The People's Commission
to Decriminalize Maryland

INTERIM REPORT 2021

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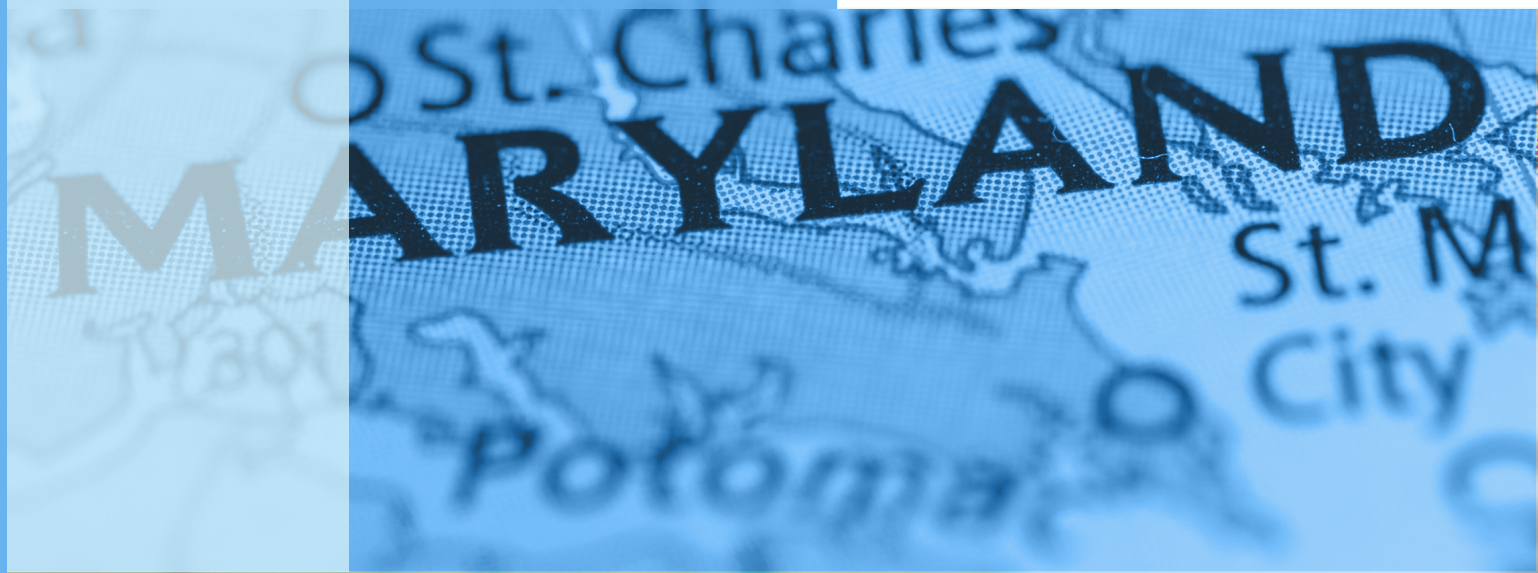
TO DECRIMINALIZE MARYLAND



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About the **People's Commission**

Open Society Institute-Baltimore convened the People's Commission to Decriminalize Maryland (the People's Commission) to reduce the disparate impact of the justice system on youth and adults who have been historically targeted and marginalized by local and state criminal and juvenile laws based on their race, gender, disability, or socio-economic status. Through a statewide collaboration with organizations and affected individuals, the People's Commission conducted an examination of the existing Maryland code and court systems to identify the specific ways that criminal laws disproportionately harm historically marginalized groups.

Beyond identifying the issues, the groups worked together to envision the ways the law can be changed, rewritten, or eliminated altogether to reduce disparate impacts, reduce the prison industrial complex, and improve public health, community safety, and overall human flourishing. As the state of Maryland and jurisdictions around the nation grapple with calls to disinvest from law enforcement, it is crucial that we also examine the criminal laws police are tasked to enforce and consider how we as a state can find more effective ways to achieve community well-being and safety.

ENDORSING ORGANIZATIONS

Advocates for Children and Youth | Baltimore Action Legal Team | Baltimore Harm Reduction Coalition | Baltimore Safe Haven | Baltimore Youth Arts | Cause Engagement Associates | Center for Children's Law and Policy | Community Law in Action | Disability Rights Maryland | FreeState Justice | Health Care for the Homeless | Homeless Persons Representation Project | Job Opportunities Task Force | Justice Policy Institute | Maryland Justice Project | NARAL Pro-Choice Maryland | National Alliance on Mental Illness - Maryland | Open Society Institute - Baltimore | Out for Justice | Power Inside | Public Justice Center | Rebuild, Overcome, and Rise (ROAR) Center at University of Maryland | Baltimore (UMB) School of Law - University of Baltimore | Sex Workers Outreach Project - Baltimore | University of Maryland School of Law | Women's Law Center of Maryland | Youth as Resources | Youth Empowered Society

What is **Decriminalization?**

Our commission defines decriminalization as the elimination of policies and practices that expose marginalized communities to increased justice involvement primarily because of behaviors and conduct that arise from their status or identity as opposed to a legitimate public safety threat or offense. Decriminalization also includes the implementation of policies and practices that do not rely on the police, courts, and corrections to respond to this category of behaviors and conduct. This includes an increase in the role of community organization, harm reduction efforts, and systems that help individuals obtain their most basic needs.

WHY DECRIMINALIZATION?

Throughout United States history, criminal laws have been used to stamp out social problems and "undesirable" populations. Those struggling with substance abuse, the mentally ill, and people of color have borne the brunt of this system. This means that the majority of those who are arrested and ultimately incarcerated or otherwise involved in the criminal-legal system are facing one or several of these issues.

The over-reliance on criminal laws to accomplish "law and order" in our nation has led to America being one of the most carceral countries in the world. The United States holds the world record for rate of imprisonment, surpassing rates in Russia and China.[i] Today, in the U.S., 2.3 million people are being held in state prisons, federal prisons, juvenile correctional facilities, immigration detention centers, civil commitment centers, military prisons, and psychiatric hospitals.[ii] The most disturbing aspect of the phenomenon of mass incarceration is how it dramatically and disproportionately affects poor people of color. African Americans comprise 14% of the U.S. population, but they make up a staggering 40% of the nation's prison population.[iii] As for the poor, a study on the incomes of incarcerated people found that they had a median annual income 41% less than non-incarcerated people of similar ages.[iv] Instead of accomplishing a safer and more humane society, criminalization in America has served to wrongly ensnare people whom U.S. history has deemed undesirable into the system (courts, jails, and prisons) and assign them second-class status by labeling them "criminals."

Maryland is not immune from this phenomenon. According to the most recent data available, at least 169,230 people in Maryland are behind bars or are under some sort of criminal-legal supervision.[5] This includes pre-trial detention, probation, and parole. Of those involved in the criminal-legal system, people of color are disproportionately represented.[6] In Maryland, the poorest communities also pay the most into the criminal-legal system. For example, a study found that Baltimore City, where 25% of families live below the poverty line, has the highest number of individuals paying bail in the entire state.[v]

Maryland spends over $55 million on its criminal-legal system (e.g. police, courts, jails, and prison facilities).[vi] Yet, despite these expenditures on police, courts, and "correctional facilities," the same social problems persist — poverty, homelessness, racial injustice, and over-policing. This shows that using the criminal legal system to address social problems is ineffectual and costly. It costs not only tax dollars, but the lives and communities of those who are unnecessarily enmeshed in the system for petty crimes.

That is why the People's Commission is calling for decriminalization in Maryland. The ordinances and statutes identified in the section below fail to accomplish community safety and security. These laws only serve to feed and perpetuate America's ineffectual system of mass incarceration.

The most disturbing aspect of the phenomenon of mass incarceration is how it dramatically and disproportionately affects poor people of color.

What You Will Find in This **Report**

This report will focus primarily on highlighting statutes that serve to further marginalize already marginalized populations. It will also provide recommendations on how to eliminate this disparate impact and accomplish greater public safety, health, and well-being in our communities.

Additionally, the People's Commission conducted an in-depth analysis of records culled from the Maryland Judiciary Case Search Database, using the Case Harvester (CH) tool developed by Open Justice Baltimore (OJB).[vii] This analysis includes records from cases filed or heard between January 1, 2018 and December 31, 2019. The data examined cases in Baltimore City, Anne Arundel County, and Prince George's County. Various data points from this project will be included in the sections below.

Unlike recommendations from other task forces and commissions, these recommendations reflect the voices of those who are most impacted by Maryland's current criminal and juvenile code. As a result, the Commission believes the recommendations below will result in outcomes that will be most impactful for those who are disproportionately marginalized and stigmatized by the criminal-legal system, and lead to a better way of life for all. Now more than ever is the time to take inventory on the effects of Maryland's system of criminal laws and take action for change.

Five Priorities

DRUG POLICY

Decriminalizing drugs means eliminating criminal and financial penalties associated with possession and use of drugs and pursuing public health-oriented policies to address issues of chronic substance abuse and addiction.

HOMELESSNESS

Decriminalizing homelessness means reducing the harm of criminalizing people who have to live their private lives in public due to being unhoused and reallocating resources from criminalization into more equitable housing options and community-based crisis response services.

POVERTY

Decriminalizing poverty means eliminating the laws that reinforce cycles of poverty by inflicting criminal-legal sanctions (incarceration, loss of license, excessive fees, and criminal records) on individuals because of their inability to pay or economic status.

