

Idaho Center for Fiscal Policy Brief

Reform Revisited: The Future of Criminal Justice in Idaho



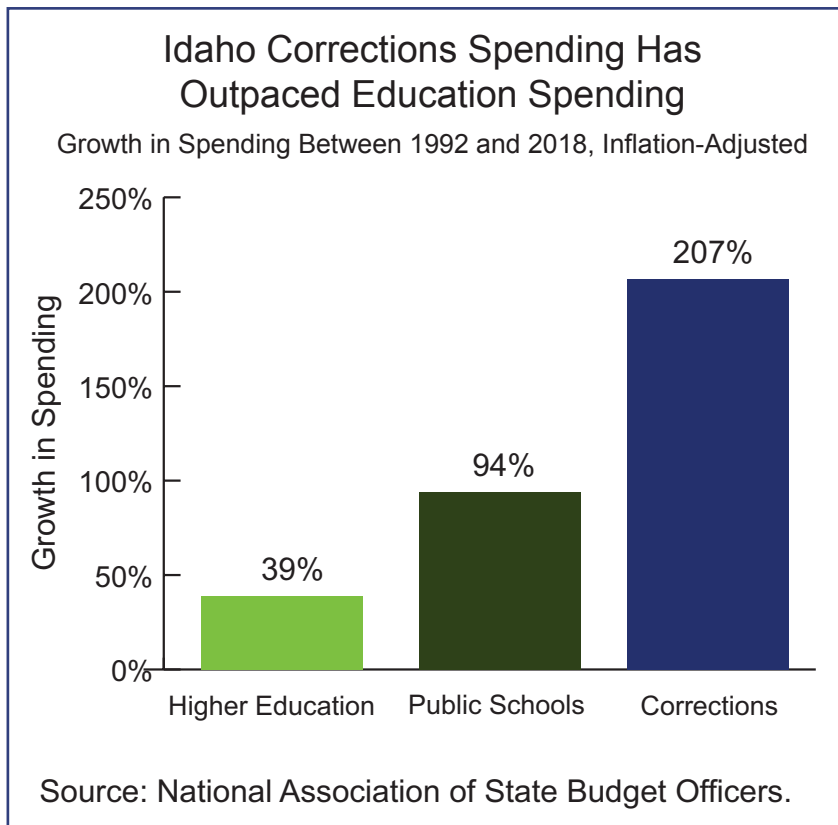
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Ensuring public safety and building thriving communities are always top priorities for state leaders. Building on Idaho's work to reform criminal justice policies would go a long way towards making these goals a reality in our state. Over the last 25 years, prison spending increased by over 200 percent, one of the highest increases in the nation, using public dollars that could have been invested in schools, higher education, and other policy priorities. It is also clear that Idaho incarcerates people at higher rates than previous generations and has outpaced other states in growth in prison spending (see Appendix). These trends have deep implications for the state budget and for Idahoans who are incarcerated, their families and their communities.

Policy choices in the last 40 years have fueled growth in the prison population. Idaho, along with many other states, adopted policies that would lengthen prison terms as a response to federal approaches to crime rates in the 1980s and 1990s. Mandatory minimum sentences for drug offenses in Idaho were enacted in 1992. Idaho is one of three states - along with New Hampshire and Nevada - that requires people in prison to serve 100 percent of their fixed terms, a result of the truth-in-sentencing laws that lengthened terms starting in the 1980s. Idaho has a habitual offender law - or three strikes law - that requires a third felony to result in a minimum five-year term. Across the nation, lengths of prison stays have increased by 33 percent from 1993 to 2009.¹ Yet, no strong scientific evidence shows that these policies have made communities safer.

Idaho can make a new set of choices that could set Idahoans, their communities, and the state budget on a different path. Specifically, reforms to sentencing and a focus on community supervision can direct public dollars to strategies that promote the successful reintegration of people who have served their sentences.



