



## Alternatives to Traditional Prosecution Can Reduce Defender Workload, Save Money, and Reduce Recidivism

*National Association for Public Defense  
Workload Committee - Demand Side Subcommittee  
Statement on Reducing Demand For Public Defense<sup>1</sup>*

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There is a clear constitutional right to effective assistance of counsel for persons accused of crime, but in many places in the country public defenders and assigned counsel carry caseloads far above any reasonable level. Often, they have only a few minutes to defend a client. There are literally hundreds of thousands of minor, non-violent misdemeanor or low-level felony cases that could be handled outside of criminal court with no danger to public safety and no need for lawyers. Many of those clients would benefit from access to treatment services to address issues of homelessness, mental illness, or substance abuse. In many places, the largest facility housing mentally ill people is the county jail.<sup>2</sup> As Minnesota Judge Kevin Burke has said, “There are certainly behaviors we want to change, but the institutions of the criminal justice system aren’t necessarily very effective in dealing with them.”<sup>3</sup>

The excessive caseloads carried by many defenders are in part the result of an over-emphasis on prosecuting minor offenses. There are approximately ten million misdemeanor cases a year in the United States.<sup>4</sup> They include offenses such as sleeping in a cardboard box and feeding the homeless, as well as true criminal conduct such as assault.<sup>5</sup>

<sup>1</sup> This statement was approved by the NAPD Steering Committee on October 20, 2016.

<sup>2</sup> See Matt Ford, *America's Largest Mental Hospital Is a Jail*, THE ATLANTIC, June 8, 2015, available at <http://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/>; Michael Arceneaux, *Why Are The Three Largest Mental Health Care Providers Jails?*, NEWSONE, available at <http://newsone.com/2744141/prisons-mental-health-providers/>.

<sup>3</sup> Interview with Judge Kevin Burke, Apr. 7, 2015, on file with the American Civil Liberties Union.

<sup>4</sup> Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE (Apr. 27, 2012, 11:33 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/04/misdemeanors\\_can\\_have\\_major\\_consequences\\_for\\_the\\_people\\_charged.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged.html)

<sup>5</sup> See Robert C. Boruchowitz, Malia N. Brink, & Maureen Dimino, Nat'l Ass'n of Crim. Def. Lawyers, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 25 (2009), available at <https://www.nacdl.org/reports/misdemeanor/>.

Studies from across the nation have documented racially disproportionate arrests and prosecutions of people of color in misdemeanor, felony, and juvenile cases. For example, a recent ACLU study in Minneapolis documented the racial disparity in enforcement of petty offenses:

Black people in the city are 8.7 times more likely than white people to be arrested for low-level offenses, like trespassing, disorderly conduct, consuming in public, and lurking. Native Americans have it no better. They are 8.6 times more likely to be arrested for low-level offenses than white people.<sup>6</sup>

In Florida, black motorists “are stopped and ticketed for seatbelt violations in far greater numbers than white motorists — nearly twice as often statewide and up to four times as often in certain counties.”<sup>7</sup> In New York City, although misdemeanor marijuana-possession arrests declined about 56 percent from 2014 to 2015, the racial disparity continued, with 88 per cent of those arrested being black or Hispanic.<sup>8</sup>

A recent White House report stated: “Though Blacks and Hispanics represent approximately 30 percent of the population, they comprise over 50 percent of the incarcerated population.”<sup>9</sup>

The National Association for Public Defense urges all states and local governments<sup>10</sup> to build on existing alternatives that can save public funds, reduce defender workloads and help meet constitutional requirements for effective representation, assist individual accused persons, and improve public safety by reducing recidivism and re-allocating resources. The LEAD program outlined below is an example of such an alternative. On a national basis, alternatives can save more than \$1 billion per year.<sup>11</sup>

There are more than 2 million people in jail and prison in the United States.<sup>12</sup> This is a four-fold increase since 1980.<sup>13</sup> This increase and the racial disproportionality among incarcerated people has led to alliances across the political spectrum to address the impact on people and on budgets. As the new Coalition for Public Safety has put it, “Our country has an ‘overcriminalization’ problem and an

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<sup>6</sup> *Picking Up the Pieces: a Minneapolis Case Study*, AM. CIV. LIB. UNION,, available at <https://www.aclu.org/feature/picking-pieces>

<sup>7</sup> *Racial Disparities in Florida Safety Belt Law Enforcement*, AM. CIV. LIB. UNION, (Jan. 2016), available at <https://www.aclu.org/report/racial-disparities-florida-safety-belt-law-enforcement>.

<sup>8</sup> See Victoria Bekiempis, *Whites only 8 Per cent of NYC’s Misdemeanor Pot Arrests*, NEWSWEEK,, (Nov. 4, 2015), <http://www.newsweek.com/new-york-police-department-marijuana-arrests-racial-disparity-390240>.

<sup>9</sup> *Economic Perspectives on Incarceration and the Criminal Justice System*, EXEC. OFF. OF THE PRESID. (Apr. 23, 2016) [https://www.whitehouse.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf)

<sup>10</sup> Most people accused of crime are in state courts. Congress has been considering a variety of reforms to federal criminal laws. The ideas in this statement would be helpful for federal law changes as well.

<sup>11</sup> Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel*, AMER. CONST. SOC. (2010) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1783057](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1783057).

<sup>12</sup> Bureau of Justice Statistics, *Total Correctional Population*, available at [www.bjs.gov](http://www.bjs.gov) (last visited 9/1/2016).

