

Reimagining Rights & Responsibilities in the United States: Criminal Justice & Public Safety

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Overview

Starting with the Nixon administration in the early 1970s, and gaining steam throughout the next decade, the prevailing view on criminal justice was that “tough on crime laws make crime rates go down.” That sentiment was predicated on the notion that criminals were not being sufficiently punished for their offenses, and that sentences must be increased—including mandatory minimums and “three strikes laws”—both to remove criminals from communities, and to deter others from committing crimes. The incarceration rate more than tripled between 1980 and its peak in 2008, from 310 to 1,000 prisoners per 100,000 adults—some 2.3 million people in all. Today, the United States leads the world in incarceration, with a rate more than 4 times that of comparable democracies in Western Europe.¹

According to the nonprofit Vera Institute of Justice, such policies had minimal impact at best on crime. While crime rates fell throughout the 1990s and early 2000s, studies have found a weak relationship with higher incarceration—which accounted for less than 25% of the drop throughout the 1990s and 0% of the drop in the 2000s. In fact, studies have found that spending time in prison actually increased an individual’s proclivity to commit crimes, and some states with the highest increases in incarceration rates also had the smallest drop in crime.²

Given the high cost and limited effectiveness of such policies, some states began pushing through limited reforms to reduce sentences and release offenders to community supervision. Such policies focused on reducing recidivism, that is, the likelihood that a released prisoner would re-offend and return to incarceration, through drug treatment and reentry programs. Between 2007 and 2017, the Brennan Center for Justice found that 34 states reduced both crime and incarceration, decreasing prison populations and making communities safer. Massachusetts, for example, decreased crime by 40% during that period, at the same time reducing those convicted of non-violent drug crimes by 45%.³

The incarcerated population in the United States now stands at its lowest point in more than 2 decades, at 655 people per 100,000 adults in 2018. Despite the progress, the drop in incarceration has not kept pace with the drop in crime, which is also now at its lowest rate nationwide—in fact, far below the rates in the early 1980s when the dramatic increase in incarceration first occurred. In the face of these realities, Gallup polls find that public perceptions of crime in the U.S. have not followed the decrease in crime, with people believing crime rates are much higher than the actual number.⁴

Incarceration is just one aspect of a criminal justice system that has often failed to uphold the principles of equal justice for all Americans under the law. Despite recent bipartisan gains on sentencing reform and prisoner reentry, the “tough on crime” attitudes of the 1980s continue to dominate. Frustration over the racial inequities in policing, for example, led to mass protests in 2020 accompanied by calls to “Defund the Police” in favor of more community-based solutions to violence, drugs, and mental health issues. At the same time, new rhetoric by the Trump administration appealing to “law and order”—the same phrase used by the Nixon administration that spurred the tough on crime movement decades ago—threatens to undo the modest progress that has been made.

On any given day there are nearly 7 million people directly involved with the U.S. corrections system—including arrests, pre-trial detention, incarceration, probation, and parole.⁵ At each stage of the system, there are issues of rights, including widespread discrimination and systemic racism that results in unequal justice for people of color. This report addresses these disparities in the chapter on “Racial Discrimination.” In addition to issues of equal protection, individuals caught up in the criminal justice system also face issues of due process, which is the subject of this chapter.

The United States Constitution protects the right to due process of law through the 5th and 14th Amendments. These constitutional provisions are intended to prevent the government from arbitrarily depriving individuals of life, liberty, or property. Government officials in many cases, however, have overridden these rights in the name of tougher enforcement at each stage of the criminal justice process. For example:

- Misconduct in **policing** can lead to violations of due process before an arrest is even made.
- Following arrest, **pre-trial detention** can unfairly deprive individuals of liberty as they are held due to an inability to pay bail.
- Once a verdict is reached, an arbitrary and poorly functioning **sentencing system** that relies on plea bargaining and mandatory minimums can leave individuals serving unfairly long sentences. **Incarceration** may lead to cruel treatment through solitary confinement and other extreme forms of punishment.
- Upon **reentry**, former prisoners frequently face barriers to reintegrating with society as a result of felony disenfranchisement and limited employment opportunity.

1. Gramlich, John. “America’s incarceration rate is at a two-decade low.” *Pew Research Center*, 2 May 2018, <https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/>.

2. Stemen, Don. “The Prison Paradox: More Incarceration Will Not Make Us Safer.” *Vera Institute of Justice*, July 2017, https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

3. Kimble, Cameron, and Ames Grawert. “Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem.” *Brennan Center for Justice*, 6 Aug. 2019, www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem.

4. “Crime.” *Gallup*, <https://news.gallup.com/poll/1603/crime.aspx>.

5. Porter, Nicole D. “Top Trends in State Criminal Justice Reform, 2019.” *The Sentencing Project*, 17 Jan. 2020, <https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2019/>.

- Children and youth are often punished as adults in **juvenile detention** systems.
- Exacerbating these problems is a growing **private prison system** that has created a demand for incarceration, as well as cutting costs and reducing prisoner welfare.

Reform of the criminal justice system must take into account each stage of the process, respecting the due process rights of individuals throughout their interaction with the system while at the same time bringing criminals to justice and improving overall public safety.

Main Elements of the Criminal Justice System

POLICING

Policing is often the point of entry into the criminal justice system. Since the beginning of the “tough on crime” approach, and in particular the war on drugs, law enforcement has become increasingly militarized. This process began with a policy signed into law by President Lyndon Johnson known as the Omnibus Crime Control and Safe Streets Act of 1968.⁶ The legislation led to the creation of the Law Enforcement Assistance Administration, an agency that provided federal funds to local governments to obtain military resources to control potential riots.⁷ Fifty years later nearly 90% of cities in the U.S. with populations above 50,000 have paramilitary police units known as SWAT (Special Weapons and Tactics) teams.⁸

Further entrenching this heavily armed and regimented response to crime, in 1990 the annual National Defense Authorization Act that specifies the budget and expenditures for the Department of Defense (DoD), authorized DoD to transfer military gear and weapons to local governments.⁹ After the September 11 attacks in 2001, the Department of Homeland Security began to disburse billions of dollars in grants to local governments for counterterrorism and counter-drug programs.¹⁰ This wide

distribution of military equipment led to an increase in aggressive tactics by police: in 1980 SWAT teams were deployed 3,000 times in U.S. cities, but by 2015 they were deployed more than 50,000 times annually.¹¹ Advocates point to the need to arm police for self-protection, but the trend toward militarization has led to an increase in police use of lethal force. A report by the Bureau of Justice Statistics estimated that 1,900 arrest-related deaths occurred across all U.S. states in the 12-month period between June 2015 to May 2016.¹²

The increasing militarization of police has gone hand in hand with racial disparities in enforcement. A Maryland study found that SWAT deployments concentrated on minority neighborhoods, even when they had controlled for crime rates between minority and non-minority neighborhoods. The study found that “more heavily militarized policing in those areas had little effect on public safety but did erode public trust in police among residents.”¹³

The use of excessive force by police departments prompted attempts to change the emphasis from heavily armed enforcement to building trust in communities. A federal pilot project emerged from the recommendations of My Brother’s Keeper, an organization launched by the Obama White House, involving community-oriented policing practices, a public health approach to preventing and reducing violence, and police training on racial bias.¹⁴ The National Initiative for Building Community Trust was a three-year project with a \$4.75 million budget to use social psychology to repair the relationship between police and community.¹⁵ Despite such attempts to reduce aggressive police tactics, little progress has been made.

Other issues with policing are inherent in the criminal system. Despite numerous states legalizing or decriminalizing marijuana in recent years, many of the policies instituted during the “war on drugs” continue. Arrests for drug-related crimes peaked in 2006 at 2 million.¹⁶ While there was a small decline between 2006 and 2015, the rate started to increase again in 2016, while at the same time, arrests for violent crime and property crime continued to

6. Adachi, Jeff. “Police Militarization and the War on Citizens.” *ABA Human Rights Magazine*, vol. 2, no. 1, 1 Feb. 2017, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2016-17-vol-42/vol-42-no-1/police-militarization-and-the-war-on-citizens/.

7. Ibid.

8. J.F. “How America’s police became so heavily armed.” *The Economist*, 18 May 2015, <https://www.economist.com/the-economist-explains/2015/05/18/how-americas-police-became-so-heavily-armed>.

9. Ibid.

10. Ibid.

11. Ibid.

12. Banks, Duren, et al. *Arrest-Related Deaths Program Redesign Study 2015–2016: Preliminary Findings*. Bureau of Justice Statistics, U.S. Department of Justice, Dec. 2016, <https://www.bjs.gov/content/pub/pdf/ardprs1516pf.pdf>.

13. Balko, Radley. “21 more studies showcasing racial disparities in the criminal justice system.” *The Washington Post*, 9 Apr. 2019, <https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system/>.

14. *My Brother’s Keeper Task Force Report for the President*. My Brother’s Keeper Task Force, 28 May 2014, https://obamaWhitehouse.archives.gov/sites/default/files/docs/053014_mbk_report.pdf.

15. “Mission.” *The National Initiative for Building Community Trust and Justice*, <https://trustandjustice.org/about/mission>.

