A New Paradigm for Sentencing in the United States

Vera INSTITUTE OF JUSTICE

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From the President

The United States incarcerates nearly 2 million people, far more than any other country in the world. But the problem of mass incarceration in this country is not just a function of the number of people in prison—or the much larger number of people who cycle in and out of jails every year. Our system also incarcerates people for far too long, doling out excessively long sentences.

As of 2019, 57 percent of the U.S. prison population was serving sentences of 10 or more years. In fact, as of 2020, one in seven people in U.S. prisons was serving a life sentence—in numerical terms, that is more than the country's entire incarcerated population in 1970. This report will chart how we arrived at these dismal statistics. Retribution, deterrence, incapacitation, and rehabilitation are all concepts that have been central to sentencing theory, policy, and practice over the last two centuries. But these principles have been backed by paltry evidence of success—and more evidence of harm. They haven't been effective in delivering accountability, building public safety, or repairing harm, results we can ask sentencing to deliver. They have, however, disproportionately hurt Black and Latino communities.

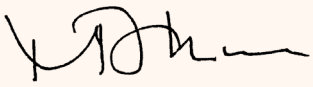
From 1996 to 1997, I clerked for Federal Judge Jack Weinstein, who strongly, and publicly, opposed sentencing guidelines. But there was little he could do to deviate from those rigid directives. I saw hundreds of people cycle through his courtroom. A large percentage of them were people who, out of desperation, had agreed to carry cocaine into the country in exchange for a couple hundred dollars.

Judge Weinstein didn't sit at the bench. We would all sit around a table in the well of the courtroom—the judge, the Assistant United States Attorney, the convicted person, their family, their attorney, and me. He tried to humanize a process that is utterly dehumanizing. It was sometimes all he could do. In most cases, he had no option but to sentence them to mandatory minimums or make a "downward departure" from the guidelines, which would be subject to reversal if the prosecutors chose to appeal. Most, no matter the offense, would have to serve a sentence that can only be described as excessively and disproportionately punitive when compared with our pre-1970s history or what we currently see in other developed countries.

Their lives and their families' lives were devastated, and millions more continue to be, as states and the federal

government continue to use mandatory minimums, three-strikes laws, and the other sentencing enhancements. And yet evidence to support our retributive, punitive approach is limited. In fact, we know this approach doesn't make our communities safer in the way proponents claim and the public assumes, causes more damage than they are willing to admit, and does not repair harm. This report will offer solutions beyond our current criminal legal apparatus that can deliver real public safety and justice—ideals our current system fails to achieve.

We hope this report will catalyze deep reconsideration, challenge assumptions, and disrupt our system's proclivity for long, harsh sentences that are ultimately ineffective. We offer sentencing reforms that would dramatically reduce the number of people incarcerated in our prisons. And we call on legislators, prosecutors, and judges to help implement them—and put an end to our codified system of excessive punishment.



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Executive Summary

One hundred years from now, we may look back at the United States's overreliance on punishment and its progeny—mass incarceration—with the kind of abhorrence that we now hold for internment camps for Japanese Americans and Jim Crow laws. Or, if we never curb our reliance on jails and prisons for public safety, we may be in the same place then as we are today.

We have an opportunity now to change course. Those events shined a devastating light on the impact that systematic dehumanization of Black people and other people of color, as well as people experiencing poverty, has had over generations. George Floyd's murder at the hands of police provided a stark example of the everyday use of state power against Black people.[1] At the same time, rural and marginalized communities were disproportionately affected by death, economic loss, and destabilization from the global coronavirus pandemic.[2] A leading theory places this confluence of stressors behind the increase in fatal gun violence in 2020.[3] As a result, discussions are now taking place on the floors of Congress, in statehouses, and in countless households about the ubiquitous and often harmful presence of the U.S. criminal legal system in people's lives, and how that system does or does not deliver safety.[4]

This report posits that maintaining our system of mass incarceration will not bring people in the United States the safety and justice they deserve, while dismantling it in favor of a narrowly tailored sentencing response to unlawful behavior can produce more safety, repair harm, and reduce incarceration by close to 80 percent, according to modeling on the federal system.

This report posits that maintaining our system of mass incarceration will not bring people in the United States the safety and justice they deserve, while dismantling it in favor of a narrowly tailored sentencing response to unlawful behavior can produce more safety, repair harm, and reduce incarceration by close to 80 percent, according to modeling on the federal system. In this report, the Vera Institute of Justice (Vera) addresses a main driver of mass incarceration: our sentencing system, or what happens to people after they have gone through the criminal legal system and are convicted of a crime. The report

- provides a review of the history of sentencing in this country;
- summarizes the research and evidence surrounding sentencing's impact on individual and community safety;
- offers new guiding principles that legislators should consider in place of the current primary reliance on deterrence, retribution, and excessive use of incapacitation;
- outlines seven key sentencing reforms in line with these guiding principles;

- models the impact of these reforms on both public safety and mass incarceration; and
- suggests a "North Star" for sentencing policy with a legal presumption toward community-based sentences except in limited circumstances.