<sup>13</sup> *Id.*

'overincarceration' problem – and it's getting worse."<sup>14</sup>

There is a great opportunity to make transformative changes that can improve justice and save money. A variety of organizations representing a wide spectrum of political views have joined together to "end the systematic problem of overcriminalization and narrow the net of incarceration by reforming criminal codes."<sup>15</sup>

As a recent national report concludes:

The growth of ballot initiatives as mechanisms to effect criminal justice reform suggests that voters are eager for change in how states punish and manage drug and property crimes—and, perhaps, that policymakers are lagging behind popular will on these issues.<sup>16</sup>

Many prosecutors are leading discussions about alternatives. At a recent meeting, they were among those who "advocated wider adoption of programs already underway in several places to divert defendants out of the system to treatment and other forms of probation so that they can avoid criminal records altogether."<sup>17</sup>

Among the many other organizations working on over-criminalization is Law Enforcement Leaders to Reduce Crime and Incarceration:

Law Enforcement Leaders to Reduce Crime and Incarceration unites more than 150 current and former police chiefs, federal and state chief prosecutors, and attorneys general from all 50 states to urge for a reduction in both crime and incarceration. With this group, law enforcement joins the emerging movement calling for an end to unnecessary, widespread incarceration. We believe the country can reduce incarceration while keeping down crime. We believe unnecessary incarceration does not work to reduce crime, wastes taxpayer dollars, damages families and divides communities. We aim to build a smarter, stronger, and fairer criminal justice system by replacing ineffective policies with new solutions that reduce both crime and incarceration.<sup>18</sup>

Public defenders can contribute to the national and local efforts, working with prosecutors, judges, and law enforcement to develop diversion programs while also helping to change legislation that could reduce the need for defenders by removing categories of cases from criminal court. Local officials can implement non-criminal alternatives even without legislative action. Changes in the law can occur across a broad spectrum of cases, from the hundreds of thousands of misdemeanor marijuana possession cases to the hundreds of death penalty cases filed each year, all

<sup>14</sup> COALITION FOR PUBLIC SAFETY (Jan. 4, 2017) <http://www.coalitionforpublicsafety.org>.

<sup>15</sup> U.S. JUSTICE ACTION NETWORK, (Jan. 4, 2017) <http://www.justiceactionnetwork.org/about/>

<sup>16</sup> *Justice in Review: New Trends in State Sentencing and Corrections 2014-2015*, VERA INST. OF JUST. (May 2016), available at <http://www.vera.org/pubs/state-sentencing-and-corrections-trends-2014-2015>, hereinafter Vera Report.

<sup>17</sup> Ted Gest, *Reforming The Justice System's 'Front End'*, (Mar. 8, 2016)

<http://thecrimereport.org/2016/03/08/reforming-the-justice-systems-front-end/>

<sup>18</sup> *We Can Reduce Unnecessary Incarceration and Crime*, LAW ENFORCEMENT LEADERS, (Jan. 4, 2017)

<http://lawenforcementleaders.org>

of which drain hundreds of millions of dollars that could be reallocated more effectively.

## **Recommendations**

### **1. States and Local Governments Should Develop and Expand Diversion Programs to Save Money and Reduce Crime**

Drug cases and suspended driver license cases occupy significant portions of the courts' workloads across the country. In 2014, 83 % of the 1,561,231 drug arrests in the country were for possession, and 39.7 % (619,808) were for marijuana possession. These marijuana cases have an extraordinary fiscal impact, more than \$600 million per year. In some misdemeanor courts, suspended driver license cases, in which the drivers often have lost their licenses for not paying a fine as opposed to having been convicted of dangerous driving, constitute more than a third of the caseload. The consequences for the defendants, who can lose housing, jobs, licenses, and school loans, can be devastating for them and their families, and they may spend weeks in jail before their case is resolved.<sup>19</sup> As a Minnesota judge said, a low-level arrest "can end up taking somebody who just got a job at Taco Bell and have him fired because they missed work because they were in jail for driving after a suspension case."<sup>20</sup>

There is an increasing recognition that the frequent deployment of military personnel to war zones has affected their conduct when they return home. Kansas has expanded its statutory criteria for city attorneys considering diversion eligibility to include

whether there is a probability that the defendant committed such crime as a result of an injury, including major depressive disorder, polytrauma, post-traumatic stress disorder or traumatic brain injury, connected to service in a combat zone, as defined in section 112 of the federal internal revenue code of 1986, in the armed forces of the United States of America...<sup>21</sup>

One example of a successful diversion program is the East River Community Court in Washington, D.C. In The District of Columbia, diversion programs in the East of the River Community Court have demonstrated dramatic reductions in re-offense rates for the people completing diversion.<sup>22</sup>

We highlight here two diversion programs that have the potential to remove significant percentages of both felony and misdemeanor cases from the traditional prosecution process.

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<sup>19</sup> Natapoff, *supra* note 4.

<sup>20</sup> *Picking Up the Pieces*, *supra* note 6, (quoting Judge Kevin Burke, interview on Apr. 7, 2015, on file with the ACLU).

<sup>21</sup> KAN STAT. ANN. § 12-4415, available at

[http://www.ksrevisor.org/statutes/chapters/ch12/012\\_044\\_0015.html](http://www.ksrevisor.org/statutes/chapters/ch12/012_044_0015.html). The Vera Institute discusses other examples of new and expanded diversion programs in *Justice in Review: New Trends in State Sentencing and Corrections 2014-2015*, *supra* note 16.

<sup>22</sup> *Study Shows D.C. Community Court Program Lowered Reoffending Rates*, LEGAL TIMES BLOG, (Aug. 1, 2012) <http://legaltimes.typepad.com/files/ercc-coverletter-and-evaluationreport.pdf>. See also, *Criminal Division Problem-Solving Courts*, DIST. OF ,COL. CTS., [http://www.dccourts.gov/internet/superior/org\\_criminal/commcourts.jsf](http://www.dccourts.gov/internet/superior/org_criminal/commcourts.jsf)

## LEAD – King County

The Law Enforcement Assisted Diversion (LEAD) program in King County, Washington, is a pre-arrest diversion program that offers low-level drug and prostitution offenders harm reduction-oriented case management and legal services as an alternative to incarceration and prosecution. Seattle’s Defender Association’s Racial Disparity Project designed the program in partnership with local prosecutors and law enforcement.<sup>23</sup>

The most recent evaluation of the program found “statistically significant reductions for the LEAD group compared to the control group on average yearly criminal justice and legal system utilization and associated costs.”<sup>24</sup>

LEAD program participants had fewer jail bookings than the control group on average per year subsequent to their evaluation entry. They also spend fewer days in jail and had 87% lower odds of at least one prison incarceration subsequent to evaluation entry. *Id.* In addition, “From pre- to post-evaluation entry, LEAD participants showed substantial cost reductions (-\$2100), whereas control participants showed cost increases (+\$5961).”<sup>25</sup>