16. *Economic Perspectives on Incarceration and the Criminal Justice System*. Executive Office of the President of the United States, Apr. 2016.

decline.¹⁷ In 2018, 40% of drug-related arrests were for marijuana offenses,¹⁸ 92% of which were for simple possession. Heroin and cocaine, on the other hand, only amounted to a quarter of the drug arrests in 2018. Marijuana arrests come at a high cost, with no clear correlation to public safety. The American Civil Liberties Union (ACLU) estimates that the annual cost of enforcing marijuana possession arrest laws is \$3.6 billion.¹⁹

Racial profiling is another abusive police practice. One study reviewed camera footage of over 100 million police vehicle stops across the U.S. by local and state police, revealing a persistent bias in the rate at which White drivers were stopped compared to Black drivers, who were more than 50% more likely to be pulled over. The rate significantly decreased in Colorado and Washington after those states legalized marijuana, cutting down on drug searches during traffic stops.²⁰ A study of racial profiling in the Los Angeles Police Department found that “a Black person in a vehicle was more than four times more likely to be searched by police than a White person, and a Latino was three times more likely.” However, “Whites were found with drugs, weapons or other contraband in 20% of searches, compared with 17% for Blacks and 16% for Latinos. The totals include both searches of the vehicles and pat-down searches of the occupants.”²¹ Other studies have also looked at the role of stop-and-frisk policies that impacted minority communities more than White Americans (see “Racial Discrimination”).

PRE-TRIAL SYSTEM

Once the police have made an arrest, the court holds a pre-trial hearing to determine if the person should be released on bail while awaiting trial. Currently, there are nearly half a million people in the United States held in detention awaiting trial, mostly at the state and local level;²² in fact, there are twice as many people in state and local jails awaiting trial than the entire number of people incarcerated in the federal prison system.²³

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According to the Bureau of Justice Statistics, those awaiting trial now constitute 65% of the jail inmates²⁴ and 24% of the prison population. Since the early 2000s, these percentages have been increasing, despite an overall decrease in crimes and arrests. According to a 2018 report by the Brookings Institution, the average defendant unable to afford bail spends anywhere from 50 to 200 days in detention.²⁵

Many of these inmates are in detention because they are unable to afford bail, and thus remain imprisoned for weeks or months before trial. Pre-trial detention can be necessary to ensure public safety by detaining some potentially violent offenders who may pose a risk of harm to society. For most defendants, however, the reliance on monetary bail represents a violation of due process and a right to a speedy trial. Individuals in pre-trial detention maintain their presumption of innocence but face punitive conditions while incarcerated.

The average bail for a felony is approximately \$10,000, a figure out of reach for many defendants; in some cases, defendants are unable to pay even a low bail of a few hundred dollars to earn their release.²⁶ The bail system is intended to prevent anyone who is a flight risk from disappearing while awaiting trial, but cash bail disproportionately impacts people in poverty.²⁷ Many studies have found that the vast number of defendants return to face trial without financial incentive, making monetary bail unnecessary.

17. Stellan, Susan. “Is the ‘War on Drugs’ Over? Arrest Statistics Say No.” *The New York Times*, 5 Nov. 2019, <https://www.nytimes.com/2019/11/05/upshot/is-the-war-on-drugs-over-arrest-statistics-say-no.html>.

18. Gramlick, John. “Four-in-ten U.S. drug arrests in 2018 were for marijuana offenses – mostly possession.” *Pew Research Center*, 22 Jan. 2020, <https://www.pewresearch.org/fact-tank/2020/01/22/four-in-ten-u-s-drug-arrests-in-2018-were-for-marijuana-offenses-mostly-possession/>.

19. Dunn, Christopher, and Michelle Shames. *Stop-and-Frisk in the de Blasio Era*. New York: Civil Liberties Union, Mar. 2019.

20. Pierson, Emma, et al. “A large scale analysis of racial disparities in police stops across the United States.” *Nature Human Behavior*, vol. 4, 4 May 2020, pp. 736-745.

21. Poston, Ben, and Cindy Chang. “LAPD searches Blacks and Whites more. But they’re less likely to have contrabands than Whites.” *The LA Times*, 8 Oct. 2019, <https://www.latimes.com/local/lanow/la-me-lapd-searches-20190605-story.html>.

22. Dews, Fred, and Betsy Broaddus. “Charts of the Week: Criminal Justice Disparities.” *Brooking Institute*, 9 Aug. 2019.

23. Ho, Vivian. “‘Outdated, unsafe, and unfair’: Coronavirus renews battle over California’s bail system.” *The Guardian*, 29 Apr. 2020, <https://www.theguardian.com/us-news/2020/apr/29/california-bail-jails-coronavirus-criminal-justice>.

24. Zeng, Zhen. *Jail Inmates in 2017*. Bureau of Justice Statistics, U.S. Department of Justice, Apr. 2019, www.bjs.gov/content/pub/pdf/ji17.pdf.

25. Patrick, Liu, et al. *The Economics of Bail and Pretrial Detention*. The Hamilton Project, Brookings, Dec. 2018.

26. “The State of Bail.” *Vera Institute for Justice*, 10 Jan. 2017.; Lockhart, P.R. “Thousands of Americans are jailed before trial. A new report shows the lasting impact.” *Vox*, 7 May 2019.

27. Stevenson, Megan T. “Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes.” *The Journal of Law, Economics, and Organization*, vol. 34, no. 4, Nov. 2018, pp. 511-542, <https://doi.org/10.1093/jleo/ewy019>.

On the other hand, detention can wreak havoc on the lives of individuals, costing them employment and putting a strain on their relationships. Some even argue that bail criminalizes poverty, by punishing impoverished defendants simply because they lack the financial means to post bail or their release.²⁸

While the system disproportionately affects poorer people, there are racial disparities as well. For example, a study found that a county in Texas is “34 percent more likely to detain Black defendants compared to White defendants.”²⁹ In New Orleans, a 2018 study found that Black offenders are more likely than Whites to be required to pay bail, that the amount is usually higher, and they are less likely able to afford bail and therefore more likely to be incarcerated before trial.³⁰ A study in Miami and Philadelphia found “bail judges are racially biased against Black defendants, with substantially more racial bias among both inexperienced and part-time judges.” That bias, it concluded was based on stereotypes that “exaggerate the relative danger of releasing Black defendants.”³¹

As increasing attention has been brought to bear on the issue of bail, some states have moved to reform their systems. In 2018, an appellate court in California found the state’s system of cash bail unconstitutional because it discriminated against defendants with less money; the ruling required judges to consider a defendant’s ability to pay in setting bail. A few months later, the state passed a new law to end its system of cash bail entirely, the first state in the country to do so, relying on an algorithm instead to determine which defendants to hold before trial based on safety risk.³² The law is still under debate, subject to a veto referendum in the 2020 election.

Other jurisdictions, including Washington, DC and New Jersey have also taken steps to reform their monetary bail systems. In 2019, the New York state legislature instituted a measure to restrict cash bail requirements for most misdemeanors and non-violent offenses. As a result, the state saw its jail population decrease by as much as a third. In early 2020, however, the legislature reversed course, passing a new law adding new categories of offenses that allows judges to order a person to be held on bail before trial.³³

28. Patrick, Liu, et al. *The Economics of Bail and Pretrial Detention*. The Hamilton Project, Brookings, Dec. 2018.; *Moving Beyond Money: A Primer on Bail Reform*. The Criminal Justice Policy Program at Harvard Law School, Oct. 2016.; Covert, Bryan. “America is Waking Up to the Injustice of Cash Bail.” *The Nation*, 19 Oct. 2017, <https://www.thenation.com/article/america-is-waking-up-to-the-injustice-of-cash-bail/>.

29. Ibid.

30. Balko, Radley. “21 more studies showcasing racial disparities in the criminal justice system.” *The Washington Post*, 9 Apr. 2019.

31. Ibid.

32. Romo, Vanessa. “California Becomes First State To End Cash Bail After 40-Year Fight.” NPR, 28 Aug. 2018, <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail>.

33. Schuppe, Jon. “Jails are releasing inmates because of coronavirus. New York just took a step to lock more people up.” *NBC News*, 8 Apr. 2020, <https://www.nbcnews.com/news/us-news/jails-are-releasing-inmates-because-coronavirus-new-york-just-took-n1179041>.

34. *Economic Perspectives on Incarceration and the Criminal Justice System*. Executive Office of the President of the United States, Apr. 2016.

35. Patrick, Liu, et al. *The Economics of Bail and Pretrial Detention*. The Hamilton Project, Brookings, Dec. 2018.

36. Van Meter, Matthew. “One Judge Makes the Case for Judgment.” *The Atlantic*, 25 Feb. 2016.

37. Villasenor, John, and Virginia Foggo. “Algorithms and Sentencing: What does due process require?” *The Brookings Institute*, 21 Mar. 2019, <https://www.brookings.edu/blog/techtank/2019/03/21/algorithms-and-sentencing-what-does-due-process-require/>.

Evidence suggests that the current pre-trial system is not only contributing to further inequalities and inefficiency in the system, there are also large economic costs associated with the current system.³⁴ Average daily costs of inmates vary widely depending on location – for example, as low as \$48 in Cherokee County, GA or as high as \$571 in NYC. Overall, Brookings estimates that the cost of holding prisoners, along with lawyers and other expenses, costs taxpayers \$38 billion a year.³⁵

SENTENCING

Once a verdict has been reached and the trial concluded, the newly convicted defendant is sentenced by a judge based on guidelines by the U.S. Sentencing Commission, a bipartisan, independent agency that is part of the judicial branch. Congress created the Sentencing Commission in 1984 to reduce disparities in sentencing across the U.S.³⁶ Recent arguments have been made by judges, lawyers, and criminal justice advocates that the Commission’s guidelines take away the judge’s discretion and ability to determine sentencing based on the individual circumstances of the crime.