Justice Reinvestment Initiative Is Driving Change But Yielding Limited Cost Savings

Idaho's Justice Reinvestment Initiative (JRI) reforms of 2014² and 2017 helped slow Idaho's prison population growth by ensuring that people eligible for parole do not spend unnecessary time in prison simply awaiting a release hearing or exit programming and investing in community supervision. Idaho has saved an estimated \$19.4 million in prison costs through JRI between fiscal year 2015 and January 2019. Savings have diminished year to year from \$7 million saved in 2017 to just under \$2 million in 2018.³

Though Idaho has thus far avoided building additional prisons – at a substantial level of avoided costs – the rate of savings is too modest to keep up with overall criminal justice spending. The Idaho

Department of Correction (IDOC) averaged about 158 fewer people in prison than was projected had the reforms not taken place. Yet today many Idahoans are serving state sentences in county jails. About 700 Idahoans are serving their time in private prisons in Texas due to overcrowding in Idaho prisons.⁴ Annually, the Council on State Governments estimates that JRI savings in Idaho now amount to one half of one percentage point of IDOC's \$276.7 million budget. Idaho can take more substantial steps to use prison less, curb spiraling costs, and maintain public safety.

Prisons House Significant Numbers of Non-violent Low-Risk Offenders

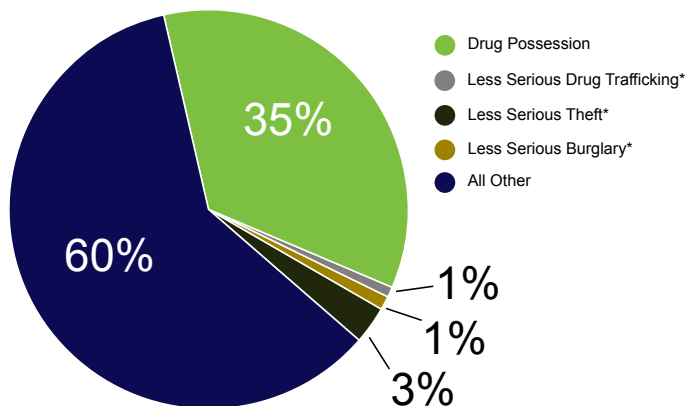
Via JRI legislation, Idaho lawmakers stated that the goal for the Idaho criminal justice system is to use prison space “on those who commit the most serious offenses or who have the highest likelihood of offending in the future.”⁵ IDOC has reported that after JRI reform, those in prison are in fact more likely to be people with a moderate to high risk of recidivating.⁶ But Idaho prisons also hold people who may be unnecessarily incarcerated. A point-in-time analysis of low-risk-to-recidivate offenders in Idaho prisons found that 10 percent had no history of felony convictions for violent crime and were there for a low-level conviction, often drug possession.⁷

Assessing Risk to Recidivate with the LSI-R

The Level of Service Inventory (LSI-R) assessment is used to measure the recidivism risk and needs among people in Idaho prisons. Probation and parole officers use it in case planning during community supervision and prison officials use it to guide supervision placement, programming, and treatment needs while in prison. The LSI-R's 54 questions assess criminal history, education and employment, financial difficulties, family relationships, substance use, and other dimensions. JRI legislation mandated the use of the LSI-R to also inform parole decisions, treatment needs, and sentencing. Our analysis looked at all people in state prison who scored in the range deemed low-risk.

A full year of Idaho prison admissions data show that people entering prison for drug possession and less serious property crimes make up a significant part of prison admissions. Approximately 4,700 people were admitted to an Idaho prison over the course of fiscal year 2019. Of these, 35 percent were admitted for drug possession and an estimated 4 percent for potentially less serious property crimes, including: 3 percent for less serious theft, and 1 percent each for less serious burglary and less serious drug trafficking (defined below).⁸

2 Out of 5 Prison Admissions Are Result of Less Serious Drug and Property Crimes



Source: Idaho Center for Fiscal Policy analysis of IDOC data.
 *Idaho does not have statutes for less serious crimes in these categories. Estimates were derived on share of less serious offenses based on IDOC data on actual convictions and evidence from prison populations in states where the criminal code accounts for degrees of severity in drug trafficking, burglary, and theft.