SEX WORK

Decriminalizing sex work means eliminating all criminal penalties for prostitution under 11-303, 11-304, 11-306, and 11-307 and passing administrative policies to protect those engaged in sex work from exploitation.

YOUTH

Decriminalizing youth means amending and eliminating laws that bring young people—disproportionately youth of color—to the attention of the justice system for behaviors that are either typical in adolescence or a reflection of how we have marginalized large segments of Maryland's youth.

01

Drug Policy

The Problem

Dozens of statutes currently exist that assign criminal penalties for individuals identified as using, selling, or in possession of drugs. Since the "War on Drugs" championed by the federal government in the 1970s, the United States' approach to drug use has been to stamp it out by creating specialized police forces to identify, arrest, and incarcerate those who are found to be associated with them.[viii]

This targeted "criminal justice" approach toward drug prohibition has left an enduring and pernicious health toll on those communities who found themselves hyper-policed and -incarcerated as a result. Drug usage is not a criminal problem, it is a health problem. Criminalizing drug users worsens the social and economic determinants that lead to unhealthy communities.[ix]

One arrest can derail a person's life. Particularly if that person is struggling with substance abuse. Criminalizing an individual who is dealing with drug problems is removing a son, daughter, father, sister, mother, friend, or employee from their community and making it even more difficult for them to subsequently get their lives on track and become sober.

When this happens in a concentrated portion of a city or town, it's not only the individual that suffers, but the community. The effects of removing large numbers of people out of under-resourced communities puts the social capital of that community into a state of constant flux. This process manifests in broader instability of local labor and housing markets. Criminalizing drug users also creates a substantial barrier to employment and receipt of social services (e.g. public housing, student loans, civic engagement through ballot voting, and food). This makes it harder to obtain healthcare and social services, job training, and higher earning wages, perpetually reinforcing economic disadvantage and these social determinants of poor individual and community health and safety.

Recently Oregon passed groundbreaking legislation decriminalizing the possession of all drugs. With this measure, the state acknowledged the failures of past efforts in the U.S. to decriminalize drugs and the need to try a better way.[x] While opponents feared that broad decriminalization efforts would encourage underage drug use, evidence from other communities who have decriminalized drug use do not show these effects. For example: In Portugal, full decriminalization has proven more humane and effective than criminalization. Because drug users don't worry about facing criminal charges, those who need help are more likely to seek and obtain it.[xi] Additionally, Portugal's overdose rate is five times lower than the average rate in the EU.[xii] Both of these figures are lower than the overdose death rate in Maryland, which is among the highest in the United States.[xiii] HIV infection rates among drug users in Portugal also dropped significantly since Portugal's decriminalization of drug in 2001.[xiv] These numbers demonstrate clear public health benefits to decriminalizing drug use in Maryland.

The Solution

The American Public Health Association and World Health Organization both support and recommend decriminalization of drug offenses as a policy stance to improve the social determinants of health for marginalized groups.[xv] Removing criminal penalties for laws that empower law enforcement to target drug users belonging to historically marginalized groups will reduce encounters between law enforcement officers and drug users. Additionally, decriminalization has the public health benefit of increasing uptake of drug treatment, with cost savings due to redirecting resources from the criminal-legal system to the health system. Therefore, a critical step in reducing structural violence by law enforcement is to repeal laws that promote and justify increased scrutiny of specific populations. The workgroup has identified the following policy recommendations a part of decriminalization efforts:

Recommended Policy Actions

1. **Decriminalize possession of drug paraphernalia for use under §5-620 and §5-619.** The Legislature should amend paraphernalia possession statutes (5-620, 5-619) to remove language about items to consume drugs. This would effectively decriminalize possession of items that could be used to use drugs. Communities should also receive funding for installation of safe deposit boxes. This would provide a safe way to dispose of drug paraphernalia, decreasing the improper disposal of these items. Eliminating criminal penalties associated with paraphernalia will also encourage proper disposal of items used to consume drugs.
2. **Eliminate escalating penalties for narcotics under §5-607, §5-608, and §5-609.** The Legislature should change each of the offenses listed below from a felony to a misdemeanor. Eliminate all fines and fees attached to §§ 5-602-5-606. Reduce each maximum sentence by half and eliminate escalation for repeat offenses.

Over time, when implemented with other measures suggest above, reduced criminal penalties will help support healthier and more stable communities.

Examples:

1. *§5-607- Penalties (§5-602-§5-606)*
   - Reduce to a misdemeanor
   - Maximum 2.5 yrs
2. *5-608 – PENALTIES FOR SCHEDULE 1-2 NARCOTICS.*
   - Reduce to a misdemeanor
   - Maximum 10 yrs
   - Eliminate all escalation language (b)-(d).
3. *§5-609 Penalties- Schedule I + II Hallucinogenic Substances*
   - Maximum of 10 years
   - Eliminate all escalation language (b)-(d)

Under this framework, a person can still be charged with the offense again and could still face a maximum of 10 years. Forty years of prison time is excessive punishment for repeat offenses. This long time of incarceration is also costly to the state, it contributes to mass incarceration, and has not been proven to reduce or deter substance abuse or in the community.[xvi] These changes would significantly reduce the number of people incarcerated and burdened with fines and fees that they cannot pay. Over time, when implemented with other measures suggest above, reduced criminal penalties will help support healthier and more stable communities.

The commission acknowledges that a reduction in penalties falls short of full decriminalization, and that being charged with a misdemeanor can have many of the same detrimental effects to a person's health and life prospects as being charged with a felony. However, the reduction in penalties of these crimes would be an important first step towards full decriminalization.

3. Establish a higher standard of proof for possession with Intent to distribute (§5-602)

Requiring knowledge and intent to the definition of "Possession with Intent to Distribute" would help deter law enforcement from arresting individuals solely based on the amount of drugs that they have in their possession. Proving the offense would require a person to have a high volume of drugs and other indicators of an intent to distribute, such as records, witnesses, scales, cutting agents, packaging material, multiple packs, etc. See example language changes below:

Md. Criminal Law Code Ann. § 5-602

Except as otherwise provided in this title, a person may not:
(1) distribute or dispense a controlled dangerous substance; or
(2) knowingly and intentionally distributes or possesses under circumstances that demonstrate an intent to distribute or dispense a controlled dangerous substance.
(3) quantity alone is not dispositive of an intent to distribute.

Legislative Action

The following bills were heard in the 2021 Legislative Session, and help to accomplish some of the drug policy goals listed above.

DRUG PARAPHERNALIA BILL (HB372/SB420)

This bill would decriminalize possession and distribution of drug paraphernalia by repealing and reenacting §5-101(h), §5-619(c) and (d) and §5-620(a), (b), and (d). This bill would eliminate penalties for:

- Use and possession of drug paraphernalia (items used to inject, ingest, inhale or otherwise introduce into the human body a controlled dangerous substance)
- Delivery, sale, or manufacture of drug paraphernalia under certain circumstance

This bill would also alter the prohibition against possession or distribution of controlled paraphernalia under certain circumstances. In addition to the Commission, this bill was supported by Baltimore Harm Reduction Coalition (BHRC). It was heard in the House on January 19, and in the Senate on February 11, 2021. The passage of this bill was among the biggest accomplishments in decriminalization legislation this session. This commission was happy to see a clean bill pass that will allow not just a small group of healthcare organizations, but also family members and caregivers to administer safe supplies to people who are otherwise targets of the drug war. This legislation is important in ensuring that lives are protected and that people who use drugs and those that love them are able to avoid interacting with the justice system.

OVERDOSE PREVENTION SITES (HB396/SB279)

This bill would authorize the establishment of an Overdose and Infections Disease Prevention Services Program by a community-based organization. Overdose Prevention Services would provide a safe place for the consumption of pre-obtained drugs, provide sterile needles, administer first aid, and provide other certain services. The program would be based out of the Maryland Department of Health and would be limited to six pilot sites: two in urban areas, two in suburban areas, and two in rural areas. In addition to the Commission, this bill was supported by BHRC. It was heard in the House Judiciary Committee on March 11, 2021 and in the Senate Judicial Proceedings Committee on January 26, 2021. This bill did not leave its originating committees. This commission looks forward to educating and working with legislators to understand that protecting people at risk of overdose and funding prevention sites is a positive investment for Maryland. This bill will be a priority for this commission in the 2022 session.

USE OR POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE—DE MINIMIS QUANTITY (HB488)

This bill aims to make use and possession of "de minimis" quantities (less than 10 grams) of 8 substances, which include marijuana, cocaine, and heroin, a civil offense, subject to up to a $500 fine, as opposed to a misdemeanor. This bill goes further than the suggestions above by removing all criminal penalties for possession of a "de minimis quantity" of select controlled substances and making possession a civil violation, however the bill also will require a court to order a person who is found to possess a de minimis quantity of drugs to attend a drug education program, refer the person to an assessment for substance use disorder, and refer the individual to treatment. Makes amendments to §5-601 and §5-601.1. In addition to the Commission, this bill was supported by Communities United. It was heard in the House Judiciary Committee on February 2, 2021 but did not get a committee vote.

