

HARRIS ON THE CRIMINAL LEGAL SYSTEM

An Opportunity for Increased Accountability, Fairness, and Humanity

Democratic nominee Vice President Kamala Harris has comprehensive knowledge of the criminal justice system and a demonstrated record of a commitment to reform. While Harris may not be aligned with all of the ACLU's positions on criminal law reform, there is nonetheless considerable overlap and synergy.

Before she was elected to the Senate, Harris served as an assistant district attorney and district attorney for the city of San Francisco, and as attorney general for the state of California. As a district attorney, Harris established a reentry program focused on removing barriers to housing, education, and employment.¹ As an attorney general, she created an office to address the rights of children in the juvenile justice system.² Later as a senator, Harris championed progressive legislation to address police transparency and accountability and to address disparities created by the war on drugs.³

To be clear, Harris has a mixed record on criminal law reform. For instance, her position on the death penalty has shifted over time. As district attorney, she demonstrated fidelity to campaign promises when she declined to seek the death penalty. But, under her leadership as attorney general, her office defended the death penalty in California after a court found it to be unconstitutionally arbitrary. That said, Harris' most recent work in the Senate to reform the criminal legal system is encouraging. If she continues this path, she could have a significantly positive impact on America's justice system.

This year also marks the 30th anniversary of the 1994 Crime Bill, which presents Harris with an opportunity to renounce the failed policies that drove mass incarceration and to embrace reform to end racial disparities and move toward a more humane system for all. The ACLU will continue our advocacy for such meaningful reform. We will push the Harris administration to expand progressive reform efforts and challenge draconian approaches to criminal legal policy.

OVERALL RESPONSE

Congress

The ACLU will continue to demand that Congress enacts key legislation to ensure a fair and just criminal legal system, some of which were championed by Harris when she was in the U.S. Senate. This includes an improved George Floyd Justice in Policing Act to ensure accountability for police misconduct; marijuana reform to begin to address the harmful impact of the war on drugs; the Driving for Opportunity Act to reduce police interaction and the commensurate risk of harm; the Mental Health Justice Act to provide non-law enforcement responses

to mental health crises; the EQUAL Act to remove sentencing disparities between crack and powder cocaine; and the End Solitary Confinement Act, to limit solitary confinement in federal facilities.

Additionally, the ACLU will continue our advocacy for legislation to repeal the federal death penalty, end mandatory minimum sentences, abolish the doctrine of qualified immunity, and stop the 1033 transfer of military weapons program.

Administrative Advocacy

We will push a potential Harris administration to implement transformative reforms to policing, sentencing policy, conditions in prisons, and to work towards abolishing the death penalty.

The ACLU has advocated for the full implementation of President Joe Biden's executive order on policing, which is an important step towards addressing the plague of police violence in this country. We will continue this advocacy under a Harris administration and urge them to go beyond the executive order and end to the Pentagon's 1033 and 1122 programs, which funnel military equipment to local police departments.

If Harris is elected, the ACLU will encourage her to appoint an attorney general committed to ending extreme sentencing practices, including the use of mandatory minimums, which are major contributors to mass incarceration. We will also urge Harris to continue to fully

implement the Biden administration's charging policies that equalize sentencing outcomes for crack and cocaine offenses. The ACLU has long championed clemency to right past injustices, and we will encourage Harris to use her clemency power to mitigate the harms of excessively harsh sentences.

Under any administration, the ACLU will continue advocating for the rights of people in federal and state prisons, jails, and immigration facilities. We will encourage a Harris administration to immediately issue an executive order banning the use of solitary confinement in federal custody and enforce Biden's executive order barring the Department of Justice (DOJ) from contracting with private prison companies, that prioritize profits over the health and safety of people behind bars.

Lastly, the ACLU will continue to lift up nationwide calls for an end to the death penalty and urge a Harris administration to finally put an end to the federal death penalty once and for all.

