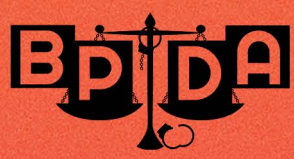


# DISRUPTING CARCERAL SYSTEMS:

BPDA'S RECOMMENDATIONS TO THE  
BIDEN-HARRIS ADMINISTRATION

END  
JUVENILE  
DENTENTION





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# A Letter from Leadership

*Disrupting Carceral Systems: BPDA's Recommendations to the Biden-Harris Administration* is part of the Black Public Defender Association's ("BPDA") continuing effort to promote positive change in the Black communities where we live, work, and serve. The creation of BPDA is based on the recognition that creating and maintaining a national network of skilled Black public defenders who identify with and come from the communities most disproportionately impacted by the criminal legal system is necessary to fight against racism and end mass incarceration. Our work is guided by our core values:

- **Humanity:** We're committed to the people who are impacted by carceral systems. Committed to the humanization of blackness. To defend the humanity of who we are as a people against massive systems that have historically been used to oppress and take away our value.
- **Black liberation:** We work to free ourselves and our communities from all systems of oppression and injustice.
- **Excellence:** We are committed to excellence, abundance, and exceeding expectations.
- **Holistic defense:** We support a holistic approach to public defense because we understand how carceral systems intersect to cause harm to Black communities.
- **Community:** Community is how we survive all of this. It's about our own community and the ways we sustain each other. It's also about centering Black communities in our work.

Throughout this paper, BPDA shares the collective voices of zealous Black public defenders and identifies key strategies on how to dismantle carceral systems that disproportionately impact Black communities. This effort is the product of collective thoughts from BPDA members, allies, and experts, with supplemental research by BPDA leadership and staff. BPDA thanks all of the practitioners, experts, advocates, and staff who contributed their time and expertise to this effort.<sup>1</sup>

In addition to advocating for racial equity and justice in Black communities, BPDA is also committed to improving the lives of its members: The Black public defenders who work tirelessly every day for their clients despite seemingly insurmountable odds. We never forget that, although the Black defenders' road is hard, it is never as hard as the journey our Black clients face when navigating carceral systems. It is our work to fight for them and with them in any way we can. We hope that this position paper will contribute to our people's fight for racial equity and justice.

In solidarity,

BPDA Board

*Throughout this paper, BPDA shares the collective voices of zealous Black public defenders and identifies key strategies on how to dismantle carceral systems that disproportionately impact Black communities.*





# Acknowledgment



The Black Public Defender Association thanks all of the defenders, advocates, and experts who provided their thoughts, ideas, and experience to this position paper, *Disrupting Carceral Systems*. Four dozen participants dedicated their time and expertise during four listening sessions in January 2021, the Stakeholders' Roundtable on March 5, 2021, and numerous consultations during the first quarter of 2021. We have endeavored to present your ideas in a manner that will make you proud.

Thank you as well to the BPDA Staff. They have worked tirelessly to compile information and ideas from participants, conduct research, and confer with subject matter experts to produce this position paper. We also appreciate the copyediting services of Keri Nash Consulting and graphic designer Sheldon Sneed Designs; they helped bring this position paper to final publication.

This project was supported by a grant from the Open Society Foundations to the Black Public Defender Association. The opinions, findings, and conclusions or recommendations expressed are those of the Black Public Defender Association and do not necessarily reflect the views of the Open Society Foundations. Thank you for your support.

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# Forward

## **H**ow the Relationship between Police, Prosecutors, and Judges Strengthens Racial Disparities in the Criminal Legal System

The criminal legal system, which dehumanizes, separates families, and cages Black people, is the most commonly known carceral system. Public defenders, especially Black public defenders, are keenly aware of how this system and its inequities can thrive through its main actors: police, prosecutors, and judges. These three system actors hold incredible power within the criminal legal system, and this power is unchecked.

Collectively, with the power entrusted in police, prosecutors, and judges through federal, state, and local laws, these three systems choose which communities to surveil; who to arrest, charge, and release; and how harsh of a sentence to impose. Collectively, their decisions overwhelmingly affect Black communities and other communities of color. They also choose how transparent their decision-making process is to the public, and unsurprisingly, very little is shared with the public. Indeed, one aspect of this trifecta cannot exist without the other two's support and acquiesce.

In 2018, Black people made up 27% of civilians arrested by the police, despite comprising just 13% of the U.S. population.<sup>2</sup> This has resulted in gross disparities in arrests, enhanced charges, and detention for Black youth and adults. The most dire consequences of racist policing are brutality and death. The police murder Black people at two to three times the rate of white people.<sup>3</sup>

Prosecutors wield almost unfettered power in the criminal legal system. In the pretrial process, they almost exclusively hold the power to determine who to charge with a crime, which charges to file, whether to request pretrial detention, and what sentences to recommend. Black public defenders see prosecutors consistently use that power disparately against Black clients. Studies show that federal prosecutors are twice as likely to charge Black clients with charges that carry mandatory minimums, and state prosecutors most often use "habitual offender" enhancements against Black people compared to similarly situated white clients.<sup>4,5</sup> Prosecutors are also more likely to drop or reduce charges against white accused people than Black accused people.<sup>6</sup> Not only are prosecutors making these decisions on a racially disproportionate

*These three system actors (police, prosecutors and judges) hold incredible power within the criminal legal system, and this power is unchecked.*





group brought in by police, but they are also amplifying and deepening institutional and systemic racism by continuing the racially disparate treatment and heightened criminalization of Black communities.

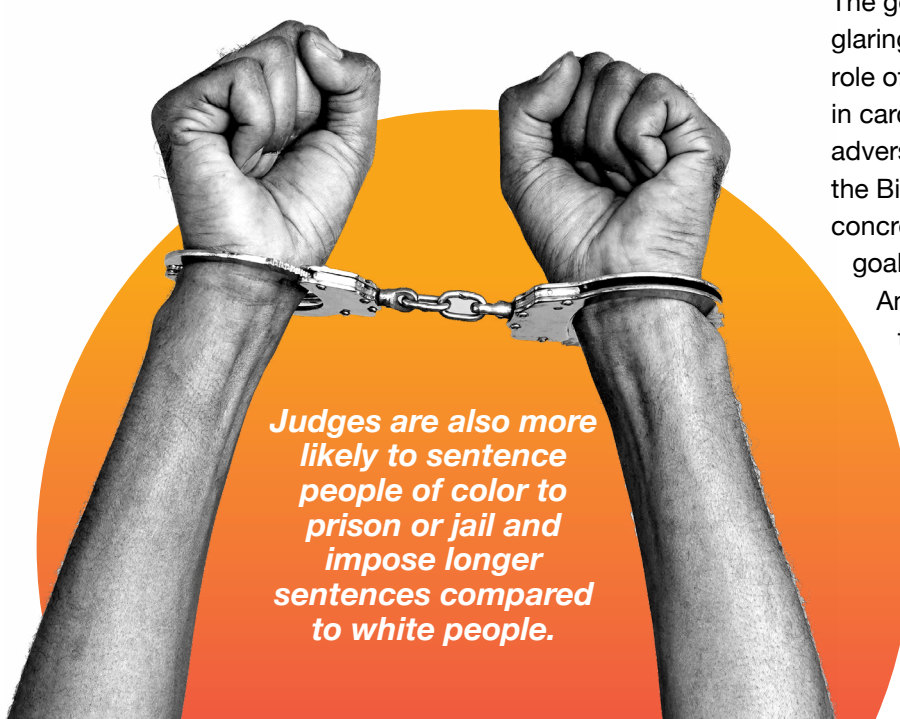
Over the years, there has been a wave of “reform-minded” prosecutors elected to office. In their jurisdictions, many of these prosecutors have made significant efforts to turn the page on outdated, failed “Tough-on-Crime” strategies of their predecessors. While BPDA is encouraged by some of their efforts, e.g., increasing retail theft penalty thresholds or no longer prosecuting drug possession, they are not enough. To truly address mass incarceration and criminalization, reform-minded prosecutors must be willing to address violent crimes.

