



TRANSFORMATIVE JUSTICE

RECOMMENDATIONS FOR THE
NEW ADMINISTRATION AND
THE 117TH CONGRESS



JUSTICE
ROUNDTABLE



JUSTICE ROUNDTABLE



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INTRODUCTION

The Justice Roundtable is a broad-based coalition of more than 100 organizations working to transform federal criminal legal system laws and policies to root out structural racism and create equitable outcomes. Founded in 2002, it convenes a quarterly assembly, working groups, and public policy events, and serves as a critical convening hub for a diverse range of partners and allies. In its first decade, the Roundtable’s work was instrumental to achieving two major legislative victories that began to change the United States’ approach to criminal justice – the Second Chance Act of 2008, which helped to create and expand essential community-based reentry programs and supports nationwide, and the Fair Sentencing Act of 2010, which reduced the draconian sentencing disparity between offenses related to crack and powder cocaine.

In its second decade, the Roundtable’s accomplishments include increased support for reentry programming, passage of the U.S. Sentencing Commission’s “Drugs Minus Two” Amendment and its retroactivity, enactment of the 2014 Deaths in Custody Reporting Act, preventing enactment of harsh collateral consequences of conviction and progress toward the final repeal of other long-standing collateral consequences, passage of the 2019 Fair Chance Act, incorporation of key sentencing reforms into the 2018 First Step Act, and introduction of numerous pieces of legislation to reform the criminal legal system. The Justice Roundtable also helped to fuel the mobilization of the Obama Administration’s Clemency Initiative, which resulted in the early release of over 1,700 incarcerated people.

Most recently, the Roundtable has turned its focus to responding to the COVID-19 pandemic. It was the first entity to focus Congress’s attention on the pandemic’s impact on incarcerated communities and successfully won early investments earmarked to address COVID-19 in carceral settings. Since then, the Roundtable’s advocacy has garnered congressional support for numerous additional provisions to address the pandemic’s deadly impact on individuals incarcerated and returning to communities nationwide.

The success of these bills and policy initiatives were the result of strategic advocacy by Justice Roundtable Working Groups, which effectively focused the attention of the Administration, legislators, the media, and the public on the importance of reentry, sentencing, law enforcement, drug policy, clemency, and prison issues.

This report – a product of the Roundtable’s working groups and the many experts and advocates who make it strong – outlines both short-term and long-term policy changes required to reform the criminal legal system and address the structural racism it embodies. The Justice Roundtable thanks its Working Group chairs and members for developing this key roadmap. The individual recommendations herein are not necessarily the position of every Justice Roundtable contributor or participant, nor of the experts listed, and their involvement should not be construed as an endorsement of each recommendation. Instead, the Roundtable’s Working Groups have developed general consensus around these recommendations, drawing on the input and expertise of many experts and contributors. Please find a list of contributors and collaborators in the acknowledgements section at the end of this document.

“I GOT THE CALL FROM THE JUSTICE ROUNDTABLE.”

Kamala Harris, 2018



Nkechi Taiifa
Convener
[Justice Roundtable](#)

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November 19, 2020



EXECUTIVE SUMMARY

“Neither slavery nor involuntary servitude, except as a punishment for crime... shall exist within the United States, or any place subject to their jurisdiction.”

—The U.S. Constitution

In 1865 the United States was on a precipice, beginning to rebuild a society that had been torn asunder by hate. It eliminated chattel slavery, an enormous step forward. But at the same time, the 13th Amendment paved the way for a new system of social control. This one would not be as uniformly racist, but yet those six words, except as a punishment for crime, kept the door open for what has been referred to as the New Jim Crow – a vast system that today oppresses millions. The system tears families apart and ruins lives. It does not protect public safety; in fact, by taking vulnerable people and treating them as irredeemable, it weakens it. Conservative estimates indicate that the criminal legal system costs more than \$80 billion a year in direct costs, but experience indicates that it costs individuals and families the priceless fabric of their lives. Carceral settings have perpetuated the spread of COVID-19, taking the lives of both incarcerated individuals and staff. Without change, the system is likely to perpetuate the spread of the next pandemic, too. Incarcerated people live in close quarters; jails and prisons are not designed for social distancing and indeed are persistently overcrowded. Conditions often are filthy. Many incarcerated people are aging, and underlying conditions that increase vulnerability to COVID-19 are rampant. Hand sanitizer is considered

contraband because it contains alcohol. Meanwhile the correctional worker population comes and goes daily; those who become infected on the outside bring the virus in, and those who become infected inside bring it back out to their families and communities.

The COVID-19 pandemic, like the Civil War, has cost many lives. But it also brings us another chance for transformation. People are ready for change; indeed, they are demanding it – a system of justice that rejects structural racism, delivers equitable outcomes, costs less, and delivers more for society as a whole.

The chapters in this report provide a vision of transformative justice for the President of the United States and the 117th Congress to implement critical changes needed at the federal level. This transformation begins with law enforcement accountability, which has been the subject of unprecedented protests, and continues by correcting the harms of pretrial detention, the punitiveness of drug policy, the excesses of sentencing, the barriers to reentry, and the under-use of clemency. And it includes excising the 13th amendment’s prison slavery exception clause, a comprehensive reckoning with race, and an institution of international standards for human rights protections.




This report offers Justice Roundtable recommendations within the following substantive areas:

- **Law enforcement** must finally live up to its mandate to serve and protect all people. It is clear that people will no longer stand silent when police kill civilians with impunity. It is also clear that people recognize the intense vulnerability of Black people and other people of color, and how this contrasts with the vision of an America with equal opportunity for all. Chapter 1 lays out a vision for a federal use of force standard, a plan for demilitarizing the police, and principles that will save lives by eliminating no-knock warrants, quick knock raids, and excessive SWAT raids. We describe how to strengthen police accountability and transparency by holding both individual police and police departments responsible for police misconduct that violates civil rights or violates the Constitution by establishing a national registry so officers who violate the law in one jurisdiction cannot get a job in another, and by gathering data on police-caused fatalities. Proposals to end funding programs that have extended the harms of policing into schools and increased the militarization of police, particularly in Democrat-run cities, will realize the goal of saving money better spent on programs that actually serve the public interest. Ending civil forfeiture, which punishes suspects of crime even if they are not found guilty, and racial profiling, which has been a key factor in mistrust of the police, are likewise necessary for a free and fair society.
- The country's **pretrial system** has been a significant driver of COVID-19 infection among those who interact with law enforcement, but well before the pandemic began it disproportionately harmed disadvantaged people and the core constitutional principle of presumption of innocence. Pretrial detention not only punishes people who are legally innocent, it increases their chances of a long sentence in a way that does not protect public safety or serve justice. Chapter 2 describes needed reforms to the bail system and pretrial detention. These include eliminating cash bail, ensuring access to counsel during pretrial hearings, and ensuring counsel has the tools they need through supporting discovery and funding, eliminating all presumptions of pretrial detention, bringing back judicial discretion with respect to pretrial matters, eliminating the use of confidential informants, funding forensic science appropriately, and ending excessive federal funding to build jails. Chapter 2 also calls for addressing postconviction and innocence issues.
- Widespread public opinion favors **drug policy** reform; the American people recognize that prohibition has failed. Supporting treatment for substance use disorders, reforming marijuana laws, and decriminalizing illegal drugs will allow for policies that support public health instead of continuing to bloat the carceral state. Eliminating policies that encourage states to implement drug testing for public assistance programs will allow those programs to benefit society at a lower cost and lessen stigma of the poor. Sensible reforms to how states address substance use disorder among parents will protect children and support families.
- **Sentencing** has been the driver of the increase in the prisoning population, which is more than five times larger than it was in the 1980s and larger than that of any country as a proportion of its population. A succession of presidents and legislators have failed to address this problem of mass incarceration, even as it strangles budgets and devastates families without addressing public safety. The COVID-19 pandemic calls for swift action to lower the country's imprisonment rate. At the same time, the federal death penalty must be ended, and excessive sentence length abated. The infamous trial penalty, civil commitment, and mandatory minimum sentences must be eliminated. The Justice Roundtable also calls for decriminalizing migration and addressing fines and fees that make it more difficult for the formerly incarcerated to reintegrate into society. Alternatives to incarceration such as prearrest diversion and avoiding unnecessary arrests can support public safety without increasing the prison population. Curtailing the use of solitary confinement is likewise a matter of justice, as current practices constitute torture, violating the U.S. Constitution and international standards.
- Failing to support **reentry** extends carceral conditions into the community and effectively transforms legal sentences into life sentences. The COVID-19 pandemic has made the need for

reentry assistance even more acute. It is vital that the federal government step up to address the needs of returning citizens to protect and support them so that they have a chance at long-term success. Chapter 5 outlines proposals to fund reentry services and to ensure access to vitally needed health care, affordable housing, human needs programs, employment supports, education, COVID-19 relief, and voting rights. It also identifies how to address barriers to employment and reimagine community supervision to support positive outcomes for individuals and society. Returning citizens are members of the body public, and supporting them benefits individuals, families, and communities.

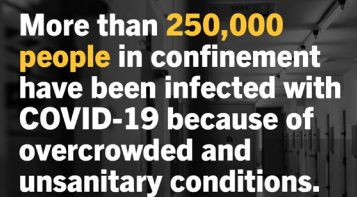
- Use of the presidential **clemency** power represents an exceptional opportunity for the executive to show mercy and compassion, correct miscarriages of justice, and right historical wrongs. The President must demonstrate a clear commitment to the robust and consistent use of clemency and make regular use of this unique power. This chapter includes recommendations for the creation of an expert commission to eliminate needless and redundant bureaucracy; use of a categorical approach to release groups of deserving candidates; and setting an example for governors to grant clemency in their states.
- **Racial justice and human rights** are the core tenets of this document and indeed of the Justice Roundtable itself. The final section of this report addresses directly the need for the federal government to support reparations for African Americans, excise the 13th amendment's prison slavery exception clause, and join international efforts to ensure human rights to all people in America.

In their totality, the recommendations in this report are designed to help the President and Congress steer the nation into a new decade of healing and hope. The U.S. carceral system, rife with systemic and institutional racism, has impeded justice and equity for far too long. The upheaval caused by the current police pandemic on top of an unprecedented health pandemic has intensified the need for overarching recommendations to transform the criminal legal system so it truly serves the interests of justice and human rights. With the right intentions and tools, the country can heal its divides. The Justice Roundtable looks forward to supporting members of the executive and legislative branches who believe in transformative justice for 2021 and beyond.



**Congress
must protect
incarcerated
people from
COVID-19.**

#COVIDJustice



**More than 250,000
people in confinement
have been infected with
COVID-19 because of
overcrowded and
unsanitary conditions.**

#COVIDJustice



**Congress' COVID-19 relief
package must protect
incarcerated people by:**

- ✓ Providing testing, medical care, sanitation & PPE
- ✓ Reducing incarceration levels to permit social distancing
- ✓ Supporting services for safe, effective reentry

#COVIDJustice

CHAPTER 1

LAW ENFORCEMENT



Police abuse and brutality in the U.S. is beyond the crisis point. Despite mass protests, sparked by the killing of George Floyd, police violence continues unabated, taking lives and destroying communities. Since Mr. Floyd's death in May 2020, police have killed more than 330 people in the U.S., and 820 people since the start of the year, with little to no accountability.¹ At the same time public support for meaningful changes to public safety and policing practices is at an all-time high. The Administration and Congress should seize on this opportunity to implement policies and enact legislation that will finally end police violence and improve public safety.

Public support for meaningful changes to public safety and policing practices is at an all-time high.

None of the bills proposed in Congress thus far go far enough in achieving these goals. Though the House-passed Justice in Policing Act contains more and better reforms than the Senate-proposed JUSTICE Act, neither meet the full demands of the civil and human rights communities.² An overarching problem with both bills is the amount of additional federal funding, hundreds of millions of dollars, they both would allocate to support law enforcement by funding more training, the establishment of accreditation programs, and research into "best practices," for example. Law enforcement should not need more money to do their jobs correctly, in line with legal standards, constitutional requirements,

¹ Mapping Police Violence, October 28, 2020, <https://mappingpoliceviolence.org/>

² Civil Rights Coalition Letter on Federal Policing Priorities, Submitted to Congress June 1, 2020. <https://civilrights.org/resource/civil-rights-coalition-letter-on-federal-policing-priorities/>; Coalition Letter on H.R. 7120 "George Floyd Justice in Policing Act," Submitted to Congress June 18, 2020, <https://civilrights.org/resource/coalition-letter-on-h-r-7120-george-floyd-justice-in-policing-act/>

and their ethical obligations. For decades the federal government has been trying to incentivize better conduct on the part of police departments with little success and at great expense.³ It is time to rethink the rote provisions frequently included in federal legislation relating to law enforcement for this purpose and to instead allocate these funds to support community-led solutions that will improve access to housing, education, job opportunities, youth programs, and health care—including care for mental health and substance use disorders. There is substantial evidence that investing in many of these things reduces crime and improves public safety.⁴

Making this shift, along with establishing effective and independent oversight bodies, the necessary legal tools to ensure accountability, and improving transparency, is essential to limiting the police violence that has caused so much harm. In addition to this reinvestment, below are several accountability, transparency, and demilitarization provisions that should be included in any police reform proposals.

ISSUE: FEDERAL USE OF FORCE STANDARD

Summary of Issue

Over 1,000 people are killed by police each year, and of those lives lost, Black people are overrepresented, creating a deleterious effect on Black communities and families across the nation that extends over generations. Police are authorized to take life in their official capacity, and this power should be limited to rare situations of

³ Robin S. Engel, Hannah D. McManus, and Gabrielle T. Isaza, "Moving beyond 'Best Practice': Experiences in Police Reform and a Call for Evidence to Reduce Officer-Involved Shootings," *Annals of the American Academy of Political and Social Science*, vol. 687, no. 1 (2020): 146-65, <https://journals.sagepub.com/doi/10.1177/0002716219889328>; Daniel S. Lawrence, Nancy La Vigne, Jesse Jannetta, and Jocelyn Fontaine, *Impact of the National Initiative for Building Community Trust and Justice on Police Administrative Outcomes*, Urban Institute, Justice Policy Center, August 2019, https://www.urban.org/sites/default/files/publication/100707/impact_of_the_national_initiative_for_building_community_trust_and_justice_on_police_administrative_outcomes_2.pdf

⁴ Human Rights Watch, *Roadmap for Re-imagining Public Safety in the United States*, August 12, 2020, https://www.hrw.org/sites/default/files/media_2020/08/A%20Roadmap%20for%20Re-imagining%20Public%20Safety%20in%20the%20United%20States.pdf, p. 24.

last resort. While there is no federal statute that governs the use of force by law enforcement, under current law, police can use deadly force whenever an “objectively reasonable” officer would have done so under the same circumstances.⁵ This standard fails to protect people against uses of force that were unnecessary or could have been avoided. The federal government should set a use of force standard that provides clear guidance for when police can use force, how to avoid using force, and how to use the least amount of force when it is necessary, which must be imposed for police at all levels of government.

Executive Branch Proposal

- The Department of Justice (DOJ) should amend use of force policies for all federal law enforcement, so that force is used only when necessary; to a degree proportional, as a last resort, after exhausting reasonable options; when there is an imminent threat to life or serious bodily injury; and causing no substantial risk to any bystander. Force must stop as soon as a legitimate legal objective is achieved or deemed unachievable. Policies must require officers to use de-escalation techniques, intervene when fellow officers violate a person’s civil or constitutional rights, and accurately report all uses of force, as well as ban the use of force as a punitive measure or means of retaliation against individuals who only verbally confront officers or against individuals who pose a danger only to themselves.

Legislative Proposal

- Limit the use of force by law enforcement to circumstances in which force is necessary as a last resort after exhausting reasonable options and, through federal funding, bar states from receiving funds unless they enact this statutory standard; prohibit maneuvers that restrict the flow of blood or oxygen to the brain, including but not limited to neck holds and choke holds, deeming the use of such force a federal civil rights violation, in keeping with the recommendations of a [June 1, 2020 Leadership Conference coalition letter](#).

Experts

Kristina Roth, Amnesty International USA
Lynda Garcia, The Leadership Conference on Civil and Human Rights

ISSUE: MILITARIZED POLICING

Summary of Issue

Department of Defense (DOD) programs like 1033 and 1122 allow military equipment transfers to local police departments for counter-narcotic activities. The 1033 Program has resulted in the transfer of approximately \$7.4 billion worth of surplus military equipment to state, local, and tribal law enforcement agencies since its creation in 1990. It has equipped law enforcement agencies with military-grade equipment such as armored vehicles, military-style assault rifles, and explosives, and has funded the creation of special tactical teams for drug investigations. The presence of even \$1,000 in equipment through the 1033 Program has been shown to increase the number of police killings in communities.

The presence of even \$1,000 in equipment through the 1033 Program has been shown to increase the number of police killings in communities.

It has paved the way for militarized police responses to protests against police violence, like we witnessed in the summer of 2014 in Ferguson, Missouri, when people protesting the killing of Michael Brown at the hands of a police officer were met with law enforcement equipped with tanks and riot gear. Moreover, the 1033 Program has been notoriously mismanaged. A 2017 federal government oversight report found that the program could not prevent fraudulent applications from acquiring weapons of war from the program.⁶

As described in the 2014 American Civil Liberties Union report, the militarization of policing is a pervasive issue that stems from several areas of federal funding. In addition to the DOD 1033 Program, several Department of Homeland Security (DHS) [Federal Emergency Management Act \(FEMA\) grant programs](#) (especially the State Homeland Security Program and the Urban Area Security Initiative), to the tune of \$24.3 billion, exacerbate local and state special weapons and tactics (SWAT) raid overuse by providing

⁶ U.S. Government Accountability Office, *DOD Excess Property Enhanced Controls Needed for Access to Excess Controlled Property*, July 2017, <https://www.gao.gov/assets/690/685916.pdf>

⁵ See *Graham v. Connor*, 490 U.S. 386 (1989).

billions of federal dollars to localities with little visibility or transparency into the way DHS FEMA grants are accounted for. After the 2014 protests in Ferguson, Missouri – spurred by the fatal shooting of an unarmed Black teenager by a police officer – testimony at a Senate hearing on the militarized police response identified \$9.4 million worth of equipment bought in St. Louis County with DHS preparedness funds. These FEMA grant programs must prohibit the purchase of military weapons and should be restricted to using non-heavy grade military equipment. FEMA grant programs should also have greater disclosure and transparency requirements for recipients.

Executive Branch Proposals

- The Administration should reinstate the Law Enforcement Permanent Working Group (PWG) work to continue dialogue among federal agencies providing military excess nonmilitary equipment and establish a new program for the transfer of that equipment to nonprofits and state and local governments.
- The Administration should issue an executive order placing a moratorium on the transfer of military weapons and vehicles through the DOD 1033 Program.

Legislative Proposal

- Repeal the DOD 1033 program and replace it with a program to transfer nonmilitary equipment.

Experts

Maritza Perez, Drug Policy Alliance
Sakira Cook, The Leadership Conference
on Civil and Human Rights



ISSUE: NO-KNOCK WARRANTS AND QUICK-KNOCK RAIDS, MILITARIZED POLICING IN THE FORM OF EXCESSIVE USE OF SWAT RAIDS

Summary of Issue

Thousands of “no-knock” warrants are issued to law enforcement every year, allowing law enforcement to forcibly enter a person’s home without announcing who they are or their intent. Judges rarely deny these warrants, and they have been increasingly permitted by courts in pursuit of the drug war. No-knock warrants are often used in conjunction with SWAT team deployments and have led to numerous tragic killings like that of Breonna Taylor in March 2020.

Similar to no-knock warrants, “quick-knocks” are also used in SWAT responses to drug cases. Like no-knock warrants, quick-knock raids do not give people much time to respond to police presence and can lead to deadly outcomes. According to a 2014 report by the American Civil Liberties Union, the use of SWAT teams to execute search warrants in drug cases has disproportionately targeted African American and Latinx individuals, who make up a staggering 61% of the total number of individuals impacted by SWAT raids for drug cases.

Legislative Proposal

- While the Justice in Policing Act would prohibit no-knock warrants, it must go further and also outlaw the use of quick-knock raids in drug investigations to prevent militarized police responses and save lives.

Experts

Maritza Perez, Drug Policy Alliance
Cynthia Roseberry, American Civil Liberties Union

ISSUE: CHANGE 18 U.S.C. SEC. 242

Summary of Issue

The murder of George Floyd by Derek Chauvin and four other police officers highlighted the need for stronger accountability provisions to eliminate excessive use of force. Specifically, there was broad outrage at the four officers who displayed deliberate indifference for the life and safety of George Floyd. Following this public execution, people across the globe flooded the streets to protest to demand justice through stronger

accountability for law enforcement. There is an urgent need for transparency as it pertains to investigations of misconduct by law enforcement. Furthermore, federal law should require stricter enforcement of civil rights violations and stronger penalties for police misconduct.

Congress should amend Title 18 U.S.C. Sec. 242 by providing a standard that ensures criminal liability for civil rights violations that are the result of police misconduct. This will permit prosecutors to successfully hold law enforcement accountable for the deprivation of civil rights and civil liberties.

In addition to lowering the *mens rea* standard, Congress should create a new subsection, under Section 242, to ensure accountability for “intentional acts” of excessive use of force and “reckless acts” of excessive use of force as well as penalties for failure to intervene. Additionally, Congress should also create a new standard for “deliberate indifference.”

Legislative Proposal

- Strengthen the Excessive Force Prevention and Accountability Act of 2020 [H.R.7206](#) to include the creation of a deliberate indifference standard.

Experts

Chris Scott, Open Society Policy Center
Sakira Cook, The Leadership Conference on Civil and Human Rights
Breon Wells, The Daniel Initiative

ISSUE: DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION PATTERN AND PRACTICE INVESTIGATIONS OF LAW ENFORCEMENT AGENCIES

Summary of Issue

In 1994, Congress passed 42 U.S.C. §14141 (re-codified at 34 U.S.C. §12601), authorizing the Attorney General to investigate cases of law enforcement conduct involving “a pattern or practice” of violating people’s rights under the U.S. Constitution and federal law. Under the statute, the Civil Rights Division of the DOJ has opened investigations to address systemic civil rights abuses in police departments across the country, including Ferguson, Baltimore, and Chicago. Many of these investigations resulted in a court-enforceable consent decree to implement remedies to hold police departments accountable

for violations of the Constitution or federal law. On November 7, 2018, Attorney General Jeff Sessions issued guidance suggesting the Civil Rights Division would not exercise its ability to seek to enter into or enforce consent decrees to remedy civil rights abuses, including by indicating the agreements should include time limitations. This has impeded the division’s ability to hold police departments accountable for misconduct when state and local actors have failed to comply with federal law or infringed upon the constitutional rights of members of the public. The division’s use of its power to investigate law enforcement agencies that systematically violate the rights of people and use of its power to negotiate consent decrees to remedy systemic unconstitutional and unlawful conduct must be restored.

Executive Branch Proposal

- Rescind the Sessions Memo and restore the division’s ability to negotiate consent decrees to hold law enforcement agencies accountable for systemic civil rights violations.⁷

Legislative Proposal

- Grant the Attorney General subpoena power under 34 U.S.C. 12601 and amend the statute to clarify that “prosecutors” and local and state judicial officers are included as law enforcement officers. Local and state judicial officers should also gain this authority.

Experts

Lynda Garcia, The Leadership Conference on Civil and Human Rights
Monique Dixon and Puneet Cheema, NAACP Legal Defense and Educational Fund, Inc.

ISSUE: COMMUNITY ORIENTED POLICING SERVICES (COPS) APPROPRIATIONS

Summary of Issue

Appropriations of COPS funding have fueled policies of mass criminalization and over policing, which incentivize acts of violence, bullying, and harassment by police disproportionately against students of color and students with disabilities within schools across the nation, and reinforces white supremacy and state-

⁷ U.S. Office of the Attorney General, “Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Government Entities,” November 11, 2018, <https://www.justice.gov/opa/press-release/file/1109621/download>

sanctioned policing violence against communities of color. The COPS Office has been the chief source of federal dollars towards police in schools, and consequently has precipitated and perpetuated the destructive and rapidly growing school-to-prison pipeline. Throughout its existence, the COPS Office has provided approximately \$1 billion in federal grants to state and local governments to police, surveil, and militarize their schools.

The COPS Office has reinforced reflexive, punitive, deadly, and wasteful aspects of justice policy.

The COPS Office oversaw the largest sustained effort to flood schools with so-called School Resource Officers (SROs) through the Cops in Schools (CIS) Program, which has funded the hiring and training of SROs by local law enforcement offices. The COPS Office has also been responsible for the administration of competitive grants and funding for several programs that have broken trust with community stakeholders and represent outdated and harmful approaches to people of color and to community safety and criminal justice. It has reinforced reflexive, punitive, deadly, and wasteful aspects of justice policy, including the war on drugs, the school-to-prison pipeline, mass incarceration, and unnecessary deadly use of force. The COPS grants and programs include the following:

- COPS Hiring Program (CHP) – Hiring and rehiring of law enforcement that provides 75 percent of entry-level salaries and fringe benefits. It also houses a school safety component (considered as a priority within the grant).
- Community Policing Development (CPD) – Advance practice of community policing through training and technical assistance.
- COPS Anti-Gang Initiative (CAGI) – Funds regional anti-gang task forces comprised of federal, state, and local law enforcement agencies.

- COPS Anti-Heroin Task Force (AHTF) and COPS Anti-Methamphetamine Program (CAMP) – Funds primarily used for investigative purposes for illicit activities or distribution of heroin and methamphetamines, respectively.

COPS funding has consistently gone to state and local police departments who have a history of problematic practices. As a result, all too often, the COPS Hiring Program supports unconstitutional policing practices and subsidizes failed police departments. For example, during fiscal years 2009–2013, the COPS Office awarded more than \$10.2 million in grants to the Baltimore Police Department (BPD) and more than \$21 million in grants to the Chicago Police Department without ensuring that these departments used these funds in compliance with nondiscrimination laws, such as Title VI of the Civil Rights Act of 1964.⁸ Both law enforcement agencies were later found to have engaged in a pattern or practice of unlawful policing practices.⁹ In a September 2013 report, the Government Accountability Office (GAO) found that the COPS funding process is flawed, with half of the funding in the past five years going to a mere six states, indicating that the funding is not spread evenly across the country.¹⁰ The GAO also had grave concerns about the program’s lack of direction. Rather than supplementing funding for hiring, as the program is intended to do, reports found that COPS often supplants state and local funding for hiring police officers, which, in effect, insulates state and local departments from the true costs of policing and the war on drugs.¹¹

Executive Branch Proposal

- Address the role of police unions in interfering with the timeliness of investigations and ensuring

⁸ U.S. Department of the Treasury, Bureau of the Fiscal Service, *USASpending.gov Database*. https://files.usaspending.gov/generated_downloads/all_prime_awards_subawards_20190326133042458231.zip.