SPECIFIC RESPONSE & OPPORTUNITIES

Policing

The ACLU will continue to advocate for evidence-based solutions to public safety and will push a Harris administration to champion reforms that increase police accountability, while advancing opportunities to provide alternative responses to community contact with law enforcement.

In 2022, President Biden issued an executive order on policing that changed the use of force standard for federal law enforcement, restricted the distribution of military equipment to local law enforcement, restricted the use of deadly chokeholds and carotid restraints, and created a national police misconduct registry.⁴ In the absence of congressional action, a potential Harris administration should continue the work of implementing President Biden's policing executive order. The ACLU will continue our advocacy for this critical work. We will also continue to call for an end to the Pentagon's 1033 and 1122 programs, which funnel battlefield equipment such as mine-resistant ambush-protected vehicles (MRAPs), tanks, and heavy arms and ammunition into local police departments.⁵

The ACLU will fight for the privacy rights and civil liberties of everyone and push the Harris administration and Congress through advocacy and public pressure to provide strong federal intervention to address the ongoing crisis of police misconduct and violence.

Justice in Policing Act

While in the U.S. Senate, Harris cowrote and was one of the lead sponsors of the Justice in Policing Act of 2020,⁶ which was the most significant police reform bill to gain traction in the U.S. Senate after the murder of George Floyd in 2020. The legislation addressed racial profiling, created a national standard for excessive use of force by police, and called for independent investigations and prosecutions for police misconduct.⁷ A companion bill in the U.S. House of Representatives, re-named the George Floyd Justice in Policing Act, passed the House of Representatives with bipartisan support.⁸ While the Act was supported by Senate Democrats, it ultimately stalled in the Senate.

In response to the ACLU's federal advocacy, the most recent introduction of the George Floyd Justice in Policing Act in the Senate included grants for mental health crisis response programs and unarmed civilian government departments to enforce traffic violations.⁹ Harris has continued to be a proponent of police reform and accountability in her current role as vice president, recently applauding the development of a national non-public police misconduct registry for hiring federal law enforcement¹⁰ and calling for the passage of the George Floyd Justice in Policing Act.¹¹ If elected, Harris has an opportunity to champion improvements to the Act.

The ACLU will continue to advocate for updates to the George Floyd Justice in Policing Act under a potential Harris administration. For example, we will push to include a publicly accessible police misconduct registry because the public has a right to know which officers have engaged in practices that are harmful to communities and should be excluded from policing.

The George Floyd Justice in Policing Act also contains some provisions limiting the use of biometric data, but these provisions must be expanded and strengthened to keep pace with the development and deployment of these technologies by law enforcement.¹² The ACLU will continue to push for privacy protections that safeguard civil liberties for everyone, especially for Black, Brown, LGBTQ+, and disabled communities. For example, the ACLU filed a lawsuit on behalf of Robert Williams, a Black man who was wrongfully arrested after the Detroit Police Department relied on incorrect results from facial recognition technology. As a result of this litigation, the city of Detroit enacted one of the nation's strongest police department policies on facial recognition technology, implementing important guardrails that constrain the technology.¹³

Ending Qualified Immunity

Qualified immunity is a court-created legal doctrine that protects police officers and government actors from being held accountable for constitutional violations. Ending qualified immunity is an important tool to increase accountability for unconstitutional use of force, and changing the culture in police departments where law enforcement feel empowered to violate rights knowing they will face little to no consequences.

In 2020, Harris cosponsored the Justice in Policing Act, including a provision that would end qualified immunity for law enforcement.¹⁴ The ACLU strongly supports an end to qualified immunity, which allows officers and government officials who engage in the most egregious conduct to evade accountability, and we will continue to advocate in Congress and the courts for an end to this doctrine.