Sentencing Reforms Could Generate Prison Cost Savings

Less serious drug and property offenses pose a lower public safety threat and have less impact on victims. Our analysis defined less serious burglary as taking place in abandoned or unoccupied structures that aren't homes or residential or office buildings and do not involve direct contact with people. Less serious theft would amount to less than \$10,000 in value stolen. Less serious drug trafficking would involve low-level engagement in a drug operation carried out by people who are often themselves facing addiction. People who are charged with drug possession cause harm primarily to themselves and additional crimes with wider victim impacts can be charged separately.⁹

If Idaho were to address these types of crimes by safely avoiding or reducing time spent in prison in favor of evidence-based sentencing and alternatives to prison, the cost savings could be redirected to help hundreds of Idahoans successfully reintegrate into their communities after prison. Idaho could free up resources in the range of \$88.5 to \$243.7 million in the near term if prison time were replaced with alternative sanctions (this analysis does not include costs of alternative sanctions). Below, we present the average minimum and maximum sentences given for these less serious offenses to estimate these savings based on an annual cost of Idaho prison of \$22,182 per person.¹⁰

Replacing Prison for Less Serious Offenses with Alternative Sanctions Could Produce Millions in Savings Prison Admissions for Less Serious Convictions, Fiscal Year 2019					
	Estimated People Convicted	Minimum Sentence Average	Maximum Sentence Average	Cost Savings of Replacing Minimum Sentences with Alternative Sanctions	Cost Savings of Replacing Maximum Sentence with Alternative Sanctions
Drug Possession	1683	2.0	5.5	\$75.4 million	\$203.8 million
Less Serious Drug Trafficking*	25	4.2	10.3	\$2.4 million	\$5.8 million
Less Serious Burglary*	32	2.3	6.7	\$1.6 million	\$4.7 million
Less Serious Theft*	165	2.5	8.0	\$9.1 million	\$29.4 million
Total	1906			\$88.5 million	\$243.7 million

*Idaho does not have statutes for less serious crimes in these categories. Estimates were derived on share of less serious offenses based on Idaho Department of Correction data on actual convictions and evidence from prison populations in states where the criminal code accounts for degrees of severity in drug trafficking, burglary, and theft.
 Source: Idaho Center for Fiscal Policy analysis of IDOC data and Brennan Center for Justice estimates.

Policy Options:

To reduce prison costs, Idaho policy makers could consider reform in sentencing laws:

- *Re-examine, as all but two other states have done, the practice of requiring people serving time to complete 100 percent of their fixed sentences.* Currently, the law only allows exceptions for people with severe health issues to exit early. Other states require a smaller portion of time to be served on a minimum sentence before parole eligibility. Credit for good behavior and rehabilitative strides for people in prison can reduce time spent in prison for people who are less likely to recidivate.
- *Re-examine the threshold for certain property crimes to qualify as felonies.* For example, felony theft is defined by \$1,000 in value in Idaho. Through their JRI reform processes, South Carolina and Nebraska raised their thresholds to qualify as felony theft from \$1,000 to \$2,000 and \$500 to \$1,500, respectively. Alaska recalibrated felony theft from \$750 to \$1,000 and included a provision for future adjustments for inflation.¹¹
- *Eliminate mandatory minimum sentences, allowing more appropriate sentencing for less serious drug trafficking offenses, reducing time spent in prison.* Idaho’s mandatory minimum sentences for drug trafficking charges lengthen prison time for people who may pose less of a public safety concern. Currently, drug trafficking convictions do not require proof of a person’s intent to deliver.
- *Revise sentencing guidance for judges which currently includes criteria that favors sending people with substance use disorder to prison for possession.* Idaho Code Section 19-2521 instructs judges to impose prison if someone is likely to commit another crime - a likely factor for people dealing with addiction - or requires “correctional treatment.” The 1977 guidance does not address treatment options.¹²

To cost-effectively maintain public safety, Idaho could also expand effective alternatives to incarceration that have already begun in Idaho:

- *Expand restitution programs.* In contrast to criminal fees that go to county and state government, restitution programs collect money from offenders to compensate victims of their crime. In Idaho an estimated \$1.1 million in restitution has been collected since 2015 and 540 restitution cases have been closed.¹³ Restitution could be expanded for property crimes and used in combination with less lengthy prison terms or as a stand-alone sanction. Payments should be calibrated on a person's ability to pay. Germany, a country with a low crime rate, assesses fines according to one's ability to pay, including as stand-alone sanctions.¹⁴
- *Expand problem-solving courts such as drug, mental health, and veterans courts.* Problem-solving courts focus on providing services and programming for people at high-risk to recidivate and have significant behavioral health needs. Idaho's first problem-solving court began in Kootenai County in 1998, and there are now 68 different problem-solving courts located throughout the state. Recent evaluations of select Idaho drug and mental health courts have found that participants had better outcomes, including lower rates of recidivism, compared with similar groups of people who did not enter specialty courts but would have qualified.¹⁵ South Dakota established veterans and drug courts focused on driving under the influence offenses and expanded its drug court capacity by almost 500 percent between 2011 and 2016. Legislation in West Virginia mandated that drug courts be available statewide by 2016.¹⁶

