

TRANSITION 2020–2021

A Federal Agenda for Criminal Justice Reform

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With a foreword by Michael Waldman

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Foreword

The United States' criminal justice system is broken. We have less than 5 percent of the world's population but nearly 25 percent of its prisoners. Mass incarceration has crushing consequences: racial, social, and economic. It reinforces systemic patterns of racial inequity across our society, with vastly unequal treatment at every step. And it is not necessary to keep our communities safe.

Plainly, criminal justice reform must be a core response to the demand for racial justice given voice in the wake of the killings of George Floyd and Breonna Taylor. If we are to make clear as a society that Black lives matter, there must be a new relationship between police and the communities they are charged with serving and protecting. But reform must go far deeper than policing to address the broad reach and overreach of the criminal justice system, its harshly punitive approach, and the need to invest in communities. We must reimagine the justice system. We must finally and fully commit to the vision that safety and equality go together.

For the past decade, in fits and starts, government at all levels has finally begun to grapple with the need for reform. Amid partisan division, it has been a rare area where Republicans and Democrats have worked together. Though most criminal justice policy is set at the state level, the federal government plays an outsize role. In 2018

Congress enacted the First Step Act, meaningful but limited sentencing reform. Far more remains to be done. And the federal government, through its funding of state systems and through the actions of the Justice Department, can help to shift paradigms and move the country away from mass incarceration. Policymakers should aim high.

President-Elect Biden, Vice President Elect Harris, and lawmakers of both parties have a chance to make significant progress. This agenda offers an array of steps that would help transform the criminal justice system. Some of these steps require legislation. Others can be done by the executive branch. This can be a moment of creativity and ferment. This agenda offers a path toward a more perfect union.

Michael Waldman
President
Brennan Center for Justice

Introduction

President-Elect Joe Biden will take office at a critical moment in the country's history. There is a tangible opportunity to reconsider and reimagine how, and for whom, the criminal justice system operates. The protests for racial justice that emerged in the summer of 2020 after the killings of George Floyd, Breonna Taylor, and so many others have intensified the demands for system and culture change, opening up political space for reform.¹

The crisis of overcriminalization and an excessive reliance on punitive enforcement feed the problem of mass incarceration. Although local jails and state prisons account for 91 percent of the nation's incarcerated population, the federal government can lead the way.² The facts are well known: 2.2 million people are behind bars; more than 9 million people cycle in and out of the nation's colossal network of local jails; more than 4.5 million people are on probation or parole; and more than 70 million people have conviction histories that subject them to lifelong consequences to their lives and livelihoods.³ In addition, about 40 percent of people in prison are incarcerated with little public safety justification.⁴ In fact, over the last decade, 34 states have reduced both imprisonment *and* crime rates, proving that less incarceration does not necessarily lead to unsafe communities.⁵

The vast racial disparities of America's justice system compound the unnecessary harms of incarceration. For example, Black people are arrested at a rate more than three times that of white people.⁶ They endure interventionist police practices such as pedestrian and traffic stops, excessive enforcement of minor offenses, and targeted policing.⁷ One out of every three Black men is incarcerated at some point during his lifetime — with all the devastating impacts that result both from a criminal conviction and from time in custody — compared with 1 in 17 white men.⁸ Discrimination on the basis of race and a criminal record can all but disqualify these Black men from housing, education, or employment — and in some places can permanently bar them from voting.⁹

What is to be done?

Congress and the president should commit to significant criminal justice reform as a key early priority. Elements of these reforms can be enacted as part of reconciliation or other budgetary measures. Some can be accomplished by executive action, through a renewed Justice Department, or directly by the president through executive orders. Quick action will show the public that the demands for accountability have been heard. Criminal justice reform will show that those in power understand the urgency of stating, with actions as well as words, that Black lives matter.

By championing national use-of-force standards, strengthening police accountability mechanisms, and supporting community-led public safety strategies, we can begin to redefine how communities interact with the police. And although states have traditionally led on sentencing reform, Congress should learn from their successes and support expansive federal drug law reform to significantly reduce the federal prison population. It can also play a greater role, reimagining incarceration itself by significantly limiting the use of solitary confinement, improving access to education, and enacting comprehensive oversight of federal prisons to ensure that incarcerated people are treated with humanity and dignity.

It is time for the federal government to lead on criminal justice reform. This document provides a blueprint for both Congress and the administration to initiate that transformative change. It outlines an affirmative agenda that would help slash America's high incarceration rate, shrink the wide reach of the justice system, help ensure that people in the system are treated humanely, assist people in rehabilitation and reentry, and reduce racial disparities in the process, all the while keeping the country safe. These solutions are ones for which, in many cases, there is already wide bipartisan consensus. Ending mass incarceration and reforming the American criminal justice system should be a defining legacy of the Biden administration. This report presents one pathway of achieving this goal.

Incentivize States to Reduce Their Prison Populations

- **Enact the Reverse Mass Incarceration Act.** Federal grants help shape criminal justice policy at the state and local levels. For decades these grants have subsidized the growth of incarceration. To reverse that flow, Congress can pass the Reverse Mass Incarceration Act, a bill that has been introduced in two separate congressional sessions. This bill would dedicate \$20 billion over 10 years to states that reduce both crime and incarceration, reshaping state and local policy.

Advance Policing Reform

▪ Champion National Use-of-Force Standards

- > **Place strict limits on permissible police use of deadly and nondeadly force.** Congress should pass legislation that would rein in police use of force. For example, holds that restrict airways should be banned, and less-lethal weapons and techniques of control should be reserved for extraordinary circumstances.
- > **Require all law enforcement agencies to adopt a duty-to-intervene policy.** Congress should promulgate standards requiring officers to intervene when their fellow officers misuse force or engage in misconduct — and to report it to their superiors.
- > **Mandate use-of-force reporting to the federal government.** The Justice Department should build a comprehensive database that is accessible to the public by mandating use-of-force reporting by all law enforcement agencies and making federal support to those agencies conditioned on their compliance.

▪ Strengthen Police Accountability Mechanisms

- > **Amend 18 U.S.C. § 242.** Congress should amend 18 U.S.C. § 242 to lower the burden of proof in cases where civil rights may have been violated, to better equip federal prosecutors to hold law enforcement officers accountable for wrongful acts. The willfulness standard in § 242 should be explicitly lowered to include knowing and reckless civil rights violations, at the same time that the law is amended to more clearly enumerate the types of force that will trigger criminal liability — including, for example, the use of choke holds.
- > **Reinvigorate DOJ pattern-or-practice investigations.** The Justice Department should resume pattern-or-practice investigations that focus on systemic problematic behavior by a police department and should support legislation that would provide subpoena power for such investigations.
- > **Create a national database of police misconduct records and promote a national standard for decertification.** The Justice Department should create a national database of police records and promote national decertification standards. Currently there is no national standard for police training or certification, nor is there a standard process by which someone can lose the privilege of holding the public trust required to enforce laws.

▪ Support Culture Change in Policing

- > **Support community-led public safety strategies and systems to identify and remedy racial inequities in policing practices.** The executive branch should support community-led strategies to identify and remedy inequities in law enforcement. The Department of Justice Bureau of Justice Assistance should provide grants and technical assistance to support the implementation of new police success metrics — ones that go beyond merely tallying arrests and summonses — in order to reflect policies and practices that better align with community-led values and public safety priorities. These metrics may include community engagement, the number of lives kept safe in dangerous police encounters, participation in youth outreach programs, and the successful diversion of people to community-based services.
- > **Promote the creation of co-responder and diversion models.** The next president and Congress should incentivize the creation and scaling of diversion strategies that focus on dealing with the root causes of crime and social disorder, such as mental illness, homelessness, substance use, and poverty. This would ensure that more Americans are diverted from the justice system entirely.
- > **Reinvigorate comprehensive police reform supported by the COPS Office.** The Justice Department should resume previous efforts undertaken by the Collaborative Reform Initiative to encourage and support police reform at the local level — whether to address racial bias, reform use-of-force policies, or improve police departments' relationships with their communities.
- > **Encourage the demilitarization of the police by eliminating the 1033 Program.** To encourage the demilitarization of police, the next administration should eliminate the 1033 Program and prohibit the transfer of all military-grade weapons to state and local law enforcement agencies.

Encourage Best Practices in Prosecution

- **Support federal, state, and local prosecutors to make transformative change.** Prosecutors are among the most powerful officials in the criminal justice system, and they are well positioned to reverse America's over-reliance on incarceration. The new administration should examine how the Justice Department can undo regressive policies that have taken hold in recent years

and reinstate former Attorney General Eric Holder's Smart on Crime Initiative, which directed federal prosecutors to prioritize serious and violent crime over lower-level drug cases. It should also seek to elevate and replicate the efforts of local, state, and national leaders implementing more justice-oriented prosecutorial practices and appoint a diverse slate of U.S. attorneys who are committed to reform.

Advance Sentencing Reform to Reduce the Federal Prison Population

- **Support More Expansive Drug Law Reform**
 - > **Repeal mandatory minimum sentences for drug offenses.** The new administration should encourage Congress to repeal mandatory minimum sentences for drug offenses, returning discretion to judges who are best placed to determine an appropriate sentence based on the circumstances of a particular case.
 - > **Repeal the 18:1 disparity between crack and powder cocaine.** Congress should eliminate sentencing disparities for crack and powder cocaine. These disparities are based on outdated and incorrect understandings of the connection between drug use and other offenses and have had racially disparate impacts that undermine community trust in police.
 - > **No longer use quantity as the primary yardstick in drug sentencing.** Congress should eliminate the weight-driven sentencing scheme for drug offenses and focus instead on the circumstances of the crime and culpability of the accused person.
 - > **Expand alternative sentences, including the existing statutory safety valve.** If Congress maintains mandatory minimum sentencing schemes, it should be encouraged to expand judicial and prosecutorial options to avoid those schemes where appropriate.
 - > **Reduce the number of people currently held in federal prison by making changes retroactive.** Recent reforms that reduce the length of custodial sentences — whether congressional or executive — should be retroactive, to directly and immediately impact the incarcerated population. Those sentenced under old laws should also reap the benefit of a more equitable and reasonable sentencing scheme.

Improve First Step Act Implementation

- **Issue clear guidance for federal prosecutors to encourage full implementation of resentencing provisions.** Prosecutors should not needlessly obstruct applications for sentence reductions under the First Step Act. Any opposition from federal prosecutors should be based on a case-by-case evaluation of the person applying for reductions.
- **Expand and fund rehabilitative programming.** The First Step Act requires evidence-based recidivism reduction programs, but the Federal Bureau of Prisons has failed to ensure that enough programming is available in federal prisons. The next administration must fully fund these programs so that everyone who wants to participate in vocational training, education, and other programs can do so.
- **Fully utilize or expand compassionate release to better respond to the coronavirus pandemic.** The next administration must fully utilize First Step Act compassionate release mechanisms, including by proactively identifying and releasing those who are particularly vulnerable to Covid-19, acknowledging that Covid-19 outbreaks and medical vulnerability are sufficient bases on which to request compassionate release, directing federal prosecutors to stop obstructing meritorious claims, and ensuring release opportunities are provided in a racially equitable manner.
- **Make the amendments that limit § 924(c) stacking retroactive.** The First Step Act amended § 924(c) so that the 25-year additional penalty, applicable to those convicted of crimes of violence or drug trafficking who also used, carried, or possessed a firearm, applied only to those who had a prior, final § 924(c) conviction. Congress should pass legislation making this change retroactive. Alternatively, the next president should categorically commute the sentences of those sentenced before the provision was amended.

Improve Prison Conditions

- **Significantly limit the use of solitary confinement.** Limiting the time and improving the conditions of solitary confinement can reduce harm to individuals and the communities to which they eventually return. Additionally, Congress should incentivize states to minimize harms by tying grant funding to the conditions and extent of solitary confinement.
- **Lift the ban on Pell Grants for incarcerated people.** Ninety-five percent of incarcerated people will return to

their communities. With access to educational opportunities, they will be better prepared to secure and sustain employment after release. Lifting the ban on Pell Grants will allow individuals to seek the education they need to break the cycle of incarceration and poverty.

- **Improve oversight of Bureau of Prisons facilities.** Congress should create an independent oversight body with the broad capacity to monitor and inspect Board of Prisons facilities. This oversight body should have unfettered and confidential access to incarcerated people, staff, and documents and should not be required to give notice before inspection. Findings should be publicly reported.

Restructure and Streamline Executive Clemency Power

- **Establish a permanent and independent clemency review board.** The next president should establish an independent clemency review board to identify both individual cases and categories of people who qualify for clemency. An independent review process will help avoid giving the impression that clemency is meted out as a personal or political favor.
- **Establish clear standards and explain clemency decisions.** Clemency decisions should be guided by clear standards and be publicly transparent. To avoid the perception of arbitrariness, the review board should provide robust written reasoning and explanations for its recommendations and publish an annual report of decisions and other activities.