Our current sentencing system defaults to putting most people convicted of crimes behind bars. In 2006 in the United States—the last year in which national sentencing data was gathered—70 percent of people convicted of state felonies ended up in prison; in the federal system, 90 percent of people convicted in 2019 did.[5]

The United States also sends people to prison for extraordinarily long periods of time. The Sentencing Project found that as of 2020, one in seven (203,865) people in U.S. prisons was serving a life sentence—more than the country's entire incarcerated population in 1970.[6] This growth in people serving life sentences within the prison population is the tip of the iceberg of the overall phenomenon of people with long sentences becoming the majority within state prisons. In 2022, the Council on Criminal Justice, examining National Corrections Reporting system data, found that from 2005 to 2019 the percentage of people serving sentences of 10 or more years in state prisons grew substantially, reaching 57 percent of the total population in 2019.[7]

The result of our overreliance on punishment is a huge jail and prison system and a devastating waste of human lives. On any given day, there are nearly 1.7 million people serving sentences in prison and jail, almost 500,000 more detained in jail pretrial, another 4.4 million under some

A note on language

In this report, you will not find words like "offender," "criminal," or "defendant."[a] People who have committed unlawful and/or harmful acts remain people, and policymakers considering how best to respond to such acts should keep that front of mind.[b] Vera also uses the words "unlawful behavior," "criminalized behavior," "harm," or "harmful behavior" instead of "criminal" to describe conduct that violates social norms and laws to avoid reinforcing stigmatizing language. Most people have experienced or delivered some form of harm in their lives. Labeling someone's harmful behavior as "criminal" immediately creates punitive connotations or associations with guilt, regardless of the conduct's severity. Using the word "harm" keeps the focus on which behavior is actually damaging—especially to a person's physical safety and well-being—and requires readers to be thoughtful about the best way to address harm.

a See Erica Bryant, "Words Matter: Don't Call People Felons, Convicts, or Inmates," Vera Institute of Justice, March 31, 2021, https://perma.cc/GSX4-QSHS.

b Eddie Ellis, *An Open Letter to Our Friends on the Subject of Language* (New York: Center for NULeadership on Urban Solutions, 2007), https://perma.cc/JQ67-UKHZ.

form of probation or parole control, and between 70 and 100 million marked with a record of arrest or conviction.[8] This level of incarceration reaches into more than 100 million U.S. households: half of all adults in the United States have had a family member detained at least overnight.[9] Our runaway yet routine use of incarceration wastes human potential, prevents people from contributing to our families and communities, and targets already marginalized neighborhoods. We have lost millions of lives—both literally and metaphorically—to mass incarceration.

Those lost lives disproportionately belong to Black and Latino people and those experiencing poverty. Black and Latino people make up 58 percent of the U.S. prison population but just 31 percent of the nation's overall population.[10] Among those serving life and "virtual life" sentences—sentences of 50 years or more—nearly half are Black, and another 16 percent are Latino.[11] One in five Black men in prison is serving a life sentence.[12] Black men receive harsher sentences and serve more time in prison compared to white men—in the federal system, for example, their sentences are 19.1 percent longer—even after controlling for factors like conviction history, education, and income.[13] In the same system, Black people are also 21.2 percent less likely to receive a sentence shorter than advised by the sentencing guidelines than white people.[14] In the last 20 years, however, racial disparities have dropped as the number of white people in prison continues to increase while the number of Black people drops.[15] Although recent sentencing reforms like California's Proposition 47 or the modest federal First Step Act are rightfully pointed to as progress, with their narrow focus on nonviolent crimes, such legislation alone will not sufficiently move the needle on mass incarceration.[16] Today, 55 percent of the more than 1.2 million people serving sentences in state prisons are convicted of offenses deemed violent.[17] Twenty-nine percent of the people incarcerated in federal prison are serving sentences involving weapons.[18]

This default to incarceration does not build safety. A 2021 meta-analysis of 116 studies found that custodial sentences not only do not prevent reoffending, but they can also actually increase it.[19] Explanations include that stripping neighborhoods of so many vital residents, including parents and breadwinners, can destabilize neighborhoods, and that the brutality of U.S. prisons, as well as the lack of opportunities after release, can negatively affect people's behavior toward others while incarcerated—and afterward.

So how do we significantly change course? As a starting place, we must move away from retribution, deterrence, heavy reliance on incapacitation, and rehabilitation as the cornerstones of sentencing theory, policy, and practice. These justifications for sentencing have been in currency for more than 200 years but are seldom scrutinized. It is time to do so.

