. Although local practices and federal laws also impact jail incarceration rates, there are discrete small steps that state legislatures can take that would have a big impact, such as:

- Encourage judges to use non-monetary sanctions, rather than fines and fees, and ensure that judges are holding indigency hearings before imposing and enforcing unaffordable fees.
- Reclassify criminal offenses and turn misdemeanor charges that don't threaten public safety into non-jailable infractions.
- Make citations, rather than arrest, the default action for certain low-level crimes.

More information: *Era of Mass Expansion: Why State Officials Should Fight Jail Growth* <https://www.prisonpolicy.org/reports/jailovertime.html> and *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems* <https://www.prisonpolicy.org/reports/repeatarrests.html>

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Shortening excessive prison sentences

Problem: Nationally, one of every six people in state prisons have been incarcerated for a decade or more. While many states have taken laudable steps to reduce the number of people serving time for low-level offenses, little has been done to bring relief to people needlessly serving decades in prison.

Solution: State legislative strategies include: enacting presumptive parole, second-look sentencing, and other common-sense reforms, such as expanding good time.

More information and suggested legislation: Our report, *Eight Keys to Mercy*, presents several effective options for states looking to shorten excessive sentences, including examples of model legislation: <https://www.prisonpolicy.org/reports/longsentences.html>

Repealing or reforming ineffective and harmful sentencing enhancement zones

Problem: Most states have laws that are intended to keep children safe by creating enhanced penalties for various drug crimes committed within a certain distance of schools. These laws sound like a common sense approach, but our research has shown that these laws do not work and exacerbate harmful racial disparities in the criminal justice system.

Solution: The most comprehensive solution is for states to repeal the enhancement zones, and instead rely on the already-existing laws that give additional penalties for involving children in drug activity. Barring repeal, there are several other ways to modify the scope of the law. The simplest approach is reducing the size of the zones like Massachusetts and New Jersey did. Alternatively, do as Connecticut did in 2015 and make the enhancement penalty subject to judicial discretion rather than mandatory.

More information: See our work about sentencing enhancement zones: <https://www.prisonpolicy.org/zones.html>

Creating a safety valve for mandatory minimum sentences

Problem: Mandatory minimum sentences have fueled the country's skyrocketing incarceration rates, harming individuals and undermining our communities and national well-being, all without significant increases to public safety.

Solution: The best course is to repeal mandatory minimum laws so that judges can craft sentences to fit the unique circumstances of each crime and individual, but where that option is not possible — either because of political or legislative realities — states should adopt sentencing “safety valve” laws, which give judges the ability to deviate from the mandatory minimum under specified circumstances.

More information, model bill language, and example bills:

Families Against Mandatory Minimums (FAMM): *Turning Off the Spigot: How Sentencing Safety Valves Can Help States Protect Public Safety and Save Money* <https://fammm.org/wp-content/uploads/State-Safety-Valve-Report-Turning-Off-the-Spigot.pdf> and American Legislative Exchange Council (ALEC): *Justice Safety Valve Act* <https://www.alec.org/model-policy/justice-safety-valve-act/>

Requiring racial impact statements for criminal justice bills

Problem: Some criminal justice bills unnecessarily and unintentionally exacerbate racial and ethnic disparities in arrest, sentencing, and incarceration rates.

Solution: Connecticut, Iowa, New Jersey, and Oregon have passed legislation to provide for racial impact statements that prospectively evaluate whether or not proposed criminal justice legislation is likely to have a racially or ethnically disparate impact.

Example bills: Iowa House File 2393 (2008), Connecticut Public Act 08-143 (2008), Oregon Senate Bill 463 B (2013), New Jersey S-677/A-3677 (2018).

More information: See our article *Oregon passes legislation to rein in racial disparities in criminal law; which state will be next?* <https://www.prisonpolicy.org/blog/2013/07/09/or-sb463/>

ELIMINATING BURDENSOME COSTS FOR INCARCERATED PEOPLE AND THEIR FAMILIES

Lowering the cost of calls home from prison or jail

Problem: The prison and jail telephone industry offers correctional facilities hefty kickbacks in exchange for exclusive contracts. While most state prison phone systems have lowered their rates, many jails are still charging exorbitant prices for in-state calls of up to \$1/minute for phone calls.

