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**NEARLY 5 MILLION ARE ON
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**MANY FOR
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DRUG OFFENSES.**

RACE & CRIMINAL JUSTICE

OHIO ISSUE 1 AND BEYOND

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Introduction

MASS INCARCERATION IS A CRISIS IN AMERICA. Nationwide, 2.2 million Americans are in prison or jail.¹ Nearly five million are on community control.² Many of these Americans are locked away or punished for low-level, non-violent drug offenses.

Our nation's history of racism and discrimination is deeply ingrained in our criminal justice system. Today, Black men are imprisoned at six times the rate of White men, and Black women are imprisoned at nearly twice the rate of White women.³ These disparities cannot be simply attributed to higher propensity to commit crimes. Research shows that people of color are more likely to be arrested and sentenced longer than whites, even in cases where similar crimes are committed at similar rates.⁴ If current trends continue, one of every three Black men born today will go to prison in his lifetime, as well as one of every six Latino men.⁵

The War on Drugs was a primary driver of racialized mass incarceration. The nation's extreme criminalization of drugs disproportionately targeted communities of color, led to a dramatic increase in the prison population, and did little to promote public safety.

The opiate epidemic is creating a new conversation around drug policy and criminal justice reform efforts across the country. Opioid related overdose deaths have hit a critical point and have begun to reach traditionally unaffected communities. As communities wrestle with overburdened jails and prisons and insufficient mental health and drug treatment facilities, policymakers and the public are challenging the strategy of criminalization utilized during the last 40 years of the War on Drugs. Many experts acknowledge the racialized nature of this shift in political will for reform.⁶

The State of Ohio, which is second worst in the nation for overdose deaths, is at the center of this debate.⁷ This November, Ohio voters will have the opportunity to vote on [State Issue One](#), a ballot initiative that seeks to reduce the prison population and reinvest the savings into drug treatment and mental health services.⁸ This brief will provide a summary of Issue 1 and highlight areas where reforms could have the potential to make the most impact on reducing the prison population and addressing racial disparities in our criminal justice system.

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Reforming The Criminal Justice System

Recognizing the need to address mass incarceration, many states across the country have successfully implemented reforms to reduce the prison population while also keeping the public safe. Since 1999, New York, New Jersey, and California have all reduced their prison population by at least 25 percent, while their crime rates have fallen faster than the national average.⁹

States have realized that they can continue to focus on violent crime while also implementing alternatives to prison for those who pose no threat to public safety. According to a recent study from the Brennan Center for Justice, there are an estimated 364,000 low-level offenders (approximately 25% of the prison population) in prison for which alternatives to prison would be more effective.¹⁰

“New York, New Jersey, and California have all reduced their prison population by at least 25 percent, while their crime rates have fallen faster than the national average”

OHIO SPENDS \$1.8 BILLION per year on its prison system and there are nearly 50,000 Ohioans sitting in our prisons today.¹¹ This places our prisons at over 130% of capacity.¹² In the past decade alone, we have seen a 12% increase in Ohio’s prison population, despite a 30 year low violent crime rate.¹³ Between 1980 and 2016, the state prison population nearly quadrupled.¹⁴

Over the past decade, Ohio legislators have taken more steps to reduce the growing prison population, with varying degrees of success. Through programs like Targeted Community Alternatives to Prison (TCAP), Ohio has made successful interventions to move more low-level nonviolent offenders from prison into community-based alternatives.¹⁵ However, many other reforms have never been fully implemented or funded by the legislature, and our prisons remain over capacity.¹⁶

While efforts are needed to reduce the prison population, special attention must also be focused to reducing racial disparities in our prison system. Racial disparities could even increase if policymakers fail to address the racial bias and discrimination in the enforcement of our practices and policies. An example of this can be seen in New Jersey, which has led the nation in reducing its prison population.¹⁷ While New Jersey has decreased its prison population by nearly 35 percent over the past twenty years, they have the nation’s highest Black/White disparity rate for incarceration.¹⁸ Black people in New Jersey are more than 12 times as likely to



be imprisoned as White people.¹⁹ In order to address these disparities, the New Jersey legislature adopted a law that would require racial impact statements of the projected impact of any proposed criminal justice policy changes.²⁰ The addition of racial impact statements can help policymakers see whether or not a proposed policy change will reduce racial disparities or perpetuate them.

