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A legislative reform agenda for 2021: Promoting fairness, justice and racial equity in policing, prosecution and corrections

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There is now emerging a broad consensus among policy experts, judges and federal lawmakers that the rate at which the state arrests, prosecutes, jails and imprisons people in the United States has in fact done grave harm to individuals, families and communities.¹

It has become clear that in order to reverse the phenomenon of mass incarceration – and to ameliorate the damage it has caused – lawmakers must re-examine the assumptions that have informed the enactment and enforcement of criminal laws for the past four decades. Reform must occur at a structural level – in the elaborate system of statutes, rules, policies and practices that scholars refer to as the carceral state.

In recent years, state lawmakers in New York have adopted important legislative reforms, with the objective of restoring fundamental fairness and common sense in police practices, prosecution and corrections. These reforms, for example in bail practice and the rules of discovery, reflect lawmakers' conviction that respect for constitutional rights and fundamental fairness is not inconsistent with the obligation to uphold public safety.

However, in 2018 there were 443 persons incarcerated in New York for every 100,000 people in the state's population – far exceeding the rate of incarceration in the world's democratic nations.² Racial disparities

1 See, e.g., Catie Edmondson, "Measure Decriminalizing Marijuana Clears House," *New York Times*, Dec. 5, 2020, p. A17; Shaila Dewan, "Criminal Justice Reform Unites Parties," *New York Times*, Nov. 25, 2020, p. A16; Carl Hulse, "Unlikely Cause Unites the Left and Right: Justice Reform," *New York Times*, Feb. 18, 2015.

2 Prison Policy Initiative, "New York Profile." The incarceration rate is based on the number of people held in prisons, jails, and in juvenile justice and immigration detention facilities, available at <https://www.prisonpolicy.org/profiles/NY.html>

remain stark: For every white person in New York who is held in a jail, prison or correctional facility, there are eight Black and three Latinx people incarcerated in the state.³

In 2020, Governor Cuomo and members of the state legislature made a new commitment to address systemic racial inequity in law and public policy. The members of the Chief Defenders Association take the position that racial justice cannot be realized without bold, creative initiatives by the governor and lawmakers to reform the criminal legal system in New York.

In the service of that objective, the CDANY recommends the following legislation.⁴

◆ **Cannabis legalization: Ensure equity and inclusivity in the commercial sale and regulation of marihuana**

New York decriminalized the possession of small amounts of marihuana in 1977. Further limitations have been placed on criminal liability; most recently, in 2019. And yet arrests continue, reflecting the selective, racialized enforcement that has characterized the policing of marihuana for fifty years. Seventy-five percent of those arrested for marihuana possession in 2019 were Black or Latinx.⁵ In the last twenty years, more than 800,000 New Yorkers have been arrested for simple possession of marihuana; along with their arrest record come the legal stigma and penalties that attach.⁶

It is long past time that New York end the criminalization of marihuana possession and use; remove the adverse legal consequences of past convictions; and structure the regulation of marihuana commerce based upon equitable reinvestment in those communities that have historically been targeted for prosecution.

- The **Marihuana Regulation and Taxation Act** would repeal the state’s policy of criminal prohibitions on the possession and sale of marihuana; establish a regulatory system for the sale and taxation of marihuana; create a public-health program that educates young people; authorize the expungement of criminal records for conduct that is now deemed lawful; incorporate social-equity licensing and small-business incubator programs that provide for broad-based access to women- and minority-owned enterprises; reinvest of tax revenues from marihuana commerce in those communities that have been harmed by the state’s prosecution of the war on drugs.

SI527-C/Krueger; A1617-C/Peoples-Stokes

◆ **Enact urgently needed parole reform – made even more urgent by the spread of the coronavirus in New York’s jails and prisons**

Mass incarceration is a consequence of overzealous policing and prosecution, harsh prison sentences, and a parole system that is hostile to the concept of rehabilitation. In New York State corrections and parole practices reflect a policy of retribution.⁷ Parole procedures and standards violate basic principles of fairness and due process – as a consequence, the racial bias that informs law enforcement is exacerbated by corrections and parole policies.

³ *Ibid.*

⁴ The legislation addressed in this document was introduced in the 2019-2020 legislative session; the bills will be re-introduced in 2021, with new identifying numbers.