CANNABIS–LEGALIZATION AND REGULATION (INCLUSION, RESTORATION, AND REHABILITATION ACT OF 2021) (HB32)

This bill changes the language of the statute from "Marijuana" to "Cannabis." It also would alter the quantity threshold (two ounces or less) and establish an age limit applicable to certain offenses involving the use or possession of cannabis. The bill also establishes a civil offense for cultivating cannabis plants in a certain manner, provides for licensing of cannabis establishments, and establishes certain duties for the Alcohol and Tobacco Commission regarding the licensing of cannabis establishments. The passing of this bill would make important progress in decriminalization of drugs and improving regulation for safe consumption. In addition to the commission, this bill was supported by BHRC. It was heard in the House Judiciary Committee on February 16, 2021 and but did not get a committee vote. This bill did not leave its originating committee, even with a racial and equity impact statement that showed a favorable impact regarding the disproportionate record of arrest and incarceration rates by race. It is confounding that this common sense legislation, with such high constituent support, was unable to gain any traction. This will be a priority bill for this commission in the 2022 session.

02

Homelessness

The Problem

In Baltimore City alone, there are over 2,000 people experiencing homelessness. At least 300 of those individuals are unsheltered, meaning they are forced to sleep on the streets. Even worse, the overwhelming majority of those individuals are African American or another racial minority (75%)[xvii]. The pandemic has exacerbated the risk of homelessness. Roughly 292,000 households are unable to pay rent and at risk of eviction in Maryland[xviii].

Unlike individuals who can lead their private lives inside safe and secure homes, those who are experiencing homelessness often have no other choice than to live their private lives in public spaces. While this looks different for each individual, Maryland law enables law enforcement to arrest and incarcerate those who are homeless simply for acts of survival. For example, homeless individuals can be fined or arrested for fourth-degree burglary or wanton trespass for being on land that is not theirs even if they do not have intent to commit a crime or act of violence. Homeless individuals can also be cited for failing to obey "lawful orders" from police officers, for sleeping, performing normal bodily functions, or simply existing in public space without basic dignities associated with privacy.

Repealing and amending the statutes identified below will be the first step in helping to prevent those who are experiencing homelessness from being swept into the criminal-legal system and provide better opportunities for them to connect with resources they need. Each section will detail how the existing codes harm marginalized communities.

1. §10-201(c)(3) Failure to obey a lawful order

Failure to obey a lawful order (FOLO) allows a police officer to arrest an individual and threaten them with up to 60 days of jail time and a $500 fine simply for not obeying orders from the officer. The interaction between police and any ordinary citizen already represents a significant imbalance of power.

The power imbalance is exacerbated when the "ordinary citizen" is poor, a racial minority, and struggling with their mental or behavioral health. In addition to that, what qualifies as a "lawful order" or "failure to obey" is vague, leaving interpretive discretion to the officer who gives the "lawful order." The ambiguity in the language of the statute leads to the criminalization of behaviors that would otherwise not be considered criminal or problematic if not for the individualized interpretation of law enforcement.[xix] The subjective nature of this offense allows police officers to be guided by their own implicit biases in their application of the law. We can see this reflected in the disproportionate number of people of color who were charged with the offense. Based on data collected with Case Harvester[xx] between 2017-2019, 63% of people charged with FOLO in the state of Maryland were Black.[xxi] This is more than double the representation of Black residents in the population.[xxii]

FOLO can be used by law enforcement to justify otherwise unwarranted arrests. This offense can also be tacked on to existing charges by prosecutors for the purpose of extending sentences, incentivizing plea agreements, admitting guilt, and to build narratives portraying people as violent or dangerous to judges and to the public. Subjective criminalization in this manner further contributes to the mass incarceration of marginalized people; making it easier to arrest and charge them with criminal offenses that will follow them the rest of their lives and create additional barriers to obtaining stable housing or employment.

2. §6-205 Fourth-degree burglary

The Maryland Criminal Code has four different "degrees" of burglary that assign criminal penalties to a range of behaviors associated with "breaking and entering" a home or storage house with the intent to commit a crime or act of violence. Burglary in the fourth-degree is the least serious degree of burglary. Proving fourth-degree burglary only requires proof that a person broke and entered into a dwelling or storehouse, or was existing inside a home or storage house with "the intent to commit theft." In practice, this statute is used by the state to harass, arrest, criminalize individuals who are experiencing homelessness without any public safety justification, particularly those who are homeless and seek shelter inside abandoned homes and buildings.

What's more, fourth-degree burglary is dropped more often than it is prosecuted. In our survey of Baltimore City, Anne Arundel, and Prince George's Counties, fourth-degree burglary was dropped, on average, 84% of the time.[xxiii] The offense is also disproportionately used against people of color. The same study of the three counties found in Anne Arundel County, where African Americans make up only 18% of the population, African Americans were defendants in 36% of cases in which fourth-degree burglary was the primary charge. That is double the proportion of blacks in the county.[xxiv] Clearly, the intent of burglary statutes is not accomplished through the fourth-degree burglary law, and it is being used to harass and criminalize those who are not harmful to society.

3. Fare evasion

Metro Fares increased in 2019 from $1.80 to $1.90.[xxv] This amount is burdensome for many people experiencing homelessness with little or no income. For example: Mia is a client of Health Care for the Homeless.[xxvi] Her main source of income is Temporary Disability Assistance, which means she lives on a monthly

income of $215 and food stamp benefits. She has not been able to obtain a subsidized disability card for her emotional disability. Her only way to get to her counseling appointments is by riding the Metro. This means she would need to purchase a bus pass for $74. However, that $74 is 34% of her usable income, leaving Mia with the impossible choice of buying a bus pass so that she can continue to receive treatment for her emotional disability or paying for food and housing. Many of the thousands of people in Maryland experiencing homelessness and poverty — the largest proportion of which are Black and female — face must make impossible trade-offs like these in their everyday lives.[xxvii] To criminalize someone who has chosen to evade the bus fare, more often than not, criminalizes those who are homeless and experiencing poverty.

Currently, Baltimore only offers one free bus line—the purple line—which primarily serves tourists. As one might imagine, the criminalization of fare evasion has a disproportionate impact on people experiencing homelessness and poverty who need transportation but cannot afford the fare. The existing Fare Evasion policy disproportionately is enforced in Maryland's metro areas, like Baltimore City and Prince George's County, which are 62% and 61% Black or African American respectively,[xxviii] and have higher rates of those who are experiencing poverty.[xxix]

4. "Public nuisance" local ordinances

Municipal codes that restrict camping, panhandling, loitering, or similar behaviors can be categorized as "public nuisance" ordinances. Similar to fourth-degree burglary, these types of local laws disproportionately target those who are experiencing homelessness and may be setting up camps in public space or panhandling for survival. In the middle of a recession, pandemic, and homelessness crisis, panhandling may be a person's best or only option for obtaining the money they need to survive, purchase food, public transportation fare, medication, or other necessities. Public nuisance ordinances that target the homeless are discriminatory and unconstitutional. In Reed v. Town of Gilbert, the Supreme Court ruled that restrictions on panhandling are unconstitutional content-based bans on free-speech.[xxx] In consideration of the Supreme Court's decision in Reed, lower courts across the country have also ruled that begging bans or anti-panhandling laws are unconstitutional content-based bans on speech under the First Amendment, leading their towns and municipalities to repeal these laws.[xxxi]

As it pertains to camping and loitering ordinances, the United States Court of Appeals for the Ninth Circuit Court also found that punishing people experiencing homelessness for sleeping and existing in public places where there are no shelter options available is unconstitutional.[xxxii] Other Federal Circuits across the United States have made similar decisions, resulting in many jurisdictions repealing ordinances that unfairly target the homeless.[xxxiii] However, many municipalities in Maryland retain their public nuisance ordinances. For example, in Montgomery County, homeless individuals can still be cited for "Aggressive Panhandling."[xxxiv] And in Cambridge and Elkton, those who are homeless can be criminalized under their ordinances which require special permits to obstruct streets or preventing camping in general, or during certain hours.[xxxv]

The Solution

The solution to Maryland's homelessness crisis is not incarceration. It is housing and support services. The state of Maryland must reallocate resources currently being used to arrest and incarcerate those who are experiencing homelessness into housing vouchers and other programs designed to secure stable housing for those who are unable to afford it. Further, community-based crisis response services are essential to divert people with disabilities from unnecessary interactions with the criminal-legal system. This shift in allocation of resources will also allow the state to see a significant cost-savings and an improvement in overall community health. Decriminalization is the first step of this process. As it will put a stop to the continuing economic, political, and social disenfranchisement of those who are experiencing homelessness.

Recommended Policy Actions

1. Repeal §10-201(c)(3) failure to obey a lawful order

Full repeal would allow the law to treat speech from law enforcement officers as speech from any other citizen or government employee. Individuals may be compelled to obey orders in order to receive services, but it would not be a criminal act to disobey. For example, if an individual disobeys a reasonable order from a bus driver who is a MTA employee, that may preclude that individual from being able to use MTA services, however it would not be a criminal act. The same should apply to orders from police officers and other law enforcement.

2. Repeal §6-205 fourth-degree burglary

Eliminating the fourth-degree burglary statute would help curb the targeting and criminalization of homeless people of color. Repeal of this statute would not expose landowners to any greater risk of break-in, theft, or burglary because anyone who breaks and enters with the requisite the intent to commit a crime or violent act would remain subject to criminal penalties pursuant to Maryland Criminal Law Code §§ 6-202-6-204 (first, second, and third-degree burglary). These provisions would continue to exist as protection for private property owners from the threat of burglary.

Criminal penalties under §6-403 Trespass are also available. Vast amounts of state and city resources are being wasted on arrests, detention, and prosecution of fourth-degree burglary charges, which ultimately end up being dismissed or dropped in the courts.[xxxvi] Those resources could be better utilized in housing programs for those experiencing homelessness.