⁹ U.S. Department of Justice, Civil Rights Division, *Investigating of the Baltimore City Police Department*, August 10, 2016, <https://www.justice.gov/crt/file/883296/download>; U.S. Department of Justice, Civil Rights Division and United States Attorney’s Office, Northern District of Illinois, *Investigation of the Chicago Police Department*, January 13, 2017, <https://www.justice.gov/opa/file/925846/download>

¹⁰ U.S. Government Accountability Office, *Community Policing Hiring Grants: Grant Application and Monitoring Processes Could Be Improved to Further Ensure Grantees Advance Community Policing*, September 2013, <https://www.gao.gov/assets/660/658158.pdf>

¹¹ U.S. Government Accountability Office, *Community Policing Hiring Grants: Grant Application and Monitoring Processes Could Be Improved to Further Ensure Grantees Advance Community Policing*, (Washington: 2013). GAO-13-521, <https://www.gao.gov/assets/660/658158.pdf>

the officer appeals process, if misconduct is found, does not allow disciplinary sanctions to be mitigated or overturned.

Legislative Proposal

- Decommission the COPS program and eliminate all federal funding to the program.

Experts

Chris Scott, Open Society Policy Center
Sakira Cook, The Leadership Conference on Civil and Human Rights
Breon Wells, The Daniel Initiative
Jenny Collier, the Collier Collective

ISSUE: POLICE IN SCHOOLS, ALSO REFERRED TO AS SCHOOL RESOURCE OFFICERS

Summary of Issue

Students who attend schools with on-site law enforcement are in greater danger of unnecessary involvement in the juvenile justice system through the criminalization of behaviors traditionally resolved through standard school discipline policies. The Gun Free Schools Act of 1994 created an even more direct path to the juvenile justice system. It required schools receiving federal funding to adopt a “zero-tolerance” approach to students who brought firearms to school, mandating a minimum one-year expulsion. But many states went further by requiring suspensions, expulsions, and arrests for minor school infractions such as disorderly conduct. Worse still, during the Clinton Administration, the DOJ’s COPS Program began funding the scaled-up deployment of SROs in response to high-profile school shootings.

“It is counterproductive for public safety goals to add more police to schools.”

Research to date has demonstrated that it is counterproductive for public safety goals to add more police to schools. In order to reduce violence and promote educational objectives, it is far more effective to provide the nation’s children with the necessary

resources to support their social, emotional, mental, and scholastic development through strong school environments. As is true of suspensions, data from the Office for Civil Rights show grave inequities – 70 percent of school arrests or referrals involve children of color. In schools where students are predominately youth of color – where SROs are concentrated – children are often the victim of violent and unchecked attacks by SROs trained to enforce the criminal code, rather than offer a nurturing environment.¹² Punitive practices by SROs such as arrests, ticketing, physical restraint, teasing, and use of mace or pepper spray are not the right responses to minor infractions like “insubordination,” dress code violations, truancy, and minor misconduct by a student. Using police in schools to enforce school discipline policies is harmful to students and disproportionately impacts and exposes students of color and students with disabilities to unnecessary physical and emotional harm, criminalizes adolescent conduct, and encourages abusive use of force. Positive school environments should utilize evidence-based, preventative measures that build positive school cultures and alternatives to exclusionary discipline, arrests, and referrals to law enforcement, such as restorative justice and healing practices; and school-wide positive behavioral interventions and supports.

Executive Branch Proposals

- Reinstatement of U.S. Department of Justice and Education Administration of School Discipline Guidance Package to Enhance School Climate and Improve School Discipline

Legislative Proposals

- Counseling Not Criminalization Act S.4360 /H.R.7848
- Allison R. Brown Building Just Schools for Children Act

¹² *Id.* (Listing examples of officers: in South Carolina, slamming a student to the ground; in Baltimore, slapping, kicking, and yelling at a student while another officer watched; in Philadelphia, punching a student and putting him in a chokehold after the student tried to use the restroom without a pass; in Pittsburgh, punching out a student’s tooth; and in Pinellas Park, Florida, using a stun gun on an unarmed student). See also *We Came to Learn, A Call to Action for Police-Free Schools*, Advancement Project (stating, “Safety does not exist when Black and Brown young people are forced to interact with a system of policing that views them as a threat and not as students,” and mapping over 60 instances of police brutality on students), <http://advancementproject.org/wp-content/uploads/WCTLweb/index.html#page=2>.

Experts

Chris Scott, Open Society Policy Center
Sakira Cook, The Leadership Conference on Civil and Human Rights,
Monique Dixon, NAACP Legal Defense and Educational Fund, Inc.
Dara Baldwin, Center for Disability Rights, Inc.

ISSUE: NATIONAL POLICE MISCONDUCT DATABASE/REGISTRY

Summary of Issue

For years, persons who have filed administrative misconduct complaints against law enforcement officers have faced tremendous obstacles accessing police records, which are critical for fairness and accountability. The public interest in ensuring police transparency and accountability for misconduct far outweighs the privacy concerns of police officers in their role as public servants. The public has a right to know when law enforcement officers have engaged in practices that are harmful to communities. Now more than ever, police misconduct has catapulted to the forefront of our national conversation. Unfortunately, the current system has proven unequipped to handle this misconduct or address the chronic structural issue of fatal police shootings against Black people and hold police accountable for their actions. To date, an outsized number of police officers who violate their duties are never tried for their offenses, and those who are fired often go to a neighboring jurisdiction or county to find policing jobs elsewhere, skirting accountability.

The current system is unequipped to handle police misconduct.

Though some law enforcement agencies have used voluntary databases to track police misconduct with the intent to prevent further malpractice and employment of offending officers who leave a police department while under investigation, these existing databases are limited. Many police departments do not report to them, and reports of misconduct often lack crucial details

regarding offenses committed or do not provide details that are necessary for accountability. The vast majority of reports only provide dates of termination and in most instances these databases are not even publicly accessible, removing yet another crucial element of accountability.

The establishment of a national registry of all federal, state, and local law enforcement officials is required to ensure police transparency, and access to data is vital for progress on police accountability to occur in our society. The registry should contain information that is publicly accessible and reported on misconduct complaints, disciplinary actions, certification, forced resignations, and termination records, use of force, racial profiling, sexual assault, domestic violence, harassment, physical assault, violence towards a minor, perjury, tampering with or destroying evidence, bias, or other civil rights violations and other misconduct.

Legislative Proposals

- The privacy provision in the national misconduct registry cited in the H.R.7120, section 201(e)(2), may restrict public disclosure of important information in the police registry and should come out.
- The national misconduct registry cited in H.R.7120 should include the collection of other pertinent information related to sexual assault, domestic violence, harassment, violence toward a minor, perjury, tampering with or destroying evidence, bias or other civil rights violations, and other misconduct.

Experts

Chris Scott, Open Society Policy Center
Monique Dixon, NAACP Legal Defense and Educational Fund, Inc.

ISSUE: ENDING QUALIFIED IMMUNITY

Summary of Issue

Qualified immunity is a judge-made doctrine that provides police officers and other government actors with a defense when they have committed constitutional violations, including brutal acts of violence. This doctrine renders it nearly impossible to hold government officials accountable, leaving those who have experienced violence and misconduct by state actors with no recourse or prospect for recovering damages.

Legislative Proposal

- Ending Qualified Immunity Act H.R. 7085

Experts

Kristine Kippins, Constitutional Accountability Center
Monique Dixon and Puneet Cheema, NAACP Legal Defense and Educational Fund, Inc.
Chris Scott, Open Society Policy Center
Sakira Cook, The Leadership Conference on Civil and Human Rights

ISSUE: BIVENS FIX – HOLDING FEDERAL LAW ENFORCEMENT OFFICERS AND OTHER OFFICIALS ACCOUNTABLE

Summary of Issue

Currently, there is no general federal statute that authorizes civil suits against federal officials who violate constitutional rights. The Civil Rights Act of 1871 permits lawsuits against local and state officials for violating constitutional rights, but there is no federal analog. The act has been diluted by a court-created doctrine of qualified immunity that has shielded police officers, among others, against claims of misconduct. The Supreme Court fashioned a federal remedy in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* but has since backed away from the doctrine, inviting Congress to act. There are multiple contexts in which federal officials have been or are being accused of misconduct – the Internal Revenue Service sued by a group of 41 conservative organizations; the Customs and Border Patrol, the U.S. Marshals Service, and the Federal Protective Service are accused of violating the First, Fourth, and Fifth Amendment rights of peaceful protestors in Portland,

Oregon;¹³ and the U.S. Park Police and U.S. Secret Service have been sued for unprovoked use of chemical irritants and rubber bullets against peaceful protesters.

The question is whether individuals who believe that their constitutional rights have been violated should have their day in court. Symbolic gestures, menial and semi-effective reform efforts should not be seen as a substitute for codifying Bivens into law, which would provide meaningful accountability for civil and constitutional violations, mandate individual insurance to protect officials within the scope of their duties, and provide remedies such as municipal liability, criminal prosecution, or a private right of action against federal law enforcement officers and other officials. The essence of civil liberty and protecting our constitutional rights is the right to be protected by the law for an injury. Codifying Bivens into law upholds this protection and ensures the constitutional rights are enforced.

Legislative Proposal

- Bivens Act of 2020 H.R.7213
- Civil Rights Enhancement and Law Enforcement Accountability Improvement Act of 2020 H.R.7828

Experts

Kristine Kippins, Constitutional Accountability Center
Justin Vail, Protect Democracy
Chris Scott, Open Society Policy Center
Sakira Cook, The Leadership Conference on Civil and Human Rights

ISSUE: PROHIBITION OF FEDERAL FUNDING FOR DOJ'S OPERATION LEGEND AND OPERATION RELENTLESS PURSUIT

Summary of the Issue

Operation Relentless Pursuit (ORP) – a sweeping crackdown on crime “targeting gangs and drug traffickers in high crime cities and dangerous rural areas” – was announced on October 19, 2019, during a meeting of the International Association of Chiefs of

¹³ The Customs and Border Patrol has a history of misconduct that has gone unchecked. In a review of 2,178 cases, 59.4 percent of all Border Patrol agent misconduct cases alleged “physical abuse.” As well, 95.9 percent of all cases resulted in no action against the agent.

Police by President Donald Trump. In early July 2020, Attorney General Barr announced he was “ratcheting up our anti-violent crime Task Forces in select cities,” calling the effort Operation Legend (OL; he later admitted in testimony to the House Judiciary Committee that OL represented simply a “rebooting” of ORP).

Critics have charged that Barr’s “surge” of federal officers in cities led by Democratic mayors served as the “law and order” plank of President Trump’s reelection campaign. The Justice Department already has joint task forces operating in many cities, including the Federal Bureau of Investigation’s (FBI’s) 170 Violent Gang Safe Streets Task Forces.

The cities targeted by Attorney General William Barr include Albuquerque, Baltimore, Chicago, Cleveland, Detroit, Indianapolis, Kansas City, Memphis, Milwaukee, and St. Louis.

At the same time that advocates for racial justice are demanding a new vision of public safety that does not rely on harsh militarized policing, DOJ is operating a massive joint federal task force effort combining resources of the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Administration, the FBI, the U.S. Marshals Service, and DHS. They have deployed hundreds of federal crime-control agents to a network of minority majority cities across America. The cities targeted by Attorney General William Barr include Albuquerque, Baltimore, Chicago, Cleveland, Detroit, Indianapolis, Kansas City, Memphis, Milwaukee, and St. Louis.

More than \$60 million in federal funding has been granted to the cities to pay for hiring new officers, paying overtime and benefits, financing federally deputized task force officers, and providing “mission-critical equipment and technology.” Local police assigned to work with the task forces are sworn in as special federal law enforcement officers working under the direction of federal crime-control authorities. As

such, they are not subject to local laws and policies intended to promote police accountability.

Executive Branch Proposal

- DOJ should shut down ORP/OL operations in the target cities, shifting any current funds remaining to other branches of the Administration that can redistribute them to support non-police programs and services sorely needed by the vulnerable communities that have suffered from counterproductive over-policing for many years.

Legislative Proposal

- Prohibit the use of funding towards OPR/OL in H.R.7617 – the Defense, Commerce, Justice, Science, Energy and Water Development, Financial Services and General Government, Homeland Security, Labor, Health and Human Services, Education, Transportation, Housing, and Urban Development Appropriations Act – as in Rep. Ted Lieu’s amendment. Identical language should be adopted by the Senate as budget deliberations move forward.

Expert

Judy Greene, Justice Strategies

ISSUE: DATA COLLECTION

Summary of Issue

Police transparency and data accessibility are vital for progress to occur in our society. Despite the enactment of the Death in Custody Reporting Act in 2014, and multiple notice and comment periods, the DOJ has yet to collect and publish important data from the 18,000 police departments on law enforcement-caused fatalities. Based on public databases such as the *Washington Post*’s Fatal Force Report,¹⁴ we know that annually an excess of 1,000 people are shot and killed by police, and further lives are lost by other means at the hands of law enforcement. Black people are killed at twice the rate of white people in the U.S.¹⁵ In 2020 the killings of Black people by law enforcement, including George Floyd, Breonna Taylor, Tony McDade, Dijon Kizzee, and too many more, have further raised the urgency of the publication of exactly how many people are killed by police.

¹⁴ *Washington Post*, “Fatal Force,” updated November 8, 2020, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>

¹⁵ *Id.*

Annually an excess of 1,000 people are shot and killed by police, and further lives are lost by other means at the hands of law enforcement.

Executive Branch Proposal

- The DOJ should ensure the collection and publication of nationwide statistics on police shootings in accordance with the Violent Crime and Enforcement Act (1994) and fully implement the Death in Custody Reporting Act. The data collected should be disaggregated on the basis of race, gender, age, nationality, sexual orientation, gender identity, and indigenous status. Further, the White House should call on the FBI to change reporting to their National Use of Force (by law enforcement) data collection, which is currently collected voluntarily, to make it mandatory, and ensure the FBI publishes this information at least annually.

Experts

Kristina Roth, Amnesty International USA
Monique Dixon and Puneet Cheema, NAACP Legal Defense and Educational Fund, Inc.

ISSUE: CIVIL ASSET FORFEITURE

Summary of the Issue

Federal civil asset forfeiture policy gives law enforcement both the power and the incentive to take property away from someone who is merely suspected, but has not been convicted, of a crime. This property can be cash, cars, homes, small businesses, or anything else that a law enforcement officer believes is connected to a crime. Under this policy, even if the owner of the property is never convicted, it can be difficult or impossible for them to get their property back.

This practice generates billions of dollars in revenue annually for law enforcement agencies at all levels, federal, state, and local, as most are permitted to keep

the assets they seize, creating a perverse incentive for agencies to abuse their forfeiture authority. In 2019, federal forfeiture policies took in \$2.3 billion, some of it through the federal government's equitable sharing program, which allows state and local law enforcement to gain access to property or funds seized pursuant to provisions in federal law or through the work of joint task forces of federal as well as state or local law enforcement. Individuals pay a high price, not only financial but also personal and emotional, when their property is taken. Civil asset forfeiture is a significant threat to everyone's civil rights and civil liberties. It disproportionately impacts small business owners, those of modest means, and people of color, who may be discriminatorily profiled.

Civil asset forfeiture is a significant threat to everyone's civil rights and civil liberties.

Executive Branch Proposals

- The Administration should support bipartisan efforts in Congress to enact civil asset forfeiture reform.
- DOJ should collect and report data on civil asset forfeiture practices, respect state forfeiture laws, and eliminate the equitable sharing program.

Legislative Proposal

- Congress should pass comprehensive civil asset forfeiture reform legislation that addresses the procedural barriers to protection and relief for property owners in the federal forfeiture system and eliminates the profit incentive driving forfeiture, similar to the FAIR Act.

ISSUE: BIASED POLICING AND RACIAL PROFILING

Summary of the Issue

Racial and other biased profiling involves unwarranted screening by law enforcement of certain groups of people believed to be predisposed to criminal behavior. Racial profiling takes place in three main ways: street-level profiling, profiling in the national security context,

and profiling based on border security or integrity. Studies have concluded that racial or discriminatory profiling results in the misallocation of law enforcement resources, a decrease in public safety, and a lack of trust between law enforcement and the communities they serve.

Racial profiling casts entire communities as suspect simply because of their appearance, country of origin, or religion, and has led countless people to live in fear. Raids on immigrant workplaces in cooperation with local law enforcement, coupled with anti-immigrant rhetoric, has led to a dramatic increase in hate crimes and racial profiling directed at Latinx communities. In 2018, a study found that four in ten Latinx individuals said they had experienced discrimination in the past year. Similarly, since September 11, 2001, airline personnel, federal law enforcement, and local police have profiled members of Muslim, Arab, and South Asian communities. In addition, LGBTQ people and people living with HIV face discrimination based on gender, sexual orientation, and gender identify. Physical and sexual violence, unlawful searches, false arrests, and discriminatory targeting and profiling are pervasive, resulting in heightened fear, higher rates of criminal justice involvement, and threats to public health and safety.

“Four in ten Latinx individuals said they had experienced discrimination in the past year.”

Executive Branch Proposal

- The Administration should support and expand efforts in federal agencies to eliminate racial profiling and other biased policing and should work with Congress to create a codified federal prohibition on racial profiling and incentivizes antibias practices.

Legislative Proposal

- Congress should pass legislation that creates a federal prohibition on racial profiling and other biased policing.

Experts

Monique Dixon and Puneet Cheema, NAACP Legal Defense and Educational Fund, Inc.



CHAPTER 2

PRETRIAL AND COURTS



The criminal legal system in America is at a critical point, one that requires us to examine the roots of mass incarceration and the significant social and economic ills that come with it. Specifically, the pathways into the justice system and our means of dealing with the criminally accused must be reckoned with, looking beyond the status quo of how things have been done to a vision of justice that recognizes humanity and dignity of all persons. Recent events like the bail reform movement in states like California, New York, and New Jersey; the global novel coronavirus pandemic that wreaked havoc in jails and prisons across the country; and the terrible conditions of many jails in which pretrial detainees are housed have exposed the truly gut-wrenching reality of our pretrial and procedural justice systems and why we must radically transform the system now before it is too late.

“**The reality of our pretrial and procedural justice systems is truly gut-wrenching.**”

Bail reform is a critical first step to addressing the pretrial system. Monetary bail can and must be eliminated and replaced with a pretrial services regime that ensures defendants return to court, which is the primary aim of bail. Alternatives like risk assessment tools and other algorithmic decision-making tools should be viewed as nonstarters by policymakers due to their racially discriminatory impact. Real reform should embrace the presumption of innocence and see detention as a last resort rather than a default.

The global COVID-19 pandemic laid bare the tremendous problems with our system of pretrial detention and the grossly unnecessary imprisonment of individuals awaiting trial. With so many disadvantaged defendants, mostly people of color, housed in jails simply because they cannot afford bail, they are

exposed to and susceptible to various contagions that are present in many dilapidated facilities. The public health risks of COVID-19 in many jails and prisons across the nation sparked reforms that were a step in the right direction, but beg the question as to whether many of these are here to stay, or will they be rolled back once the pandemic threat has lifted.

Conversely, due to the onslaught of the coronavirus, many procedural justice concerns have arisen, from the protection of the attorney-client privilege, to postponement or delay of court proceedings, to virtual jury trials. COVID-19 showed us what we all knew was lurking in the dark. What are we willing to do now that we know these concerns can no longer be kicked down the road and that changes must be made to secure a better functioning, healthier, and well-equipped system that recognizes the public interest in jails and prisons and that administers punishments sparingly and humanely? Will hard-fought reforms that have been instituted in response to the viral outbreak and that are showing promise in curtailing unnecessary incarceration be preserved? Will others that threaten constitutional and statutory rights be rolled back? We must confront these questions and take swift action to ensure we meet this moment with a resolve to push affirmative change that enforces rights and protections while ensuring public health and safety.

It is time to rethink how our justice system deals with Americans who encounter it; how and why they are detained; whether justice is served through a criminal conviction or if it would be better achieved through alternative means; and whether our jails and prisons will stop being used as treatment facilities for those who are better off with proper social and medical services for their mental health ailments. Furthermore, we must address the failure of our judiciary to police and enforce the constitutional rights of defendants in the face of abuse by overzealous prosecutors who deliberately take advantage of the accused's vulnerable condition in pretrial confinement. The

recommendations outlined below offer a starting point for rethinking our pretrial and procedural justice systems, where we must make immediate changes to ensure that the cause of justice is served and public safety is promoted to restore confidence in the system.

RESHAPING BAIL & PRETRIAL DETENTION

ISSUE: ELIMINATION OF MONEY BAIL AND OTHER FINANCIAL CONDITIONS OF PRETRIAL RELEASE

Summary of Issue

On any given day in the United States, more than 450,000 individuals – presumed innocent and not convicted of a crime – are held in local jails awaiting trial. Most are there simply because they cannot afford bail. Approximately 70 percent of all people incarcerated in jails in this country have not been convicted of a crime. This number has increased significantly over the past 20 years, and much of that growth is due to the increased use of money bail. As the “front door” to our nation’s prison system, our local jails process more than 11 million people annually, and three in five are people too poor to afford the bail amounts set for them. The social and economic costs of the current bail system are staggering. With an annual price tag of more than \$13 billion, taxpayers are shouldering a high price for a failed system.

The current bail system drives mass incarceration, extracts money from the poor, and makes us no safer.

The current bail system as implemented by many states undermines the core constitutional principle of the presumption of innocence, in other words, the right to liberty absent conviction of a crime. It drives mass incarceration, extracts money from the poor, and makes us no safer. There are more effective means of ensuring people appear for trial without money bail. There is growing evidence of alternatives to money bail that are less onerous and more effective

means of ensuring persons charged with crime return to court for their trials. The alternatives take a “needs-focused approach.” One such model can be described as “Community Release with Support.” This approach removes the financial incentive of bail and creates the equivalent of releasing people on personal recognizance. Such alternatives to cash bail include: reminders of upcoming appearance dates via calls, texts, and emails, and independent pretrial service agencies that provide access to substance abuse and mental health services as well as to supportive services, such as childcare and transportation, to help ensure defendants can make their court dates. Where implemented, these types of programs have proved to be at least as effective as money bail, often more so, and at lower cost to taxpayers, individuals, and the community.

As jurisdictions move away from money bail systems, it is critical that they not replace such systems with risk assessments. As a broad coalition of more than 100 civil rights, digital justice, and community-based organizations shared around a statement of principles, “Risk assessment tools are not a panacea to reforming our unjust and broken bail systems. In fact, these tools can worsen racial disparities and allow further incarceration.” The coalition urges jurisdictions to “not embed risk assessment tools in pretrial decision-making, but instead reform their systems to significantly reduce arrests, end money bail, severely restrict pretrial detention, implement robust due process protections, preserve the presumption of innocence, and eliminate racial inequity.”

Legislative Proposals

- Pass legislation that incentivizes state and local governments to use federal grant making to end all financial conditions of pretrial release, optimizes the use of pretrial services, and encourages reform to their pretrial justice systems through alternatives to pretrial incarceration that do not include pretrial risk assessment instruments and other algorithmic decision-making tools.
- Pass legislation that encourages state and local governments to utilize diversion programming as an alternative to jail admission. Please see additional recommendations made by the Justice Roundtable’s Sentencing Reform Working Group.
- Pass legislation that significantly increases funding for public defense services to ensure that accused

individuals have counsel at the outset of any criminal proceedings such as a bail or pretrial detention hearing. Specifically, they should be provided individualized release hearings within 24 hours of arrest, with counsel, and with a strong presumption of release without conditions.

Experts

Kanya Bennett, The Bail Project
Sakira Cook, The Leadership Conference on Civil and Human Rights
Thea Sebastian, Civil Rights Corps
Anthony Thomas-Davis, NAACP Legal Defense and Educational Fund, Inc.

ISSUE: PRESUMPTION OF RELEASE & REIMAGINING THE FEDERAL BAIL REFORM ACT

Summary of Issue

Federal bail reform is essential to reducing mass incarceration and advancing racial equity. Federal pretrial incarceration has skyrocketed since the Bail Reform Act of 1984 (the BRA) was passed. The BRA was intended to incarcerate only people who pose a high risk of nonappearance in court or a threat to others, but has instead enabled widespread jailing of nonviolent, low-risk individuals and has resulted in troubling racial disparities. Today, federal prosecutors and courts deprive three out of every four people of their liberty before trial, despite their presumed innocence. The 75 percent federal pretrial detention rate stands in stark contrast to a 45 percent detention rate for state-level violent felonies. Incarceration at such levels is unnecessary and counterproductive. Government statistics show that people released pretrial in federal cases overwhelmingly appear for court as required and are not a threat to community safety. Pretrial jailing thus needlessly deprives people of liberty, tears them away from families and communities, drains them from the workforce, and consigns them to higher sentences. These burdens fall especially heavily on Black and Latinx people, who account for 80 percent of those charged with federal crimes and are more likely to be jailed pretrial than whites.

“**People released pretrial in federal cases overwhelmingly appear for court as required and are not a threat to community safety.**”

Executive Branch Proposal

- Request detention at lower rates. For decades, the Department of Justice (DOJ) and its constituent United States Attorney’s Offices have asked judges to jail even more people than they do. The Executive Branch’s discretionary decisions are thus a key driver of high federal detention rates. Federal prosecutors seeking tougher punishment have an incentive to request pretrial detention, since evidence shows that pretrial jailing leads to longer sentences. Federal prosecutors should instead base their discretionary detention requests on the evidence, including data that show 99 percent of people released pretrial return to court and 98 percent do not reoffend. DOJ should also work to reduce racial disparities in pretrial detention.

Legislative Proposals

- Enact the Smarter Pretrial Detention for Drug Charges Act. This bipartisan bill is an important starting point. It would eliminate the BRA’s presumption of detention in drug cases – a major driver of the high federal incarceration rates and accompanying racial disparities. At least 72 percent of the people charged and convicted in presumption cases are Black and Latinx.
- Eliminate financial conditions of release. Congress intended the BRA to eradicate a system that let rich people buy their freedom while jailing poor people who could not pay for release. But in practice, federal judges routinely impose conditions of release that privilege the wealthy, imposing cash or property bonds, requiring family members to demonstrate that they are “solvent” to co-sign a bond, and burdening the indigent accused with the administrative costs of their own release, such as paying for electronic monitoring. To make pretrial liberty equally available to rich and poor alike, we need a bright-line rule prohibiting financial conditions of release.