Racial disparities exist at every level of the criminal justice system—from police stops, to arrests, to incarceration. In Ohio, Black Ohioans are only about 13 percent of the population but make up 44 percent of those imprisoned.²¹ Black Ohioans are also more likely to be arrested than White Ohioans for similar offenses, and are incarcerated at nearly six times the rate of White Ohioans.²² In order to address these disparities, criminal justice reform efforts must go beyond simply reducing the prison population. Other policy changes must be implemented, such as adopting racial impact statements, reducing incarceration pre-trial through bail reform, addressing the policies and practices among enforcement agencies, and mitigating instances of bias at discretionary points in the justice system.

OHIO ISSUE 1

Issue 1 provides voters with a unique opportunity to reform Ohio's criminal justice system via a constitutional amendment. If passed, Issue 1 has the potential to reduce the prison population and provide individuals and communities with more access to treatment and mental health services. However, some believe that criminal justice reform should be left up to the legislature.

This brief will not dive into whether or not Ohioans should vote for Issue 1, but it will discuss areas where reforms could have the potential to impact the prison population and address racial disparities. Several states across the country have recently implemented policies to address mass incarceration and reverse the consequences of the War on Drugs. While Issue 1 may represent a step in that direction, all Ohioans can and should do more to work with policymakers to ensure that we are addressing disparities at every level of the criminal justice system.

Issue 1 has four main components: **1)** reclassify certain drug possession felonies to misdemeanors, **2)** prohibit prison for probation violations, **3)** expand earned credit for rehabilitation in prison, and **4)** invest the savings into community health.²³

1

RECLASSIFY CERTAIN LOW LEVEL, NONVIOLENT DRUG POSSESSION CHARGES FROM FELONIES TO MISDEMEANORS

Any drug-possession offense that would currently count as a fourth or fifth degree felony would be reclassified as a misdemeanor—making those charged with one of these offenses ineligible for prison. The first two convictions for these new misdemeanors would also be ineligible for jail time. Additionally, this provision applies retroactively—which means that currently or formerly incarcerated individuals with one of these fourth or fifth degree felony conviction on their records will have the opportunity to apply for reclassification. All drug trafficking felonies would remain felonies.²⁴

Potential Impact in Ohio

There are roughly 2,600 Ohioans currently in prison for drug possession as their most serious offense.²⁵ If Issue 1 passes in November, many of these Ohioans would be eligible to apply to have their felony convictions reclassified and have the opportunity to be released from prison.

Issue 1 follows in the footsteps of several other states that have implemented similar criminal justice reform efforts either through a ballot initiative or the state legislature. Since 2014, five states (Alaska, California, Connecticut, Oklahoma, and Utah) have reclassified certain drug possession offenses from felonies to misdemeanors.²⁶

Figure 1: Reforms to Reclassify Drug Possession since 2014

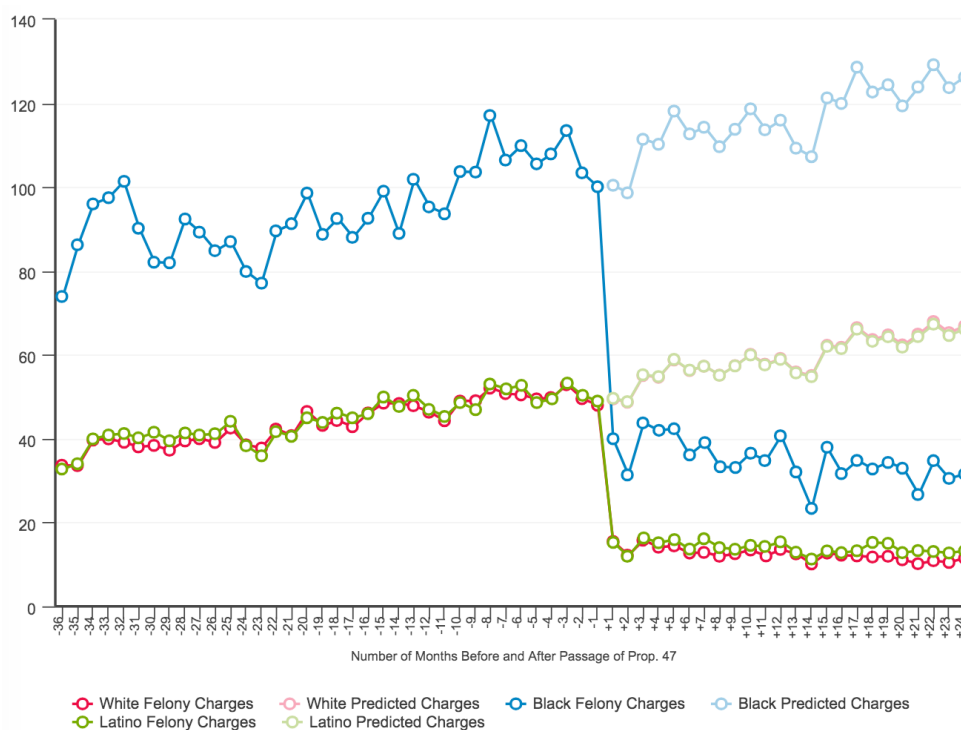
State	Reform type	Title (year)	Vote count
Alaska	Legislation	Senate Bill 91 (2016)	16-2 Senate 28-10 House
California	Voter referendum	Proposition 47 (2014)	60% Yes 40% No
Connecticut	Legislation	House Bill 7104 (2015)	23-13 Senate 96-4House
Oklahoma	Voter referendum	State Question 780 (2016)	58% Yes 42% No
Utah	Legislation	House Bill 348 (2015)	23-0 Senate 67-2 House