Several states have adopted an assessment tool to determine a prisoner’s sentence based on a computer algorithm intended to determine whether the offender is likely to commit another crime. While on the one hand, this means courts could reduce or waive a sentence when the data says the offender is unlikely to re-offend, on the other, it can lead to harsher punishment when the data determines the opposite, with no ability to challenge the accuracy of the information used in sentencing.³⁷

In Wisconsin, for example, Eric Loomis pleaded guilty in May 2013 for attempting to flee a traffic officer and taking a car without the owner’s permission. Data from a system called Correctional Offender Management Profiling for Alternative Sanctions suggested he would re-offend when released, and so the judge took that into account during Loomis’ sentencing. Loomis appealed the sentence to the Wisconsin Supreme Court, which upheld the ruling based on the fact that the judge did not rely solely on the assessment tool’s recommendation, but only used it

as a factor in the decision. As an analysis from Brookings pointed out, however, the ruling raises a “troubling paradox.” Either the tool played no part in the decision, rendering it useless, or it had some impact on the judge’s ruling, raising constitutional concerns about the lack of transparency in the process.³⁸

Loomis appealed to the U.S. Supreme Court, which declined to hear the case. In its filing with the Supreme Court, the Department of Justice acknowledged that this new technology raises “novel constitutional questions” and the “lack of transparency can raise serious issues,” even while it argued for the right of states to use it.³⁹ Other defendants subjected to an algorithm-based risk assessment are often denied access to the information input into the system that led to the results.⁴⁰ This calls into question what it means to use the data correctly and not violate due process rights when defendants do not have access to the data or methodology that determines their sentence.⁴¹

Algorithm-based tools are increasingly used to plan police patrols and make decisions about parole, based on the risk assessment applied to certain individuals.⁴² Again, the technology raises many questions without clear answers, making it difficult to understand the impact on the rights of those targeted. With limited transparency, it is impossible to understand whether gender, age, address, level of education, and other information is taken into account when determining the likelihood to re-appear. Recently, Idaho passed a law requiring increased transparency of the data used by such systems; most states, however, lack rules allowing outside observers to examine the data used to determine the likelihood that an individual will re-appear.

A study by ProPublica found that only 20% of the individuals who were predicted to commit a crime in the future actually went on to commit a crime.⁴³ The study also found that the algorithm sometimes mislabeled individuals and was more likely to make a mistake by mislabeling White individuals as low-risk compared to Black individuals. Initially, the argument for using algorithms

was based on the idea that artificial intelligence tools reduce human bias and decrease the number of people incarcerated by only focusing on those who truly pose a risk. Studies, however, call into question that premise, creating concern that algorithmic risk assessment could increase bias, exacerbating existing racial disparities.⁴⁴

PLEA BARGAINING

One critical challenge with sentencing is the fact that the overwhelming majority of federal criminal cases never come to trial. Approximately 90% of federal criminal cases in 2018 resulted in a guilty plea, with only 2% going to trial and only 1% resulting in an acquittal.⁴⁵ In other words, only 1% of the cases were actually “won” by defendants. Rates in state courts are similar, with cases rarely proceeding to trial.⁴⁶ These numbers raise questions about whether individuals charged with crimes are truly experiencing a fair system that allows them to present their case, and does not arbitrarily deprive them of their liberty.

While plea bargaining itself does not necessarily violate due process rights, it can become a due process problem if it is overused due to a system burdened with a high number of cases.⁴⁷ Adding to this challenge are concerns over whether individuals have had adequate legal representation allowing them to present their case and make informed decisions about the trial. Adequate legal representation is available when financed by the defendant; in cases where a defendant cannot afford a lawyer, however, the court appoints a public defender who may be overburdened with cases and unable to devote sufficient time and resources to the case. As with pre-trial detention, the system punishes the poor who are not able to afford adequate representation.

The worst-case scenario is when an innocent individual or a juvenile defendant assumes that the best alternative to avoid a lengthy prison sentence is to bargain with the state and accept a lesser sentence rather than risk the uncertainty and expense

38. Ibid.

39. United States, Supreme Court. Petition for Writ of Certiorari. *Eric Loomis v. State of Wisconsin*. <https://www.scotusblog.com/wp-content/uploads/2017/05/16-6387-CVSG-Loomis-AC-Pet.pdf>.

40. Ibid.

41. United States, Supreme Court. Petition for Writ of Certiorari. *Eric Loomis v. State of Wisconsin*. <https://www.scotusblog.com/wp-content/uploads/2017/05/16-6387-CVSG-Loomis-AC-Pet.pdf>.

42. Metz, Cade, and Adam Satariano. “An Algorithm that Grants Freedom or Takes it Away.” *The New York Times*, 6 Feb. 2020, <https://www.nytimes.com/2020/02/06/technology/predictive-algorithms-crime.html>.

43. Angwin, Julia, et al. “Machine Bias.” *ProPublica*, 23 May 2016, <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

44. Harcourt, Bernard E. “Risk as Proxy for Race.” *University of Chicago Public Law Working Paper No 323*, 16 Sept. 2010, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677654.

45. Gramlich, John. “Only 2% of federal criminal defendants go to trial, and most who do are found guilty.” *Pew Research Center*, 11 June 2019, <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

46. Ibid.

47. Gavett, Gretchen. “The Problem with Pleas.” *PBS Frontline*, 31 Oct. 2011, <https://www.pbs.org/wgbh/frontline/article/the-problem-with-pleas/>.

of going to trial.⁴⁸ Often, advocates say, the state presents a disparity so great that the defendant has little choice but to take the plea. This reality was challenged in the 2010 Supreme Court case, *Graham v. Florida*, in which 16-year-old Terrance Graham was charged with attempted robbery and given the choice between a life sentence as an adult without the possibility of parole, and the relatively light sentence of a year in jail and 2 years of probation. He took the plea but later violated the terms of his probation by participating in another robbery, and the life sentence was imposed. Eventually, the Supreme Court ruled that sentencing a juvenile to life imprisonment for a case not involving a homicide constituted “cruel and unusual punishment” under the 8th Amendment.⁴⁹

Mandatory Minimum Sentencing for Drug Offenses

Mandatory minimums set specific penalties upon the conviction of a federal crime and “the satisfaction of criteria set forth in that statute,” which then triggers a sentence regardless of other facts in the case.⁵⁰ The most common of these involve drug and trafficking offenses. The Anti-Drug Abuse Act of 1986 required minimum sentencing for certain drug crimes. Drug offenses that involved “5 grams of crack, 500 grams of cocaine, 1 kilogram of heroin, 40 grams of a substance with a detectable amount of fentanyl, 5 grams of methamphetamine, 100 kilograms or 100 plants of marijuana, and other drugs” required a minimum of 5 years.⁵¹ Larger amounts required a minimum sentence of 10 years, such as 50 grams of crack.⁵²

The requirement for judges to hand a minimum sentence based on the charges brought by the prosecutor removes a judge’s discretionary power. While recent federal legislation limits the use of mandatory minimum sentencing for low-level drug offenses, these sentences continue to be used, resulting in individuals with drug-related offenses serving a lengthy time in prison and leaving with a criminal record.

Capital Punishment

Serious disagreements exist around capital punishment, and the morality of the state sentencing someone to death for committing a crime. Aside from moral questions, however, capital punishment also raises questions about due process rights when

the state carries out a death sentence. The federal government stopped carrying out executions in 2003; however, in July 2020, it performed its first execution in 17 years. Moreover, the Trump administration attempted to expand the list of crimes that are eligible for the death penalty. During the federal moratorium, 21 states and the District of Columbia have abolished the death penalty and 4 states are under their own moratorium imposed by the governor.⁵³ However, 25 states, mostly in the south and the west, have continued to use the death penalty.

Constitutional challenges to capital punishment involve the potential to inflict severe pain and the potential to execute a wrongfully convicted individual. Practical challenges involve the high cost of the procedure. According to a study in 2012, approximately 3% of executions in the United States were botched in some way. Those rates vary by method, with more than 7% of lethal injections going wrong. These botched executions, the study found, usually result from a breakdown in protocols, and have the potential to inflict unintended pain. Death penalty opponents argue that such pain is a violation of the 8th Amendment’s stricture against “cruel and unusual punishment.”⁵⁴ In several cases in recent years, however, the Supreme Court has ruled in 5-4 decisions that the current use of lethal injections is constitutional.⁵⁵

Given the severity of capital punishment, one might assume that only individuals convicted of serious offenses without any shred of doubt would be subject to execution. That is not necessarily the case, however. A study attempting to identify the erroneous conviction of innocent criminal defendants finds that at least 4% of individuals on death row could be exonerated, and concludes that even this is a conservative number of the innocent individuals who have wrongfully been convicted and sentenced to death.⁵⁶ In fact, since 1973, 165 people on death row have been exonerated for wrongful convictions.⁵⁷ According to organizations defending inmates on death row, the main causes of innocent people being sentenced to death include inadequate defense, misused forensic data, false confessions, and eyewitness misidentification.

Capital sentences are very costly. Costs vary from state to state but studies frequently find that the death penalty is more costly than life imprisonment. A study by Seattle University School of Law found that death penalty cases cost the state of Washington

48. Yoffee, Emily. “Innocence is Irrelevant.” *The Atlantic*, Sept. 2017, www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/.

49. Ibid.

50. Pryor, William H., et al. *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System*. U.S. Sentencing Commission, July 2017, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

51. “Mandatory Minimums and Sentencing Reform.” *Criminal Justice Policy Foundation*, <https://www.cjpf.org/mandatory-minimums>.