3. Remove criminal penalties for fare evasion under §17-705 and make it a civil offense without the possibility of jail time

Decriminalizing fare evasion would mean that failing to pay a fare may result in a ticket or removal from the train, not a custodial arrest. In lieu of criminalization, the light rail system that serves Baltimore and the surrounding suburbs should use a model similar to that used by the MARC (Maryland Area Regional Commuter) train that serves parts of Maryland and DC. MARC uses civilian fare inspectors to check that passengers have tickets and asks un-ticketed passengers to pay the fare while on board. This process could also achieve the same goal of ensuring riders pay a fare without criminalizing those who do not pay. In addition to this, to avoid using fines as a form of economic violence on those who are

LEGISLATIVE ACTION

CRIMINAL LAW – FAILURE TO OBEY A REASONABLE AND LAWFUL ORDER – REPEAL (HB640)

This is a bill that would have accomplished the policy goals listed above. It was heard in the House Judiciary Committee on February 12, 2021 but did not receive a committee vote. In addition to the commission, this bill was supported by Homeless Person's Representation Project and Disability Rights Maryland. This bill received vocal push back from a few members of the House Judiciary who argued that police need Failure to Obey a Reasonable and Lawful Order to do their jobs and that police should have a tool to remove people experiencing homelessness from public spaces in circumstances where the person is viewed as disrupting businesses. Advocates spent time this session explaining that Failure to Obey a Reasonable and Lawful Order is a non-violent offense and repeal would not threaten public safety or the safety of police officers. This commission will reiterate that individuals experiencing homelessness that are not acting in a disorderly manner or breaking any other laws and have as much right to occupy public space as any other person. This bill will be a priority for this commission during the 2022 session.

indigent, the penalty should also allow those who cannot afford the fine to perform community service as an alternative.

4. Amend §6-403 and §11-107 to make an exception for those experiencing homelessness.

a. §11-107 Indecent Exposure

This intent of this statute is to prevent lewd, malicious, or unwanted public exposure of human genitals. Yet, this statute is often used against people experiencing homelessness urinating or defecating in a public space or people with mental or behavioral health impairments. Those who are shown to be experiencing homelessness with mental or behavioral health issues should be provided the option of treatment Instead of facing a maximum criminal penalty of three years in prison or a fine. Furthermore, the law should be written only to criminalize indecent exposure that is found to have lewd, malicious intent or can be likened to an assault. Currently the law does not contain these elements.[xxxvii]

When someone is found in violation of the statute and is experiencing homelessness, or a mental health crisis, a trained, unarmed mental health professional or social worker should respond and assess whether the person would benefit from professional treatment. Regardless of whether they choose to go to treatment or not, the individual should be directed to an appropriate housing program that assists with their specific needs. If first responders find that the individual needs care, they will be referred to treatment. If the individual's need is only shelter, they should be provided with shelter.

b. §6-403 Wanton Trespass

As mentioned previously, people experiencing homelessness often seek refuge in abandoned homes or on private property when they have no other viable options for shelter. This act makes them vulnerable to criminalization for Wanton Trespass on private property under Maryland law. Creating an exception to criminal penalties to Wanton Trespass for those experiencing homelessness, have mental or behavioral health challenges and who are seeking shelter would prevent additional barriers to obtain basic needs such as stable housing.

3. Eliminate "public nuisance" municipal codes that penalize loitering, panhandling, and solicitation and camping.

Eliminating municipal codes that unconstitutionally criminalize panhandling could be accomplished through umbrella state legislation that prohibits any local policy, law, ordinance, executive order, or other regulation from assigning criminal or civil penalties for existing or sleeping in public in compliance with federal court holdings.

03

Poverty

The Problem

Numerous reports[xxxviii] have found that Maryland's system of laws unnecessarily criminalizes those who are poor. This happens through a variety of channels, many of which begin with the criminal-legal system. Contact with the legal system: arrest, detention, criminal records, leads to a vicious cycle of disenfranchisement that makes previously simple acts like obtaining employment, public benefits, or credit to purchase land nearly impossible. These channels of disenfranchisement disproportionately affect people of color and their communities. Communities that are already over-policed and hyper-criminalized.

1. Bail and pre-trial procedures

About half of those imprisoned in Maryland are held there "pre-trial," before they are found guilty of any crime.[xxxix] Maryland's pre-trial procedure statutes allow a judge to hold someone who has been arrested for any offense for a period of time in jail pending their next trial date. The judge may, alternatively, choose to assign that person cash bail, giving them the opportunity to pay for their release pending their next trial date.

The racist roots of the criminal-legal system are no clearer than in Maryland's pre-trial system. People of color experiencing poverty are those who find themselves held in Maryland jail more than any other population.[xl] This system of detention and release punishes those who may not be able to afford the unattainable bail amounts set by Maryland courts. It also contributes to the poverty of those who are held without bail and lose their jobs as a result, or those who are granted release and required to pay hundreds of dollars a month for home detention devices.

Despite the recent change in the law establishing a legal presumption of release, judges continue to disproportionately assign Black defendants higher bail amounts than defendants of other races and hold them without the option of bail for low-level offenses.[xli] For example, Black defendants charged with Second-Degree Assault — the most frequently charged low-level offense in Baltimore — on average, paid $1,000-$5,000 more in bail than

defendants of other races.[xlii] Furthermore, defendants in Baltimore city — where the greatest proportion of individuals living in poverty are African Americans — paid nearly double that of defendants in other counties.[xliii] The thousands of dollars defendants are assigned to pay in bail are absurd, especially considering that more often than not, those who are charged with low-level offenses ultimately have their charges dismissed. For example, in Anne Arundel County District Court and Prince George's County District Court, charges for Possession of a Dangerous Substance (§5-601) were dropped on average 85% of the time. Still, judges held those who were charged with this offense without bail or forced them to pay thousands of dollars in bail in 66% and 82% of cases, respectively.[xliv]

The sole purpose of bail, as established by the law, is to ensure that defendants appear at their next court date and reasonably maintain community safety. However, bail practices in Maryland, particularly in Baltimore, unfairly target and punish those who are poor and Black before they are even found guilty of any crime. These pre-trial procedures drain resources and limit the job opportunities of those who are statistically most likely to already be experiencing poverty.

2. Court costs—electronic monitoring fees

When someone is detained and awaiting trial, they may also be offered the opportunity to participate in GPS Monitoring or Home Detention. While this is considered by some a more humane alternative to pre-trial detention in a jail, GPS monitoring more frequently is an instrument of severe economic violence against those who struggle to pay the costs of the monitoring device. The state has a very limited number of electronic monitoring devices it pays for on behalf of defendants. As a result, most defendants end up having to bear the cost of their own court-ordered electronic monitoring.

Private companies, such as ASAP Home Detention, charge defendants hundreds of dollars a month for the surveillance devices.[xlv] When defendants are unable to pay for these devices, they receive arrest warrants. These warrants for non-payment increase the possibility that an indigent defendant who has not been convicted of a crime, can be arrested and incarcerated for being unable to pay for their own GPS monitoring. Even if the defendant is later found not guilty of the underlying crime for which they were accused, or the case is dropped, they could still owe hundreds of dollars to the GPS Monitoring Agency. There is a direct link between poverty and increased or prolonged rates of incarceration as a result of electronic GPS monitoring fees.

Consider Irving Haygood; a Baltimore man who paid over $3,500 for his home monitoring service over the course of 9 months during the height of the Covid-19 Pandemic. When he was first accused of an offense, he was held in jail and lost his job of 20 years because he was unable to show up for work. The court later released him on home detention due to the pandemic. However even on release, he felt the constant stress of having to come up with $250 every two weeks in order to pay for his new electronic shackle and avoid going back to jail. The judge told him he would go back to jail if he did not keep up on payments. He "borrowed money, burned through his savings, then used his unemployment benefits from his career with the state." When Federal unemployment benefits stopped at

the end of July of 2020, he became desperate and felt compelled to accept a plea deal from the prosecution.

> **I couldn't pay for the home detention no longer...so its either take the plea deal and stay free or go back to jail and fight the charge. It don't make sense to go to jail just to fight a charge.**[xlvi]

After leaving court the day he accepted the plea deal, the first stop Mr. Haygood made was to ASAP Home Detention to drop off his ankle monitor and pay his $108 balance.[xlvii] His story is a small glimpse into the plight of hundreds of people in Maryland who are crippled by oppressive home detention fees. While national statistics are not available on the racial breakdown of Americans wearing ankle monitors, local studies suggest that mass supervision—just like mass incarceration—disproportionately affects people of color.

3. Criminal records

A criminal record can easily be both the cause and consequence of poverty. In Maryland, a criminal record is acquired upon arrest, whether or not a person is ever convicted of a crime. Anything that occurs after arrest is documented on an individual's criminal record. That includes non-convictions such as dismissals and instances where the State declines to prosecute. Even if dismissed, Maryland law allows these charges to remain publicly visible on a person's record until they are expunged. Maryland's existing procedure makes the process very onerous for individuals seeking expungements for non-convictions.

Individuals who have not been convicted of crimes should not face any consequences since they were not found guilty. However, the existing process of criminal records results in individuals facing social stigma and other significant barriers to carrying on their life as normal. For example, employers may view a person's record and choose not to consider a candidate for employment, even if the charges were dropped and the individual was not found guilty of any crime.