- Eliminate all presumptions of detention, not just the presumption in drug cases. Government research proves that the presumptions of detention sweep too broadly, lead to systematic de facto jailing of many low-risk defendants, and increase incarceration rates without advancing public safety. The presumptions also deprive judges of discretion, contrary to the BRA drafters' intent. In practice, many federal judges view the presumptions of detention as mandating pretrial jailing, regardless of the person's background or minimal role in the offense. The clearest answer is to eliminate the presumptions of detention across the board and ensure judges have the discretion to detain anyone who threatens community safety on a case-by-case basis.
- Give judges more discretion to consider a person's individual circumstances before jailing them. Currently, § 3142(f) of the Act ties judges' hands by mandating jailing at the outset whenever the prosecutor requests it, based solely on the nature of the allegation. This mandatory jailing is authorized in nearly half of all federal cases, including low-level drug cases. The solution is simple: Congress should authorize judges to make individualized determinations about whether to jail people at the initial bail stage. This would make it less likely that low-risk individuals are needlessly jailed and would reduce racial disparities.

ISSUE: ENDING FEDERAL GRANTS, LOANS, AND INVESTMENTS IN LOCAL CORRECTIONS INFRASTRUCTURE

Summary of Issue

While most of the money spent on the criminal-legal system comes from state and local coffers, federal actions have incentivized the expansion of state and local carceral systems. Federal investments in these systems include the following:

- The United States Marshals Service (USMS) uses intergovernmental agreements (IGA) to maintain a dispersed and shifting network of locally run county jails to hold people awaiting trial on federal charges. In fiscal year (FY) 2018, USMS paid over \$1 billion to local jails for this purpose. This network came about as a result of the lesser-known 1984 Crime Bill, the Comprehensive Crime Control Act, and jail incarceration rates rose dramatically after the law's enactment and only leveled off in the late 2000s. USMS employees also sometimes encourage local officials to increase the number of beds in their jail, and the agency provides some financial support for construction.
- U.S. Immigration and Customs Enforcement (ICE) has its own IGAs in place with local facilities to detain immigrants and can piggyback on USMS IGAs. ICE payments to local jails in FY 2018 totaled approximately \$340 million. As with USMS, ICE employees have used promises of revenue for holding people on behalf of the agency to encourage local officials to increase their jail's capacity.
- U.S. Department of Agriculture (USDA) allows recipients of funds under its Community Facilities (CF) loan and grant programs for jail construction. The agency possesses no recognized expertise in criminal justice system issues, and jail construction and expansion do not align with the spirit of the programs. Indeed, CF operated for over two decades before it funded its first jail construction project.

Congress should authorize judges to make individualized determinations about whether to jail people at the initial bail stage.

Experts

Alison Siegler, Federal Criminal Justice Clinic, University of Chicago Law School
 Erica Zunkel, Federal Criminal Justice Clinic, University of Chicago Law School
 Patricia Richman, Federal Public and Community Defenders

These federal investments – particularly by ICE, USDA, and USMS – are associated with alarming increases over recent decades in rural jail incarceration. Since 2013, the jail population has grown 27 percent in rural counties and 7 percent in smaller cities – even as the number of

people in jails in the nation's biggest cities declined by 18 percent. This crisis of incarceration is both a cause and consequence of the challenges faced by small town America, including deaths of despair, joblessness, and poverty. As we work to support and revitalize rural America, it is critical to vastly reduce jail incarceration rates in these parts of the country. The federal government can provide critically needed leadership by curbing the flow of these federal dollars into rural and small county jails.

The crisis of incarceration is both a cause and consequence of the challenges faced by small town America, including deaths of despair, joblessness, and poverty.

Executive Branch Proposals

In the first 100 days of the next presidential term, the Administration should pursue agency-initiated divestment that includes the following:

- End IGAs between ICE and USMS and local jails.
- End the practice of ICE and USMS staff encouraging local officials to expand the number of jail beds in their communities.
- Prohibit the use of USDA CF program funds for jail construction expansion, operation, or equipment.

Legislative Proposals

We urge Congress to permanently end these investments by doing the following:

- Include in the next Farm Bill reauthorization of a prohibition on the use of USDA CF funds for jail construction, expansion, operation, or equipment.
- Include in relevant legislation before the House and Senate Homeland Security and Judiciary Committees provisions to end IGAs between ICE and USMS and local jails, and prohibit ICE and USMS staff from communicating with local officials about expanding the number of jail beds in their communities.

Experts

Micah Haskell-Hoehl, Vera Institute of Justice

ENSURING CONSTITUTIONAL RIGHTS & DUE PROCESS

ISSUE: ENSURING THE EARLY APPOINTMENT OF COUNSEL TO ACCUSED INDIVIDUALS

Summary of Issue

Almost two-thirds of the U.S. jail population is being held pretrial. This takes a toll on the lives of those detained – all of whom are presumed innocent and many of whom are determined to be low-risk – and results in high costs for jurisdictions. The collateral consequences of pretrial detention can include a higher likelihood of conviction, longer prison sentences, and recidivism, as well as difficulty finding employment and housing. According to a 2018 study, pretrial detention is correlated with higher rates of conviction, longer sentences, and increased recidivism. In terms of taxpayer dollars, pretrial detention is estimated to cost local governments \$13.6 billion per year. Providing counsel at first appearance (CAFA) can help increase rates of pretrial release, thereby both helping individuals and reducing jail costs.

The collateral consequences of pretrial detention can include a higher likelihood of conviction, longer prison sentences, and recidivism, as well as difficulty finding employment and housing.

Research indicates that defendants who have assigned CAFA have a higher likelihood of improved case outcomes as compared to those who do not, and early access to counsel has been shown to increase release rates, reduce the pretrial detention population, and potentially contribute to a reduction in the

prison population down the road. For example, a study conducted in Baltimore revealed that pretrial defendants represented by counsel were 2.5 times more likely to be released on their own recognizance and 2.5 times more likely to have bail reduced to an affordable amount. It does not appear that these findings are limited to Baltimore. Additionally, those held pretrial are 4 times more likely to be sentenced to jail, 3 times more likely to have a longer jail sentence, 3 times more likely to be sentenced to prison, and 2 times more likely to have a longer prison sentence than those not held pretrial.

In addition, early appointment of counsel can help properly identify individuals for diversion and those who need treatment instead of incarceration. Defenders can help the accused make informed decisions within a complex process that is difficult to navigate, ensuring that the accused understands the legal process and the possible repercussions of pretrial detention or a guilty plea.

Executive Branch Proposals

The President is charged with appointing the leadership team for his/her Administration, which includes the U.S. Department of Justice and the U.S. courts. Additionally, the President oversees the White House Domestic Policy Council, which prioritizes domestic policy issues. As such, the President should see to the following:

- Ensure that U.S. Department of Justice leadership appointees respect public defense and see public defense service providers as vital, equal, and essential partners in providing the fair and impartial administration of justice as stated in the Department of Justice’s mission statement.
- Identify the right to counsel and public defense reform as issues to be supported by relevant White House staff.

- Appoint federal judges who previously served as public defenders – as former President Ronald Reagan did by appointing Judge Charles Randolph Butler Jr., Judge Edward C. Prado, and Judge G. Kendall Sharp, among others.
- Appoint U.S. Attorneys who were former public defenders.
- The Office of Justice Programs in the Department of Justice should elevate and support public defense work through the Justice for All Reauthorization Act by funding creative demonstration projects, such as counsel at first appearance, and funding opportunities for other criminal justice stakeholders to attend trainings and meetings about the importance of a strong public defense system, including the ethical and cost-saving implications associated with one, that can be translated into state strategic plans.

Legislative Proposals

- Reform 42 U.S.C. §3751, designating public defense as its own purpose area for Bureau of Justice Assistance (BJA) Justice Assistance Grants (JAG), after which prosecution and courts should be separated into their own purpose areas.
- Prioritize improving state and local defense delivery systems in all criminal justice policymaking efforts, such as Justice Reinvestment and the Second Chance Act.
- Analyze criminal justice legislation, including spending bills, for impact on public defense.

Experts

Genevieve Citrin Ray, Office of Justice Programs, American University School of Public Affairs



TRANSFORMING CRIMINAL PROSECUTION IN THE UNITED STATES

ISSUE: PROSECUTORIAL ACCOUNTABILITY, TRANSPARENCY, & OVERSIGHT

Summary of Issue

Unfortunately, there is little transparency and accountability built into our justice system for the critical role of the prosecutor. Even the mechanisms built into our legal system that successfully hold other attorneys accountable for unethical or illegal actions are either not used or cannot be used to hold prosecutors accountable. The misconduct of prosecutors is also vastly underreported. Many defendants do not discover the misconduct that occurred in their case because they accept a plea deal before a trial can occur, which shields a prosecutor's actions from challenge. Yet even when egregious prosecutorial misconduct is discovered and proven, prosecutorial offices, judges, and bar associations mostly fail to take any significant action to remedy or to deter future misconduct. The situation in our federal system is made worse by the fact that the Department of Justice's Inspector General does not even have the legal authority to address claims of misconduct by DOJ attorneys; instead, any allegations are handled by an internal office inside DOJ itself. There is no transparency as to how allegations are dealt with, and there has been no accountability in most cases of known and proven federal prosecutorial misconduct.

Due process rights lie at the core of our Constitution's protections of individual liberty. But for any due process reforms to achieve their intended outcome, accountability measures need to exist that return prosecutorial and enforcement climates to ones in which ethics, fairness, and restraint are valued. We therefore recommend the following actions.

“Prosecutorial and enforcement climates must promote ethics, fairness, and restraint.”

Executive Branch Proposals

- Ensure that Department of Justice leadership appointees identify internal and external incentives that create a prosecutorial and enforcement climate in which ethics, fairness, and restraint are valued, and explore both how to identify and effectively address instances of prosecutorial misconduct.
- Quickly appoint reliable candidates to key positions in the Civil Rights Division of the Department of Justice, the United States Commission on Civil Rights, and other key federal agencies that can be instrumental for the investigation of prosecutorial misconduct.
- Question any potential federal court nominee on his or her perspective concerning federal judicial discipline of prosecutors who engage in unethical or illegal behavior in pursuit of their duties.
- Direct the Department of Justice to establish a public database detailing judicial findings of prosecutorial misconduct in federal cases. Without more tracking of the problem, prosecutorial training initiatives are likely to be less effective than if they were narrowly tailored to address specific concerns.

Legislative Proposals

- Pass legislation that ensures proper accountability of federal prosecutors, including that which enables the Inspector General of the Department of Justice to review and address claims of misconduct by DOJ attorneys. One example of such legislation is the Inspector General Inspection Act of 2019 (H.R.202; S.685).
- Pass legislation that amends the Federal Rules of Evidence to address the timely and appropriate disclosure of informant testimony.
- Pass legislation that abolishes or reforms the legal doctrine of absolute immunity to ensure that federal prosecutors who engage in unethical or illegal behavior in pursuit of their duties are held accountable for those actions.
- Pass legislation that reforms or abolishes the judicial “harmless error” doctrine that many appellate courts inappropriately use to excuse egregious misconduct by prosecutors – particularly violations of constitutional due process rights.
- Pass legislation that would: (1) require prosecutors to disclose to the grand jury all known favorable

evidence relating to the subject or target of the indictment; (2) prohibit a prosecutor from presenting evidence to the grand jury that would be constitutionally impermissible to present at trial; (3) ban the disclosure of named unindicted co-conspirators in indictments; and (4) require the disclosure of a recording or transcript of grand jury proceedings to the defense in the event of indictment.

- Amend the Hyde Amendment, 18 U.S.C. § 3006A, so that the law fulfills Congress’s original intent when it was passed in 1997 – to meaningfully allow criminal defendants to recover attorneys’ fees and court costs for wrongful prosecution, which is currently a rare occurrence.

Experts

Shana-Tara O’Toole, Due Process Institute
Nina Morrison, Innocence Project
Ellen Yaroshefsky, Hofstra University Law School
Anthony Thomas-Davis, NAACP Legal Defense and Educational Fund, Inc.

ISSUE: DISCOVERY REFORM

Summary of Issue

Discovery rules that leave defendants in the dark about the evidence against them undermine fairness and due process and increase the risk of wrongful convictions. Criminal discovery can be divided into two categories: (1) disclosure of so-called “exculpatory evidence” that is constitutionally required under the Supreme Court’s 1963 *Brady v. Maryland* opinion and (2) disclosure that is required by statute or court rule. Unfortunately, the *Brady* rule has sown confusion about (1) what must be disclosed, (2) when it must be disclosed, and (3) what remedies exist when it is not. The easiest and most fair way to fix this is to require prosecutors to disclose to the defense all the evidence in the case. At the very least, prosecutors must disclose all evidence that is favorable to the defendant (regardless of “materiality”) and should do so without delay after arraignment or prior to entry of a guilty plea.

“**Prosecutors must disclose all evidence that is favorable to the defendant.**”

Executive Branch Proposal

- Because discovery in criminal cases is controlled by prosecutors, agency policy could be amended to require disclosure of all evidence to the defense or, at least, disclosure of all evidence favorable to the defense.

Legislative Proposals

- Open-file legislation, where the prosecution would turn over its entire case file to the defense is the strongest proposal that would ensure fair discovery. This is modeled on the success of similar state laws (e.g., North Carolina and Texas). Model open-file legislation may be found [here](#).
- The bipartisan Fairness in Disclosure of Evidence Act introduced by Senator Lisa Murkowski in the 112th Congress would require disclosure of all favorable information to the accused, regardless of “materiality.” This bill also enjoyed broad support from groups including National Association of Criminal Defense Lawyers, the American Civil Liberties Union, and the U.S. Chamber of Commerce.
- The 116th Congress took a small, but important, step to ensure *Brady* obligations are met with its passage of the bipartisan Due Process Protections Act, which requires federal district judges to enter an order in each case confirming prosecutors’ *Brady* obligations.

- Other areas for reform include mechanisms for verifying prosecutors’ compliance with *Brady* obligations, ensuring the availability of post-conviction discovery, and forensic discovery.

Experts

Nathan Pysno, National Association of Criminal Defense Lawyers
 Rebecca Brown, Innocence Project
 Shana-Tara O’Toole, Due Process Institute

ISSUE: CONFIDENTIAL & IN-CUSTODY INFORMANTS

Summary of Issue

The widespread use of confidential informants (CIs) has led to wrongful imprisonment, perverse incentives, and putting members of the public in danger. Their use in drug investigations and prosecutions is especially troubling. Confidential informants have been used to encourage and facilitate criminal acts, acted as the sole witness in cases without corroboration, been placed in dangerous situations by law enforcement, and received financial incentives to “find” cases. Similarly, in-custody informants are incentivized to provide unreliable information and testimony, often enabling wrongful convictions. The lack of oversight and regulation of this area of the criminal justice system calls out for Congress’s attention to this issue.

“**The lack of oversight and regulation of the use of informants calls out for Congress’s attention.**”

Executive Branch Proposals

- Stop using CIs: The government should discontinue paying money or promising anything of value in exchange for testimony.
- Timely, thorough disclosures: The government should produce for the defense in a timely manner all information and records regarding their contact with the informant, their criminal histories, any promised benefits, the informant’s

prior cooperation with law enforcement, and the informant’s credibility.

- Informant registry: Establish a uniform system of state and federal informant registries through which law enforcement officers would maintain information about confidential and in-custody informants, as well as a national informant registry.
- Jury instructions: In all trials involving the testimony of in-custody informants or confidential informants, the courts should issue appropriate cautionary jury instructions.

Legislative Proposals

- Reliability hearing: Prior to admitting informant testimony in any proceeding, the government should be required to establish the informant’s reliability in a separate hearing.
- Corroboration: Require that in-custody informant testimony be corroborated by noninformant testimony and/or evidence – both in the grand jury and at trial – before it can be deemed legally sufficient to establish either probable cause or guilt beyond a reasonable doubt.
- Heightened warrant requirement: Require that warrants based on information from an informant include corroborating evidence and detailed information regarding the informant.

Experts

Kyle O’Dowd, National Association of Criminal Defense Lawyers
 Rebecca Brown, Innocence Project



EQUAL JUSTICE AND THE IMPORTANCE OF PUBLIC DEFENSE

Few rights are as fundamental as the Sixth Amendment's promise that when the government brings its power to bear against an individual, that government also bears the responsibility to ensure the accused has a zealous and dedicated advocate to defend them. A robust defense function helps prevent wrongful convictions of the innocent and unjust sentences for the convicted; preserve core constitutional rights and public faith in judicial outcomes; shine a light on government abuses of power; fight racial inequities; and facilitate treatment and services to reduce recidivism.

With the overwhelming majority of persons charged with crimes at the state and federal levels relying on publicly funded defense services, it is vital to have a robust, adequately funded public defense system.

The overwhelming majority of persons charged with crimes at the state and federal levels rely on publicly funded defense services.

ISSUE: FUNDING

Summary of Issue

Inadequate funding plagues public defense systems at virtually every level, leading to inadequate attorney and support staffing, excessive workloads, and insufficient and outdated infrastructure. These factors individually and collectively contribute to representation that falls below constitutional standards, harming the promise of equal justice. In the nearly 60 years since *Gideon v. Wainwright*, state and local governments have repeatedly failed to provide the financial support needed to operate a public defense delivery system that is a true and equal adversary to the government's prosecution entities. All funding considerations must include both institutional defender agencies and court appointed counsel and should consider the resources provided to corresponding prosecution agencies.

Legislative Proposals

- Support and promote efforts that ensure adequate funding, staffing, and resources for federal defender offices and Criminal Justice Act attorneys.
- Support and promote efforts to ensure adequate funding and resources for state and local public defense delivery systems, address excessive defender workloads, improve technology and data collection infrastructure, provide for the hiring and retention of qualified defense lawyers, and provide access to relevant training opportunities.

ISSUE: PROTECT ACCESS TO COUNSEL

Summary of Issue

The federal government plays a key role in protecting the Sixth Amendment right to counsel by ensuring federal, state, and local public defense systems provide the accused with attorneys who have the resources, skills, and independence needed to be an effective advocate and to serve as a meaningful adversary of the government.

Executive Branch Proposals

- Encourage the Department of Justice (utilizing its authority under 28 U.S.C. §517) to file Statements of Interest in litigation that challenge the systemic failures of state and local public defense systems to provide adequate resources, oversight, staffing, workloads, and independence so as to deny those accused of denying the Sixth Amendment's promise of the meaningful and effective assistance of counsel.
- Ensure that a significant share of Department of Justice grant funding is allocated to support public defense.
- Reinstate the Department of Justice's Access to Justice Office.

Legislative Proposals

- Ensure federally funded [initiatives](#), such as Byrne JAG and other Bureau of Justice Assistance grants, and support public defense efforts at levels commensurate with the funding provided to prosecution and law enforcement initiatives.
- Support measures, such as the EQUAL Defense Act of 2019, that provide grants and other financial support to fund pilot programs that promote innovative, holistic, and constitutionally effective public defense services.

- Significantly increase funding for the John R. Justice Program, which provides student loan repayment assistance to public defenders and prosecutors who meet certain conditions.
- Support legislation to enable the Department of Justice and classes of indigent defendants to challenge systemic Sixth Amendment violations in federal court. (E.g., from the 114th Congress: The Right to Counsel and Taxpayer Protection Act [H.R.2955] and the Equal Justice Under Law Act [H.R.5124, S. 3144]).

ISSUE: PRIORITIZE EQUAL REPRESENTATION

Summary of Issue

The fundamental principles of equality and justice cannot begin to be realized without a properly resourced and independent public defense system, whose representatives are given equal opportunity to evaluate and reform the criminal legal system. According to a recent study by the Center for American Progress, only about 1 percent of sitting federal appellate judges spent most of their careers as public defenders or in a legal aid setting. Instead, “the federal judiciary is massively tilted in favor of former prosecutors over former criminal defense attorneys.” The same imbalance dominates criminal legal policy-making bodies. For example, a presidential blue-ribbon commission created to study “ways to make American law enforcement the most trusted and effective guardians of our communities” was comprised entirely of current and former law enforcement officers. A federal judge halted the commission’s work, noting that “especially in 2020, when racial justice and civil rights involving law enforcement have erupted across the nation, one may legitimately question whether it is sound policy to have a group with little diversity of experience examine, behind closed doors, the sensitive issues facing law enforcement and the criminal justice system in America today.”

The composition of the U.S. Sentencing Commission provides another case in point of the pervasive tilt toward law enforcement in policymaking. The U.S. Sentencing Commission is tasked, inter alia, with “advis[ing] and assist[ing] Congress and the executive branch in the development of effective and efficient crime policy.” The seven voting members on the Commission are appointed by the President and

confirmed by the Senate to serve six-year terms. The Attorney General and the Parole Commission serve as nonvoting, ex officio members of the Commission. But the Commission has no such role for the federal public defenders – who represent the majority of all individuals in the federal criminal legal system.

Legislative Proposals

- Improve the quality of, and public confidence in, the U.S. Sentencing Commission’s work by adding a Federal Defender ex officio representative to balance existing representatives from the executive branch.

ISSUE: INDEPENDENCE

Summary of Issue

Independence is a foundational requirement for any good system of public criminal defense. The Constitution guarantees anyone charged with a crime the right to a defense attorney regardless of ability to pay, and that attorney has the ethical obligation to provide a zealous defense, free from any conflicting outside influence. And yet many systems of public defense – including the federal system – are funded, managed, and supervised by the very judges in front of whom defenders must vigorously defend their clients. This arrangement creates serious constitutional, ethical, and policy problems. For example, the 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (“Cardone Report”) found, after an exhaustive two-year study of the provision of public defense in the federal courts, that judicial control of the defense function “creates conflicts of interest and other serious impediments to genuine justice.” Some of the most serious conflicts include: (1) judicial “control over the defense budget,” (2) “individual judges [with] sole authority to appoint counsel and determine staffing levels at federal defender offices,” and (3) judicial power to “decide what, if any, resources attorneys may or may not use in defending their clients and what constitutes fair compensation for their legal services.” Fundamental structural change is needed now.

Defenders must vigorously defend their clients in front of judges who manage systems of public defense. This creates serious constitutional, ethical, and policy problems.

Legislative Proposals

- Establish an independent, nonpartisan federal agency for federal defense that possesses funding and oversight responsibilities.
- Support federal grant-funded programs that promote the independence of state and local public defense systems and restrict (deny) federal funding to criminal legal system programs that interfere with an independent defense function.

Experts

David E. Patton, Federal Defenders of New York
Lisa Freeland, Federal Public Defender for the Western District of Pennsylvania
Bonnie Hoffman, National Association of Criminal Defense Lawyers
Jon Rapping, Gideon's Promise
April Frazier-Camara, National Legal Aid & Defender Association

ISSUE: FORENSIC SCIENCES

Summary of Issue

The misapplication of forensic science is the second leading contributor to wrongful convictions, found in almost half of DNA exonerations. In 2009 and 2016, leading scientific organizations brought national attention to the fragmented state of the forensic science system and the insufficiently established scientific foundations of many disciplines. Investigations are significantly hampered by these shortfalls, and while some progress has been made to strengthen forensic science and practice, a significant investment in foundational research and in validated and reliable standards for all forensic science techniques is needed. And as new forensic science methods and police technologies emerge, they must be governed by scientific guidance, regulatory oversight, and contemplation of ethical, legal, and social implications (ELSI) to prevent further exacerbation of existing racial disparities in the criminal legal system.

Executive Branch Proposals

- Reestablish the National Commission on Forensic Science (NCFS) through the joint leadership of the Department of Justice (DOJ) and the National Institute of Standards and Technology (NIST).

- Establish a multi-agency forensic science research agenda led by the Office of Science and Technology Policy that integrates ELSI.
- Task NIST with the central role of evaluating the scientific foundations of forensic sciences methods and police technologies.

Legislative Proposals

- Codify and allocate funding for the federal forensic science research agenda, NCFS, NIST's Organization of Scientific Area Committees (OSAC), and NIST's foundational validation of all forensic methods. The NCFS and OSAC must be led by a board with a scientific and balanced membership, integrate transparency and public engagement, and contemplate ELSI issues.

Experts

Alicia Carriquiry, Center for Statistics and Applications in Forensic Evidence (CSAFE)
Eric Lander, Broad Institute
Anne Marie-Mazza, Committee on Science, Technology, and Law, National Academies of Sciences, Engineering, and Medicine
Peter Neufeld, Innocence Project
Rashida Richardson, Rutgers Law
Vincent Southerland, Center on Race, Inequality, and the Law, NYU

ISSUE: POSTCONVICTION AND INNOCENCE ISSUES

Summary of Issue

The National Registry of Exonerations has tallied over the past 30 years almost 2,700 exonerations, and from those wrongful convictions, more than 24,000 life years were lost. National Registry data also show that the number of exonerations has significantly increased since federal innocence programs – for example, the Bloodsworth Post-Conviction DNA Testing and Wrongful Convictions Review grant programs – began to receive funding approximately 10 years ago (in 2008 and 2009, respectively). This dramatic increase in the number of exonerations is in part a result of the federal decision to invest in these innocence programs to help ensure the accuracy and integrity of the criminal justice system. In the 20 years prior to the initiation of innocence program funding (from 1989 to 2008), the rate of exonerations was much lower. In 2016, the

number of exonerations was at its peak, and in recent years, exoneration totals have been approximately 150 per year – or on average, more than 12 exonerations per month. These outcomes show the power and need to continue to invest in federal innocence programs.

Executive Branch Proposal

- Ensure that at least 50 percent of funds appropriated to the Capital Litigation Improvement and Wrongful Conviction Review grant programs (if appropriated together as part of the same funding stream) support Wrongful Conviction Review grantees, providing high-quality and efficient postconviction representation for defendants in postconviction claims of innocence. Wrongful Conviction Review grantees should be nonprofit organizations, institutions of higher education, and/or state or local public defender offices that have in-house postconviction representation programs that show demonstrable experience and competence in litigating postconviction claims of innocence. Grant funds also should support grantee provision of postconviction legal representation of innocence claims; case review, evaluation, and management; experts; potentially exonerative forensic testing; and investigation services related to supporting these postconviction innocence claims.