52. Ibid.

53. “State by State.” *Death Penalty Information Center*, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>.

54. “Botched Executions.” *Death Penalty Information Center*, <https://deathpenaltyinfo.org/executions/botched-executions>.

55. “The Case Against the Death Penalty.” *ACLU*, 2012, <https://www.aclu.org/other/case-against-death-penalty>.

56. Gross, Samuel R., et al. “Rate of false conviction of criminal defendants who are sentenced to death.” *PNAS*, vol. 111, no. 20, 20 May 2014, pp. 7230-7235, <https://doi.org/10.1073/pnas.1306417111>.

57. “Innocence.” *Death Penalty Information Center*, <https://deathpenaltyinfo.org/policy-issues/innocence>.

an additional \$1 million a year over cases where the death penalty is not sought.⁵⁸ A study by the Kansas Judicial Council found that it costs 4 times as much to defend a death penalty case than a non-death penalty case.⁵⁹ The Idaho State Appellate Public Defenders office found that it spent 4 times more on death penalty cases than on cases with a life sentence.⁶⁰ The state of New York reports that death penalty cases can cost the state \$1.8 million per case on the trial and automatic appeal.⁶¹

These higher costs are often associated with the trial, the automatic appeal that is required for death penalty cases, and the cost of the execution. In some states, housing death penalty prisoners is more expensive than housing prisoners in the general population. While research varies, some criminologists in the U.S. find the death penalty achieves no deterrent effect not achieved by long imprisonment.⁶²

Racial Disparity in Sentencing

Finally, a defendant's racial identity may lead to racial disparity in sentencing.

In 2005, the Supreme Court ruled in *United States v. Booker* that a judge using facts not presented to the jury to enhance a sentence outside of the Sentencing Commission guidelines constitutes a violation of the 6th Amendment. In the same ruling, however, it stated that the guidelines are advisory, and not mandatory.⁶³ Based on that ruling, judges have felt more leeway to depart from the sentencing guidelines and use their own discretion based on the facts of the case. As a result, sentences are subject to judges' biases that could result in unequal treatment. A 2012 study by the U.S. Sentencing Commission found that after the Supreme Court ruling in *Booker*, Black male offenders received sentences on average 19% longer than similarly situated White male offenders.⁶⁴ Another study found that although in general sentence lengths have decreased, White offenders have seen a greater decrease in sentence length compared to Black offenders.⁶⁵ It also found that

A 2012 study by the U.S. Sentencing Commission found that after the Supreme Court ruling in *Booker*, Black male offenders received sentences on average 19% longer than similarly situated White male offenders.

judges are less likely to revise sentences for Black male offenders than for White male offenders, and even when judges do mitigate them, they do not reduce them as much.

This disparity is costly to states. A study by the University of Michigan found that simply reducing the sentencing disparity between Black male offenders and White male offenders, would reduce the number of Black men in federal prison by about 9% and save \$230 million a year.⁶⁶

INCARCERATION

While the 2.2 million people currently incarcerated in the United States represents a two-decade low, it is still far above 330,000 people held in jails and prisons in 1980, in both absolute and relative numbers. The dramatic rise in incarceration resulted from a series of policy changes in the early 1980s related to the theory that a "tough on crime" approach would reduce crime rates. While numerous federal and state policies were instituted, 4 policies had a high impact on incarceration rates.

- In 1982, Congress passed the Violent Crime and Drug Improvements Act,⁶⁷ and the rate of incarceration began to dramatically increase.
- In 1984, Reagan signed into law the Comprehensive Crime Control Act.⁶⁸ This policy introduced the U.S. Sentencing Commission, increased penalties for drug-related offenses, and reinstated the federal death penalty.

58. Collins, Peter, et al. *An Analysis of the Economic Cost of Seeking the Death Penalty in Washington State*. Seattle University School of Law, 1 Jan. 2015.

59. Phillips Erb, Kelly. "Considering the Death Penalty: Your Tax Dollars At Work." *Forbes*, 1 May 2014, <https://www.forbes.com/sites/kellyphillipserb/2014/05/01/considering-the-death-penalty-your-tax-dollars-at-work/#3435ba53664b>.

60. Ibid.

61. Ibid.

62. Radelet, Michael L., and Traci L. Lacoock. "Do Executions Lower Homicide Rates: The Views of Leading Criminologists." *Journal of Law and Criminology*, vol. 99, no. 2, 2009.

63. United States, Supreme Court. *United States v. Booker*, 12 Jan. 2005. Oyez, <https://www.oyez.org/cases/2004/04-104>.

64. Schmitt, Glen, et al. *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*. U.S. Sentencing Commission, Nov. 2017.

65. Saris, Patti, et al. *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*. U.S. Sentencing Commission, 2012, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_A.pdf.

66. Starr, Sonja B., and M. Marit Rehani. "Racial Disparity in Federal Criminal Sentences." *Journal of Political Economy*, vol. 122, no. 6, 2014, pp. 1320-54, <https://doi.org/10.1086/677255>.

67. United States, Congress, House. Violent Crime and Drug Enforcement Improvements Act of 1982. *Govtrack*, <https://www.govtrack.us/congress/bills/97/hr6497>. 97th Congress, House Resolution 6497.

68. Maitland, Lesile. "Reagan Offers Bill to Tighten Rules on Criminal Defendants." *The New York Times*, 14 Sept. 1982, <https://www.nytimes.com/1982/09/14/us/reagan-offers-bill-to-tighten-rules-on-criminal-defendants.html>

- The Crime Control Act of 1990 had a large impact on juvenile detention. It also increased the maximum term of imprisonment for some offenses (accessory after the fact, drug offenses, sexual abuse, possession of firearms).⁶⁹
- In 1994, the Violent Crime and Law Enforcement Act was signed into law by President Clinton. By then incarceration had already dramatically increased and this legislation enabled the continued high rate. The policy specifically provided funding for 100,000 police officers, instituted a federal 3 strikes sentencing mandate, and provided \$12.5 million in grants to states to build prisons and requiring inmates to serve 85% of their sentence.⁷⁰

As the number of incarcerated people rose with these policies, so too did government spending on the criminal justice system, which grew by 74% from 1993 to \$274 billion in 2012.⁷¹ Prisons alone cost the U.S. about \$80 billion per year; accounting for the second-fastest-growing category in state budgets, second only to Medicaid.⁷² The average yearly cost of confinement ranges from \$14,000 to \$35,000 per adult prisoner.⁷³ In FY 2018, prison and detention were the second-highest costs in the Department of Justice's budget, accounting for 30% of the total.

Incarceration has been shown to have some impact on public safety and crime reduction. However, for the high number of people imprisoned, the impact has a diminishing return.⁷⁴ Crime rates have been steadily declining since the 1990s and have continued after 2000. Yet the important distinction in the reduced crime rates is in recognizing the many contributing factors that have resulted in crime rates lower than at any point since the 1960s.^{75, 76} Some of these other factors include police strategies,

changing demographics, technology, private security, criminal law reform, a decrease in certain types of crimes, and economic changes.⁷⁷

Cementing the notion that high incarceration does not necessarily lead to lower crime rates is the lack of correlation in the data. Crime rates were already beginning to drop as incarceration rates started to increase in the early 1980s; then rose along with incarceration throughout the late 1980s and early 1990s; then dropped dramatically throughout the late 1990s and 2000s, even as incarceration rates remained steady.⁷⁸ This limited correlation has fueled bipartisan debates around the benefits of high incarceration rates given the high cost of maintaining correctional institutions.

Efforts to reform the criminal justice system began in the mid-2000s, due to a unique convergence of factors, including calls from liberals to reduce harsh punishment and increase racial equity, concerns from deficit hawks about the high costs of prisons, and a push from evangelical Christians for rehabilitation and forgiveness. The leading force that brought these divergent factions together was Charles Colson, a former Nixon administration official who spent several months in federal prison for his role in the Watergate scandal during which time he experienced a renewed commitment to Christianity as a 'born-again Christian.'⁷⁹ Upon his release, he founded the Prison Fellowship dedicated to ministering to prisoners and advocating for criminal justice reform.⁸⁰ Colson played a leading role in bringing the cause of justice reform to mainstream conservative advocacy. His proven record as a high-ranking conservative politician, and moral credibility as an Evangelical, attracted others in the conservative sphere to seriously take on the cause of justice reform.⁸¹

69. United States, Congress, Senate. Crime Control Act of 1990. *Congress.gov*, <https://www.congress.gov/bill/101st-congress/senate-bill/3266>. 101st Congress, Senate Bill 3266.

70. Eisen, Lauren-Brooke, and Inimai M. Chettiar. "The Complex History of the Controversial 1994 Crime Bill." *The Brennan Center for Justice*, 14 Apr. 2016.

71. *Economic Perspectives on Incarceration and the Criminal Justice System*. Executive Office of the President of the United States, Apr. 2016.

72. Lewis, Nicole, and Beatrix Lockwood. "How Families Cope with Hidden Costs of the Incarceration for the Holidays." *The New York Times*, 20 Dec. 2019, <https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html>.

73. Ibid.

74. Eisen, Lauren-Brooke, and Inimai M. Chettiar. "The Complex History of the Controversial 1994 Crime Bill." *The Brennan Center for Justice*, 14 Apr. 2016.

75. Blumstein, Alfred, and Joel Wallman. *The Crime Drop in America*. Cambridge University Press, 2005.

76. "Factors Contributing to Crime Decline." *The Pew Charitable Trusts*, 11 Sept. 2014, <https://www.pewtrusts.org/en/research-and-analysis/articles/2014/09/11/factors-contributing-to-the-crime-decline>.