The program has been so successful that it has been adopted by Santa Fe, New Mexico, and Albany, New York, it is being considered by other jurisdictions, and the White House hosted a national convening about it in July 2015.<sup>26</sup> As the White House statement explained,

Under LEAD, officers have the option to divert individuals who have been arrested for certain low-level crimes - such as drug or prostitution offenses - to case managers, rather than into custody. Case managers connect these individuals with treatment, housing, and other services, ensuring they receive support they need to stay out of the criminal justice system.<sup>27</sup>

### ***Suspended Driver License Cases - City of Spokane Diversion and Relicensing Program***

The city prosecutor in Spokane, Washington developed a diversion program for suspended driver license cases, and in the process, reduced the municipal court caseload (and the defender caseload) by one third. The program operates in tandem with a relicensing program. The prosecutor reported the following:

<sup>23</sup> Robert C. Boruchowitz, *Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. FOR SOC. JUST. 891, 924 (2013).

<sup>24</sup> Susan E. Collins, Heather S. Lonczak & Seema L. Clifasefi, *LEAD Program Evaluation: Criminal Justice and Legal System Utilization and Associated Costs*, (June 24, 2015) at 2, available at <http://static1.1.sqspcdn.com/static/f/1185392/26401889/1437170937787/June+2015+LEAD-Program-Evaluation-Criminal-Justice-and-Legal-System-Utilization-and-Associated-Costs.pdf?token=EtGZ7kPb%2F9ZJnowyJbKa%2FMvP+uM=>

<sup>25</sup> *Id.*

<sup>26</sup> Roy L. Austin, *LEAD-ing the Way to a More Efficient Criminal Justice System*, WHITE HOUSE BLOG (July 2, 2015, 5:54 PM), <https://www.whitehouse.gov/blog/2015/07/02/lead-ing-way-more-efficient-criminal-justice-system>

<sup>27</sup> *Id.*

Since our relicensing program began in June of 2008, \$8,926,987.68 has been pulled out of collections and people in the program since that time are *paying toward* those previously uncollectable fines. Spokane District Court has actually collected \$968,664.20; Spokane Municipal has collected \$946,678.09; Pend Oreille has collected \$13,112.14 and so on.<sup>28</sup>

This effort reduced defender caseloads and saved prosecutorial and judicial resources, all while not adversely affecting public safety and providing a conviction-free path for many defendants.<sup>29</sup> As Professor Boruchowitz testified before the Senate:

Because of a combination of the use of diversion programs and an amendment to the statute concerning the types of violations that could lead to suspension of a driver license, Washington State as a whole reduced third degree suspended driver license (DWLS 3) criminal filings by 41.5 per cent from 2009-2014.<sup>30</sup>

## **2. States and Local Governments Should Develop and Expand Programs for Mentally Ill Offenders**

In addition to mental health courts aimed at diverting cases for mentally ill offenders out of the traditional prosecution process, state and local governments should develop resources to assist people before they are charged with crime. This can include both community-based housing and treatment for people who have not drawn the attention of police and options for officers to take people to treatment centers instead of to jail.

The Seattle Police Department has a Crisis Intervention Team which has specially trained and certified officers who

respond to persons in mental health crises, with the objective of diverting them from the criminal justice system and getting them to help to address their physical and mental health needs. This not only provides more appropriate treatment to such persons, but also reduces the justice system costs associated with the mentally ill.<sup>31</sup>

New York City recently announced NYC Safe,

an evidence-driven program to support the narrow population of New Yorkers with untreated serious mental illness who pose a

<sup>28</sup> Presentation, *The City of Spokane's Third Degree Strategy: An Approach to Case Prioritization*, available at [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2013/Is\\_sclaid\\_def\\_8th\\_summit\\_spokane\\_diversion\\_program.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2013/Is_sclaid_def_8th_summit_spokane_diversion_program.auth_checkdam.pdf) (last visited Nov. 8, 2013) (emphasis in original).

<sup>29</sup> Boruchowitz, *supra* note 23, at 922 (footnotes omitted). Information on the relicensing program is available at <https://my.spokanecity.org/courts/prosecutor/relicensing/>.

<sup>30</sup> See WASH. REV. CODE § 46.20.289; WASH. ADMIN. CODE § 308-104-160; Testimony of Professor Robert C. Boruchowitz, Senate Judiciary Committee, May 13, 2015, On Misdemeanor Public Defense, available at [https://law.seattleu.edu/Documents/news/archive/2015/boruchowitz\\_testimony.pdf](https://law.seattleu.edu/Documents/news/archive/2015/boruchowitz_testimony.pdf)

<sup>31</sup> *Crisis Intervention*, SEATTLE POLICE DEP'T (Jan. 5, 2017), <http://www.seattle.gov/police/work/cit.htm>.



concern for violent behavior. NYC Safe changes the way the City intervenes to stop and respond to violence committed by the mentally ill by establishing a centralized oversight body that coordinates public safety and public health. With NYC Safe, the City can respond more rapidly and appropriately to prevent violence and more assertively when it happens.<sup>32</sup>

For persons with mental illness who have committed a crime, an intensive case management system should be created in place of incarceration.<sup>33</sup>

### **3. States Should Review Their Criminal Codes and Reclassify Conduct that Does Not Threaten Public Safety**

As outlined above, the cost of prosecuting minor offenses and the racial disparity in the enforcement of certain offenses are significant. Changing statutes so that the conduct is either decriminalized and changed to civil matters or completely removed from regulation can save millions of dollars and improve fairness in the legal system.