Legislative Proposals

- Reauthorize the Justice for All Act, which should include reauthorization of the Kirk Bloodsworth Post-Conviction DNA Program and stand-alone authorization of the Wrongful Conviction Review Program in the Department of Justice’s Bureau of Justice Assistance.
- For FY21, appropriate \$10 million for the Kirk Bloodsworth Post-Conviction DNA Testing Program.
- For FY21, appropriate \$10 million for the Wrongful Conviction Review Program (which is a part of the Capital Litigation Improvement Program).



Experts

Rebecca Brown, Innocence Project
Tricia Bushnell, Midwest Innocence Project and
President, Innocence Network
Jenny Collier, Collier Collective and the
Innocence Project

CHAPTER 3

DRUG POLICY REFORM



Public opinion favors sensible reforms that expand health-based approaches and reduce the role of criminalization in drug policies. Despite recent progress in sentencing and marijuana reform, more than 660,000 individuals were still arrested for marijuana offenses in 2018, and more than 450,000 people remain behind bars for drug law violations. Communities of color remain subjected to extremely disproportionate drug enforcement and sentencing practices. Overdose deaths continue to hit unprecedented levels, but policymakers have failed to repeal outdated and stigmatizing laws and regulations that impede access to evidence-based forms of treatment and harm-reduction services, let alone invest federal resources toward meeting high levels of need for these interventions in communities across the country.

2020 has brought the additional challenge of the COVID-19 pandemic – a public health crisis that is compounding the overdose crisis as well as impeding access to necessary medication-assisted forms of treatments, such as methadone and buprenorphine as well as other health and harm-reduction resources. As the new Administration and Congress develop priorities, it is critical that these include health-based reforms, such as ending marijuana prohibition, decriminalizing drug use, and expanding access to harm-reduction and medication-assisted forms of treatment, which will reduce economic waste, dangers to health and well-being, and racial disparities perpetuated by punitive drug policies.

“As the new Administration and Congress develop priorities, it is critical that these include health-based reforms and expanding access to harm-reduction and medication-assisted forms of treatment.”

First 100 Days

- Permanently extend the SAMHSA/DEA COVID-19 accommodations for methadone and buprenorphine access, including the option of audio-only telehealth for people in rural or low-income circumstances without access to video-based technology.
- Allocate \$58 million for harm-reduction providers through the CDC program to reduce the infectious diseases consequences of the opioid epidemic in both the next COVID-19 relief package and the final FY21 appropriations bill.
- Direct the FDA to make at least one formulation of naloxone available over-the-counter (OTC): All forms of naloxone currently approved by the FDA require a prescription for use. If naloxone was available for purchase OTC, it would become much more accessible.
- Rescind the Department of Health and Human Services' (HHS) proposed rule that establishes a federal standard for the use of hair-based drug testing as a condition of employment. HHS determined in 2008 that hair testing was not reliable for use in making employment decisions.

ISSUE: MARIJUANA REFORM

Summary of Issue

Prohibitionist marijuana laws have wasted billions of dollars criminalizing people who use marijuana. The FBI recently revealed that 545,601 marijuana arrests were made throughout the country in 2019 and that the vast majority of these arrests were for simple possession. This represents 35 percent of all drug arrests in 2019 and amounts to more arrests for marijuana than for violent crime that year. An arrest record can carry significant consequences, affecting a person's ability to maintain a job, find housing, or go to school. What is more, Black and Latinx people are disproportionately arrested for marijuana even though white people use marijuana at similar rates. Another egregious outcome of marijuana prohibition is that many people with health challenges cannot legally access marijuana for medicinal purposes. There are several million state-licensed medical marijuana patients in the U.S., in addition to people who use marijuana to improve their quality of life and personal well-being. Today, the majority of U.S. states have taken steps to eliminate criminal penalties for marijuana to some degree, and there continues to be bipartisan support for marijuana reform. Two-thirds of the country is in favor of making marijuana legal. Marijuana must be legalized at the federal level, and robust provisions addressing criminal justice reform, racial justice, and patient access must accompany legalization.

“**Two-thirds of the country is in favor of making marijuana legal.**”

Legislative Proposal

- Marijuana Opportunity Reinvestment and Expungement (MORE) Act (S.2227/H.R.3884): This bicameral bill would remove marijuana from the list of federal controlled substances and address historical and current racial inequities through specific grant programs. By removing marijuana from the federal Controlled Substances Act and making way for the expungement and resentencing of marijuana convictions, this bill would reduce racial disparities in the criminal legal system and ensure that marijuana activity (including use of

medicinal marijuana) no longer jeopardizes a person's immigration status or ability to receive federal benefits. Moreover, it would provide funds for services in communities most harmed by the war on drugs and diversify the regulated marijuana industry by supporting entrepreneurs whose communities bore the brunt of this country's lopsided marijuana enforcement.

Experts

Maritza Perez, Drug Policy Alliance
Queen Adesuyi, Drug Policy Alliance
Justin Strekal, NORML

ISSUE: MEDICATION-ASSISTED TREATMENT FOR OPIOID USE DISORDER

Summary of Issue

Access to judgment-free, individualized, and evidence-based substance use disorder treatment is scarce in the United States. This includes methadone and buprenorphine, the safest and most effective medication-assisted forms of treatments (MAT) available for opioid use disorder. Access to these lifesaving forms of treatment is severely limited due to stigmatizing and restrictive federal laws and regulations. For example, health care practitioners are discouraged from treating patients with buprenorphine due to federal rules limiting the number of patients they can see and the need to meet an arbitrary requirement to obtain an additional “X-waiver” from the DEA. Federal rules also prevent health practitioners from using telehealth technologies to initiate buprenorphine treatment, despite its unique benefits, even for patients living in rural areas. Federal rules pertaining to methadone are even more onerous, which include requiring patients to report to an opioid treatment program to receive this treatment rather than access it in traditional health care settings. People incarcerated in U.S. jails and prisons typically are denied access to these forms of treatment.

Taken together, federal restrictions severely and unnecessarily limit access to these optimal treatments for opioid use disorder, even as the United States continues to grapple with unprecedented rates of overdose death. The overdose crisis has further worsened during the COVID-19 pandemic and economic downturn, disproportionately harming communities of color. In response to COVID-19, SAMHSA and the DEA recently waived several

regulations that have reduced barriers to methadone and buprenorphine. The Administration should make these waivers permanent, work with Congress to remove other legal impediments to access, and advance increased federal investment in evidence-based treatment and continuum of care.

Federal restrictions severely and unnecessarily limit access to these optimal treatments for opioid use disorder, even as the United States continues to grapple with unprecedented rates of overdose death.

Executive Branch Proposals

- (First 100 days) Permanently extend the SAMHSA/DEA COVID-19 accommodations for methadone and buprenorphine access, including the option of audio-only telehealth for people in rural or low-income circumstances who are without access to video-based technology.
- Direct the Department of Justice to require that state and local governments provide access to all forms of FDA-approved MAT as a condition of eligibility for funding allocations, and direct the Bureau of Prisons to make all forms of MAT available for people in its custody who could benefit from them.

Legislative Proposals

- Mainstreaming Addiction Treatment Act (S.2074/H.R.2482): This bill eliminates the redundant “X-waiver” to prescribe buprenorphine for substance use disorder treatment.
- Community Re-Entry through Addiction Treatment to Enhance Opportunities Act (S.1983/H.R.3496): This bill establishes a Department of Justice grant program to provide MAT to people incarcerated in jails and prisons.

Experts

Gabrielle de la Gueronniere, Legal Action Center
Grant Smith, Drug Policy Alliance

ISSUE: HARM REDUCTION

Summary of Issue

Harm reduction is a set of ideas and interventions that seek to reduce the health harms associated with drug use. Community-based organizations such as syringe services programs provide people who use drugs with access to harm-reduction services and supplies such as sterile syringes and naloxone. Syringe services programs and other harm-reduction providers are essential stakeholders in the fight to end the overdose crisis and prevent new HIV and hepatitis C infections. Moreover, harm-reduction providers offer many other critical public health services. Black people in particular face significant overdose risk and disproportionate criminalization due to institutional racism in our systems and policies. Harm-reduction programs are essential to achieving greater health equity and racial justice.

Harm-reduction programs are essential to achieving greater health equity and racial justice.

Services provided by harm-reduction organizations are especially critical during the ongoing overdose crisis in the United States and as we are seeing increases in overdose deaths during the COVID-19 pandemic. At the same time, these providers are underresourced and undervalued. Moreover, federal law prohibits the use of federal money to pay for sterile syringes, which prevent the spread of blood-borne diseases among people who inject drugs. The Administration should work with Congress to repeal this ban, for which there is no public health rationale, and allocate funding equitably to sustain the work of syringe services programs and other harm-reduction providers, which is especially needed now as providers have lost revenue and staffing due to the COVID-19 pandemic. The Administration should also refrain from prosecuting overdose prevention centers (OPCs) and work with Congress to clarify federal law to permit their operation. OPCs are designed to reduce the health and public order issues often associated with public drug consumption. No OPCs currently operate in the U.S. due to fear of federal law enforcement. The Administration should also make at least one form of naloxone available

as an OTC drug. The FDA has been [encouraging](#) development of an OTC formulation of naloxone for several years, but no OTC option is yet available. The FDA has the legal [authority](#) to reclassify naloxone as OTC.

Executive Branch Proposals

- (First 100 days) Direct the FDA to make at least one formulation of naloxone available OTC: All forms of naloxone currently approved by the FDA require a prescription for use. If naloxone was available for purchase OTC, it would become much more accessible.
- Direct the Department of Justice to refrain from prosecuting organizations that operate OPCs and to work with Congress to clarify that OPCs do not violate federal drug laws.

Legislative Proposals

- (First 100 days) Allocate \$58 million for harm-reduction providers through the CDC program to reduce the infectious diseases consequences of the opioid epidemic in both the next COVID-19 relief package and the final FY21 appropriations bill.
- Emergency Support for Substance Use Disorders Act (S.4058): This bill requires SAMHSA to award grants during the COVID-19 pandemic to states and community-based organizations to support harm-reduction services.

Experts

Tracie Gardner, Legal Action Center
Grant Smith, Drug Policy Alliance
Jenny Collier and Bill McColl, Collier Collective

ISSUE: DRUG TESTING

Summary of Issue

In recent years, a handful of states have taken steps to impose drug testing on people who apply for public assistance. These states make successfully passing a drug test a condition of eligibility for federal assistance programs such as SNAP and TANF; additionally, a few states have attempted to impose drug testing on Medicaid recipients. Drug testing schemes are descendants of the racist war on drugs. Furthermore, they are predicated on the false assumption that people

in need of government assistance use drugs at higher rates, and, thus, states can save taxpayer money by denying eligibility to a large number of applicants who test positive. [Studies](#) show, however, that individuals who receive public benefits use drugs at rates similar to the general population. States that have implemented drug testing policies have [consistently](#) identified only a few positive results. [Florida](#), for example, showed only 32 out of 21,000 individuals tested positive for illegal drugs. The imposition of state-mandated drug testing requirements on public assistance applicants has been struck down in courts, including a Sixth Circuit Court of Appeals [ruling](#). States have responded to these legal challenges by incorporating screening procedures that have also failed to generate large numbers of positive test results. A recent [analysis](#) of 13 states identified only 338 positive test results out of more than 260,000 applicants subjected to such procedures.

Conditioning receipt of public assistance on completion of a drug test unfairly stigmatizes and punishes low-income families and children, and is increasingly harmful as the pandemic and high rates of unemployment persist.

Conventional urinalysis drug testing methods utilized by governments and employers are prone to false positives, and further tests are often needed at additional expense to verify a positive result. Each drug test costs more than \$40 on average, not including administrative costs. Drug tests often fail to detect substances such as cocaine and opiate-based drugs but easily detect marijuana, which is legal for adult use in 11 states and Washington, DC. In addition, a positive urinalysis result, if accurate, does not diagnose or treat a substance use disorder or facilitate access to care. Conditioning receipt of public assistance on completion of a drug test unfairly stigmatizes and punishes low-income families and children, and is increasingly harmful as the pandemic and high rates of unemployment persist. The next Administration should oppose efforts by states to impose these requirements and instead reduce reliance on drug testing as a screening tool.

Executive Branch Proposals

- Rescind the Department of Labor rule that encourages states to condition the receipt of unemployment insurance on a drug test for certain applicants.
- (First 100 days) Rescind the Department of Health and Human Services' (HHS) proposed rule that establishes a federal standard for the use of hair-based drug testing as a condition of employment. HHS determined in 2008 that hair testing was not reliable for use in making employment decisions.
- Prohibit the Department of Agriculture and the Centers for Medicare and Medicaid Services from approving waivers that propose drug testing program recipients.

Legislative Proposals

- Repeal 21 U.S.C. § 862b permitting drug testing of federal beneficiaries.
- Preclude public assistance programs from requiring applicants to complete a drug test.

Experts

Victoria Palacio, Legal Action Center
Elizabeth Lower-Basch, CLASP
Grant Smith, Drug Policy Alliance

ISSUE: PREGNANT AND PARENTING PEOPLE WITH SUBSTANCE USE DISORDER

Summary of Issue

Despite its intended role to protect children and families, the child welfare system relies on punitive approaches, which disrupt and harm families, to address pregnant and parenting people struggling with substance use disorder. Involvement by the child welfare system in these communities is more pronounced than in white communities. One of the primary functions of the child welfare system is to investigate possible child abuse and neglect. The criminalized approach to substance use disorder in the U.S. has long been a part of how the child welfare system addresses maternal substance use. Pregnant and parenting people are routinely screened for substance use, and positive results are reported to child protective services. Federal and state child welfare laws require "notification" of child protective services when an infant is born "substance affected." Once child

protective services are notified, they often investigate and open cases, contributing to the number of cases entering the overburdened foster care system. Family separation and other punitive and traumatizing actions are common, and given the increased surveillance of communities of color, minority families are disproportionately harmed. Black newborns are four times more likely than white newborns to be reported to child protective services for substance exposure at delivery.

Family separation and other punitive and traumatizing actions are common, and given the increased surveillance of communities of color, minority families are disproportionately harmed.

State programs were developed in accordance with two key federal laws. First, the Child Abuse Prevention and Treatment Act (CAPTA) mandates states to have child welfare system notification procedures in place and "plans of safe care" for infants affected by maternal substance use, such as those with a neonatal abstinence syndrome diagnosis. Second, the Adoption and Safe Families Act (ASFA) sets timelines for "permanency" for children in the system, which can be impossible for parents in recovery to meet. Child protective services also routinely block access to MAT for substance use disorder such as methadone and buprenorphine. Guidance from the Centers for Disease Control and Prevention encourages the initiation of methadone or buprenorphine for pregnant people who struggle with opioid use disorder and notes neonatal abstinence syndrome as an "expected condition."

Legislative Proposal

- Overhaul CAPTA and ASFA to be better aligned with evidence and best practices for substance use in families. This includes diverting federal funds used for surveillance and family separation to supporting families, including through evidence-based substance use disorder treatment and community-based solutions. It also includes incentivizing states to create a separate system for tracking and providing support to families affected

by substance use disorder and barring states from prohibiting pregnant and parenting people from accessing medication-assisted forms of treatment when a health professional has prescribed or recommended them.

Experts

Indra Lusero, National Advocates for Pregnant Women

Lisa Sangoi, Movement for Family Power

ISSUE: DRUG DECRIMINALIZATION

Summary of Issue

For most of the past century, the United States has adopted increasingly punitive policies toward the possession, use, and distribution of drugs, and particularly in the last 50 years, it has built a massive regime to enforce those policies. Congress and states have adopted harsher sentencing, including mandatory minimums and “three strikes” laws; established far-reaching and oppressive civil forfeiture schemes; opened the door to broad exceptions to the Fourth Amendment for drug searches; and fostered incentives for aggressive and militarized policing in the alleged pursuit of drugs. For decades, prohibition and criminalization have exacerbated harm associated with drug use. The continued commitment to treat drug use and misuse as a criminal legal system issue instead of a public health one has resulted in an ongoing fatal overdose crisis throughout the country.

The time has come to try a new approach that helps restore individual liberty, protects against some police abuses, better assists those in need, and saves tax dollars.

The drug war apparatus has cost the federal government hundreds of billions of dollars in direct enforcement and incarceration costs, as well as inflicted collateral impacts of mass criminalization on the lives of those caught in its path. The time has come to try

a new approach: eliminate criminal penalties for all possession of personal-use quantities of controlled substances, eliminate collateral consequences of drug convictions, provide for decarceration and expungement of records for those incarcerated under the current system, and shift federal resources away from futile enforcement strategies to support initiatives to protect public health and safety. While drug decriminalization cannot fully repair our broken and oppressive criminal legal system or the harms of an unregulated drug market, shifting from absolute prohibition to drug decriminalization will help restore individual liberty, protect against some police abuses, better assist those in need, and save tax dollars.

In October 2020, the United States will mark the 50th anniversary of Congress’s enactment of the Controlled Substances Act, which authorized and launched the harsh drug war policies sought by the Nixon Administration. In this moment, Congress must recognize the failed experiment in prohibition and move the country in a new direction.

Executive Branch Proposals

- Shift the authority for classifying and regulating controlled substances from the Drug Enforcement Administration (DEA) to the National Institutes of Health (NIH) within the Department of Health and Human Services (HHS).

Legislative Proposals

- Enact the Drug Policy Alliance’s Comprehensive Drug Decriminalization Framework (The Drug Policy Reform Act), which is reflected in the soon-to-be-introduced M4BL’s BREATHE Act.

Experts

Queen Adesuyi, Drug Policy Alliance

CHAPTER 4

SENTENCING AND PRISON REFORM



More people are incarcerated by the federal government than by any other jurisdiction in the United States. As of October 2020, 155,000 people were incarcerated by the Bureau of Prisons (BOP) and an additional 52,000 were in the custody of the U.S. Marshals Service in state, local, and private facilities. The coronavirus pandemic has placed the safety and well-being of these individuals at great risk. Since March 2020, the Justice Roundtable's Sentencing Reform Working Group has urged Congress and the Administration to substantially reduce the level of incarceration to protect people most vulnerable to infection from COVID-19. While the Department of Justice has taken some steps to transfer people to home confinement, those decisions were hampered by overly strict criteria for eligibility, and as a result many people in federal institutions remain at significant risk of infection and death. The BOP reports that over 17,000 people have tested positive for the virus as of October 2020, and 138 incarcerated people and 2 staff members have died. The infection rate within BOP is almost five times that of the general population.

Addressing the devastating impact of the coronavirus is a pressing priority for the organizations that have endorsed the following recommendations. But the breadth of the COVID-19 crisis in federal detention is a symptom of harsh sentencing practices, excessive pretrial detention, and overcrowding in prisons and jails that have plagued the federal criminal justice system for decades and must be confronted. Since the 1980s, the implementation of harsh sentencing guidelines and mandatory minimum penalties has severely lengthened federal prison sentences and contributed to an over 500-percent increase in the prison population. In 2019 alone, the U.S. Sentencing Commission catalogued over 76,000 felony and Class A misdemeanor cases of sentenced individuals in federal courts; 65 percent of those cases were for drug or immigration offenses.

“**The breadth of the COVID-19 crisis in federal detention is a symptom of harsh sentencing practices, excessive pretrial detention, and overcrowding in prisons and jails that have plagued the federal criminal justice system for decades and must be confronted.**”

This section on sentencing and prison reform addresses 15 issues that represent our organizations' greatest concerns for ensuring a more humane, fair, and effective federal justice system:

- Crisis in Federal Detention
- Federal Death Penalty and Executions
- Life and Excessive Sentences
- Mandatory Minimum Sentencing
- Retroactive Application of Sentencing Reforms
- Fentanyl and Other Emerging Drugs
- Trial Penalty
- Conspiracy
- Decriminalizing Migration (Unauthorized Entry/ Reentry)
- Civil Commitment
- Community Sanctions
- Fines and Fees
- Reducing Avoidable Arrests
- Sentencing and Prearrest Programs for Parents
- Solitary Confinement

ISSUE: CRISIS IN FEDERAL DETENTION

Summary of Issue

Every person is entitled to basic human dignity, including people jailed or imprisoned. But the institutions charged with ensuring the safety and well-being of those held in federal custody – the United States Marshals Service (USMS) and Bureau of Prisons (BOP) – have failed to consistently meet this basic standard.¹⁶ Instead, conditions during confinement too often pose grave risks to the health and safety of incarcerated individuals. Overcrowding, violence, sexual abuse, dangerously restrictive environments, and inhumane conditions are only a few of the issues that many people routinely face during incarceration. These problems have worsened during the COVID-19 crisis, which has unmasked the “culture of cruelty and disregard for the well-being of incarcerated people”¹⁷ that pervades these institutions. These problems have been exacerbated by the government’s lack of transparency or accountability.¹⁸

“Protecting people residing in correctional facilities during the COVID-19 pandemic and in regular times is a constitutional mandate and should be a public health priority.”¹⁹ Public health experts agree: the only way to stop the spread of COVID-19 in correctional facilities and their surrounding communities is to reduce the prison population.²⁰ Locking people down in institutions that lack adequate medical care and poor sanitation is not the answer.

Immediate and decisive action is necessary to stop unnecessary deaths and suffering among those in federal detention.

¹⁶ See Sentencing Resource Counsel for the Federal Public & Community Defenders, *The COVID-19 Crisis in Federal Detention* (Sept. 9, 2020), <https://bit.ly/3lovFcz>.

¹⁷ See Wash. Post Ed. Board, *Coronavirus Cases in Prisons Are Exploding. More People Need to Be Let Out.* (Aug. 21, 2020), <https://wapo.st/2laZ3Vt>.

¹⁸ See, e.g., Katie Benner, “Justice Dept. Denies House Panel’s Request for Officials to Appear After Combative Barr Hearing,” *NY Times* (Sept. 22, 2020).

¹⁹ Carlos Franco-Paredes et al., “Personal View: Decarceration and Community Re-Entry in the COVID-19 Era,” *Lancet* (Sept. 29, 2020), <https://bit.ly/2GNXfRD>.

²⁰ See Letter from David Patton, Jon Sands, and Lisa Freeland to AG Barr at 2-6 (Apr. 1, 2020).

Immediate and decisive action is necessary to stop unnecessary deaths and suffering among those in federal detention.

First 100 Days Administrative Actions

- Use existing authorities, such as compassionate release and home confinement, to prioritize the immediate release or transfer of elderly and vulnerable people out of the BOP.
- Direct the Attorney General to minimize arrests, decline to seek detention of individuals at their initial appearance in court, and consent to the release of those already detained, absent clear and convincing evidence that the person poses a specific threat of violence to a specific person.
- Implement universal and ongoing testing for all correctional staff and people in federal custody.
- Support full funding for the Department of Justice’s Bureau of Justice Statistics to meet and exceed its obligations for data collection and reporting in a timely manner on people in BOP and USMS custody.

Legislative Proposals

- Pass the Emergency Community Supervision Act, as amended in H.R.6800, the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, which would reduce the number of individuals in federal custody as a response to the COVID-19 pandemic. It would transition vulnerable people and those nearing the end of their sentence from incarceration to community supervision (e.g., home confinement); limit the use of pretrial detention; and modify supervised release, including placing a limit on the use of incarceration as a sanction for a parole violation.
- Grant court authority to reduce sentences and temporarily release individuals by expanding court authority to designate individuals in BOP custody; order compassionate release; reduce sentences, including for those sentenced before 1987 under parole eligibility; and remove administrative barriers that slow the ability of prisoners to seek compassionate release during the COVID-19 emergency.
- Extend the federal Elderly Home Confinement Program to individuals who are 50 years old and over who have completed at least 50 percent of their sentence.

- Pass the Martha Wright Prison Phone Justice Act and the Martha Wright-Reed Just and Reasonable Communications Act, which would require the Federal Communications Commission to ensure reasonable charges for voice and video calls made to and from correctional facilities.
- Pass the Effective Assistance of Counsel in the Digital Era Act, which would ensure email communications between defense attorneys and their clients in BOP custody remain confidential.
- Pass the COVID-19 in Corrections Data Transparency Act, which would require the BOP, USMS, and state and local correctional agencies to report disaggregated data to the Centers for Disease Control and Prevention on the effects of COVID-19 in their facilities.

Experts

Kara Gotsch, The Sentencing Project
 Patricia Richman, Federal Public and Community Defenders
 Maritza Perez, Drug Policy Alliance
 Logan Schmidt, The Vera Institute of Justice

ISSUE: FEDERAL DEATH PENALTY AND EXECUTIONS

Summary of Issue

There is a growing consensus against the death penalty in the United States. Twenty-two states and Washington, DC, have repealed the death penalty as a sentencing option, and three states, California, Pennsylvania, and Oregon, have gubernatorial moratoria prohibiting executions. An additional 12 states have not carried out an execution in at least 10 years.²¹ Executions and new death sentences have both sharply declined. Executions have fallen to 25 or fewer per year for each of the last five years, compared to a record high in 1999 of 98 executions. New death sentences have fallen below 50 per year over the last five years, in comparison to the mid-1990s when 300 new death sentences were the norm. In 2019, the annual Gallup polls on the death penalty showed a record high number of people who

support sentences other than the death penalty²² and a record low number of people who believe that this irrevocable punishment is applied fairly.²³

The steep decline in support and use of the death penalty reflects the growing recognition that the death penalty fails to protect the innocent and does not advance legitimate law enforcement objectives. Moreover, there is a growing understanding of how the use and administration of the death penalty remains affiliated and aligned with a legal history and practices rooted in oppression dating back to slavery, Black codes, Jim Crow, and lynching, when the death penalty was used based on the race and status of people, and unrelated to the severity of the crime or harm done.²⁴

This decline in public support stands in stark contrast to what has happened recently at the federal level, as the Trump Administration has resumed executions for the first time in 17 years, in the midst of a global pandemic. In 2019, the Department of Justice (DOJ) issued a new lethal injection protocol, and with it, five federal execution dates were originally set to take place between 2019 and 2020. Between July and September 2020, the federal government has carried out seven executions, more than any other single year as far back as reliable information is available.²⁵ The federal government has now executed as many people as the whole rest of the country put together in 2020 and have set more execution dates through December.