Reducing Contact With Police Officers

A majority of police-initiated contact with the public happens during police-initiated stops, whether of drivers or pedestrians.¹⁵ These stops disproportionately impact Black and Brown people and can escalate into violent encounters.¹⁶ And, the practice of police enforcing fines and fees increases opportunities for this contact with law enforcement. There are an estimated 30 million cases for infractions, violations, and misdemeanors filed every year that are punishable by fines and fees.¹⁷ A 2021 ACLU report documents the pervasive practice of using driver's

license suspension as punishment for unpaid fines and fees, and its consequences. These burdens are borne disproportionately by Black and Brown communities, fueling a vicious cycle of poverty and criminalization, and can even result in deadly consequences.¹⁸

The ACLU has advocated for the passage of the Driving for Opportunity Act, introduced by Senators Chris Coons (D-Del.) and Roger Wicker (R-Miss.), which was co-sponsored by Harris during her time in the Senate.¹⁹ This bipartisan legislation provides grants to states that do not suspend, revoke, or refuse to renew the driver's license of a person or registration of a motor vehicle for failure to pay a civil or criminal fine or fee. By helping states cover the costs of reinstating driver's licenses previously suspended for unpaid fines and fees, the Driving for Opportunity Act would encourage states to pass similar laws, and it would give millions of Americans the opportunity to have their driving privileges restored and significantly reduce potential encounters with police. Ten states have already ended debt-based license suspensions, and Congress can encourage more to do so by passing the Driving for Opportunity Act.²⁰ A potential Harris administration could support these state and local efforts at the federal level by championing the Driving for Opportunity Act and other federal grant programs that incentivize states and localities to repeal laws that unnecessarily criminalize people, saddling them with debt and jail time.

Police are also often the default response to people experiencing mental health crises. Law enforcement is ill-equipped to provide assistance in these circumstances, which can lead to violent and even deadly encounters.²¹ A 2021 study found that the risk of experiencing police use of force during contact is almost 12 times more likely for a person with mental illness than one without mental illness.²² The ACLU will continue to advocate for increased funding for alternative responses to behavioral and mental health emergencies — including programs that offer trained professionals such as social workers and community violence intervention specialists in lieu of law enforcement in emergency situations — and passage of the bipartisan Mental Health Justice Act.²³ The Harris administration should continue the Biden-Harris administration's commitment to providing funding and incentives for these critical alternative public safety resources.

Sentencing & Charging Discretion

A Harris administration has an opportunity to address systemic issues in the criminal legal system that drive mass incarceration and fuel the growth of the prison industry. The ACLU will press a Harris administration to champion policies on charging discretion and sentencing consistent with a more effective and less punitive

approach to public safety that also reduces racial disparities.

Mandatory Minimums

Mandatory minimum sentences require federal judges to impose a required sentence — sometimes as much as five years, 10 years, or 20 years, or even a mandatory life in prison sentence — regardless of the specific facts of the case or the circumstances of the person sentenced. Mandatory minimum sentences remove discretion from federal judges and transfer that power to federal prosecutors. Prosecutors regularly use their charging authority to pressure people to accept a plea deal who may be innocent, have testimony that should be heard by a jury, or were coerced. Mandatory minimums have fueled mass incarceration, racial disparities, and overcrowding in our federal prison system.²⁴

In 2019, Senator Harris introduced a criminal justice reform plan for federal criminal court that would end mandatory minimum sentences and limit solitary confinement and the federal death penalty, as well as phase out cash bail and for-profit prisons.²⁵ The ACLU will encourage her to pursue these important goals as president. In service of those goals, the Harris administration should appoint an attorney general committed to ending mandatory minimums. The Harris administration can also support and champion legislative proposals such as the Justice Safety Valve Act, which Harris has co-sponsored in the past,²⁶ and would allow federal judges the discretion to sentence below the mandatory minimum sentence.