Help Formerly Incarcerated People Rejoin the Workforce and Community with Clean-Slate Legislation

- **Expand the reach of federal expungement law.** “Clean slate” legislation removes barriers for formerly incarcerated people who want to rejoin the workforce and be contributing members of their communities. Currently the federal system has few ways to protect criminal records, which are then used to deny individuals’ access to employment, education, and housing. Expanding expungement options for people with low-level or victimless crimes will give them more opportunities to thrive in their communities and stay out of prison.

Eliminate the Death Penalty

- **Declare a moratorium on federal executions and enact the Federal Death Penalty Abolition Act.** There is substantial evidence that the death penalty is applied inequitably in the United States and that people sentenced to death suffer in ways that may well violate the constitutional prohibition on cruel and unusual punishment. The next president should immediately declare a moratorium on federal executions and should encourage Congress to enact legislation abolishing the federal and military death penalties and commuting existing death sentences.

Incentivize States to Reduce Their Prison Populations

Washington has a strong track record of using funding incentives to shape state and local policy. In 1984 President Ronald Reagan signed a law requiring states to raise the drinking age to 21.¹⁰ Those that refused would lose up to 10 percent of their federal highway funding. This is just one example of how the federal government has incentivized states to change laws across a broad array of issues.¹¹

Since the 1960s, the federal government has played a central role in shaping the nation's criminal justice landscape through outlays of grant money to states. For decades federal grants encouraged states to increase arrests, prosecutions, and imprisonment. The Omnibus Crime Control and Safe Streets Act of 1968 authorized more than \$400 million for law enforcement across the country to train personnel, increase salaries, and improve equipment and tactics.¹² It was followed and amended by the Anti-Drug Abuse Act of 1986, which mandated minimum sentences for certain types of drug possession and established \$230 million in grants for states that adopted similar sentencing policies.¹³

Less than a decade later, the Violent Crime Control and Law Enforcement Act of 1994 authorized incentive grants to build or expand correctional facilities.¹⁴ Grants totaling \$12.5 billion were authorized for incarceration, with nearly 50 percent earmarked for states that adopted tough “truth-in-sentencing” laws that required people to serve substantial portions of their custodial sentences before they could be considered for release.¹⁵

When the 1994 crime bill's Truth-in-Sentencing Incentive Grants Program was implemented, many states had already begun to make their sentencing structures and practices more draconian, and the precise impact of the incentive funding is hard to quantify. Nevertheless, the law's passage and the concurrent or subsequent passage of at least 20 state truth-in-sentencing laws marked a turning point in the length of sentences served nationwide.¹⁶ A 2012 Pew study of 36 states found that the average length of stay for people released from prison in 2009 had increased 36 percent relative to those released in 1990, with nine states reporting increases of more than 50 percent.¹⁷ While some states had enacted tougher sentencing laws prior to 1994, the legislation rewarded states for doing so and gave powerful incentives for others to adopt similar laws.

The federal government should no longer subsidize mass incarceration. To fully reverse course, the president should champion and Congress should pass a bill — the Reverse Mass Incarceration Act — to unwind these incentives by ensuring that federal grants are sent only to states that reduce both crime *and* incarceration.¹⁸

This act represents a powerful step the federal government can take to end mass incarceration. And even in a divided Congress, it would draw bipartisan support. Hilary O. Shelton, director of the NAACP's Washington,

DC, office, heralded the proposal as a break from the “old paradigms” of crime and punishment.¹⁹ Bryan Stevenson, founder and executive director of the Equal Justice Initiative, has noted, “We have burdened families, communities, and individuals who need help, not extreme punishment. With misguided subsidies and federal dollars, we have created an incarceration crisis in too many communities. This act is a critically needed response to the problems overincarceration has created in America. This is urgent, important legislation that deserves all of our support.”²⁰

The act would set aside incentive funds, perhaps \$20 billion over 10 years, to reward states that reduce their prison population by 7 percent over three years and reduce or hold stable crime rates.²¹ This 7 percent threshold is slightly greater than the average annual reduction in states already cutting their imprisonment rate, making it an achievable, if ambitious, goal. The initiative could be funded by recalibrating current federal grant programs, ensuring that all federal dollars point toward the same goals. Or it could be established through a new grant program, as either a stand-alone act or a section of an omnibus bill.

If states compete to meet these goals and receive funding, as they have done in the past, the act could achieve a 20 percent reduction in imprisonment over 10 years.²² It would help spur changes to state and local policies, undoing the harmful incentives created by previous grant programs.

Executive and legislative action: Pass the Reverse Mass Incarceration Act.

The Biden administration should work with Congress to enact a bill that will dramatically reduce the number of Americans incarcerated in state prisons. The Reverse Mass Incarceration Act was first introduced in 2017 and then introduced again by Sens. Cory Booker (D-NJ) and Richard Blumenthal (D-CT), along with Rep. Tony Cardenas (D-CA), in May 2019.²³ The legislation's introduction in two separate Congresses and support from the civil rights community indicate its potential to make transformative change at the state level. In fact, President-Elect Biden has made the policy a central part of his criminal justice agenda to “create a new \$20 billion competitive grant program to spur states to shift from incarceration to prevention.”²⁴

Advance Policing Reform

Racialized police violence has taken lives and injured countless individuals, caused psychological and emotional trauma, and reinforced the perception that the police devalue the lives of Black Americans.²⁵ This has imperiled police–community relations, engendered public anger and mistrust, and undermined the legitimacy of the police. Use-of-force policies and other rules and regulations need to be altered. Moreover, there is a pressing need for a more fundamental shift in the role and purpose of law enforcement, particularly in how police officers engage the communities they serve.

Although American policing has always been primarily a local concern, with approximately 18,000 law enforcement agencies nationwide responsible for their own policies and practices, the federal government is well positioned to encourage and even require action by states and localities.²⁶

The American people are demanding change.²⁷ Communities are calling for material interventions that disrupt current practices and provide substantive protections for citizens in their encounters with the police.²⁸ This requires changing the policies that have made law enforcement reliant on punitive and often aggressive enforcement.

The federal government should spur and support broad-based culture changes in policing: strictly limiting use of force, strengthening the role of the Department of Justice (DOJ) in accountability, creating national standards for certification and a database of misconduct, encouraging demilitarization, supporting community-led public safety strategies and systems to combat racial inequities, and investing in or partnering with alternative community-based services that target the root causes of crime and social disorder.

Champion National Use-of-Force Standards

Since the May 2020 killing of George Floyd by Minneapolis police officers, there has been a sustained national outcry against unjustified police use of deadly or excessive force that disproportionately targets Black and Latino communities.²⁹ This and similar incidents have renewed focus on rules regulating the levels and types of force that police are permitted to use and whether there are ways to better rein in police use of aggressive and violent tactics.

Comprehensive reform is complicated by the fact that there is no universal policy governing how law enforcement agencies use force in carrying out their duties. Officers are generally granted authority to use force — including

deadly force — when accomplishing certain lawful objectives, such as making an arrest.³⁰ But the exact contours of that authority vary among jurisdictions, and national guidance on the circumstances in which police officers can use force, or the types of force permitted in a particular situation, is limited.³¹ Law enforcement agencies often provide only vague direction for when or how police can use lethal or nonlethal force, and many do not provide specific or rigorous guidance on how to minimize the likelihood or severity of force.³² Yet these regulations are used to train and guide officers in their interactions with the people they serve. They are also the benchmarks used to evaluate incidents.

Cases such as the police killing of Breonna Taylor illustrate that criminal prosecutions under state law, combined with current policies, do not meet the community’s expectation for legal accountability.³³ The constitutional limits on police use of force give confusing guidance to officers in the field. They also provide standards of review that, while facially objective, in practice rely heavily on police officers’ perspectives and judgments regarding the underlying facts, making limits on police force largely toothless.³⁴ This approach allows for police killings that are “lawful, but not necessary” — a startlingly low bar for the taking of human life.³⁵

With growing calls to curb police violence and rebuild community trust, the Biden administration must support the development of uniform national standards detailing specific, descriptive, and meaningful protections that strictly curb unnecessary, excessive, and ethically repugnant exercises of police force.³⁶ Recently enacted state and local policies aimed at achieving this goal have shown some success. Between 2013 and 2019, jurisdictions that enacted reforms saw police killings decline significantly.³⁷ According to one study, each limit on use of force enacted by a police department resulted in a 5 to 25 percent drop in police killings per capita.³⁸ These findings suggest that police violence is enabled by the widespread lack of well-defined, detailed, and exacting standards that center harm minimization, life preservation, and substantive protections.

Legislative action: Place strict limits on permissible police use of deadly and nondeadly force.

Congress should adopt national standards that place stricter limits on police use of force.³⁹ These should be based on the core principle that law enforcement officers must value and preserve the dignity and sanctity of human life.⁴⁰ Deadly force should be used only as a method of last resort to prevent imminent death or serious bodily injury.⁴¹ The standards should also ban the use of choke holds and neck holds, especially given these tactics' higher risk of incurring injury and death.⁴²

Use of less-lethal techniques and weapons — including synthetic chemical sprays, pepper spray, impact projectiles, batons, and electroshock weapons — should be reserved for exceptional situations and treated as tactics of last resort.⁴³ Such techniques of control can still cause irreparable harm, including death.⁴⁴

Considering the harm that police use of force can cause, the new standards should make clear that de-escalation and nonviolent conflict-resolution strategies, including verbal persuasion, mediation, scene stabilization, threat containment, and distancing techniques, should always be the first course of action in situations that do not pose an immediate or imminent threat.⁴⁵ Law enforcement training on de-escalation and nonviolent conflict resolution is inadequate; 34 states do not even require such training.⁴⁶ One study found that police academy recruits received, in total, eight hours of de-escalation and crisis intervention training, compared with 58 hours in firearm training.⁴⁷

Police agencies should be required to provide robust training that centers on harm reduction, force minimization, and de-escalation, making it abundantly clear that force is permissible in only the most limited of circumstances.⁴⁸ Rather than leave each of the nation's 18,000 police departments to develop its own training standards, there should be a national standard.⁴⁹ The federal government should support the development of a national training academy with standard curricula, resources, and technical assistance.⁵⁰

Legislative action: Require all law enforcement agencies to adopt a duty-to-intervene policy.

Newly promulgated standards should require officers to intervene when fellow officers misuse force, or otherwise engage in misconduct, and report it to their superiors.⁵¹ Police cannot be bystanders when fellow officers engage in inappropriate conduct.⁵² Federal law should encourage all police departments to adopt policies that encourage and mandate peer intervention and reporting.⁵³ Further,

officers should be taught in training that they are legally “obligated to intervene when they believe another officer is about to use excessive or unnecessary force, or when they witness colleagues using excessive or unnecessary force, or engaging in other misconduct.”⁵⁴

Executive action: Mandate use-of-force reporting to the federal government.

Although the public is witnessing instances of police violence with growing frequency due to the proliferation and dissemination of video footage, the true scope of the problem remains unknown due to a lack of reliable data on the prevalence of violent encounters between police and civilians.⁵⁵ Researchers are left to rely on projects like the *Washington Post's* “Fatal Force” database, which aggregates news about use of force on an annual basis.⁵⁶ But this database is necessarily incomplete: it relies on press releases, social media, and publicly available police reports for its information, and these sources do not always contain accurate or complete data.

Formal reporting structures remain woefully incomplete. In 2018 the FBI launched an effort to collect use-of-force data — including any fatality or serious bodily injury connected to law enforcement use of force, as well as any time an officer discharges a firearm — but participation is voluntary.⁵⁷ Response rates have been low; in 2020 the FBI revealed that only 5,043 of the 18,514 federal, state, local, and tribal law enforcement agencies had submitted data for the previous year.⁵⁸ President Trump's recent executive order requiring the attorney general to establish a database is also insufficient; it requires only the reporting of “excessive force,” a legal conclusion that takes time, and sometimes a trial, to determine.⁵⁹ As a result, police departments are prevented from timely identifying problematic patterns, such as disparate use of force against Black people and other minorities.

To better understand the problem, the new administration should build a comprehensive database by mandating use-of-force reporting by all law enforcement agencies and make federal support to those agencies conditioned on their compliance.⁶⁰ The federal government should also make the database public.⁶¹

Strengthen Police Accountability Mechanisms

Analysis of police violence shows that Black Americans are three times more likely to be killed by a police officer than white Americans, even though they are 1.3 times less

likely than white Americans to be armed during a fatal police encounter.⁶² Black people represented a quarter of the nearly 1,000 Americans police killed in 2019, despite making up less than 13 percent of the population.⁶³ At the same time, prosecutors and grand juries rarely charge officers who cause civilian deaths, and few such trials end with guilty verdicts.⁶⁴ Faced with this incongruity and repeated high-profile killings of unarmed Black people by police, Americans are demanding change.⁶⁵ Since George Floyd's death, nearly two-thirds of Americans have come to believe that police who have injured or killed civilians are treated too leniently in the criminal justice system.⁶⁶ Greater accountability is needed.