⁵ Drug Policy Alliance: <https://drugpolicy.org/new-york/marijuana-reform>

⁶ *Ibid.*

⁷ See, e.g., David Brand, “Formerly incarcerated New Yorkers Push state to pass parole overhaul,” *Queens Daily Eagle*, Jan. 31, 2020; Ginia Bellafante, “Should N.Y. Be Jailing Parolees for Minor Lapses During a Pandemic?” *New York Times*, July 31, 2020 (updated Aug. 2, 2020).

The injustice does not end with release from prison. New York State spends hundreds of millions of dollars annually to send people back to prison for minor, technical violations of the conditions of release. A report by the Prison Policy Initiative found that New York was one of ten states that accounted for two-thirds of all “returns to incarceration for technical violations.”⁸ In 2016, New York reincarcerated more than 6,300 people for minor, non-criminal violations of parole – two-thirds of all people sent back to prisons for parole violations in that year.⁹

The report concluded that “states should stop putting parolees behind bars for behaviors that, were the individual not on parole, would not warrant prison time.”¹⁰ Vincent Schiraldi, a director of Columbia University’s Justice Lab (and a former New York City probation commissioner) has observed, “It was bad policy to be incarcerating so many people for noncriminal violations even before the pandemic. It’s absolutely ridiculous and dangerous now.”¹¹

- The **Less is More Act** would restrict the reincarceration of persons based upon technical violations of conditions of release. The bill would place a thirty-day limit on incarceration for technical violations of parole; establish an earned-credit system for those who have complied with conditions of release; and would authorize release on bail for those accused of a parole violation so that the accused could fulfill employment and family obligations while resolving the alleged parole violation. *S1343-C/Benjamin; A5493-B/Mosley*
- The **Fair and Timely Parole** bill would establish standards for making parole determinations based upon a person’s rehabilitation and status at the time of review, pursuant to procedures designed to remove racial discrimination from a determination of parole eligibility. *S497-A/Rivera; A4346-A/Weprin*
- The **Elder Parole** bill would authorize parole review for persons aged fifty-five or older. *S2144/Hoylman; A9040/De La Rosa*

◆ Establish alternatives to incarceration that protect vulnerable populations

In approving reform of the state’s bail statute, the legislature explicitly recognized that the state must address the underlying issues that often lead to arrest and detention – including mental illness, drug and alcohol dependency, homelessness and the range of life problems related to poverty. It is due to a failure of public policy that these issues have been left, by default, to the police, prosecutors and the courts.

- The **Treatment Not Jails Act** would allow a court to order persons charged with certain offenses to treatment and rehabilitations programs. Diversion of those cases from criminal proceedings would be based upon the assessment of a licensed health-care provider that the person charged has a condition – including substance or alcohol dependence, mental illness, and developmental or intellectual disability – that impairs function. *S8687/Ramos*

⁸ Jorge Renaud, *Eight Keys to Mercy: How to shorten excessive prison sentences*, Prison Policy Initiative, Nov. 2016 (The report is based on an analysis of data compiled by the *Bureau of Justice Statistics*):

<https://www.prisonpolicy.org/reports/longsentences.html>

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Ginia Bellafante, “Should N.Y. Be Jailing Parolees for Minor Lapses During a Pandemic?” *New York Times*, July 31, 2020 (updated Aug. 2, 2020).

◆ Provide legal representation to parents who appear in family court proceedings – and notice of rights to those are the subject of an investigation

In 2019 the Commission on Parental Legal Representation issued an Interim Report that identified “systemic problems” in New York’s family court system.¹² In its report to Chief Judge Janet Di Fiore, the Commission called for the development of a plan “to ensure the future delivery of quality, cost-effective parental representation across the state.”¹³ The Commission’s findings included the following:

“Giving parents representation when it matters – before they appear in court – is consistent with principles of equal protection and due process . . . can prevent unnecessary and prolonged separation of children from their parents; and can mitigate the disruption and trauma that accompanies State intervention into the family. Timely access to counsel may also help reduce the disproportionate percentage of children of color in New York’s foster care system.”¹⁴

