

How has Covid Impacted the Call for Reform for the Criminal Justice System?

Olivia Sinkoff¹⁴⁹

Since 2002, the United States has held the highest incarceration rate in the world.¹⁵⁰ Today, there are around two million people incarcerated in U.S. state and federal prison, local jails, and non-voluntary mental health facilities— many of whom have yet to be convicted. There are 445,000 people in local jails and another 88,000 in federal prisons who are detained before their trial because they cannot afford bail payment.¹⁵¹ The detainment rate increased exponentially between 1980 and 1996, primarily as a result of the War on Drugs which was a government initiative started by President Nixon to dissuade drug abuse. Nixon increased federal financial support for drug-control agencies and implemented rigid laws and punishments for drug offenders.¹⁵² Critics of the War on Drugs have pointed out that it has disproportionately affected people of color – the increase in incarceration rates for Black Americans and Hispanics during the seventeen years the policy was active was one and a half times and three times respectively, higher than the increase for white Americans. The larger increase in incarceration rates for minorities is evidence of systemic racism in the criminal justice system, which has prompted numerous calls for reform. Advocacy for reform was amplified in May 2020, following the murder of George Floyd and as the COVID-19 pandemic placed heavy burdens on the criminal justice system. During this period, the Defund the

¹⁴⁹ Brandeis University Undergraduate, Class of 2023.

¹⁵⁰ Wagner and Sawyer, “Mass Incarceration.”

¹⁵¹ Wagner and Sawyer, “Mass Incarceration.”

¹⁵² History.com Editors, “War on Drugs,” 2017.



Police movement assumed the mantle for criminal justice reform. The criminal justice system tried to prevent the spread of the virus by releasing thousands of inmates early.¹⁵³ Less than 0.2 percent of those inmates released have committed new crimes, pushing the question of the integrity of the United States' system of incarceration to the forefront of social justice concerns.

The United States has the highest incarceration rate and most prisoners in the world.¹⁵⁴ Due to the policies implemented during the War on Drugs, the incarceration rate in the U.S. skyrocketed in the latter part of the twentieth century, which has disproportionately affected communities of color.¹⁵⁵ In 2020, the Coronavirus pandemic compounded problems by straining and highlighting weaknesses in the criminal justice system. The criminal justice system faced both internal and external pressures – from activist movements opposing law enforcement practices to prisons acting as virus super-spreader locations requiring urgent attention.¹⁵⁶ 2020 was a period of reinvigorated social activism calling for police accountability, the end of racial disparities in the criminal justice system, and creating alternative community safety options to policing; all of these discussions coincided with the Black Live Matter movement, which highlighted systemic racism, discrimination, and inequality faced by black Americans. The result was adaptations in how the United States approached criminal justice, which included reducing low-level arrests, putting aside traffic enforcement, emphasizing diversion programs, and

¹⁵³ Gill, “Opinion | Thousands Were Released from Prison during Covid,” 2022.

¹⁵⁴ Statista Research Department, “Ranking,” 2022.

¹⁵⁵ Blumstein and Beck, “Population Growth in U.S. Prisons, 1980-1996,” 1999, 21.

¹⁵⁶ Wagner and Sawyer, “Mass Incarceration.”



releasing prisoners early.¹⁵⁷ It also raised awareness of racial inequality and discrimination in the criminal justice system.

The United States has the highest incarceration rates primarily due to pretrial detention policies that place burdens on poorer communities. Incarcerated individuals are in jails and prisons; jails, which run at county level, are primarily for short term sentences and where people held pending conviction, while prisons, which are run either at the federal or state level, are for long term sentences after conviction. About sixty-seven percent of detainees in jails are not yet convicted, and most are held due to their inability to pay bail. In 2015, the median income for pre-trial detainees was \$15,598 compared to median annual income of those released, \$39,600.¹⁵⁸ At any given time, there are about two million people in federal and state prison, juvenile corrections facilities, immigrant detention centers, military prisons, and psychiatric facilities.¹⁵⁹ All together, these figures constitute an incarceration rate of 639 per 100,000 of the national population. El Salvador follows the United States with the second highest incarceration rate of 562 per 100,000 of the population.¹⁶⁰ More than half of incarcerated people in the United States in 2022 – about 1.04 million – are in state prisons, with the majority of prisoners sentenced for violent crimes. The next largest group of 547,000 is those held in local jails, 80 percent of whom have not yet been convicted due to the lack of resources poorer communities have to post bail.¹⁶¹

Between 1980 and 1996, mass incarceration rates in the United States increased by 200 percent. This dramatic rise was primarily composed of drug offenses, but was compounded by

¹⁵⁷ Jackson, “Criminal Justice in the Pandemic Era and Beyond,” 2021.