The Biden administration should underscore its commitment to equal treatment under law and improved oversight by reinvigorating the enforcement authority of the Department of Justice's Civil Rights Division. It should champion legislation to strengthen the primary federal criminal civil rights statute used in cases of police brutality and direct the DOJ to fully use its authority to initiate pattern-or-practice investigations when law enforcement agencies are engaging in systemic misconduct or other unconstitutional behavior.⁶⁷ The Biden administration should also create a national database of police misconduct records, promote national decertification standards, and support a ban on qualified immunity in civil lawsuits.⁶⁸

Legislative action: Amend 18 U.S.C. § 242.

The Biden administration should champion an amendment to Title 18, United States Code, Section 242, the main federal criminal civil rights statute used in cases of police brutality. At present, a successful prosecution under this provision requires proof of "willfulness" to deprive a person of his or her rights, a significantly high burden for a prosecutor to meet that, in practice, has largely insulated officers from liability.⁶⁹ Section 242's vague and expansive language fails to put law enforcement officers and other public officials on notice of what the law specifically forbids, making it nearly impossible to prove that they had the intent required for a criminal conviction.⁷⁰

To better equip federal prosecutors to hold law enforcement officers accountable for wrongful acts, the willfulness standard in Section 242 should be lowered to include knowing and reckless civil rights violations, and the law should be amended to more clearly enumerate the types of force that will trigger criminal liability, including, for example, choke holds.⁷¹ Strengthening Section 242 in this way would underscore, approximately 150 years after the statute was passed, the federal government's commitment to protecting Americans' lives and civil rights.⁷² Such an amendment would also likely bring substantial changes to law enforcement training across the country on

improper uses of force and would bolster the aforementioned proposed national use-of-force standards.

Executive and legislative action: Reinvigorate DOJ pattern-or-practice investigations.

A powerful and underused federal tool to combat unjust policing is the DOJ's authority to investigate law enforcement agencies engaged in a "pattern or practice" of behavior that "deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."⁷³ These investigations focus on systemic problematic behavior by a police department rather than specific incidents of police misconduct.⁷⁴

The statute granting this authority, enacted in 1994 in response to the acquittal of Los Angeles Police Department officers involved in the brutal beating of Rodney King, gives the federal government the power to significantly change local police departments' policies and practices.⁷⁵ Over the past quarter century, the DOJ has initiated 70 pattern-or-practice investigations and established 40 reform agreements across both Democratic and Republican administrations.⁷⁶ These investigations can yield significant results, including decreased police shootings and long-term increases in accountability.⁷⁷ After President Trump took office, however, the DOJ essentially brought these investigations to a halt, commencing only one such investigation.⁷⁸

The Biden administration should rescind the guidance issued by former Attorney General Jeff Sessions that has curtailed pattern-or-practice investigations and direct the DOJ to engage in robust enforcement, including of existing consent decrees.⁷⁹

In addition, the Biden administration should support legislation to provide the DOJ with subpoena power for these critical investigations, which would provide an enforcement mechanism if state or local officials refused to comply with a document request and would enable federal investigators to quickly gather the voluminous information needed from police departments and other state and local agencies.⁸⁰

Executive action: Create a national database of police misconduct records and promote a national standard for decertification.

Officers with histories of misconduct have been at the center of some of the most recent instances of police killings of unarmed civilians. The officers who killed Laquan McDonald, Eric Garner, and George Floyd all had been the subject of numerous misconduct complaints.⁸¹ But because misconduct records are often shielded from

public view — and sometimes destroyed — the public often remains unaware of an officer’s disciplinary history or whether an officer with a misconduct history remains employed and armed in its midst.⁸² Meanwhile, police misconduct and the mechanisms that exist to address it remain largely shrouded in mystery.

But some recent analyses have started to lift the veil on the prevalence and nature of police misconduct nationwide. One investigation revealed tens of thousands of cases involving allegations of serious misconduct, such as use of excessive force, rape and other types of sexual abuse and misconduct, and dishonesty, often to obstruct or otherwise subvert an investigation.⁸³ Alarmingly, thousands of officers in these records had been subject to 10 or more misconduct investigations, and 20 officers had faced 100 or more allegations without losing their badges.⁸⁴

Police officers with records of misconduct are not consistently held accountable. Even in cases where misconduct is proved, officers may still retain employment, be reinstated after termination due to collective bargaining agreements that mandate arbitration, or obtain certification and employment in law enforcement elsewhere.⁸⁵ The latter is a particularly insidious problem created by the fragmented nature of jurisdiction-specific certification regimes. While most states have the authority to revoke an officer’s occupational license, the criteria for decertification vary widely among jurisdictions, and an officer decertified in one state may be employable in another.⁸⁶

The new administration should establish national criteria for decertification to avoid substantial variations that could lead to conduct or behavior warranting decertification in one jurisdiction but not another.⁸⁷ The administration should also create a robust, public national decertification database that mandates all relevant state agencies to report police officer decertification.⁸⁸ To strengthen this mandate, reporting compliance should be tied to federal funding and support.⁸⁹ In addition, the federal government should require the states that still lack decertification authority — California, Massachusetts, New Jersey, and Rhode Island — to create a strong police decertification mechanism that tracks misconduct histories.⁹⁰

Although national police decertification standards and a comprehensive registry cannot eliminate police misconduct, both are critical to holding law enforcement officers to higher standards of conduct. They will ensure accountability mechanisms are more transparent, and police departments will have the requisite data to make better-informed hiring decisions that prevent decertified officers from being reinvested with police authority. National decertification criteria should, at a minimum, include the following:⁹¹

- A criminal conviction
- Termination or resignation during an ongoing misconduct investigation

- Use of inappropriate or excessive force
- Failure to intervene when fellow officers use inappropriate force⁹²
- Failure to report instances of misconduct committed by fellow officers to supervisors
- Lying or concealing any information, including the production of false reports
- Commission of domestic violence, sexual assault, or criminal offenses against a minor

Support Culture Change in Policing

Communities across the country are calling for police defunding and questioning whether current levels of public spending on law enforcement reflect our society’s values.⁹³ The Biden administration must bolster community-driven policing, in which the community and police collaborate, sharing joint responsibility for public safety.⁹⁴ Such efforts are central to repairing community–police relations and recognize that many challenges do not require law enforcement. Even a growing number of law enforcement professionals recognize that “we cannot arrest our way out of societal problems.”⁹⁵

The federal government can help law enforcement agencies reset their culture and practices in ways that better align with community expectations and needs. Strengthened funding streams and technical assistance can encourage agencies to create appropriate infrastructure and incentives that support less intrusive and nonenforcement strategies, including enhanced collaboration with and investment in community-based service providers. Through a combination of legislative and executive actions, the Biden administration should support community-led public safety models, promote alternative co-responder and diversion programs, utilize the Office of Community Oriented Policing Services to enforce police reform, and encourage Congress to demilitarize the police.

Executive action: Support community-led public safety strategies and systems to identify and remedy racial inequities in policing practices.

To build community-led public safety strategies and systems to identify racial inequity in policing, law enforcement agencies may need to throw out parts of

their policy manuals and focus on what policing success means to their communities.⁹⁶ To spur innovation, the federal government should provide grants and technical assistance through the DOJ's Bureau of Justice Assistance to support the implementation of new police success metrics, and it should reduce federal funding to law enforcement agencies when they do not achieve this goal. New metrics should go beyond merely tallying the number of tickets issued and arrests made to reflect policies and practices that better align with the community's values and public safety priorities. These metrics may include community engagement, the number of lives kept safe in dangerous police encounters, participation in youth outreach programs, and the successful diversion of people to community-based services.⁹⁷ Because there is no one-size-fits-all strategy for ensuring public safety and promoting healthy communities, proposed metrics will need to be tailored to specific communities. They should consider factors including police–community relations, use-of-force policies and practices, and whether officers are held accountable for misconduct.⁹⁸

In addition, to identify and guard against disparate treatment and the entrenchment of inequality, the new administration should create a grant program for state and local police departments to analyze their policies and practices explicitly through the prism of race. Police departments need to be encouraged to collect data that reliably captures whether their policies and practices — including those concerning use of force — perpetuate discrimination. While accurate collection of demographic data can pose difficulties, without this information departments will have no way to gauge whether efforts to prevent discrimination are successful.⁹⁹ They also need to be encouraged to adopt novel accountability measures that can help gauge whether justice is carried out on equitable terms, including ways to assess police legitimacy, procedural justice, and minority communities' cooperation with police.

This would not be the first time that the federal government has incentivized changes in local police practices. In 2016 the DOJ, spurred in part by Brennan Center recommendations, allocated \$352 million in Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) funding to local law enforcement based on metrics of success that encouraged the reduction of mass incarceration.¹⁰⁰ By incentivizing law enforcement agencies to measure their success in terms of reducing arrests and diverting individuals from the criminal justice system, the federal government began to decrease its subsidization of mass incarceration, but there is more work to be done.¹⁰¹

Legislative and executive action: Promote the creation of co-responder and diversion models.

The events of 2020 have spotlighted how police departments are expected to respond to situations and problems that would be better addressed by social workers, mental health professionals, and behavioral specialists.¹⁰² The Biden administration should further incentivize the creation and scaling of diversion strategies that focus on the root causes of crime and social disorder — such as mental illness, homelessness, substance use, and poverty — outside of the traditional criminal justice process. It can accomplish this by working with Congress to provide more funding and technical assistance to municipalities that implement co-responder models, in which officers become conduits to behavioral health treatment in situations where enforcement is not necessary (see page 16).¹⁰³ These approaches will require expanding the capacity of service providers and other community-based organizations. When they have the capacity to respond to emergencies and provide robust services and programming, they can provide paths away from the criminal justice system. By delivering treatment and services, they can also help reduce crime.¹⁰⁴ Various bills that would draw from different funding streams, such as those for Medicaid or the Substance Abuse and Mental Health Services Administration (SAMHSA), are pending in Congress and could serve as models for future legislation.¹⁰⁵

Executive action: Reinvigorate comprehensive police reform supported by the COPS Office.

For many years, the Department of Justice's Office of Community Oriented Policing Services (COPS Office) Collaborative Reform Initiative (CRI) helped spearhead police reform by assessing a law enforcement agency's operations, providing recommendations for reform, and assisting the agency in implementing them.¹⁰⁶ Through CRI, the Justice Department worked with cities including Las Vegas; Philadelphia; Fayetteville, North Carolina; Milwaukee; and San Francisco to reform their policing practices as an alternative to entering into complex and lengthy litigation against them, garnering widespread support from police chiefs across the country.¹⁰⁷ Despite this appetite for collaboration, Attorney General Sessions announced in 2017 that the COPS Office would discontinue the significant work that began under the Obama administration.¹⁰⁸ At that time, 16 police departments across the country had signed up for collaborative reform.

Local Initiatives: Promote Alternative-to-Arrest Programs

>> **Investing in communities** and redefining public safety often mean reducing law enforcement's footprint. To achieve this, myriad jurisdictions are implementing or expanding co-responder models, where communities and police work together to coproduce public safety. Instead of relying on arrest and incarceration, localities are turning to models that break cycles of criminal justice involvement for those with underlying mental health issues, histories of substance use or trauma, and more. Models across the country, such as Connections Health Solutions in Arizona, the Middlesex County Restoration Center in Massachusetts, and the Bexar County Jail Diversion Program in Texas, demonstrate that many law enforcement agencies are eager to divert individuals from jails and toward services.¹⁰⁹

>> **Similarly, the LEAD program** is a prearrest diversionary program currently operating in jurisdictions across 20 states.¹¹⁰ An additional 24 local jurisdictions are currently developing or launching LEAD programs.¹¹¹ First introduced in Seattle in 2011, LEAD creates an opportunity for law enforcement, and in some jurisdictions community members, to recommend diversion from the criminal justice system for people who are suspected of violating the law but have underlying behavioral health or substance use issues, directing them instead to appropriate services, such as housing and treatment.¹¹² Federal incentives and funding to scale up LEAD and similar programs would help to increase their capacity and expand them to other jurisdictions.

The Biden administration should resume previous CRI efforts to encourage and support police reform at the local level, whether to address racial bias, reform use-of-force policies, or improve police departments' relationships with their communities.

Legislative action: Encourage the demilitarization of the police by eliminating the 1033 Program.