- Lawmakers must act on the DiFiore Commission’s recommendation that the state provide legal representation to parents who are the subject of family court proceedings. This reform is in the interest of protecting the rights of parents and the well-being of families.
- Require that parents are informed of their rights prior to being questioned by an investigator with child protective services. Investigators behave as police when conducting investigation, searching homes and questioning parents. The **Family Miranda Bill** would not create new rights, but simply require that parents are informed of their existing rights when they are the subject of an investigation.
S7533/Thomas; A9841/Stern

◆ Protect the rights and well-being of young people facing criminal charges

Research in neuroscience and psychology demonstrates that the brains of young people are not fully developed until they are in their mid-twenties. Brain development affects physical and mental health, maturity and judgment. Criminal law and policy, however, does not reflect current scientific knowledge about brain development in young people. In the name of law and order, authority figures resort to aggressive policing and prosecution of young people, when their conduct could be addressed more effectively through positive, constructive interventions. Legislation pending before the state legislature would reform policing and prosecution when the accused is a young person.

- Raise the age of youthful offender status, and establish young adult status. The proposed legislation would broaden legal protections of young people subject to arrest and prosecution – allowing them to take responsibility for their conduct, and to resolve conflict without a criminal record that would sabotage their best efforts to seek education and employment. *A8381-A/O’Donnell*

¹² Commission on Parental Legal Representation, *Interim Report to Chief Judge DiFiore*, Feb. 2019, p. 6. “Several fundamental principles emerged from the Commission’s discussions,” including “Equal access to justice must be provided to parents, children, and their families.” *Ibid.*, p. 8.

¹³ *Ibid.*, p. 6.

¹⁴ *Ibid.*, p. 16. In New York City, a Black child is approximately thirteen times more likely than a white child to be placed in foster care; Latinx children in New York City are nearly six times more likely to be placed in foster care than are white children. OCFS, *Disproportionate Minority Representation in Child Welfare and Juvenile Justice Systems*, Request for Proposals, Dec. 2015, pp. 7-8, available at https://ocfs.ny.gov/main/bcm/DMR_Section%20Seven%20of%20Grant%20RFP_2015.pdf

- Allow young people under the age of eighteen to consult with an attorney before being subject to a custodial interrogation. Youths are highly vulnerable to coercion by police -- even more so than adults; and as a consequence, they are more apt than more mature individuals to falsely confess to a crime. Miranda warnings are inadequate in this context. Proposed legislation would ensure that young people do not waive their constitutional rights without the guidance of an attorney. *S4980-B/Bailey; A6982-B/Joyner*

- Stop criminalizing kids of grade-school age. Proposed legislation would make youths who are seven to twelve years of age eligible for juvenile delinquency status in family court proceedings. Under existing law, these youths are handcuffed, interrogated, detained with older children, and placed on probation – the “suspect” population is comprised disproportionately of Black and Latinx children. This bill would allow for more effective social-service interventions, if and when appropriate. *S.8685/Montgomery; A.10727/Rules Committee/Jaffee*

◆ End the discriminatory policing and prosecution of loitering for purposes of prostitution

Penal Law Section 240.37 prohibits loitering for the purpose of engaging in a prostitution offense. As applied, this law permits the police to arrest people for a range of lawful conduct, such as “repeatedly” waving at a person in a vehicle, wearing a mini-skirt, or merely speaking with someone in the street.¹⁵ This penal code provision serves as a pretext for the police to profile women – most often, women of color; and transgender women, in particular. The practice is patently unconstitutional. It enlists the police in degrading and dehumanizing women of color and non-binary people of color – who are often targeted for violent assaults.

- Repeal the penal code provision of loitering for purposes of prostitution. This provision serves as a justification for unlawful police action; it reinforces bigoted stereotypes. *S2253/Hoylman; A654/Paulin*

◆ Prohibit the brutal and inhumane uses of solitary confinement

In 2018, New York correctional facilities issued nearly 40,000 sanctions requiring solitary confinement.¹⁶ The state permits solitary confinement in special housing units (SHU) – about the size of an elevator car – for twenty-three hours per day, for a duration of months and years. Solitary confinement is a particularly cruel and brutal form of punishment. Long term isolation causes mental illness, and exacerbates mental illness in those subjected to such isolation. The United Nations considers holding a person in solitary confinement for more than fifteen days a form of torture; and for this reason, the UN has called on the United States to ban the practice.¹⁷ New Yorkers should demand banning of the practice under state law.