› **Retribution,** or "just deserts," is the idea that punishment must restore the moral order that is upset by harmful behavior or conduct that violates the law—that the individual should be punished.

- The **deterrence** theory posits that punishment will prevent future crime. Deterrence can be specific (deterring this person from committing any more crimes) or general (making an example of this person so that others will reconsider committing crimes).

- **Incapacitation** holds that locking people up in prisons will keep them from committing new crimes in the community.

- **Rehabilitation** is invoked to support the theory that a period of banishment from society through incarceration should serve as an opportunity for reflection, remorse, and growth. (For more on these theories, see "Origin and description of sentencing theories" on page 14.)

As old as these justifications are, the evidence does not support the assertion that they deliver safety and satisfaction as promised. In this report, Vera details how severe sentences do not deter crime, retribution often does not help survivors of crime heal, and that as a rule, we overestimate who presents a current danger to the community and when incarceration is needed for public safety. Vera also demonstrates that rehabilitation best occurs in the community, not in prisons.

Aside from the evidence, on a practical level, these theories conflict with each other and provide little meaningful guidance for a clear sentencing outcome. Consider the possible interior dialogue of a prosecutor, legislator, or judge wrestling with how to set a sentence to incarceration for, say, armed robbery:

> In order for society's rules to mean something, we need to mark transgressions for failing to comply [punishment and deterrence]. We want the people who have hurt others to feel some of that same pain [retribution], and to make sure they cannot hurt others [incapacitation], but we also want to ensure they are reformed so that when they are released from prison, fewer people will be hurt [rehabilitation], and more people will follow the law [general deterrence]. So—seven years?

These theories do not, by themselves, lead to any objectively clear action—like choosing an arbitrary term of years—in setting a sentence. Into that vacuum, the state has generally leaned on retribution, deterrence, or incapacitation to justify as much prison time as possible—particularly for Black people, who have been wrongly depicted as inherently more "criminal" and dangerous throughout the history of this country and continuing to this day.[20]

A new sentencing paradigm is needed. This report sets out a path toward such a transformation in the way this country approaches sentencing.

- **Chapter 1** chronicles the overlap between sentencing justifications, race, and the expansion of the U.S. prison system.

› **Chapter 2** discusses the facts behind how sentences do or do not deliver more public safety or achieve satisfaction for survivors of crime, two rationales behind the prevalence and length of prison sentences since the "tough-on-crime" era that began in the 1970s.

› **Chapter 3** proposes alternate guiding principles, or justifications, that must be considered in sentencing:

  ↳ privileging liberty, a constitutionally protected right;

  ↳ creating real safety; and

  ↳ repairing harm.

These principles would undergird statutory sentencing schemes and apply to all crimes, not just nonviolent ones, as concepts of safety and repair are particularly resonant when someone commits a violent act.[21]

› **Chapter 4** outlines seven recommended pieces of legislation that lead to decarceration and more public safety, satisfaction, and efficacy by centering safety, repair, and racial justice. These seven reforms, in order of decarcerative impact, include

  ↳ capping prison sentences at a maximum of 20 years for adults convicted of the most serious crimes and 15 years for young people up to age 25;

  ↳ significantly expanding "good-time" credit—opportunities to earn time off of sentences for behavior that demonstrates repair and growth;

  ↳ removing prior conviction sentencing enhancements;

  ↳ abolishing mandatory minimums;

  ↳ allowing any conviction, regardless of severity, to be eligible for a community-based sentence;

  ↳ creating second-look resentencing options for those currently behind bars; and

  ↳ mandating racial impact assessments for crime-related bills.

› **Chapter 5** demonstrates how these reforms would result in much smaller prison populations, using the federal system as an illustration. We model what the federal prison population would look like today had Congress passed and implemented 10 years ago some of the reforms discussed in Chapter 4. Remarkably, if five of these reforms had been

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enacted (excepting racial impact statements and second-look provisions, which could not be modeled with the data at hand), the federal prison population would be approximately 20 percent of what it is today—or roughly 30,000 people instead of the 150,000 currently in Federal Bureau of Prisons custody.

› Finally, we cannot stop at these reforms. **Chapter 6** offers a new approach—a North Star—to sentencing, one in which incarceration is the limited exception rather than the rule, and grounds this approach in the principles of safety and repair. A strong presumption toward liberty is fundamental to this approach, because without it, judges, prosecutors, and legislators will continue to assume, intentionally or because of implicit biases, that many people of color must be incarcerated, particularly if they have been convicted of a violent felony. Vera's North Star requires the court to consider whether the principles of safety or repair overcome that presumption of liberty by clear and convincing evidence. If a person is sentenced to incarceration, that sentence should then be evaluated every five years to assess whether the compelling interests of safety and repair justify further incarceration.