Section 1033 of the 1997 National Defense Authorization Act gave the Department of Defense permanent authorization to dispose of excess U.S. military property by transferring it to federal, state, and local law enforcement.¹¹³ Since the program's creation, more than 8,000 law enforcement agencies have received property worth \$7.4 billion.¹¹⁴ Although the Obama administration curtailed the distribution of surplus military equipment through this program after 2014, President Trump has since fully revived it.¹¹⁵

While the 1033 Program includes nonmilitary items such as office furniture, kitchen supplies, and standard law enforcement equipment including handcuffs, cameras, first aid kits, and binoculars, it also transfers

military-grade equipment such as weapons and tactical vehicles to local law enforcement agencies.¹¹⁶ As a result, many local police departments have acquired military-grade equipment, developed for war, to use in their communities. Humvees, M16 automatic rifles, pistols, grenade launchers, and Mine Resistant Ambush Protected (MRAP) vehicles all contribute to the sense that local law enforcement is an occupying force rather than a protective one.¹¹⁷ This perception gained particular currency following the civil unrest that unfolded in Ferguson, Missouri, after the killing of Michael Brown in 2014.¹¹⁸

Police agencies that have received military gear are more likely to be involved in fatal police shootings.¹¹⁹ Police officers should not be trained in tactics or weapons of war or positioned in a way to suggest that they are at war with the communities they are sworn to protect and serve. To encourage the demilitarization of police, the Biden administration should eliminate the 1033 Program and prohibit the transfer of all military-grade weapons to state and local law enforcement agencies.¹²⁰ Eliminating the 1033 Program is one necessary step of many to change police culture and ensure that law enforcement agents act as guardians, not warriors, in their communities.¹²¹

Encourage Best Practices in Prosecution

>> **Prosecutors are among** the most powerful officials in the criminal justice system, enjoying largely unfettered discretion. They can accept or decline a criminal case; choose whom to charge, what to charge, and the number of counts; and decide whether to engage in plea negotiations to resolve a case, wielding immense leverage in defining the terms of an acceptable agreement.¹²² Prosecutors have historically played a key role in driving mass incarceration, and they are well positioned to roll it back.¹²³ Decades of research illustrates that crime reduction can occur along with marked decreases in incarceration rates.¹²⁴

>> **At the local level,** reform-minded prosecutors have swept into office on platforms focused on diverting people from the traditional criminal justice process.¹²⁵ They are pursuing important policy changes that other offices should emulate, including broad declination policies that divert people to programming (sometimes mental health or drug treatment); the dismissal of old bench warrants for minor offenses to ensure that petty crimes do not pull people back into jail and prison; and the creation of conviction review units to determine whether the outcomes of old cases were tainted by unjust practices, faulty evidence, or racial bias.¹²⁶

>> **The next president** and attorney general can support transformative change at the local and federal levels.

▪ **Executive action: Champion prosecutorial reform in cities and states.** The attorney general should urge local prosecutors to adopt the recommendations in *21 Principles for the 21st Century Prosecutor* in order to move away from punitive, incarceration-driven policies.¹²⁷ Practices such as defaulting to diversion, charging with restraint, ending cash bail, and encouraging treatment over incarceration for mental health and drug addiction should be scaled up.¹²⁸ The attorney general should also champion the work of state and local

prosecutors in speeches to law enforcement officials and in conversations with the media and the broader public.¹²⁹

- **Executive action: Reinstate guidance to federal prosecutors to mete out individualized justice.** The attorney general should direct federal prosecutors to use their discretion to mete out more individualized justice based on the specific facts and circumstances in each case, rather than what is simply provable.¹³⁰ Additionally, the Justice Department should reinstate its 2013 policy directing federal prosecutors to ensure that people charged with low-level, nonviolent drug offenses with no ties to large-scale organizations, gangs, or cartels are not exposed to mandatory minimum sentences.¹³¹
- **Executive action: Appoint a diverse slate of U.S. attorneys who are committed to reducing the use of incarceration.** Given the leading role U.S. attorneys can play in refocusing prosecutorial practices to reduce both incarceration and recidivism, they should reflect a diversifying nation. The bench of 93 U.S. attorneys is overwhelmingly white and male; currently, there are only two Black U.S. attorneys and just seven who are women.¹³² Only one of President Trump's first 42 nominees for the role was a woman.¹³³ President-Elect Biden should reverse this trend and appoint U.S. attorneys with varied backgrounds and experiences, including some who have served as public defenders. There is no shortage of qualified attorneys, and it is the responsibility of the president to identify and elevate voices that have historically been excluded from positions of power. Increasing the number of U.S. attorneys from historically excluded or underrepresented communities would be an important first step in ensuring that the nation's law enforcement leaders better reflect the communities they serve.

Advance Sentencing Reform to Reduce the Federal Prison Population

Over the last 40 years, prison populations rose dramatically as more Americans were sentenced to prison for longer periods of time.¹³⁴ The tools policymakers used included mandatory minimum sentences, automatic sentence enhancements, habitual offender statutes like “three strikes” laws, truth-in-sentencing laws, and the abolition of parole.¹³⁵ But after decades of punitive policies that ratcheted up prison populations nearly 700 percent between 1972 and 2012, change is now afoot in American sentencing policy and practice.¹³⁶

Faced with imprisonment levels that are without precedent and not remotely comparable to those of other Western democracies, legislators, policymakers, and criminal justice practitioners have been making efforts to reduce both the number of people in prison and the time they spend there. States have been at the vanguard of this movement, and these initiatives have reached nearly all corners of the country.¹³⁷ Almost every state has enacted some type of sentencing reform — often multiple times over successive years — aimed at shrinking the reach of incarceration.¹³⁸ And some have achieved a modicum of success in the process.¹³⁹

A similar undertaking has not yet taken root at the federal level. Despite bipartisan agreement that the country should reverse the nearly four decades of growth in the federal prison population, momentum on the federal level to enact bold sentencing reform to end mass incarceration has been markedly slow over the last 10 years.¹⁴⁰ The Fair Sentencing Act of 2010 reduced the controversial weight ratio of crack versus powder cocaine that triggers mandatory sentencing and eliminated the five-year mandatory minimum for first-time possession of crack cocaine. It took eight more years for Congress to pass another criminal justice reform bill, despite sustained interest and persistent attempts.¹⁴¹ The First Step Act of 2019, which passed by a wide bipartisan margin, represented much-needed and long-overdue progress in easing the severity of federal sentencing policy.¹⁴² (For more information about the First Step Act and ways the new administration can improve it, see page 20.) It reduced, or in some cases eliminated, mandatory minimum penalties for certain offenses and made the Fair Sentencing Act retroactive but was ultimately modest in both scope and reach.¹⁴³

Nevertheless, the federal prison population has decreased by 41 percent since 2013.¹⁴⁴ The Fair Sentencing Act’s reduction in sentence length for crack cocaine offenses is primarily responsible for that reduction, but several other actions have contributed as well.¹⁴⁵ A 2014 policy shift by the U.S. Sentencing Commission (USSC) known as the Drugs Minus Two Amendment shortened sentences for many individuals convicted of drug

offenses.¹⁴⁶ In addition, as a result of then Attorney General Eric Holder’s 2013 charging memorandum, which called on federal prosecutors to refrain from seeking a mandatory minimum penalty in response to low-level drug offenses, the proportion of drug cases receiving a mandatory penalty declined between 2012 and 2017.¹⁴⁷ Finally, substantial reductions in the federal prison population have accelerated with the advent of the Covid-19 global pandemic. These declines may be due to a decrease in new admissions and an increase in the number of people being transferred from prison to home confinement.¹⁴⁸

The new administration will be well poised to achieve more far-reaching and impactful sentencing reform that will reduce the federal prison population further. Today the federal criminal justice system remains extraordinarily punitive in nature. In 2019 more than 90 percent of people convicted in the federal system received a sentence of incarceration, primarily for a felony offense.¹⁴⁹ Unlike state prison populations, most people sentenced to incarceration in a federal prison were convicted of nonviolent drug or immigration-related offenses that too often require unnecessarily long mandatory custodial sentences.¹⁵⁰

To achieve prison population reductions, the new administration can easily draw from a wide set of sentencing reforms that states have recently enacted, particularly diversion and alternatives to incarceration for nonviolent and drug offenses. At the same time, the remarkable drop in the incarcerated population between March and October 2020 as a result of the pandemic shows that too many people are unnecessarily incarcerated in federal prison in the first place.¹⁵¹ The new administration’s challenge is to make such dramatic population reductions sustainable over time. To ensure that the federal prison population will not rebound in a post-pandemic future, the new administration can help foster a substantially less punitive federal criminal justice system by considering reforms that target the largest segment of the federal prison population: people who are convicted and sentenced to a term of incarceration for a nonviolent drug offense.

Support More Expansive Drug Law Reform

Drug interdiction remains a central focus of federal criminal justice enforcement. For example, in 2019 drug offenses of all types were the second most common federal crime, accounting for 26.6 percent of all cases reported to the USSC and just over 46 percent of the federal prison population, with lengthy sentences often due to mandatory minimums or automatic sentence enhancements.¹⁵² Under the current sentencing scheme, defendants can be exposed to sentences of up to 40 years, and even life imprisonment, depending on the quantity of drugs involved.¹⁵³

Mandatory minimums and other zero-tolerance sentencing practices for drug offenses have devastated the Black and brown communities that bear the brunt of uneven drug enforcement activities.¹⁵⁴ These practices are the key contributors to the massive increase in the federal prison population.¹⁵⁵ At the same time, there is little evidence that America is winning the war on drugs: drug use has remained stable, and drug markets have proved resilient.¹⁵⁶ In addition, a growing body of research casts doubt on the deterrent effect of long sentences, especially for people convicted of nonviolent drug offenses.¹⁵⁷ Instead, scholarship increasingly demonstrates that community-based treatment and support can provide a more effective response to drug-related offenses than long terms of incarceration. It is a policy option that a growing plurality of the public endorses, particularly in the shadow of the twin epidemics of opioid and methamphetamine use.¹⁵⁸

A punitive, one-size-fits-all criminal justice approach is no solution to a public health crisis. Overly long custodial sentences are unduly harsh, have an outsize impact on racial minorities and the economically disadvantaged, and produce no real public safety dividend. President-Elect Biden should work with Congress to return reason and proportionality to federal drug sentencing.

Legislative action: Repeal mandatory minimum sentences for drug offenses.

Although the First Step Act mitigated the impact of some mandatory minimum sentencing regimes, it did not go far enough.¹⁵⁹ (For more information on the First Step Act, see page 20.) Congress should repeal all mandatory minimums for drug offenses found in Title 21 of the U.S. Code, including provisions that escalate mandatory sentences for people with prior felony drug convictions or those who commit drug offenses in so-called school or statutory drug-free zones; both provisions disproportionately impact people of color, the latter in urban settings.¹⁶⁰

Existing statutory maximums and sentencing guidelines for drug offenses should be reduced and altered to allow judges maximum flexibility to craft individualized sentences that take into account differences among people convicted of drug offenses. Potential sentences might include probation, a shorter term of incarceration, drug treatment, or a combination of approaches to address an individual's risks and needs.¹⁶¹

Legislative action: Repeal the 18:1 disparity between crack cocaine and powder cocaine.

The Fair Sentencing Act of 2010 reduced the weight disparity between crack cocaine and powder cocaine that triggered a mandatory minimum sentence from 100:1 to 18:1, and the First Step Act made this change retroactive.¹⁶² Among the reasons for the reduction was that harsh penalties were being applied broadly, most often to people convicted of lower-level drug offenses.¹⁶³ The central reason for the change, however, was an acknowledgment that the 100:1 ratio disproportionately and unfairly exposed people of color to excessively severe sentences, a result of the now debunked assumption that crack cocaine is far more harmful than powder cocaine, as well as the racial differentials in use of the two forms of the drug.¹⁶⁴ Yet the 2010 reform failed to provide a reason for maintaining any disparity between crack cocaine and powder cocaine. There is no reason to treat 1 gram of crack cocaine as equivalent to 18 grams of powder cocaine; any disparity is arbitrary and capricious and risks racialized consequences. Thus, the ratio should be lowered to 1:1.¹⁶⁵

Legislative action: No longer use quantity as the primary yardstick in drug sentencing.

The weight-driven sentencing scheme for drug offenses, as many courts have noted, has no practical grounding or rationale: unlike sentencing guidelines for other offenses, recommended drug sentences are “not based on empirical data, [USSC] expertise, or the actual culpability of defendants.”¹⁶⁶ There is a growing recognition that quantity as a proxy for the seriousness of the crime or culpability obscures important distinctions among defendants, resulting in unfair and disproportionate sentences.¹⁶⁷ To reduce the harshness of the current regime, Congress should act on the USSC's repeated urgings to amend Section 2D1.1 of the United States Sentencing Guidelines to focus on a defendant's role in an offense.¹⁶⁸ Such a scheme would prod judges, prosecutors, and defense counsel to meaningfully assess culpability at the sentencing phase, rather than simply referring to the quantity of the controlled substance involved.

Legislative action: Expand alternative sentences, including the existing statutory safety valve.

If Congress maintains mandatory minimum sentences, it should limit their use to exceptional cases and expand the statutory “safety valve” provision to allow courts more discretion. Currently the safety valve provision permits a sentencing court to disregard a statutory minimum sentence for the benefit of only certain low-level, nonviolent, cooperative defendants who have a minimal prior criminal record and were convicted of certain mandatory minimum controlled-substance offenses.¹⁶⁹ While the First Step Act of 2018 expanded relief for defendants with slightly more extensive prior criminal records, Congress should permit courts to invoke the safety valve in a broader set of circumstances.¹⁷⁰ Congress should also narrow the threat-of-violence disqualification so that the

mere presence of a weapon cannot be so easily used to infer actual or intended harm.¹⁷¹

Legislative action: Reduce the number of people currently held in federal prison by making changes retroactive.