Today, people of color comprise 60 percent of those on federal death row, and most of those people of color are Black.²⁶ Nearly half of the people on federal death row were sentenced to death in just three states: Texas, Missouri, and Virginia. The racial disparities in those jurisdictions are striking: all of the federal sentences from Virginia, all of the federal sentences from the

²² Jeffrey M. Jones, "Americans Now Support Life in Prison Over the Death Penalty." *Gallup.com*, Gallup, November 24, 2019, <https://news.gallup.com/poll/268514/americans-support-life-prison-death-penalty.aspx>

²³ Justin McCarthy, "New Low of 49% in the U.S. Say Death Penalty Applied Fairly." *Gallup.com*, Gallup, October 22, 2018, <https://news.gallup.com/poll/243794/new-low-say-death-penalty-applied-fairly.aspx>

²⁴ *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty*, Death Penalty Information Center, September 2020, <https://files.deathpenaltyinfo.org/documents/reports/r/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>

²⁵ "Historical Information." Federal Bureau of Prisons, Capital Punishment, https://www.bop.gov/about/history/federal_executions.jsp

²⁶ "List of Federal Death Row Prisoners." Death Penalty Information Center, <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners>

²¹ "States with No Recent Executions." *Death Penalty Information Center*, <https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions>

Eastern District of Missouri, and three-quarters of the federal death sentences from Texas were imposed against people of color. Black federal defendants are still being sentenced by all white juries. Nationally, people of color have a higher risk of wrongful death sentences and executions. A majority of the 172 people who have been exonerated of all charges related to the wrongful convictions that initially put them on death row nationwide have been people of color, and most of those people are Black.

As the federal government seeks to reimagine public safety and reject approaches that victimize communities of color and reinforce structural racism, the death penalty must be closely examined and ultimately rejected.

As the federal government seeks to reimagine public safety and reject approaches that victimize communities of color and reinforce structural racism, the death penalty must be closely examined and ultimately rejected. The use of the federal death penalty requires scrutiny. Certainly, the precipitous and chaotic pace at which federal executions have been proceeding must end.

Executive Branch Proposals

- Direct the Department of Justice to rescind the July 19, 2019, addendum to the Federal Executive Protocol and withdraw any pending death warrants.
- Direct the Attorney General to withdraw authorization for all pending death penalty trial cases.
- Direct the Bureau of Prisons to dismantle the federal death chamber at FCC Terre Haute prison.
- Commute all death sentences.

Legislative Proposal

- Pass legislation to repeal the federal death penalty.

Experts

Kristina Roth, Amnesty International USA
Henderson Hill, American Civil Liberties Union
Monique Dixon, NAACP Legal Defense and Educational Fund, Inc.

ISSUE: LIFE AND EXCESSIVE SENTENCES

Summary of Issue

In the United States, over 200,000 youth and adults are currently serving life sentences, including life without parole, life with parole, or virtual life (50 years or more). No other country in the world utilizes these extreme sentences to the extent we do. As a result, as of 2016, an overwhelming two-thirds of individuals serving life sentences in our prisons are people of color.

Yet, studies show that increasing sentence length has a limited deterrent effect on the crime rate since most people do not expect they will be apprehended, are not familiar with relevant legal penalties, or criminally offend when their judgment is compromised by immaturity, substance use, or mental health problems. Instead of preventing crime, lengthy sentences break a human being's spirit, weaken their community, and rob decades of an individual's productivity.

Instead of preventing crime, lengthy sentences break a human being's spirit, weaken their community, and rob decades of an individual's productivity.

In the wake of the U.S. Supreme Court decisions in *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*, 18 states and the District of Columbia have eliminated the use of life without parole for youth. The American Bar Association has called on states and the federal government to abolish life without parole sentences and give persons incarcerated for offenses committed before age 18 a meaningful opportunity to obtain release at a reasonable point during their incarceration. Federal law continues to remain in violation of the *Graham*, *Miller*, and *Montgomery*

decisions. The Administration should ensure that federal policies and procedures hold all people accountable in age-appropriate ways that guarantee their safety and focus on rehabilitation and reintegration into society.

At the federal level, the abolition of federal parole in the 1980s and implementation of harsh sentencing guidelines and mandatory minimum penalties has severely lengthened federal prison sentences and contributed to an over 500-percent increase in the prison population since 1980. Today, a majority of the federal prison population is serving a sentence of 10 years or longer. Almost 20 percent of the population has a sentence of 20 years or longer. At the same time, the federal prison population is rapidly aging, with over 30,000 people over the age of 50 in custody. This cohort is widely recognized in criminological research to have largely “aged out” of crime and maintain among the lowest rates of recidivism, regardless of their criminal history.

“The federal prison population is rapidly aging, with over 30,000 people over the age of 50 in custody.”

The First Step Act, signed by President Donald Trump in 2018, included some limits to federal life sentences, but more is needed to address the excessive and disproportionate nature of federal sentences, including life sentences for youth and adults.

First 100 Days Administrative Actions

- Due to the current pandemic and the devastating impact it has wrought on people in federal prisons, the Administration should direct the Attorney General to utilize authority under the CARES Act to expand eligibility for home confinement to incorporate those most at risk of serious illness and death from COVID-19, regardless of sentence length or underlying offense, as long as an individual does not present an immediate and serious threat to public safety.

- Broader extension of compassionate release during the pandemic is critical to saving lives of people most at risk of serious illness and death from COVID-19. The Bureau of Prisons should prioritize the identification and recommendation of vulnerable people in its custody for compassionate release.

Executive Branch Proposals

- Direct the Attorney General to adopt Department of Justice guidance instructing U.S. attorneys not to seek life without parole sentences.
- Following the U.S. Supreme Court’s precedents, urge states to end life without parole sentences for children.

Legislative Proposals

- Pass the Emergency Community Supervision Act, as amended in the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, to reduce the number of individuals in federal custody as a response to the COVID-19 pandemic. This bill would transition vulnerable people and those nearing the end of their sentence from incarceration to community supervision (e.g., home confinement).
- Clarify the authority of courts to order compassionate release based on COVID-19 vulnerability, ensure that individuals sentenced for offenses committed before November 1987 may seek compassionate release, and reduce the amount of time courts must wait before considering compassionate release motions during the coronavirus crisis.
- Pass the Second Look Act to provide for a mechanism through which the judiciary can review long sentences and offer relief through an early release to those who can demonstrate rehabilitation.
- End federal life without parole sentences for youth and adults, and cap sentence lengths at 20 years.
- With respect to the approximately 200 federal “old law” incarcerated people (individuals sentenced for offenses committed before November 1987), abolish or expire the U.S. Parole Commission, and transfer the remaining parole cases to the federal court system.

Experts

James Dold, Human Rights for Kids
Heather Renwick, Campaign for the Fair Sentencing of Youth
Jose Santos Woss, Friends Committee on National Legislation
Kara Gotsch, The Sentencing Project
Kyle O'Dowd, National Association of Criminal Defense Lawyers
Nkechi Taifa, The Taifa Group

ISSUE: MANDATORY MINIMUM SENTENCING

Summary of Issue

Mandatory minimum sentences are criminal penalties that limit judicial discretion and require judges to impose a specified minimum term of imprisonment upon conviction. Mandatory minimums have significantly contributed to overcrowding and racial disparities in the Bureau of Prisons (BOP). Nearly two-thirds of all federal drug sentences are subject to mandatory minimums, and most federal cases with mandatory minimum sentencing involve drugs, guns, or both. Mandatory minimums undermine appropriate and equitable sentencing by taking discretion away from trial judges and transferring authority almost entirely to federal prosecutors by virtue of their control over charging decisions. Not only does this place extraordinary power in the hands of one party to the adversarial system, but federal prosecutors also routinely use the threat of these lengthy sentences to incentivize plea bargains and frustrate the accused's assertion of the constitutional right to trial. In 2017, drug trafficking offenses accounted for almost two-thirds of the offenses carrying a mandatory minimum penalty in the federal system.²⁷ Even though Black Americans are no more likely than white people to use drugs, evidence shows they are far more likely to be prosecuted for drug law offenses and far more likely to receive longer sentences than white people.

²⁷ U.S. Sentencing Commission, *Quick Facts: Mandatory Minimum Penalties*, (2018), <https://www.ussc.gov/research/quick-facts/mandatory-minimum-penalties>.

Mandatory minimums undermine appropriate and equitable sentencing by taking discretion away from trial judges and transferring authority almost entirely to federal prosecutors.

Moreover, children prosecuted in the criminal justice system face the same mandatory minimum sentences that apply to adults, despite the fact that their brains are not fully developed and that they have diminished culpability given their young age. Research has shown that the vast majority of children in the justice system are contending with early childhood trauma and unmitigated adverse childhood experiences.

Executive Branch Proposals

- Reignite the Department of Justice Clemency Initiative to release people who are serving long federal sentences.
- Direct the Attorney General to issue Department of Justice guidance that directs federal prosecutors to seek alternatives to offenses that trigger mandatory minimum sentences when making charging decisions.

Legislative Proposals

- Pass legislation eliminating mandatory minimum sentences, and apply those changes retroactively. Congress must also provide a pathway for the expungement of prior convictions. There are several existing proposals to address mandatory minimums:
 - The Justice Safety Valve Act of 2019 would allow courts to impose a sentence below a mandatory minimum if the court finds that it is necessary to do so in order to impose a sentence that is not greater than necessary to comply with the statutory purposes of sentencing enumerated in 18 U.S.C. 3553(a). It requires courts to give the parties reasonable notice of its intent to do so and provide a written statement of reasons for imposing a sentence below the mandatory minimum.

- The Mandatory Minimum Reform Act of 2020 would eliminate mandatory minimum sentences for drug offenses.
- The Emergency Community Supervision Act of 2020, as amended in H.R.6800, the Health and Economic Recovery Omnibus Emergency Solutions (HEROES) Act, would help reduce dangerous overcrowding in federal prisons by transferring into community supervision individuals who are medically vulnerable, people over 50 years of age, and people within 12 months of release from incarceration from federal custody, and it would also limit pretrial detention.
- The COVID-19 Correctional Facility Emergency Response Act of 2020 incentivizes state and local officials to reduce jail and prison populations and curtail pretrial detention during the pandemic. The language of the bill that was included in the House-passed HEROES Act should be adopted.
- The Second Look Act would allow any individual who has served at least 10 years in federal prison to petition a court to take a “second look” at their sentence before a judge and determine whether they are eligible for a sentence reduction or release. The legislation would create a rebuttable presumption of release for petitioners who are 50 years of age or older.
- Pass legislation requiring judges to consider the relationship that early childhood trauma has on a child’s involvement in criminal behavior, and authorize judges to depart from any mandatory minimum sentence or sentencing enhancement when trauma has influenced a child’s behavior.

Experts

Kara Gotsch, The Sentencing Project
 Patricia Richman, Federal Public and Community Defenders
 Maritza Perez, Drug Policy Alliance

ISSUE: RETROACTIVE APPLICATION OF SENTENCING REFORMS

Summary of Issue

Recent experience shows that Congress can provide retroactive sentencing relief to advance the goals of reducing mass incarceration and racial disparities without sacrificing public safety. Since enactment of the First Step Act in December 2018, over 3,363 people serving crack cocaine sentences have benefited from retroactive application of sentencing reductions originally incorporated in the Fair Sentencing Act of 2010.²⁸ The average sentence reduction is approximately six years, and 91 percent of those receiving sentence reductions are Black.²⁹ Research conducted by the U.S. Sentencing Commission on previous retroactive amendments to the Sentencing Guidelines shows that people who benefited from reduced prison terms for crack cocaine offenses did not have higher recidivism rates than their counterparts who had served longer sentences.³⁰

“**Once Congress recognizes an injustice, it should not delay in delivering relief to incarcerated individuals.**”

Once Congress recognizes an injustice, it should not delay in delivering relief to incarcerated individuals. Congress let racial disparities caused by the old crack cocaine laws persist for eight years before passing the First Step Act of 2018, which finally made the new mandatory minimums in the Fair Sentencing Act retroactive. Although retroactive application of the Fair Sentencing Act has corrected an injustice for many individuals who remained incarcerated under the racially unjust crack cocaine laws, others were effectively denied relief because they passed away or

²⁸ U.S. Sentencing Comm’n, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report* (Oct. 2020), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20201019-First-Step-Act-Retro.pdf>.

²⁹ *Id.*

³⁰ U.S. Sentencing Comm’n, *Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment*, (May 2014), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf.

completed their sentence during the eight-year delay. The prospective sentencing reforms incorporated in the First Step Act, including reduced sentencing enhancements for prior drug offenses, clarification that the 25-year mandatory minimum for certain firearm offenses is reserved for true recidivists, and expanded safety valve relief for certain nonviolent drug offenses, will help to limit excessive sentences in the future. Unfortunately, these changes are not retroactive, and it is estimated at least 4,000 people³¹ in federal prison today serving sentences under now-reformed statutes will not benefit, including many people who will die in prison without retroactivity.

Executive Branch Proposal

- Presidential clemency is a powerful tool to right injustice and address excessive penalties. The President should expeditiously commute the sentences of individuals who were sentenced prior to enactment of the First Step Act of 2018 whose penalty would be lessened if sentenced today.

Legislative Proposals

- Include in any sentencing reform legislation provisions that ensure the new law will be applied retroactively to individuals who have already been sentenced.
- Avoid delay in passing legislation making the sentencing reforms enacted in the First Step Act of 2018 retroactive. Those reforms include sections 401, 402, and 403 of the Act, which, respectively, reduced certain recidivist enhancements for drug offenses, clarified congressional intent by limiting application of the 25-year mandatory minimum for certain firearm offenses to true recidivists, and expanded safety valve relief for certain nonviolent drug offenses.

Experts

Aamra Ahmad, Federal Public and Community Defenders
Kara Gotsch, The Sentencing Project
Monique Dixon, NAACP Legal Defense and Educational Fund, Inc.

ISSUE: FENTANYL AND OTHER EMERGING DRUGS

Summary of Issue

In response to increases in overdose deaths involving illicit fentanyl-related substances, Congress has sought to increase the use of mandatory minimum sentences for crimes involving these synthetic drugs—even if there is no scientific evidence that they are harmful—and expand the Drug Enforcement Administration’s authority to permanently add these substances to Schedule I of the Controlled Substances Act without scientific oversight. We cannot enforce and incarcerate our way out of the overdose crisis.³² Harsh penalties for illicit fentanyl, in fact, are detrimental to public health and exacerbate the overdose crisis. This is because criminalization pushes people away from seeking harm-reduction and treatment services, and encourages underground chemists to make chemically distinct variations of illicit fentanyl or other synthetic drugs that can prove deadlier. Furthermore, many of these proposals are sweeping expansions of our already broken and racist criminal legal system. While proponents of these punitive approaches may claim to target “kingpins,” federal sentencing data shows that these harsh penalties often fall on the shoulders of people who play a small role in distribution of these drugs and are overwhelmingly from communities of color.³³

“We cannot enforce and incarcerate our way out of the overdose crisis.”

Congress has passed important overdose and criminal legal reform legislation in recent years on a bipartisan basis, such as the CARA Act. The push to increase penalties on illicit fentanyl and other emerging synthetic drugs undercuts all this good work and will only further exacerbate the overdose crisis.

³² Colby Itkowitz, “The Health 202: Obscure Provision in House Opioids’ Bill Could Restart War on Drugs,” *Washington Post*, (Sept. 19, 2018), https://www.washingtonpost.com/news/powerpost/paloma/the-health-202/2018/09/19/the-health-202-obscure-provision-in-house-opioids-bill-could-restart-war-on-drugs/5ba155e41b326b47ec9596e2/?utm_term=.730d6eaa329d.

³³ “Public Data Briefing: Synthetic Drugs,” United States Sentencing Commission, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/data-briefings/2018_synthetic-drugs.pdf; https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Fentanyl_FY18.pdf

³¹ See U.S. Sentencing Comm’n, *Sentence and Prison Impact Estimate Summary*, S.1917, The Sentencing Reform and Corrections Act of 2017 (Aug. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/August_2018_Impact_Analysis_for_CBO.pdf.

Executive Branch Proposal

- Allow 21 CFR 1308.11(h)(30)³⁴ to expire: This temporary scheduling order authorizes the Drug Enforcement Administration to add thousands of substances to Schedule I without oversight from the Department of Health and Human Services to confirm a substance actually poses a risk to public health. As a result, substances have been added by this scheduling order to Schedule I that pose no harm to humans and conversely may actually have therapeutic potential. Cases involving fentanyl-related substances added to Schedule I by this scheduling order can be subjected to harsher penalties, including the use of mandatory minimum sentences, even for miniscule amounts.

Legislative Proposal

- Pass the Comprehensive Addiction Resources Emergency Act, which would provide emergency federal assistance to jurisdictions that are disproportionately impacted by the opioid overdose crisis, enabling significant scale-up of treatment, prevention, and harm-reduction services in communities. The need for treatment and support services vastly outweighs the current availability, and significant resources are needed to expand access to these services that are critical to reducing opioid overdose deaths.

Experts

Grant Smith, Drug Policy Alliance
Kara Gotsch, The Sentencing Project
Patricia Richman, Federal Public and Community Defenders



³⁴ Federal Register, Volume 85, Number 70, April 10, 2020, p. 20155, 21 CFR Part 1308, Docket No. DEA-597, Schedules of Controlled Substances: Temporary Placement of Fentanyl-Related Substances in Schedule I; Correction, https://www.deadiversion.usdoj.gov/fed_regs/rules/2020/fr0410_2.htm

ISSUE: TRIAL PENALTY

Summary of Issue

The “trial penalty” has virtually eliminated the constitutional right to a trial.

The “trial penalty” refers to the substantial difference between the sentence offered in a plea offer prior to trial versus the sentence a defendant receives after trial.³⁵ This penalty is now so severe and pervasive that it has virtually eliminated the constitutional right to a trial, with only about 3 percent of federal cases going to trial. To avoid the penalty, accused persons must surrender many other fundamental rights that are essential to a fair justice system, including the right to challenge unconstitutional searches, the right to challenge the government’s evidence, and the right to appeal. The trial penalty coerces innocent people to plead guilty, contributes to mass incarceration, shields police misconduct, and erodes citizen participation in our justice system.

Executive Branch Proposal

- Direct the Department of Justice to issue a charging and sentencing policy memorandum that prohibits enhanced charges and penalties based on the defendant exercising the right to trial.

Legislative Proposals

- In addition to repealing or narrowing mandatory minimum sentences and authorizing judicial “second looks” (discussed elsewhere in this document), Congress (or the Sentencing Commission) should amend the sentencing guidelines for acceptance of responsibility and obstruction of justice to remove the defendant’s exercising the right to trial and/or testifying at trial as a consideration.
- Provide defendants full access to all relevant evidence, including any exculpatory information, prior to entry of a guilty plea.

³⁵ NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf>

- Do not permit the government to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty. This includes an accused person’s decision to seek pretrial release or discovery, investigate a case, or litigate statutory or constitutional pretrial motions.
- Under current law, a defendant may be sentenced for conduct that a jury has acquitted him or her of at trial. This is deeply unfair, weakens the finality and citizen oversight that a jury trial provides, and disincentivizes defendants from going to trial. The bipartisan Prohibiting Punishment of Acquitted Conduct Act, introduced during the 116th Congress, would eliminate consideration of acquitted conduct by federal courts during sentencing.
- Ensure proportionality and fairness between similarly situated defendants, regardless of whether they plead guilty or go to trial. Additionally, 18 U.S.C. § 3553(a)(6) should be amended to require a sentencing court, in determining the sentence of a defendant who has been found guilty after trial, to consider the sentence imposed for similarly situated defendants who pled guilty (including any defendant who pled guilty in the same matter).

Expert

Nathan Pysno, National Association of Criminal Defense Lawyers

ISSUE: CONSPIRACY

Summary of Issue

The offense of conspiracy – basically an agreement to commit a crime – lacks clear definitions and limitations, and too often misrepresents or overstates the culpability of the accused. Overused by federal prosecutors, this form of criminal liability has been widely criticized for producing overbroad charges, dangerously lax evidentiary standards, and unnecessarily harsh sentences.³⁶ In charging or proving a conspiracy, prosecutors can rely solely on circumstantial evidence, including hearsay from alleged co-conspirators, and the agreement can be inferred from statements or

³⁶ Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1 (1992).

actions.³⁷ Some federal statutes, including the federal drug trafficking statutes, do not even require an overt act in furtherance of the conspiracy; even when required, an overt act can be quite minor and totally legal. Once deemed part of a conspiracy, a person can become liable for the actions of co-conspirators, even if performed before their participation began.³⁸ Minor participants, frequently women, swept into the conspiracy net can be held responsible for the most serious crimes committed while the actual perpetrators of those crimes receive reduced sentences in return for providing information to the government.³⁹ Low-income women of color, especially those caught up in abusive or coercive relationships, are particularly subject to prosecution based on their associations rather than their personal conduct. Drug conspiracy provisions have contributed to the increase in drug convictions and incarceration rates for women.

“**Low-income women of color, especially those caught up in abusive or coercive relationships, are particularly subject to prosecution based on their associations rather than their personal conduct.**”

Executive Branch Proposal

- Direct the Attorney General to adopt Department of Justice guidance instructing U.S. Attorneys that choose to charge people who play a peripheral role in a drug conspiracy to charge them with aiding and abetting, not as a co-conspirator.

Legislative Proposals

- Require meaningful overt actors to be held liable as co-conspirators.
- Raise the bar for the type of evidence necessary to establish conspiracy.

³⁷ Charles Doyle, *Federal Conspiracy Law: A Brief Overview*, Congressional Research Service (Jan. 20, 2016).

³⁸ 21 U.S.C. § 846; *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

³⁹ Vera Institute for Justice, *Overlooked: Women and Jails in an Era of Reform* (2016), 27.

- Limit liability for conduct that a co-conspirator did not actually commit.

Expert

Kyle O’Dowd, National Association of Criminal Defense Lawyers

ISSUE: DECRIMINALIZING MIGRATION (UNAUTHORIZED ENTRY/REENTRY)

Summary of Issue

Prosecution for entering and reentering the U.S. without authorization, a criminalization with roots in xenophobic and eugenicist policy goals, has grown exponentially over the past two decades. In 2002, there were 3,000 misdemeanor prosecutions for unauthorized entry (8 U.S.C. 1325) and 8,000 felony prosecutions for unauthorized reentry (8 U.S.C. 1326). In fiscal year 2019 there were 106,312 cases of unauthorized entry and reentry prosecutions. Many of the people charged under these laws are people who have lived in the U.S. for many years and who were deported with no legal way to reunite with family and community in the U.S. Most recently, these laws served as a basis to separate family members under the Trump Administration “zero-tolerance” policy, perpetuate injustices in the criminal and immigration legal systems, and summarily violate the rights of asylum seekers.

Most recently, criminalization of migration served as a basis to separate family members under the Trump Administration “zero-tolerance” policy, perpetuate injustices in the criminal and immigration legal systems, and summarily violate the rights of asylum seekers.

Those who enter the U.S. without authorization already face deportation and other civil penalties – it is not necessary to require additional criminal penalties that can result in years behind bars. Removing the threat of

criminal penalties would reduce a burden on federal criminal courts and mitigate the harm already inflicted on immigrant communities. The deeply racist and white supremacist origins of these laws from 1929 cannot form the basis for any legitimate government policy. Repealing these laws is an essential step toward ending systemic injustices, reducing mass incarceration, and protecting fundamental human rights.

Executive Branch Proposals

- Halt all unauthorized entry and reentry prosecutions under 8 U.S.C. §§ 1325 and 1326.
- Revoke the 2017 Attorney General memorandum on prioritizing criminal immigration enforcement and the April 2018 “Zero-Tolerance” memo.
- Issue a memo suspending all private prison contracts, including revoking contracts for all existing Bureau of Prisons (BOP) Criminal Alien Requirement (CAR) facilities where immigrants are incarcerated.

Legislative Proposals

- Amend the Immigration and Nationality Act (INA) to repeal 8 U.S.C. § 1325 (unauthorized entry) and 8 U.S.C. § 1326 (unauthorized reentry).
- Until repeal is accomplished, exercise congressional authority to mitigate the harms of 8 U.S.C. §§ 1325 and 1326 through must-pass spending bills:
 - Make no funds available to the DOJ to implement the U.S. Attorney General’s April 2017 memo instructing federal prosecutors to prioritize criminal immigration enforcement or the April 2018 “Zero-Tolerance” policy.
 - Make no funds available for the implementation of Operation Streamline or other programs that facilitate large-scale prosecutions that undercut due process rights and other constitutional protections.
 - Make no funds available to Department of Homeland Security to refer for prosecution of, or for DOJ to accept prosecutions of, vulnerable individuals or asylum seekers under 8 U.S.C. §§ 1325 and 1326.
- Ban for-profit federal prisons contracted by the DOJ, including CAR prisons that hold people convicted under 8 U.S.C. §§ 1325 and 1326.

Experts

Laura Pitter, Human Rights Watch
Judy Greene, Justice Strategies
Julie Mao, Just Futures Law
Jacinta González, Mijente
Jesse Franzblau, National Immigrant Justice Center
Sirine Shebaya, National Immigration Project of the National Lawyer's Guild

ISSUE: CIVIL COMMITMENT

Summary of Issue

In 2006 Congress enacted the Adam Walsh Act, which authorized the federal government to civilly commit a person after a judge finds an individual is a “sexually dangerous person” by clear and convincing evidence, specifically by finding that an individual has committed an act of child molestation or sexual violence in the past, that the individual suffers from a mental disorder, and that as a result of that disorder, he would have serious difficulty refraining from reoffending if released.⁴⁰ Proponents of civil commitment argue it is necessary because those who commit sex offenses are more likely to recidivate⁴¹ despite evidence to the contrary⁴² and the speculative nature of the inquiry into whether someone is likely to reoffend in the future.⁴³ All individuals committed as sexually dangerous persons under the Adam Walsh Act are housed at the Federal Correctional Institution in Butner, North Carolina, for one single treatment program, the Bureau of Prisons’ Commitment and Treatment Program (CTP). A recent report found that men who have sex with men faced higher rates of civil commitment than their heterosexual counterparts,⁴⁴ and another report indicates transgender people struggle to access gender-affirming

⁴⁰ 18 U.S.C. § 4248

⁴¹ Eric S. Janus, “Closing Pandora’s Box: Sexual Predators and the Politics of Sexual Violence,” *34 Seton Hall L. Rev.*, 1233 (2004).

⁴² See Caleb Durling, “Never Going Home: Does It Make Us Safer? Does it Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law,” *97 J. Crim. L. & Criminology*, 317. (2006). <https://www.jstor.org/stable/40042826>; Corey Rayburn Yung, “Sex Offender Exceptionalism and Preventative Detention,” *101 J. Crim. L. & Criminology*, 969 (2011). <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7407&context=jclc>>.