¹⁵⁸ Wagner and Sawyer, “Mass Incarceration.”

¹⁵⁹ Wagner and Sawyer, “Mass Incarceration.”

¹⁶⁰ Statista Research Department, “Ranking,” 2022.

¹⁶¹ Wagner and Sawyer, “Mass Incarceration.”



an increase in arrests and commitment rates.¹⁶² In 1973, Cohen and Blumstein described the stability of the early 1970s incarceration system in their “theory of the stability of punishment.” They argued that a nation’s stable incarceration rate rests upon the economic and political pressures of an incarceration rate that is unmanageable with the tolerance of certain crimes. In other words, as crime increases, societies adapt their regard toward certain crimes and whether offenders should be incarcerated. If crime decreases, then offenders of more marginal crimes, or low-level offenses, will tend to be incarcerated at a higher rate.¹⁶³ After the 1970s, incarceration rates increased steadily.¹⁶⁴

The War on Drugs influenced the shift in focus of the criminal justice system to drug offenses. Drug use has been present in the United States since the beginning, but Nixon’s declaration of the War on Drugs criminalized drug use on a massive scale. In 1970, the Controlled Substances Act, which regulated specific drugs and classified them in degrees of “dangerousness”, was ratified. The following year, Nixon officially classified drugs as “public enemy number one.” The DEA was created in 1973 and had the sole purpose to rid illegal drug smuggling and use. Under President Reagan, the “Say No to Drugs” campaign resulted in mandatory prison sentences for illegal drug use.¹⁶⁵ Between 1980 and 1996, drug offenders grew from the lowest number in the prison population to the highest, growing from 15 prisoners per 100,000 adults to 148 prisoners per 100,000 adults.¹⁶⁶ Critics

¹⁶² Blumstein and Beck, “Population Growth in U.S. Prisons, 1980-1996,” 1999, 17.

¹⁶³ Blumstein and Beck, “Population Growth in U.S. Prisons, 1980-1996,” 1999, 18.

¹⁶⁴ Blumstein and Beck, “Population Growth in U.S. Prisons, 1980-1996,” 1999, 21.

¹⁶⁵ History.com Editors, “War on Drugs,” 2017.

¹⁶⁶ Blumstein and Beck, “Population Growth in U.S. Prisons, 1980-1996,” 1999, 21.



emphasize the racist implications of the established practices set by the widespread criminalization of drug use. For example, the Anti-Drug Abuse Act gave longer prison sentences for using crack than using the powder form of cocaine – it took 100 times more cocaine than crack to have the prison sentence time to be the same. This increased incarceration amongst the black American community, where crack was more popular than among white Americans who preferred cocaine. Not only was race heavily influential in the sentence times allocated due to the disparity between the type of drug use among different racial communities, minority communities were also targeted more heavily than white Americans. The War on Drugs caused the disruption of minority and poor communities.¹⁶⁷

It is well established that the penal system disproportionately affects minority communities. During the sixteen year period, incarceration rates for Black Americans and Hispanics increased by 261 percent and 554 percent, respectively, compared to 185 percent for white Americans.¹⁶⁸ Arrests, convictions, and sentence times have increased for various crimes including: murder, sexual assault, robbery, and drug offenses in the latter part of the twentieth century. Sentence time also includes time spent in recommitments due to parole violations, which have also escalated. Parole boards became more reluctant to release inmates when they first became eligible for parole and became stricter with violations, even technical ones, such as a violation of a condition for a person's release. An example of a parole condition would be the banning of drug or alcohol use. The Parole boards have a direct impact on incarceration numbers depending on how strict or lenient they are with recommitting based on parole violations and how long they take to release prisoners. During the sixteen year period, drug use violations grew by a larger

¹⁶⁷ History.com Editors, "War on Drugs," 2017.