Most sentencing reforms reduce sentence lengths prospectively. Population reductions may not be apparent for several years, as those convicted and sentenced to federal prison prior to any enacted reform must still serve out their full sentences. To achieve immediate reductions in the federal prison population and see a drop in the attendant costs, enacted changes should also be applied to those already serving custodial sentences in federal prison.¹⁷² Sentencing reform that is given retroactive effect would provide equity and yield reductions in a short time frame.¹⁷³

Improve First Step Act Implementation

>> **The First Step Act of 2018** had two primary purposes: to cut unnecessarily long federal sentences and to improve conditions for people in federal prison. While the new law has made considerable improvements to many lives, there is still much more to be done to fully realize the law’s intended goals.¹⁷⁴

- **Executive action: Issue clear guidance for federal prosecutors to encourage full implementation of resentencing provisions.** The First Step Act (and its retroactive application of the Fair Sentencing Act of 2010) has helped many people gain relief from excessively long custodial sentences.¹⁷⁵ However, some federal prosecutors, following the direction of Attorney General William Barr’s DOJ, have sought to prevent people from having their prison sentences shortened, opposing resentencing motions or even seeking to reincarcerate people who have already been granted relief.¹⁷⁶ The Biden administration should discourage prosecutors from these practices.
- **Legislative action: Expand and fund rehabilitative programming.** The First Step Act requires the Bureau of Prisons (BOP) to offer “evidence-based recidivism reduction programs and productive activities” — including vocational training, classes, and behavioral therapy — to all people under its care and authorizes \$75 million per year for the first five years of implementation.¹⁷⁷ Incarcerated people who participate in these programs

can earn time credits that can be applied toward a transfer to prerelease custody (such as a halfway house or home confinement), thus allowing them to finish their sentences in the community.¹⁷⁸

However, after more than a year of implementation, the BOP has not delivered on the promise to bring more programs to incarcerated people. Although the BOP has not disclosed much information on programming availability or capacity, as many as 25,000 people are wait-listed for the UNICOR work program (which has been proven to reduce recidivism by nearly 25 percent), at least 15,000 are wait-listed for education and vocational training, and at least 5,000 are wait-listed for drug treatment programs.¹⁷⁹ Approximately 25 percent of people who have spent more than a year in federal prison have been unable to complete any programs, which not only denies them access to time credits but also lowers their likelihood of getting a risk assessment score that would make them eligible for release.¹⁸⁰ The \$75 million that Congress finally authorized in December 2019 may be insufficient given that the anticipated cost of providing programming to meet demand is likely more than \$300 million.¹⁸¹

The Biden administration must commit to the First Step Act by urging Congress to expand funding. The new law will not fully succeed without the \$300–\$500 million that is necessary to realize its rehabilitative goals.¹⁸²

continued on next page

Increasing the provision of in-custody programs and services can help reduce people's risk of recidivism, a key performance indicator of a jurisdiction's correctional system.¹⁸³

- **Executive and legislative action: Fully utilize or expand compassionate release to better respond to the coronavirus pandemic.** Since March 2020, there have been more than 197,600 coronavirus cases reported among people incarcerated in U.S. prisons, more than 22,000 of which were in federal prisons.¹⁸⁴ The First Step Act permits people in federal prisons to seek a reduction in their sentence based on age, time served, or other “extraordinary and compelling reasons,” including the high risk of infection and spread of Covid-19 in prison facilities.¹⁸⁵ Throughout the crisis, the BOP has claimed that coronavirus vulnerability is not a sufficient basis for compassionate release, and prison wardens have denied or ignored over 98 percent of Covid-19-related compassionate release applications.¹⁸⁶ Ignoring serious medical needs violates the Constitution's prohibition of cruel and unusual punishment.¹⁸⁷ The 156 people released from federal prison is woefully insufficient given the urgent danger.¹⁸⁸

The Biden administration must direct the BOP to proactively identify and release those who are medically vulnerable, or older, or who may be otherwise eligible for early release under the federal compassionate release provision, and it must end DOJ and BOP obstruction of meritorious claims. In addition, the president should urge Congress to consider further federal legislation that would address coronavirus concerns in federal prisons, such as the Covid-19 Safer Detention Act, the Emergency Grace Act, and the Covid-19 Correctional Facility Emergency Response Act.¹⁸⁹

Finally, the administration must direct the BOP to provide release opportunities equitably. In at least one state, there is evidence that white people have disproportionately benefited from early release provisions.¹⁹⁰

- **Legislative action: Make the amendments that limit § 924(c) stacking retroactive.** The First Step Act amended 18 U.S.C. § 924(c), a provision which allowed for the imposition of additional mandatory minimum sentences when someone was found to have used, carried, or possessed a firearm in furtherance of another federal crime of violence or drug trafficking. Judges were required to tack on a further sentence for each separate § 924(c) charge, to be served consecutively — at least 5 years for the first charge, depending on what firearm was present and how it was used, plus another 25 years for each additional charge — on top of the original sentence for the underlying crime.¹⁹¹ The First Step Act amended this provision so that while each mandatory minimum penalty for a § 924(c) charge is still added up in determining the final sentence, the 25-year-per-additional-charge clause applies only to people who have a final, prior § 924(c) conviction.¹⁹² In the first year of implementation, over 95 percent of cases that could have had 25-year penalties had penalties of 5, 7, or 10 years instead.¹⁹³ However, this provision does not apply retroactively. The Biden administration must remedy this injustice and ensure that people are not treated differently for the same acts simply based on their date of sentencing. First, the new administration should urge Congress to make the change to § 924(c) retroactive. If no legislation is forthcoming, the president can commute sentences for the entire category of people sentenced before § 924(c) was amended, thus giving more widespread effect to Congress's intent.¹⁹⁴ (For more information about clemency, see page 26.)

Improve Prison Conditions

As of December 1, 2020, 154,125 people were incarcerated by the Federal Bureau of Prisons, a fraction of the approximately 1.3 million people serving prison sentences in the United States.¹⁹⁵ It is critical to improve incarcerated people’s quality of life and address the special challenges of incarceration. The trauma of their prison experience impacts their future success as well as their communities and loved ones.¹⁹⁶

Improving prison conditions immediately will ensure that they meet not only minimum constitutional standards but also a much higher standard of elevating human dignity and mitigating the inherent harms of incarceration.¹⁹⁷ To do this, prisons should provide the people in their custody with high-quality health care; meaningful protection from physical and emotional abuse; resources and space to develop and sustain relationships both inside and outside prison; and the infrastructure to pursue productive activities, including support related to employment and education, behavioral and mental health, physical health, and family responsibilities during and after incarceration.¹⁹⁸ These improvements would also promise better safety and working conditions for the people who work in prisons, help reduce recidivism, and benefit the communities to which incarcerated people return.¹⁹⁹ The best way to ensure that conditions are actually improving is to have consistent, active monitoring by an independent oversight team.

The federal government should take the following steps to improve conditions for people in federal custody:

- Significantly limit the use of solitary confinement
- Increase postsecondary education opportunities in prison
- Improve oversight of prisons and prison conditions

Congress should also pass legislation that provides incentives for states to do the same.

Significantly Limit the Use of Solitary Confinement

Solitary confinement — the incarceration of someone in a jail or prison cell alone “for 22 or more hours a day without meaningful human contact” — is routinely used as a population management tool by U.S. corrections agencies.²⁰⁰ U.S. state and federal prisons currently hold more

than 61,000 people in prolonged isolation.²⁰¹ Of them, 77 percent are in solitary confinement for longer than one month and almost 20 percent are confined for more than a year.²⁰² On any given day in 2020, the BOP holds more than 10,000 people in some form of restricted housing.²⁰³ A U.S. penitentiary in Colorado, the Florence Administrative Maximum Facility, or USP Florence ADMAX, is a “supermax” prison that houses every person in solitary confinement for 22 to 23 hours a day. It currently holds almost 360 people.²⁰⁴

This dependence on solitary confinement is expensive, ineffective, and harmful.²⁰⁵ It is two to three times more expensive to house people in solitary confinement than in the general population.²⁰⁶ An extensive body of research confirms that manifold mental and physical health risks result from subjecting people to such conditions — including increased paranoia, visual and auditory hallucinations, cognitive disturbances, hypersensitivity to stimuli, post-traumatic stress disorder, suicide, depression, anxiety, psychosis, obsessive thoughts, and death after release.²⁰⁷ Trauma makes it difficult for people to transition back to life not only in the prison’s general population but also in their communities once released from prison.²⁰⁸

These effects are so severe that the United Nations refers to prolonged isolation as torture in its Standard Minimum Rules for the Treatment of Prisoners (known as the “Nelson Mandela Rules”).²⁰⁹ Regional human rights bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights have also emphasized the long-term dangers inherent in social and sensory isolation, with the latter stating categorically that “prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person’s psychic and moral integrity and . . . the dignity inherent to the human person.”²¹⁰

In a worrisome trend, the BOP has increased its reliance on solitary confinement in response to the Covid-19 pandemic.²¹¹ In early April 2020, the BOP instituted its first system-wide lockdown in 25 years, essentially placing all 160,000 people in its prison population in prolonged restricted housing.²¹² In fact, since the pandemic began, the use of solitary confinement in state and federal prisons has increased by 500 percent.²¹³ Even more concern-

ing, both states and the federal government have increased their reliance on isolation as both a punitive and a purportedly precautionary measure; many incarcerated people have reported threats of solitary confinement as retaliations for protesting unsafe or unsanitary conditions.²¹⁴ And in June, a nationwide lockdown was instituted amid the protests spurred by the killing of George Floyd.²¹⁵

Thus far, little has been done at the federal level to limit the use of solitary confinement.²¹⁶ In the last 30 years, only two pieces of legislation regarding the practice have been signed into law: the 21st Century Cures Act, which permits the attorney general to award grants to facilities that pursue alternatives to solitary confinement, and the First Step Act, which bans the use of solitary confinement for juveniles.²¹⁷ The only other developments have been a series of executive actions in 2016.²¹⁸ These actions ultimately did not result in significant limits on the use of solitary confinement at the federal level.

Executive action: Limit the use and reduce the harmful impacts of solitary confinement.

The BOP must adopt the Nelson Mandela Rules' 15-day limit on the amount of time a person can spend in solitary confinement. Holding an individual for any longer greatly increases the chances of adverse health effects.²¹⁹

The federal government must also eliminate the use of solitary confinement as a response to low-level infractions. Only violent infractions that pose an immediate health or safety risk should be eligible for solitary confinement. Placing people in restricted housing for nonviolent infractions is a disproportional punishment that jeopardizes their physical and mental health.

Additionally, the BOP must allow people in solitary confinement access to television, radio, internet, and telephone services. The lack of stimulation in restricted housing exacerbates isolation and worsens its adverse impacts.²²⁰ Furthermore, the ability of individuals in solitary confinement to communicate with others via internet and phone permits healthy socialization without posing safety risks. The BOP should also improve conditions in solitary confinement to maintain physical health and well-being. Ample time for recreation, three adequate and nutritious meals daily, time outdoors, access to congregant activities, and sustained access to family, friends, treatment, and programming all minimize the inherent harms of isolation.

Solitary confinement exacerbates the symptoms and difficulties of serious mental illness, developmental delays, disabilities, and neurodegenerative diseases, and the BOP should prohibit its use for people living with these conditions.²²¹

Legislative action: Reorient federal funding to incentivize states to limit solitary confinement.

Congress should provide funding that incentivizes states to limit their use of solitary confinement. This legislation would ideally fund diversionary programs and programming for individuals currently in restrictive housing. In order to be eligible for the grants, states would have to limit the maximum length of time they subject people to solitary confinement to align with the Nelson Mandela Rules; guarantee adequate meals, lighting, and ventilation; reduce the number of people they hold in isolation; and provide opportunities for people there to exercise and interact with others.

Increase Postsecondary Education Opportunities in Prison

A substantial body of literature demonstrates the manifold benefits of postsecondary education in prison. It improves formerly incarcerated people's likelihood of finding formal employment, increases their earnings, and reduces their likelihood of returning to prison.²²²

Despite this evidence, the Violent Crime Control and Law Enforcement Act of 1994 categorically banned incarcerated people from receiving funding through the Federal Pell Grant Program, which provides need-based financial aid to low-income undergraduates.²²³ In the year preceding the crime bill's passage, 23,000 people in prison benefited from the program.²²⁴ More than 70 percent of people in prison would like to enroll in an educational attainment program, and of these, 82 percent are interested in postsecondary education.²²⁵ Most incarcerated people lack the financial resources to pay for postsecondary schooling themselves and so are prevented from receiving the education and skills that will help them succeed once released.²²⁶ They face profound challenges once in the job market as well, experiencing long-term harm to their economic well-being as well as that of their families and communities.²²⁷ Increased educational opportunities translate not only to more thriving communities but also to increased public safety.²²⁸ Unemployment and underemployment — and the economic instability that flows from them — are associated with a higher risk of recidivism.²²⁹ After release, people who have been to prison earn 50 percent less than they otherwise might have. Black and Latino people experience the sharpest losses.²³⁰

Given persistently high recidivism rates, and prompted by a recognition that education reduces recidivism, there

have been a number of state and federal efforts to reintroduce postsecondary education to prisons in recent years.²³¹ Of particular note is a 2015 Department of Education pilot program.²³² Through the Second Chance Pell Experimental Sites Initiative, 67 institutions of higher learning partnered with prisons to offer postsecondary education to incarcerated people funded through Pell Grants. The initiative, which has expanded to 130 institutions of higher learning in 42 states and Washington, DC, has enrolled nearly 17,000 people and awarded more than 4,500 certifications and degrees.²³³ However, the program's future will be in question if Congress fails to fund it beyond the pilot period.