Utah Reaping Benefits from Reforming Drug Possession Sentences

Eighteen states, including Utah, undertook sentencing reforms as part of their JRI involvement.¹⁷ Policymakers were motivated by data revealing that almost two out of three people serving state prison sentences had been convicted of non-violent offenses and that sentences had lengthened by 20 percent over a decade. In 2013, Utah legislators converted a person's first and second convictions for drug possession from felony charges to misdemeanors that carry less time. Utah also instructed its sentencing commission to reduce sentencing guidelines by four to six months for other lower-level criminal offenses.

In Idaho, felony drug possession covers all controlled substances with sentence lengths and fines based on the type of substance and its potential for addictive behavior and use for medical purposes. Possession of narcotics is punishable up to a life term and a \$25,000 fine. Other controlled substances such as codeine and some steroids carry a maximum sentence of five years and a \$15,000 fine. Medicines that have small amounts of specified narcotic drugs carry a maximum term of three years and a \$10,000 fine. Last year 1,683 people in Idaho entered prison to serve - on average - a minimum of two years for drug possession, leading to \$75.4 million in prison costs for two years in prison. Reducing the maximum to one year could cut costs in half.

Addressing Delayed Parole Revocation Hearings Could Save Costs

Unnecessary and prolonged jail and prison stays have negative impacts on the livelihoods of people on parole awaiting hearings for a parole violation. Parole violations span in severity from technical violations of parole terms to new criminal offenses. Also known as parole disposition reviews or parole revocation hearings, it is during a hearing that an actual sentence is given for the violation, whether it is prison time, reinstatement to parole, or an alternative sanction. However, delayed hearings impose unnecessary, costly – and at times overly punitive - confinement for nonviolent parole violations, many of which are serious but do not constitute a crime on their own. For example, missing appointments with a parole officer, drinking alcohol, or failing a drug test are parole violations. A delayed hearing can lead to an increased risk of recidivism because as people wait in confinement for the hearing to take place, jobs, income, housing, and treatment are lost and family and community relationships upended. In 2017, 36 percent of Idaho's prison admissions were the result of individuals incurring a violation of a parole agreement or for a new non-violent offense.¹⁸

JRI legislation aimed to decrease the burden of hearings for parole violations. Follow-up legislation sought

¹ Any new criminal charge is considered simply a parole violation until conviction, including violent and non-violent felonies and violent misdemeanors. In 2018, about one-third of all parole hearings held were the result of new charges, both violent and non-violent.

to expand the capacity of the Commission of Pardons and Parole to hold more hearings by adding commissioners and implementing new diversion review panels that focused on diversions in lieu of parole revocation for certain people. Data show that six months after the changes, more hearings are taking place, suggesting that parole decisions are being made in a more timely way. Data available for 2019 show a similar trend. During this same time period, the average number of months spent in custody from arrest to hearing for technical parole violators also rose, indicating that unnecessary confinement could be taking place.

These trends suggest that the policy and procedural changes made to the Commission of Pardons and Parole in 2017 may not have been sufficient to keep up with the growing number of hearings for people on parole who incur a parole violation. In October 2019, the Commission revised the parole disposition review process to allow for more timely parole reinstatement decisions to be made and improve outcomes. However, it is too soon to evaluate those changes.

Idahoans with technical parole agreement violations and/or new non-violent charges are unnecessarily incarcerated while they wait for hearings, risking job loss and other de-stabilizing circumstances. Lawmakers can help people under community supervision be set up for success by ensuring the Idaho Commission of Pardons and Parole has the resources to ensure parole hearings are held in a timely manner.