¹⁶⁸ Blumstein and Beck, "Population Growth in U.S. Prisons, 1980-1996," 1999, 22.



percentage than other offenses leading to more drug-related commitments.¹⁶⁹

Prior to 2020, there were persistent calls to reform the criminal justice system, particularly in regard to the increasing number of inmates cycling through the prison system. Both the public and experts have challenged the responsibilities that the justice system is expected to perform, such as substance abuse control, neighborhood conflict resolution, and handling mental health emergencies; these burdens result in more people incarcerated rather than given proper help, such as mentally ill patients going to jail instead of a hospital.¹⁷⁰ For example, in Albuquerque in June 2020, Mayor Tim Keller announced an initiative for the Albuquerque Community Safety Department which would be a branch of responders composed of civilians for non-violent situations that could be called instead of the police.¹⁷¹ This taxing set of tasks was exacerbated during the COVID-19 pandemic when law enforcement was given the additional responsibilities that came with the onset of the pandemic such as enforcing mask mandates. The pandemic fundamentally altered and strengthened the connection between public health and criminal justice and prompted additional questioning of how the United States addresses criminal justice.¹⁷² The spread of COVID-19 raised issues about public health, and increased the politicization of many topics including law enforcement.¹⁷³

¹⁶⁹ Blumstein and Beck, “Population Growth in U.S. Prisons, 1980-1996,” 1999, 37.

¹⁷⁰ Jackson, et al, “How the Criminal Justice System's COVID-19 Response Has Provided Valuable Lessons for Broader Reform,” 2021, 2.

¹⁷¹ Parsons, Lo, Pearl, and Figgatt, “5 Discussions That Shaped the Justice Reform Movement in 2020,” 2022.

¹⁷² Jackson, et al, “How the Criminal Justice System's COVID-19 Response Has Provided Valuable Lessons for Broader Reform,” 2021, 2.

¹⁷³ Jackson, et al, “How the Criminal Justice System's COVID-19 Response Has Provided Valuable Lessons for Broader Reform,” 2021, 4.



In the early phases of the pandemic, police were ordered to shut down events where guests were not wearing masks, further emphasizing the link between public health and criminal justice. The year 2020 was a period of reawakening for many criminal justice reform movements. It was the year that George Floyd was murdered by police in Minneapolis, an event which sparked massive protests nationwide and demanded tangible change to how the police function and interact with the public.¹⁷⁴ During this time, the main demands raised were: an investment into alternative safety methods to policing, an accountability of the police, the end of unjust punishments, eliminating obstacles for people impacted by the justice system and finally, removing racial disparities in the criminal justice system. Changes came in the form of new state campaigns and laws. For example, in regard to removing barriers for convicts, California ratified a constitutional amendment to reinstate the right to vote for parolees who were convicted for felonies in November. That same month, Philadelphia, in an effort to remove racial bias, passed a ballot to include charter language to stop the unconstitutional stop-and-frisk practices of the police that disproportionately affect minority communities.¹⁷⁵ The national unrest among activists and the public further fueled a movement called “defund the police.” This movement grew parallel to the Black Lives Matter movement since many of the calls for reform to the criminal justice system were based on racial disparities that resulted in police killings of primarily black Americans, such as George Floyd. This phrase has become heavily divisive, with Republicans arguing that Democrats want the entire removal of law enforcement from the streets. Democrats, on the other hand, believe the current law enforcement policies

¹⁷⁴ Jackson, et al, “How the Criminal Justice System's COVID-19 Response Has Provided Valuable Lessons for Broader Reform,” 2021, 4.

¹⁷⁵ Parsons, Lo, Pearl, and Figgatt, “5 Discussions That Shaped the Justice Reform Movement in 2020,” 2022.



that the majority of Republicans favor are riddled with lack of accountability of police and racial bias. In regard to the “defund the police” movement, in reality, many activists view “defund” as reallocation. Activists are primarily concerned with systemic racism within law enforcement, over-policing, and gun violence. Some activists believe there needs to be a “reinvestment in our underfunded systems,” such as social services.¹⁷⁶ Today, the “defund the police” movement has been pushed to the back of America's minds. In 2021, a poll by Pew Research Center found that the percentage of Americans who supported budget cuts on law enforcement fell from 25 to 15 percent from 2020 to 2021. It also highlighted a discrepancy between racial groups; 23 percent of Black Americans supported the movement in comparison to 13 percent and 16 percent of white and Hispanic Americans, respectively.¹⁷⁷

I. The Pandemic's Toll on the Prison System

Within the first year of the COVID-19 pandemic, the United States saw a 15% decrease in prison population and a 25% decrease in jail populations. This was due to a reduction of the incarceration of prisoners rather than an increase in the prisoner releases. In fact, there was a 40% decrease in prison admissions, which subsequently created an extensive backlog in court cases and prison transfers. Federal and state facilities did little to prevent the spread of covid among the inmates in large numbers. For example, with few exceptions, the justice system failed to release detainees awaiting trials. Further, inmates who were qualified for parole were not released to empty prison populations in order to prevent the spread of the virus. The lack of action resulted in unnecessary numbers of illness and death in crowded prisons.¹⁷⁸

¹⁷⁶ Bates, “Defund the Police Movement,” 2021.