If Congress does not lift the ban on Pell Grant funding for incarcerated people, the Department of Education can terminate this pilot program. Yet incarcerated people's demand for need-based funding will remain: although "70 percent of people in prison [have] expressed a desire to pursue postsecondary education," nearly 60 percent of incarcerated people complete no educational programs beyond a GED.²³⁴ Furthermore, public opinion is shifting in support of lifting the Pell ban. A study by the Vera Institute of Justice indicates that most voters in the states it polled support lifting the ban, as do major employers like J.P. Morgan Chase.²³⁵

Legislative action: Lift the ban on Pell Grants for incarcerated people.

Broad access to postsecondary education can help people secure and sustain employment after release. Postsecondary education in prison helps reduce recidivism while supporting reentering individuals as well as their families and communities.²³⁶ Expanding access to postsecondary education in prison therefore holds the promise of breaking the vicious cycle of poverty and incarceration.

In 2020 the House of Representatives voted to lift the ban on Pell Grants for incarcerated people; the legislation sits with the Senate Committee on Appropriations.²³⁷ If this legislation fails in Congress, the incoming administration should urgently work to expand the Second Chance program while supporting new legislation to reinstate Pell Grant eligibility for all incarcerated learners. Removing roadblocks to higher education for people who are incarcerated will expand the employment opportunities and earning potential for people reentering society, particularly amid the current recession. Given its promise to reduce recidivism, this action is also likely to free up scarce government dollars for investment in areas such as health care and infrastructure.

Improve Oversight of Bureau of Prisons Facilities

Transparency and meaningful accountability, prerequisites for all well-run public institutions, are particularly important for prisons and jails, institutions that wield unparalleled power over individuals and typically operate in a hidden or insular way.²³⁸ Indeed, prisons and jails have absolute and total responsibility over some of the most marginalized and vulnerable populations yet are walled off from public scrutiny, a dynamic that makes them uniquely susceptible to unethical practices and abuses of power.²³⁹

Therefore, oversight is necessary to ensure safe and humane correctional institutions. It can prevent or detect emerging problems, from ineffective policies or programs to staff misconduct, as they arise; identify failures and inefficiencies; investigate complaints made by incarcerated people; and provide information that is critical for decision-makers to improve the treatment of people in prison.²⁴⁰ At its best, oversight can promote overall good governance and professionalism, revealing not only when institutions are struggling but also when they are succeeding, enhancing the legitimacy of the prison in the eyes of staff, community members, incarcerated people, and their loved ones.

Although America puts more people behind bars than any other country, it lacks a cohesive or integrated system of oversight for its vast network of prisons and jails.²⁴¹ Where they exist, such systems vary significantly in both their authority and their effectiveness.²⁴² This may be attributable to America's fragmented and localized criminal justice system, in which distinct authorities (federal, state, local, tribal, and military) oversee an archipelago of confinement facilities, including more than 1,700 state prisons, 100 federal prisons, 1,700 juvenile correctional facilities, 3,100 local jails, and 80 jails on Native American reservations, as well as facilities like military prisons.²⁴³

The Bureau of Prisons, the largest prison system in the country, has approximately 154,117 individuals under its authority in the country's 122 federal prisons.²⁴⁴ Oversight duties are generally vested in the Department of Justice's Office of the Inspector General.²⁴⁵ Additionally, the House of Representatives' Committee on Oversight and Reform has broad jurisdiction and legislative authority, and the Senate Judiciary Committee can hold oversight hearings. Inspectors general operate as discrete offices investigating complaints of waste, fraud, and abuse and also make recommendations for improvement. However, the Office of the Inspector General's broad purview over all DOJ employees and programs, its focus on issue-specific reports, and its lack of regular and holistic review of BOP facilities hinder the consistency and effectiveness of federal prison oversight.²⁴⁶ And although inspector

general staff can access facilities for inspection, the office does not regularly inspect every BOP correctional facility.²⁴⁷

The current federal system of prison oversight falls short, but what it does reveal is troubling. The inspector general regularly finds mismanagement of federal prison contracts and mistreatment of incarcerated people.²⁴⁸ The emergence of the coronavirus has given the nation additional cause to worry about the safety and health of incarcerated people in the federal system, especially since particular BOP facilities have experienced serious outbreaks that have had implications for the health and safety of neighboring communities as well. As of November 20, 2020, 1,454 incarcerated people and 98 staff have died of Covid-19.²⁴⁹ The BOP's nationwide lockdown to curb the virus's spread greatly restricted movement outside of cells and raised concerns of significant and sustained infringement of basic rights.²⁵⁰ And even with substantial reductions in the federal prison population in recent years, the BOP still operates 12 to 19 percent over capacity.²⁵¹

It is time to implement a better system of oversight and accountability for the nation's largest prison system. The exercise of asymmetric power over people who are disproportionately poor, Black, Native American, and Latino is one of the defining characteristics of correctional facilities.²⁵² The watchful eyes of outsiders can help ensure that the often harsh, isolating, restrictive, and dehumanizing dynamics of carceral environments do not lead to situations where abuses or misconduct take root and flourish.²⁵³

Legislative action: Create an independent oversight body for the BOP.

Congress should create an independent oversight body, such as a prison ombudsman, with broad authority and capacity to monitor BOP facilities with the goal of investigating and ensuring the protection of rights and preventing mistreatment of incarcerated people. To be effective, such a body should have the following:

- A mandate to regularly inspect each facility annually without providing advance notice
- Unfettered and confidential access to incarcerated people, staff, documents, and other materials
- A broad approach, drawing on diverse sources of information and expertise from a representative group of correctional professionals, private-sector experts, justice-involved persons, advocates, researchers, and laypeople²⁵⁴
- A mandate to publicly report findings after inspections or investigations and require a prompt and public response from the BOP
- Adequate resources and control over its budget

Restructure and Streamline Executive Clemency Power

Executive clemency power can be a vital mechanism of mercy, tempering the sometimes harsh and inequitable effects of criminal law.²⁵⁵ Laws and associated penalties may change with evolving standards of justice, but such changes are often prospective in nature, meaning that many people convicted under old laws may not benefit from ameliorative changes.²⁵⁶ In addition, individual circumstances — whether exemplary conduct while in confinement or increased vulnerability due to age or infirmity — may render a prison sentence unjust and in need of moderation.²⁵⁷ In recent years clemency has been exercised in some of these circumstances — to mitigate particularly harsh mandatory sentences, correct for unwarranted disparities among codefendants, or give retroactive effect to recent changes in the law. Still, this highly discretionary postsentencing device for delivering individualized justice is seldom used.²⁵⁸

It is also little understood. The clemency process, which is overseen by the Department of Justice's Office of the Pardon Attorney and supervised by the deputy attorney general, is extraordinarily opaque.²⁵⁹ Fact-finding takes place behind closed doors and requires seven layers of review.²⁶⁰ And the decision to grant or deny relief relies entirely on the will of a single decision-maker: the president.²⁶¹ Reasons for grants or denials are neither explained nor subject to judicial review.²⁶² There is no right of appeal.²⁶³ And since the recommendations and review documents are not subject to Freedom of Information Act requests, petitioners and the public are regularly left to guess why clemency decisions are — or are not — made.²⁶⁴ It is unknown, for example, why 1,696 people received a commuted sentence under President Obama's 2014 Clemency Initiative when only 86 of them appear to have met all the requisite eligibility criteria.²⁶⁵ Many more people — almost 2,600 — appear to have met all of those criteria but were not offered clemency.²⁶⁶ A further 7,881 petitions were never reviewed.²⁶⁷ As of October 2020, more than 13,000 federal clemency petitions sat awaiting action.²⁶⁸ Because of this pervasive lack of transparency and accountability, the public perception of clemency has too often been one of corruption or arbitrariness. Confidence in the current system and expectations of its use remain low despite good intentions and public support for grants of clemency.

Given that there are possibly thousands of people who are appropriate clemency candidates sitting in federal prison, the new administration should make more productive and broad-based use of the president's clemency power. Clemency holds the promise of swifter relief than waiting for curative legislation. A new process, independent of the Department of Justice, should be adopted to better routinize its use. Clear standards and written

clemency decisions should be made accessible to the public to help demystify how clemency operates and secure public confidence in the system.

Executive action: Establish a permanent and independent clemency review board.

Because Justice Department officials, and especially the deputy attorney general, have a vested interest in preserving federal convictions, the current structure of clemency should be changed to avoid any appearance of a conflict of interest. The new administration should remove the clemency process from the Justice Department and establish a permanent, independent, and bipartisan review board to evaluate clemency petitions and make recommendations to the president.²⁶⁹ Board members should be drawn not only from the legal profession or corrections but also from a broad range of other fields, such as psychology, sociology, and criminology, to ensure that decisions are based on a full understanding of the justice system.²⁷⁰

Clemency review boards have been impaneled in the past — in particular under President Ford and informally under President Kennedy — but only on an ad hoc basis, to deal with specific demarcated classes of people and offenses.²⁷¹ A permanent board with broad authority to routinely review clemency cases and give recommendations to the president holds the promise of making clemency an integral part of the justice system rather than an irregular and idiosyncratic gift that is arbitrarily bestowed. It would ensure that all applications are reviewed and decided on. A board could also proactively identify classes of people — for example, those who are still imprisoned under repealed drug sentencing laws — who may not have applied for resentencing but would be otherwise eligible

for a shortened sentence under new sentencing laws.²⁷² Such a board could also reduce the public perception that pardons arise out of cronyism or special access to the president and are granted as personal favors.²⁷³

Executive action: Establish clear standards and explain clemency decisions.

Clemency decisions should be guided by clear standards so that applicants and the public fully understand the criteria being used to evaluate requests and protect against arbitrary decision making. Standards must be flexible and

offer a fully developed departure power — a codified ability to deviate from written guidelines — to acknowledge that no set of rules can anticipate every situation and that material differences in cases may warrant varied treatment.²⁷⁴ To avoid the perception of arbitrariness, the board must also provide robust written reasoning and explanations for its recommendations and publish a report on its decisions and other activities annually. This would not only add credibility but also establish a record of decisions outlining the actual factual application of the rule. It would cement a more consistent and principled way of exercising clemency power while increasing transparency and public confidence.

Help Formerly Incarcerated People Rejoin the Workforce and Community with Clean-Slate Legislation

More than 95 percent of people confined to jail or prison will one day return home.²⁷⁵ As release day looms, so too do countless challenges on the other side of the prison gate. Incarcerated people, after having been instructed for weeks, months, and years on when to eat, what to wear, and where to go, suddenly bear all responsibility for making decisions for themselves.

Because of the vast footprint of incarceration in America, these issues implicate a substantial number of people in any given year: More than 600,000 individuals are released from federal and state prisons annually, and nearly 9 million more churn through the country's more than 3,000 local jails.²⁷⁶ A disproportionate number of them come from historically and politically marginalized groups that are disproportionately marked by endemic poverty and unemployment, family dislocation, and a breakdown of community social processes and controls.²⁷⁷ People leaving incarceration often go back to impoverished communities with few social supports.²⁷⁸

Whether a person returns after a few nights in jail or a few decades in prison, life after release is rife with roadblocks. Foremost among these are a bewildering web of collateral consequences of a criminal conviction. Legal penalties or regulations restrict people with criminal histories from whole areas of mainstream life, including housing, employment, social benefits, and even education.²⁷⁹ But criminal histories — and especially incarceration — pose serious and persistent challenges for people beyond those prescribed by law. These histories can serve as a basis for job, credit, or housing denial.²⁸⁰ Indeed, too often a quick internet search is used as the basis for “digital punishment”; more than 9 in 10 employers, 4 in 5 landlords, and 3 in 5 colleges use background checks without taking into account the severity or date of a criminal record.²⁸¹ The challenges a conviction and incarceration history pose to successful reintegration, particularly employment and stable housing, help explain America's persistently high rearrest and recidivism rates.²⁸² Within eight years of

release, nearly half of people are rearrested, and nearly one-quarter return to prison.²⁸³

Legislative action: Expand the reach of federal expungement law.