77. Ibid.

78. Gramlich, John. "America's incarceration rate is at a two-decade low." *Pew Research Center*, 2 May 2018.; Baker, Thomas. "Most Americans support rehabilitation compared to 'tough on crime' policies." *LSE US Centre*, <http://bit.ly/1Ubofo4>.

79. "Our Founder, Chuck Colson." *Prison Fellowship*, <https://www.prisonfellowship.org/about/chuckcolson/>.

80. Ibid.

81. Teles, Steven M. and David Dagan. "Conservatives and Criminal Justice." *National Affairs*, 2016, <https://www.nationalaffairs.com/publications/detail/conservatives-and-criminal-justice>.

In 2003, President George W. Bush invited Colson to the White House to present findings showing a correlation between prison rehabilitation programs and lower rates of recidivism. This led to a focus on correctional policy reform both in the Bush administration and in Congress. Many states with fiscal conservative governments, including Texas and Indiana, led the way on reform. These reforms continued under the Obama administration, which pushed to reform sentencing laws. At the same time, nonprofit organizations including the Pew Research Center, the Vera Institute of Justice, the Brennan Center for Justice, and the Brookings Institution have played a key role in gathering data and evidence to show the efficacy of correctional policy reform in reducing costs and numbers of individuals involved in the criminal justice system, while also improving public safety.

Despite such work, however, the prison system in the United States continues to be overburdened, leading to prisoners in many states being held in poor conditions that threaten their mental and physical health, as well as their safety and human dignity. Prisons in Mississippi are under pressure to reform as a result of the death of prisoners and cruel conditions of confinement.⁸² The U.S. Department of Justice has opened an investigation, and currently, there are open lawsuits for civil rights and constitutional violations. Issues include dirty water, pests, rodents, inadequate medical care, overall unsanitary conditions, and gang violence in prisons that result in the deaths of inmates. Kevin Horan (R), chairman of the Mississippi House Corrections Committee, has stated that he is interested in seeing changes within the corrections systems: "We have the obligation and responsibility to, once we place people in custody, to see that they're treated fairly, humanely."⁸³ He described the State of Mississippi as relying too heavily on incarceration since the mid-1990s and not investing enough in programs that incentivize reducing time served prison time as well as re-entry programs.⁸⁴

Mississippi's corrections department is emblematic of poor state-level prison conditions. A Department of Justice investigation in April 2019 found prison conditions in Alabama unconstitutional, violating the 8th Amendment of cruel and unusual punishment.⁸⁵ The report found that Alabama prisons have the highest suicide rate in the country, 3 times the national average.⁸⁶ As *The New York Times* reported, "One prisoner had been dead for so long that when he was discovered lying face down, his face was flattened. Another was tied up and tortured for 2 days while no one noticed. Bloody inmates screamed for help from cells whose doors did not lock."⁸⁷ The report also found that the prison had the highest rates of homicide and rape in the country.⁸⁸ The Justice Department attributes the problems to understaffing and overcrowding of the prisons, with Alabama's prisons at an occupancy rate of 182% capacity.

Alabama's atrocious prison conditions are not unique. High suicide and homicide rates were reported in other state prisons including Florida, Mississippi, Arizona, and Texas. Furthermore, the Justice Department also found that Alabama prison officials misstated the homicide rate in their facilities.⁸⁹ This calls into question how other facilities may be misstating their numbers. Other issues that lead to poor prison conditions include prisoner-on-prisoner violence and low wages for prison labor. For example, a gang dispute in a South Carolina prison sparked one of the deadliest prison riots in decades. Seven inmates were killed, and 17 other inmates were wounded in an eight-hour-long series of fights in the facility.⁹⁰

Prisoners who work reportedly earn as little as 4 cents per hour for their labor.⁹¹ Prisoners can be in coercive labor situations where power dynamics leave prison workers without bargaining power in employment settings.⁹² Prisoners are also used for dangerous work with few resources, such as fighting California fires where they are reportedly paid \$1 per hour.⁹³

82. Elliott, Debbie, and Walter Ray Watson. "After Inmate Deaths, Mississippi Faces Pressure to Reform its Prisons." NPR, 20 Apr. 2020, <https://www.npr.org/2020/04/20/836829813/after-inmate-deaths-mississippi-faces-pressure-to-reform-its-prisons>.

83. Ibid.

84. Ibid.

85. Pegues, Jeff. "Investigation finds Alabama prison conditions are 'unconstitutional.'" *CBS News*, 15 May 2019, <https://www.cbsnews.com/news/alabama-prison-conditions-are-unconstitutional-investigation-finds-2019-05-15/>.

86. Ibid.

87. Benner, Katie, and Shaila Dewan. "Alabama's Gruesome Prisons: Report Finds Rape and Murder at all Hours." *The New York Times*, 3 Apr. 2019, <https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html>.

88. Ibid.

89. Ford, Matt. "The Everyday Brutality of American Prisons." *The New Republic*, 5 Apr. 2019, <https://newrepublic.com/article/153473/everyday-brutality-americas-prisons>.

90. Simpson, Ian, et al. "Gang dispute sparks deadliest US prison riot in 25 years: official." *Reuters*, 16 Apr. 2018, <https://www.reuters.com/article/us-south-carolina-prison/gang-dispute-sparks-deadliest-u-s-prison-riot-in-25-years-official-idUSKBN1HN1GN>.

91. Barron, Laignee. "Here's Why Inmates in the U.S. Prison System have Launched a Nationwide Strike." *TIME*, 22 Aug. 2018, <https://time.com/5374133/prison-strike-labor-conditions/>.

92. Ibid.

93. Gomez, Luis. "For \$1 an hour, inmates fight California fires. 'Slave labor' or self-improvement?" *San Diego Union Tribune*, 20 Oct. 2017, <https://www.sandiegouniontribune.com/opinion/the-conversation/sd-how-much-are-california-inmate-firefighters-paid-to-fight-wildfires-20171020-htmlstory.html>.

Solitary confinement is another result of the “tough on crime” approach of the 1980s and early 1990s in which it was believed that the worst criminals needed to be housed in supermaximum security facilities as both punishment and deterrence to others.⁹⁴ Solitary confinement is a particularly problematic issue within the system due to its severe psychological impact in prolonged use.⁹⁵ Some inmates have been in solitary confinement for over 10 years in California’s Pelican Bay Prison.⁹⁶ Prisoners in solitary confinement are not allowed personal phone calls and prohibited from physical contact.⁹⁷ Most prisoners in solitary confinement spend 23 hours a day locked in their cells.⁹⁸ Prison facilities cite the use of solitary confinement for those who may potentially form gangs and incite violence. But investigations of the use of solitary confinement show that may not actually be the case.⁹⁹

Recently states have been attempting to move away from solitary confinement based on arguments that it violates the 8th Amendment prohibition on “cruel and unusual punishment,” as well as the high cost of operating solitary confinement facilities.¹⁰⁰ A 2015 settlement in California ended solitary confinement in the state.¹⁰¹

Finally, the COVID pandemic has brought attention to health facilities within prisons. By late May 2020, *The New York Times* reported 47,000 confirmed COVID infections and 468 deaths in inmates and staff for state and federal prisons and local jails.¹⁰² Some inmates reported to the *Times* that they were not being

informed about infections and transmission. They are also unable to social distance. The first prisoner who died from COVID in Rikers Jail in New York City was a 53-year-old who was imprisoned for a technical non-criminal parole violation. Not long after, 362 Rikers inmates out of 3,974 were confirmed to be infected with COVID.¹⁰³

On April 6, the California state government issued an emergency bail schedule to release prisoners currently held in jail on bail pre-trial, and to require no bail payment for those arrested during the pandemic. The goal is to release thousands of defendants to wait for the trial from their homes,¹⁰⁴ with exceptions for serious and violent felonies such as murder, rape, kidnapping, robbery, assault with a violent weapon, domestic abuse, and violating a protective order.¹⁰⁵

Efforts similar to California have been undertaken in other states to release inmates. Thousands of inmates have been released from several states including New York, Illinois, and Florida.¹⁰⁶ In Texas, the governor released some inmates who have not committed any physical violence.¹⁰⁷ While these efforts have pushed forward the debate about prison reform in the US, they also have had some setbacks. In Florida, for example, after some inmates were released, one of them killed a man the day after his release.¹⁰⁸ Even though NY released some inmates, there remain many held in jail before a trial and are expected to stay longer because Gov. Mario Cuomo listed grand juries as non-essential

94. Baker, Peter, and Erica Goode. “Critics of Solitary Confinement are Buoyed as Obama Embraces Their Cause.” *The New York Times*, 21 July 2015, <https://www.nytimes.com/2015/07/22/us/politics/critics-of-solitary-confinement-buoyed-as-obama-embraces-cause.html>.

95. Goode, Erica. “Solitary Confinement: Punished for Life.” *The New York Times*, 3 Aug. 2015, <https://www.nytimes.com/2015/08/04/health/solitary-confinement-mental-illness.html>.

96. Ibid.

97. Ibid.

98. Ibid.

99. Ibid.

100. Ibid.

101. Dinzeo, Maria. “California Still Keeping Inmates in Solitary, Ninth Circuit Hears.” *Courthouse News*, 12 May 2020, <https://www.courthouse-news.com/california-still-keeping-inmates-in-solitary-ninth-circuit-hears/>.

102. “Prisons have been overwhelmed by the virus.” *The New York Times*, 24 May 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=Spotlight&pgtype=Homepage>.