¹⁷⁷ Blow, “Defund the Police' Is Dead,” 2021.

¹⁷⁸ Wagner and Sawyer, “Mass Incarceration.”



The pandemic forced the justice system to adapt, particularly the prison system, since the crowded nature of it had the potential to spread COVID-19 quickly. In March 2020, the Justice Department ordered the release of more than 11,000 federal prisoners to serve their sentence in home confinement. Out of that 11,000, only 17, or 0.15%, were reported by the Bureau of Prisons (BOP) to have committed crimes after release.¹⁷⁹ According to Washington Post author Molly Gill, this low recidivism rate, the proclivity of a former inmate to reoffend and relapse into criminal behavior, is a sign that many more similar prisoners from low-security prisons can be released. However, the candidates for release were highly evaluated. The 11,000 prisoners were all in low-level security prisons or at high risk to infection, and were given priority for release. The only incarcerated group that were not even considered for release was for those convicted of sex crimes. Others were considered individually, evaluating their conduct, prison record, and risk to the public community. Another condition for release was that the inmates had somewhere to go with supervision and support. The Cares Act raised awareness that sentence times were often too lengthy. It focused on the release of two groups, both of which, statistically, present very little risk, or none at all. They included the elderly, who according to data have a lower recidivism rate as they get older, and the chronically ill and physically disabled who are not dangerous but expensive to care for with tax money. The success of the Cares Act in thoughtfully releasing low-threat individuals highlights a potential solution to an overburdened prison system with relatively low negative impacts and large financial benefits.¹⁸⁰ By August 2022, the BOP reported that 442 people who were released during Covid were back in

¹⁷⁹ Gill, “Opinion | Thousands Were Released from Prison during Covid,” 2022.

¹⁸⁰ Gill, “Opinion | Thousands Were Released from Prison during Covid,” 2022.



prison despite only seventeen of them actually committing new crimes.¹⁸¹ At least 230 of those sent back to jail were sent back on a drug or alcohol related infraction. Others were sent back because of a technicality, or noncriminal violations of probation, which could have been as minor as not picking up the phone when a probation officer calls.¹⁸²

While alcohol or drug infractions, or the inability to pick up a parole officer's call in time, may warrant a case review on the parolee's release, it should be questioned whether parolees should be simply sent back to prison based on, oftentimes, small technicalities. Is it a waste of resources to send former inmates back to state and federal prisons because of such a small infraction that poses very little danger to society? Reincarceration may be too severe of a punishment for a simple missed call, especially considering how taxing and costly keeping inmates is in the prison system. About 18% of the inmate population in local jails are incarcerated for a parole violation, and in some counties the number is up to a third. In 2019, 25% of state prisoners had been reincarcerated due to supervision infractions.¹⁸³ This data shows that the US prison system is following its pre-pandemic mindset in regard to incarceration. As a result, the prison population is steadily making its way back to pre-pandemic levels.¹⁸⁴

The prison population was the lowest during the pandemic due to a significant decline in admissions, rather than large releases of inmates. Admissions in jails and prisons, locally and state level, were due to the deferment of cases and some policy change. There was a 33% decrease in prison population during 2020. Policy changes included issuing citations instead of arresting, or choosing not to prosecute people for low-level, or non-violent, crimes, and reducing bail

¹⁸¹ Johnson, "Released during COVID," 2022.

¹⁸² Johnson, "Released during COVID," 2022.

¹⁸³ Wagner and Sawyer, "Mass Incarceration."