4. Auto-insurance

Maryland law allows insurance companies to use non-driving factors such as credit score, education, and occupation in setting insurance premiums. This practice amounts to legalized wealth discrimination. Those who have been disadvantaged and have had fewer education opportunities, will face higher insurance premiums, not be able to afford auto insurance, and will be at a greater risk of being pulled over and criminally charged for driving without insurance.

Prohibiting insurers from using non-driving related factors in setting premiums can help to ensure that low-income individuals and people of color are not forced to pay disproportionately high premiums. California, Massachusetts, and Hawaii, have banned insurer use of credit scores in setting premiums. California state regulations also require that insurers give primary consideration to driving-related fac-

tors — such as driving record, years licensed, and miles driven — over non-driving related factors in setting insurance rates. A number of states have banned or placed restrictions on insurer use of education and occupation in underwriting or rating: Georgia, Wisconsin, New Jersey, Colorado and California.[xlviii]

5. Child support

The goal of the Maryland's child support program is to ensure that both parents abide by their legal duty to support their child based on their ability to provide that support. Unfortunately, Maryland Courts frequently order noncustodial parents to make child support payments that they cannot afford. When these parents are unable to pay, harsh enforcement measures are employed. These measures include driver's license suspension, wage garnishment, mounting fees, and/or incarceration.[xlix] These practices further impoverish and criminalize noncustodial parents who are experiencing poverty and only diminish their ability to meet child support obligations.

The most common measure taken by the state is the immediate suspension of the driver's license for the non-custodial parent within 60 days of non-payment. The Census Bureau reported that 47% of Marylanders drive to another county for work, particularly in zip codes with lower household incomes.[l] Thus, the suspension of the driver's license is not just an inconvenience, it means an inability to work for many low-wage workers (e.g. MTA, Lyft, Uber, DoorDash, Grubhub, Sanitation). Driver's license suspension, coupled with wage garnishment, often pushes non-custodial parents to work in the underground economy, and only make it more difficult for them to fulfill their obligations. The measures must be changed.

The Solution

The solution to Maryland's issue of poverty criminalization is to change the laws and policies identified above that serve to further marginalize and criminalize those who are experiencing poverty. The poverty workgroup has also worked in conjunction with its partner organizations to support legislation to make some of the following important changes to Maryland's laws.

Recommendations for Policy Actions

1. Revise §5-201 and any related law such that electronic monitoring fees are based off of the defendant's ability to pay.

If ability to pay was factored into considerations regarding electronic monitoring devices or if the state bore the cost of all electronic monitoring devices it assigns to defendants, impoverished populations would see a significant reduction in unreasonable debts and detentions. These measures would reduce the phenomenon of defendants like Mr. Haygood entering into guilty pleas just to avoid paying electronic monitoring fees.

2. Make expungement more easily accessible

a. Automatic expungement for non-convictions

Expungement should be automatic for charges that do not carry guilty verdicts (non-convictions). This would reduce barriers to employment after interaction with the criminal legal system.

b. Repeal Md. crim code §10-107 "The unit rule"

The Unit Rule adds an unnecessary barrier to expungement for individuals with non-convictions on their record. It prevents the expungement of charges that would normally be eligible for expungement if the eligible charges are included within a "unit[li]" of other charges that are ineligible for expungement. This rule serves no public safety purposes. In fact, the likelihood of recidivism is increased when formerly incarcerated individuals are unable to enter into a viable line of employment.[lii]

3. Stop wealth discrimination in auto-insurance

a. Eliminate the use of non-driving factors when underwriting auto insurance policies by changing the law statute.

b. Create a low-cost auto insurance program for indigent individuals

The most effective and comprehensive solution to address the need for affordable auto insurance for low-income Marylanders is to implement a low-cost auto insurance program. California has implemented a program that provides a good model and has successfully provided affordable auto insurance to its previously uninsured drivers in the state.[liii]

c. Eliminate arrests for driving without insurance

The State Government has a multiplicity of other avenues through which it can penalize drivers for lack of auto insurance that do not include incarceration. Because the root cause of driving without insurance is most frequently lack of disposable income, the decriminalization and low-cost insurance measures discussed above will help to curb the frequency of individuals driving without insurance simply because they cannot afford it. Recommendations on penalization will not be listed here.

4. Child support reform

a. Limit the use of punitive efforts that undermine noncustodial parent's ability to earn the income needed to pay child support order (i.e. driver's license suspension)

b. Ensure that the suspension of child support on incarceration is fully implemented

Research suggests that many incarcerated parents often leave prison with an average of $15,000–$30,000 or more in unpaid child support, with no means to pay upon release.[liv] Studies also indicate that orders that are unrealistically high may undermine stable employment and family relationships, encourage participation in the underground economy and increase recidivism, elimination of suspensions will also save state time and resources.

c. Set child support orders based on the non-custodial parent's ability to pay.

Maryland must make greater efforts to determine ability to pay and ensure that all child support orders are based on actual income rather than income imputation. Income imputation occurs after a court finds the noncustodial parent to be "voluntarily impoverished." This means they could work but choose not to. When this is found, the court will infer, or impute the parent's income — even if they are unemployed. Properly tailoring child support orders based on the non-custodial parent's ability to pay may require revision of the child support guidelines. Research has found that overall, child support orders seem to be too high for low-income debtors, and when child support orders are set above 15-20% of actual income, compliance is reduced.

Legislative Action

The following bills were heard in the 2021 Legislative Session, and help to accomplish some of the policy goals listed above.

GPS MONITORING - INDIGENCY DETERMINATIONS IN PRETRIAL (SB23/HB316)

This bill will require indigency determinations (a person's ability to pay) when requiring home detention in pretrial and require the state to cover monitoring costs for indigent pretrial defendants. This bill was heard in the House Judiciary Committee on January 26, 2021, and in the Senate Judicial Proceedings Committee on February 3, 2021. The bill passed with amendments. The legislation as introduced would have required the state or local jurisdiction to cover the costs of home detention fees for indigent pretrial defendants. As amended, the legislation (1) requires the state or local jurisdiction to cover home detention fees for indigent pretrial defendants during the course of, and for one year following, the current state of emergency and (2) establishes a workgroup to study the use of home monitoring fees. While use of home monitoring did increase exponentially during the pandemic, there is no guarantee that it will cease to be a common tool for the pretrial system once the state of emergency is lifted and viral spread is (hopefully) reduced in jails. Therefore, this commission will be monitoring the progress of the workgroup and and continue to advocate that all indigent defendants have their home monitoring provided by or paid for by the state.

MARYLAND CRIMINAL JUSTICE DEBT ELIMINATION AND PREVENTION ACT OF 2021 (SB898/HB1331)

Bill will help to eliminate costly, predatory criminal justice fines and fees that generate revenue for state and local government functions but effectively cripple lower-income communities of color and saddle many with lifelong debt. It was heard in the House Judiciary Committee on March 9, 2021 and in the Senate Judicial Proceedings Committee on March 10, 2021. It did not receive a vote in either committee.

STATE FINANCE AND PROCUREMENT– CENTRAL COLLECTION UNITY – POWERS (HB364)

This bill would repeal the authority of the Central Collection Unit of the state to settle a debt of claim without suit. It also reduces the maximum amount of a certain fee that may be assessed and collected from a debtor under certain circumstances. It also repeals the requirement of collection of fees for collection and administrative costs. This bill would help to reduce the barrage of fees that can cause a significant financial hardship on individuals entangled in the criminal-legal system. It was heard in the House Appropriations Committee on January 27, 2021 but did not receive a committee vote.

ELIMINATING NON-DRIVING FACTORS IN AUTO INSURANCE – CREDIT HISTORY (SB552/HB221)

This bill would allow the elimination of credit history as a cost factor in auto insurance rates to increase access to affordable transportation options for low-wage workers. Unfortunately, it was withdrawn from consideration in the 2021 Legislative Session in the Senate, and received an unfavorable report in the House Economic Matters Committee. It's disheartening to this commission how this bill to make safe driving more accessible to all Marylanders was corrupted by harmful amendments by the National Conference of Insurance Legislators (NCOIL). NCOIL added an amendment that removed language to end the use of credit history in setting insurance rates and replaced it with vague language that puts the burden of proof on the individual when requesting a lower rate. Under this NCOIL Amendment, the insurance companies have no obligation to lower rates or reduce the use of discriminatory non-driving factors.

AUTOMATIC EXPUNGEMENT OF NON-CONVICTIONS (HB238)

This bill would have worked to clear the records of returning citizens who were imprisoned for certain misdemeanors that today would not entail a prison sentence and allow for automatic expungement of offenses that did not lead to conviction. In addition to the commission, this bill was championed by JOTF for the fifth year in a row. It was heard in the House this year on February 23, but did not receive a committee vote.

CRIMINAL PROCEDURE – EXPUNGEMENT OF RECORDS – WAITING PERIOD (HB1269/SB201)

This bill would reduce the waiting time for expungement for certain charges that were dropped by the state's attorney. This, in effect, would make it easier for individuals who have been charged with certain crimes to obtain employment following their contact with the criminal justice system, by removing the offenses from their record. This bill was heard in the Senate Judicial Proceedings Committee on February 4, 2021 and in the House Judiciary Committee on March 9, 2021 but did not receive a vote in either committee. In addition to the commission, it was supported by the Job Opportunities Task Force (JOTF).

UNIT RULE REPEAL

For the past 15 years, JOTF has supported the repeal of the unit rule and supported the successful passage of legislation during the 2020 session that would establish a workgroup tasked with developing procedures for full elimination of the unit rule. The legislation was vetoed by Governor Hogan immediately following the 2020 session. The veto was overridden during the 2021 session, a major victory for the commission, JOTF, and other partners.