⁴³ Stefan Volger, “Constituting the ‘Sexually Violent Predator’: Law, Forensic Psychology, and the Adjudication of Risk,” *23 Theoretical Criminology*, 509 (Nov. 2019). <https://journals.sagepub.com/doi/10.1177/1362480618759011>.

⁴⁴ Trevor Hoppe, Ilan H. Meyer, Scott De Orio, and Megan Armstrong, “Civil Commitment of Sex Offenders in the United States: Are Black and LGBTQ Communities Disproportionately Impacted?” Williams Institute, <https://williamsinstitute.law.ucla.edu/publications/civil-commitment-us/>.

care while civilly committed.⁴⁵ Individuals remain civilly committed until they are no longer sexually dangerous – though without adequate safeguards, civil commitment can turn into a de facto life sentence.

Proponents of civil commitment argue it is necessary because those who commit sex offenses are more likely to recidivate despite evidence to the contrary.

Legislative Proposal

- End federal civil commitment because of the flawed science on which civil commitment is based. If Congress chooses to continue with its civil commitment system, it should take steps to ensure that individuals receive adequate due process, specifically:
- Once an individual is civilly committed, the statute should make clear that the individual has, as a matter of right, a hearing every six months if he chooses to seek one. Currently, under 18 U.S.C. Section 4247(h), an individual can request a hearing every 180 days, but nothing in the statute requires the courts to grant the motion. The government routinely opposes requests for hearing under Section 4247(h). Section 4247(h) should be amended to read that upon request, the courts shall hold review hearings every 180 days.
- Once an individual is civilly committed, the government should retain the burden of proving at review hearings that the person remains sexually dangerous. Currently, Section 4248(e) sets the burden of proof as a preponderance of the evidence and is silent as to which party bears the burden. Section 4248(e) should be amended to require that the government continue to have the burden to prove by clear and convincing evidence at review hearings that the person remains sexually dangerous and that civil commitment continues to be required.

⁴⁵ Sessi Kuwabara Blanchard, “Struggle to be Trans in Minnesota’s Sex Offender Program,” *Appeal* (Jul. 15, 2019), <https://theappeal.org/transgender-women-minnesotas-sex-offender-program/>.

- Section 4247(b) provides that an individual certified as sexually dangerous can request the court to appoint an additional examiner to evaluate them. This statute should make clear that the individual and their defense attorney can prepare *ex parte* with the examiner, which is routinely disallowed by the district courts and undercuts individuals' ability to prepare a defense.
- The Bureau of Prisons has elected to treat all individuals committed under the Adam Walsh Act at the Commitment and Treatment Program in Butner, North Carolina. Congress should institute an audit of the program to ensure that quality treatment is provided and that individuals are not held any longer in custody than is necessary. Congress should also require that the Bureau of Prisons submit annual reports to Congress regarding the status, contents, and success of the treatment program.

Experts

Guy Hamilton-Smith, Sex Offense Litigation and Policy Resource Center, Mitchell Hamline School of Law

Tyrone Hanley, National Center for Lesbian Rights

ISSUE: COMMUNITY SANCTIONS

Summary of Issue

Overreliance on supervision practices as well as sex and other public conviction registries drive incarceration because of the overly punitive nature of supervisory and registry requirements. The U.S. Sentencing Commission recently analyzed supervised release revocations, finding that 35 percent of federal prisoners had at least one conviction and one revocation. Of these, 60 percent received additional criminal history points, and more than 50 percent of those individuals received a higher criminal history category, leading to an increased sentence and security classification in the BOP because of at least one revocation.⁴⁶ However, the Sentencing Commission could not accurately determine the percentage of people receiving higher criminal

⁴⁶ Tracey Kyckelhahn and S. Alexander Maisel, *Revocations among Federal Offenders*, U.S. Sentencing Comm'n, (Jan. 2019), <http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190131_Revocations.pdf>.

history categories for a “new crime” revocation versus a “technical or crimeless” revocation, due to the lack of accurate information from supervising jurisdictions.⁴⁷

Executive Branch Proposal

- Absent the repeal of the Adam Walsh Act by Congress, the Department of Justice should implement a policy stating the agency will not prosecute individuals for failure to register in cases in which a person had no specific intent to avoid compliance with registration laws.

Legislative Proposal

- Require better data collection from judicial districts and curb excessive responses to technical violations of supervision.

Experts

Guy Hamilton-Smith, Sex Offense Litigation and Policy Resource Center, Mitchell Hamline School of Law

Tyrone Hanley, National Center for Lesbian Rights

ISSUE: FINES AND FEES

Summary of Issue

Over the past two decades, the use of fines, fees, surcharges, and other monetary costs in the criminal justice system has expanded rapidly, particularly for misdemeanors and minor infractions. These fines and fees are rarely tailored to an individual's financial circumstances. The Supreme Court has repeatedly held that penalizing someone for the inability to pay violates the Constitution.⁴⁸ Nevertheless, in many jurisdictions, failure to pay can result in an arrest warrant and/or jail time.⁴⁹ In other jurisdictions, in an effort to raise as much revenue as possible from fines and fees, courts engage in debt collection practices that coerce payment from defendants, many of whom live at, or below, the poverty line – driving them deeper into poverty.⁵⁰ In most jurisdictions, individuals who cannot pay outstanding fines and fees can have their drivers'

⁴⁷ *Id.*

⁴⁸ See, e.g., *Bearden v. Georgia*, 461 US 660 (1983).

⁴⁹ Roopal Patel and Meghna Philip, *Criminal Justice Debt, A Toolkit for Action*, The Brennan Center (2012).

⁵⁰ Matthew Menendez et al., *The Steep Costs of Criminal Justice Fines and Fees*, The Brennan Center (2019).

licenses suspended as punishment, often hindering such individuals from working to pay their fines and fees or subjecting them to further criminal punishment for driving with a suspended license.⁵¹ Failure to pay can also result in the deprivation of fundamental rights, including the right to vote.⁵²

“The Supreme Court has repeatedly held that penalizing someone for the inability to pay violates the Constitution.”

Fines and fees also prevent effective reentry into society for those released from prisons. People transitioning back into society from federal prison are assigned to a halfway house and have to pay at least 25 percent of their income to the government while there.⁵³ Even worse, sometimes their wages are garnished even when they are allowed to finish their sentences in home confinement, although the garnishment is ostensibly rent for staying at a halfway house. Similarly, individuals incarcerated in state prisons often have their commissary accounts garnished to pay fines and fees, including their meagre prison wages and family contributions. Instead of being able to make phone calls home or buy needed hygiene products, food, and other necessities, they are required to pay fines and fees.

Executive Branch Proposals

- Support and expand efforts to eliminate criminal justice fines and fees and/or reform imposition of fines and fees to take into account an individual’s ability to pay, including promoting national standards that enforce the Supreme Court’s requirement that fines and fees account for a defendant’s ability to pay.⁵⁴

⁵¹ Mario Salas and Angela Ciolfi, *A State-by-State Analysis of Driver’s License Suspension Laws for Failure to Pay Court Debt*, Legal Aid Justice Center (Fall 2017).

⁵² Campaign Legal Center, *Can’t Pay, Can’t Vote: A National Survey on the Modern Poll Tax* (July 2019).

⁵³ 18 U.S.C. § 3622-4; 28 CFR §§ 570.20-570.22; BOP, *Community Corrections Manual*, 7900.09 at 5.13.1.

⁵⁴ See, e.g., *Tate v. Short*, 401 U.S. 395 (1971); *Turner v. Rogers*, 564 U.S. 431 (2011); American Bar Association, *Ten Guidelines on Court Fines and Fees* (2018).

- Support legislative proposals to ensure that no individual faces incarceration or other disproportionate punishment, including driver’s license suspension, due to inability to pay criminal justice fines and fees.
- Direct the Department of Justice to prioritize the investigation of court practices related to the imposition of fines and fees on those who lack an ability to pay and the resulting debt collection practices.
- Direct the Bureau of Justice Assistance to provide training and technical assistance so that state and local court systems can end “offender-funded” criminal justice systems.

Legislative Proposals

- Take steps to ensure that criminal justice fees and fines do not exacerbate poverty by establishing national standards that enforce the Supreme Court’s requirement that fines and fees account for a defendant’s ability to pay.⁵⁵
- Take steps to ensure that debt collection practices with regard to criminal fines, fees, and surcharges are fair, particularly for low-income individuals.
- Support legislative efforts to bar states from using driver’s license suspension as a penalty for failure to pay fines, fees, or surcharges.⁵⁶
- Support legislative efforts to ensure that citizens are not disenfranchised as a penalty for failure to pay fines, fees, or surcharges.
- Support legislative efforts that encourage state and local governments to end their reliance on fines and fees to fund the justice system and other government functions.

Experts

Lisa Foster, Fines and Fees Justice Center
Lauren-Brooke Eisen, Brennan Center for Justice at NYU Law School
Beth Colgan, UCLA Law School
Malia Brink, American Bar Association Standing Committee on Legal Aid and Indigent Defense

⁵⁵ See, e.g., *Tate v. Short*, 401 U.S. 395 (1971); *Turner v. Rogers*, 564 U.S. 431 (2011).

⁵⁶ The Driving for Opportunity Act (S.B. 4186) was introduced by U.S. Senators Coons (D-Del) and Wickers (R-Miss) in July 2020. It would create incentives for jurisdictions to stop debt-based driver’s license suspensions.

ISSUE: REDUCING AVOIDABLE ARRESTS

Summary of Issue

Programs that reduce arrests and promote prearrest diversion for low-risk individuals can save government resources by diverting individuals from costly incarceration and protect individuals from the extensive burdens of a criminal record.

Executive Branch Proposals

- Establish standards in federal police grants to encourage the elimination of policies that require officers to make arrests for most violations and to reduce arrests and other nonconsensual encounters between police and citizens.
- Shift funding from the problematic drug court model to community-based programs based on harm-reduction principles. A well-known program of this type, highlighted in a White House forum in 2015, is Law Enforcement Assisted Diversion (LEAD).

Legislative Proposals

- Enact decriminalization statutes that either eliminate penalties for appropriate low-level offenses or replace current penalties with small fines.
- Establish funding incentives to states and other jurisdictions to encourage the enactment of decriminalization policies.
- Direct current funding to alternatives to drug courts, focusing on programs like LEAD that are community based and use harm-reduction principles.
- Shift funding to reentry services to help formerly incarcerated people move forward positively, as part of the nation's COVID-19 response and move forward.

Experts

Neill Franklin, Law Enforcement Action Partnership (LEAP)

Kris Nyrop, LEAD consultant

ISSUE: SENTENCING AND PREARREST PROGRAMS FOR PARENTS

Summary of Issue

The United States currently incarcerates the parents of 2.7 million children, with over 5 million children having a parent incarcerated at some point in their lives. Incarcerating parents creates poor outcomes for children and communities. Black children are seven times more likely and Latinx children are two times more likely than white youth to have a parent in prison. Incarceration of parents creates substantial drops in income for families, increases anxiety, exacerbates mental health difficulties, and reduces educational achievement.

“Six states have created successful programs that divert parents from incarceration.”

California, Illinois, Massachusetts, Tennessee, Oregon, and Washington have created successful programs that divert parents from incarceration. Such programs provide eligible parents with community custody, including extensive programming and treatment. They provide greater stability for children, ensure family success, reduce crime, and increase community vibrancy. Washington State's program has a 71 percent successful completion rate – only 8 percent of participants who successfully complete the program return to prison, compared to 30 percent for the overall sentenced population.

Executive Branch Proposals

- Create programs that remove eligible parents from entanglement with the criminal justice system and provide resources to keep families together.
- Direct the Department of Justice to review and support programs within the Bureau of Justice Assistance to keep families together. Alternatives to incarceration should prefer removing parents as early as possible from criminal justice involvement.
- Conduct research to ensure programs are equally available and avoid fueling disparities of race, ethnicity, gender, or sexual orientation.

Legislative Proposals

- During the fiscal year 2021 appropriations process, appropriate at least \$10 million to state, local, and community agencies for parental sentence alternative programs, including planning grants for states wishing to start such programs.
- Pass the FAMILIES Act to create a diversion program for parents that would be a collaboration between the Departments of Justice and Health and Human Services. FAMILIES is expected to be introduced in the 117th Congress by Sen. Wyden and Rep. Jayapal, and will provide education, employment services, parenting skills training, and mental health and substance abuse services, and will fund research.

Experts

Patricia Allard, RDR – Relational Dispute Resolution
William McColl, McColl Strategies

ISSUE: SOLITARY CONFINEMENT

Summary of Issue

Solitary confinement, also known as segregation, isolation, or restrictive housing, is the placement of a person, alone or with a cellmate, in a locked room or cell for 22 hours or more per day, for any reason, with or without the person's consent. In the U.S. on any given day, at least 61,000 people are held in solitary confinement in state and federal prisons,⁵⁷ in addition to as many as 20,000 in local jails and an unknown number in immigration, juvenile, and military detention facilities.⁵⁸ In one year, about 20 percent of all incarcerated people spend time in solitary confinement.⁵⁹ Permanent psychological harm can result from placement in solitary for as many

⁵⁷ *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, Liman Center for Pub. Interest Law & Ass'n of State Corr. Adm'rs, at 4 (Oct 2018), https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf (noting that this statistic does not include people who are in solitary confinement for under fifteen days) [hereinafter "ASCA-Liman Nationwide Survey"]; FAQ: *Solitary Confinement in the United States*, Solitary Watch (2018), <https://solitarywatch.org/wp-content/uploads/2019/05/Solitary-Confinement-FAQ-2018-final.pdf> (last updated Dec. 2018).

⁵⁸ *Id.* at 11.

⁵⁹ *Use of Restrictive Housing in U.S. Prisons and Jails 2011-12*, Bureau of Justice Statistics (Oct. 2015), <https://www.bjs.gov/content/pub/pdf/urhspj1112.pdf>.

as 15 days,⁶⁰ and prolonged solitary confinement is shockingly common in the United States. Nearly 20 percent of people held in solitary confinement have been there for over one year, and nearly 5 percent have been in solitary confinement for over six years.⁶¹ Further, overreliance on solitary confinement rather than medical isolation as a pandemic containment strategy within correctional facilities has resulted in a near 500-percent increase in the use of punitive solitary confinement in 2020.⁶² People who are held in solitary confinement are disproportionately male, young, people of color, LGBTQ people, and/or people who have been diagnosed with serious mental illnesses.⁶³ Solitary confinement puts people at risk of long-term, devastating, and even fatal consequences, including an increased risk of self-harm and suicide.⁶⁴ Many of these effects can be long-lasting or permanent, and are carried back into the community when people are released. Vulnerable populations, including people with mental illness, youth, and pregnant people, are at a particular risk of serious psychological and physical harm as a result of any time in isolated conditions.⁶⁵

Solitary confinement puts people at risk of long-term, devastating, and even fatal consequences.

⁶⁰ *United States: Prolonged Solitary Confinement Amounts to Torture, Says UN Expert*, U.N. Office of the High Comm'r for Human Rights (Feb. 28, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25633&LangID=E> (highlighting anxiety, extreme stress, and suicidal tendencies as psychological trauma resulting from DOC practices in Connecticut); Keramet Reiter, Joseph Ventura, and David Lovell et al., "Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017-2018," 110 *Am. J. Pub. Health* (2020); National Institute of Justice, *Restrictive Housing in the US: Issues, Challenges, and Future Directions*, U.S. Dep't of Justice (2016).

⁶¹ ASCA-Liman Nationwide Survey, *supra* note 1.

⁶² *Solitary Confinement Is Never the Answer*, Unlock the Box Campaign (2020), <https://www.unlocktheboxcampaign.org/solitary-covid-report>.

⁶³ *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems* (2018), <https://www.vera.org/rethinking-restrictive-housing>.

⁶⁴ ASCA-Liman Nationwide Survey, *supra* note 1; UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 5 March 2015, U.N. Doc. A/HRC/28/68, <https://www.refworld.org/docid/550824454.html> [hereinafter A/HRC/28/68].

⁶⁵ ASCA-Liman Nationwide Survey, *supra* note 1, at 45-46, 55, 83.

First 100 Days Administrative Action

- In response to the COVID-19 pandemic, the Attorney General should direct the Bureau of Prisons and United States Marshals Service to end prolonged lockdowns and to immediately implement the use of medical isolation as distinct from punitive solitary confinement, ensuring ongoing access to medical and mental health staff as well as transparency with the public and family members, as recommended by public health officials.
- Direct the Department of Justice to create an Emergency Advisory Board, comprising public health experts, public defenders, human rights advocates, survivors of both medical isolation and solitary confinement, and correctional staff, which advises facilities on effective, humane containment of COVID-19.

Executive Branch Proposals

- Issue an executive order directing all federal agencies that confine people, either directly or through a contract or intergovernmental agreement, to implement and abide by the Mandela Rules. The “Nelson Mandela Rules,” a revised minimum standard on the treatment of incarcerated individuals, call for UN member states to prohibit indefinite or prolonged solitary confinement (beyond 15 consecutive days) for all incarcerated people and to ban solitary altogether for vulnerable groups, including people with mental illnesses.
- Direct the Attorney General to appoint a prison ombudsperson to oversee and audit conditions of confinement at the Bureau of Prisons and United States Marshals Service, to receive and investigate civil rights complaints from incarcerated individuals, and to recommend policies enhancing the dignity and safety of incarcerated individuals.
- Direct the Attorney General to prioritize litigation aimed at ending abuses of solitary confinement by state and local correctional systems, utilizing the Special Litigation Section of the DOJ’s Civil Rights Division.

Legislative Proposals

- Hold hearings on solitary confinement and pass The Solitary Confinement Study and Reform Act to create a National Solitary Confinement Study and Reform Commission, which will conduct a comprehensive legal and factual study on the impacts of solitary confinement in the U.S. and propose national standards and regulations for significantly reducing the use of solitary in all state and federal correctional facilities.
- Pass legislation to implement the Nelson Mandela Rules for all people confined in the BOP and other federal confinement facilities used by other federal agencies, including ICE-run facilities, and appropriate funds as needed to provide humane and effective alternatives to solitary.
- Appropriate new funding to the National Institute of Justice (NIJ) to (1) solicit innovative proposals to assess restrictive housing policies and help state and local corrections systems work toward compliance with the Mandela Rules and to (2) require yearly reporting from each state’s Department of Corrections on their restrictive housing practices and timely reports on findings.

Experts

Jessica Sandoval, Unlock the Box Campaign
Amy Fettig, The Sentencing Project
Jean Casella, Solitary Watch
Laura Markle Downton and Johnny Perez,
National Religious Campaign Against Torture
Dr. Brie Williams, University of California San Francisco
Maria Morris, The American Civil Liberties Union,
National Prison Project
Juan E. Méndez, American University –
Washington College of Law

CHAPTER 5

REENTRY



Each year, millions of people leave prisons, jails, and other carceral settings to return to their communities. Black people and other people of color are disproportionately impacted by the criminal legal system. Black people are incarcerated at more than 5 times the rate of white people. In 2018, the incarceration rate of Black men was 5.8 times higher than that of white men, and Black young men ages 18–19 years old were 12.7 times as likely to be incarcerated as white young men in the same age group. The number of women incarcerated increased by more than 700 percent from 1980 to 2016. In 2018, Black women were 1.8 times as likely to be incarcerated as white women, and Black girls were 3 times more likely to be incarcerated than white girls. Upon release, these disparities persist: the combined effect of race, socioeconomic status, and a criminal record can present major barriers to successful reentry.

As a result of systemic and institutional racism and discrimination; collateral consequences of conviction that ban or limit legal access to housing, employment and licensure, food, living, and education supports; and a limited investment in resources for the large number of people returning each year, these individuals, who are predominately Black, return to their communities without the basic support and tools needed for long-term success. Access to appropriate health care, including reduction in morbidity, mortality, and risk factor disparities for Black people, as well as overdose prevention and behavioral health care; affordable housing; education services from high school completion to higher education retention and graduation; and job training and workforce development services that will lead to career-path employment are difficult and sometimes impossible to secure. When these resources are available, they often are not offered by one, holistic program or service provider that can help individuals navigate all of the administrative, logistical, and digital requirements needed to access these critical supports.

The millions of people who leave prisons, jails, and other carceral settings to return to their communities are predominately Black, and they return to their communities without the basic support and tools needed for long-term success.

COVID-19 has made returning to the community even more difficult during a time of fear of infection, limited access to safe housing, constrained resources, a struggling economy, and changeable program availability. Because of the racial disparities and systemic oppression that exist in the criminal legal system, Black people and other people of color who are incarcerated in correctional facilities are among the most vulnerable to contract COVID-19, as correctional facilities have been persistent hotspots nationwide.

Because of this fact, medical and public health experts have called for reductions in incarceration levels, and in some instances complete closure of jails and prisons, to limit overcrowding and protect individuals who are at high risk of serious illness and death from COVID-19. During this historic pandemic, additional reentry supports are urgently needed, as individuals who are released from carceral settings have to navigate reentry during this challenging and uncertain time when shelter is imperative and access to medical care, food, and work is even more difficult.

Broad bipartisan commitment to improving reentry has been evident over the past three federal administrations and across several Congresses. To ensure that individuals returning from incarceration have access

to all of the resources and tools required for long-term success, the Administration and Congress should make an increased, public commitment to criminal legal system reform and reentry by advancing the recommendations outlined here.

RECOMMENDATIONS FOR THE FIRST 100 DAYS OF THE NEXT ADMINISTRATION AND CONGRESS

Executive Branch Proposals

- Centers for Medicare & Medicaid Services (CMS) should immediately implement Section 5032 of the SUPPORT Act (P.L. 115-271), which required CMS, by October 2019, to convene a best practices stakeholder group to inform the development of policy guidance on continuity of care for the justice-involved population.
- The Department of Housing and Urban Development (HUD) should repeal existing tenant screening regulations and codify the guidance in its sub-regulatory notices prohibiting practices that create additional barriers to housing for people with a criminal history. Furthermore, HUD should require an individualized review of housing applicants; mandate the use of reasonable lookback periods; place limitations on what criminal activity housing providers may consider; set minimum standards for the quality and nature of criminal background information that can be used during screenings; and allow formerly incarcerated individuals to be added to a household's lease. Much of HUD's guidance on evaluating tenants is advisory and not mandatory, giving public housing agencies (PHAs) and project owners broad discretion in developing screening criteria that can often have little or no bearing on whether someone will be a successful tenant and raising fair housing concerns.
- Implement the Fair Chance to Compete for Jobs Act of 2019 (P.L. 116-92, Section 1121) by ensuring that the Office of Personnel Management and other federal agencies adopt robust complaint procedures; narrowly apply their discretion to exempt categories of workers; and execute outreach, education, monitoring, and an auditing process, particularly with the nation's private contractors, to ensure that the protections and the intent of the Fair Chance law are realized fully.

- Increase the amount for which the Department of Labor's federal bonding program indemnifies employers who hire individuals with criminal records, or who otherwise qualify for bonding from its current level (ranging from \$5,000 to \$25,000 per bond), to \$25,000 for all bonds.
- Under its authority to make loans to small businesses under Section 7(a) of the Small Business Act of 1953 (15 U.S.C. 636(a)), the Small Business Administration should thoroughly review and revamp its general 7(a) rules and policies to fully remove exclusions based on criminal history.
- Ensure that if any criminal history restrictions remain in regulations, the standards in policy documents and application forms for the Paycheck Protection Program and other loans within the general 7(a) program do not exceed what regulations require.

Legislative Proposals

- Swift passage of the Medicaid Reentry Act (H.R.1329), which would allow Medicaid to finance an individual's care during the last 30 days of incarceration.
- Pass the Removing Barriers to Basic Needs Act of 2020 (H.R.7916). This bill would immediately lift the lifetime bans on people with drug felony convictions from accessing assistance under the Supplemental Nutrition Assistance Program (SNAP) (7 U.S.C. 2011, et seq.) and Temporary Assistance for Needy Families (TANF) (42 U.S.C. 601, et seq.) during the COVID-19 pandemic.
- Increase funding for the Workforce Innovation and Opportunity Act (WIOA) program, Reentry Employment Opportunity (REO) program, and apprenticeship programs to support workforce development for individuals impacted by the criminal legal system.
- Pass and fund the One Stop Shop Community Reentry Program Act (H.R.8161), a bipartisan proposal that would create community resource centers (CRCs) to assist returning residents as they leave custody as well as individuals who already have returned to the community. CRCs would provide comprehensive, holistic services related to housing, employment, education, health, and assistance with navigating government processes and bureaucratic hurdles.

- Expand the Fair Chance law to apply to private-sector business and industry, and prohibit employment discrimination, solely based on an arrest or conviction record.
- Pass the Fair Chance Licensing Act (FCLA) included in Section VIII of the Next Step Act (S.697/H.R.1893).
- Increase funding for secondary education programs in the federal prison system, where current wait lists for literacy and secondary diploma programs exceed 16,000 individuals.

ISSUE: FEDERAL SUPPORT FOR REENTRY

Summary of Issue

Over the past decade, federal funding has played a critical role in supporting reentry programs and services that address the needs of and barriers faced by formerly incarcerated individuals and individuals with criminal legal histories. Providing federal resources for reentry helps to ensure greater success and addresses unfair barriers that exist as a result of systemic racism and inequities that disadvantage individuals directly impacted by the criminal legal system. One of the oldest federal reentry programs is the Second Chance Act grant program that supports state, local, and tribal governments and nonprofit organizations in providing a range of reentry services. Since 2009, more than 800 Second Chance Act awards have been allocated to grantees across 49 states.

Black people and other people of color are among the hardest hit by the COVID-19 pandemic, just as they are disproportionately impacted by the criminal legal system. Medical and public health experts have called for reductions in incarceration to limit overcrowding and protect individuals at risk for COVID-19. However, some jurisdictions are releasing people without adequate support, such as safe, appropriate medical care; cash assistance; and housing. Additional supports are needed urgently as individuals navigate reentry during the pandemic.

Executive Branch Proposals

- Develop federal grant opportunities within the Second Chance Act program and other reentry programs to provide funding directly to nonprofits, especially those led by or that significantly involve people directly impacted by the criminal legal system.
- Establish federal interagency coordination on reentry grant programs for housing, workforce development, education, and health care. Interagency coordination should develop grant opportunities as well as provide training and technical assistance to help reentry programs holistically address the wide range of reentry needs and barriers.