Source: Urban Institute. Reclassified: State Drug Law Reforms to Reduce Felony Convictions

Reductions in the prison population in California, Utah, and Connecticut have occurred as the result of the passage of their drug reform laws.²⁷ It is expected that there will be reductions in Alaska and Oklahoma as well.²⁸

The defelonization of drug offenses also has the potential to reduce racial disparities in the criminal justice system. After the passage of Proposition 47 in California, the state saw a nearly 75 percent decrease in all felony drug arrests and reduced disparities of drug arrests between blacks and whites.²⁹

Figure 2: Felony Drug Arrest Rates per 100,000 Population



Source: Racial/Ethnic Disparities in Arrests for Drug Possession After California Proposition 47, 2011–2016

However, racial disparities did not decline across all stages of the criminal justice system and varied across the state. In a study by the Public Policy Institute of California that evaluated the impact of Prop 47 in 12 counties in California, researchers found that while there was a decline in jail bookings across all racial and ethnic groups, racial disparities remained among Black arrestees.³⁰ Meanwhile, a post-Prop 47 study on the impact on the criminal justice system in San Francisco found that racial disparities declined in the local population across all case outcomes, including in jail bookings, dropped cases, convictions, and sentencing.³¹

Of the states that have recently reclassified their drug reform laws since 2014, California was the only state that had its law apply retroactively.³² This means that currently or formerly incarcerated individuals are eligible to apply to have one of these past drug possession felony convictions reclassified to a misdemeanor. Ohio's Issue 1 also applies retroactively.

Retroactive felony reclassification could have a significant impact on alleviating some of the past harms from the War on Drugs. People of color are disproportionately charged with felony convictions, which lead to a variety of disparities in other outcomes.³³ Felony convictions mean less access to opportunities, such as employment or other barriers.³⁴ In Ohio, people with felonies face hundreds of collateral sanctions that restrict their rights to housing, employment, education, family involvement, and more.³⁵

If Issue 1 passes in November, it will be imperative that there is a system in place to ensure that people with past felony convictions for one of these drug possession offenses are aware that they are eligible to apply for reclassification. Since the passage of Prop 47 in California, over 350,000 petitions for resentencing or reclassification have been filed in the courts.³⁶ There are an estimated 1.5 million Californians that might be eligible to petition for reclassification.³⁷ Initially, Prop 47 had a three-year time limitation for petitions or applications, but the law was amended to give petitioners until November of 2022 or later if there is a good cause.³⁸ Ohio may need to consider similar adjustments should Issue 1 be implemented.