The reticence of reform-minded prosecutors to take on the perceived “less sympathetic” charges is the reason that criminal legal reform efforts should not be centralized and placed on the shoulders of prosecutors. Often, prosecutors shield themselves with public opinion and are forced to bend to the will of law enforcement when making decisions, but defenders are not forced to contend with those forces. Instead, defenders stand alongside accused people every day as the system works to break people and communities down without any long-term improvement to public safety.

There is also substantive evidence of racially biased judicial decision-making, from bond and detention determinations to sentencing, resulting in more Black bodies incarcerated for longer periods of time. Judges often rely on racial stereotypes about dangerousness and criminality to impose pretrial detention and higher bail amounts against Black people.<sup>7</sup> Judges are also more likely to sentence people of color to prison or jail and impose longer sentences compared to white people.<sup>8</sup>

Defenders witness the daily impact of police officers, prosecutors, and judges having too much discretion or not enough; they know which sentencing laws need to change for the greatest impact and what resources accused people need to thrive. Far too often, public defenders are excluded from these conversations or their voices are overlooked. Meaningful changes to carceral systems cannot happen without public defenders, especially Black public defenders, who intimately know the harms of these systems on Black communities.

The goal of this paper is to shine a glaring light on the historical and present role of white supremacy and racism in carceral systems beyond the adult adversarial courtroom and to provide the Biden-Harris Administration with concrete steps to achieve their stated goal of advancing racial equity in America. To advance race equity in this country, the Administration must start by dismantling the deep-seated, oppressive systems of racism within carceral systems that disproportionately harm Black communities.



*Judges are also more likely to sentence people of color to prison or jail and impose longer sentences compared to white people.*



# Overview

**B**lack people in the U.S. are disproportionately surveilled, arrested, and funneled into carceral systems, causing lifelong disastrous collateral consequences. “There but for the grace of God go I” has an all too real meaning for the Black public defenders who advocate for their fellow Black folk ensnared in the criminal legal system. Black public defenders see first-hand the causes and effects of the systemic, institutional, and individual racism inflicted on their clients and fellow community members. This position paper is an opportunity for the Black Public Defenders Association (“BPDA”) to share the expertise of Black defenders and to provide recommendations to this new, hope-filled Biden-Harris Administration on how to disrupt carceral systems that target Black communities.

It is important to note that police, prosecutors, and judges wield tremendous power and must play a pivotal role in addressing racial inequities. They sustain and amplify policies that have marred and ostracized generations of Black communities in ways that handicap their everyday lives. The symbiotic relationship of these three law enforcement actors imposes the full weight and authority of the racially skewed criminal legal system on Black clients. BPDA supports efforts to address the long-standing harms of policing and prosecutorial and judicial discretion outlined in our recommendations.

Carceral systems exist within the larger political system that creates and enforces the laws and regulations that govern these entities on federal, state, and local levels. This paper focuses on the control and influence federal legislation, regulation, and enforcement have on carceral systems in federal, state, and municipal jurisdictions. We have witnessed the power of the federal government during Reconstruction after the abolition of slavery, during the Civil Rights Era of the mid-twentieth century with the passage of civil rights legislation and abolition of Jim Crow. Now we are entering an era of racial reckoning and reconciliation, where there is an opportunity for us to address perpetual racial bias along with the more modern ills imposed by “Tough-on-Crime” laws of the 1980s and 1990s.

## Summary of Recommendations

In this position paper, BPDA wishes to draw attention to carceral systems holistic defenders valiantly work to disrupt: Juvenile Dependency, Juvenile Delinquency, Education, Immigration, Incarceration, Reentry, and Housing. In January 2021, BPDA held four listening sessions, during which Black defenders shared their thoughts on the identified carceral systems, both in small and larger group discussions. In February, BPDA staff consolidated this information, conducted supportive research, and conferred with subject-matter experts. Then, BPDA enlisted expert allies’ help to provide their thoughts on proposals from BPDA members in a roundtable discussion and through individual meetings as staff drafted the position paper.


The criminalization of poverty, children, immigrants, the unhoused, and those with criminal records has acted as a gravitational pull towards the black hole that is mass incarceration, with subsequent erasure from society. BPDA urges the Biden-Harris Administration to disrupt and dismantle this path to criminal purgatory in the following ways.





Carceral System	Harms	Disruptions
<b>Juvenile Dependency</b>	<p>Black children are disproportionately in foster care and, therefore, are in yet another pipeline to incarceration.</p>	<p>Support the repeal of the Adoption and Safe Families Act (“ASFA”) and the Child Abuse Prevention Treatment Act (“CAPTA”), which have led more to harmful family separations than to reunification and support.</p> <p>Support initiatives that fund states’ support of prevention services, using funds to support the families of children who would otherwise go into foster care.</p> <p>Fund and support universal basic income for youth formerly in foster care.</p> <p>Prioritize dependency over delinquency by altering funding requirements to enable funds to go from the delinquency system to support dependency cases of youth with dual status.</p>
<b>Juvenile Delinquency</b>	<p>Although Black children make up only 14% of the youth population, they make up nearly one-third of children arrested, 42% of children confined in jail or prison-like facilities away from home, and over half of the children whose cases are prosecuted in adult court.</p>	<p>Work to abolish juvenile delinquency and confinement facilities by redistributing funding from the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) discretionary grants to states for alternatives to incarceration.</p> <p>Support the abolition of transfers of children to adult court and the abolition of juvenile life without parole sentences.</p> <p>Ensure full implementation of the Juvenile Justice and Delinquency Prevention Act (“JJDP”) with the Juvenile Justice Reform Act of 2018 (“JJRA”) amendment to reduce racial and ethnic disparities (“RED”).</p> <p>Support resumption of Department of Justice (“DOJ”) practice of investigating the juvenile delinquency system for violations of the civil rights of youth.</p>