Policy Options:

- *Increase the capacity of the Commission of Pardons and Parole and expand investments in timely hearings to ensure people coming up for parole revocation can have a timely hearing.*
 - In 2017, the Commission was expanded to 7 part-time members to improve its ability to hold more hearings per month. This capacity could be further increased and streamlined by switching from 7 part-time commissioners to fewer, full-time commissioners solely dedicated to making parole revocation decisions (and pardon decisions).
 - Investments in staff support for hearings and timely transportation (through IDOC) increase the ability of commissioners to make more decisions per month and will result in lower incarceration costs as parole violators remain in custody for shorter durations while awaiting their parole revocation hearings.

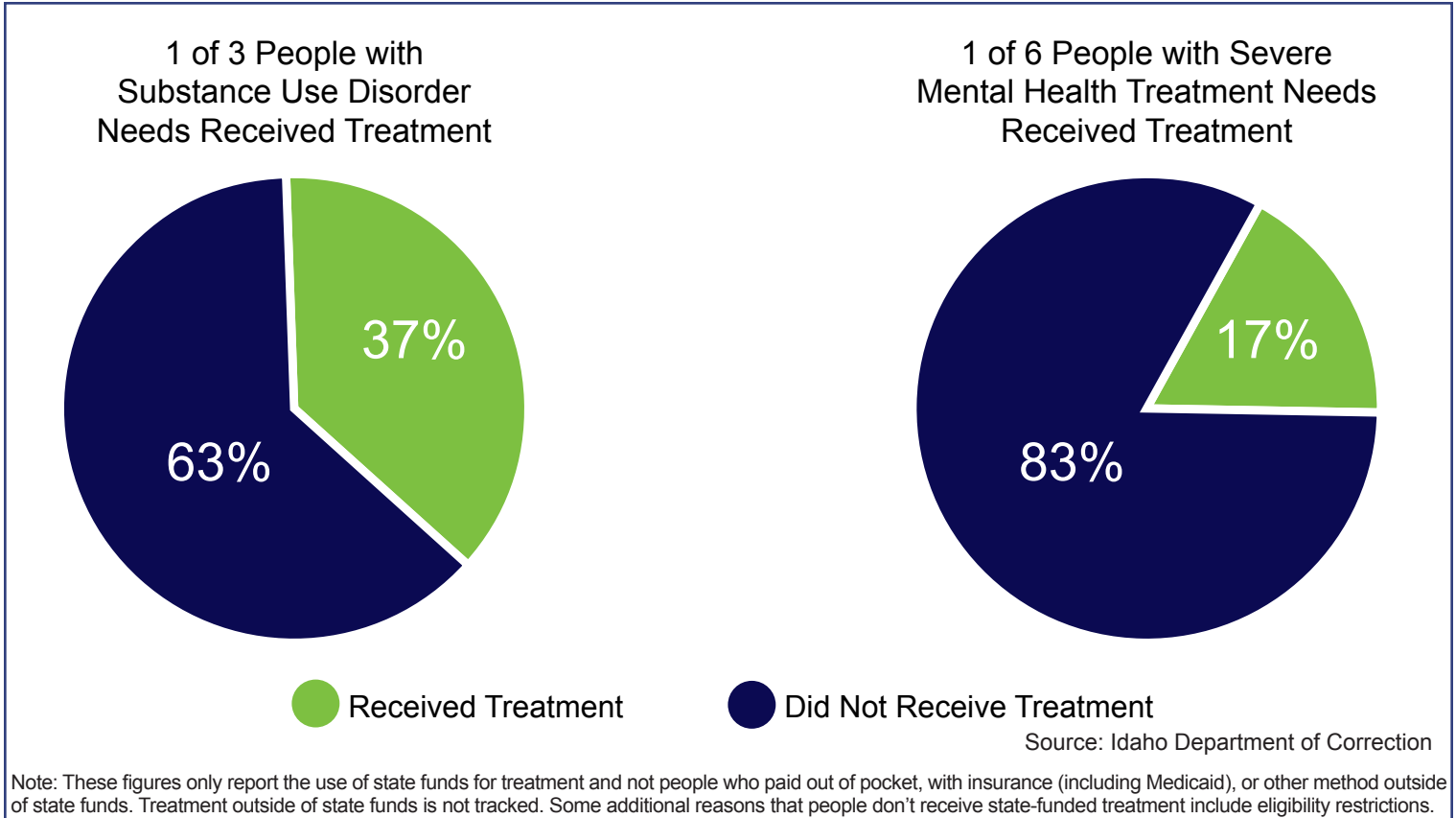
Improved Access to Behavioral Health Treatment Could Curb Recidivism