Solution: The Federal Communications Commission approved a series of historic regulations in 2013 and 2015 that would make calls home from prisons and jails more affordable, but it then abandoned its defense of those regulations. States can easily pick up where the FCC has left off and pass legislation requiring the state prison systems and counties to negotiate for phone calls and video calling services for people in their custody on the basis of the lowest cost to the consumer, and state Public Utilities Commissions can also regulate the industry.

Example bill: New York Corrections Law § 623 bans commissions and requires that contracts be based on the lowest possible cost to consumers. However: this New York law only applies to contracts with state prisons. The ideal solution would apply to both state prison and local jail contracts. (The strongest state regulations are by the Alabama Public Service Commission, so state regulators in other states will find Alabama's regulations helpful.)

More information: Beyond the obvious solution to set maximum rates, our ideas for state legislation are explained in our report *State of Phone Justice: Local jails, state prisons and private phone providers* https://www.prisonpolicy.org/phones/state_of_phone_justice.html. For suggestions on which problems to focus on in your state, see *The biggest priorities for prison and jail phone justice in 40 states* <https://www.prisonpolicy.org/blog/2019/09/11/worststatesphones/>. For additional information, see our website at <https://www.prisonpolicy.org/phones/>

Protecting in-person family visits from the video calling industry

Problem: Video calling is quietly sweeping the nation's prisons and local jails. Unfortunately, rather than providing the video technology as an additional way for families to stay connected, private companies and sheriffs are working together to replace traditional in-person family visits with expensive, grainy computer chats.

Solution: Follow the lead of Texas, California, and Massachusetts, which have passed legislation that requires jails to preserve in-person visits.

Example bill: Section 36C of Massachusetts' S. 2371 (2018) requires jails to provide people in jails with at least two in-person visits per week and prohibits jails from replacing in-person visits with video calls.

More information: *Screening Out Family Time: The for-profit video visitation industry in prisons and jails* <https://www.prisonpolicy.org/visitation/>

Curbing the exploitation of people released from custody

Problem: Correctional facilities are increasingly using fee-riddled cards to repay people they release for money in their possession when initially arrested, money earned working in the facility, or money sent by friends and relatives. Before the rise of these release cards, people were given cash or a check. Now, they are given a mandatory prepaid card instead, which comes with high fees that eat into their balance. For example, the cards charge for basic things like having an account (up to \$3.50/week), making a purchase (up to \$0.95), checking your balance (up to \$3.95), or closing the account (up to \$30.00).

Solution: States can prohibit facilities from using release cards that charge fees, and require fee-free alternative payment methods.

Model bill: <https://www.prisonpolicy.org/releasecards/model.html>

More information: Our *Release Cards* page at <https://www.prisonpolicy.org/releasecards/>

Taking the profit motive out of Department of Corrections decision making

Problem: Services like phone calls and commissary are often chosen based not on which provider offers the best service, but on which will kick back the most revenue to the DOC. This creates a conflict of interest for the DOC and raises costs for incarcerated people and their families.

Solution: When the Department of Corrections is negotiating a contract whose cost will be borne by families, the Department should not be allowed to accept kickbacks (or “commissions”) on that contract. It should negotiate from the perspectives of security and the needs of the families only, and never with an eye towards revenue.

Model bill: The New York State bill on phones (see page 3) is a model that could be easily extended to all services.

More information: See our detailed explainer of how kickbacks and commissions to departments of corrections have driven phone rates higher: <https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/> . Also see Stephen Raher’s law review article *The Company Store and the Literally Captive Market*, which explains DOC conflicts of interest, as well as other consumer protection issues in prisons and jails: <https://tinyurl.com/vz3gqrt>

Abolishing fees for juveniles

Problem: Children are deemed legally incompetent to enter into contracts of any kind, including taking on debt, but all 50 states allow courts to impose economic sanctions on children (or their families) for one or all of these expenses: confinement, supervision, or treatment; cost of counsel; diversion; court operations; expungement; court-ordered examinations or assessments; probation; fines; and restitution. While our juvenile courts have moved away from punitive approaches to instead emphasize positive youth development, these fines and fees undermine that goal.

Solution: California’s SB 190 (2018) prohibits counties from charging fees to parents and guardians for their children’s detention, representation by counsel, electronic monitoring, probation supervision, and drug testing in the juvenile system. Nevada passed similar legislation in 2019 (AB 439). The strongest reforms eliminate as many fees as possible and retroactively address past fee debt.