Carceral System	Harms	Disruptions
<b>Education</b>	<p>Black children are more likely to attend school with law enforcement presence and zero-tolerance policies that disparately funnel them into the juvenile legal system. Also, young people with learning disabilities rarely have access to special education programming during confinement.</p>	<p>Defund and remove police from schools, and support the reintroduction of the Counseling Not Criminalization Act, S.4360/H.R.7848, which would prohibit the use of federal funds for law enforcement in schools and redirect funds to mental health and trauma-informed services.</p> <p>Provide special education and related services to youth in custody pursuant to Individuals with Disabilities Education Act (“IDEA”) and tie state funding to improvements in this area.</p> <p>Ensure school credit transfer and provide credit-bearing education to detained youth as we work to abolish youth detention.</p> <p>Fast-track the availability of Pell Grants in correctional facilities now, not by June 2023.</p>
<b>Immigration</b>	<p>Black immigrants, who are 10% of the U.S. Black population, are likewise disproportionately targeted by the criminal legal system. Black immigrants are disproportionately removed from the U.S. on criminal grounds compared to other immigrants.</p>	<p>Support the repeal of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) and the Anti-terrorism and Effective Death Penalty Act (“AEDPA”), which make criminal contact the deciding factor in determining immigration status. The IIRIRA allows law enforcement participation in immigration enforcement activities, and the AEDPA provides grounds for immigrant detention and fast-tracking deportation.</p> <p>Support the New Way Forward Act, which includes ending mandatory detention.</p> <p>Eliminate automatic criminal bars to remaining in the United States.</p> <p>Redirect U.S. Immigration and Customs Enforcement (“ICE”) funding to address the hearing backlog, legal representation, and due process in immigration hearings, family unification, and non-carceral alternatives to detention.</p>



Carceral System	Harms	Disruptions
<b>Incarceration</b>	<p>In 2018, Black people made up 33% of the prison population, 30% of those under community supervision, but only 13% of the U.S. adult population.</p>	<p>Support reversing the effects of the Violent Crime Control Act and Law Enforcement Act of 1994 and other racially disparate punitive laws of the 1980s and 1990s.</p> <p>Issue federal pardons and commutations for those unjustly incarcerated due to disparate racial impact.</p> <p>Support the elimination of mandatory minimums, the death penalty, solitary confinement, and incarceration for technical violations of community supervised release.</p> <p>Support bills such as the Federal Bail Reform Act of 2020 and other initiatives to end money bail.</p> <p>Champion the federal Second Look Act.</p> <p>Defund police and corrections to increase funding for alternatives to detention and incarceration.</p>
<b>Reentry</b>	<p>Formerly incarcerated people face thousands of legal and regulatory restrictions to employment, housing, voting, and other vital resources and rights. These restrictions are pronounced for Black communities who have disproportionately endured “Tough-on-Crime” policies.</p>	<p>Support federal “Clean Slate” legislation to automatically seal criminal records and incentivize states to do the same.</p> <p>Champion “Ban the Box” legislation to disrupt discrimination based on the racially disparate impact of the criminal legal system in employment, licensing, housing, and other essential paths to reentry.</p> <p>Provide increased federal government funding through Byrne-JAG and other sources for community-based programs for people returning from incarceration.</p> <p>Support returning resident service providers and advocates who know best what is needed to ensure successful reentry.</p> <p>Champion legislation such as the For the People Act of 2021, H.R. 1, to restore voting rights in federal elections for returning residents.</p>



Carceral System	Harms	Disruptions
<p><b>Housing</b></p>	<p>Housing insecurity creates a revolving door between incarceration and homelessness. Unhoused people are over-policed and criminalized. People returning from incarceration and youth aging out of foster care face barriers to stable, affordable housing.</p>	<p>Enforce and strengthen the Fair Housing Act by rescinding the prior administration's limitations on disparate impact liability and creating regulations to prevent discrimination based on racially disparate criminal records.</p> <p>Champion the reintroduction of the Fair Chance at Housing Act of 2019 to limit public housing agencies from denying or terminating federally assisted housing based on criminal record.</p> <p>Increase housing vouchers for returning residents and youth aging out of foster care.</p> <p>Challenge "quality of life" or "broken window" laws that criminalize homelessness.</p>



*Black women have the highest rate of sheltered homelessness than any other demographic group, highlighting that Black women face significant barriers to housing after incarceration.*





# JUVENILE DEPENDENCY

*Fifty-three percent of Black children will be investigated by child protective services before turning 18.*

In this country, one in three children will be the subject of a child abuse investigation; but for Black children, over one-half will be subjected to child protective services investigation before they turn 18.<sup>9</sup> Black children are also disproportionately separated from their parents, making up over 23% of foster children despite being only 14% of the child population in 2018.<sup>10</sup> There is a pattern and practice of racial disproportionality due to the over-policing and overcriminalization of Black communities. Over-policing Black communities is directly related to the over-policing of Black families, with police making a fifth of child abuse and neglect complaints overall.<sup>11</sup>

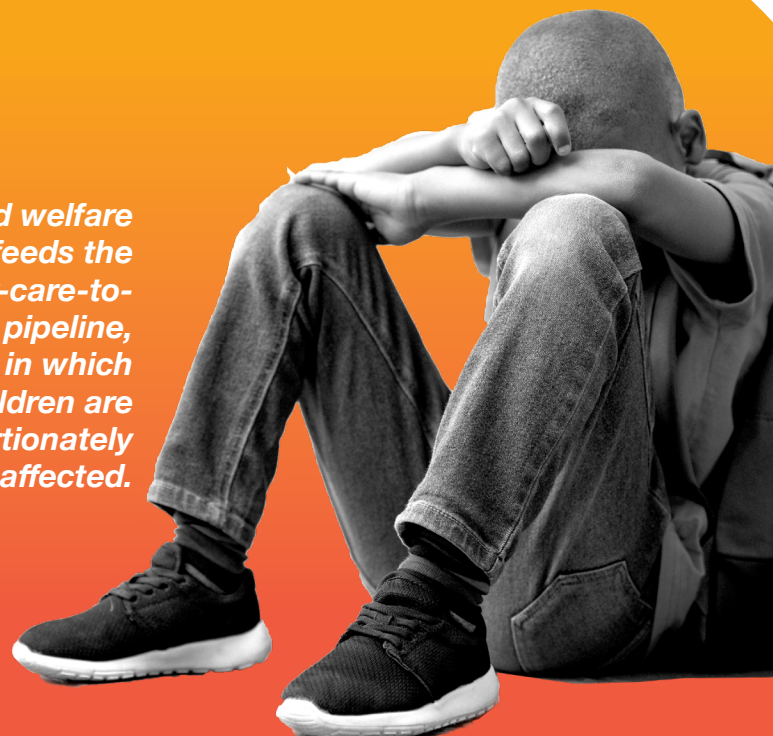
Although many families are investigated for child abuse or neglect, only a fifth of the investigations actually finds maltreatment.<sup>12</sup> University of Pennsylvania law professor Dorothy Roberts describes mandatory reporting as the “stop-and-frisk” of child welfare, “Because of individual and institutionalized racial bias in child maltreatment reporting, like the bias in police surveillance, these seemingly neutral practices that are supposed to increase safety end up unjustly punishing people of color.”<sup>13</sup>