Attorney General Policies on Charging, Pleas, and Sentencing

As we continue to advocate for the abolishment of mandatory minimums, the Harris administration should use its authority to minimize their impact in federal criminal prosecutions. The current administration offers a useful framework. Specifically, on December 16, 2022, Attorney General Merrick Garland issued two memoranda to all federal prosecutors: *General Department Policies Regarding Charging, Pleas, and Sentencing* (“General Memo”)²⁷ and *Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases* (“Drug Memo”).²⁸ These changes include directing prosecutors to charge crack cocaine offenses like powder cocaine offenses in order to avoid unwarranted and racially disparate sentencing outcomes. The also include guidance to not pursue charges that carry a mandatory minimum sentence for cases where such charges would not sufficiently reflect the seriousness of the person’s alleged criminal conduct, danger to the community, or harm to victims.²⁹

If properly implemented, policies requiring federal prosecutors to exercise greater restraint in using mandatory minimums could reduce racial disparities in sentencing. Research has shown that “[t]he initial mandatory minimum charging decision alone is capable of explaining more than half of the black-white sentence disparities not otherwise explained by pre-charge characteristics.”³⁰

Attorney General Garland wisely included requirements for U.S. Attorneys’ Offices and commitments by the DOJ to conduct training, implementation, reporting, and transparency measures to ensure compliance with the memoranda’s new policies.³¹ However, notwithstanding the promise of these policies and the administration’s pledge of transparency, reports from federal public defenders and other defense attorneys in multiple federal court districts indicate federal prosecutors are not consistently abiding by the memoranda. In response, on March 5, 2024, the ACLU, the National Association of Criminal Defense Lawyers, and the Federal Public & Community Defenders submitted a Freedom of Information Act (FOIA) request seeking public records detailing the DOJ’s implementation of the December 2022 memoranda.³² Because the administration has since failed to provide any of the requested records, we filed a lawsuit on June 6, 2024.³³

A potential Harris administration should renew the previous administration’s stated commitment to limiting the use of mandatory minimums by federal prosecutors and make good on the current administration’s commitment to transparency by providing the public with the information necessary to assess whether federal prosecutors are abiding by the administration’s charging policies.

EQUAL Act

The ACLU has long advocated for an end to the racially disparate sentencing between crack and powder cocaine.³⁴ The Anti-Drug Abuse Act of 1986 established a five-year mandatory minimum sentence for first-time simple possession of crack cocaine.³⁵ The law created the infamous 100:1 crack versus cocaine disparity, where an individual with five grams of crack would receive the same punishment as an individual with 500 grams of powder cocaine, despite the identical chemical nature of crack and powder cocaine.³⁶ In 2010, the Fair Sentencing Act removed the mandatory minimum five-year sentence for simple possession of crack and reduced the sentencing ratio for crack and cocaine powder to 18:1.³⁷ But it was still an unconscionable distinction based on politics rather than science. As a senator, Harris called for an end to the crack and powder cocaine sentencing disparity.³⁸

The ACLU strongly supports passage of the EQUAL Act, a bipartisan bill³⁹ that would end the racist and unfounded sentencing disparity that has resulted in racially disproportionate arrests, prosecutions, and federal imprisonment of Black and Brown people. The Harris administration should prioritize the EQUAL Act and federal sentencing reform to curb lengthy and racially disproportionate sentences that are fueling mass incarceration in our federal prison system.

Marijuana Reform

The ACLU and coalition partners have advocated for legislation that would ensure marijuana legalization is grounded in racial justice and remove re-entry and employment barriers to individuals and communities that were directly harmed by the war on drugs. Vice President Harris has advocated for similar positions as a senator and during her previous presidential campaign.⁴⁰ In 2019, Vice President Harris advocated for ending the war on drugs with specific emphasis on the harms of marijuana criminalization,⁴¹ which accounts for 340,000 people charged with crimes at the state and federal level annually.⁴²

In 2019, Harris introduced the Marijuana Opportunity Reinvestment and Expungement Act (MORE) Act.⁴³ The legislation would have decriminalized marijuana at the federal level and made the de-scheduling of marijuana retroactive.⁴⁴ Additionally, the bill would have created an opportunity trust fund to administer funds to nonprofit community organizations to serve individuals adversely impacted by the war on drugs, and administer substance-use treatment services. The bill would have also provided funds through the Small Business Administration to implement equitable licensing programs for marijuana businesses and employment.⁴⁵

The ACLU supports the aims of the MORE Act and federal legislation that decriminalizes marijuana and allows states to undo the harms of the war on drugs. As states continue to legalize marijuana, the ACLU will push a Harris administration to support federal legislation that includes critical decriminalization components, automatic expungements, and equitable opportunities for individuals and small business owners most impacted by the war on drugs.