Beyond sentences: Other ways to reduce mass incarceration

This report focuses on sentencing reform, known as the "back end" of the criminal legal system. But ending mass incarceration will also require disrupting the "front door" to the system by ending overcriminalization, reducing arrests, leveraging prosecutorial discretion, enacting bail reform, and expanding the number of people eligible for diversion away from sentences to incarceration. This could all be done consistent with public safety. Law enforcement could dramatically reduce the 10.4 million arrests made each year, 80 percent of which are for common, nonserious behavior like cannabis and other recreational drug use, low-level traffic offenses, and other minor offenses like trespassing and disorderly conduct.[a] Already, many jurisdictions are moving in this direction: the majority of states have either decriminalized or legalized possession of small amounts of cannabis for medical or personal use, and in 2020, Oregon decriminalized personal noncommercial possession of recreational drugs entirely.[b] But the country is just starting to experiment with decriminalizing other low-level offenses that generate large numbers of arrests, like disorderly conduct, trespassing and loitering.[c]

Doing so is critical to ending mass incarceration because reducing low-level arrests will decrease the resulting criminal convictions that subject people to longer sentences down the road based on prior conviction history. Reducing the number of cases entering the system will also relieve court congestion and free up limited prosecutorial and judicial resources to focus on more serious cases. Shrinking the country's carceral footprint also requires legislatures to take on bail reform, prosecutorial overreach, criminal justice fines and fees, and the flawed systems of probation and parole that drive almost half of all admissions to jail and prison for technical violations of supervision that in and of themselves do not qualify as crimes or carry carceral sanctions.[d]

To end mass incarceration, we must do both: enact these front-end reforms and reform sentencing and the back end of the system. Even though felony convictions and admissions to prison overall have declined in recent years, long lengths of stay per conviction, especially for convictions

for violent offenses and for people with prior criminal convictions, contribute to the continued large size of the prison population.[e]

a Rebecca Neusteter and Megan O'Toole, *Every Three Seconds: Unlocking Police Data on Arrests* (New York: Vera Institute of Justice, 2019), 6, https://perma.cc/2Q57-6AP2.

b For a map of cannabis laws in the United States and its territories, see National Conference of State Legislatures, "Cannabis Overview," July 6, 2021, https://perma.cc/U6WA-7NGD. For the 2020 Oregon law, see Oregon Measure 110 (2020), https://perma.cc/R6TU-YC55.

c See for example Virginia HB 256 (2020) (removes school behavior from the definition of disorderly conduct), https://perma.cc/Z8JW-XFM7; and New York SB 1351 (2021) (repeals loitering for the purpose of prostitution), https://perma.cc/UH9J-VPTW.

d Forty-five percent of admissions to state prison are for violations of parole or probation. Technical violations—which involve failed drug tests or other rule violations such as missed appointments—make up more than half of these admissions. Council of State Governments Justice Center and Arnold Ventures, *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets* (New York: Council of State Governments Justice Center, 2019), 1, https://perma.cc/7VRS-G4GC.

e Fifty percent of people in prison have been convicted of violent offenses. There has been only a 5 percent drop in the prison population for these crimes since 2009, compared to a 31 percent drop in drug crimes and a 24 percent reduction for property crimes. Therefore, any meaningful reform must address charging and sentencing for violent crimes. Nazgol Ghandnoosh, *Can We Wait 60 Years to Cut the Prison Population in Half?* (Washington, DC: Sentencing Project, 2021), 3, https://perma.cc/M96W-76QU.

Chapter 1: A History of Sentencing in the United States

The United States leads the world in incarceration, locking up its residents at a rate more than six times that of the average of comparable countries worldwide.[22] If the country used incarceration at the same rate as the rest of the world, instead of the current nearly 2 million people in prison and jail, we would have fewer than 350,000 people behind bars.[23]

Those lives disproportionately belong to Black and Latino people and those experiencing poverty. Black and Latino people make up 58 percent of the U.S. prison population, but just 31 percent of the overall population.[24] Among those serving life and virtual life sentences—sentences of 50 years or more—nearly half are Black and another 16 percent are Latino.[25]

How did we get here? To understand how the United States became the most incarcerated nation in the world, it is critical to understand the role that sentencing—and the use of various rationales underlying it (retribution, incapacitation, deterrence, and rehabilitation)—played in the onset not only in justifying the use of incarceration as a response to unlawful behavior over the years, but also in a two-tiered system of "justice" that has punished some people excessively while veering toward leniency and rehabilitation for others. Beginning in the 1970s, however, with the advent of the "War on Drugs" and "tough-on-crime" rhetoric, a more uniformly punitive rationale emerged and calls for retribution, broad application of incapacitation, and deterrence drove sentencing policy toward excessively long and punishing prison sentences across the board—although the repercussions for Black and Latino people were far greater in terms of loss of life, human capital, and impact on families and communities. A look at the history of how this pattern emerged is critical to understanding the policy and philosophical changes needed to forge a different path for anyone facing sentencing going forward.