The child welfare system feeds the foster-care-to-prison pipeline, again, in which Black children are disproportionately affected. Children in group homes are 2.5 times more likely to enter the juvenile delinquency system than those placed in foster families.<sup>14</sup> Also, 90% of those with five or more foster care moves end up in the juvenile delinquency system.<sup>15</sup> Within two years of aging out of care, 25% of former foster care children will be in the criminal legal system.<sup>16</sup> Black children are disproportionately in foster care and, therefore, are in yet another pipeline to incarceration, barring disruption of this harmful system.

In 1997, the Adoption and Safe Families Act (“ASFA”) was enacted to fast-track adoptions, by limiting time in foster care before moving to terminate parental rights.<sup>17</sup> This time limit was ostensibly for children to obtain some new family permanency quicker. The ASFA has resulted in more broken families, more children in foster care,<sup>18</sup> and an emboldened carceral system of juvenile dependency. For Black communities that are over-surveilled, over-policed, and where Black parents are disproportionately arrested and incarcerated, family separation and termination of parental rights by the state harkens back to family separations cruelly imposed on our enslaved ancestors. Families need non-carceral support services, not surveillance and separation. It is estimated that 30% of children could be reunited with their families if their parents had stable housing.<sup>19</sup>

Family reunification and support should be the main goals of the Biden-Harris Administration’s child welfare platform.

*The child welfare system feeds the foster-care-to-prison pipeline, again, in which Black children are disproportionately affected.*





## The Biden-Harris Administration should:

**1** ■ Support the **repeal of the Adoption and Safe Families Act and the Child Abuse Prevention Treatment Act**, which have led more to harmful family separations than to reunification and support. At present, the government spends ten times as much money on foster care and adoption as it does on family reunification and support.<sup>20</sup> Money for ASFA and Child Abuse and Prevention Treatment Act (“CAPTA”) should be redirected to family and community support services to further family reunification. Use the funds to support housing, welfare, Medicaid, and other financial supports for families to better ensure family unification and children’s best interest.

**2** ■ **Fund and support universal basic income for youth formerly in foster care.** The money provided to states for children in foster care and the financial incentives to private adoption agencies should be redirected to provide universal basic income (“UBI”) and non-carceral, non-punitive services to youth exiting the foster system. Funds can be redistributed from the repeal of the ASFA, CAPTA, and from the Foster Connections to Success and Increasing Adoptions Act, which has provided funds to states to extend foster care to age 21.<sup>21</sup> A similar initiative has been implemented in Santa Clara County, California, providing UBI to former foster children for up to three years. Policymakers have proposed legislation this year to expand it to a state-wide program.<sup>22</sup>

**3** ■ **Support initiatives that fund states’ support of prevention services**, using funds to support families of children who would otherwise go into foster care. This includes enabling Title IV-E funds from the 1994 Amendment to the Social Security Act to be provided directly to legal representatives and community service providers that support families, rather than funneling the money through the child protective services agencies that investigate and surveil their clients.

**4** ■ **Support the repeal of the Family First Prevention Services Act of 2018**, which requires entry into the neglect system as a condition of eligibility for funded community support services.<sup>23</sup> Instead, make funding available to truly support programs and services to families in need, providing what they need, when they need it, preventing the government intervention and family separation.

**5** ■ The Administration should use its funding influence to encourage jurisdictions to **prioritize dependency over delinquency** by altering funding requirements to enable funds to go from the delinquency system to support dependency cases of youth with dual status. When a child has the dual status of being in both the dependency and delinquency systems, rather than staying in the delinquency case,<sup>24</sup> the dependency case should take precedence so that the child can remain with their family and receive supportive services.



A young Black boy with a serious expression, arms crossed, against a textured wall. The image is overlaid with a dark blue tint.

# JUVENILE DELINQUENCY

*"There are 13 states that have no minimum age for trying a child as an adult, which means that I have represented 9-year-old kids facing adult sentences, decades of adult imprisonment."<sup>25</sup>*

*~ Bryan Stevenson*

*A Black child is nearly nine times more likely than a white child to be given an adult prison sentence.<sup>26</sup>*

**B**efore the COVID-19 pandemic, there were about 48,000 children held in adult and juvenile facilities in the United States at any given time.<sup>27</sup> Although Black children make up only 14% of the youth population, they make up 32% of children arrested, 42% of children confined in jail or prison-like facilities away from home, and 52% of children whose cases are prosecuted in adult court.<sup>28</sup> While the number of children held has decreased over the last couple of decades, the racial disparity gap has grown wider.<sup>29</sup>

Two months into the COVID-19 pandemic, admissions into detention dropped by 52%, and jurisdictions released previously confined children to protect them from the coronavirus. Research has shown that confining fewer children does not lead to a decrease in public safety. Furthermore, research has shown that putting youth in detention does not work, with up to 80% of incarcerated children being rearrested within three years of release.<sup>30</sup> So why do we keep investing in a system that has a proven horrendous track record? Much like adult prisons, jurisdictions have treated juvenile detention facilities as employment generators. In California, confinement dropped from 10,000 to 1,700 between 1996 and 2008, but the cost per child rose from \$36,000 to \$252,000 per year.<sup>31</sup> Children are being taken away from home to feed a carceral industry with detrimental effects to Black children. Youth confinement is the biggest indicator of future incarceration.<sup>32</sup>

We must never forget that these are children removed from their homes and confined in jail and prison settings, and nearly 10% are confined in adult facilities. Kalief Browder is the most notable tragic case of a child being brutalized by staff and incarcerated adults and tortured by solitary confinement in an adult facility.<sup>33</sup> But in 2019, there were over 4,530 children in adult correctional facilities in the U.S.,<sup>34</sup> four-and-a-half years after Kalief Browder's death. Children are also frequently abused in juvenile facilities, both physically and sexually, by staff and other confined children.<sup>35</sup>

All of this is happening to children during a time in their lives when their brains are not completely developed and are more vulnerable to stress and trauma. The decision-making and problem-solving areas of their brain are not developed until the mid-'20s,<sup>36</sup> and yet children are still being held responsible for their actions as an adult, sometimes for the rest of their lives. Black children are disproportionately and biasedly not seen as children by non-Black adults. Some view Black children as much as 4.5 years older than their actual age, and, therefore, they are often treated and punished like adults.<sup>37</sup> Racial bias and the dehumanization of Black children result in disproportionate confinement and waiver to the adult system with higher exposure to abuse and trauma.<sup>38</sup>

***“Racial bias and the dehumanization of Black children result in disproportionate confinement and waiver to the adult system with higher exposure to abuse and trauma.”***





# The Biden-Harris Administration should:

**1** ■ Work to **abolish juvenile detention and confinement facilities**. The federal government should reallocate funding towards measures that support children and families in communities and provide financial incentives for state and local governments to invest in alternatives to youth confinement. Department of Justice (“DOJ”) can redistribute the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”) funding from discretionary grants to states to formula grants. In FY 2020, states received over \$369 million in discretionary grants compared to \$44 million in formula grants.<sup>39</sup> Formula grant areas target alternatives to incarceration, including community support services, school programs, mental health services, and indigent defense funding.<sup>40</sup> In 2014, 34 states reported spending more than \$100,000 per child per year in confinement costs.<sup>41</sup> The federal government can help them redirect these funds towards alternatives to confinement and community supports for children and their families.