Conditions of Confinement & Decarceration

Solitary Confinement

Solitary confinement, even for relatively short periods of time, causes intense suffering and aggravation of

mental illness, and can lead to self-harm and suicide. Numerous courts have recognized that it can violate the Constitution's prohibition on cruel and unusual punishments. As a senator, Harris co-sponsored legislation to limit solitary confinement in immigration detention,⁴⁶ as well as an early version of Senator Dick Durbin's bill to reform solitary in federal prisons.⁴⁷ Before ending her campaign for the Democratic presidential nomination in 2020, she promised to "end solitary confinement, but ensure alternative therapeutic and rehabilitative mechanisms are available to protect the safety of individuals in prisons and of prison staff."⁴⁸

The Biden-Harris administration failed to keep its promise, with the use of solitary confinement in the federal Bureau of Prisons increasing between 2021 and 2024.⁴⁹ A Harris administration should immediately issue an executive order banning the use of solitary confinement in all forms of federal custody.⁵⁰ The administration should, through the executive order, require the Federal Bureau of Prisons, the U.S. Marshals Services (USMS), and Immigration and Customs Enforcement to implement the limits on solitary confinement set out in the End Solitary Confinement Act.⁵¹ The administration should also support the passage of the Act to ensure that the prohibition of solitary confinement is permanent.

Prison Privatization

Private prisons cut corners on health care, safety and security, and other essential services to maximize shareholder profits. They are also less transparent, and subject to less public oversight, than publicly operated prisons. One of the first acts of the Biden-Harris administration was to issue an executive order barring the DOJ from contracting with private prison companies.⁵² This executive order led the Federal Bureau of Prisons to end its use of private prisons, but the USMS evaded the order's requirements and continues to hold thousands of people in private detention facilities.⁵³ If elected, Harris should ensure that the USMS complies with the executive order and that the DOJ ends, once and for all, its use of private, for-profit prisons.

Clemency & First Step Act

The ACLU has championed clemency to right past injustices. The ACLU Redemption Campaign is a nationwide effort to liberate 50,000 people from federal and state prisons by pushing elected officials — from the president to state governors — to use their existing clemency powers in new and transformational ways, forcefully confronting mass incarceration and racial injustice.⁵⁴

The ACLU advocates for categorical commutations to release for four large groups of people who are unjustifiably imprisoned, including:

1. People who would serve a lesser sentence than what they are serving if they were convicted under current reformed laws;
2. People convicted of drug distribution and possession offenses regardless of the underlying substance, including marijuana;
3. People incarcerated for technical probation or parole violations; and
4. Older incarcerated people.⁵⁵

Clemency offers a chance to prioritize humanity over finality and mitigate the harms of excessively harsh sentences that do not serve a public safety interest.

Harris has been a supporter of clemency for marijuana-related convictions,⁵⁶ which keep countless individuals locked behind bars or create barriers to housing, employment, education, and stability.⁵⁷ Harris has previously called for reforms to the clemency process and to increase the use of clemency and sentencing review units.⁵⁸ We will encourage a potential Harris administration to commute sentences consistent with the categories identified above and for marijuana-related convictions.