Legislative Proposals

- Pass the next COVID-19 response package, the COVID-19 Correctional Facility Emergency Response Act of 2020 (S.3720/H.R.6414), and fund the program at \$1 billion to incentivize states and localities to reduce incarceration levels, including in pretrial detention, and to support safe reentry through nonprofit services during the COVID-19 pandemic.
- Appropriate \$250 million for the Second Chance Act program in the next COVID-19 relief package to support expanded access to urgently needed reentry services and ensure that nonprofit organizations have direct access to this funding.
- Appropriate for FY21 \$100 million for the Second Chance Act grant program.
- Pass and fully fund the One Stop Shop Community Reentry Program Act (H.R.8161), which would provide grants to community-based nonprofits to create Community Reentry Centers to support job training, employment, housing, financial counseling, behavioral health services, and legal assistance.

Experts

Sodiqa Williams, Safer Foundation
 Roberta Meyers Douglas, National HIRE Network/
 Legal Action Center
 Christopher Scott, Open Society Policy Center
 Jenny Collier, Collier Collective

ISSUE: HEALTH CARE ACCESS/MEDICAID

Summary of Issue

Better addressing health care needs, including mental health and substance use disorders (MH/SUD), is critically important to helping people avoid contact with the criminal legal system and ensuring that transitions from carceral settings to the community are successful. With the coverage expansions of the Affordable Care Act (ACA), and provisions of the law that have specifically improved coverage of MH and SUD care, there is a significant opportunity to strengthen access to care for the justice-involved population. A strong Medicaid program is essential to improving care access, and improving outcomes, for people impacted by the criminal legal system.

There is a strong relationship between untreated mental health and substance use disorders, criminal legal system involvement, and high rates of recidivism.

A large number of people involved in the criminal legal system have untreated MH/SUD. Unfortunately, there is a strong relationship between untreated MH and SUD, criminal legal system involvement, and high rates of recidivism. Although the ACA did not amend the “inmate exclusion provision” of the Medicaid law, which precludes federal Medicaid matching funds for health care services provided to incarcerated people, many more people involved in the criminal legal system are eligible for Medicaid coverage now under the ACA. Tied to this new coverage, states can collect 90 percent in federal matching funds for health care services provided to newly Medicaid-eligible people. As a result, states are increasingly considering policy changes to prevent Medicaid coverage disruptions as people move through the criminal legal system and between the system and the community. States also are using their Medicaid demonstration waivers to better meet the needs of people involved in the criminal legal system who have complex co-occurring health conditions. Additionally, there has been recent greater bipartisan focus on the possibility of

expanding the use of Medicaid in prisons and jails to better support continuity of care and reentry to the community. Congress and federal regulators have an important role to play in strengthening Medicaid policy and practices for people involved in the criminal legal system. Leveraging Medicaid for people involved in the criminal legal system will help reduce unnecessary use of incarceration for health issues, improve health and reentry outcomes, and reduce costs to state and local health and criminal legal systems.

Executive Branch Proposals

- Centers for Medicare & Medicaid Services (CMS) should encourage and incentivize all states to expand their Medicaid population under the ACA.
- CMS should immediately implement Section 5032 of the SUPPORT Act (P.L. 115-271), which required CMS, by October 2019, to convene a best practices stakeholder group to inform the development of policy guidance on continuity of care for the justice-involved population.
- CMS should release guidance requiring states to:
 - Implement Medicaid eligibility screening and enrollment throughout the criminal legal system
 - Suspend an individual’s Medicaid during incarceration and reactivate coverage 30 days before release (for eligible individuals serving more than one year)
 - Activate Medicaid upon admission (for eligible individuals who will be serving a term of less than one year)
- CMS should encourage states to utilize Medicaid waivers and initiatives to support innovation and improve the ability to seamlessly meet the co-occurring physical, mental, and SUD care needs of people involved in the criminal legal system.
- CMS should not approve any proposed state waivers that would restrict eligibility or access to care, including through the use of drug testing and work requirements.
- CMS and DOJ should work together through joint funding and initiatives to strengthen coverage and access to care for people involved in the criminal legal system.

Legislative Proposals

- Swift passage of the Medicaid Reentry Act (H.R. 1329), which would allow Medicaid to finance an individual’s care during the last 30 days of incarceration.
- Appropriate additional discretionary funding to strengthen reentry planning and improve access to high-quality, culturally and linguistically effective health care, including MH and SUD services, prior to release to strengthen continuity of care in the community.
- Authorize and fund mechanisms that link people involved in the criminal legal system who are uninsured (including individuals who are not eligible for Medicaid) to community health centers, and programs that provide MH and SUD services, harm-reduction services, and linkage to social services.
- Increase the federal investment to build the infrastructure of culturally competent and effective community-based health and MH/SUD services, so that there is capacity in every community, particularly in underserved, low-income communities. Such infrastructure will help reduce and prevent entry into the criminal legal system.
- Pass legislation to expand and strengthen safety net programming, including Medicaid, SNAP, TANF, SSI/DI, housing assistance, and grant programs provided by HHS and other federal agencies; and ensure that people involved in the criminal legal system have non-discriminatory, equitable access to these programs, benefits, and services.

Experts

Gabrielle de la Guéronnière, Legal Action Center
Mel Wilson, National Association of Social Workers
Jenny Collier and Bill McColl, Collier Collective

ISSUE: HOUSING

Summary of Issue

Every year, more than 600,000 people return to their communities from prisons or jails and face myriad challenges to successfully reintegrating, including profound housing insecurity. People involved in the criminal legal system – who, as a result of generations of racist and discriminatory policies and practices, are disproportionately Black or Latinx people, people with disabilities, or members of the LGBTQ community – face significant barriers to attaining housing and are at increased risk of homelessness and subsequent recidivism as a result. It is imperative to address the structural inequities that leave people with criminal histories unhoused after exiting incarceration. Resources must be invested in affordable, accessible housing to ensure stability for people involved in the criminal legal system, their families, and their communities.

People involved in the criminal legal system face high risk of homelessness and subsequent recidivism as a result.

Executive Branch Proposal

- The Department of Housing and Urban Development should repeal existing tenant screening regulations and codify the guidance in its sub-regulatory notices prohibiting practices that create additional barriers to housing for people with a criminal history. Furthermore, HUD should require an individualized review of housing applicants, mandate the use of reasonable lookback periods, place limitations on what criminal activity housing providers may consider, set minimum standards for the quality and nature of criminal background information that can be used during screenings, and allow formerly incarcerated individuals to be added to a household’s lease. Much of HUD’s guidance on evaluating tenants is advisory and not mandatory, giving public housing agencies (PHAs) and project owners broad discretion in developing screening criteria that can often have little or no bearing on whether someone will be a successful tenant and can raise fair housing concerns.

Legislative Proposals

- Pass the Fair Chance at Housing Act (S.2076/H.R.3685), which would ban “one-strike” and “no-fault” eviction policies, raise the standard of evidence to reject applicants on the basis of their criminal record, and mandate individualized review processes that take into account the totality of circumstances surrounding a criminal offense and mitigating evidence provided by a prospective tenant.
- Authorize and fund a Reentry Housing Voucher program to provide housing vouchers to individuals being released from local, state, or federal criminal-legal facilities to ensure that people exit incarceration into safe, stable, accessible, and affordable housing.
- Increase rental-screening transparency in the private market. Private market landlords should be required to provide tenants access to their screening policies, reasons for any denials, and relevant supporting information. Automated or algorithmic screening and application fees should be banned.
- Pass legislation to ban source of income discrimination and expand anti-discrimination protections for individuals involved in the criminal legal system. Housing vouchers play a vital role in helping people afford safe, decent, accessible housing, but landlords can refuse to rent to voucher holders and may impose screening processes that create a de facto ban on people involved in the criminal legal system. These allowances pose additional barriers to housing access and contribute to racial and economic segregation.
- Allocate \$10 billion for 200,000 new emergency housing vouchers. A proposal from Senator Sherrod Brown (D-OH) and Representative Maxine Waters (D-CA) (S.4164/H.R.7084) would provide funding for 200,000 new emergency housing vouchers specifically targeted for people at risk of or experiencing homelessness, including people exiting incarceration.
- Allocate \$11.5 billion in McKinney-Vento Emergency Solutions Grants (ESGs), as proposed in the Public Health Emergency Shelter Act (S.3856/H.R.6362), which can be used to ensure that formerly incarcerated people can access non-congregate shelter and housing during the

pandemic through short-term rental assistance, rapid rehousing, and housing counseling services.

- Allocate \$100 billion in emergency rental assistance distributed through HUD’s Homeless Assistance Grants program, as outlined in the Emergency Rental Assistance and Rental Market Stabilization Act (S.3685/H.R.6820), which could be used to help formerly incarcerated people cover security and utility deposits, and provide short- and medium-term rental assistance for recently released individuals.

Experts

Dara Baldwin, Center for Disability Rights, Inc.
Kim Johnson, National Low Income Housing Coalition
Deborah Thrope, National Housing Law Project

ISSUE: SNAP/TANF BAN

Summary of Issue

In 1996, Congress imposed a lifetime ban on individuals convicted of a drug felony from accessing the Supplemental Nutrition Assistance Program (SNAP) (7 U.S.C. 2011, et seq.) and/or Temporary Assistance for Needy Families (TANF) (42 U.S.C. 601, et seq.). The ban was incorporated into President Clinton’s 1996 welfare overhaul, one of many harmful policies conceived during the misguided “tough on crime” era. Individuals and families who qualify for SNAP and TANF are very poor, generally living at or far below the poverty line. Having access to safety net supports such as SNAP and TANF is essential to prevent food insecurity for individuals and families with children, especially during times of extreme hardship, such as the current COVID-19 pandemic and economic downturn.

People of color and women are more likely to be harmed by the SNAP/TANF drug felony ban. This harm includes families with children who receive a much lower overall benefit when a parent is ineligible. Concentrated police presence and drug enforcement in low-income communities of color have resulted in higher conviction and incarceration rates for Black people and other people of color. Women are more likely than men to be incarcerated for a drug crime (25 percent

of women in state prison have been convicted of a drug offense, compared to 14 percent of men). Women also comprise the vast majority of recipients for both SNAP and TANF.

Access to programs such as SNAP and TANF provides crucial support for formerly incarcerated individuals particularly vulnerable to experiencing both unemployment and food insecurity following release. Congress gave states the ability to opt out when it enacted the SNAP/TANF ban in 1996. However, many states still bar individuals from accessing these programs or impose onerous and costly requirements that create barriers to restoring assistance. Congress should repeal this harsh and counterproductive policy. Lifting this ban is especially critical now, during the COVID-19 pandemic, when access to community-based supports has been severely compromised.

Access to programs such as SNAP and TANF provides crucial support for formerly incarcerated individuals particularly vulnerable to experiencing both unemployment and food insecurity following release.

Legislative Proposals

- Lift the ban during the COVID-19 pandemic: The Administration should work with Congress to pass the Removing Barriers to Basic Needs Act of 2020 (H.R.7916). This bill would immediately lift the lifetime bans on people with drug felony convictions from accessing SNAP and TANF assistance during the COVID-19 pandemic.
- The Administration should work with Congress to permanently repeal the ban. Bills such as the RISE Out of Poverty Act (H.R.7010) and the Next Step Act (S.697/H.R.1893) include a permanent repeal of the lifetime bans on people with drug felony convictions from accessing SNAP and TANF assistance.

Experts

Grant Smith, Drug Policy Alliance
Kara Gotsch, The Sentencing Project
Elizabeth Lower-Basch, CLASP
Jenny Collier, Collier Collective

ISSUE: EMPLOYMENT AND WORKFORCE DEVELOPMENT

Summary of Issue

People impacted by the criminal legal system face significant barriers to finding quality employment and achieving economic security as a result of systemic divestment from communities of color and racism. Prior to COVID-19, the unemployment rate for formerly incarcerated individuals was over 27 percent, with a disproportionately higher rate for Black men and Black women at 35.2 and 43.6 percent, respectively. Structural racism and barriers, such as labor market discrimination and arbitrary licensing bans, preclude formerly incarcerated people from working. Furthermore, when employment is found, jobs are more likely to be low wage, with median wages just \$10,090 within the first year of reentry.

Federal workforce development programs, including those funded by the Workforce Innovation and Opportunity Act (WIOA), the Reentry Employment Opportunities (REO) program, and apprenticeship and pre-apprenticeship programs, provide employment and training to individuals who face barriers, including people impacted by the criminal legal system. To meet current need, these programs require increased funding and targeted approaches. Building a holistic system that addresses the range of needs and supports required for successful reentry will make employment and workforce development efforts more successful. Scaling up community reentry services with new programs, such as the One Stop Shop Community Reentry Program Act (H.R.8161) described below, will improve long-term reentry success by addressing immediate needs and connecting people to career pathways that provide for long-term self-sufficiency. Finally, while increased investment in the current workforce systems is needed, new programs must be developed to respond to the economic and employment consequences of the COVID-19 pandemic and decades of systemic divestment. These responses must include robust, permanent investments that prioritize individuals

impacted by the criminal legal system and other historically marginalized communities.

A holistic system that addresses the range of needs and supports required for successful reentry will make employment and workforce development efforts more successful.

Executive Branch Proposal

- The Department of Labor, Department of Health and Human Services, and other federal agencies should issue guidance to require existing workforce development programs to prioritize services for youth and adults impacted by the criminal legal system, and provide support for transitional jobs programs and other supportive services, including cash assistance, food and nutrition supports, housing, child care, transportation, and health and behavioral health care.

Legislative Proposals

- Increase funding for WIOA, REO, and apprenticeship programs to support workforce development for individuals impacted by the criminal legal system.
- Establish and fund a new title within WIOA specifically for youth and adults impacted by the criminal legal system that would increase access to subsidized employment and transitional jobs models, integrated education and training, supportive services, health and mental health care, and community-informed reporting and accountability requirements.
- Pass the REO Act (S.4387), which would codify the Reentry Employment Opportunities Program, which currently exists as a national program authorized by WIOA.
- Pass the Pathways to Health Careers Act (H.R.3398), which continues funding for the Health Profession Opportunity Grants (HPOG) program.

- Pass and fund the One Stop Shop Community Reentry Program Act, (H.R.8161) a bipartisan proposal that would create community resource centers (CRCs) to assist returning residents as they leave custody as well as individuals who already have returned to the community. CRCs would provide comprehensive, holistic services related to housing, employment, education, health, and assistance with navigating government processes and bureaucratic hurdles.
- Develop and fund a permanent, national, large-scale transitional jobs program that prioritizes youth and adults impacted by the criminal legal system and other historically oppressed communities. This investment must give immediate access to wages and quality career pathways during the immediate recovery as well as in times when the economy is strong.

Experts

Sodiqa Williams, Safer Foundation
Duy Pham, Center for Law and Social Policy (CLASP)
Roberta Meyers Douglas, National HIRE Network/
Legal Action Center
Melissa Young, Chris Warland, and Caitlin C. Schnur, Heartland Alliance
Christopher Scott, Open Society Policy Center
Jenny Collier and Danielle Neal, Collier Collective

ISSUE: FAIR EMPLOYMENT AND LICENSURE

Summary of Issue

Job seekers with arrest and conviction records often experience high unemployment rates or limited advancement opportunities as a result of legal and policy restrictions, discrimination, and stigma. Even the most motivated job seeker with a criminal history struggles to find a job and faces a myriad of barriers to employment that must be addressed. The Administration and Congress must open more doors to quality careers that offer family-sustaining wages by: (1) eliminating or reducing the harmful impacts of laws and regulations that prevent qualified people from working; (2) ensuring that background checks are fair, accurate, and complete; (3) adopting fair hiring policies that apply to both the public and private sectors; and (4)

enhancing business incentive programs to encourage employers to hire qualified workers with conviction records.

Executive Branch Proposals

- Implement the Fair Chance to Compete for Jobs Act of 2019 (P.L. 116-92, Section 1121) by ensuring that the Office of Personnel Management and other federal agencies adopt robust complaint procedures; narrowly apply their discretion to exempt categories of workers; and execute outreach, education, monitoring, and an auditing process, particularly with the nation’s private contractors, to ensure that the protections and the intent of the Fair Chance law are realized fully.
- Ensure that the Consumer Financial Protection Bureau aggressively enforces the Fair Credit Reporting Act’s requirements for employers and background screening companies that work with criminal records.
- Increase the amount for which the Department of Labor’s federal bonding program indemnifies employers who hire individuals with criminal records, or who otherwise qualify for bonding from its current level (ranging from \$5,000 to \$25,000 per bond) to \$25,000 for all bonds.
- Work to end blanket felony or misdemeanor disqualifications in high growth industries, particularly in the health care industry.

Legislative Proposals

- Expand the Fair Chance law, Section 1120 of O.L. 116-92, to apply to private-sector business and industry, and prohibit employment discrimination solely based on an arrest or conviction record.
- Pass the Fair Chance Licensing Act (FCLA) included in Section VIII of the Next Step Act (S.697/H.R.1893).
- Pass the Fairness and Accuracy in Criminal Background Checks Act (H.R.2851) to address incomplete or erroneous FBI records that cost job seekers licensing and employment opportunities.
- Make the Work Opportunity Tax Credit (26 U.S.C. 51-52) permanent, and increase the credit for individuals with arrest and conviction records to match the tax credits available for other hard-to-employ populations.

Experts

Sodiqa Williams, Safer Foundation
Roberta Meyers Douglas, National HIRE Network/Legal Action Center
Shayla Thompson, National Employment Law Project

ISSUE: EDUCATION – PELL REINSTATEMENT AND POST-SECONDARY EDUCATION

Summary of Issues

More than half of people in prison are academically eligible to enroll in postsecondary courses while in prison, but the majority of them cannot afford to enroll due to a provision included in the 1994 Crime Bill that stripped incarcerated students’ eligibility to access Pell Grants. Prior to the ban, the United States had approximately 772 college-in-prison programs operating in over 1,200 correctional facilities, almost all of which closed after passage of the 1994 Crime Bill. As a result, the vast majority of incarcerated adults don’t have access to postsecondary opportunities, and over half (58 percent) of incarcerated adults leave prison without having completed any further education. Advocates are rightly calling for access to postsecondary courses in prison as part of criminal legal reform efforts. Access to quality education for all people should be considered a human right. The reinstatement of Pell Grants for incarcerated people would disproportionately benefit nonwhite and low-income communities, as a result of the overcriminalization of these communities. The next Administration should work with Congress to reinstate Pell Grants for incarcerated students as a step toward redressing systemic failures to offer first chances to this population, let alone “second chances.”

Access to quality education for all people should be considered a human right.

A federal policy known as the Aid Elimination Penalty (20 U.S.C. 1091(r)) denies federal student aid to people convicted of a drug law violation while they were receiving student aid. Since 2000, the Department of Education has enforced the Aid Elimination Penalty by including a question (#23) about drug law convictions on the FAFSA. The penalty unfairly penalizes students who rely on federal student aid to access postsecondary education and earn credentials increasingly important to achieving prosperity in a rapidly evolving economy. The penalty also disproportionately affects people of color, who are statistically no more likely to use drugs than whites but are disproportionately arrested and incarcerated for drug law violations. Many students are rendered ineligible for student aid or deterred by FAFSA question 23 from applying for it. The next Administration should work with Congress to repeal the Aid Elimination Penalty.

Executive Branch Proposal

- The Department of Justice should provide leadership to increase access to educational technology in U.S. prisons and jails by piloting and evaluating technology solutions in the Bureau of Prisons and by supporting the efforts of state, local, and other correctional systems with grant funding and technical assistance.

Legislative Proposals

- Pass the Restoring Education And Learning (REAL) Act (S.1074/H.R.2168), which would repeal the prohibition of Pell Grants for incarcerated students.
- Pass the Financial Aid Fairness for Students Act (H.R.4584), which would repeal the Aid Elimination Penalty and remove the drug conviction question from the FAFSA.

Experts

George Chochos, Vera Institute of Justice
Satra Taylor, The Education Trust
Stephanie Bazell, College and Community Fellowship
Christopher Scott, Open Society Policy Center
Jenny Collier, Collier Collective

ISSUE: EDUCATION – LITERACY AND SECONDARY EDUCATION

Summary of Issue

Correctional education programs in the country's prisons and jails have dwindled alarmingly in the past two decades. Currently, the Bureau of Prisons (BOP) reports a waiting list for literacy and secondary diploma programs of over 16,000, and the number of secondary diplomas awarded has fallen from 6,598 in FY2014 to 2,857 in FY2019. In a 2014 national educational assessment survey of over 1,300 incarcerated individuals in state and federal prisons, 70 percent reported an interest in academic classes and programs, but only 21 percent were enrolled. The same study indicated that literacy levels and secondary diploma attainment among incarcerated individuals were 50 percent lower and 100 percent lower, respectively, than among the general public. The diminished opportunities to improve literacy skills, earn secondary diplomas, and acquire vocational and employment skills fall particularly harshly on Black people and other people of color, as well as those with disabilities who are disproportionately represented in the nation's prison and jail populations. Denying these opportunities is also costly, as correctional education reduces recidivism by 13 percent and returns \$5 in benefits for every \$1 spent, according to several rigorous studies conducted by the Rand Corporation. The need to expand education programs in federal, state, and local carceral settings is imperative.

Correctional education reduces recidivism by 13 percent and returns \$5 in benefits for every \$1 spent.

Executive Branch Proposals

- BOP should develop and implement a 3-year plan to reduce waiting lists for literacy programs to zero and increase the number of GED awards to FY2014 levels.
- Expansion of correctional education programs and enrollment should be prioritized for formula-based funding under the Individuals with Disabilities

Education Act (IDEA), WIOA, and the Vocational and Technical Education Act (Perkins Act).

- All corrections facilities should follow the Americans with Disabilities Act of 1990 and provide reasonable accommodations for all incarcerated individuals within the system and for their needs as per their disability.

Legislative Proposals

- Increase overall funding and establish funding floors of 20 percent of Workforce Innovation and Opportunity Act (WIOA) title II funds and 10 percent of Vocational and Technical Education Act (Perkins Act) funds that must be directed to serving the education and workforce training of incarcerated individuals. Ensure that programming is flexible and performance measures are tailored to the unique challenges individuals under correctional control face.
- Congress should request that the Department of Education conduct a national study of state and local correctional education programs to determine the quality of services provided; the amount of services available; the amount of funding required to improve and expand services; and how federal funding, including from the Department of Education, could expand and improve services.
- Congress should require BOP to offer sufficient educational programming so that incarcerated individuals can make satisfactory progress in their educational attainment. Individuals also should be eligible to use educational hours as good conduct time or earn their full amount of good conduct time to be eligible for release based on the number of educational hours attained. Additionally, BOP should allow individuals who have achieved satisfactory progress to be eligible for adjudication to time served in order to attend literacy or educational programming in a non-supervisory institution that may include, but should not be limited to, four-year colleges and universities, community colleges, vocational training and technical training programs, and specialized programs requiring education for licensure and accreditation.
- Expand education in the federal prison system, which could be paid for in part with unobligated appropriations (\$505 million) from a federal prison

construction project in Letcher County, KY. The federal prison population has dropped by 58,000 since 2013, and current data do not support the need for this new prison.

Experts

Stephen Steurer, CURE (Citizens United for Rehabilitation of Errants) National and Barbara Bush Foundation

Christopher Scott, Open Society Policy Center
Irwin Kirsch, Center for Global Assessment – Educational Testing Service

Jeff Abramowitz, JEVS Human Services

Lois Davis, RAND Corporation

Stefan LoBuglio, Justice Innovations, LLC

Noah Freedman, Nucleos, Inc.

Gary Mohr, American Correctional Association

Margaret diZerega, Vera Institute for Justice

Dara Baldwin, Center for Disability Rights, Inc.

Annelise Hafer, CURE

ISSUE: SBA PAYCHECK PROTECTION PROGRAM AND 7A LOANS

Summary of Issue

After Congress authorized the Paycheck Protection Program (PPP) as a new component of the Small Business Administration (SBA) 7(a) (15 U.S.C. 636(a)) loan program in response to the COVID-19 crisis, the SBA imposed new, highly restrictive, and frequently changing criminal history disqualifications. The SBA's application forms also were frequently more restrictive than the published regulations. These far-reaching policies – which even disqualified people for participation in pretrial diversion and probation before judgment – likely had disparate impacts on multi-marginalized individuals who have encountered the criminal legal system. Accordingly, the policies were specifically found to have disparate impacts on Black-owned businesses.

In light of bipartisan advocacy, as well as litigation, the SBA relaxed its standards at least four times. The most recent version disqualifies an applicant with equity ownership of 20 percent or more who is incarcerated; or who was charged with a felony; or was convicted, pleaded to, or was placed on supervision for a felony in the past year (or past 5 years for certain financial felonies).

It has also been [reported](#) that the SBA imposed new restrictions during COVID-19 for Economic Injury Disaster Loans (EIDL) under the 7(b) disaster loan program, but the SBA did not publish those policies.

Executive Branch Proposals

- The SBA should thoroughly review and revamp its general 7(a) rules and policies to fully remove exclusions based on criminal history.
- The SBA should ensure that if any criminal history restrictions remain in regulations, the standards in policy documents and application forms for the Paycheck Protection Program (PPP) and other loans within the general 7(a) program do not exceed what the regulations require.

Legislative Proposals

- Amend the Small Business Act to prohibit the SBA from excluding people from applying for 7(a) loan assistance based on criminal history.
- Strengthen the Paycheck Protection Program Second Chance Act (S.3865), a bipartisan Senate bill that would prohibit many criminal history restrictions for PPP relief by removing exceptions for applicants with an equity ownership of 20 percent or more who are incarcerated or were convicted of certain felonies.

Experts

Breon Wells, The Daniel Initiative
Jenny Collier, Collier Collective
Dara Baldwin, Center for Disability Rights
Donna Hylton, A Little Piece of Light
Margaret Love and David Schluskel, Collateral Consequences Resource Center

ISSUE: CONDITIONS OF SUPERVISION AND DIVERSION

Summary of Issue:

Conditions of supervision are meant to reduce the risk that a person will commit another criminal act, not to serve as punishment or long-term incarceration for an offense. As such, conditions of supervision must be reasonably related to the underlying offense and impose only those restrictions that will make recidivism less likely. Under federal law, sentencing judges are

required to consider any discretionary condition imposed upon a supervisee, and to provide factual reasons for it. Judges are not permitted to excessively delegate their authority to supervision officers. Studies have proven that this system is riddled with racial inequities that need to be removed.