**2** ■ Support DOJ’s Civil Rights Division **resumption of the practice of investigating the juvenile delinquency system for violations of the civil rights of youth**, from the time of arrest, court, probation, or detention, under 42 USCA § 14141 (re-codified at 34 USC § 12601).<sup>42</sup> Also, DOJ’s Civil Rights Division can support this effort by conducting investigations under the Civil Rights of Institutionalized Persons Act (“CRIPA”) of youth detention facilities<sup>43</sup> or filing statements of interest in cases that highlight and condemn the abuse, trauma, and maltreatment inflicted on children in the juvenile delinquency system.

**3** ■ **Support abolition of transfers of children to adult court and abolish the federal provision allowing transfer of children to adult court** under 18 USCA § 5032. The Biden-Harris Administration should also support a federal law requiring data collection on all of the transfer mechanisms that place youth in adult courts. The federal government should use its influence to deter states from continuing to charge children as adults and use its investigative powers on the adult state and local facilities that currently house children. Beyond mere guidelines, the Biden-Harris Administration should support the position that treating children as adults is unconstitutionally cruel.

**4** ■ **Support abolition of juvenile life without parole sentences**, super predator policies, mandatory minimums, and other laws implicating youth as “irreparably corrupt”<sup>44</sup> or without hope of rehabilitation, starting with the federal repeal of all such policies. Also, incentivize states to do the same with federal funding or with statements of interest in cases against such state laws. Black children are on the receiving end of discretionary determinations of who exhibits the “transient immaturity of youth” versus “permanent incorrigibility,” and they will continue to be disproportionately impacted as long as this discretion exists. It is disappointing that the Biden-Harris Administration did not support the United Nations Human Rights Council’s recommendation that the United States end juvenile life without parole sentences.<sup>45</sup> However, it is not too late to reverse this position and abolish the imposition of such sentences retroactively and in the future.

**5** ■ **Ensure full implementation of the Juvenile Justice and Delinquency Prevention Act, as written with the Juvenile Justice Reform Act of 2018 amendment, which directs states and local jurisdiction to apply evidence-based approaches to reduce racial and ethnic disparities**. Direct OJJDP to reward and provide technical assistance to jurisdictions that conduct racial impact studies, provide funding for system-wide evaluations of racial bias, and supply stakeholders with tools to counteract bias at all steps of the juvenile legal system. Tools should include anti-racism training and measures to ascertain whether stakeholders – including judges – are using these tools to reduce disparities.





# EDUCATION

*“Black students are more likely to attend schools with zero-tolerance policies and law enforcement presence on campus, increasing a student’s chance of being arrested at a young age, expelled, or suspended.”<sup>46</sup>*



**T**he school-to-prison pipeline must be disrupted to ensure that education systems are not feeders into carceral systems. Black children are criminalized from an early age in a place where they are supposed to feel safe: school. Racial bias and disparate treatment result in Black students being arrested three to four times that of white students.<sup>47</sup> Black students experience constant surveillance by police from an early age in a place where they are trying to learn. A recent study showed that police at affluent white schools were on alert for threats from outside the school; police in schools of predominantly students of color saw the students as the primary threat.<sup>48</sup> It appears that the police are present in school to arrest Black children because there is no evidence that their presence makes schools safer.

What are law enforcement policing in schools? Teen drug use and crime rates are down to historic lows. In 2015-2016, 96% of “serious offenses” were fisticuffs in the halls – no weapons.<sup>49</sup> Yet, schools with police had 3.5 times more student arrests than those without, and some schools have as much as a 400% increase.<sup>50</sup> Racial bias leads Black children to be arrested at school even when there is no police presence, with school officials referring Black and Hispanic students to law enforcement at disproportionate rates.<sup>51</sup>

The education carceral system has racially-biased actors that feed Black children into juvenile delinquency system and adult prisons, where they have less access to education. As many as two-thirds of children in juvenile detention between 2013 and 2016 did not earn any high school credits while detained. One-third of children in juvenile corrections did not receive any credits during that time, and fewer than 7% obtained a high school diploma.<sup>52</sup>

Children with learning disabilities, by law, are entitled to special education and related services – including transitional services – until age 22 provided by the state and funded by the federal government via the Individuals with Disabilities in Education Act (“IDEA”).<sup>53</sup> Less than half of young people with learning disabilities have access to special education programming during confinement.<sup>54</sup> And, because the IDEA is a funding act, the delivery of special education is state-by-state with no uniformity across the country.

Before 1994, an incarcerated adult could earn college credit with the help of the Pell Grant program. However, during the “Tough-on-Crime” 1990s, Congress and the Clinton-Gore Administration banned incarcerated people’s access to the Pell Grant Program. This action reduced postsecondary education programs in U.S. corrections from over 300 to about 12.<sup>55</sup> While the Omnibus Appropriations bill passed in December 2020 will lift this ban, it will not be fully implemented until July 2023.<sup>56</sup>

The Biden-Harris Administration should help ensure access to education for Black children and adults, whether in school or for those in the government’s custody.