103. “Prisons worldwide risk becoming incubators of covid-19.” *The Economist*, 20 Apr. 2020, <https://www.economist.com/international/2020/04/20/prisons-worldwide-risk-becoming-incubators-of-covid-19>.

104. Ho, Vivian. “‘Outdated, unsafe, and unfair’: Coronavirus renews battle over California’s bail system.” *The Guardian*, 29 Apr. 2020.

105. Ibid.

106. Williams, Timothy, et al. “‘Jails Are Petri-Dishes’: Inmates Freed as the Virus Spreads Behind Bars.” *The New York Times*, 30 Mar. 2020, <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>.

107. Texas State, Governor [Greg Abbot]. Executive Order GA-13: Relating to detention in county and municipal jails during the COVID-19 disaster. 29 Mar. 2020. https://gov.texas.gov/uploads/files/press/EO-GA-13_jails_and_bail_for_COVID-19_IMAGE_03-29-2020.pdf.

108. Yuhas, Alan, and Michael Levenson. “Florida Inmate Released Amid Pandemic Killed Someone the Next Day, Officials Say.” *The New York Times*, 15 Apr. 2020, <https://www.nytimes.com/2020/04/15/us/florida-inmate-coronavirus-murder.html>.

work.¹⁰⁹ In New Orleans, by the end of March, the Orleans Parish jail had still detained 200 individuals not yet convicted of a crime who were unable to post bail and were accused of nonviolent crimes. A month later, 100 of them tested positive, and 2 sheriff's deputies had died.¹¹⁰

RE-ENTRY AND RECIDIVISM

There are about 4.5 million people on parole or probation in the U.S., which is more than 3 times the number of individuals incarcerated.¹¹¹ These supervised alternatives to incarceration are offered for early release from prison (parole) or instead of prison time (probation). Yet data shows that 45% of state prison admissions are a result of violations of the probation or parole terms, either by committing new crimes or technical violations.¹¹² Approximately 95,000 individuals are incarcerated as a result of technical violations of their probation or parole on any given day.¹¹³ Incarcerating people for probation and parole violations costs \$2.8 billion annually collectively for all states, with 12 states spending in excess of \$100 million each.¹¹⁴ As a result, states spend huge amounts to incarcerate some individuals who violated technical terms but are not a threat to public safety.

After incarceration, two key challenges impact former prisoners' due process rights. These are felony disenfranchisement and inability to obtain employment. Felony disenfranchisement occurs as a result of millions of former felons being excluded from democratic processes, such as voting.¹¹⁵ An estimated 1 out of every 40 American adults could not vote in the November 2016 election because of a criminal record, with a higher likelihood for racial minorities.¹¹⁶ Most of the individuals who are ineligible to vote are not in prison and have already served their time.¹¹⁷

As with incarceration, there are racial disparities with reentry.

Only 16 states restore the right to vote after a convicted felon is released.¹¹⁸ In others, the right to vote is restored when a former prisoner completes their probation and/or parole. In 11 states, former prisoners are permanently barred from voting, at least for some types of offenses.¹¹⁹

An estimated 70 million Americans have a criminal record and that impacts employment.¹²⁰ According to the American Bar Association, over 1,000 mandatory license exclusions for individuals with misdemeanors and 3,000 for those with felony records. One independent academic study "confirms that even fairly minor felony records have large negative effects on employment callbacks across a variety of subsamples defined by applicant and job characteristic," and the ability to obtain employment can be determined by an employer through either voluntary or mandatory removal of the criminal record box on job applications.¹²¹ The cost of not employing people due to their previous record is high, estimated at a loss of 1.7 million workers at a cost of at least \$78 million to the economy.¹²²

As with incarceration, there are racial disparities with reentry as well. A 2018 Pew study found that "1 in 23 Black adults in the United States is on parole or probation, versus 1 in 81 White adults." Moreover, while Black adults comprise 13% of the U.S. population, they account for 30% of those on probation or parole.

109. Weichselbaum, Simone. "Coronavirus is putting America's broken bail system on full display." *Mic*, 7 May 2020, <https://www.mic.com/p/coronavirus-is-putting-americas-broken-bail-system-on-full-display-22874542>.

110. Stillman, Sarah. "Will the Coronavirus Make us Rethink Mass Incarceration?" *The New Yorker*, 18 May 2020, <https://www.newyorker.com/magazine/2020/05/25/will-the-coronavirus-make-us-rethink-mass-incarceration>.

111. Walz, Tim, and Mike Parson. "Criminal Justice Reform Shouldn't Just Focus on People Behind Bars. Here's How We Can Improve the Lives of Millions More." *TIME*, 15 Oct. 2019, <https://time.com/5700747/parole-probation-incarceration/>.

112. *Ibid.*

113. *Ibid.*

114. *Ibid.*

115. "Criminal Disenfranchisement Laws Across the United States." *The Brennan Center for Justice*, 18 Dec. 2019, <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states>.

116. Lai, K.K. Rebecca, and Jasmine C. Lee, "Why 10% of Florida Adults Can't Vote: How Felony Convictions Affect Access to the Ballot." *The New York Times*, 6 Oct. 2016, <https://www.nytimes.com/interactive/2016/10/06/us/unequal-effect-of-laws-that-block-felons-from-voting.html>.

117. *Ibid.*

118. *Ibid.*

119. "Criminal Disenfranchisement Laws Across the United States." *The Brennan Center for Justice*, 18 Dec. 2019.

120. *Economic Perspectives on Incarceration and the Criminal Justice System*. Executive Office of the President of the United States, Apr. 2016.

121. Agan, Amanda, and Sonja B. Starr. "The Effect of Criminal Records on Access to Employment." *American Economic Review: Papers & Proceedings*, vol. 107, no. 5, 2017, pp. 560-64, <https://repository.law.umich.edu/articles/1892>.

122. "Barriers to Work: People with Criminal Records." *National Conference of State Legislatures*, 7 July 2018, <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx>.

JUVENILE DETENTION

In 2018, law enforcement agencies in the U.S. made an estimated 728,280 arrests of children under the age of 18.¹²³ As of 2017, the Department of Justice reported a total of 43,580 juvenile offenders held in detention centers. Of that, approximately 12,600 were held by private facilities, 3,600 were inmates in adult jails, and fewer than 1,000 were held in state prisons.¹²⁴ The number of juveniles in detention reached its peak in 1999 at 107,493 and has declined ever since.¹²⁵ Even so, youth of color are disproportionately represented in the juvenile system (including adult sentencing) and stay longer periods of time than White youth.¹²⁶

Children and youth held in adult prisons have limited access to education and rehabilitative services appropriate for their age and development. The federal government protects children from being detained in adult correctional facilities through two statutes: the Juvenile Justice and Delinquency Prevention Act of 1974 (JJJPA) and the Prison Rape Elimination Act (PREA) of 2003. The guidelines state that juveniles should be housed separately from adults.¹²⁷ PREA defines a juvenile as anyone under the age of 18 while JJJPA allows states to define the age of a juvenile.¹²⁸ Only a few states, such as South Carolina and Georgia, continue to set the upper limit for juveniles at 16 years of age.¹²⁹

Recently, bipartisan efforts have worked to prevent children from spending their lives in prison.¹³⁰ Yet these efforts have been slow to enact changes. The concept of trying children as adults began in the late 1990s, as the now-discredited myth that some children were vicious “superpredators” took hold, leading to the mantra “adult time for adult crime.” Even as this myth was

growing, however, juvenile crime declined from 1994 to 2000. In 2001, the U.S. Surgeon General’s report found that there was no evidence that children in the 1990s were more frequent or vicious offenders than children in previous years.¹³¹

Recent research has found that children’s brains are less mature than those of adults, causing juveniles to be more impulsive and have less control than older people; therefore, psychologists have argued, they should not be subject to the same punishment as adults for the same crimes.¹³² Other studies have shown that there is limited to no deterrent effect of severe punishment for children. In fact, long sentences for children may negatively impact their psychological development, creating negative future consequences for both the children and society.¹³³ Among other issues, children tried as adults are 5 times as likely to experience sexual assault in prison.¹³⁴

The U.S. Supreme Court has ruled in 4 separate cases since 2005 that children cannot be treated as adults and sentenced to life without parole. It set forth guidelines to ban the use of adult facilities, finding that children are “constitutionally different” than adults and should not receive the harshest punishment.¹³⁵ These cases include *Roper v. Simmons* (2005), which stated juvenile death sentences violate the 8th Amendment; *Graham v. Florida* (2010), which found it unconstitutional to sentence a juvenile to life without parole for any crime other than murder; *Miller v. Alabama* (2012), which made it illegal for states to impose sentences of life without parole; and, *Montgomery v. Louisiana* (2016), which made the *Miller* decision retroactive for inmates serving life sentences determined as juveniles eligible for resentencing.¹³⁶

123. “Law Enforcement and Juvenile Crime.” *Office of Juvenile Justice and Delinquency Prevention Statistical Briefing Book*, U.S. Department of Justice, <https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp>.

124. “Year of Census by Sex.” *Easy Access to the Census of Juveniles in Residential Placement*, National Center for Juvenile Justice, <https://www.ojjdp.gov/ojstatbb/ezacjrp/asp/display.asp>.

125. *Ibid.*

126. *Economic Perspectives on Incarceration and the Criminal Justice System*. Executive Office of the President of the United States, Apr. 2016.

127. Lahey, Jessica. “The Steep Costs of Keeping Juveniles in Adult Prisons.” *The Atlantic*, 8 Jan. 2016, <https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/>.