Origin and description of sentencing theories

Traditionally, sentencing has had four purposes:

- **retribution** treats the sentence as a punishment for wrongdoing in order to right the moral affront of the harmful action;
- **incapacitation** removes people who have shown themselves capable of committing harm from the community to prevent future harm;
- **deterrence** is the notion that the state can, in sentencing one person, set an example so that someone else chooses not to commit the same crime ("general deterrence") or that the same person originally sentenced chooses to avoid further unlawful behavior ("specific deterrence"); and
- **rehabilitation** sees the sentence as an opportunity for people to unlearn old behaviors and learn new ways of thinking and acting that make them less likely to cause further harm.[a]

These purposes have philosophical roots at least as old as the practice of incarceration, but for the founders of the United States they would have been familiar as the work of 18th century political philosophers Immanuel Kant and Jeremy Bentham.

Kant and his followers, referred to in this context as retributivists or retributionists, focused on the punitive power of the state.[b] This goal, focused solely on the person who committed the act, is also called retribution, or "just deserts." It is fundamentally backward-focused, looking at the crime and seeking to "balance" it by punishment.[c] In contrast, the theory of utilitarianism (also called consequentialism) advanced by competing philosopher Bentham drew on the earlier work of Cesare Beccaria to argue that the purpose of consequences ought to be the prevention of future crime.[d]

Both retributionists and utilitarians acknowledge in theory, if not in practice, that sentences should be constrained by two principles:

- **proportionality**—the notion that sentences should be set in proportion to the severity of the crime and the blameworthiness of the person sentenced,[e] and
- **parsimony**—the notion that sentences should err on the side of the smallest amount of constraint needed to effect the purposes of sentencing.[f]

a See generally Nora Demleitner, Douglas Berman, Marc Miller, and Ronald Wright, *Sentencing Law and Policy: Cases, Statutes, and Guidelines (4th ed.)* (New York: Wolters Kluwer, 2018), 2, 13–18. See for example Mont. Code Ann. § 46-18-101 (2) "The correctional and sentencing policy of the state of Montana is to: (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable; (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders; (c) provide restitution, reparation, and restoration to the victim of the offense; and (d) encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community."

b Kant advocated strongly for a retributive theory of punishment and held that the punishment should be, as closely as possible, matched to the victim's loss, including the use of the death penalty for murder. For Kant, the only justification for punishment was the guilt for having committed a specific crime; deterrent effects are incidental at best for this philosophy and should never be the primary means for designing a punishment. Frederick Rauscher, "Kant's Social and Political Philosophy," in *Stanford Encyclopedia of Philosophy,* edited by Edward N. Zalta (Stanford, CA: Stanford University, 2017), https://perma.cc/F6NX-FLNH.

c So committed was Kant to this principle that he wrote, "Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in his public violation of justice." *Metaphysics of Morals* (Der Metaphysik der Sitten) (1797).

d Jeremy Bentham, *An Introduction to Principles of Morals and Legislation* (London: Athlone, 1970 [1789]); and Demleitner, Berman, Miller, et al., *Sentencing Law and Policy,* 2018, 2. Cesare Beccaria, known as the "father of criminal justice," introduced the idea of proportionality in punishment, which Jeremy Bentham later expanded on and developed more fully into a treatise on the utilitarian theory of punishment. Beccaria described the purpose for proportionality in *On Crimes and Punishments: "The degree of the punishment, and the consequences of a crime, ought to be so contrived as to have the greatest possible effect on others, with the least possible pain to the delinquent.* If there be any society in which this is not a fundamental principle, it is an unlawful society; for mankind, by their union, originally intended to subject themselves to the least evils possible. . . . It is, then, of the greatest importance that the punishment should succeed the crime as immediately as possible, if we intend that, in the rude minds of the multitude, the seducing picture of the advantage

arising from the crime should instantly awake the attendant idea of punishment" (emphasis in original). Cesare Beccaria, *Of Crimes and Punishments* (Indianapolis, IN: Hackett Pub. Co., 1986), https://perma.cc/WQ58-97E5.

e Model Penal Code: Sentencing § 1.02(2)(2) (American Law Institute, 2017) ("The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system are, (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.")

f For an example of parsimony deployed in in the purpose section of a sentencing code, see 18 USC § 3553(a) "The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2). . . ." For an argument of how the principle of parsimony should be revived to act as a check against the excessive use of state power, including in sentencing, see Daryl Atkinson and Jeremy Travis, *The Power of Parsimony* (New York: Square One Project, 2021), https://perma.cc/28CG-CC6A.