The New York City Council recently passed legislation that would encourage police officers to issue civil summonses to New Yorkers for public urination, drinking alcohol in public, and other low-level offenses.<sup>34</sup> The bill states in part:

The Council has identified concerns with the use of criminal enforcement for many of these offenses and has concluded that criminal enforcement of these offenses should be used only in limited circumstances and that, in the absence of such circumstances, civil enforcement should be utilized.<sup>35</sup>

According to the New York Times,

Council officials estimated that after the legislation takes effect next year, more than 100,000 cases would be diverted from the state's criminal court system annually, sending them instead to a civil system overseen by a city agency.<sup>36</sup>

<sup>32</sup> Mayor de Blasio Announces "NYC Safe," An Evidence-Driven Public Safety and Public Health Program That Will Help Prevent Violence, CITY OF NEW YORK, (Aug. 6, 2015) <http://www1.nyc.gov/office-of-the-mayor/news/540-15/mayor-de-blasio-nyc-safe-evidence-driven-public-safety-public-health-program>

<sup>33</sup> See Joel A. Dvoskin & Henry J. Steadman, *Using Intensive Case Management to Reduce Violence by Mentally Ill Persons in the Community*, 45 HOSP. & COMM. PSYCH 7, 679 (July 1994), available at [http://joeldvoskin.com/Dvoskin\\_Steadman\\_1994.pdf](http://joeldvoskin.com/Dvoskin_Steadman_1994.pdf).

<sup>34</sup> J. David Goodman, *New York Council Approves Bills to Divert Minor Offenders From Court System*, N.Y. TIMES, (May 25, 2016), <http://www.nytimes.com/2016/05/26/nyregion/new-york-council-approves-bills-aimed-at-broken-windows-policing-to-divert-minor-offenders-from-court-system.html>

<sup>35</sup> New York, N.Y., Int. No. 1057-2016 (June 6, 2016), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2553507&GUID=BF52096B-1917-4914-977F-91E604025A50&Options=ID%7c&Search=>.

<sup>36</sup> Goodman, *supra* note 34.

Nationally, there were more than 619,000 arrests for marijuana possession in 2014.<sup>37</sup> At an estimated cost of at least \$1000 per case, that is \$619 million that could have been saved by moving those cases out of criminal court.<sup>38</sup>

Decriminalization of possession of small amounts of marijuana is possible without endangering public safety. As the Vera Institute recently reported, “Alaska and Oregon, for example, joined Colorado, Washington, and the District of Columbia at the vanguard of decriminalizing recreational use.”<sup>39</sup>

By initiative, Washington State's voters changed the law in 2012 to make it legal for an adult to possess up to one ounce of marijuana.<sup>40</sup> Massachusetts passed a similar law in 2009:

Notwithstanding any general or special law to the contrary, possession of one ounce or less of marijuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older to a civil penalty of one hundred dollars and forfeiture of the marijuana, but not to any other form of criminal or civil punishment or disqualification.<sup>41</sup>

Washington, D.C., also changed its marijuana possession laws. Under the new law, adults 21 years of age or older may lawfully possess up to two ounces or less of marijuana.<sup>42</sup>

It is worth reviewing a variety of criminal offenses to consider changing them to civil violations. But caution is recommended because of the unintended consequences that can occur, particularly if there is reliance on heavy fines:

In sum, while decriminalization appears to offer relief from the punitive legacy of overcriminalization and mass incarceration, upon closer inspection it turns out to be a highly conflicted regulatory strategy that preserves and even strengthens some of the most problematic aspects of the massive U.S. penal system.<sup>43</sup>

Locally developed diversion alternatives that attend to the kinds of problems identified by Professor Natapoff can produce real savings without hurting the people involved.

### General Approach to Changing Criminal Codes

It is time to restore proportionality and reasonableness to the overall structure of penal codes and other parts of the criminal legal system, holding all offenders accountable, but reserving the most severe penalties for those whose conduct reflects the most severe breaches of public safety and values.

<sup>37</sup> Federal Bureau of Investigation, Uniform Crime Report, (2014).

<sup>38</sup> See, Boruchowitz, *supra* note 11.

<sup>39</sup> Vera Report, *supra* note 16 (also containing other examples of state legislative changes at 23-25); see also OR. REV. STAT.Ch. 1, et seq. (2015), available at [https://www.oregonlegislature.gov/bills\\_laws/lawsstatutes/2015orLaw0001.pdf](https://www.oregonlegislature.gov/bills_laws/lawsstatutes/2015orLaw0001.pdf)

<sup>40</sup> See Initiative Measure No. 502 (Wash. 2011), available at <http://www.newapproachwa.org/content/about-initiative>

<sup>41</sup> MASS. GEN. LAWS, ch. 94C, § 32L.

<sup>42</sup> D.C. CODE § 48-904.01.

<sup>43</sup> Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1055 (2015)



In most states, the criminal laws or the penal codes have substantially been degraded by repeated yearly amendments that have undermined consistency. States should review their statutes to eliminate irrational and inconsistent provisions.

Penal code revision is important because as Paul Robinson observes:

...criminal law that has earned a reputation with the community as a reliable moral authority gains the power to move people to internalize the law's norms. And that can be a more powerful—and a less expensive—mechanism of gaining compliance than any threat of criminal sanction. But irrationalities and internal inconsistencies in a criminal code can quickly undermine the criminal law's moral credibility, and thereby undermine its power to gain compliance and deference through social influence.<sup>44</sup>

Examples of needed reform are mandatory minimums and repeat offender laws. These contribute to the enormous growth in the prison population. These mandatory minimums

essentially guarantee a stream of injustices, as some offenders in some cases really will have the kind of important mitigations that demand a sentence in the lower end of the range forbidden by the mandatory minimum. This guarantee of a string of mandatory minimum injustices can only serve in the long run to undermine the criminal justice system's reputation for being just, for being a reliable assessment of the punishment that each offender genuinely deserves.<sup>45</sup>

Common sense reform of penal codes will reduce the correctional population safely. Reducing incarceration costs will then allow resources to be reallocated to reducing readmissions through community-based, individual treatment and for other pressing needs including resources for public defenders.

When Congress provided federal funds for prison construction on the condition that recipient states require violent offenders to serve no less than eighty-five percent of their prison sentence, many states enacted such laws.<sup>46</sup> These statutes unfairly limit the guided discretion of others within the system, including judges, jurors, and parole boards. An 85% parole eligibility, which is effectively a sentence of no parole, does not account for the fact that older inmates recidivate less. Prisoners are "less dangerous as they age," and "more expensive to maintain."<sup>47</sup>

Adjustments to repeat offender provisions would not only recognize the significant limitations of reliably identifying those who should be incarcerated indefinitely but also provide substantial, sustainable savings.