*Racial bias leads Black children to be arrested at school even when there is no police presence, with school officials referring Black and Hispanic students to law enforcement at disproportionate rates.*



## The Biden-Harris Administration should:

- 1. Defund and remove police from schools.** DOJ's Community Oriented Policing Services ("COPS") Office has awarded \$50 million to 160 school districts for school police offices, also known as "School Resource Officers," in 2020.<sup>57</sup> This money should be redirected for more youth programming and family support services. The Biden-Harris Administration should support the reintroduction of the Counseling Not Criminalization Act S.4360/H.R.7848, which prohibits the use of federal funds for law enforcement in schools and redirects funds to mental health and trauma-informed services.<sup>58</sup>
- 2. Provide special education and related services to youth in custody pursuant to Individuals with Disabilities in Education Act.** Tie IDEA funding to states' proven ability to provide special education and related services to youth in custody. Federal prisons should be mandated to provide IDEA education services to all eligible persons in their custody. For state compliance with IDEA, the Biden-Harris Administration should make money available based on meeting the Department of Education ("DOE") and DOJ's "Guiding Principles for Providing High Quality Education in Juvenile Justice Secure Care Settings,"<sup>59</sup> while holding in abeyance funds dedicated to meeting the requirements of the law. The federal government should also investigate facilities under CRIPA to ensure compliance with providing disability services.
- 3. Fast-track the availability of Pell Grants in correctional facilities NOW, not by June 2023.** Even though legislation was passed and signed into law to lift the ban on Pell Grants, DOE has until July 2023 to implement it. The Rand Corporation, in 2013, found that incarcerated persons who participated in educational programming were 43% less likely to recidivate.<sup>60</sup>
- 4. Deploy federal funding incentives to enable state education agencies to ensure credit transfer, provide credit-bearing education, and encourage high school graduation for children who are incarcerated.** The Biden-Harris Administration should lead by example by resuming the planned semi-autonomous school district within the federal prison system.<sup>61</sup>
- 5. During the Obama-Biden Administration, the DOE and DOJ issued guidance, "[Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline](#),"<sup>62</sup> which was rescinded during the prior administration and should be reinstated to hold schools accountable for racial discrimination in the application of school discipline as well as referrals to law enforcement. Also, the DOJ should resume filing [Statements of Interest](#) to disrupt state school discipline practices that criminalize "disruptive behavior" and other arbitrary and vague rules that are disproportionately enforced to criminalize Black children.<sup>63</sup>**





# IMMIGRATION

***“The racism present in the criminal legal system spills over and informs the immigration enforcement system, and thus it naturally and unjustly targets Black immigrants at all stages of the process.”<sup>64</sup>***



**T**he Biden-Harris Administration has made addressing immigration to the United States a priority during its first term in office. With this comes rolling back the toxic immigration policies of the last administration with recent executive orders.<sup>65</sup> However, we must not forget to address the legislation and policies of prior administrations, especially those of the 1990s that overly criminalize and remove Black immigrants from America.

Nearly ten percent of Black people in the U.S. – approximately 4.2 million – are immigrants, and 84% of Black immigrants are here without authorization.<sup>66</sup> Although they do not share the same history of ancestral enslavement in the U.S., they share the same skin with their Black American brethren and are, therefore, disproportionately arrested at the same rate. Black immigrants are disproportionately removed from the U.S. on criminal grounds. While comprising only 7% of non-citizens in the U.S., Black immigrants are over 20% of those facing deportation on criminal grounds;<sup>67</sup> and 76% of deported Black immigrants were removed on criminal grounds versus 45% of all immigrants in 2013.<sup>68</sup>

The 1990s “Tough-on-Crime” legislative era issued harmful, draconian immigration legislation that basically “criminalized” one’s lack of immigration status, which was further exploited by the last administration. The Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996 included the 287(g) program that enabled local law enforcement participation in immigration enforcement, eliminated due process in removal cases, imposed mandatory detention, erected barriers to asylum claims, and criminalized lack of immigration status.<sup>69</sup> Because Black immigrants are racially profiled and disproportionately dragged into the criminal legal system, they are also disproportionately exposed to the removal proceedings under IIRIRA, even when criminal cases are ultimately dismissed.<sup>70</sup>

*Black immigrants are disproportionately removed from the U.S. on criminal grounds, while comprising only 7% of non-citizens in the U.S. on criminal grounds.*



# The Biden-Harris Administration should:

- 1. Support the repeal of the *Illegal Immigration Reform and Immigrant Responsibility Act* and *Anti-terrorism and Effective Death Penalty Act*, aka “1996 Immigration Laws.”**

■ These laws made criminal contact the deciding factor in determining immigration status,<sup>71</sup> and we know that this disproportionately affects Black immigrants due to increased criminal contact from racial profiling and discrimination. Repealing IIRIRA would also repeal provisions, such as the 287(g) program that enables local law enforcement participation in immigration enforcement. Repealing AEDPA would reverse grounds for immigrant detention and fast-tracked deportation of recent immigrants and longer-term legal permanent residents who have called the United States home for years.
- 2. Support the *New Way Forward Act* and beyond.** This bill was recently re-introduced in the House of Representatives with thirty (30) co-sponsors, and it touts disrupting the prison-to-deportation pipeline. Provisions also include ending mandatory detention, prohibiting deportation for criminal convictions over five years old, banning local law enforcement from aiding federal agents in apprehending and detaining immigrants, and phasing out the use of private facilities and county jails for immigrant detention. This Act addresses some of the provisions of the IIRIRA that should be repealed, including the 287(g) program and mandatory detention. While more should be done, the New Way Forward Act would be a good start along a path to disrupting the carceral harms of current U.S. immigration policies.
- 3. Eliminate automatic criminal bars** to remaining in the U.S. for asylum seekers and refugees, for those eligible under executive action programs such as Deferred Action for Childhood Arrivals, those under Temporary Protected Status, and other paths to citizenship.
- 4. Redirect Immigration and Customs Enforcement funding.** Overall, spending on immigration enforcement has increased from about \$2 billion in 1997 to over \$21 billion in 2018.<sup>72</sup> For 2021, the Department of Homeland Security estimated its \$10.4 billion budget submission and wrote that they anticipated detaining 60,000 persons daily and removing over 257,000 persons.<sup>73</sup> The Biden-Harris Administration should redirect ICE funding to address the hearing backlog, provide for legal representation and due process in immigration hearings, family unification, and non-carceral alternatives to detention.<sup>74</sup>





22

# INCARCERATION

*"If African Americans and Hispanics were incarcerated at the same rates as whites, prison and jail populations would decline by almost 40%."*<sup>75</sup>

**T**he criminal legal system is a \$182 billion industry,<sup>76</sup> with 2.3 million people incarcerated in prisons, jails, detention centers, plus 4.5 million under community supervision.<sup>77</sup> Even though the impact of mass incarceration has spilled over to many communities, Black people have been the targets of and have endured the brunt of it. In 2018, Black people made up 33% of the prison population,<sup>78</sup> 30% of those under community supervision, but only 13% of the U.S. adult population.<sup>79</sup> Black people have also been condemned to state-sanctioned execution at disparate rates, accounting for 35% of people executed under the death penalty within the (40) years.<sup>80</sup>

Unfortunately, we know how we got here. In addition to the brutal history of slavery and other forms of oppression and discrimination, the “War on Drugs” was a veiled war on Black Americans since the Nixon Administration.<sup>81</sup> The Reagan Administration continued with this “dog whistle” tactic by signing and enforcing the Anti-Drug Abuse Act of 1986. It enacted the 100-to-1 crack to powder cocaine disparity in sentencing, which created extremely long, disparate sentences for Black people in federal custody. The Act also gave the green light for states to follow suit in enforcing disparate criminal law measures.<sup>82</sup>

Mass incarceration was turbo-charged with the Violent Crime Control Act and Law Enforcement Act of 1994, with “truth in sentencing” resulting in more time incarcerated, expanding the death penalty, imposing “three strikes” and mandatory sentences, and drug testing and incarcerating those on supervised release, which criminalizes addiction. It also infused state and local jurisdictions with funds to expand police power and build more prisons and jails.<sup>83</sup> As a result, the state and federal prison population grew 800% in the forty (40) years from 1971 to 2012.<sup>84</sup>

The Biden-Harris Administration should commit to correcting the wrongs inflicted on Black people in the U.S. by racist and predatory carceral policies that have continuously been enacted against us over the last fifty (50) years.