The Colonial era: Developing theories of sentencing

Sentencing theories among the colonies were as varied as the settlers themselves and are still reflected in state laws, but besides flogging, corporal, and even capital punishment, incarceration was always an option.[26]

Virginia was the first state to enact "slave code" legislation, the forerunner of what would become Jim Crow laws and Ferguson, Missouri's "manner of walking in the roadway" ordinance that remained in place until 2016.[27] These laws created strict divisions of punishment along racial lines and were replicated throughout much of what would become the South.[28] The harsh punishments fell firmly into the deterrent and retributivist theories of sentencing, and even when laws were applied to all races, the punishments frequently differed depending on the race of both the person who committed the act and the person harmed.[29]

The early 19th century: The Enlightenment and early reforms

As Enlightenment ideals about humanitarianism and justice changed the approach to punishment in the United States, the theory of rehabilitation in sentencing gained new focus. Enlightenment reformers advanced two theories: wrongful behavior was driven by social surroundings and instability, and overly harsh punishment as a response to crime undermined the perceived legitimacy of the law.[30] To these reformers, rehabilitation did not mean what we consider it to encompass today. A sentence to "rehabilitative" incarceration meant enforced solitude and discipline so that "deviants" could reflect and grow from their mistakes.[31] This led to increased reliance on incarceration and decreased use of corporal punishment—at least as far as white people, those considered "nonwhite" in the era but not subject to chattel slavery, and free Black people were concerned.

In addition to imposed isolation, another core aspect of "rehabilitation" in this era was hard labor, military-like routine and regimentation, and corporal punishment.[32] Through this combination of isolation and forced industry, incarcerated people were thought to have been given an opportunity to redeem themselves and return to society.

The Civil War, Reconstruction, and the rise of Jim Crow

As the nation struggled to reconstitute itself after four years of civil war, it began with a reckoning of the fundamental changes to the Constitution. Notably, the 13th Amendment ensured that slavery and involuntary servitude did not end with the war, but could continue as "a punishment for crime whereof the party shall have been duly convicted," leading to the use of convict leasing and forced labor.[33] By 1870, the rate of imprisonment across all states had more than doubled, as the nation took some of its first deliberate steps to incarcerate Black people at rates disproportionate to their share of the population.[34]

During this period, Northern states were reexamining crime and social disorder in light of the unfulfilled promises of the system of isolated incarceration as a means of rehabilitation.[35] Under this scrutiny, the rehabilitative methods shifted from isolation and discipline to "treatment."[36] With this change came one of the lasting innovations in modern-day sentencing—indeterminate sentences, or prison terms without a definite duration in which release is determined by an observer such as a judge or parole board based on the person's participation in treatment and resulting rehabilitation.[37] In theory, motivated people could earn their release more quickly than otherwise; in practice, the decision was largely at the whim of the parole board, and lengthy sentences could result.[38]

Meanwhile, the South was building prisons and passing laws known as "Black Codes" harking back to Colonial-era laws—vague legislation that outlawed common behaviors and could be unevenly enforced against newly freed Black people.[39] The South was firmly in the retributive camp of sentencing rationales, at least when it came to punishing Black people. By the 1870s, 95 percent of people incarcerated in the South were Black.[40] By 1890, Black people—while making up 12 percent of the nation's population—made up 30 percent of its incarcerated population, a statistic that that has remained more or less stable to this day, when Black people make up 13 percent of the population but 33 percent of people in state and federal prisons.[41]

In the North, although legislatures did not pass Black Codes, deep-seated racism and a belief that Black people were inherently inferior or criminal produced their own version of racial disparity in sentencing, as evidenced in prison system statistics.[42] From the 1890s through the 1950s, Black people received harsher and longer sentences than white people.[43] Although the data overall is scant, there are some telling examples. In 1923, a nationwide study found that Black children were more than twice as likely as white children to be sentenced to correctional facilities.[44]

The 20th century, the Civil Rights era, and "tough-on-crime" politics

By the early 20th century, social constructions of race were shifting, and both sentencing policy and prison conditions made it starkly clear who was—and was not—included in the category of whiteness, with its access

to shorter sentences and more rehabilitative conditions of incarceration. As European immigrant groups such as the Irish, Italians, and Polish were absorbed into the white racial category, the white public became increasingly concerned about the conditions they endured in prison. A new era of reform emerged, and rehabilitation took on a more active meaning in practice. Prisons began to offer more recreation, visitation, and communication with the outside world, as well as education and vocational training.[45] But the new programs weren't intended to rehabilitate everyone in prison: in practice, they were reserved for people believed to be capable of redemption—by and large white people.[46]