An estimated two out of three people entering state prison do so because of violations of their probation or parole terms. This brings them from low-cost community supervision to high-cost jails and prisons. In our interviews of high-ranking criminal justice officials in Idaho, we heard consensus that Idaho is ill-equipped to meet the behavioral and substance use disorder treatment needs of Idahoans under community supervision. It is critically important that barriers to successful re-entry – in particular, substance use disorder and mental health treatment needs – are addressed to stem the number of people returning to prison on parole violations who pose a low risk to public safety. Treatment for substance use disorder and mental health have been linked to lower recidivism among Idahoans under community supervision with a moderate to high risk to recidivate.¹⁹

Strikingly, not all people under community supervision in Idaho with a moderate to high risk to recidivate receive substance use disorder and mental health services, even though those needs are identified.²⁰ IDOC, which oversees people who committed felonies and are now under community supervision, estimates that providing substance use disorder and mental health treatment to all moderate to high risk felony offenders that did not receive services in fiscal year 2018 totals \$8.5 million in state funding. That funding gap exists despite \$5.5 million that was invested each year in the last two years in mental health funding for people in community supervision.

² Individuals facing revocation of their parole due to a new crime often waive their right to a parole revocation hearing until the new crimes are adjudicated. This may contribute to the increase in the average number of months spent waiting for a hearing.

People Under Community Supervision with Moderate to High Risk of Recidivating Unlikely to Receive Treatment



Medicaid expansion will make substance use disorder and mental health treatment available to many people exiting Idaho jails and prisons. IDOC anticipates the majority of people released from custody of state prisons will be eligible, and is directing people to enroll in Medicaid upon their release date.

Policy Options:

- *Expand investment in health, substance abuse disorder, and mental health treatment for people with moderate to high needs in community supervision.* A funding gap of \$8.5 million has been identified by IDOC in achieving treatment access for all people who demonstrate a need for substance use disorder and mental health treatment. Treatment is more cost-effective than prison time and is linked to reduced recidivism.
- *Remove potential work reporting requirements for Medicaid that prevent people leaving prison from receiving substance use disorder and mental health treatment.* People who leave prison are often already reporting work-related activities to parole officers. Savings from otherwise duplicative reporting requirements could be reinvested in treatment.
- *Create public and private incentives to attract and retain a robust behavioral health workforce throughout Idaho, particularly in the state's most remote and rural areas.* Idaho healthcare providers report that there is a critical shortage in Idaho's behavioral health workforce and that shortage impacts treatment access for people under community supervision. Incentives could include: increased Medicaid reimbursements for treatment, training for behavioral health professionals, and a pipeline between education providers, student loan forgiveness programs and qualified loan forgiveness employers. Idaho's behavioral health system has not been comprehensively assessed by the legislature or governor and convening a group of public officials, behavioral health treatment consumers, and industry voices to develop a roadmap that includes addressing the behavioral health workforce could result in enhanced treatment access for Idahoans under community supervision.

Barriers Threaten Successful Re-Entry in the Near- and Long-Term

A felony conviction comes with consequences that affect people for a lifetime, some of which can be more severe than the sentence applied by the courts. People can be denied places to live, jobs, and student loans and grants based on criminal records. Criminal debt that is not based on people's ability to pay hampers their ability to get a foothold. Barriers to successful re-entry diminish the return on Idaho's investment in corrections and rehabilitation of Idahoans by driving up recidivism.

An estimated 112,000 adult Idahoans have a felony conviction and figures for the share with a criminal record that includes arrests is even greater.²¹ Currently juveniles in Idaho can petition for expungement – the process by which a legal record of an arrest or conviction is sealed - on non-violent, non-sexual offenses. The provision requires that accountability is in place and that expungement decisions take into account public safety considerations. Adults in Idaho can seek expungement only for acquittals and dismissals, not convictions. Adults with felony convictions in Idaho can apply for an official pardon three to five years after the completion of their sentence to have their civil rights restored, but even the pardon process does not expunge the crime from an individual's criminal record. That means even a minor offense could prevent someone from securing a job or home rental decades later.