The First Step Act created a retroactive pathway for the sentencing reforms in the Fair Sentencing Act of 2010, however, the First Step Act still requires people to petition the federal courts for relief if they were convicted prior to the law's passage.⁵⁹ Federal judges frequently deny these petitions, leaving some people with an incredibly long sentence for crack offenses that they would not receive under today's sentencing laws. The Harris administration should grant clemency to individuals who were left behind by some of the First Step Act's sentencing reforms. Additionally, the ACLU will push the Harris administration to fully implement the reforms in the First Step Act, including addressing the flaws and racial bias in the federal risk assessment tool.⁶⁰

In March 2020, Congress expanded the Bureau of Prisons' authority to allow people to serve the remainder of their federal sentences in the community on home confinement during the "COVID-19 emergency period."⁶¹ Since then, over 13,000 people have been released to home confinement, and about 2,600 remain on home confinement.⁶² The overwhelming majority of people released under this Act successfully reintegrated into their communities without committing new offenses.⁶³ Their success demonstrates that we hold far too many people in prisons for too long, and the Harris administration should commute the remaining sentences for individuals who have successfully re-integrated into their communities. Additionally, the Harris administration should grant clemency to older and vulnerable people in custody.

Death Penalty

The ACLU will continue our multi-faceted advocacy efforts — including litigation, organizing, and coalition action — to abolish the death penalty once and for all.

The death penalty is rife with injustice. Since 1973, when the "modern death-penalty era" began, 200 innocent people condemned to die in the United States have been exonerated.⁶⁴ Botched executions, often caused by the experimental use of compounded drugs administered by incompetent personnel, occur on a regular basis.⁶⁵ The costs of these shameful errors in the American death penalty system fall hardest on Black and Brown people.⁶⁶ Indeed, the capital sentencing process itself is infused with racial bias, including in over-selection of Black defendants for death sentences, particularly in white-victim cases,⁶⁷ and the under-selection of Black jurors.⁶⁸ These are just a sampling of the myriad problems with America's most extreme punishment.⁶⁹

Acknowledging these concerns, and in the immediate wake of the Trump administration's execution spree, which killed 13 people, the Biden-Harris administration ordered, through Attorney General Garland, a halt to any future federal executions and a review of the federal execution process.⁷⁰ This was consistent with President Biden's campaign promise to end the federal death penalty and to incentivize states to follow the federal government's example.⁷¹ Notwithstanding this public commitment, the Biden administration has continued to seek the death penalty in isolated cases.⁷²

Over the course of her life in public service, Harris's stance on the death penalty has fluctuated. During her time in the Alameda County and San Francisco District Attorney's Offices throughout the 1990s, Harris did not prosecute any death penalty cases. She then won a race for district attorney on a platform promising never to seek execution⁷³ — and adhered to this position even under pressure from political allies.⁷⁴ When she became attorney general of California in 2011, she became the chief law enforcement officer in the state with the largest death row population. Although California has held no executions since 2006,⁷⁵ Harris' office defended the death penalty, challenging a court ruling that found California's statute to be unconstitutionally arbitrary. Then, as a senator in 2019, Harris took more of an abolitionist position, co-sponsoring S. 2390, which would have ended the death penalty for federal crimes, consistent with her record.⁷⁶

Against this backdrop, the ACLU is hopeful that Harris, joined by Tim Walz, will create an administration that is responsive to calls for a continued suspension of federal executions, broad grants of clemency to those on federal death row, and abolition of the federal death penalty.

We will continue to advocate for those positions. The ACLU will also continue our critical litigation that puts the death penalty “on trial” in the states, invalidating the death penalty based on its racist administration,

including in the selection of juries.⁷⁷ Under a Harris administration, we will steadfastly advance these efforts with the aim to repeal both the federal death penalty and its imposition in every state jurisdiction.

CONCLUSION

If elected, Harris will have an opportunity to work toward dismantling mass incarceration. Much of this will require Harris to recommit to the legislative agenda she pursued as a senator and that the Biden administration advanced during its tenure. Those efforts aimed to end mandatory minimums, the war on drugs, solitary confinement, and the federal death penalty, along with securing meaningful police reform.

As president, Harris must not wait for Congress to act. Her administration should leverage its power to limit mandatory minimums and inequitable drug sentencing, halt federal executions, vastly expand the number of people granted clemency from excessive sentences and increase police accountability. If Harris is elected, the ACLU will advocate for the enactment of these critical measures, and to end mass incarceration.

ENDNOTES

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