*Even though the impact of mass incarceration has spilled over to many communities, Black people have been the targets of and have endured the brunt of it as well as policing and overcriminalization.*



# The Biden-Harris Administration should:

## 1.

**Release people from incarceration** by reversing racist, disparate criminalization and sentencing inflicted on Black communities, including:

- Going beyond the First Step Act of 2018, with **clemency** – including pardons and commutations – for those convicted and sentenced under drug laws and other laws that have had a disparate impact on Black people.
- Working to **abolish mandatory minimum sentencing**, including supporting legislation to abolish the sentence provisions. Incentivize states to eliminate mandatory sentencing through funding initiatives such as Justice Reinvestment Initiative (“JRI”) or Bureau of Justice Assistance Grants.
- Supporting the appointment **of a federal defender with expertise in racial equity as a member of the United States Sentencing Commission**. Further, the United States Sentencing Commission should require judges to apply a racial disparity analysis to all sentencing decisions, especially upward and downward departures from sentencing guidelines.
- Supporting legislation to **abolish incarceration for technical violations of community supervised release**, both federally and in states. DOJ has used Justice Reinvestment Initiative (JRI) funding to reduce incarceration for technical violations in states, but it must go further in eliminating the practice. Four-and-a-half million people are exposed to re-incarceration, despite not reoffending.<sup>85</sup>
- Working to **abolish the death penalty, starting with abolishing the federal death penalty**. Start by commuting all current federal death penalty sentences immediately. Support the passage of the Federal Death Penalty Prohibition Act, H.R. 262. Support states to follow suit of Virginia and 22 others that have abolished the death penalty.<sup>86</sup> Also, champion the **repeal of the Anti-terrorism and Effective Death Penalty Act** (see Immigration section above), which virtually obliterated federal habeas corpus for people sentenced in state courts.<sup>87</sup>
- Championing the reintroduction of The Second Look Act, S. 2146/H.R. 3795, which provides the opportunity for a **sentence modification** after having served 10 years in prison.

## 2.

Support an Attorney General **mandate that prosecutors apply racially disparate treatment analysis** to every charging decision, including data analysis and Inspector General oversight to ensure compliance.



**3. Decriminalize minor drug offenses,** making this retroactive, and clear such offenses from persons' prior records. Support the Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act").

**4. Abolish Pre-trial Detention,** including support for the reintroduction of the Federal Bail Reform Act 2020. The federal courts do not, in practice, impose prohibitive money bail, but the Act would make this official and set an example for state and local jurisdictions. Also, through federal funding, support jurisdictions that make the change to abolish money bail.

**5. Ban the use of solitary confinement** in federal correctional facilities. The Obama-Biden Administration began making strides in this area in the U.S. Department of Justice Report and Recommendations Concerning the Use of Restrictive Housing.<sup>88</sup> Now is the opportunity to turn these recommendations and guidance into bans on the use of restrictive housing in federal facilities and to incentivize state and local facilities to do the same. This sanctioned use of psychological torture in the United States must end.<sup>89</sup>

**6. Defund police and corrections,** which are also drivers of the jail and state prison populations. Redirect funding to **alternatives to detention and incarceration.** Targeted funding to redirect includes Byrne-JAG funding, COPS funding, and other major federal funding sources for law enforcement and corrections. Support initiatives such as The BREATHE Act, which calls for support of alternatives to incarceration and community services in lieu of law enforcement.

A Black man with a shaved head and a goatee is standing in front of a height chart. He is wearing a dark, short-sleeved button-down shirt with two chest pockets. The height chart behind him has horizontal lines and numbers on the left side: 6'0", 5'6", 5'0", 4', 3', and 3'. The word "REENTRY" is overlaid in large, bold, orange letters on the left side of the image.

# REENTRY

*Over 70 million people have a criminal record.<sup>90</sup> One in three Black men have a felony conviction.<sup>91</sup>*

One in five Americans has a criminal record of some kind,<sup>92</sup> but the harm of “Tough-on-Crime” policies is most pronounced among Black adults. By 2010, 23% of Black adults had a felony conviction, compared to 6% of non-Black adults. For Black men in particular, who have been heavily targeted by the criminal legal system, one-third has a felony conviction.<sup>93</sup> A criminal record can be a permanent barrier, especially for Black Americans who already encounter discrimination. For example, Black people without a criminal record earn less than socioeconomically similar white people who have a criminal record. Being Black with a criminal record exacerbates existing inequities.<sup>94</sup>

More than 44,000<sup>95</sup> separate legal and regulatory restrictions prevent or limit people with criminal convictions from employment, eligibility for public assistance and social services, occupational licensing, education, and other vital services needed to live with dignity and access essential resources. These restrictions are often referred to as “collateral consequences,” but there is nothing collateral about losing access to essential resources, being trapped in poverty, and forced into circumstances that lead to future contact with the legal system.<sup>96</sup>

People with a criminal conviction lose close to \$100,000 in earnings in their lifetime, and formerly incarcerated people lose nearly half a million dollars in earnings over their careers.<sup>97</sup> But these burdens of reentry are not shared equally as formerly incarcerated Black people, particularly Black women, face higher rates of unemployment and homelessness compared to their white counterparts.<sup>98</sup> A criminal conviction also relegates people to second-class citizenship by way of stripping their right to vote. One in 16 Black Americans cannot vote due to a felony conviction, compared to one in 59 non-Black voters.<sup>99</sup>

The Biden-Harris Administration must disrupt these harmful barriers that disproportionately disenfranchise Black people and trap them in a cycle of incarceration and poverty.

*People with a criminal conviction lose close to \$100,000 in earnings in their lifetime, and formerly incarcerated people lose nearly half a million dollars in earnings over their careers.*





## The Biden-Harris Administration should:

**1. Support federal clean slate legislation to automatically seal criminal records with no fee to the returning resident.** The Biden-Harris Administration should also allocate proper funding to support the full implementation of a clean slate at the federal level. It should incentivize states to adopt similar laws and provide the funding to cover expungements and sealing of records.

**2. Champion “Ban the Box” legislation** to disrupt discrimination and barriers to employment, occupational licensing, access to public assistance and social services, education, among other services. The Biden-Harris Administration should also incentivize states to adopt similar measures and provide funding to enforce compliance by fining entities that violate it.