MOTOR VEHICLES – DRIVER'S LICENSE AND INSURANCE OFFENSES – PENALTIES (HB699)

This bill would eliminate arrests for driving without insurance where it is clear that the individual could not afford insurance. It was heard in the House Environment and Transportation Committee on February 11, 2021 but did not receive a committee vote. This bill was stalled due to "public safety" concerns articulated by Maryland Department of Transportation. Disappointingly, and despite the collaboration, the House subcommittee refused to move the bill.

SMALL CLAIMS - EXAMINATION IN AID ENFORCEMENT- PROHIBITION ON ARREST OR INCARCERATION FOR FAILURE TO APPEAR (HB848/SB657)

This bill would prohibit an individual from being arrested or incarcerated for failure to respond to certain orders to appear in court relating to an examination in aid of enforcement of a money judgement entered in a small claim action in the District Court. This bill would help curb the phenomenon of debtor's prisons that exist in Maryland. That is, it would prevent the incarceration of individuals for not being able to afford a debt. This bill passed in the House Judiciary Committee. It was heard in the Senate Judicial Proceedings Committee on March 3, 2021 but did not receive a committee vote. In addition to the Commission, this bill is supported by JOTF.

04

Sex Work

The Problem

Sex work and sex workers face severe stigmatization by society because of the work they do. Individuals who engage in sex work are often trans and queer people of color who already experiencing interdependent systems of discrimination, stigmatization, and disadvantage due to their social status, sexual orientation, and race. Those engaging in sex work are also more likely to also be facing housing and food insecurity.[lxxx]

Criminal penalties only exacerbate the negative view and difficult lives of sex workers. Sex workers are human beings who are too often ostracized, taken advantage of, and criminalized due to their occupation and the interdependent systems of discrimination that they face. Decriminalization is the first step in moving forward to improve the health, safety, and well-being of this marginalized population. In Maryland, consensual adult prostitution is criminalized under criminal codes §§ 11-303, 11-304, 11-306, and 11-307. These laws perpetuate the narrative of these sex workers as victims and conflate consensual sex work with human trafficking. Criminalizing sex workers distracts government resources and time from investigating and prosecuting legitimate cases of sex, labor, and/or child trafficking. Assigning criminal penalties to sex workers also exposes them to increased risks of:

- Sexual violence and extortion from law enforcement[lv]
- Intimate partner violence
- Sexual violence from clients[lvi]
- Financial hardship inflicted by court fines, supervision fees and lack of employment
- Housing instability due to §11-307[lvii][lviii] and
- Food instability[lix]

Additionally, as mentioned in other areas of this report, having a criminal record as a result of being charged with these offenses adds mounting barriers to employment, obtaining essential services, puts individuals at a higher risk of deportation, and adds to the social stigmatization of sex workers.

The Solution

Reduce the harm and dangers faced by those who are engaged in sex work by choice or circumstance by decriminalizing adult consensual sex work. Decriminalization will allow law enforcement and prosecutors to focus their energies on identifying and prosecuting human sex traffickers who pose a genuine threat to public safety, while also increasing the health and safety of those engaged in consensual sex work, providing them with better opportunities and self-determination.

Recommendations for Policy Actions

4. Eliminate:

- §11-303. This code criminalizes any person who engages in prostitution or assignation "by any means" or occupies a building, structure or conveyance for the purpose of prostitution or assignation.
- 11-304. This code criminalizes managers, third parties, and other support staff that are of service to sex workers. Sometimes sex workers prefer to rely on these support staff for safety reasons. Assigning criminal penalties to these individuals most negatively impacts those engaging in sex work, because it increases their susceptibility to violence and exploitation from clients or police.
- §11-306. This code criminalizes any person who knowingly procure or solicit prostitution. This was the most frequently charged criminal offense among the prostitution offenses in Baltimore City District and Circuit Court. And it was used overwhelmingly against women and people of color.[lx]
- §11-307. This code makes it a crime for the owner of any building, structure, or conveyance to allow their building to be used for prostitution, or to allow any person in the building to engage in prostitution. The statute also makes it illegal to set up any building, structure or conveyance for the purpose of prostitution.

5. Automatically expunge prostitution-related offenses from the records of those who have been charged or convicted of these offenses

6. Involve other agencies such as the Department of Health, Department of Labor, Department of Human Services, etc. to respond and or assess the legislation

These changes would dramatically reduce the compounded violence and hardships faced by consenting adults in the sex trade. Particularly those who are already struggling to survive at the fringes of our communities due to other identities and lived experiences. This would also reduce the disparate impact of the criminal-legal system on women of color and LGBTQ+ individuals and support individual agency and positive decision-making among those who have been stigmatized and shamed by society for engaging in sex work.

05

Youth

The Problem

Maryland's code contains laws that bring young people — disproportionately youth of color — to the attention of the justice system.[1] Criminal laws used against youth punishing them for typical adolescent behaviors or for simply doing an action while being a certain age are a reflection of how we have marginalized large segments of Maryland's youth. Many behaviors that are criminalized under Maryland's juvenile laws stem from trauma, abuse, neglect, or poverty.

Maryland ought to empower educators, school administrators, and other adults in care of youth to respond to these behaviors by providing the necessary support and resources required to help a young person thrive. Instead, the law empowers those in care of youth to criminalize these behaviors. All young people in Maryland, particularly those of color, should have the benefit of their youth. Each section below will detail how Maryland's current system of juvenile laws and policies fail to do that.

1. Criminalizing the behavior of children and adolescents through the terms "status offenses," "children in need of services," "delinquent acts," and "delinquent child"

a. Children in need of supervision, status offenses, and violations

Children In Need of Supervision (CINS) cases can be filed when youth skip school, when they are being "disobedient" at home, when they run away from home, or if they've committed an offense applicable only to children. These cases do not rise to the level of "delinquent acts" under Maryland law, but they still allow a child to be referred to the Maryland Department of Juvenile Services (DJS), who may then choose whether to file a petition with the court or not. DJS reported that over 2,400 youth were reported to DJS with CINS referrals or citations as their most serious alleged offense in Fiscal Year 2019, which was 13% of all referrals to DJS.[lxi]

b. Status offenses

Another way Maryland law criminalizes youth is through "status offenses," which are behaviors that are treated as criminal only when done by someone under age 18.[lxii]

Examples include: truancy, underage drinking, and running away from home. Maryland's juvenile legal system allows youth to be criminalized for status offenses through CINS cases and citations that can be referred to DJS.

c. "Violations"

Youth are cited and referred to the Maryland Department of Juvenile services for violations that are not defined as "delinquent acts" but can still result in youth referral to the court and juvenile justice involvement.[lxiii] "Violations" include underage use or possession of tobacco or alcohol, possessing or using a fake ID, and use or possession of small amounts of marijuana, among other behaviors.

Many of these behaviors are part of normal adolescent development. These are behaviors that many adults remember engaging in while adolescents. However, the current law exposes children who engage in these behaviors to the risk of ending up in court, placed under the supervision of the justice system, and/or removed from their homes. The criminal-legal system is the system that is least equipped to provide support, help, and guidance to a young child, and Maryland law ought to provide better opportunities for intervention instead of involvement in the legal system.

d. "Delinquent Act" and "Delinquent Child"

The primary pathway to criminalization of youth behavior in Maryland's juvenile legal system is being charged with committing a "delinquent act." Maryland law defines "delinquent act" as "an act which would be a crime if committed by an adult." By defining "delinquent act" as any act that would be a crime if committed by an adult, Maryland law makes it possible to label a huge array of normal adolescent behavior as a "delinquent act" committed by a "delinquent child," from a fight at school to shoplifting. This overly broad definition of "delinquent act" lends itself to subjective determinations about when behavior rises to the level of criminal conduct. Subjectivity and vagueness in the law leaves an inappropriate amount of room for law enforcement to use their discretion to criminalize the behavior of youth of color, youth with disabilities, and other vulnerable young people in making these determinations.

Data in Maryland show that low-level offenses committed by youth are the primary entryways into the juvenile legal system. Indeed, in Fiscal Year 2019, 81% of referrals to the Maryland Department of Juvenile Services were for status offenses, citations, ordinance violations, and misdemeanor offenses like those listed above.[lxiv] For example, youth can be charged with "affray" and labeled delinquent, for engaging in a fight where a group of youth gather to watch. Youth can be charged with misdemeanor second-degree assault or disturbing school activities or personnel for threatening to fight with another student or engaging in a fight at school even if it doesn't result in any injury.

Additionally, Maryland's juvenile legal system defines "delinquent child" as "a child who has committed a delinquent act and requires guidance, treatment, or rehabilitation." The definition of delinquent child contains no minimum age of juvenile court jurisdiction. Thus, the behavior of very young children can be – and is – criminalized. For example, in Fiscal Year 2019, 1,882 complaints were referred to DJS intake for youth age 12 and under, with 83% of the most serious charges in those referrals being misdemeanors. Additionally, Black youth represented two-thirds (65.8%) of youth age 12 and under referred to DJS.[lxv] It may be ap-

propriate to refer some youth to social service agencies, community-based organizations, schools, or local management boards, but labeling their behavior as criminal should not be an option.

The existing definitions of "delinquent act" and "delinquent child" make no explicit or implicit acknowledgment of the unique developmental stage of adolescence, during which time humans are expected to engage in more defiant, risk-taking, or ill-advised behavior. There is no acknowledgment of the fact that certain behaviors may be manifestations of trauma, including trauma associated with systemic racism, poverty, and other factors. It makes it easy for teachers, administrators, and law enforcement to criminalize youth for poor decisions instead of redirecting and showing them a better way.