2

PROHIBIT PRISON FOR PROBATION VIOLATIONS THAT ARE NOT NEW CRIMES

Rather than incarcerating people for minor or technical probation violations, this provision of the amendment stipulates that courts should each propose and follow their own “graduated responses” for technical probation violations, but that those responses cannot include prison time. “Graduated responses” refers to an accountability system of both sanctions and incentives.³⁹

Potential Impact in Ohio

Ohio has the third-highest adult probation rate in the country, with 2,706 per 100,000 adult residents.⁴⁰ In 2015, one in 48 Ohio residents were on probation.⁴¹ When individuals violate the terms of their probation, they can be sent back to prison. Today, nearly 23 percent of the individuals entering Ohio’s prisons (roughly 4,500) are sent there as a result of technical probation violations, as opposed to new crimes.⁴² This means that an individual on probation can be sent to prison for a technical probation violation such as missing a meeting with a probation officer or failing a drug test.⁴³ With the passage of Issue 1, no longer would people be sent to prison for probation violations that are not new crimes.

Reforms to our probation system have the potential to reduce the current prison population and address racial disparities. Research shows that people of color return to prison more often than whites for technical violations.⁴⁴ Much of this may be due to racial bias that manifests during the degree of discretion given to probation officers at this decision point to decide whether or not to send an individual back to prison.⁴⁵ The restriction of incarceration for technical violations would eliminate this decision point.

People of color are also more likely to remain on probation longer than similarly situated White offenders.⁴⁶ The longer the terms of supervision, the higher the chance of committing a low-level technical violation of conditions that lands an individual back in prison.⁴⁷ This failure to reintegrate successfully into society limits an individual’s access to opportunity.

3

EXPAND EARNED CREDIT FOR REHABILITATION IN PRISON

This provision of the amendment would expand Ohio’s current earned-credit program from the potential to earn up to an 8 percent reduction of an individual’s prison sentence to 25 percent if an individual participates in certain rehabilitation and educational programming. This does not apply to those “serving sentences of death or life without the possibility of parole, nor to individuals serving sentences for murder, rape, or child molestation.”⁴⁸

Potential Impact in Ohio

Issue 1 would significantly expand Ohio’s earned credit program. If passed, the reforms would likely incentivize more prisoners to participate in rehabilitative programming and reduce the state’s prison population.

Research shows that earned credit programs help to incentivize rehabilitation and can reduce recidivism among offenders.⁴⁹ Increasing access to earned credit can also alleviate some of the negative impacts of “tough-on-crime” policies, which have led to harsher prison sentences and disproportionately affect people of color in the criminal justice system.⁵⁰

However, expanding earned credit on its own will not be enough to guarantee that everyone gets the full benefit of the program. Since there is currently no notice requirement outlined for Ohio’s earned credit program, some prisoners may not know that they are eligible to receive earned credit for early release.⁵¹ Thus, efforts should be made to notify eligible prisoners of any opportunities for earned credit.

Attention must also be paid to the potential for unequal access to program participation in earned credit. While Issue 1 expands earned credit program opportunities, the Ohio Department of Rehabilitation and Correction still has some discretion in determining a prisoner’s eligibility and can revoke a prisoner’s previously earned credit if they violate certain prison rules.⁵² As is the case with discipline decisions regarding probation violations, racially disparate outcomes could emerge as a result of some of the discretionary decisions regarding who is eligible to participate in programming. Institutions should keep track of who participates in earned credit opportunities and make sure steps are taken to address unequal access to program participation.

4

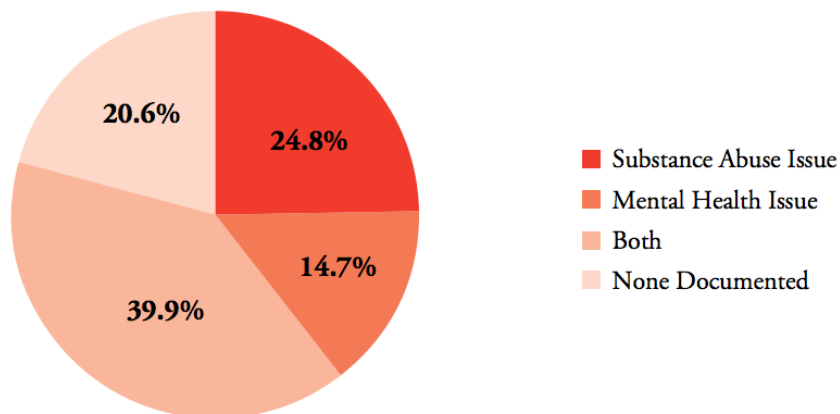
REINVEST THE SAVINGS INTO COMMUNITY HEALTH AND TREATMENT

This provision of the amendment would reinvest potential savings from not incarcerating individuals into rehabilitative programs and community health. The formula for how saved funds will be used is outlined in detail in the amendment. 70% of funds will go toward drug treatment programs via a competitive grant process. 15% will be disbursed through the Office of the Attorney General for trauma recovery services for victims of crime, with the remaining 15% to the criminal justice system to aid in implementing the new reforms.⁵³