128. *Ibid.*

129. *Ibid.*

130. *Ibid.*

131. Quandt, Katie Rose. “Why Does the U.S. Sentence Children to Life in Prison?” *JSTOR Daily*, 31 Jan. 2018, <https://daily.jstor.org/u-s-sentence-children-life-prison/>.

132. Ritter, Malcolm. “Experts link teen brains’ immaturity, juvenile crime.” *ABC News*, 3 Dec. 2007, <https://abcnews.go.com/Technology/story?id=3943187&page=1>.

133. Travis, Jeremy, et al. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. The National Academies Press, 2014.

134. *Ibid.*

135. Southerland, Vincent M., and Jody Kent Lavy. “Why Are We Sentencing Children to Life in Prison Without Parole?” *Newsweek*, 10 Aug. 2017, <https://www.newsweek.com/why-are-we-sentencing-children-life-prison-without-parole-649162>.

136. Quandt, Katie Rose. “Why Does the U.S. Sentence Children to Life in Prison?” *JSTOR Daily*, 31 Jan. 2018.

Nevertheless, several states and counties are not complying with this mandate.¹³⁷ Some of these states cite financial burdens as the reasons for not placing children in separate facilities.¹³⁸ The e are also adults serving life sentences who were sentenced as juveniles, and not all states have been willing to resentence them. In Michigan, one of the states with the largest number of these cases, adult inmates who were sentenced at age 17 have served sentences for over 50 years.¹³⁹ As of 2016, there are approximately 2,300 inmates serving sentences of life without parole for crimes committed as juveniles.¹⁴⁰

Juvenile detention is very costly, with the average price for incarcerating a young person \$35,000 to \$64,000 a year. Some juvenile advocates argue that money would be better spent on rehabilitative or early intervention programs that could keep young people out of prison. A year of Head Start’s intervention program, for example, costs only \$4,300 per child a year.¹⁴¹ The e is evidence, however, that the opposite is happening, with o ers placed in schools bringing harsh punishment on children with behavioral problems, causing them to end up in the criminal justice system, a phenomenon known as the “school-to-prison pipeline.” This issue is especially prevalent with students of color, who are much more apt to be brought into the criminal justice system for behavioral infractions at school. (For more information about this issue, see “Racial Discrimination.”)

Juvenile detention centers also have seen confirmed positive cases of coronavirus. Bon Air Juvenile Detention Center in Virginia, for example, confirmed that 25 young people tested positive for COVID-19.¹⁴² The facility only tested one-third of its population of 284, however, leading news organizations to speculate that the actual number of positive cases was much higher.¹⁴³ At

several Louisiana juvenile detention centers, children were kept in lockdown or solitary confinement despite knowledge of the spread of COVID.¹⁴⁴

PRIVATE PRISONS

Between 1980 and 2013, the federal prison population increased by 800%, a faster rate than the Bureau of Prisons could accommodate, leading to the use of private prison facilities.¹⁴⁵ By 2013, when the prison population reached its peak, 30% of the federal prison population was housed in private facilities.¹⁴⁶ States also relied on the use of private facilities to accommodate the dramatic increase in state prisoners. Private prison advocates have argued that private companies are able to house prisoners more efficien y.

Critics have pointed out that the need to profit o prisoners provides exactly the wrong incentives, encouraging prison companies to cut corners on food, staffi , rehabilitation programs, and other costs. The Department of Justice Inspector General found in 2016 that private prisons had a 28% higher rate of prisoner-on-prisoner assaults, and twice the number of assaults on prisoners by corrections official compared to federally run facilities.¹⁴⁷ After large-scale criticisms of conditions in private prisons, as well as a decrease in the number of prisoners, the Justice Department announced in August 2016 that it would gradually phase out the use of private prisons in the federal prison system.¹⁴⁸

With the election of Donald Trump, however, the private prison ban was reversed in February 2017. According to the Bureau of Prisons statistics, about 128,063 people were housed in private prison facilities in 2016, including both federal and state prisoners,

137. Ibid.

138. Lahey, Jessica. “The Steep Costs of Keeping Juveniles in Adult Prisons.” *The Atlantic*, 8 Jan. 2016.

139. Keneally, Meghan. “Hundreds of inmates serving life without parole for crimes as juveniles left waiting for another look.” *ABC News*, 21 Oct. 2019, <https://abcnews.go.com/US/despair-hundreds-inmates-serving-life-crimes-juveniles-waiting/story?id=66329947>.

140. Rovner, Josh. “Juvenile Life Without Parole: An Overview.” *The Sentencing Project*, 25 Feb. 2020, <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>.

141. “ACLU Fact Sheet on the Juvenile Justice System.” *ACLU*, <https://www.aclu.org/other/aclu-fact-sheet-juvenile-justice-system>.

142. “Bon Air JCC Residents Who Test Positive for Coronavirus Receiving 24-Hour Medical Care.” *Virginia Department of Juvenile Justice*, 17 Apr. 2020, <http://www.djj.virginia.gov/pdf/admin/Newsroom/News/041720%20Bon%20Air%20JCC%20Residents%20Get%2024-Hour%20Medical%20Care.pdf>.

143. Fisher, Nicole. “Juvenile Justice Centers and Vulnerable Youth Latest Victims of COVID-19.” *Forbes*, 24 Apr. 2020, <https://www.forbes.com/sites/nicolefisher/2020/04/24/juvenile-justice-centers-and-vulnerable-youth-latest-victims-of-covid-19>.

144. Stillman, Sarah. “Will the Coronavirus Make us Rethink Mass Incarceration?” *The New Yorker*, 18 May 2020.

145. Yates, Sally Q. Memorandum for the Acting Director Federal Bureau of Prisons. 18 Aug. 2016. U.S. Department of Justice, <https://www.justice.gov/archives/opa/file/886311/download>.

146. Ibid.

147. *Review of the Bureau of Prisons Monitoring of Contract Prisons*. Office of the Inspector General, U.S. Department of Justice, Aug. 2016, <https://oig.justice.gov/reports/2016/e1606.pdf>.

148. Yates, Sally Q. “Phasing out our use of private prisons.” *Office of Public Affairs*, Department of Justice Archives, 18 Aug. 2016, <https://www.justice.gov/archives/opa/blog/phasing-out-our-use-private-prisons>.

about 8% of the total prison population.¹⁴⁹ The two main private prison companies, Geo Group and CoreCivic (formerly known as Corrections Corporation of America),¹⁵⁰ restructured themselves into real estate investment trusts (REITs), portfolio companies that own, operate, or finance real estate. This approach¹⁵¹ allowed these two companies to avoid paying federal corporate taxes. In 2017 GEO Group reported \$44 million in tax benefits after converting to a REIT.¹⁵²

The challenge with privatization is not just the facilities but also the other related private industries. For example, it is estimated that the prison phone industry earns about \$1.2 billion per year. These companies operate the phones in prisons with some short calls reported to cost up to \$15 because these companies operate as monopolies within the prison walls.¹⁵³ Inmate health care is also a privatized service that generates \$1.4 billion in annual revenues. Yet while this private service provides essential care, it has been the subject of 660 separate malpractice lawsuits over the past 5 years. Some of the complaints include malpractice that led to the death of inmates.¹⁵⁴ A 2012 investigation in Idaho found inmates with terminal illness were left without food and in their soiled linens.¹⁵⁵

Even while the use of private prisons decreased for state and federal prisoners during the Obama administration, the same administration oversaw the expansion of the mass detention of migrants, with multiple large investments awarded to private prisons. (For more information on this issue, see “Immigration.”)

REFORMS

Despite the many challenges with the entire criminal justice system, bipartisan efforts have been underway to address the economic and social costs of a weak system. Major changes must be made in the system in order to provide basic due process rights enshrined in the U.S. Constitution.

Recent Reforms

The First Step Act (FSA) is a bipartisan criminal justice bill that cleared the Senate in December 2018 and was signed into law by President Trump. The First Step Act (FSA) expands job training and other programs aimed at reducing recidivism rates among federal prisoners. The FSA also modifies mandatory minimum sentencing and expands early-release programs.¹⁵⁶

While the FSA applies to federal prisons, it provides states with a roadmap of options they could adopt to reform their systems.¹⁵⁷ The Act mandates a Risk and Needs Assessment system that matches people in prison to programs that would support their rehabilitation. To incentivize participation, prisoners earn 10 days Earned Time Credit for every 30 days of programming. The Act also scales back some components of the 1994 Crime Bill. This includes eliminating mandatory “three strikes” life sentences for drug offenses, providing relief to 3,000 prisoners serving harsh sentences for crack cocaine convictions, giving judges discretion to sentence below mandatory minimums, and requiring the Bureau of Prisons to place those convicted of crimes in facilities within 500 miles of their families. The FSA also improves a compassionate release process (terminally ill and elderly), allocating \$375 million for programs and classes. The Act increases Good Time Credit, bans placing juveniles in solitary confinement, provides women with adequate hygiene products free of charge, and bans shackling of pregnant women, women in labor, and women postpartum.

Since the First Step Act was passed over a year ago, more than 3,000 inmates have been released and 1,700 have seen their sentence reduced (though some of this has also been due to the 2011 sentencing reform).¹⁵⁸ A majority of the releases have been Black men. The Act, however, only covers the 175,000 federal inmates but not the 1.3 million who are in state prisons,¹⁵⁹ or the 700,000 in county jails. Despite being the most significant change to the criminal justice system in decades, much work still needs to be done to reform the system.