2. Limiting Access to Effective Diversion Opportunities

As mentioned above, 81% of referrals to the Maryland Department of Juvenile Services were for status offenses, citations, ordinance violations, and misdemeanor offenses in Fiscal Year 2019. Research makes it clear that diverting these youth away from arrest and court involvement gets better public safety outcomes and better results for the young people themselves.[lxvi] While Maryland does use diversion in certain situations, there are many limitations on its use that result in the criminalization of youth.

First, there is no clear guidance in Maryland law requiring or informing law enforcement's use of diversion, such as warning and releasing youth to parents or legal guardians or referring youth to a community-based program. While some jurisdictions in Maryland have developed diversion programs for law enforcement, such as Baltimore County's JOINS program, not every young person lives in a place that offers an option for this type of diversion. The Maryland Police and Correctional Training Commissions did release Model Policies, last updated in 2007, that suggest that in cases involving minor offenses, law enforcement officers should "consider releasing the juvenile to the custody of a parent or legal guardian at the scene of the incident before transporting the juvenile to a police facility and formally processing the juvenile."[lxvii] However, the Model Policies do not provide guidance on when a law enforcement officer should consider diversion.

Second, while the Maryland Department of Juvenile Services has the authority to divert cases through the use of informal adjustment in certain situations, there is no requirement that youth be diverted under certain circumstances. Without clear criteria requiring diversion, officials will use their discretion to make decisions — discretion that can lead to disparate outcomes for youth of color. Indeed, Maryland's own data show that youth of color are statistically significantly less likely to be diverted than white youth.[lxviii]

Third, victims must consent to diversion for youth to be eligible. Victim consent is not required for diversion in the adult criminal justice system. As such, there is no compelling rationale to require victim consent for youth diversion. In addition to victim consent, DJS must obtain the permission of the State's Attorney if considering diversion for felony referrals (including low-level, non-violent felonies), misdemeanor referrals involving a handgun, and referrals for crimes of violence.

Maryland has produced data demonstrating that diversion works to accomplish public safety outcomes. For example, a 2019 report

found that the one-year recidivism rate for youth who were informally handled by having their cases closed at intake or put on pre-court supervision had respective recidivism rates of 7% and 9%,[lxix] compared to a 15% recidivism rate for youth who had their cases formally processed by a State's Attorney.[lxx] In recent years, other states, such as New York State, have removed the requirement to obtain victim consent in order to divert a young person. These states recognized that allowing victims to effectively "veto" a youth's opportunity to be diverted was counterproductive. Progress in New York, along with Maryland's own research, shows that requiring additional hurdles for law enforcement to pursue diversion is counterproductive in obtaining the safety outcomes the state purports to accomplish through its juvenile "justice" system and should be removed.

3. Incarcerating Youth for Typical Adolescent Behavior and Minor Misbehavior

In Maryland, youth can be put in short-term detention for a range of reasons. The Maryland Department of Juvenile Services can put youth in detention if it is required "to protect the child or others" or because the young person is likely to skip court.[lxxi] Judges can also detain youth "for the protection of the child" or "for the protection of the community."[lxxii] Additionally youth can be detained for violating court orders or technical violations of terms of community supervision. In Fiscal Year 2019, there were 2,406 placements of youth in detention, 85% of which were for youth of color.[lxxiii] Of youth who were in detention prior to their disposition in juvenile court, close to half (47.5%) had a misdemeanor, ordinance offense, citation, or CINS as their most serious charge).[lxxiv]

Judges can also commit youth to the Department of Juvenile Services, which can involve removing a youth from his or her home and/or incarceration, for a wide range of reasons, including misdemeanors and other low-level offenses. Maryland law currently has very weak limits on the use of out-of-home placements.[lxxv] During Fiscal Year 2019, 767 youth were committed by a judge to an out-of-home placement, and 79% were youth of color.[lxxvi] Of youth who were committed to an out-of-home placement following their adjudication in juvenile court, almost 60% had a misdemeanor as their most serious charge.[lxxvii]

With such vague criteria as detention "for the protection of the child" or commitment and out-of-home placement "for the welfare of the child" (as opposed to a legitimate concern about public safety), Maryland law allows for the criminalization and incarceration of children based on subjective judgments about what is in their best interest.

Without clearer, objective criteria in place for detention, commitment, and out-of-home placement, Maryland's youth justice system leaves ample opportunity for bias against vulnerable groups to enter into decision-making. This includes youth of color, girls, immigrant youth, LGBTQ+ youth, youth with mental health needs, and youth with disabilities.

The Solution

All young people in Maryland should have the benefit of their youth, and Maryland must re-write or eliminate those laws that prevent this goal. Specifically, that means:

1. Redefining Maryland's juvenile justice system to exclude common adolescent behaviors,
2. Expanding and standardizing diversion of youth away from the juvenile justice system to ensure that all of Maryland's youth receive the opportunity for diversion, and
3. Prohibiting the use of short or long-term incarceration for common adolescent behaviors that do not pose a risk to public safety.

Recommendations for Policy Actions:

1. **Eliminate "status offenses" "violations" and "Child in Need of Supervision" from the "Juvenile Causes" section of the Maryland Code.**
2. **Narrow the definition of "delinquent act" and "delinquent child" in Maryland to focus on public safety, not minor misbehavior.**

The new definition should exclude common minor misbehavior (i.e. disturbing school activities, or being involved in a fight at school) from the jurisdiction of the juvenile justice system. While those behaviors would no longer fall within the definition of "delinquent act," youth could still be referred to social service agencies, community-based organizations, schools, or local management boards.

Similarly, the definition of "delinquent child" should be revised to exclude children age 13 and under. These children could still be referred to social service agencies, community-based organizations, schools, or local management boards for whatever additional services they may need, but criminalization should no longer be an option.

HB1187 passed with nullifying amendments. In one of the biggest letdowns of the 2021 session, the comprehensive Juvenile Justice Reform omnibus legislation, which reflected the consensus of over a year's worth of work by the Juvenile Justice Reform Council (JJRC), was gutted of its key provisions during the last days of session in the Senate Judicial Proceedings committee. Senate leadership's failure to pass common-sense reforms that had support of both representatives of the State's Attorney Office and the Office of the Public Defender was a significant setback in a year when Maryland was ranked as one of the worst states for juvenile justice by Human Rights for Kids. The amended legislation reinstates the JJRC, which must include supporting this legislation next session. The bill, as amended, also allocated significant funding for youth services in Baltimore City. However, the legislation allocated all of the funding to one organization, led by people who are not members of the community, instead of establishing a process to make investments across the range of community-based programs, led by community members, working with youth in Baltimore City. This continues an unfortunate and long-standing trend of failing to resource the Black and Brown-led organizations that most intimately understand the needs of young people in the City, as well as how best to meet those needs.

3. **Greatly expand and standardize access to community-based diversion.**

Require — at a minimum — diversion of all first and second-time referrals for misdemeanor and non-violent felonies to the Maryland Department of Juvenile Services, without consultation with the State's Attorney and victim. Victim consent is not required to divert adults from the adult criminal-legal system and it should not be allowed to force youth into a system that is likely to leave them – and the public – worse off than if the youth were diverted to a community-based program.

The statute should also give judges explicit authority to return a case that has been initiated back to intake for diversion. Maryland should ensure that in state law, agency policy, and actual practice, arrest and intake records for diverted youth are kept separately from other court records, are only consulted for the purpose of determining eligibility for diversion, and are erased after a set period of time.

To promote the use of diversion of youth by law enforcement to community-based resources prior to referring a case to DJS, Maryland's Attorney General should issue a directive similar to that issued by New Jersey's Attorney General that standardizes access to diversion by police.[lxxviii] State law should also require the Maryland Police and Correctional Training Commissions to a new model diversion policy aligned with that directive.

Finally, Maryland should create a program similar to California's Youth Reinvestment Grant Program to provide resources to community-based organizations and localities to develop pre-arrest and post-arrest, pre-referral diversion programs for young people.

4. Prohibit incarceration of youth for engaging in common adolescent behavior, minor misbehavior, and other actions that do not pose a legitimate risk to public safety.

Other states and jurisdictions have put stronger restrictions on the use of short-term detention and out-of-home placement and incarceration of youth in their laws. While work by the Department of Juvenile Services and its partners to develop community-based alternatives to detention and out-of-home placement continues, Legislators and voters should move to change state law to reflect more stringent limits on a judge's ability to use detention and out-of-home placement only for situations that pose a legitimate risk to public safety where no other options are available. This includes removing the ability to detain or incarcerate youth for technical violations of probation, which has been recommended by the National Council of Juvenile Court Judges, the Council of State Governments, and the Georgetown University Center for Juvenile Justice Reform.[lxxix]

Legislative Actions

EDUCATION – DISRUPTION OF SCHOOL ACTIVITIES – REPEAL OF PROHIBITION (HB700)

This bill would repeal a section of the Maryland Education Code that allows students to be charged with a misdemeanor crime if they "willfully disturb or otherwise willfully prevent the orderly conduct of the activities, administration, or classes of any institution of elementary, secondary, or higher education. It was heard in the House Ways and Means Committee on February 10, 2021, but died after crossover to the Senate Education, Health, and Environmental Affairs committee failed to give it a vote. Although the legislation did not receive any opposition testimony when heard in the Senate Education, Health, and Environmental Affairs committee, legislators failed to pass it out of committee. This bill, which would take a significant step toward ending Maryland's school-to-prison Pipeline, will be a priority for this commission during the 2022 session.