Criminologists have been unable to develop practical and reliable methods to select those who will become career criminals. Attempts to incarcerate based on any predictive criteria will inevitably end up incarcerating a large number

<sup>44</sup> Paul Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 U. LOUISVILLE L. REV. 173, 177, (2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2527971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527971)

<sup>45</sup> *Id.* at 180.

<sup>46</sup> Robert Lawson, *Difficult Times in Kentucky Corrections – Aftershocks of a "Tough on Crime" Philosophy*, 93 KY. L.J. 305, 358 (2004-05), available at [http://uknowledge.uky.edu/law\\_facpub/144/](http://uknowledge.uky.edu/law_facpub/144/)

<sup>47</sup> Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U.L.Q. 1, 16-17 (2004) available at [http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1360&context=law\\_lawreview](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1360&context=law_lawreview).

of people who do not persist in serious crime...[S]entencing should not be based on what we think a person will do but rather on what they have done and in proportion to the seriousness of the crime.<sup>48</sup>

The way forward is clear: reduce admissions to prison for new convictions and re-entry into the system; reduce length of stay in the system, and incentivize de-incarceration.<sup>49</sup>

NAPD is committed to working for a rational, better future because the combination of excessive incarceration and harsh punishment is a blunt instrument for social control that perpetuates the country's painful, historical legacy of injustice and inequality, and deprives masses of black and brown people unfairly of freedom and opportunity. It is the site of today's civil rights struggle.<sup>50</sup>

#### **4. States and Counties Should Develop Diversion Programs Aimed to Help Juvenile Offenders**

Finding ways to keep children out of court can break the "school to prison pipeline" and help youth become successful adults. We mention three examples here.

##### ***Juvenile Diversion in Washington, D.C.***

The Washington, D.C., Department of Human Services has a juvenile diversion program for non-violent offenders that offers six months of mentors, counselors, and supervision. Social workers recommend services tailored to the needs of the youth.<sup>51</sup> The D.C. Attorney General is referring more than 20 youth per month to the program, including for shoplifting and vandalism charges. Most of the youth complete the program, and of those, 92 percent have not been re-arrested.<sup>52</sup> Attorney General Karl Racine said that the program is based on the principle that "violence and trauma and stress and kind of chaos unfortunately is endemic to parts of our community. In order to break the cycle of violence, you've got to be far more creative in looking at it as an epidemic – an illness that can be treated."<sup>53</sup>

##### ***180 Program in King County, Washington***

The King County Prosecutor developed the 180 Program as a pre-filing diversion effort to keep youth out of court. The prosecutor "recognized that the criminal justice system is not always the most effective tool in addressing complex social issues, including getting at the heart of why juveniles often make poor choices."<sup>54</sup>

<sup>48</sup> THE JFA INSTITUTE, UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 12 (Nov. 2007) available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>

<sup>49</sup> See AM. CIV. LIB. UNION, ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT (2013), available at <https://www.aclu.org/ending-mass-incarceration-charting-new-justice-reinvestmentf>

<sup>50</sup> *Id.*

<sup>51</sup> See, Matthew S. Schwartz, *Youth Program Points to Ways D.C. Can Be 'Far More Creative' Against Crime*, WAMU 88.5, American University, (Feb. 25, 2016) [http://wamu.org/news/16/02/25/youth\\_program\\_points\\_to\\_ways\\_dc\\_can\\_be\\_far\\_more\\_creative\\_with\\_anti\\_crime\\_policies](http://wamu.org/news/16/02/25/youth_program_points_to_ways_dc_can_be_far_more_creative_with_anti_crime_policies).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> 180 Program, KING CNTY. DIST. ATT., (Jan. 5, 2017)

<http://www.kingcounty.gov/depts/prosecutor/youth-programs/180-program.aspx>.

The Program diverts approximately 400 youth each year from the criminal justice system. Saturday half-day workshops are held each month at the Seattle University (SU) Law School Annex, a space SU Law School loans to the 180 Program free of charge. As the Prosecutor reports,

Diverting 400 youth out of our juvenile court system generates considerable financial savings in public defense, detention, and court costs. However, the immeasurable costs avoided include avoiding the youth's own self-image as a criminal, in handcuffs, in a police car, and booked into detention. The 180 Program instead returns youth to their community, to hear from respected community leaders and others with criminal justice experience about the consequences of their decisions to participate in crime.

A 2012 evaluation of the 180 Program conducted by the University of Washington found that the program is effective at reaching youth, inspiring them to change, and helping them identify the assets and liabilities in their lives that can help or hinder their desire to change. The evaluation also revealed that the effects of the 180 Program stayed with youth over time, that the program was effective in changing attitudes and behavior.<sup>55</sup>

#### ***Kentucky Juvenile Diversion Program***

Kentucky has "court designated workers" who are part of the Court of Justice. A juvenile case goes to the CDW prior to going to the prosecutor, and in many instances, those cases are never filed. According to a pamphlet about the program, "Court designated workers have given a second chance to thousands of Kentucky youth by helping troubled young people avoid formal court appearances through diversion programs."<sup>56</sup>

Juveniles involved in minor offenses are generally eligible for informal processing and enter diversion agreements. A diversion agreement is a voluntary contract between the CDW and the juvenile to resolve a complaint.... For example, a young person charged with criminal mischief in the third degree who enters a diversion agreement might be asked to participate in an educational program, complete 20 hours of community service, write a letter of apology, pay restitution for damaged items and stay off the victim's property.<sup>57</sup>

### **5. States Should Eliminate Mandatory Transfers of Juveniles to Adult Court and Implement Sentencing Structures that Recognize the Immaturity of Children**

Studies consistently show that the threat of adult prosecution is not a deterrent to juvenile crime, and that overuse of adult prosecution actually increases

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<sup>55</sup> *Id.*

<sup>56</sup> *Making a Difference*, KY CT. OF JUST., <http://courts.ky.gov/resources/publicationsresources/Publications/P20CDWProgramBrochureEXP82012.pdf>

<sup>57</sup> *Court Designated Workers Make a Difference*, KY. CT. OF JUST. (Jan. 5, 2017), <http://courts.ky.gov/aoc/familyjuvenile/Pages/CDW.aspx>.

recidivism and reduces public safety.