Example bill: California SB 144 (2019)

More information: Juvenile Law Center’s *Debtor’s Prison For Kids 50-state interactive map* <https://debtorsprison.jlc.org/#!/map>, and the Berkeley Law Policy Advocacy Clinic report *Making Families Pay* <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Making-Families-Pay.pdf>

PROMOTING PHYSICAL AND MENTAL HEALTH IN PRISONS AND JAILS

Offering evidence-based opioid treatment to reduce deaths and re-incarceration

Problem: Despite a growing body of evidence that medication-assisted treatment (MAT) is effective at treating opioid use disorders, most prisons are refusing to offer those treatments to incarcerated people, exacerbating the overdose and recidivism rate among people released from custody.

Solution: States can pass legislation requiring their Department of Corrections to implement MAT to eligible patients in their custody. MAT pairs counseling with low doses of opioids that, depending on the medication used, either reduce cravings or make it impossible to get high off of opiates.

Model program: Rhode Island launched a successful program to provide MAT to some of the people incarcerated in their facilities. The early results are very encouraging: In the first year, Rhode Island reported a 60.5% reduction in opioid-related mortality among recently incarcerated people.

More information: See our explainer at <https://www.prisonpolicy.org/blog/2018/12/07/opioids/> . The Substance Abuse and Mental Health Services Administration published a useful guide to using medication-assisted treatment for opioid use disorder in jails and prisons: <https://tinyurl.com/ql7lpe4> .

Protecting pregnant women and their newborns in prison

Problem: Most state departments of corrections fail to adhere to nationally recognized guidelines on the care of pregnant women in prison. Provisions for adequate nutrition and prenatal care are often missing from correctional facilities' healthcare policies.

Solution: States can pass legislation requiring their Department of Corrections to bring healthcare policies in line with the standards set by the National Commission on Correctional Health Care: https://www.prisonpolicy.org/scans/NCCHC_standards_2018_pregnancy.pdf

Model policy: See California's code of regulations regarding health care during pregnancy and childbirth: <https://tinyurl.com/t76x96t>

More information: We published an analysis of how each state fares on health care policy for pregnant women and newborn children: <https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/>

Eliminating medical co-pays for doctor visits in prison

Problem: Most state departments of corrections, and many local jails, charge incarcerated people a co-pay to see the doctor. Though these \$2-\$5 co-pays appear inexpensive, they can amount to a day's wages (or more) for incarcerated people. As a result, they often deter sick people from seeking medical attention, creating health problems in prisons and high healthcare costs for people leaving prison.

Solution: Pass legislation ending co-pays in prisons and jails.

Model policy: California passed legislation (AB 45) eliminating medical and dental co-pays for people in prison and jail. See this fact sheet about the bill: <https://www.initiatejustice.org/wp-content/uploads/2019/06/AB-45-Fact-Sheet-Eliminating-Copayments-in-Prisons-and-Jails-6.19.19.pdf>

More information: Our analysis showing which states charge co-pays to people in prison, and illustrating the cost burden of each state's co-pay on incarcerated patients: <https://www.prisonpolicy.org/blog/2017/04/19/copays/>

Protecting letters from home in local jails

Problem: Sheriffs in at least 14 states — Arizona, California, Colorado, Florida, Georgia, Kentucky, Kansas, Maryland, Michigan, Missouri, Oregon, Tennessee, Utah, and Washington — have been experimenting with a harmful policy in local jails: banning letters from home.

Solution: States can send a clear message about the importance of protecting family communication by passing a bill or administrative rule requiring correctional facilities to allow personal letter correspondence.

Example rule: "Inmates shall be permitted to send as many letters of as many pages as they desire, to whomever they desire... [and] may receive correspondence in any quantity, amount, and number of pages." (Texas Commission on Jail Standards, Inmate Correspondence Plan (Rule §291.2))

More information: *Protecting Written Family Communication in Jails: A 50-State Survey* <https://www.prisonpolicy.org/postcards/>

SUPPORTING REENTRY AND SUCCESS ON SUPERVISION

Eliminating probation fees and regulating privatized probation services

Problem: Most states charge people on probation a monthly fee, even though many probationers are among the nation's poorest, and these fees put them at risk of being jailed for nonpayment. The Supreme Court has ruled it unconstitutional to incarcerate someone because they cannot afford to pay court ordered fines and fees, but many courts effectively do just that, by ignoring the question of ability to pay and treating nonpayment as a probation violation. When counties rely on these fees for revenue, courts are incentivized to impose unnecessary or excessive probation sentences. Moreover, the growth of privatized probation has led to unnecessary "pay only" probation supervision for minor offenses.