Despite a brief spike in crime in the 1920s, crime rates had remained largely stable through the first half of the century. That changed in 1961, when they began to rise and continued that trend for two decades, peaking in 1980.[47] Violent crime alone increased by 126 percent from 1960 to 1970, and by another 64 percent from 1970 to 1980.[48] Those numbers, compounded by increasingly salacious and race-baiting stories about crime on the nightly news, fueled fearmongering and calls for harsher and more swift punishment.[49]

The nation had already flirted with replacing indeterminate with determinate sentencing in the 1950s through the federal Boggs Act, which set mandatory minimum sentences for certain drug convictions.[50] President Lyndon B. Johnson laid the foundation for the federal government's involvement in "tough-on-crime" policies when he presented the Law Enforcement Assistance Act to Congress on March 8, 1965.[51] He also oversaw a massive increase in federal block grants to expand law enforcement agencies across the country as part of his Great Society program and the beginning of the "War on Crime."[52]

Nixon won the presidential election in 1968 on a campaign rife with racially coded appeals to white voters—that greater investments in welfare and social programs did not reduce crime.[53] This fearmongering solidified consensus that there was only one way to tackle rising crime rates—to get "tough on crime." Nixon carefully crafted his messaging to implicate—although never explicitly—Black Americans in the rising crime rate.[54] But Nixon's presidency was a mixed bag of policies, and he had already repealed most mandatory minimum sentences in the Drug Abuse Prevention and Control Act of 1970.[55] Still, his speech declaring drugs as "public enemy number one" in 1971 is often credited with starting the War on Drugs, which would lead to the incarceration of thousands.[56]

As the focus of policing and crime control turned from prevention and rehabilitation (at least rhetorically) to retribution and incapacitation, the call for determinate sentences to ensure that people were punished *enough* became louder. Sentencing from the 1960s through the mid-1990s took a sharp turn to the "tough-on-crime" rhetoric of retribution, deterrence, and overuse of incapacitation that still underscores our sentencing practices today.[57] Legislators passed "tough-on-crime" policies in a social and political moment when crime rates were rapidly increasing across the country.[58] Presidents Ronald Reagan and Bill Clinton presided over

the largest expansion of the carceral system via a series of "tough-on-crime" laws, from the Anti-Drug Abuse Act of 1986 to the now infamous 1994 Crime Bill.[59] These laws were race-neutral on their faces but racially coded and biased in effect. For example, the Anti-Drug Abuse Act of 1988 established a minimum five-year sentence without parole for possession of five grams of crack cocaine—or 500 grams of powder cocaine.[60] This arbitrary discrepancy was not rooted in science—the physiological and psychoactive effects of crack and powder cocaine are virtually identical—yet the intent was clearly to target Black people charged with drug crimes far more harshly than whites, given the misperception that crack cocaine was consumed primarily by Black users.[61] These race-baiting tropes and dog whistle language were ubiquitous in the press and in political speeches, with phrases like "welfare queen," "superpredator," "inner city," and "drug user" linked to Black and Latino people, criminality, and violence.[62]

Homicides peaked at an average of 9.8 deaths per 100,000 residents nationwide in 1991, while the rate in some cities and states was much higher.[63] But by the mid-1990s, crime rates—especially for violent crimes—were in steady decline.[64] However, even as the country became safer overall, a strong majority of people believed crime was increasing—to this day, public perception about crime is out of sync with actual crime rates.[65] This incorrect perception has time and time again been leveraged to call for harsher punishment and more incarceration—to deliver more purported safety to a select subset of U.S. communities that are predominantly white and wealthy despite the fact that violence most severely impacts neighborhoods of color and those experiencing income instability.[66] It was in this political environment that Clinton signed the 1994 Violent Crime Control and Enforcement Act (the 1994 Crime Bill) into law, ushering in an array of overly punitive sentencing legislation in the federal system and spurring similar legislation in the states by incentivizing them with billions of dollars to expand policing and build prisons.[67] The U.S. incarceration rate more than *tripled* from 1971 to 1999—from 161 people incarcerated in jails and prisons per 100,000 population to 682 people incarcerated per 100,000.[68]

As the end of the 20th century neared, states and the federal government rapidly passed sentencing laws and policies that fueled mass incarceration. (For a list of major sentencing legislation, see Appendix A on page 55.) They fell into four main categories—mandatory minimums, "truth in sentencing," new and longer enhancements based on prior criminal convictions (such as "three-strikes" laws and other "habitual offender" laws), and laws that restricted parole release, such as life without parole (LWOP) sentences.[69]

These four types of sentencing laws had an immediate and dramatic impact on the landscape of the criminal legal system. For one, mandatory minimums drastically influenced prosecutors' charging decisions.[70] Suddenly they had much more power and could grant a stark choice to those being charged: take this plea deal (which is a longer sentence than what you would have faced had the mandatory minimums not existed) or risk the mandatory minimum of 15 years for a first offense of simple possession of marijuana if convicted after trial.[71]