- The **Humane Alternatives to Long-Term (HALT) Solitary Confinement Act** would prohibit the placement of a person in solitary confinement for more than fifteen days; require at least four hours of programs per day outside a SHU; and provide for a hearing on a solitary-confinement sanction before an individual is isolated. The bill would also prohibit placing in solitary confinement persons who are twenty-one years of age or younger, or fifty-five years of age or older; who are pregnant or in post-partum recovery; who care for a child in a correctional facility, or who have a disability as defined in the

15 Amanda Arnold, “A Guide to the ‘Walking While Trans’ Ban,” *The Cut*, July 22, 2020.

16 Michelle Shames and Philip Desgranges, *TRAPPED INSIDE: The Past, Present, and Future of Solitary Confinement in New York*, NYCLU, Oct. 2019, available at <https://bit.ly/2Jfj8KI>.

17 *Ibid.*, p. 6.

Executive Law. It is estimated that implementation of the HALT Act would save the state and localities more than \$132 million annually.¹⁸ *S1623/Sepulveda; A2500/Aubry*

◆ **Uphold the constitutional right of appeal in criminal matters; restore fairness to the rules and procedures governing post-conviction relief**

New York’s law of criminal procedure provides protections of fairness and due process, including the right to appeal a conviction and seek other forms of relief. But, as applied, these rules are often subverted. For example, prosecutors routinely condition the acceptance of a plea upon a waiver of the right to appeal. As a consequence, people surrender their right to appellate review even when the court record includes compelling evidence of police misconduct, racial disparities in sentencing, sex-trafficking of the person convicted, or ineffective assistance of counsel. The following legislation would amend the law consistent with the legislature’s intent regarding the right to seek post-conviction relief.

- Restore the right to appeal a conviction, notwithstanding a guilty plea, on grounds that unlawful police conduct or racial bias in sentencing have led to an unjust outcome. (*Introduction of legislation pending*)
- Authorize a court to set aside a conviction when the accused is a victim of sex or labor trafficking. Under existing law, a court may vacate a conviction for prostitution when the person charged was the victim of sex or labor trafficking; but vacatur is not permitted when the defendant has also been convicted of a minor offense (such as petit larceny or a minor drug charge) that is the result of having been a trafficking victim. As a consequence, the victim of trafficking becomes a victim of the law. The legislature must act to prevent such unjust outcomes. *S3181/Lanza*
- Adopt comprehensive reform of the statute governing applications for post-conviction relief. Section 440.10 of the Criminal Procedure Law authorizes an appeal of a conviction based on evidence of prosecutorial misconduct; but no right of appeal exists when the evidence demonstrates the person found guilty is actually innocent of the charges on which the conviction is based. Pending legislation would address this anomaly and other flaws in the statute. (*Introduction of legislation pending*)
- Remove procedural obstacles to obtaining appellate counsel. Individuals represented by a public defender (or by assigned counsel) must submit to the court a signed affidavit asserting they remain eligible for legal representation in pursuing an appeal. However, many of those who have grounds to bring an appeal never receive the affidavit documents, or are unable to complete them. There is a simple remedy: Authorize the trial counsel to certify that the economic status of the defendant is unchanged, and that s/he therefore has a right to a lawyer for purposes of appealing a conviction. (*Introduction of legislation pending*)

¹⁸ Amanda Fries, “Report: Reducing Solitary Confinement Could Save New York \$132M annually,” *Times Union*, Nov. 27, 2020, available at <https://bit.ly/36rZ7cX>.

◆ Stop the harassment and stigmatization of people who have been caught up in the criminal justice system

Among the world’s democracies, the United States is the world’s most aggressive cop and prison warden.¹⁹ The U.S. imprisons, on a per-capita basis, far more of its people than any other democratic nation.²⁰ More than one in every five people in the United States has a criminal record.²¹ And the penalties and sanctions for a criminal conviction attach long after a sentence has been served.²² The legal system, including federal and state laws, impose a range of collateral consequences that may result in disqualification for a job, a professional license, housing, college admission, financial aid for higher education, the right to vote, to own a gun – even the right to have custody of one’s own children.