Solutions: Pass legislation that would eliminate probation fees, require hearings on ability to pay before assessing fees, and/or regulate the use of privatized probation.

Example bills: San Francisco County Ordinance No. 131-18 (2018) eliminated all discretionary criminal justice fees, including probation fees; the ordinance includes a detailed discussion of the County's reasons for ending these fees. Louisiana HB 249 (2017) makes many reforms, including requiring inquiries into ability-to-pay before imposing fines and fees or enforcing any penalties for failure to pay.

More information: See our briefing with national data and state-specific data for 15 states: https://www.prisonpolicy.org/blog/2019/04/09/probation_income/ as well as our report *Punishing Poverty: The high cost of probation fees in Massachusetts* <https://www.prisonpolicy.org/probation/#ma> States with privatized misdemeanor probation systems will find helpful the nine recommendations on pages 7-8 of the Human Rights Watch report *Profiting from Probation: America's "Offender-Funded" Probation Industry*: https://www.hrw.org/sites/default/files/reports/us0214_ForUpload_0.pdf

Reducing the length of probation sentences

Problem: Because probation is often billed as an alternative to incarceration and is imposed through plea bargains, the lengths of probation sentences do not receive as much scrutiny as they should. Excessively long sentences put defendants at risk of lengthy incarceration for subsequent minor offenses or, even worse, incarceration for minor violations of probation rules ("technical violations").

Solutions: States should set upper limits for probation sentences and enable early discharge by awarding "compliance credits" for successfully meeting probation's requirements for a given time period.

Example bills: Several states, including Louisiana (Act 280 (2017)), Florida (Fla. Stat. § 948.04), and New York (S4664A (2014)), have shortened probation sentences by eliminating minimum sentences, setting caps on probation sentences, and awarding compliance credits. Although, Louisiana's law is stronger, ALEC has an Earned Compliance Credit Act <https://www.alec.org/model-policy/earned-compliance-credit-act/>

More information: For more on how probation sets people up to fail, see our report *Correctional Control 2018: Incarceration and supervision by state* <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html> and for more on downsizing probation, see the Executive Session on Community Corrections report *Less Is More: How Reducing Probation Populations Can Improve Outcomes* https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf

Cap or reduce jail time for technical violations

Problem: Incarcerating people for "technical violations" of probation and parole conditions is a common but harmful and disproportionate response to minor rule violations. These unnecessary incarcerations make it harder for people under supervision to succeed and lead to higher corrections costs. In many states, incarceration for technical violations is more common than incarceration for new crimes.

Solution: States should limit incarceration as a response to supervision violations to only when the individual has committed a new crime and poses a direct threat to public safety. When incarceration is used to respond to technical violations, the length of time served should be limited and proportionate to the harm caused by the non-criminal rule violation.

More information: Pew Charitable Trusts, *To Safely Cut Incarceration, States Rethink Responses to Supervision Violations* https://www.pewtrusts.org/-/media/assets/2019/07/pspp_states_target_technical_violations_v1.pdf

Ending electronic monitoring for individuals on parole

Problem: Individuals on parole face an array of conditions that may result in them being returned to prison even without committing another crime. Electronic monitoring imposes unnecessary, often contradictory conditions on recently released individuals, hindering their movement, and creating serious barriers to successful reentry.

Solution: States can introduce and enforce legislation that would outlaw the imposition of electronic monitoring devices for individuals on parole. Until then, individuals forced to wear electronic monitors should not be required to pay for those devices nor be fined or re-incarcerated for their inability to pay monitoring fees.

More information: *Challenging E-Carceration* provides details about the encroachment of electronic monitoring into community supervision: <https://www.challengingcarceration.org> and fact sheets, case studies, and possible solutions are available from the Center for Media Justice: <https://centerformediajustice.org/our-projects/challengingcarceration-electronic-monitoring/>

Ending driver's license suspensions for nonpayment of fines and fees

Problem: All states except for California, Idaho, Kentucky, Mississippi, Montana, and Wyoming suspend, revoke or refuse to renew driver's licenses for unpaid traffic, toll, misdemeanor and felony fines and fees, resulting in more than 11 million debt-related suspensions nationwide. License suspension prevents people from earning the money they need to pay their fines and fees, undercuts their ability to support themselves, and forces law enforcement to waste time stopping, citing, and arresting people for driving on a suspended license instead of focusing on serious crime.