More than 40 states passed "truth in sentencing" policies from 1984 to 1999, under which people convicted of offenses characterized as violent were required to serve at least 85 percent of their prison terms.[72] In some states, this more than *doubled* people's expected time in prison.[73] Eighty percent of states had a version of a three-strikes law, and 60 percent had a version of a two-strikes law, which required increasingly severe sentences—even life sentences—for repeat offenses; as with mandatory minimums, these laws could be used to drive harsher plea bargains.[74] But punitiveness reached its zenith in life without parole sentences. All states but Alaska now permit life-without-parole sentencing, and 37 of them permit it for crimes short of homicide, usually as part of enhanced sentencing for prior convictions.[75] Five states require *all* life sentences to be actual life—with no possibility of parole.[76] People serving LWOP sentences continue to grow as a percentage of people in prison, rising from 2 percent in 2008 to 4 percent in 2019, as the prison population dropped from its peak of 2008 while people sentenced to these draconian sentences remained in prison.[77] (For more information on these policies, see Appendix A on page 55.)

Mass incarceration, the caging of approximately 2 million people in U.S. jails and prisons today, is the direct result of these policy changes.[78] They led to bloated prison populations, longer sentences, and disproportionate numbers of Black people incarcerated.[79] Today, there are more people in prison serving life sentences (203,865 people) than there were people serving *any* prison sentence in 1970 (197,245 people).[80]

The 21st century: An age of reforms?

There has been increasing recognition since the late 1990s that the "tough-on-crime" approach to crime prevention and public safety is at the very least fiscally—if not morally—troubling, and that the United States's position as the world's most incarcerated nation is an incongruous label for the so-called land of the free. There have been bipartisan efforts to address mass incarceration through sentencing reform; however, those attempts have been sporadic and piecemeal and lack a comprehensive and strategic vision. Some high-profile—but incomplete sentencing reforms in the past two decades have included:

There have been bipartisan efforts to address mass incarceration through sentencing reform; however, those attempts have been sporadic and piecemeal and lack a comprehensive and strategic vision.

- **2003:** Michigan's elimination of mandatory minimums for most drug convictions, following an earlier elimination of life without parole for possessing or distributing 650 grams of cocaine or heroin.[81]
- **2009:** New York's reform of its draconian Rockefeller Drug Laws (see "Case studies: Prison releases as a result of sentencing changes and administrative decisions that did not impact public safety" on page 27).[82]

- **2010:** The federal Fair Sentencing Act of 2010, which decreased the disparity in sentencing for crack cocaine and powdered cocaine from 100:1 to 18:1. However, this reform applied only *prospectively,* not retroactively.[83]

- **2011:** California's Proposition 36, which adjusted the state's three-strikes law to remove the possibility of a life sentence for a third felony conviction that is neither violent nor serious.[84]

- **2014:** California's Proposition 47, which reclassified certain theft and drug possession offenses from felonies to misdemeanors and allowed for resentencing for people imprisoned under the old classifications.[85]

- **2018:** The federal First Step Act, which, among other things, changed mandatory minimum life sentences for third-strike drug offenses to mandatory minimums of 25 years and made the 2010 Fair Sentencing Act's crack-to-powder cocaine sentencing disparity reduction retroactive.[86]

- **2020:** Washington, DC's "Second Look Amendment Act," which gave people who were convicted of serious offenses before the age of 25 and who have served at least 15 years in prison the opportunity to apply for resentencing.[87]

Since 2010, the federal government has also funded the Justice Reinvestment Initiative (JRI), in which states examine the drivers of their prison populations to reduce prison incarceration and reinvest in solutions that lower recidivism rates.[88] Although JRI has led to at least 18 states adopting various sentencing reforms like reclassifying felonies to misdemeanors, giving judges discretion to apply "safety valves" if someone is faced with a mandatory minimum drug conviction, and creating or expanding alternatives to incarceration like presumptive probation for limited offenses, overall, its impact on reducing prison populations has been limited at best.[89] JRI's consensus-driven model, under which reforms do not pass unless all parties—including bipartisan groups of legislators, court system actors, and others—are on board, means that the changes are tethered to which system actors deeply invested in existing sentencing paradigms are willing to make.[90]

These reforms also have not significantly reduced racial disparities. Today, Black people are more than twice as likely to be arrested and 5.1 times as likely to be sentenced to prison than white people.[91] Although this rate has decreased from its peak, when it was 8.3 times more likely, it has not decreased nearly enough.[92] This disparate impact extends to other racial and ethnic groups—today, Latino people are 2.5 times more likely than white people to be sentenced to prison.[93] And this drop in disparity does not necessarily signal true reform: the proportional as well as actual number of white people in prison is climbing, but more incarceration, even if it reduces disparities, is not the answer to the inequities of the system.[94]