149. Gotsch, Kara, and Vinay Basti. “Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons.” *The Sentencing Project*, 2 Aug. 2018, <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/>.

150. Covert, Bryce. “How Private Prison Companies Could Get Around a Federal Ban.” *The American Prospect*, 28 June 2019, <https://prospect.org/health/private-prison-companies-get-around-federal-ban/>.

151. Ibid.

152. Ibid.

153. Markowitz, Eric. “Making Profits on the Captive Prison Market.” *The New Yorker*, 4 Sept. 2016, <https://www.newyorker.com/business/currency/making-profits-on-the-captive-prison-market>.

154. Ibid.

155. Ibid.

156. Fandos, Nicolas. “Senate Passes Bipartisan Criminal Justice Bill.” *The New York Times*, 18 Dec. 2018, <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html>.

157. Jones, Van, and Jessica Jackson. “10 reasons to celebrate the First Step Act.” *CNN*, 21 Dec. 2018.

158. Clark, Dartunorro, and Janell Ross. “The First Step Act promised widespread reform. What has the criminal justice overhaul achieved so far?” *NBC News*, 24 Nov. 2019, www.nbcnews.com/politics/politics-news/first-step-act-promised-widespread-reform-what-has-criminal-justice-n1079771.

159. Ibid.

Bipartisan organizations aimed at criminal justice reform have been working to identify issues and lobby members of Congress for changes. For example, the Justice Action Network had promoted legislation to eliminate solitary confinement and prevent pregnant women from being shackled.¹⁶⁰ Social movements have also been drawing greater attention to mass incarceration and racial disparity in the criminal justice system. The Black Lives Matter movement has been working to draw attention to this issue and advocate reform of policing and laws around policing to stop racial profiling and end the abuse of innocent people stopped by police.

On a state level, both Republican and Democrat states have enacted reforms.¹⁶¹ Thirty-five states have reduced imprisonment rates and seen a reduction in crime.¹⁶² In 2005, Texas legislators decided not to build new prisons because of the high cost, despite an initially projected increase of 17,000 in the prison population.¹⁶³ State legislator Jerry Madden explains the Texas approach that resulted in closing 8 prisons and reducing the population by 11%¹⁶⁴:

“Our approach was to establish programs to treat drug and alcohol addiction, improve mental health services, and provide other rehabilitative programs in prison. For those on probation and parole, we expanded intermediate sanctions in lieu of revoking people to prison for non-violent, low-level rule-breaking, and reduced caseloads to enable officers to provide better supervision services. We also expanded community-based drug treatment programs and our specialty court system, and we provided additional funding for mental health care throughout the state.”¹⁶⁵

Other states have followed that lead to enact similar reforms. For example, in 2015, Minnesota was in the process of determining whether to build new prison facilities.¹⁶⁶ The state studied drivers behind prison admission and discovered it was largely due to

readmission from technical violations of probation.¹⁶⁷ The state made changes for improved reentry outcomes to save on the cost of building new facilities.¹⁶⁸ By 2018, Minnesota saw a decline for new entries for technical violations for the first time in 8 years.¹⁶⁹

States have also been making important changes to their pre-trial detention and bail system. In early 2019, Colorado lawmakers banned cash bail for petty and municipal offenses and set up new requirements for more timely bond hearings.¹⁷⁰ Earlier this year, lawmakers were also working to set up a system that provided leniency for individuals who missed their first court date, allowing them 3 days to reschedule a new date. This change was in response to recognizing that missed court dates were mainly due to low-income individuals who relied on public transportation, or individuals with mental health illnesses or who faced other problems that prevented them from attending the court date. This was an important step in recognizing that heavier penalties resulted in further punishing disadvantaged persons, not in increasing public safety.

In 2017, New Jersey reformed pre-trial laws to make it easier for a defendant to stay out of prison before trial. There were fears that the crime rate would increase especially after a murder by a man who was released on bail.¹⁷¹ Yet a report by the New Jersey Administrative Office of the Courts stated that people released under this system are no more likely to commit a crime now than under the old system of money bail. In fact, the number of people who showed up for their court hearing was roughly the same as before the reform. There are now approximately 6,000 fewer people in state and county jails on any given day.

Kansas State government recently decided to reform its juvenile detention system. It changed its processes so that every child referred to the court for a misdemeanor with no prior offense enters a diversion program called the Immediate Intervention Program (IIP). In the first year, the number of children who had

160. “Accomplishments.” *Justice Action Network*, <https://www.justiceactionnetwork.org/accomplishments>.

161. *Ibid.*

162. Denney, Jacob, and Adam Gelb. “National Prison Rate Continues to Decline Amid Sentencing, Re-Entry Reforms.” *The Pew Charitable Trusts*, 16 Jan. 2018, <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms>.

163. Madden, Jerry. “Prisons, probation, and parole reforms – the Texas model.” *The Hill*, 9 Dec. 2018, <https://thehill.com/opinion/criminal-justice/420204-prison-probation-and-parole-reforms-the-texas-model>.

164. *Ibid.*

165. Madden, Jerry. “Prisons, probation, and parole reforms – the Texas model.” *The Hill*, 9 Dec. 2018.

166. Walz, Tim, and Parson, Mike. “Criminal Justice Reform Shouldn’t Just Focus on People Behind Bars. Here’s How We Can Improve the Lives of Millions More.” *TIME*, 15 Oct. 2019.

167. *Ibid.*

168. *Ibid.*

169. *Ibid.*

170. Herrick, John. “Colorado lawmakers want fewer people awaiting trial in jail.” *The Colorado Independent*, 26 Nov. 2019, <https://www.coloradoindependent.com/2019/11/26/bail-reform-pretrial-jail/>.

171. Pugliese, Nicholas. “Did NJ bail reform cause a surge in crime? Court analysis says no.” *Northjersey.com*, USA Today Network, 2 Apr. 2019, <https://www.northjersey.com/story/news/new-jersey/2019/04/02/nj-bail-reform-no-crime-surge-pretrial-release/3336423002/>.

the opportunity to join the program increased by 37%, with 88.6% of the children in the program completing it successfully, helping to reduce the number of children in juvenile facilities.¹⁷² The number of children in residential centers dropped by 67% in the first year of the program. As of December 2018, 20 months after the program started, only 11 children remained.¹⁷³ These reforms resulted in \$30 million of savings for the state to date and are projected to save the state \$72 million in savings for reinvestment by 2022.¹⁷⁴

In 2015, South Dakota passed comprehensive reform legislation based on policy recommendations from a bipartisan group, the Juvenile Justice Reinvestment Initiative Work Group. The changes included incentives for counties to have diversion programs as a default response for many lower-level offenses and using reserve out-of-home state custody for the most serious offenses that pose a public safety risk.¹⁷⁵ After 3 years, youth committed to the Department of Corrections dropped by 63%, and the rate of probation increased from 85% to 95%, with filings for supervision violations dropping 43%.¹⁷⁶

Positive reforms such as these have in recent years continued to decrease prison populations on both the state and federal level, while allowing for the more humane treatment of those involved in the criminal justice system, and at the same time improving public safety. Due to the bipartisan nature of the issue, the criminal justice system in the United States is now poised for a historic moment of reform in which it could reverse decades of misguided practices, and return due process rights to those involved in all aspects of the system.

How to Reimagine Rights and Responsibilities:

- **Reform Law Enforcement and Strengthen Public Safety.** Public safety reforms should be designed and implemented to redefine law enforcement, increase funding of social services, abolish “qualified immunity” (which shields police officers from accountability through civil liability), demilitarize the police, prohibit chokeholds and “no-knock” unannounced searches, eliminate racial discrimination in policing, and bar police unions from blocking disciplinary actions against police officers. The call for “defunding” should not mean abolishing the police, but shifting some funds to social service agencies that can better perform non-law enforcement functions currently assigned to police such as mental health care, drug treatment, homeless assistance, community mediation, and restorative justice. Public safety and racial justice would be advanced by making greater investments in communities ravaged by violence and the discriminatory justice system.

- **Reduce Mass Incarceration.** Review and reform federal and state sentencing codes and procedures to reduce mass incarceration and create alternatives to imprisonment, establish procedures for the early release of prisoners during the COVID pandemic and similar public health emergencies, expand the release of nonviolent offenders, and create increased opportunities for home confinement under the federal First Step Act.
- **Reform Sentencing Laws and Practices.** Eliminate federal and state mandatory minimum sentencing, treat drug abuse as a rehabilitation issue not requiring imprisonment, decriminalize marijuana use, and abolish the death penalty.
- **Reduce Pre-trial Detention.** Eliminate federal and state cash bail in most cases and limit the use of pre-trial detention to violent crimes where the defendant is a direct threat to public safety.
- **Reduce Juvenile Detention.** Develop federal and state programs to shut down the “school-to-prison pipeline,” implement diversion and rehabilitation programs for juveniles who have committed non-violent crimes, prohibit the charging of juveniles as adults and holding them in adult facilities, and resentence prisoners serving long prison sentences imposed when they were juveniles.
- **Ban Private Prisons.** Ban the private operation of prisons and detention centers.

172. Shoenberg, Dana. “How State Reform Efforts are Transforming Juvenile Justice.” *The Pew Charitable Trusts*, 26 Nov. 2019, <https://www.pewtrusts.org/en/research-and-analysis/articles/2019/11/26/how-state-reform-efforts-are-transforming-juvenile-justice>.

173. Ibid.

174. Ibid.

175. Ibid.

176. Ibid.

Reimagining Rights & Responsibilities in the United States

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