**3. Provide government funding to community-based programs led by returning residents for people returning from incarceration.** The Biden-Harris Administration should work with the DOJ’s Office of Justice Programs to create specific funding opportunities for organizations and programs that provide reentry support and services and are led by returning residents.

**4. Champion the For the People Act of 2021, H.R. 1, which among other provisions, includes the Democracy Restoration Act, which would restore voting rights in federal elections for people who have returned from incarceration.** Voting is a fundamental right that should not be taken away because of a conviction, and H.R. 1 is a first step in achieving this goal. Additionally, the Attorney General, where applicable, should file statements of interest, incentivize states to affirm voting as a fundamental right, and allow all voting-age people to vote regardless of conviction or current incarceration.

**5. Seek input from and work directly with people who have been impacted by the criminal legal system.** Returning residents should be among the stakeholders the Administration calls to the table when discussing reentry support and services and criminal legal reform. People with lived experiences, returning residents and people who have been exposed to the criminal legal system offer a unique and critical insight into the system. They could raise concerns that may otherwise be excluded, overlooked, or minimized.



# HOUSING

*People who have been to prison just once experience homelessness at a rate seven times higher than the general public.<sup>100</sup>*



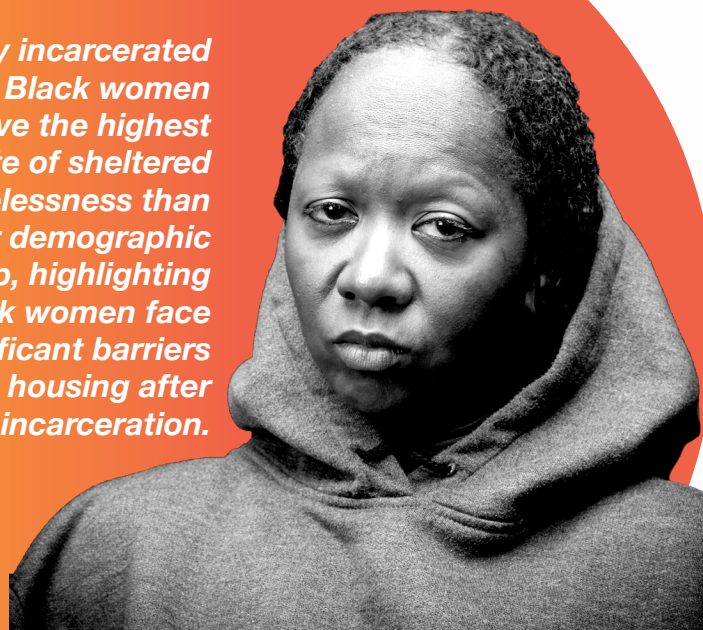
**A**ccess to affordable housing in and of itself is extremely challenging. Four in ten low-income people are homeless or use more than half of their income to pay rent in the U.S.<sup>101</sup> Housing insecurity exposes people to over-policing and incarceration. Studies show that 15% of incarcerated people were unhoused the year before entering prison,<sup>102</sup> and unhoused people are 11 times more likely to be arrested than people who are housed.<sup>103</sup>

A criminal record exacerbates the existing challenges to securing stable housing. Housing is often the first barrier most returning residents face after incarceration. Local housing authorities often conduct criminal background screenings for public housing applicants and prevent returning residents from accessing housing assistance, public housing programs, or living with family members receiving such services.<sup>104</sup> This has life-altering consequences on the individual and their family, as families face the threat of losing their housing due to a loved one's arrest or contact with the criminal legal system. A 2015 study by the Ella Baker Center for Human Rights found that nearly one in five families interviewed for the study were evicted or denied housing when their family member returned home from incarceration.<sup>105</sup>

People who have been to prison just once experience homelessness at a rate seven times higher than the general public.<sup>106</sup> In a country fueled by institutional racism, it is no surprise that racial disparities are prevalent in the rate of homelessness among returning residents. Formerly incarcerated Black men have the highest rate of unsheltered homelessness compared to white and Hispanic men. Studies also show that formerly incarcerated Black women have the highest rate of sheltered homelessness than any other demographic group, highlighting that Black women face significant barriers to housing after incarceration.<sup>107</sup>

People need stable housing to successfully reenter their communities and avoid contact with the juvenile and criminal legal system.

*Formerly incarcerated Black women have the highest rate of sheltered homelessness than any other demographic group, highlighting that Black women face significant barriers to housing after incarceration.*





# The Biden-Harris Administration should:

**1. Enforce and strengthen the Fair Housing Act by rescinding the prior Administration's limitations on disparate impact liability** and converting 2013 disparate impact guidance on the use of criminal background checks and nuisance laws into the Department of Housing and Urban Development ("HUD")<sup>108</sup> regulations. Although returning residents are not a protected class, the Fair Housing Act has recognized that the use of criminal records in housing determinations can have a disparate impact on Black persons.<sup>109</sup> The use of this racist "dog whistle" tactic in housing discrimination should not only be discouraged but disallowed.

**2. Champion the reintroduction of the Fair Chance at Housing Act of 2019**, which was introduced by Vice President Harris in 2019. It would limit public housing agencies from denying or terminating federally assisted housing based on criminal records. This legislation also proposes banning blanket "one strike" bans for one or minor offenses and "no-fault" policies leading to the eviction of entire families. Such legislation should modify or repeal harmful provisions under 4 USCA § 13661, which currently allows housing prohibitions based on drug use or criminal records. It should also modify 4 USCA 1437d(q)(1)(C) to prohibit the use of juvenile delinquency system records in public housing determinations.<sup>110</sup>

**3. Increase access to affordable housing by making housing vouchers available for returning residents and youth aging out of foster care.** People need housing without preconditions and not contingent on case management. Additionally, Housing First programs,<sup>111</sup> such as Permanent Supportive Housing, should be expanded for returning residents and youth with special needs. The Biden-Harris Administration should propose budgets for HUD and other federal agencies that provide housing support to increase the availability of subsidized, affordable housing for returning residents.

**4. Direct the Department of Housing and Urban Development to incentivize state and local housing agencies to lift public housing restrictions and allow returning residents to live with family members in public housing when they return from incarceration.** Programs similar to New York City's 2013 Family Reentry Pilot Program should be established with federal funding and oversight by HUD, but with the New York City pilot evaluation's recommendations for program improvements to better serve returning residents and their families.<sup>112</sup> HUD should also provide funding support to families not in public housing who house returning residents.

**5. Support the US Department of Justice's resumption of filing statements of interest challenging "quality of life" laws**, which target and criminalize unhoused people for behaviors and activities associated with homelessness, such as sleeping outside, loitering, and asking for money in public. Further, the Administration should incentivize jurisdictions to repeal quality of life and "broken window" laws, which have proven to be disastrous because they meet people and communities needing essential resources with punishment instead of support.

## End notes

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