Idahoans who are under community supervision for misdemeanors or felony convictions must pay fees toward the cost of their supervision. The counties determine misdemeanor supervision fees, which range from \$0 (in Benewah County) to \$75 per month (the Idaho state statutory cap). Fees collected by the counties are deposited into counties' misdemeanor probation funds – also known as justice funds – and can only be spent on supervision or related purposes. Felony supervision fees are collected by IDOC. While IDOC is authorized to collect up to \$75 per month, the agency currently collects \$60 per month. Combined with criminal fees that can range into the thousands of dollars, criminal justice debt can loom over Idahoans returning to their communities. Yet, little is known about the size of this debt, how much it costs to collect debt (including law enforcement resources for arresting people for unpaid debt and other administrative costs), and how these dollars fit into county and state budgets.²²

Policy Options:

- *Implement adult expungement for people with records who pose no public safety risk.* Idaho's provision for juvenile expungement ensures that violent crimes cannot be expunged and could serve as a starting point for creation of expanded expungement for adults.
- *Review the impact of criminal fees and fines on Idahoans leaving prison and costs associated with collecting debts.* Reductions in criminal fees and fines may produce savings by decreasing costs of collection.
- *Promote awareness of the pardon process for all adults with felony convictions.* Although the pardon process does not expunge the crime from an individual's criminal record, an official pardon indicates that the Commission conducted a review and determined that the individual has changed their life. This decision can pave the way for many new opportunities – such as access to certain professional licenses– not previously afforded to them due to their felony conviction. IDOC could promote increased pardon application submissions if every individual under supervision received information about the pardon process.

Criminal Justice Policies Disproportionately Affect Idaho Communities of Color

Criminal justice policies in our state are critical to ensuring public safety and managing our budget in ways that use resources wisely and help Idahoans and their communities thrive. Reforms to sentencing, investments in community supervision, and expanded treatment opportunities can build upon the successful timely parole release policies initiated by JRI and ensure that public dollars are allocated to strategies that promote the successful reintegration of people who have served their sentences.

Idaho communities of color and Native communities of Idaho, in particular, have been harmed the most from past criminal justice policy decisions and will benefit the most from smarter policies that remove barriers to re-entry and help people succeed in and contribute to their communities. The legacy of conscious and unconscious discriminatory practices in criminal justice mean that Hispanic, Black, and Native American Idahoans today are disproportionately involved in the criminal justice system (see Appendix). Though serious work is required to reduce the impact of the criminal justice system on these communities, a commitment to ensuring prison is used for serious crimes and for people at highest risk to commit further crimes can strengthen all Idaho communities.

Citations

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2. For a summary of JRI please see Idaho Department of Correction report, *Justice Reinvestment Impact in Idaho, Report to the Legislature*.
3. Idaho Department of Correction (2019). *Justice Reinvestment Impact in Idaho Report to the Legislature*. An additional \$10 million has been saved in community supervision costs since 2015 with the creation of the Limited Supervision Unit (LSU), which is community supervision for people with fewer supervision needs. In 2017, for example, two probation and parole officers in LSU oversaw the cases of 2,300 people under community supervision, a higher ratio compared with regular supervision.
4. Idaho Department of Correction (2019). *Justice Reinvestment Impact in Idaho, Report to the Legislature*.
5. Russell, B. (Nov 29, 2018). *New report finds justice reinvestment reforms succeeding in Idaho*. Idaho Press.
6. Idaho Department of Correction (2019). *Justice Reinvestment Impact in Idaho, Report to the Legislature*.
7. We analyzed a point-in-time count of all people in Idaho prisons on July 1, 2019 with low LSI scores. We excluded people who were convicted of violent and other serious crimes. Low-level crimes were defined as drug possession, where people are typically driven by addiction and not by harm to others, and lower-level property crimes that only result in loss of property (and not harm to others).
8. Prison admissions include people sentenced to retained jurisdiction, which is a shortened prison sentence with intensive programming and education, at the end of which the court decides whether to place a person on community supervision or impose a full sentence.
9. These definitions were derived from the Brennan Center for Justice Report, *How Many Americans Are Unnecessarily Incarcerated?*
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18. The Council of State Governments' Justice Center (2019). *Idaho Supervision Violation Data Snapshot*.
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20. Ibid.
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Appendix