To counteract some of these effects, most jurisdictions in the United States have established sealing or expungement laws, which bar access to criminal records and in some cases allow for their destruction.²⁸⁴ Many jurisdictions have recently expanded access to this type of relief.²⁸⁵ In the federal system, however, expungement is extremely limited; most offenses are categorically ineligible, and courts have determined that they have no inherent authority to expunge records of a valid federal conviction.²⁸⁶ The only explicit federal expungement provision applies to people convicted under Section 404 of the Controlled Substances Act, 21 U.S.C. § 844 (2012), who at the time of the offense were less than 21 years old.²⁸⁷ Federal expungement can also apply in cases of an unconstitutional conviction or an illegal arrest, or when motions are filed under other constitutional claims.²⁸⁸

The new administration should encourage Congress to enact the Clean Slate Act, a bill originally introduced in 2019, which would allow individuals to petition to have certain federal records sealed after completing all terms of their sentence.²⁸⁹ It would also automatically seal federal criminal records for people with specified low-level, victimless crimes, such as marijuana possession, as long as the individual has not committed a number of enumerated national security–related additional crimes.²⁹⁰

Eliminate the Death Penalty

The most consequential criminal punishment is death. Many have argued to the U.S. Supreme Court that capital punishment violates the “cruel and unusual” clause of the Eighth Amendment, yet the Court has allowed state and federal executions to persist.²⁹¹ Today 28 states allow the death penalty, although three of those states currently have a governor-imposed moratorium on the practice.²⁹² At the same time, the use of the death penalty remains at near historic lows and is very localized in nature, with over 80 percent of all executions since 1976 taking place in the South, and 37 percent in Texas alone.²⁹³ In 2019 the federal government announced it would resume executions after a 16-year hiatus, against a strong public outcry.²⁹⁴ Since the federal death penalty was reinstated in 1988, only three people had been executed until this year, when eight people were executed over the course of merely 11 weeks. Three additional executions are scheduled for this year alone.²⁹⁵

The death penalty is at best morally contested, and at worst cruel and unusual.²⁹⁶ It is both unfair and unjust. The agonizing pain of those subjected to botched capital punishment attempts alone is troubling.²⁹⁷ And it is now known that lethal injection, the principal method of execution and one once thought to be “humane,” likely causes extended periods of pain and suffering.²⁹⁸ Perhaps the most perilous issue is the possibility of irreversible error. Human judgment is demonstrably fallible, and miscarriages of justice occur in devastating ways; more than 160 people sentenced to death since 1973 in the United States were later exonerated, severely undermining confidence in the capital punishment system.²⁹⁹ The death penalty is also levied in a racially biased way. In one study, 96 percent of reviewed death penalty cases were found to show a pattern of either race-of-victim or race-of-defendant discrimination, or both.³⁰⁰ Another study found that jurors in Washington State were four times more likely to recommend a death sentence in cases involving Black defendants than for white defendants in similar cases.³⁰¹

Not only is the death penalty unacceptably applied more often to people of color, but the practice is ineffective. While some proponents of the death penalty argue that it has deterrent value, a plurality of studies examining the practice indicate that there is no such effect.³⁰² In 2012 the National Research Council concluded that studies claiming the death penalty deters crime were fundamentally flawed.³⁰³ Meanwhile, a growing body of research has found that the threat of the death penalty can be enough to coerce a guilty plea even when a defendant is innocent.³⁰⁴

Also at issue is the practice’s real and escalating price tag. A 2016 study found that Nebraska spent \$14.6 million annually on its capital punishment system, with each capital case that it prosecuted costing about \$1.5 million more

than a noncapital case.³⁰⁵ Since 1978, California’s maintenance of the death penalty (resulting in just 13 executions) has cost the state an estimated \$4 billion.³⁰⁶ And in the federal system, the median costs for cases where the death penalty is sought are almost eight times higher than cases where it is not.³⁰⁷

The federal government’s rush to resume executions is out of step with both domestic public opinion and prevailing international practice. A majority of Americans are more supportive of a life-without-parole sentence for murder than a death sentence.³⁰⁸ Nearly half of Americans believe that the death penalty is imposed unfairly, and 40 percent find it “morally wrong.”³⁰⁹ While prosecutors often laud the death penalty as “closure” for homicide victims’ families, research increasingly shows opposition to the death penalty among family members as well.³¹⁰ Meanwhile, the number of nations that practice capital punishment has dwindled; 106 countries have banned the death penalty altogether, and an additional 29 countries have abolished it in practice.³¹¹ This includes a plurality of Western democracies, including the United Kingdom, Canada, Germany, and France.³¹² Even the Russian Federation no longer executes people.³¹³ Today, only 56 of 198 countries do.³¹⁴

Executive and legislative action: Declare a moratorium on federal executions and enact the Federal Death Penalty Abolition Act.

Congress should pass legislation, such as the Federal Death Penalty Abolition Act, proposed in 2019, to immediately and permanently halt all federal executions by abolishing the federal and military death penalty and commuting existing federal and military death sentences to life without parole.³¹⁵ While awaiting legislative action,

the president should sign an executive order implementing a moratorium on federal executions. If the Department of Justice refuses to pursue death penalty sentences, the Supreme Court may be encouraged to strike it down

for good; the president and Department of Justice's view that the death penalty is unconstitutional may convince the Court that our "standards of decency" have evolved beyond this cruel and unusual practice.³¹⁶

Conclusion

Reforming the U.S. criminal justice system sounds like a daunting task and one that would have to be accomplished with sweeping, innovative steps. But the reality is that a few simple commonsense changes, built on principles of justice and dignity and already proven in the crucible of state law, could rebuild community trust and create a justice system that is exactly that: just.

It is not revolutionary to say that police should be held to a standard commensurate with the trust we place in them. Nor is it radical to suggest that after half a century of failure to protect communities or create a safer country, mass incarceration should be unwound and the harms it has done remedied. It is hardly extreme to imagine a system where substance use issues and mental health problems are dealt with by professionals trained to handle these crises rather than armed, militarized, uniformed officers, or where people who must be incarcerated for the safety of the public are themselves safe from abuse

and mistreatment. And the notion that the 95 percent of people who will leave prison and rejoin the community should be educated and prepared to contribute to their families and the workforce is simply logical, as well as cost effective.

The federal government has the opportunity to lead the way to a future where Americans are safe and secure in their homes and communities. Where trust between police and the people they serve can be rebuilt with accountability and transparency. And where justice is served equitably, for all.

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- 14 Violent Crime Control and Law Enforcement Act of 1994, Pub.L. 103-322, 103rd Congress (1994), <https://www.congress.gov/bill/103rd-congress/house-bill/3355/text>. Approximately \$2.7 billion was awarded as grants to the states and territories between FY 1996 and 2001 for constructing, expanding, or renovating correctional facilities. See U.S. Department of Justice, Bureau of Justice Assistance (BJA), *Report to Congress, Violent Offender Incarceration and Truth-in-Sentencing Incentive Formula Grant Program 1*, 2012, 6, <https://www.bja.gov/Publications/VOITIS-Final-Report.pdf>.
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- 20 See Brennan Center for Justice, "Lawmakers Introduce Bill to Incentivize Reductions in Prison Populations," May 21, 2019, <https://www.brennancenter.org/our-work/analysis-opinion/lawmakers-introduce-bill-incentivize-reductions-prison-populations>.
- 21 For a full analysis of the expected costs associated with the act and the reasonableness and effects of its targets, see Eisen and Chettiar, *The Reverse Mass Incarceration Act*. The 7 percent reduction is recommended as it is slightly higher than the average rate at which states have reduced their prison populations between 2011 and 2014. For the 23 states that decreased imprisonment during this period,

the average decrease was about 5 percent. See Eisen and Chettiar, *The Reverse Mass Incarceration Act*, 7–8.

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23 See Reverse Mass Incarceration Act of 2019, S 1557, 116th Congress (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/1557/text>.

24 President-Elect Biden has not explicitly embraced the Brennan Center’s proposal, preferring instead to refer to his plan as “inspired by” the Reverse Mass Incarceration Act. See Joe Biden, “Preventing Crime and Providing Opportunities for All,” in *The Biden Plan for Strengthening America’s Commitment to Justice*, last accessed October 6, 2020, <https://joebiden.com/justice/>.

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30 Chad Flanders and Joseph Welling, “Police Use of Deadly Force: State Statutes 30 Years after *Garner*,” *St. Louis University Public Law Review* 35, no. 1 (2015): 120–24 and appendix A, <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1029&context=plr>.

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DeRay McKesson et al., *Police Use of Force Policy Analysis*, Campaign Zero, 2016, <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/57e1b5cc2994ca4c1d97700/1474409936835/Police+Use+of+Force+Report.pdf>.

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34 “The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Graham v. Connor*, 490 U.S. 386, 394 (1989), <https://supreme.justia.com/cases/federal/us/490/386/>. In practice, this means that police officers will describe their subjective perceptions at the time of the incident, and their recollection of those perceptions (for example, their guess about the presence or absence of a weapon) will govern the “objective reasonableness” of their use of force. See, for example, Lauren A. Monds, Helen M. Paterson, and Keenan Whittle, “Can Warnings Decrease the Misinformation Effect in Post-Event Debriefing?,” *International Journal of Emergency Services* 2, no. 1 (2013), <https://link.springer.com/article/10.1007/s11896-014-9141-6>.

35 U.S. Commission on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices*, 2018, 154, <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf>.

36 As discussed below, amendments to the main federal criminal civil rights statute, Title 18, U.S.C., § 242 (2018), which will be the topic of a forthcoming Brennan Center report, would help to clarify constitutional limits on police use of force. To encourage states to go further than current federal constitutional limits in the development of protective policing standards, Congress can enact federal police reform legislation and provide incentives for state conformity with these regulations under the Spending Clause. *South Dakota v. Dole*, 483 U.S. 203 (1987), <https://supreme.justia.com/cases/federal/us/483/203/>.

37 Samuel Sinyangwe, “Police Are Killing Fewer People in Big Cities, but More in Suburban and Rural America,” *FiveThirtyEight*, June 1, 2020, <https://fivethirtyeight.com/features/police-are-killing-fewer-people-in-big-cities-but-more-in-suburban-and-rural-america/>.

38 Working with legal experts, advocates, and academics, Campaign Zero identified eight use-of-force policies that establish meaningful restrictions on police officers, including: require de-escalation, use a force continuum or matrix, ban choke holds and strangleholds, require warning before use of deadly force, restrict shooting at moving vehicles, require deadly force as a last resort, impose a duty to intervene, and require comprehensive reporting of uses of force and threats of force. The authors estimated that police departments that enacted all eight policies could see a cumulative 72 percent decrease in killings compared with departments that had enacted none. McKesson et al., *Police Use of Force Policy Analysis*, 8.

39 Law Enforcement Action Partnership, *Recommendations to Transform Policing*, Law Enforcement Action Partnership, 2020, 1–6, <https://lawenforcementactionpartnership.org/national-policing-recommendations/>.

40 Leadership Conference on Civil and Human Rights, *New Era of Public Safety: A Guide to Fair, Safe, and Effective Community Policing*, 2019, 119–49, <https://civilrights.org/wp-content/uploads/Policing-Full-Report.pdf>; see also International Association of Chiefs of Police (IACP), *National Consensus Policy and Discussion Paper on Use of Force*, 2017, 2, <https://www.theiacp.org/sites/default/files/all/n-o/National-Consensus-Policy-On-Use-Of-Force.pdf>.

41 For example, the George Floyd Justice in Policing Act of 2020, § 364, would prohibit the use of deadly force unless it “is necessary, as a last resort, to prevent imminent and serious bodily injury or death to the officer or another person.” George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong., <https://www.congress.gov/bill/116th-congress/house-bill/7120>. The Commission on

Accreditation for Law Enforcement Agencies (CALEA) recently proposed that an appropriate use-of-force standard should read: "Deadly force may only be used when an officer reasonably believes that the action is in defense of any human life in imminent danger of death or serious bodily injury." See "Proposed Revision to Law Enforcement Standard 4.1.2 Relating to the Use of Deadly Force," CALEA, July 6, 2020, <https://www.calea.org/forum/topic/proposed-revision-law-enforcement-standard-412-relating-use-deadly-force>. And the Police Executive Research Forum recommends a prohibition on the use of lethal force against individuals who pose a danger only to themselves, recommending that officers should "wait as long as necessary" to resolve crises peacefully. Police Executive Research Forum, *Guiding Principles on Use of Force*, 48.

42 Choke holds are defined as a "physical maneuver that restricts an individual's ability to breathe for the purposes of incapacitation." IACP, *National Consensus Policy*, 3; see also George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020) § 363, which defines choke holds as any "maneuver that restricts blood or oxygen flow to the brain, including chokeholds, stranglegolds, neck restraints, neckholds, and carotid artery restraints." In the wake of George Floyd's death, the Leadership Conference on Civil and Human Rights — a coalition of 220 national organizations, including the Brennan Center — and an additional 454 organizations called on Congress to prohibit such maneuvers and restraints. Leadership Conference on Civil and Human Rights, Letter to Speaker Pelosi, Leader McCarthy, Majority Leader McConnell, and Minority Leader Schumer, June 1, 2020, <https://civilrights.org/resource/civil-rights-coalition-letter-on-federal-policing-priorities/>.

43 Leadership Conference on Civil and Human Rights, Letter to Speaker Pelosi. Less lethal techniques may involve manual restraints, electronic control weapons also known as tasers, pepper aerosol spray, tear gas, stun grenades, and kinetic impact projectiles (rubber bullets), among other tactics. Charlie Mesloh, Mark Henych, and Ross Wolf, *Less Lethal Weapon Effectiveness, Use of Force, and Suspect & Officer Injuries: A Five-Year Analysis*, National Institute of Justice, 2008, <https://www.ncjrs.gov/pdffiles1/nij/grants/224081.pdf>.