Research shows the human brain is not fully developed until around the age of 25. Not unrelated, data shows that the likelihood of criminal behavior peaks between the ages of 18 and 24. These two conclusions should open the door to an evidence-based response in criminal law, recognizing age as a mitigating factor and capitalizing on the potential for meaningful reformation of the still-developing offender.<sup>58</sup>

#### **6. States Should Consider Raising the Age of Adult Criminal Responsibility for Youth from 18 to 21 or 24**

Increasingly the courts have realized the impact of greater knowledge of and research about neurobiology and the development of the adolescent brain. Keeping young people out of the adult criminal system and adult jails and prisons can help them avoid reoffending in the future and keep them more safe while incarcerated, also reducing costs.<sup>59</sup>

#### **7. States Should Consider Reducing the Seriousness Level of Certain Offenses and Incarceration for Probation and Parole Violations**

Fair and proportionate sentences can reduce costs in the justice system.

Reducing incarceration costs long term in a sustainable way must include reducing admissions to jail and prison, including revocations to prison from probation and parole, and reducing length of stay, including for those convicted of serious and violent crimes, to be more fair and proportionate to the offense and to make sure taxpayer money is not being spent to incarcerate persons beyond any need to ensure safety.

##### **A. Reducing low level felonies to misdemeanors**

1. Legislative changes and jurisdictions that have accomplished this include:
  - California voters passed Proposition 47, a ballot measure that reclassified six low-level property and drug offenses from felonies to misdemeanors. Offenses include shoplifting, theft, and check fraud under \$950, as well as personal use of most illegal drugs.<sup>60</sup>
  - Connecticut lawmakers reclassified drug possession to a misdemeanor and eliminated mandatory minimum sentences for nonviolent drug possession.<sup>61</sup>
  - Texas has a law that allows a court to punish a defendant who is convicted of a state jail felony by imposing the confinement

<sup>58</sup> Rebecca Diloreto, *Shared Responsibility: The Young Adult Offender*, 41 N. KY. L. REV. 253, 253-72 (2014).

<sup>59</sup> Vincent Schiraldi & Bruce Western, *Why 21 year-old offenders should be tried in family court*, THE WASHINGTON POST, (Oct. 2, 2015), [https://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac\\_story.html](https://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html)

<sup>60</sup> *Reclassification*, MYPROP47.ORG (Jan. 18, 2017) <http://myprop47.org/reclassification/>.

<sup>61</sup> Conn. Gen. Stat. Ann. § 21a-279 (West).

permissible as punishment for a Class A misdemeanor if, after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice.<sup>62</sup>

- Lawmakers in Connecticut, Maine, North Dakota, and Utah have passed legislation reclassifying certain drug possession offenses from felonies to misdemeanors.<sup>63</sup>

## B. Reducing the length of sentences

1. Legislative changes and jurisdictions that have accomplished this include:

- Mississippi lawmakers scaled back truth-in-sentencing provisions for violent offenses from 85-percent to 50-percent.<sup>64</sup>
- As the Boston Globe noted in 2015, Rhode Island eliminated mandatory sentencing for nonviolent drug offenses six years ago. Its prison population decreased (by 9.2 percent), and the state saw a decline in violent crime between 2009 and 2011.<sup>65</sup>
- Rhode Island lawmakers eliminated mandatory minimums for the manufacture, sale, or possession with intent to manufacture or sell controlled substances.<sup>66</sup>
- Substantial revisions to mandatory drug sentences in New York, allowing resentencing for persons sentenced under the old law.<sup>67</sup>
- In Utah, A “Sentence Reduction Program” has enabled people serving prison sentences for certain offenses to earn reductions in their minimum term and become eligible for parole consideration sooner by completing educational, vocational, treatment, and service programs.<sup>68</sup>
- In California, the voter-approved Proposition 47 ballot measure reduced certain drug possession felonies to misdemeanors and required “misdemeanor sentencing for petty theft, receiving stolen property and forging/writing bad checks when the amount involved is \$950 or less.”<sup>69</sup> It did not

<sup>62</sup> Tex. Penal Code Ann. § 12.44 (West).

<sup>63</sup> Nicole D. Porter, *The State of Sentencing 2015: Developments in Policy and Practice*, THE SENTENCING PROJECT, Feb. 10, 2016, available at <http://www.sentencingproject.org/publications/the-state-of-sentencing-2015-developments-in-policy-and-practice/>.

<sup>64</sup> HB 585, (Miss. 2014). See *Practitioner Guide to HB 585*, MISSISSIPPI CORRECTIONS AND CRIMINAL JUSTICE TASK FORCE, available at

<http://www.ospd.ms.gov/585%20Forms/Practitioner%20Guide%20to%20HB%20585.pdf>

<sup>65</sup> *Repeal mandatory minimum drug sentences*, BOSTON GLOBE, (June 7, 2015)

<https://www.bostonglobe.com/opinion/editorials/2015/06/06/repeal-mandatory-minimum-drug-sentences/2XSeZQz8GDpYaMqbZH2vqL/story.html>

<sup>66</sup> R.I. GEN. LAWS § 21-28-4.01.1; R.I. GEN. LAWS §. 09-346 (09-S 39) (2009).

<sup>67</sup> Rockefeller Drug Law Reform Bill, signed by Governor on April 7, 2009, Formerly known as A156-B Budget, S56-B Budget, 2009 N.Y. Laws ch. 56. See also Peter A. Mancuso, Comment, *Resentencing After The “Fall” Of Rockefeller: The Failure of the Drug Law Reform Acts Of 2004 And 2005 To Remedy The Injustices Of New York’s Rockefeller Drug Laws And The Compromise Of 2009*, 73 ALB. L. REV. 1535 (2010).

<sup>68</sup> Utah Code Ann. § 64-13-21 (West).

<sup>69</sup> *What you need to know about Proposition 47*, CAL. DEP’T OF CORRECTIONS AND REHABILITATION <http://www.cdcr.ca.gov/news/prop47.html>

exclude persons with certain prior violent convictions from applying for felony reclassification on the offenses authorized for a downgrade from felony to misdemeanor and allowing for resentencing.

- In Delaware, the state passed SB 163, eliminating mandatory life sentences for persons convicted on their third strike under the state's habitual offender statute. The law provides "a mechanism for those convicted under existing law to petition the court for a sentence modification."<sup>70</sup>

### C. Changing the use of felony probation and reducing the length of time to be eligible for parole

A variety of jurisdictions have made these changes.<sup>71</sup>

Utah limits admissions to prison for parole and felony probation violations not resulting in a new offense.<sup>72</sup>

Vikrant Reddy and Marc A. Levin of Right on Crime stated, "One promising practice is the Hawaii HOPE Court which uses swift, sure, and commensurate sanctions to promote compliance with drug tests and the terms of probation. ... It works because swift and certain sanctions are more effective than severe sanctions that come only after multiple probation violations have been ignored."<sup>73</sup>

Both New York and California's prison population has declined by more than 20% since their peak.<sup>74</sup>

- California expanded parole reviews to young adults with violent offenses. Senate Bill 261 expanded recent changes to policies governing parole for persons sentenced as juveniles.<sup>75</sup> During 2013, state lawmakers passed Senate Bill 260, a measure that required Youth Offender Parole hearings for eligible incarcerated youth convicted of specified crimes prior to the age of 18.<sup>76</sup> SB 261 expanded that policy to persons who were 18-22 at the time of their crimes and applies to persons sentenced to life prison terms or lengthy determinate sentences.
- In Utah, lawmakers established earned time for the first time in a previously indeterminate system. These earned time credits will be available for all offense types including violent

<sup>70</sup> SB 163 (Del. July 19, 2016). See synopsis and history of bill at <http://legis.delaware.gov/LIS/LIS148.NSF/vwlegislation/80F301E88C1B9A3E85257F470056EFF6>.

<sup>71</sup> See Vera Report, *supra* note 16, at 28-30 (for additional examples).

<sup>72</sup> UTAH CODE ANN. § 64-13-29, available at [https://le.utah.gov/xcode/Title64/Chapter13/64-13-S29.html?v=C64-13-S29\\_2015051220151001](https://le.utah.gov/xcode/Title64/Chapter13/64-13-S29.html?v=C64-13-S29_2015051220151001)

<sup>73</sup> Vikrant P. Reddy & Marc A. Levin, *The Conservative Case Against More Prisons*, THE AMERICAN CONSERVATIVE (Mar. 6, 2013), available at <http://bit.ly/1qnlZvb>.

See U.S. Prison Population Trends 1999-2014: Broad Variation Among States in Recent Years, SENTENCING PROJECT, Feb. 16, 2016, available at <http://sentencingproject.org/wp-content/uploads/2016/02/US-Prison-Population-Trends-1999-2014.pdf>

<sup>75</sup> SB 216, (Cal. 2015).

<sup>76</sup> CAL. PENAL CODE § 3051(2013).



offenses.<sup>77</sup>

- New York implemented “merit time” credits and other incentives for participation in education and vocational training, treatment and other services to speed parole consideration.<sup>78</sup>
- In Michigan, the House advanced a bill authorizing presumptive parole for parole-eligible life prisoners classified as low risk. The measure is waiting action in the Senate.<sup>79</sup>

## **8. Ending The Death Penalty Would Save Millions of Dollars Without Endangering Public Safety**

Numerous studies have documented that death penalty prosecutions cost far more than homicide prosecutions that do not seek the death penalty—at least \$1 million per case.<sup>80</sup> As reported in a recent study, police chiefs agree that death penalty prosecution is ineffective:

The nation’s police chiefs rank the death penalty last in their priorities for effective crime reduction. The officers do not believe the death penalty acts as a deterrent to murder, and they rate it as one of most inefficient uses of taxpayer dollars in fighting crime. Criminologists concur that the death penalty does not effectively reduce the number of murders.<sup>81</sup>

Nineteen states have abolished the death penalty.<sup>82</sup> Washington’s governor has imposed a moratorium on executions.<sup>83</sup> Pennsylvania and Oregon governors also have imposed moratoria.<sup>84</sup>

There were 28 executions in 2015.<sup>85</sup> There were 49 new death sentences in

<sup>77</sup> HB 348, (Utah 2015), available at <http://le.utah.gov/~2015/bills/static/HB0348.html>

<sup>78</sup> Judith Greene & Marc Mauer, *Downscaling Prisons: Lessons from Four States*, THE SENTENCING PROJECT, Mar. 1, 2010, available at <http://www.sentencingproject.org/publications/downscaling-prisons-lessons-from-four-states/>

<sup>79</sup> Emily Lawler, *Could new Senate criminal justice plan breathe life into House's presumptive parole?*, MLIVE.COM, (May 4, 2016, 11:54 AM), [http://www.mlive.com/news/index.ssf/2016/05/could\\_new\\_senate\\_criminal\\_just.html](http://www.mlive.com/news/index.ssf/2016/05/could_new_senate_criminal_just.html)

<sup>80</sup> A recent Washington State study found that “The estimated average difference in total costs when the death penalty is sought is \$1,058,885.” Robert C. Boruchowitz et al., *An Analysis of the Economic Costs of Seeking the Death Penalty in Washington* (Report), SEATTLE U. SCHOOL OF L. 1, 5 (2015) available at <http://digitalcommons.law.seattleu.edu/faculty/616>.

<sup>81</sup> *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, DEATH PENALTY INFO. CNTR., at 6 (Oct. 2009) available at <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf>.

<sup>82</sup> PROCON.ORG, <http://deathpenalty.procon.org/view.resource.php?resourceID=001172> (last updated Dec. 9, 2016, 2:21 PM).