What’s more, the state imposes various fines and surcharges on people with a criminal conviction or traffic infraction. Failure to pay a fee or surcharge related to a conviction can lead to extended incarceration, or to the suspension of a license for an unpaid traffic fine.

- The **Clean Slate Act** would make expungement of a criminal record automatic after a date certain. Legislation recently enacted permits an application-based process for sealing a criminal record, but the law has allowed fewer than one percent of those eligible to clear their criminal history. (*Introduction of legislation pending*)
- The **End Predatory Court Fees Act** includes provisions that would prohibit mandatory minimum fines and surcharges for violation of the penal law or the vehicle and traffic law; vacate warrants issued solely because of a person’s inability to pay such fines or fees, and suspend existing sentences of incarceration for such non-payment; prohibit the collection of a fine, restitution or reparation from the funds of an incarcerated person, as well as the obligation to pay fines, fees, surcharges, restitution and reparation from the money earned by an incarcerated person. The new law would vacate existing unpaid fees and surcharges; and would require courts to address a defendant’s ability to pay before assessing a fine or surcharge. *A11083/Niou*

◆ Commit the resources necessary to uphold the right to legal representation

In 2017, New York State lawmakers approved a bill that commits the state to providing the financial resources necessary to ensure effective legal representation of people facing criminal charges who cannot afford to hire a lawyer. This landmark legislation incorporates standards for quality representation established in the settlement of the *Hurrell-Harring* class-action litigation, in which the State of New York was a defendant.

Adequate funding for public defense services is a prerequisite for realizing the comprehensive reforms prescribed by the legislature. The creation of an effective public defense system also requires the recruitment, and retention, of skilled, dedicated public-service lawyers. The CDANY recommends the following legislation in support of these objectives.

¹⁹ The Sentencing Project, “Criminal Justice Facts,” available at <https://www.sentencingproject.org/criminal-justice-facts/>

²⁰ *Ibid.*

²¹ Brennan Center, “Lost Earnings by the Numbers,” available at <https://www.sentencingproject.org/criminal-justice-facts/>

²² *Ibid.*

- Uphold the state’s commitment to provide quality public-defense services statewide. The state is now mid-way through a plan, administered by the Office of indigent Legal Services, that calls for incremental increases in funding for public-defense services across the state, pursuant to rigorous criteria and standards regarding caseloads and quality of representation. The governor and the legislature must stay the course.

(Legislation will be introduced in the 2021 budget)

- Raise the hourly rates for assigned counsel. In many areas of New York State – in particular, areas where there are no public-defense services – courts appoint private attorneys to represent low-income New Yorkers. These attorneys are indispensable to the state’s public-defense system. However, the statutorily prescribed rates of compensation paid assigned counsel remain unchanged since 2004: \$75/hour for representation in felony cases, and for representation of children; \$60/hour for representation in misdemeanor cases. As a consequence, attorneys are withdrawing from assigned counsel programs in significant numbers. Chief Judge Di Fiore together with state’s bar associations have called for an increase in the compensation paid assigned counsel under Art. 18-B of the County Law. *(Introduction of legislation pending)*

- Increase grants that provide debt relief to public service lawyers. New York offers a modest student loan-forgiveness grant to lawyers employed by district attorneys, public defender offices, and by providers of civil legal services to low-income New Yorkers. However, these grants are insufficient to recruit and retain lawyers in public-service careers. Eligible attorneys receive an annual award of \$3,400, for six years. Since 2009, when the loan-forgiveness program was established, the cost of tuition at public law schools has increased 43 percent; 34 percent, at private law schools. Nearly 70 percent of members of the Association of Legal Aid Attorneys carry at least \$100,000 of student debt; 38 percent owe more than \$200,000. As a consequence, there is a high rate of attrition among public-service attorneys. The loss of dedicated public-service lawyers compromises the rights and well-being of the most vulnerable New Yorkers. *S6668/Ramos; A8644/Crespo*



The Chief Defenders Association of New York (CDANY) was created by a group of experienced public-defense attorneys from across New York State.

CDANY advocates on behalf of the administrators of organizations that provide mandated legal representation – and on behalf of their staffs and clients – in an effort bring positive change to the criminal justice system.