44 IACP, *National Consensus Policy*, 10–11.

45 Police Executive Research Forum, *Guiding Principles on Use of Force*, 40.

46 Curtis Gilbert, "Not Trained to Not Kill," American Public Media Reports, May 5, 2017, <https://www.apmreports.org/story/2017/05/05/police-de-escalation-training>.

47 Police Executive Research Forum, *Re-engineering Training on Police Use of Force*, August 2015, 11, <https://www.policeforum.org/assets/reengineeringtraining1.pdf>.

48 Leadership Conference on Civil and Human Rights, *New Era of Public Safety*, 112. Although the precise contours of what a detailed use-of-force policy should include is beyond the scope of this report, 11 of the most significant law enforcement leadership and labor organizations in the United States issued a consensus policy in 2017 on the use of force by law enforcement. See IACP, *National Consensus Policy*; see also Camden County Police Department, *Use of Force Policy*, January 28, 2013, <https://static1.squarespace.com/static/c4c000192f311/1566345667504/CCPD+UOF+Policy+%288.21.19%29+%28FINAL%29.pdf>.

49 Erin Schumaker, "Police Reformers Push for De-escalation Training, but the Jury Is Out on Its Effectiveness," ABC News, July 5, 2020, <https://abcnews.go.com/Health/police-reformers-push-de-escalation-training-jury-effectiveness/story?id=71262003>.

50 A police training academy could be modeled after the FBI's National Academy. Federal Bureau of Investigation, "National Academy," accessed October 15, 2020, <https://www.fbi.gov/services/training-academy/national-academy>.

51 Leadership Conference on Civil and Human Rights, *New Era of Public Safety*, 141–43.

52 See Matt Vasilogambros, "Training Police to Step In and Prevent Another George Floyd," The Pew Charitable Trusts, June 5, 2020, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/05/training-police-to-step-in-and-prevent-another-george-floyd>. The New Orleans Police Department's Ethical Policing Is Courageous (EPIC) program has the potential to serve as a national model for intervention training. EPIC trains police officers of all ranks to engage in peer intervention practices to "stop a wrongful action before it occurs." Jonathan Aronie and Christy E. Lopez, "Keeping Each Other Safe: An Assessment of the Use of Peer Intervention Programs to Prevent Police Officer Mistakes and Misconduct, Using New Orleans' EPIC Program as a Potential National Model," *Police Quarterly* 20, no. 3 (2017): 2, <https://epic.nola.gov/epic/media/Assets/Aronie-Lopez-Keeping-Each-Other-Safe.pdf>. Building on EPIC's success, Georgetown University's Innovative Policing Program developed the Active Bystandership for Law Enforcement (ABLE) Project to train police officers on intervention strategies when peer officers are engaging in misconduct or causing harm. Georgetown Law, "Active Bystandership for Law Enforcement (ABLE) Project," <https://www.law.georgetown.edu/innovative-policing-program/active-bystandership-for-law-enforcement/>.

53 Police Executive Research Forum, *Guiding Principles on Use of Force*, 50; see also Ronal Serpas's Testimony to the President's Commission on Law Enforcement and the Administration of Justice, transcript of call recorded June 24, 2020, 9–14, <https://www.justice.gov/ag/page/file/1294591/download>.

54 Police Executive Research Forum, *Guiding Principles on Use of Force*, 50; and Vasilogambros, "Training Police."

55 For example, police in Kenosha, Wisconsin, were not wearing body cameras when they shot Jacob Blake on August 23, 2020, but video of the encounter was widely disseminated, leading to an investigation of the incident and renewed protests. Elliott C. McLaughlin and Amir Vera, "Wisconsin Police Shoot a Black Man as His Children Watch from a Vehicle, Attorney Says," CNN, August 24, 2020, <https://www.cnn.com/2020/08/24/us/kenosha-police-shoot-ing-jacob-blake/index.html>.

56 "Fatal Force," *Washington Post*, updated October 14, 2020, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

57 Federal Bureau of Investigation (FBI), "FBI Announces the Official Launch of the National Use-of-Force Data Collection," press release, November 20, 2018, <https://www.fbi.gov/news/pressrel/press-releases/fbi-announces-the-official-launch-of-the-national-use-of-force-data-collection>. The FBI's reporting requirements go further than what would be mandated under the George Floyd Justice in Policing Act of 2020, if passed as written. H.R. 7120, 116th Cong. (2020).

58 "Crime Data Explorer: United States," Federal Bureau of Investigation, last accessed October 8, 2020, <https://crime-data-explorer.fr.cloud.gov/officers/national/united-states/uof>.

59 Exec. Order No. 13929, 85 Fed. Reg. 37325, June 16, 2020, <https://www.whitehouse.gov/presidential-actions/executive-order-safe-policing-safe-communities/>.

60 See George Floyd Justice in Policing Act of 2020 § 223, which anticipates mandated use-of-force reporting for any state or tribe that receives grant funding under the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) program and the publication of a report of the collected data. Failure to comply would allow the attorney general to reduce Byrne JAG grant funding to a noncompliant state by a maximum of 10 percent. H.R. 7120, 116th Cong. (2020). The President's Task Force on 21st Century Policing similarly recommended in 2015 that policies on use of force should require agencies to collect, maintain, and report data to the federal government on all officer-involved shootings, whether fatal or nonfatal, as well as any in-custody death. Office of Community Oriented Policing Services, President's Task Force on 21st Century

Policing, *Final Report of the President's Task Force on 21st Century Policing*, 2015, 21–22, Action Item 2.2.4, <https://cops.usdoj.gov/RIC/Publications/cops-p311-pub.pdf>.

61 The Police Executive Research Forum recommends that law enforcement agencies publish public reports on officers' use of force, including demographic information about the officers that use and the civilians that are subject to force. Police Executive Research Forum, *Guiding Principles on Use of Force*, 49.

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63 "Fatal Force," *Washington Post*.

64 Amelia Thomson-DeVeaux, Nathaniel Rakich, and Likhitha Butchireddygar, "Why It's So Rare for Police Officers to Face Legal Consequences," *FiveThirtyEight*, June 4, 2020, updated September 23, 2020, <https://fivethirtyeight.com/features/why-its-still-so-rare-for-police-officers-to-face-legal-consequences-for-misconduct/>.

65 Larry Buchanan, Quoc Trung Bui, and Jugal K. Patel, "Black Lives Matter May Be the Largest Movement in U.S. History," *New York Times*, July 3, 2020, <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (estimating that 15 to 26 million Americans participated in demonstrations following the death of George Floyd). Monmouth University found that 76 percent of Americans believe racial and ethnic discrimination is a "big problem" in the United States and, in a significant change from prior polls, that 57 percent of Americans believe that "police officers facing a difficult or dangerous situation are more likely to use excessive force if the culprit is black." Monmouth University Poll, "National: Protestors' Anger Justified Even If Actions May Not Be," press release, Monmouth University, June 2, 2020, 1, 3, https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_060220.pdf/.

66 Kat Stafford and Hannah Fingerhut, "AP-NORC Poll: Sweeping Change in US Views of Police Violence," AP News, June 17, 2020, <https://apnews.com/728b414b8742129329081f7092179d1f>.

67 18 U.S.C. § 242 (2018) provides the primary cause of action in use-of-force cases. 34 U.S.C. § 12601 (2018) authorizes pattern-or-practice investigations.

68 The George Floyd Justice in Policing Act of 2020 contemplates amending § 242, although it does not go as far as the recommendations herein regarding § 242. See generally George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), Section 101 (seeking to amend the mens rea requirements of § 242); Section 102 (proposing amendment to 42 U.S.C. § 1983 (2018) to disallow the defense of qualified immunity in civil lawsuits); Section 103 (providing subpoena power to the U.S. Department of Justice to conduct pattern-or-practice recommendations under 34 U.S.C. § 12601 (2018), and establishing a grant program for states and localities to assist states in conducting pattern-or-practice recommendations). See also Leadership Conference on Civil and Human Rights, Letter to Speaker Pelosi.

69 See *Screws v. United States*, 325 U.S. 91, 104 (1945), <https://supreme.justia.com/cases/federal/us/325/91/> (interpreting the "willful" standard of § 242 as requiring proof that an individual "knows or acts in reckless disregard" of the statute in order to deprive an individual of a defined constitutional or other federal right); see also *United States v. Kerley*, 643 F.2d 299, 303 (5th Cir. 1981), <https://law.justia.com/cases/federal/appellate-courts/F2/643/299/454270/> ("The district court's failure to charge the jury that willfully, as used in Section 242, means *acting with bad purpose or evil motive* was reversible error" [emphasis added]).

70 One court has described § 242 as "perhaps the most abstractly worded statute among the more than 700 crimes in the federal criminal code." *United States v. Lanier*, 73 F.3d 1380, 1382 (6th Cir. 1996).

71 Specific details regarding proposed changes to the text of

§ 242, to combat police brutality, brutality by prison guards, sexual contact under color of law, and deliberate indifference to medical needs, will be further detailed in a forthcoming Brennan Center report. The George Floyd Justice in Policing Act of 2020 recommends lowering the intent standard of this statute to "knowingly or recklessly," along with other changes, including eliminating the death penalty as a possible penalty and a provision that provides that "[f]or purposes of this section, an act shall be considered to have resulted in death if the act was a substantial factor contributing to the death of the person." George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020) § 101. The George Floyd Justice in Policing Act of 2020 also would ban choke holds under § 242 as a civil rights violation. See § 363.

72 See Joanna R. Lampe, *Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242*, Congressional Research Service, 2020, <https://crsreports.congress.gov/product/pdf/LSB/LSB10495>.

73 34 U.S.C. § 12601 (2018).

74 U.S. Department of Justice, Civil Rights Division, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994–Present*, 2017, <https://www.justice.gov/crt/file/922421/download>.

75 U.S. Department of Justice, *The Civil Rights Division's Pattern and Practice Police Reform Work*; and Anjuly Sastry and Karen Grigsby Bates, "When LA Erupted in Anger: A Look Back at the Rodney King Riots," NPR, April 26, 2017, <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots>.

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78 Tolan and Fantz, "As Rage over Killings of Black Americans Sweeps Nation."

79 See "Memorandum from Attorney General Jefferson B. Sessions to Heads of Department Components and United States Attorneys re: Supporting Federal, State, Local and Tribal Law Enforcement," March 31, 2017, <https://www.justice.gov/opa/press-release/file/954916/download>; and "Memorandum from Attorney General Jefferson B. Sessions to Heads of Civil Litigating Components, U.S. Attorneys re: Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities," November 7, 2018, <https://www.justice.gov/opa/press-release/file/1109681/download>.

80 See George Floyd Justice in Policing Act of 2020 § 103.

81 Taryn A. Merkl, "Ending Police Impunity in New York Required Repealing a Secrecy Law Called '50-A,'" Brennan Center for Justice,

June 9, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/ending-police-impunity-new-york-required-repealing-secrecy-law-called-50>; and Shaila Dewan and Serge F. Kovaleski, "Thousands of Complaints Do Little to Change Police Ways," *New York Times*, May 30, 2020, <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html>.

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83 John Kelly and Mark Nichols, "We Found 85,000 Cops Who've Been Investigated for Misconduct. Now You Can Read Their Records," *USA Today*, June 11, 2020, <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/>.

84 Kelly and Nichols, "We Found 85,000 Cops."

85 One study found that in any given year, roughly 1,100 full-time law enforcement officers who had been previously fired from one Florida law enforcement agency were working for another Florida law enforcement agency. This is likely a conservative estimate; the study does not account for officers who were fired out of state and then obtained law enforcement employment in Florida. Ben Grunwald and John Rappaport, "The Wandering Officer," *Yale Law Journal* 129, no. 6 (2020), https://www.yalelawjournal.org/pdf/GrunwaldRappaportArticle_s6branzny.pdf. The phenomenon is hardly limited to Florida: Cleveland Police Officer Timothy Loehmann, who shot and killed 12-year-old Tamir Rice in 2014, had been previously deemed unfit to serve and dismissed from another Ohio police department. Minyonne Burke, "Officer Who Fatally Shot Tamir Rice Quits Ohio Police Department Days After He Was Hired," *NBC News*, October 11, 2018, <https://www.nbcnews.com/news/us-news/officer-who-fatally-shot-tamir-rice-quits-ohio-police-department-n919046>.

86 Roger L. Goldman, "A Model Decertification Law," *St. Louis University Public Law Review* 32, no.1 (2012): 147–57 and footnote 4, <https://scholarship.law.slu.edu/cgi/viewcontent.cgi?article=1221&context=faculty>. While most — but not all — states with decertification procedures will decertify an officer with a felony conviction, policies for misdemeanor convictions, misconduct, and even termination of employment for cause vary wildly among the states. Matthew Hickman, "Officer Decertification and the National Decertification Index," *Police Quarterly* 16, no. 4 (2013), https://www.researchgate.net/publication/270600207_Officer_Decertification_and_the_National_Decertification_Index. See also Roger L. