

# THE STATE HOUSE TO PRISON PIPELINE

A review of criminal justice policy in the Nebraska Legislature 2006-2016



By Anna Holmquist, ACLU Pre-Law Intern  
with Spike Eickholt

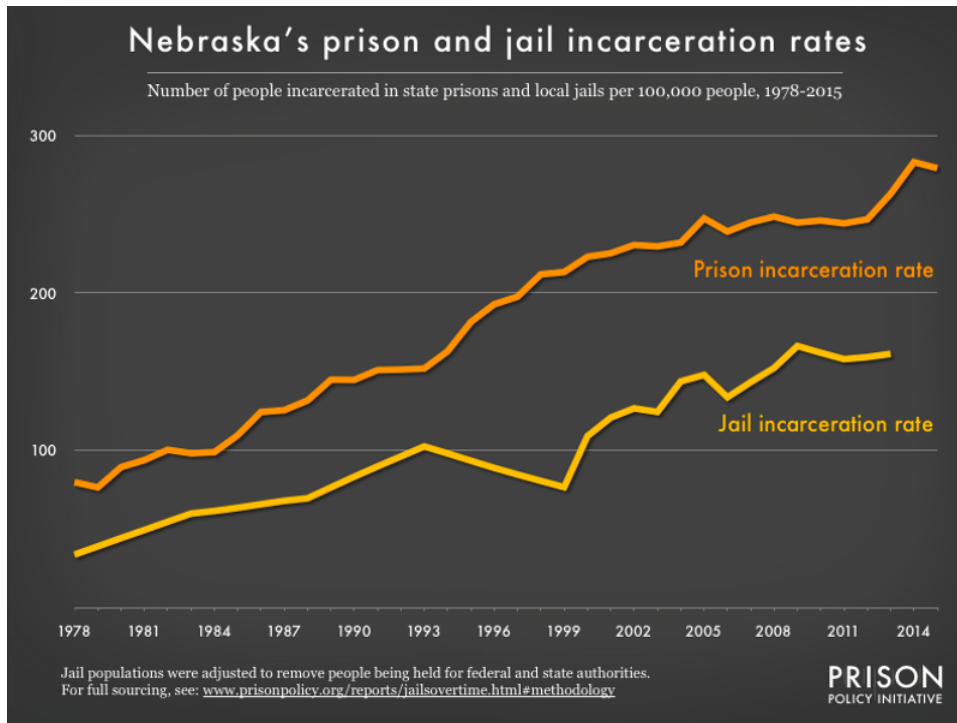
## INTRODUCTION

The ACLU of Nebraska is a non-profit, non-partisan organization that works to defend and strengthen the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through policy advocacy, litigation and education. For over fifty years, the ACLU of Nebraska has been a constant guardian for freedom and liberty fighting for the civil rights and civil liberties of all Nebraskans. The ACLU of Nebraska intentionally prioritizes the needs of historically unrepresented and underrepresented groups and individuals who have been denied their rights; including people of color, women, LGBT Nebraskans, persons incarcerated and formerly incarcerated, students, and people with disabilities.

Nebraska's criminal justice policies have created a system of mass incarceration which hurts our communities and disproportionately impacts low income families and communities of color. Existing conditions violate the 8th Amendment's protection against cruel and unusual punishment and do not provide for meaningful transition back into our communities and our economy. The ACLU is leading the way to rethink and reform these policies and conditions through our campaign for Smart Justice to protect individual rights, reduce the taxpayer burden, and make our communities safer.

Existing "tough on crime" policies, particularly around punitive drug policies, have failed to achieve public safety while putting an unprecedented number of people behind bars and eroding constitutional rights. This system also erodes economic opportunity, family stability, and civic engagement during and after incarceration, and in many instances a criminal record becomes a life-long barrier to accessing basic human needs and ensuring individual and family stability.

## NEBRASKA OVERCROWDED PRISONS ARE IN CRISIS



For decades, Nebraska's incarceration rate has increased significantly, creating the current system of mass incarceration. This has resulted in the present overpopulated and under resourced prison system Nebraska has today. According to the U.S. Department of Justice, Nebraska's prison system is the second most crowded in the nation with some facilities 200+% and 300%+ over capacity. The system is designed to house approximately 3,275 people and is currently housing 5,278 people.<sup>2</sup> Nebraska has fostered a system of mass incarceration that is so unwieldy that almost one in ten Nebraska kids have had a parent in the criminal justice system. Moreover, in 2016 NDCS had over 300 staff vacancies.<sup>3</sup> With a significant excess of prisoners and too few staff to provide them the services they need, Nebraska's prison system remains one teetering on the brink.

Nebraska prisons are packed with far too many non-violent offenders. For example, there are 14% of prisoners serving time for drug offenses.<sup>4</sup> Another 21% percent are serving time for nonviolent offenses.<sup>5</sup> According to recent studies, Nebraska has the second highest rate of drug arrests even though it has among the lowest rates of drug overdose deaths or illicit drug use.<sup>6</sup> Nebraska's high prison population numbers are not in sync with other indicators

<sup>1</sup> <https://www.prisonpolicy.org/profiles/NE.html>

<sup>2</sup> [http://www.omaha.com/news/nebraska/nebraska-s-prison-population-is-declining-but-not-as-fast/article\\_3100fcd0-f95b-5efa-a1e5-0969eb3bf1f4.html](http://www.omaha.com/news/nebraska/nebraska-s-prison-population-is-declining-but-not-as-fast/article_3100fcd0-f95b-5efa-a1e5-0969eb3bf1f4.html)

<sup>3</sup> [http://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Inspector\\_General\\_of\\_the\\_Nebraska\\_Correctional\\_System/600\\_20160915-141014.pdf](http://nebraskalegislature.gov/FloorDocs/104/PDF/Agencies/Inspector_General_of_the_Nebraska_Correctional_System/600_20160915-141014.pdf)

<sup>4</sup> [https://www.corrections.nebraska.gov/sites/default/files/files/39/datasheet\\_2017\\_2nd\\_qtr.pdf](https://www.corrections.nebraska.gov/sites/default/files/files/39/datasheet_2017_2nd_qtr.pdf);

<sup>5</sup> [https://www.corrections.nebraska.gov/sites/default/files/files/39/datasheet\\_2017\\_2nd\\_qtr.pdf](https://www.corrections.nebraska.gov/sites/default/files/files/39/datasheet_2017_2nd_qtr.pdf)

<sup>6</sup> <https://wallethub.com/edu/drug-use-by-state/35150/>

of prison growth. Even though crime rates have declined, imprisonment in the state has not.

Overcrowding and understaffing have led to increased numbers of incidents including regular inmate and staff assaults, riots, and other scandals that have endangered prisoners and staff in NDCS facilities. Mass incarceration has also devastated the lives of countless individuals, families and communities, especially for people of color who bear the brunt of sweeping criminalization.

## REPORT METHODOLOGY

This report documents how the relentless, incremental and deliberate expansion of Nebraska's criminal laws over a ten-year period has fostered a system of mass incarceration. This system of mass incarceration has resulted in extreme overcrowding which fuels the crisis in our prison system and hurts countless Nebraskans, especially people of color. This system of mass incarceration also comes with an expensive, unnecessary, and unsustainable price tag for Nebraska taxpayers.

Legislators across the political spectrum are reflexively inventing new crimes and punishments. Bill after bill, legislators propose creating new criminal offenses, extending the scope of existing laws and lengthening prison and jail sentences. The sweeping expansion of criminal law into individuals' lives should concern all state leaders. It has created a bloated criminal code, clogged the justice system and driven mass incarceration—all while contributing very little to advancing our shared public safety goals.<sup>7</sup>

The ACLU of Nebraska reviewed legislation introduced and enacted over the last ten years. Nebraska legislators have historically proposed bills, and continue to propose bills, that create new criminal offenses, extend the scope of existing laws and increase criminal penalties, exacerbating the prison population crisis. The sweeping expansion of criminal laws should concern elected officials of all parties. It has created a complex criminal code, containing overlapping crimes with a multitude of penalties. Most of the legislation--both proposed and enacted--increase criminal penalties, many of these on a felony-level. This has contributed to the growth of the prison population.

Research included a review of legislative journals from the 2007-08, 2009-10, 2011-12, 2013-14, and 2015-16 legislative sessions, using the subject index to locate all bills relating to crimes and punishments, criminal procedure, criminal code, correctional facilities and inmates, the department of correctional services, and those that were referred to the Judiciary and Transportation and Telecommunications Committees. It also included an online review of all introduced legislation from the 2017 session through the website of the Nebraska legislature.

Responsibility for this crisis does not solely rest on state policymakers. Other key stakeholders have advocated for creating new crimes and boosting existing penalties. Current and past attorneys general and governors have supported many of the bills described in this report that contributed to mass incarceration. Local prosecutors and

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<sup>7</sup> <http://www.acluohio.org/wp-content/uploads/2017/02/StatehouseToPrisonPipeline2017.pdf>

advocacy groups have also supported efforts to boost penalties and broaden crimes.<sup>8</sup> Any effort to counter this trend will similarly require support from these same actors.

## THE STATEHOUSE TO PRISON PIPELINE

Considered alone, a bill to create a new crime or to increase the penalty for an existing crime might seem straightforward and innocuous to the growth of the prison population. Focusing on the categories of crime individually does not always reflect significant prison numbers. However, when taken in the aggregate, year after year, the lawmaking practice of continually creating new crimes and lengthening sentences for existing crimes causes the tide of imprisonment to rise. It is mass incarceration by a thousand cuts.

The Statehouse functions, whether legislators appreciate it or not, as a factory that produces new crimes and longer sentences supporting a flow of defendants through a legal pipeline emptying into our jails and prisons. Certainly, some crimes are heinous and deserve significant criminal sanction, but many of the recently enacted laws use incarceration to address public health issues related to addiction and similar issues. Many of these penalties are disproportionate for individuals and society as a whole as the prison system is not designed nor able to deal with these issues effectively.

Additionally, increasing penalties for existing offenses directly contributes to the prison population. This is particularly the case with mandatory minimum sentences. Mandatory minimum sentences also shift power away from independent judges in favor of a one size fits all approach. Rather than allowing for a judge to make an individual determination on a case-by-case basis to ensure that the "time fits the crime," mandatory minimums give police and prosecutors extraordinary power. In the real world, over-criminalization puts a thumb on the scales of justice in ways that lead to injustice and mass incarceration.<sup>9</sup>

From 2007 to 2017, the Nebraska Unicameral introduced 163 bills that would either increase penalties for existing crimes or create new offenses if enacted into Nebraska law. Many of these bills received strong support from law enforcement, prosecutors, and others interested parties in the criminal justice system. 38 of the proposed bills were passed into law. Many of these bills concerned nonviolent crimes. In nearly the same time frame (2005-2015), the prison population rose by 1,000 inmates.<sup>10</sup> There is a clear association between increasing penalties, broadening offenses, and an increase in prison growth.

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<sup>8</sup> <http://www.ncnewspress.com/article/20130110/NEWS/130119981>  
[http://www.omaha.com/news/legislature/sex-trafficking-edible-marijuana-are-new-nebraska-ag-s-top/article\\_32e6a7c7-56f5-5e50-a928-915fb6e4b08d.html](http://www.omaha.com/news/legislature/sex-trafficking-edible-marijuana-are-new-nebraska-ag-s-top/article_32e6a7c7-56f5-5e50-a928-915fb6e4b08d.html)  
[http://www.kearneyhub.com/news/regional\\_news/bruning-to-crack-down-on-patent-trolls-stalkers/article\\_5bd2ca5a-7890-11e3-812a-001a4bcf887a.html?mode=jqm\\_gal](http://www.kearneyhub.com/news/regional_news/bruning-to-crack-down-on-patent-trolls-stalkers/article_5bd2ca5a-7890-11e3-812a-001a4bcf887a.html?mode=jqm_gal)

<sup>9</sup> <http://www.acluohio.org/wp-content/uploads/2017/02/StatehouseToPrisonPipeline2017.pdf>

<sup>10</sup> Department of Correctional Services Special Investigative Committee LR 34 (2015) Report to the Legislature, December 22, 2016

For illustration, the Legislature passed LB 63 in 2009, an omnibus bill that increased penalties for an array of existing crimes and created or broadened a series of other offenses. LB 63 increased penalties for fifteen categories of existing felony offenses, several of which were boosted into the mandatory minimum category of offenses. LB 63 also created at least four different criminal offenses, targeting criminal conduct that was arguably already prohibited in existing statutes. The bill was supported by the Attorney General, the County Attorneys Association, law enforcement, and the city of Omaha. This omnibus bill received overwhelming support from the Legislature and passed on a 43-4 vote.

Some effort was made to moderate or reform the criminal code and the criminal justice and prison system in the same timeframe. From 2007-2017, 73 bills were introduced by Nebraska legislators that could be considered as promoting smart justice reform. 17 of the proposals were passed into law in some form. Any step toward reform is a step in the right direction, but the numbers show that these bills, though well-meaning, have not created the change the system requires.

Even though state officials were becoming increasingly cognizant of the growing prison population crisis, there was still a difference of 90 bills which were introduced to seek increases in penalties. If all of these bills had passed, the likely result would have been even greater growth in the prison population. There is an undeniable correlation between the increase in penalties and the growth of the prison population.

Though there has been a greater focus on the problems with Nebraska's prisons in recent years that has included some legislative reform, efforts have not yet had a significant impact on the prison population. In 2014, LB 605 was passed with the goal to reduce prison numbers by 1,000 by 2020 and to supervise 300 more prisoners through parole each year. Unfortunately, numbers have only marginally decreased; each year since the legislation has seen only about a 1% decrease in the prison population, drastically below the legislation's goal. Although the LB 605 reforms are focused on the appropriate factors, such as putting more nonviolent offenders on probation and parole, a lack of proper programming within the prison system has been an obstacle to the law becoming fully effective. A significant number of prisoners who are presently eligible for parole remain incarcerated, often because programming is unavailable. These inmates will subsequently "jam out", or complete their sentences without receiving programs and services to help address the root causes of their criminal behavior. This typically jeopardizes successful and positive reintegration into society and ultimately jeopardizes public safety.

## **SUCCESSFUL SMART JUSTICE REFORMS IN OUR SISTER STATES**

Other states have faced a similar overcrowding problem that Nebraska presently faces. Many of these other jurisdictions have implemented significant reforms to mitigate the problems of overcrowding and mass incarceration, typically by implementing a multifaceted and comprehensive reform to their court and prison systems. A consideration of these other states' experiences can provide models for Nebraska.

Georgia passed a series of policies that modified mandatory minimum sentences, expanded judicial discretion, provided education programming for prisoners, and "banned the box" so that former prisoners do not have to disclose their criminal histories in job applications. Georgia officials also invested in programs to reduce recidivism and rehabilitate low-risk and nonviolent offenders, like sending those suffering from mental illness and addiction to accountability courts where they can gain access to the treatment they need. Since 2012, these reforms have saved this state \$260 million and reduced their prison numbers by six percent.<sup>11</sup>

Mississippi--at one time the world's leading jailer--implemented many reforms that are projected to reduce prison numbers by 10% and save the state \$262 million over the next ten years.<sup>12</sup> These reforms included reducing mandatory minimums, shortening some sentences, reducing drug penalties, and expanding alternatives to prisons, such as drug courts.

Illinois passed a bill into law in June 2017 that provides protections for low-level offenders imprisoned due to their inability to post bail. The bill outlines five rights for defendants: presumption against monetary bail, counsel at a bail hearing, a new bail hearing within seven days, considering economic and social circumstances for release, and for time served to count toward bail.<sup>13</sup> This legislation is expected to reduce rampant overcrowding by 25% by 2025.<sup>14</sup>

In 2011, North Carolina worked with the Council for State Governments and adopted a comprehensive Justice Reinvestment Act, which was sweeping criminal justice reform legislation focusing on probation and alternatives to imprisonment. The law change lowered North Carolina's prison population by 8 percent, closed 10 prisons and saved the state \$560 million in incarceration-related costs while maintaining public safety.<sup>15</sup>

In the mid-2000s, the Texas prison population was skyrocketing. Texas prisons were at 97% of capacity in 2005. In 2010, the population reached an [all-time high](#) of more than 170,000 state and federal inmates. A consensus movement among conservatives, led by the Right on Crime campaign linked forces with traditionally liberal forces and implemented legislative change to address substance abuse with treatment rather than incarceration, and promoted parole, probation, and reentry programs. Other areas of common effort were significant bail reform, rehabilitation and treatment programs, and prosecuting youths through juvenile rather than adult courts were all fair game for collaboration. Instead of building

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<sup>11</sup> <https://csgjusticecenter.org/jr/ga/>

<sup>12</sup> [http://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_4203a3e4-4a04-11e7-a2a1-1bb38774f4c7.html](http://www.theadvocate.com/baton_rouge/news/politics/legislature/article_4203a3e4-4a04-11e7-a2a1-1bb38774f4c7.html)

<sup>13</sup> [https://www.ilnews.org/news/justice/first-bill-gov-rauner-signs-this-year-is-bipartisan-bail/article\\_2ead72ac-4d42-11e7-9a6c-ef3028918683.html](https://www.ilnews.org/news/justice/first-bill-gov-rauner-signs-this-year-is-bipartisan-bail/article_2ead72ac-4d42-11e7-9a6c-ef3028918683.html)

<sup>14</sup> <https://www.usnews.com/news/best-states/illinois/articles/2017-03-11/new-law-aimed-at-reducing-illinois-prison-population>

<sup>15</sup> <http://www.newsobserver.com/opinion/op-ed/article121874508.html>



new prisons, which is what many expected in 2010, the state closed six of them and saved \$33 million in operating costs alone.<sup>16</sup>

These successful examples from other states show that the solution to slowing this pipeline starts by focusing at the front-end of it--the legislative policy and legislative response to making crimes and creating penalties for crimes.

## RECOMMENDATIONS TO TAME THE NEBRASKA STATEHOUSE TO PRISON PIPELINE

1. Stop Making New Crimes. Nebraska lawmakers should adopt a “first, do no harm” mentality with regard to our prison system. They need to be very skeptical when considering any legislation that creates new crimes or that increases penalties. Merely increasing penalties for crimes does not increase enforcement or detection rates nor does it necessarily aid in the prosecution of crimes. Similarly, senators should be cognizant in creating new crimes that overlap or duplicate existing crimes. Such duplication can lead to prosecutorial over-charging and layering of multiple crimes for singular criminal acts, which leads to inflated sentences.
2. Sentencing Reform. Nebraska lawmakers should right-size our “get tough on crime” mandatory minimum sentencing laws. Mandatory minimums contribute directly and indirectly to the growth in our prison population. Mandatory minimums contribute directly because mandatory sentences are lengthier and inmates serving mandatory minimums are not parole eligible and cannot earn good time on their time. Mandatory minimums and habitual criminal laws also contribute indirectly because they are often used as leverage to get defendants to plead to charges that will result in significant sentences.
3. Alternatives to Prison. One way to reduce prison population is to send fewer people to prison. Nebraska lawmakers should continue to devote a laser focus to front-end sentencing reforms and criminal justice diversion programs that have proven successful in other states. These reforms include but are not limited to eliminating or mitigating the impacts of mandatory minimums, habitual criminal laws, indeterminate sentencing reforms, problem solving courts, and mental health and substance abuse treatment options. The Legislature should continue its investment in problem-solving Courts, such as Drug Courts, Mental Health Courts, or Veterans Courts. Existing pretrial diversion programs should be broadened to allow for more participants. These alternatives are demonstrably more cost-effective than mass incarceration and participants generally have lower recidivism rates.
4. Innovations to Probation and Parole. Within the alternative to incarceration, Nebraska policymakers should consider innovations in probation or parole. For instance, California developed a concept of “non-revocable” parole, which is a lower-level of supervision for non-

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<sup>16</sup> <http://rightoncrime.com/2017/08/ten-years-of-criminal-justice-reform-in-texas>; <http://www.businessinsider.com/texas-criminal-justice-reform-conservatives-liberals-bipartisan-alliance-2017-7>.

violent offenders.<sup>17</sup> This lower-level of monitoring low-risk offenders saved the state a significant amount of money in saved prison beds and in lower monitoring costs.

Similarly, Nebraska lawmakers can look to broaden its furlough and supervised-release laws in an effort to allow for the release of prison inmates who are not parole-eligible. Inmates who are not parole-eligible cannot be within the supervision of the Office of Parole. They can, however, be supervised in the community by the Department of Corrections. Priority should be placed on releasing elderly or sick inmates on a medically or humane release basis in order to focus on inmates within the prisons. Inmates who are released for medical reasons are often better-served in the community. Additionally, such inmates are costly and staff-intensive to manage in a prison facility.

5. Bond Reform. Nebraska lawmakers, judges, and prosecutors must continue to reform debtors' prisons and the recent increases in county jail populations across the state. Growing jail populations are a different version of mass incarceration. Many inmates in jails are pretrial detainees who cannot make bond. Those jail inmates who are unable to make bond are more likely to be sentenced to prison.<sup>18</sup> Senators should continue to build on their efforts to address these "debtors' prisons" by continuing bond reform, which began with LB 395, passed in 2017 in LB 259, which seeks to avoid unnecessary incarceration in our jails. The Legislature should also continue to provide for alternatives to "sitting out fines" in jails, by building on LB 145 also passed in 2017 in LB 259, which encourages courts to allow low-level offenders satisfy fines by community service and other means rather than have them be incarcerated. Judicial branch education should be conducted on these topics and other stakeholders need to be engaged.

6. Re-entry Opportunities. Nebraska lawmakers must establish and invest in a robust re-entry agenda to ensure meaningful supports for retuning citizens to improve individual outcomes and to lower recidivism. Successful reentry for former offenders significantly reduces recidivism.<sup>19</sup> The "end" of the pipeline should provide for a meaningful way for offenders to complete their sentences and move on with their lives in a constructive, law-abiding way. These legislative efforts include broadening set-aside and expungement laws for former offenders to "clean up" their records. Other key reentry supports include removing barriers to employment through an expansion of "ban-the-box" legislation and occupational licensing reform. Nebraska lawmakers should remove barriers to civic engagement and revisit the arbitrary two-year ban on ex-felon voting rights. Finally, the state should provide access to public benefits so that former offenders can seek assistance when they need it so they do not revert to criminal activities.

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<sup>17</sup> [http://www.cdcr.ca.gov/parole/Non\\_Revocable\\_Parole/index.html](http://www.cdcr.ca.gov/parole/Non_Revocable_Parole/index.html)

<sup>18</sup> <https://qz.com/900777/the-us-bail-system-punishes-the-poor-and-rewards-the-rich/>

<sup>19</sup> [https://www.prisonpolicy.org/research/recidivism\\_and\\_reentry/](https://www.prisonpolicy.org/research/recidivism_and_reentry/)



## CONCLUSION

Nebraska has had unprecedented prison growth in the last several years. While the causes for this growth can be traced to a number of factors, one contributing factor is the legislative policy regarding criminal law and criminal justice. Existing "tough on crime" policies have failed to achieve public safety while putting an unprecedented number of people behind bars and eroding constitutional rights. This practice contributes to our present system of mass incarceration and prison over-crowding crisis. However, the solution to this problem is within reach of policy-makers and involves a series of steps to comprehensively reform our present system of mass incarceration. One critical step is slowing the Statehouse to Prison Pipeline.