Potential Impact in Ohio

Nationwide, approximately 79 percent of today’s prisoners suffer from either drug addiction or mental illness, and 40 percent suffer from both.⁵⁴ In Ohio, over 90 percent of those admitted into Ohio’s prisons in 2014 noted a history of drug abuse.⁵⁵ Alternative interventions such as community-based treatment are often more effective options than prison.

Figure 3: Substance Abuse & Mental Health Issues, State & Federal Prisoners (2014)



Source: Brennan Center for Justice. "How Many Americans are Unnecessarily Incarcerated?"

It is difficult to predict the exact estimates for the potential savings that would result from the passage of Issue 1. Estimates have ranged anywhere from \$25 million to \$136 million per year in savings.⁵⁶ Depending on the amount in savings, the reinvestment of those dollars could help to steer more money and focus into local community-based treatment and trauma recovery services, especially in communities that have been left behind.

The 70 percent of the saved funds would be reallocated via a competitive grant program through the Ohio Department of Mental Health and Addiction Services, but the details are limited on exactly what this program would look like. This presents both an opportunity as well as an area for caution. Policymakers and communities should work to ensure that the funding model is equitable and that eligible organizations are made aware of their ability to apply for funding.

15 percent of the funds will be reallocated to victim trauma recovery services “to reduce further victimization of underserved victims of violent crime.”⁵⁷ While this provision of the amendment does not specifically define “underserved victims of violent crime,” this may serve as an opportunity for stakeholders to call for investments into traditionally under-resourced communities. Research shows that underserved victims of violent crime are more likely to be low-income and/or people of color.⁵⁸ These victims are often unaware of all of the services that may be available to them.⁵⁹ Community stakeholders should advocate for traditionally marginalized communities to be at the table when it comes to funding decisions and where these funds are distributed. Reinvesting in underserved communities could help alleviate unaddressed trauma in families and neighborhoods.

The remaining 15 percent of funds saved is stipulated to go back into the criminal justice system to implement the new reforms as a result of the amendment. However, some claim that this amount will not be enough to offset potential costs shifted to local governments and courts as a result of the new reforms.⁶⁰

While the exact estimates of savings of Issue 1 are unclear, communities will still need to advocate for even more money to be invested into treatment programs. Issue 1 explicitly states that any money saved and reinvested is designed to “supplement, not supplant, funding obligations of the state and local governments.”⁶¹ The addiction crisis has ravaged our communities, and there are currently not nearly enough treatment options available to meet the need. Supporting and expanding community-based treatment options will require significant investments that go beyond the scope of Issue 1.

Conclusion

ISSUE 1 HAS STIRRED GREAT DEBATE AND CONTROVERSY among those on both sides of the issue. Both proponents and opponents of Issue 1 tend to agree that as a society we should focus on treatment over incarceration for low-level offenders who are addicted to drugs. However, disagreement exists over the best way to implement reforms to our criminal justice system.

Many communities are rightfully asking the question of *why is the opiate epidemic the catalyst for modern criminal justice reform?* At the core of this question is the notion that broad-sweeping reform efforts are much more politically feasible when the issue also impacts communities with privileged identities—whether that be race, economic status, or party affiliation. In the future, we should not wait for collective tipping points to address systemic inequities because policies that disproportionately harm marginalized communities harm us all.

Now that reform efforts are in motion, it is critical that a racial lens be applied to policies moving forward. A reduction in racial disparities in the criminal justice system should not be an assumed outcome of reform. Disparate outcomes will likely re-emerge in the health care system, community based corrections, and all other institutions without intentional effort paid to undoing our legacy of racism and discrimination. A more equitable system will require explicit interventions to address systemic discrimination and interpersonal biases at every level.

Regardless of the outcome in November, communities must demand that those implementing Issue 1 or other criminal justice reform efforts be held accountable to reducing racial disparities and repairing the intergenerational harm caused by mass incarceration and decades of disinvestment.

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