<sup>83</sup> *Gov. Jay Inslee announces capital punishment moratorium*, WASH. GOV. OFF., (February 11, 2014), <http://www.governor.wa.gov/news-media/gov-jay-inslee-announces-capital-punishment-moratorium>

<sup>84</sup> *Governor Tom Wolf Announces a Moratorium on the Death Penalty in Pa.*, PENNLIVE, (Feb. 13, 2015), available at <http://www.scribd.com/doc/255669059/Governor-Tom-Wolf-Announces-a-Moratorium-on-the-Death-Penalty-in-Pa.>; Shelby Sebens, *New Oregon Governor Kate Brown to extend death penalty moratorium*, REUTERS,, (Feb. 20, 2015), <http://www.reuters.com/article/us-usa-politics-oregon-idUSKBN0LO2E420150220>.

<sup>85</sup> *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>

2015.<sup>86</sup> At a minimum, approximately \$50 million could have been saved if in those cases the prosecutor did not seek death. Because the death penalty is sought in many cases that do not result in a death verdict, the total savings if capital punishment were eliminated likely would be at least double that amount.

Even in cases that are settled without trial, seeking the death penalty at least doubles the cost of the case. A Kansas study found:

Even in cases that ended in a guilty plea and did not go to trial, cases where the death penalty was sought incurred about twice the costs for both defense (\$130,595 v. \$64,711) and courts (\$16,263 v. \$7,384), compared to cases where death was not sought.<sup>87</sup>

Death penalty cases have resulted in wrongful convictions. As reported by the Innocence Project, 20 of the 336 people exonerated through DNA served time on death row. Another 16 were charged with capital crimes but not sentenced to death.<sup>88</sup> The Death Penalty Information Center reports that "Since 1973, a total of 156 inmates have been exonerated and freed from death row."<sup>89</sup>

## Conclusion

Adequate funding of the defense function is critical to ensure justice and accountability within the criminal justice system. Public defenders have long struggled with overwhelming caseloads caused by insufficient funding that has made providing a constitutionally adequate defense very difficult in many cases. Increased mandatory minimum sentences, the criminalization of minor offenses, and the lack of social services to address issues of mental illness and addiction overburden a criminal justice system that consumes \$80 billion tax-payer dollars each year in incarceration costs alone,<sup>90</sup> not to mention the additional costs for law enforcement and for the prosecution and defense of those charged with crimes. And a recent study shows that when calculating the economic impact on families and communities, the true cost of incarceration is more than \$1 trillion a year.<sup>91</sup>

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<sup>86</sup> *Death Sentences in 2015*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/2015-sentencing>

<sup>87</sup> *Costs of the Death Penalty*, DEATH PENALTY INFO. CTR., citing ("Report of the Judicial Council Death Penalty Advisory Committee," Judicial Council, Kansas Legislature, Feb. 13, 2014), <http://www.deathpenaltyinfo.org/costs-death-penalty>.

<sup>88</sup> *DNA Exonerations Nationwide*, INNOCENCE PROJECT.ORG, (Dec. 18, 2015), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>

<sup>89</sup> *DEATH PENALTY 2015: YEAR END REPORT*, DEATH PENALTY INFO. CTR. (2015), available at <http://www.deathpenaltyinfo.org/YearEnd2015#graphic>.

<sup>90</sup> Tracey Kyckelhahn & Tara Martin. *Justice Expenditures and Employment Extracts, 2010—Preliminary*, Table 1 (2013), BUREAU OF JUSTICE STAT. available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4679>. See also *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM*, EXEC. OFF. PRES. (April 2016), available at

[https://www.whitehouse.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf)

<sup>91</sup> Kristen Taketa *Incarceration in the U.S. costs more than \$1 trillion a year*, *Washington University study claims*, ST. LOUIS POST-DISPATCH, Sept. 10, 2016, [http://www.stltoday.com/news/local/crime-and-courts/incarceration-in-the-u-s-costs-more-than-trillion-a/article\\_070eecea-42c1-5258-a508-062079e9b333.html](http://www.stltoday.com/news/local/crime-and-courts/incarceration-in-the-u-s-costs-more-than-trillion-a/article_070eecea-42c1-5258-a508-062079e9b333.html)

Bi-partisan calls for reform provide the possibility of fulfilling the constitutional mandate for effective assistance of counsel while also increasing public safety and saving money.

For decades, the culture of incarceration and extreme punishment has thwarted or watered down most reform efforts. Today, however, these dynamics seem to be shifting. . . In nearly every state of the country, a political premium has developed in favor of containing correctional costs, scrutinizing proposals for further growth, and considering strategies to downsize correctional populations and budgets that were out of the question just a few years ago.<sup>92</sup>

We have an unprecedented opportunity to reverse the harsh excesses and destructive effects of a criminal justice system that every day perpetrates countless, inexcusable injustices, convicting and incarcerating poor people without a fair chance to present their case in court. Public Defenders work on the frontlines, shouldering unimaginable workloads, advocating for those most profoundly affected by the system, and the insights and experience that this work provides are invaluable tools in the reform effort. Research supports what public defenders know to be true—that the path forward depends on forging partnerships, restoring reasonableness to our legislation of crime and punishment, building on existing alternatives and re-allocating public resources.

The need for additional funding for public defense is undeniable. A combination of programs to reduce the burden on the criminal justice system of over-arrest, over-criminalization and over-incarceration are critical pieces of an effective strategy to reduce the demand for public defense and to transform the criminal justice system. Creating partnerships with prosecutors and law enforcement to develop and expand diversion programs for adults and youth, developing and expanding programs for mentally ill and addicted offenders, reviewing and revising state penal codes, eliminating mandatory transfers of juveniles to adult court, raising the age of adult criminal responsibility, reducing the seriousness level of some offenses, reducing incarceration for probation and parole offenses, and eliminating the death penalty—these are the recommendations that NAPD proposes to reduce recidivism, increase public safety, reduce workloads, and end public investment in counterproductive policies and practices.



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<sup>92</sup> *Ending Mass Incarceration Charting a New Justice Reinvestment*, SENTENCING PROJECT 3 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Ending-Mass-Incarceration-Charting-a-New-Justice-Reinvestment.pdf>