Solution: Stop suspending drivers licenses for non-payment of fines and fees. In the past two years, Montana, Texas, Virginia, Mississippi, California, Idaho, Maine, and the District of Columbia have all enacted partial or complete legislative reforms.

Example bill: Montana HB 217 (2019). (The strongest reforms completely eliminate the practice of revoking, suspending, or refusing to renew drivers licenses because of a failure to pay fines and fees.)

More Information: Free to Drive Coalition's state-by-state analysis freetodrive.org and the Legal Aid Justice Center's report *Driven By Dollars: A State-By-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt* <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>

Stopping automatic driver's license suspensions for drug offenses unrelated to driving

Problem: 9 states have failed to repeal an outdated relic from the War on Drugs — automatic driver's license suspensions for all drug offenses, including those unrelated to driving. Our analysis shows that there are approximately 175,000 licenses suspended every year for non-driving drug convictions. These suspensions disproportionately impact low-income communities and waste government resources and time.

Solution: Alabama, Arkansas, Florida, Michigan, Mississippi, New Jersey, New York, Texas, and Virginia should formally opt out of the federal automatic suspension law. There is no financial penalty for opting-out as long as states pass a legislative resolution and the governor informs the Federal Highway Administration.

More information: Our *Driver's License Suspensions* page, <https://www.prisonpolicy.org/driving/>

Reducing homelessness among formerly incarcerated people

Problem: Communities are safer when all residents have access to housing, but discriminatory practices (combined with housing shortages) often make it impossible for people with criminal records to find homes. Unfortunately, a lack of state-specific data about this problem impedes state attempts to address it.

Solution: States should establish commissions to investigate what housing options exist for people leaving prison, how many formerly incarcerated people are unable to access housing, and what legal barriers prevent them from finding stable homes. Members of the commission should include advocates who are formerly incarcerated as well as experts from homeless shelters, prisoner reentry programs, and tenants' unions.

More information: We explain the national scale of this problem, and recommended solutions, in our report *Nowhere to go: Homelessness among formerly incarcerated people*: <https://www.prisonpolicy.org/reports/housing.html> . See also the Seattle Office of Civil Rights' *Fair Chance Housing* page: <http://www.seattle.gov/civilrights/civil-rights/fair-housing/fair-chance-housing> .

Expanding state aid for college in prison

Problem: In-prison college programs, which support successful reentry, are unavailable to most incarcerated people due to underfunding. Because incarcerated people are overwhelmingly poor, in-prison college programs rely largely on public funding. But only a small share of these programs are able to use federal Pell grants through the very limited Second Chance Pell program, and some states also limit the use of state funds for incarcerated and formerly incarcerated college students.

Solution: States should lift restrictions on state funding for incarcerated or formerly incarcerated students, and offer additional funding sources such as tuition and fee waivers and funding for supportive services.

Examples: California SB 1391 (2014); California College Promise Grant

For more information: Vera Institute of Justice, *A Piece of the Puzzle: State Financial Aid for Incarcerated Students* <https://www.vera.org/publications/a-piece-of-the-puzzle-state-financial-aid-for-incarcerated-students> ; Corrections to College California, *Don't Stop Now* <https://correctionstocollegeca.org/resources/dont-stop-now> ; and Bradley Custer's article *States – not just Congress – should unlock student financial aid for people in prison* <https://theconversation.com/states-not-just-congress-should-unlock-student-financial-aid-for-people-in-prison-117068> .

CURBING MASS INCARCERATION'S INFLUENCE ON ELECTIONS

Ending prison gerrymandering

Problem: The Census Bureau's practice of tabulating incarcerated people at correctional facility locations (rather than at their home addresses) leads state and local governments to draw skewed electoral districts that grant undue political clout to people who live near large prisons and dilute the representation of people everywhere else.

Solution: States can pass legislation to count incarcerated people at home for redistricting purposes, as California, Delaware, Maryland, Nevada, New York, and Washington State have done. Ideally, the Census Bureau would implement a national solution by agreeing to tabulate incarcerated people at home in the next Census, but time has run out for that change before the 2020 Census, so states must prepare their own fix to the redistricting data released in 2021.

Model bill: <https://www.prisonersofthecensus.org/models/example.html>

More information: Prison Gerrymandering Project website <https://www.prisonersofthecensus.org>

For interesting reports that can help you make the case for criminal justice reform in your state, see <https://www.prisonpolicy.org/reports.html>