“**The supervision and diversion system is riddled with racial inequities.**”

There are 4.4 million people in community supervision in the U.S. as of 2018 (Carson 2020; Kaeble and Alper 2020; Zeng 2020). They are required to abide by a set of supervision conditions imposed by the court or the supervision agency. A recent policy brief done by Columbia University’s Justice Lab, titled [More Work To Do: Analysis of Probation and Parole in the United States 2017-2018](#) (Carson 2020; Kaeble and Alper 2020; Zeng 2020), discusses the decline in these rates over the past 10 years. However, this brief goes on to say that this decline does not mean that conditions of supervision and diversion have improved. From the Justice Lab brief: Finally, from 2008 to 2018, the decline in the number of people on probation has failed to keep pace with the decline in arrests, resulting in an increase in the rate of probation, per arrest.

In addition to meetings with a community supervision officer, conditions imposed may include drug testing (sometimes multiple screenings per week), mental health treatment and assessments, avoiding certain locations or people, and drug counseling or treatment. Although the purpose and standards for conditions of supervision are clear, imposition of discretionary conditions that are not reasonably related to the underlying offense is commonplace. Community supervision officers have discretion over enforcement of the conditions, and often set additional conditions. Some supervisees are given technical violations that can lead to re-incarceration even absent a subsequent violation of the law. People on community supervision, most of whom do not have access to counsel, are often both unaware of the standards for conditions of supervision and unable to contest any imposed conditions. Some supervisees find these conditions

untenable due to cost, and the time required to comply with these conditions may interfere with securing regular employment, housing, or education. Worrisome and counterproductive trends of imposing conditions meant to publicly shame supervisees remain barriers to success. These include requiring individuals to wear shirts emblazoned with their offenses and posting signs in their yards so that neighbors are aware of their criminal records. Finally, as with all discretionary systems, the potential for discriminatory enforcement is high.

Community supervision must be reimagined to provide support to youth and adults impacted by the criminal legal system, particularly as states and localities work to decarcerate. This includes connecting individuals under community supervision to quality education and career-employment pathways; health and mental health supports; and access to food and nutrition, housing, and cash assistance. Community supervision must not punish people with incarceration histories for technical violations and should not impose strict restrictions that make it difficult for people to access and participate in life, education, career, and community supports and opportunities. Additionally, fines and fees associated with community supervision must be eliminated.

Executive Branch Proposals

- The U.S. Parole Commission, the Court Services and Offender Supervision Agency, and the Department of Justice (DOJ) should work together with advocates and those currently or previously under supervision to create a set of best practices for supervision agencies.
- DOJ must investigate supervision agencies that demonstrate a pattern or practice of discriminatory enforcement of conditions of supervision.
- DOJ must create an informed staff and leadership, and make annual race and equity training mandatory for the entire division.

Experts

Dara Baldwin, Center for Disability Rights (CDR)
Christopher Scott, Open Society Policy Center
Duy Pham, CLASP

ISSUE: ACCESS TO VOTING

Summary of Issue

The right to vote is a fundamental right. Millions of Americans are denied access to the ballot box because of criminal disenfranchisement. These laws are part of a larger framework of collateral consequences of a conviction that often arbitrarily penalize individuals outside the context of a court-imposed sentence, and undermine a person's ability to successfully reintegrate into society post-conviction. Criminal disenfranchisement is another detrimental part of the punitive system and is counterintuitive to bipartisan efforts to combat recidivism.

More than 5 million individuals are unable to vote as a result of “felony disenfranchisement” laws.

A 2020 [report](#) by the Sentencing Project estimated that 5.2 million individuals are unable to vote as a result of “felony disenfranchisement” laws.⁶⁶ These laws vary by state, creating confusion and uncertainty about when and how a person's right to vote is restored. This confusion extends to state election officials. Currently, Maine, Vermont, and the District of Columbia allow individuals to vote while incarcerated. Inversely, there are 11 states where people with convictions can lose their voting rights indefinitely.⁶⁷ In the 17 states that have automatic restoration upon release, there is no automatic registration. Simply put, states are not as proactive in restoring voting rights as they are in revoking them.

Individuals confined in jails also face barriers to accessing the ballot box, even though most maintain the legal right to vote. Generally, people who are incarcerated in jails are awaiting trial, sentenced to misdemeanor offenses, or have been sentenced for longer terms of incarceration and are awaiting

⁶⁶ Larson, R., Shannon, S., Uggen, C. (October 6, 2016). “6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement,” 2016, The Sentencing Project, <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>

⁶⁷ Felon Voting Rights (2020, October 1). Retrieved from <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>

transfer to a state prison. Of the 745,000 individuals incarcerated in jail as of 2017, nearly two-thirds (64.7 percent), or 482,000, were being held pretrial because they had not been able to post bail. Of the 263,000 who were serving a sentence, the vast majority had been convicted of a misdemeanor offense that does not result in disenfranchisement. [Few jurisdictions prioritize access](#) to voter education or registration materials for people in jail, and the voting process is exceedingly difficult to pursue without the help of administrators.

Congress has ultimate supervisory power over federal elections, and has consistently engaged on these issues. We support congressional initiatives supporting voting rights restoration and voting while in pretrial detention through the [For the People Act of 2019](#), the [Democracy Restoration Act](#), the [Voter Information and Access Act](#), and the [Every American Has the Right to Vote Act](#).

Executive Branch Proposal

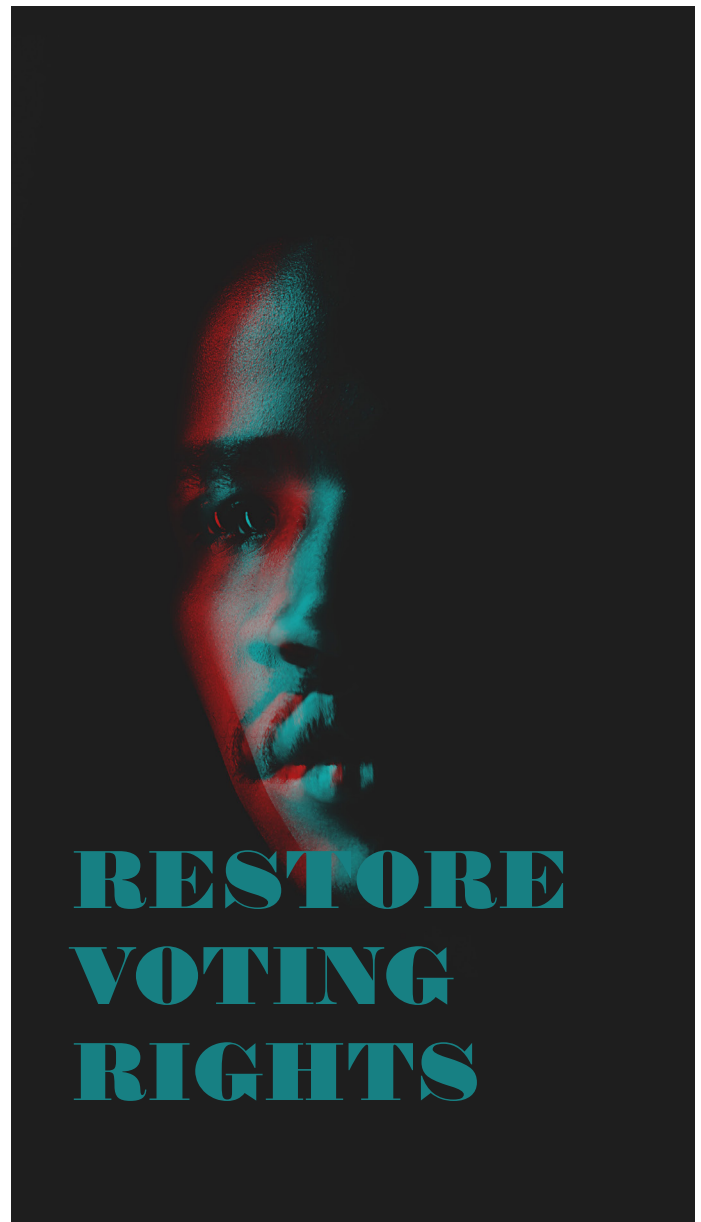
- The Federal Bureau of Prisons and the Election Assistance Commission should establish an Interagency Working Group to increase discussion and collaboration, reduce barriers, and implement any changes needed for robust voting rights restoration.

Legislative Proposals

- Congress should strengthen and pass a Democracy Restoration Act that clarifies that a person's right to vote is automatically restored after completion of a custodial sentence.
- While the 116th Congress introduced various legislative proposals that would automatically restore the voting rights of formerly incarcerated individuals who have reentered the community, the 117th Congress must ensure that its proposals include all individuals with convictions, including individuals who are incarcerated.
- Congress should either expand funding categories within existing grant programs or create new funding for programs to increase civic engagement for justice-impacted people.

Experts

Breon Wells, The Daniel Initiative
Kara Gotsch, The Sentencing Project
Donna Hylton, A Little Piece of Light
Dara Baldwin, Center of Disability Rights
Eric Spencer, Voting Rights Activist & Advocate



CHAPTER 6

CLEMENCY



From the kangaroo courts and lynching laws of yesterday to the mass incarceration crisis today, miscarriages of justice have been an ever-present feature of the U.S. criminal punishment system. However, the President has always held the power to correct mistakes and show mercy through clemency – a catch-all term for several related procedures – including shortening sentences through commutation and restoring civil rights through pardon.

President Kennedy sought to relieve the impact of lengthy mandatory minimum narcotics laws from the 1950s through sentence commutations, impacting, in today's numbers, about 2,000 prisoners. In 1974 President Ford addressed the sensitive issue of the convictions of Vietnam-era draft-dodgers by establishing a review board to vet appropriate cases for possible commutation, which resulted in the possibility of conditional clemency for about 14,000 draft evaders and military deserters in less than a year. President Carter then used the clemency power to offer draft-evaders amnesty as a way to heal the wounds from the controversial Vietnam War. In 2014 President Obama established a Clemency Initiative, inviting petitions from people convicted of nonviolent offenses who would have received substantially lower sentences if convicted of the same offenses today, resulting in the release of over 1,700 people.

Use of the clemency power represents an exceptional opportunity for the President to show mercy, correct miscarriages of justice, and right historical wrongs.

Use of the clemency power represents an exceptional opportunity for the President to show mercy, correct miscarriages of justice, and right historical wrongs. If there is a serious interest in making a dent in over-incarceration, the Executive must demonstrate a clear commitment to the robust and consistent use of clemency and make regular use of this unique power.

ISSUE: A COMMISSION MODEL OF FEDERAL CLEMENCY

Summary of Issue

During the Obama Administration, the evaluation of clemency petitions traveled through seven independent stages, which operated sequentially: from the Pardon Attorney's Staff to the Pardon Attorney; from the Deputy Attorney General's Staff to the Deputy Attorney General; from the White House Counsel's Staff to the White House Counsel, and finally to the President.

This process resulted in needless and redundant bureaucracy and cost. Reviewing petitions sequentially (one after the other, rather than at the same time) creates inefficiency and allows the whole process to clog if one actor does not keep up or a job is unfilled. During the Obama Administration, five of the stages were in the hands of generalists, who were often occupied with other priorities. Moreover, much of the process rested in the hands of the Department of Justice, resulting in deep conflict.

It is imperative that this type of model be replaced permanently – a short-term fix will leave a poor legacy to future presidents, as we saw with the Obama model. A commission system, based on the experience of the Ford-era Presidential Clemency Board and high-functioning state systems, would best address the afore-stated problems.

A commission model would essentially cut out all of the generalists (except the President). A professional, full-time staff would prepare reports to the commission, which would review the cases and convey its recommendations to the President. The Ford Clemency Board was initially comprised of nine members, of diverse views, regions, and backgrounds, who reviewed the clemency petitions in panels of three. A commission would operate periodically – meeting in Washington – to review cases and make recommendations.

This model could incorporate the existing Pardon Attorney and his experienced staff as the core of the commission’s staff, and immediately take over both the formal and informal streams of cases that now exist. The commission could be created by executive order and placed in either the White House Counsel’s office or the Executive Office. Some staff could be detailed from other units.

There are important benefits to the implementation of a Commission Model. It would avoid the politicization inherent in other models, allow simultaneous rather than sequential review by multiple experts, create much greater efficiency, and be revenue-positive due to reduced prison costs.

Executive Branch Proposal

- During the first 100 days, issue an executive order creating a bipartisan clemency commission, housed in either the White House Counsel’s office or the Executive Office.

Experts

Mark Osler, University of St. Thomas Law School
Rachel Barkow, New York University School of Law
Nkechi Taifa, The Taifa Group

ISSUE: RIGHTING HISTORICAL WRONGS THROUGH CLEMENCY

Summary of Issue

The public health crisis presented by COVID-19 in carceral settings has intensified the urgent need to decarcerate. Public health experts have advised government officials to release people who pose no threat to public safety. If mass incarceration is ever to be abated, whether because of its inherent importance or whether pursuant to the need to adhere to social distancing guidelines, it is critical that intentional steps be implemented that expand the number of people eligible for relief. Thus, in addition to petitions considered on a case-by-case basis, a categorical approach to releasing groups of deserving candidates for clemency must be seriously considered as well.

Categories for commutation could include, but not be limited to, those who have unsuccessfully petitioned for compassionate release, older or elderly prisoners, and those who have a debilitating, chronic, or terminal medical condition. Individuals serving sentences that have since been deemed unjust but not made retroactive should be prime candidates. Those who are serving excessively lengthy prison sentences as a result of exercising their constitutional right to go to trial should likewise be considered. The only remedy for these individuals, subject to what has been called the trial penalty, is executive clemency. Veterans as a group should be considered, as well as parents of minor children. The sentences of people convicted of marijuana offenses must be commuted. Those who are COINTELPRO-era political prisoners who remain incarcerated should be granted clemency. Individuals who have been labeled as career offenders who have only narcotics as a triggering offense, as well as those who have received double mandatory minimum sentences where the individual has only drug convictions should also be considered. Tiered relief could be provided to ensure people serving overly punitive sentences for drug crimes have the opportunity for release once they have paid a reasonable debt to society. Such relief should also be structured to ensure that no one serves a sentence of more than 20 years. And, the category of individuals sentenced for drug-related offenses – many of whom were sentenced pursuant to policies in the 1994 crime bill that have now been denounced as unjustly contributing to mass incarceration – should be granted clemency. These represent just some possible recommendations for

categorical clemency relief. And, not to be forgotten, clemency is a matter of compassion and mercy. Regardless of whether an individual fits into any of the categories suggested above, the focus must be on who the person is today and any postconviction achievements they have attained, as opposed to their conviction of record.

With the stroke of a pen, the President can change the lives of thousands of individuals and their families, allow adherence with CDC guidelines, and leave a legacy that will stand throughout history. The Constitution envisions precisely this kind of corrective action against undue severity in the law and, particularly in the midst of an unprecedented pandemic. The harms that mass incarceration has wrought on families and communities has been massive; correcting the harms must be massive as well.

Executive Branch Proposal

- First 100 days: The President and Administration must determine a process that results in clemency to targeted categories of people – preferably through a commission as described above. The concept of clemency must be extended from case-by-case grants of individual mercy into a systemic response to correct decades of racist, punitive, and degrading incarceration.

Experts

Nkechi Taifa, The Taifa Group
Mark Osler, University of St. Thomas Law School
Jason Hernandez, Crack Open the Door
Amy Povah, Can-Do Foundation
Kemba Smith, Kemba Smith Foundation
Andrea James, National Council for Incarcerated and Formerly Incarcerated Women and Girls and #ClemencyWorks Campaign

ISSUE: STATE CLEMENCY

Summary of Issue

Governors have a responsibility to slash the incarcerated population within their states. Reducing state prison populations through other means is extremely difficult. People in prison have been sentenced following a conviction. The integrity of that conviction aside, release via parole can be an

inaccessible or unduly burdensome process, and legislative reforms that would change sentencing laws are usually not made retroactive. That means that for most of the people in state prisons, a governor's grant of clemency is often the only chance they have of timely release and a pathway to hope and healing.

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That the power to immediately release thousands of people rests in the hands of a single actor – as opposed to being dependent upon a legislative body and process – makes it all the more important because justice cannot wait. Individual commutations, however, are not enough to tackle the enormity of this challenge.

Executive Branch Proposal

- The President can set an example for governors to follow by, on day one, making a commitment to grant commutations to large categories of people, such as those imprisoned on drug charges, for technical violations, older incarcerated people, or those under sentences that are no longer fair due to new laws or policies.

Legislative Proposal

- Congress can premise the awarding of justice-focused grants to states on a governor's commitment to reduce state prison populations through categorical commutations that correct past systemic abuses of the past.

Experts

Dylan Hayre, American Civil Liberties Union
Cynthia Roseberry, American Civil Liberties Union
Jason Hernandez, Crack Open the Door
Mark Osler, University of St. Thomas Law School
Amy Povah, Can-Do Foundation
Andrea James, National Council for Incarcerated and Formerly Incarcerated Women and Girls and #ClemencyWorks Campaign

CHAPTER 7

RACIAL JUSTICE AND HUMAN RIGHTS

The Justice Roundtable’s Racial Justice and Human Rights working groups convene discussions and collaborations that bring justice reform advocates together with people in other sectors to address issues at the core of any democracy – race and human rights. We encourage the integration of a racial justice analysis into the Roundtable’s work, and recognize that even a well-meaning, multiracial coalition such as our own has a long way to go toward eliminating biases and structural inequities, particularly as they relate to race and the ideal of centering the experiences of formerly incarcerated people. We support the engagement of Justice Roundtable partners and allies with international human rights mechanisms, including the United Nations treaty bodies, as well as the Inter-American Commission on Human Rights, and seek to make connections with domestic justice issues where relevant. And, particularly within the spirit of the International Decade for People of African Descent (IDPAD), the Justice Roundtable is committed to the passage of legislation that excises the prison slavery clause from the Constitution’s 13th Amendment, and making the passage of a federal commission to study and develop reparation proposals for African Americans a reality.

ISSUE: RACIAL JUSTICE

Summary of Issue

It has been stated for years that racism permeates every stage of the U.S. criminal punishment system, from profiling, arrest, and trial to sentencing, release, and reentry. The frightening resurgence of terrorist white supremacy, which has intensified the persistence of racism, both overt and implicit, against Blacks, must not be ignored. In addition to bringing attention to racism and racial disparities in the country’s punishment system, it is past time to advance a serious effort to address the prison slavery exception clause to the 13th Amendment, and excise that repugnant vestige enshrined within the U.S. Constitution. Indeed, Colorado, Utah, and Nebraska have already voted to strip the clause from their respective state constitutions. And federal legislation introducing a constitutional



amendment is poised to be introduced in Congress by Senator Jeff Merkley (D-OR), seeking to end this official abomination.

The direct linkage between the enshrinement in the Constitution of this “except as punishment for a crime” clause and the mass incarceration of today that disproportionately impacts Black people is no accident. Indeed, it is this “loophole to reestablish slavery by another name” that is the direct genesis of today’s carceral state and the manner and means that have been used to control Black bodies post–chattel slavery. Indeed, the extension of chattel slavery via the slavery exception clause is what allowed for the transition from peonage, convict leasing, and chain gangs to today’s system of mass incarceration.

Despite a legacy of structural racism and deliberate indifference to the discriminatory effect of these policies, successful community-based strategies exist to advance public safety, stem the flow of young people of color from schools to prison, and support the successful reentry of people back into society. When official decision-makers have had formal notice of less costly, more effective alternatives to incarceration, the failure to use these alternatives constitutes deliberate indifference. Thus, public notice hearings to put officials on formal notice of the racially discriminatory impact of policies and practices can be strategically used to overcome the legal requirement of having to prove discriminatory intent.⁶⁸

For over 30 years H.R.40, the Commission to Study and Develop Reparation Proposals for African Americans Act, has languished in Congress. The legislation would

⁶⁸ <http://www.racialjusticeinitiative.org/wp-content/uploads/2010/11/Article-An-Offer-They-Cant-Refuse-2010.pdf>

create a federally chartered expert commission to study the sordid history of the enslavement era that still impacts society today, and make recommendations for reparatory justice solutions.

Racism in the U.S. is rooted in governmental failings and discriminatory treatment at the federal, state, and local levels that began with Black people being kidnapped from their homeland in Africa and illegally transported to North America to be brutalized, dehumanized, and enslaved.

Racism in the U.S. is rooted in governmental failings and discriminatory treatment at the federal, state, and local levels that began with Black people being kidnapped from their homeland in Africa and illegally transported to North America to be brutalized, dehumanized, and enslaved. Recent events have reached an inflection point where the appeal for reparations is increasingly and correctly being viewed as an urgent necessity to finally address systemic, structural, institutional racism, and the U.S. H.R.40 is a critical part of the necessary reckoning with the country's tragic past and subsequent manifestations in the present. The legislation would create an expert commission to study and issue recommendations for reparatory justice solutions.

If history is to be any guide, there is likely to be yet another unleashing of the racism and intolerance that are unfortunately still a part of the country's DNA. Passage of H.R.40 and its Senate counterpart, S.1083, will be the first step toward a long overdue reckoning, and putting the country on the path to healing and reconciliation.

Executive Branch Proposals

- During the first 100 days, sign an executive order to establish a federally chartered commission to study and develop reparation proposals for African Americans. As of November 6, 2020, the House

bill had 162 co-sponsors and the Senate bill had 20 co-sponsors.

- During the first 100 days, sign a proclamation supporting the International Decade for People of African Descent (2015–2024), which calls for reparatory justice through national, regional, and international legal frameworks for generations of involuntary servitude, socioeconomic subjugation, and racial discrimination.
- During the first 100 days, schedule the first in a series of public notice hearings designed to dismantle structural racism and the systematic exclusion of African Americans and other people of color from best practices in criminal justice. These hearings would convene experts to present effective and less expensive evidence-based strategies to promote public safety, along with a road map to implement them.

Legislative Proposals

- Pass legislation to eliminate the prison slavery exception clause from the 13th Amendment.
- Pass the Commission to Study and Develop Reparation Proposals for African Americans Act (H.R.40), introduced by Representative Sheila Jackson-Lee (D-TX), and its Senate counterpart (S.1083), introduced by Senator Cory Booker (D-NJ).

Experts

Nkechi Taifa, The Taifa Group (issues: H.R.40/S.1083; 13th Amendment exception clause; IDPAD)

Dreisen Heath, Human Rights Watch (issues: H.R.40/S.1083)

Charlie Sullivan, International CURE (issue: 13th Amendment exception clause)

Cynthia Robbins, The Racial Justice Initiative of TimeBanks USA & Consult CR (issue: public notice hearings confronting structural racism)



ISSUE: HUMAN RIGHTS

Summary of Issue

On August 3, 2020, over 500 family members of victims of police violence and representatives of civil society organizations wrote to H.E. Michelle Bachelet, the United Nations High Commissioner for Human Rights, regarding [Human Rights Council resolution 43/1](#) “on the promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers.” The impressive group [letter](#) stressed that the Human Rights Council body, although adopting a “watered-down resolution due to enormous diplomatic pressure from the United States and other allied countries,” considered the resolution as a “critical first step towards full accountability for systemic police violence against Black people in the United States and more generally against people of African descent around the world.” Demanding effective implementation of the resolution, this action by hundreds of signees is but one example of a myriad of appeals by African Americans to international bodies for vindication of human rights abuses in the U.S.

On November 9, 2020, the United States’ human rights record was reviewed by the U.N. Human Rights Council as part of the [Universal Periodic Review \(UPR\)](#) process. The UPR is a means to assess the human rights records of all governments and to foster accountability. The U.S. was reviewed in 2011 and 2015, and though it has consistently made recommendations to other governments, it has historically disregarded recommendations that it has received.

Civil society voices are essential to accurately reflect the state of human rights in communities across the United States. To inform the Review, civil society groups contributed more than 100 submissions, including a [recent statement on systemic anti-Black racism in the criminal legal system](#).

Executive Branch Proposals

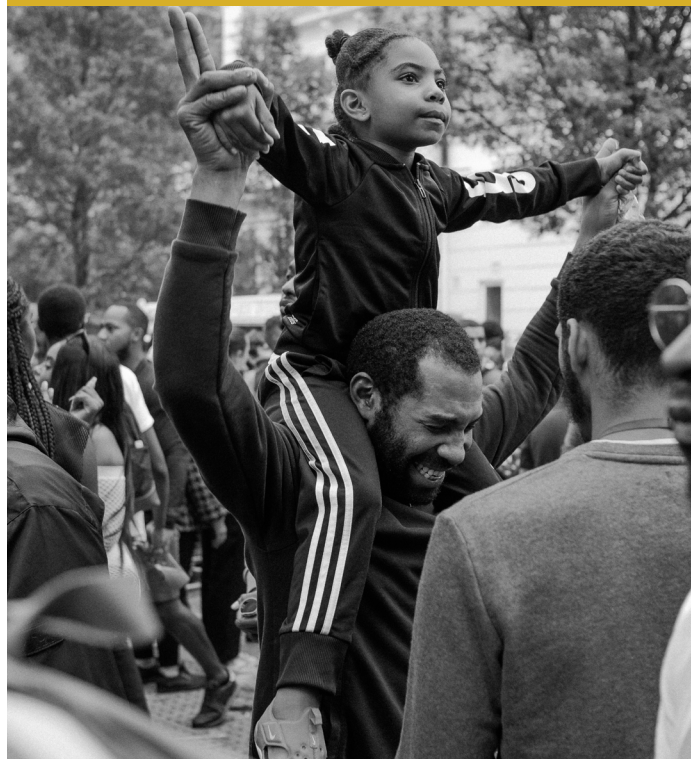
- Rejoin the U.N. Human Rights Council and recommit to full cooperation and engagement with U.N. human rights experts and other international and regional bodies, including the Inter-American Commission on Human Rights.
- Ensure meaningful government compliance with

the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the U.S. ratified in 1994. The Administration must create a plan of action to fully implement the ICERD and strengthen federal, state, and local government coordination in support of human rights.

- Issue a Presidential Proclamation updating Executive Order 13107 on Implementation of Human Rights treaties, dismantle Secretary Pompeo’s Commission on Unalienable Rights, and instruct the State Department to cancel the implementation of its final report and recommendations.
- Reactivate the federal inter-agency working group to implement international human rights recommendations, including those made as part of the United States’ UPR.
- Support legislation to transform the U.S. Commission on Civil Rights into a U.S. Commission on Civil and Human Rights, to expand its mandate to include not only civil and human rights issues but also monitoring human rights implementation and enforcement efforts, and to make structural reforms to improve the commission’s ability to function as an independent national human rights institution.

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THE BAIL PROJECT

We are the Drug Policy Alliance.

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