"JUVENILE JUSTICE REFORM" BILL (HB1187/SB853)

This bill will would remove youth under 13 from the jurisdiction of the juvenile court, and establish an exception to the requirement that intake officers forward copies of complaints alleging a youth's commission of an act that would be a felony if committed by an adult to the States Attorney. This bill would play an important role in the decriminalization of youth as it would reduce the number of young children who are taken into the system, and reduce the potential penalties certain youth may face when they are taken into the system. In addition to the Commission, this bill was supported by Advocates for Children and Youth. HB1187 passed with nullifying amendments. In one of the biggest letdowns of the 2021 session, the comprehensive Juvenile Justice Reform omnibus legislation, which reflected the consensus of over a year's worth of work by the Juvenile Justice Reform Council (JJRC), was gutted of its key provisions during the last days of session in the Senate Judicial Proceedings committee.

"JUVENILE JUSTICE REFORM" BILL (HB1187/SB853)

Senate leadership's failure to pass common-sense reforms that had support of both representatives of the State's Attorney Office and the Office of the Public Defender was a significant setback in a year when Maryland was ranked as one of the worst states for juvenile justice by Human Rights for Kids. The amended legislation reinstates the JJRC, which must include supporting this legislation next session. The bill, as amended, also allocated significant funding for youth services in Baltimore City. However, the legislation allocated all of the funding to one organization, led by people who are not members of the community, instead of establishing a process to make investments across the range of community-based programs, led by community members, working with youth in Baltimore City. This continues an unfortunate and long-standing trend of failing to resource the Black and Brown-led organizations that most intimately understand the needs of young people in the City, as well as how best to meet those needs.

JUVENILE LAW - INFORMAL ADJUSTMENT (HB169)

This bill would authorize the juvenile court to refer "certain matters" to the DJS for "informal adjustment" if "the time for a certain adjudicatory hearing has been waived and the petition is not the result of an unsuccessful informal adjustment; providing a certain exception to the requirement that the court hold an adjudicatory hearing; and requiring a certain petition to be dismissed if a certain informal adjustment is successfully completed." In addition to the Commission, this bill was supported by Advocates for Children and Youth. This bill was heard in the House Judiciary Committee on February 25, 2021 but did not receive a committee vote.

JUVENILE LAW - DISPOSITIONS - PLACEMENT GUIDANCE (HB1028/SB875)

This bill would change the circumstances that prohibit the juvenile court from committing a child to the Department of Juvenile Services for out-of-home placement. This bill would prohibit incarceration of youth for engaging in common adolescent behavior, low-level offenses, and other reasons that do not pose a legitimate risk to public safety. In addition to the commission, this bill was supported by Advocates for Children and Youth. These bills were withdrawn by their sponsors because the legislation was covered in HB1187. Unfortunately, the Juvenile Justice Reform bill had almost all of its key provisions stripped out during the last days of session, meaning this bill will continue to be a priority for this commission during the 2022 session.

"COUNSELORS NOT COPS" ACT (HB496)

This bill alters the membership of the School Subcabinet Advisory board, and requires a $10 million appropriation for the Safe Schools Fund in order to expand the availability of school-based mental health services. This bill plays an important role in expanding the support available to young people and providing better options for educators and those in care of children to help them obtain the help they need instead of criminalizing their behaviors. In addition to the commission, this bill was supported by the Public Justice Center. This bill was heard in the House Ways and Means Committee on February 3, 2021, but did not receive a committee vote. Unfortunately, while House and Senate leadership touted police reforms passed during session, they did not include support for this bill, which would have strengthened protections regarding police interrogations of youth. This bill will remain a priority for this commission during the 2022 legislative session.

"POLICE–FREE SCHOOLS" ACT (HB1089)

This bill would play an essential role in decriminalizin- youth by removing law enforcement from schools. It would repeal certain provisions of law relating to the establishment of a Baltimore City School Police force. It would prohibit a local school system from contracting with certain law enforcement agencies and prohibit school systems from establishing their own police force. It also alters certain functions and duties of the Maryland Center for School Safety to require them to analyze certain data and submit a report on police in schools. Without police in schools, youth—particularly those of color who are historically targeted by law enforcement—can embark on their educational and developmental journey without being policed and cited by law enforcement officers in their schools. In addition to the commission, this bill was supported by the Public Justice Center. It was heard in the House Ways and Means Committee on March 3, 2021 but did not receive a committee vote.

06

Epilogue

The House and Senate leadership and the Governor have all claimed the 2021 legislative session as one of Maryland's most productive sessions in achieving meaningful change to the social justice landscape. This year was the year that the legislature finally passed Anton's Law, giving Maryland residents a chance to access police misconduct records. Immigrants in Maryland are now safer after years of waiting for an end to state and local jurisdictional extrajudicial participation in Federal immigration enforcement. Trauma-informed care is now being studied and Maryland will hopefully soon have a strategy to ensure state agencies are in sync regarding reproductive health, best practices for LGTBQ+ residents, and disabled Marylanders needs. It is also commendable that tenants may now have access to counsel in rent court.

While 2021 may have been a productive social justice session, it needs to be understood in context. Advocates have been asking for police reform, immigration reform, health care reform, and rent court reform for many years. In the meantime, coalitions like The People's Commission have formed in order to further this discourse and expand ideas about what reform and a safer Maryland for all residents could look like. Decriminalizing the status of our marginalized neighbors is one more way that we can change how police operate in our communities. The House and Senate leadership went into the 2021 session after the national conversation that took place over the summer of 2020 and had a rigid sense of what police reform could look like in Maryland. The legislature needs to expand its focus and pay attention to all of the possibilities that advocates are bringing to the table.

During the 2020 legislative session, before this commission had finalized its research and identified which laws would be targeted for decriminalization, many commission members were already working with legislators to end the "Unit Rule". House Bill 1336 of the 2020 Regular Session allows Marylanders to apply for a partial expungement of their record, ensuring that all eligible charges are wiped from their record, even if some ineligible charges remain. Though the Governor vetoed this bill, the state legislature took it back up this session and overrode the veto. It was gratifying to see such an obviously opportunity to grant residents access to justice accomplished.

The biggest accomplishment in decriminalization legislation this session was the passage of SB420 Criminal Law – Drug Paraphernalia for Administration – Decriminalization.

We were very happy to see a clean bill pass that will allow not just a small group of healthcare organizations, but also family members and caregivers to administer safe supplies to people who are otherwise targets of the drug war. This legislation is important in ensuring that lives are protected and that people who use drugs and those that love them are able to avoid interacting with the justice system. We were disappointed that HB32 Cannabis - Legalization and Regulation (Inclusion, Restoration, and Rehabilitation Act of 2021) did not leave its originating committee, even with a racial and equity impact statement that showed a favorable impact regarding the disproportionate record of arrest and incarceration rates by race. It is confounding that this common sense legislation, with such high constituent support, was unable to gain any traction. The commission looks forward to working on reintroducing this and HB396 Public Health - Overdose and Infectious Disease Prevention Services Program in the 2022 session.

The biggest letdown in decriminalization legislation of the 2021 session was the decimation of the comprehensive Juvenile Justice Reform omnibus legislation, HB1187. This bill, which reflected the recommendations of over a year's worth of work by the Juvenile Justice Reform Council (JJRC), was gutted of its key provisions during the last days of session in the Senate Judicial Proceedings committee. Senate leadership's failure to pass common-sense reforms that had support of representatives of both the State's Attorney Office and the Office of the Public Defender was a significant setback in a year when Maryland was ranked as one of the worst states for juvenile justice by Human Rights for Kids. The amended legislation reinstates the JJRC, which must include supporting this legislation next session. The bill, as amended, also allocated significant funding for youth services in Baltimore City. However, the legislation allocated all of the funding to one organization, instead of establishing a process to make investments across the range of community-based programs, led by community members, working with youth in Baltimore City. This continues an unfortunate and long-standing trend of failing to resource the Black and Brown-led organizations that most intimately understand the needs of, and how to help, young people in the City. This, and each of the four other bills that would have decriminalized youth and how they interact with police, will all be priorities for this commission in the next session.

The repeal of Failure to Obey a Lawful Order, HB 640, unfortunately died in committee. It received a vocal push back from a few members of the House Judiciary who argued that police need Failure to Obey a Reasonable and Lawful Order to do their jobs and that police should have a tool to remove people experiencing homelessness from public spaces in circumstances where the person is viewed as disrupting businesses. Advocates spent time this session explaining that Failure to Obey a Reasonable and Lawful Order is a non-violent offense and repeal would not threaten public safety or the safety of police officers. This commission will reiterate that individuals experiencing homelessness that are not acting in a disorderly manner or breaking any other laws and have as much right to occupy public space as any other person. This bill will be a priority for this commission during the 2022 session.

We look forward to educating lawmakers on issues of decriminalization and working to expand the number of decriminalization bills

during the 2022 session. We also look forward to sharpening our focus on people's health status and needs. Working with partners from reproductive rights organizations and LGTBQ+ organizations we have come to understand that we can expand our work with and for marginalized populations by addressing how the justice system targets the status of pregnant, trans, and gender non conforming people as they live their lives.

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For more information about policies and programs to reduce the disparate impact of the justice system on Marylanders contact:

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