¹⁸⁴ Wagner and Sawyer, "Mass Incarceration."



costs. For example, Philadelphia discontinued arrests and released more people charged for low-level crimes. With the end of the pandemic, the courts have finally been able to catch up with the cases it had set aside. In addition, cities like Philadelphia have resumed making property crime arrests, discarding pandemic reforms, fueling the re-population of jails and prisons.¹⁸⁵

II. Conclusion

The pandemic resulted in increased calls for reform within the criminal justice system in regard to the overcrowding of prisons and the allocation of resources within law enforcement. At the same time, it provided the environment to experiment with different approaches to the prison system. Police deferred arrests or simply issued citations instead. 2020 was filled with massive social demonstrations and tangible change to law enforcement policies in an effort to address the “defund the police” and BLM movements. Additionally, many inmates were released early, under the Cares Act after careful consideration of candidates, with an astoundingly low recidivism rate that calls to question if the United States should go back to its pre-pandemic approaches or adapt. Despite the amplified calls for reform and the extraordinary measures taken during the pandemic, state and federal prison systems are showing a trend of returning to pre-2020 incarceration rates and policies. Notwithstanding, COVID-19 still played a vital role in changing people’s mindsets in regard to the criminal justice system because it emphasized many issues, including health and social justice, that were faced by the most vulnerable – communities of color.

¹⁸⁵ Wildra, “State Prisons and Local Jails Appear Indifferent to COVID Outbreaks,” 2022.



Bibliography

- Bates, Josiah. "Defund the Police Movement: Why the Term Has Become Divisive." *Time*, February 23, 2021. <https://time.com/5936408/defund-the-police-definition-movement/>.
- Blow, Charles M. "Defund the Police' Is Dead. Now What?" *The New York Times*. The New York Times, August 31, 2021. <https://www.nytimes.com/2022/08/31/opinion/defund-the-police.html>.
- Blumstein, Alfred, and Allen J. Beck. "Population Growth in U. S. Prisons, 1980-1996." *Crime and Justice* 26 (1999): 17. <http://www.jstor.org/stable/1147683>.
- Gill, Molly. "Opinion | Thousands Were Released from Prison during Covid. The Results Are Shocking." *The Washington Post*. WP Company, September 29, 2022. <https://www.washingtonpost.com/opinions/2022/09/29/prison-release-covid-pandemic-incarceration/>.
- History.com Editors. "War on Drugs." *History.com*. A&E Television Networks, May 31, 2017. <https://www.history.com/topics/crime/the-war-on-drugs>.
- Jackson, Brian A. "Criminal Justice in the Pandemic Era and Beyond." *RAND Corporation*, September 7, 2021. <https://www.rand.org/blog/rand-review/2021/09/criminal-justice-in-the-pandemic-era-and-beyond.html>.
- Jackson, Brian A., Michael J. D. Vermeer, Dulani Woods, Duren Banks, Sean E. Goodison, Joe Russo, Jeremy D. Barnum, Camille Gourdet, Lynn Langton, Michael G. Planty, Shoshana R. Shelton, Siara I. Sitar, and Amanda R. Witwer, "How the Criminal Justice System's COVID-19 Response Has Provided Valuable Lessons for Broader Reform: Looking to the Future." Santa Monica, CA: *RAND Corporation*, 2021.



https://www.rand.org/pubs/research_briefs/RBA108-6.html.

Johnson, Carrie. “Released during COVID, Some People Are Sent Back to Prison with Little or No Warning.” NPR. NPR, August 22, 2022.

<https://www.npr.org/2022/08/22/1118132380/released-during-covid-some-people-are-sent-back-to-prison-with-little-or-no-warn>.

Parsons, Chelsea, Kenny Lo, Betsy Pearl, and Sarah Figgatt. “5 Discussions That Shaped the Justice Reform Movement in 2020.” Center for American Progress, June 9, 2022.

<https://www.americanprogress.org/article/5-discussions-shaped-justice-reform-movement-2020/>.

Statista Research Department, and Aug 5. “Ranking: Most Prisoners per Capita by Country 2021.” Statista, August 5, 2022.

<https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/#:~:text=As%20of%20May%202021%2C%20the,the%20highest%20rate%20of%20incarceration>.

Wagner, P. and Sawyer, W. “Mass Incarceration: The Whole Pie 2022.” Prison Policy Initiative. Accessed September 30, 2022.

<https://www.prisonpolicy.org/reports/pie2022.html#:~:text=Together%2C%20these%20systems%20hold%20a%20most,centers%2C%20state%20psychiatric%20hospitals%2C%20and>.

Wildra, Emily. “State Prisons and Local Jails Appear Indifferent to COVID Outbreaks, Refuse to Depopulate Dangerous Facilities.” Prison Policy Initiative, February 10, 2022.

<https://www.prisonpolicy.org/blog/2022/02/10/february-2022-population/>.

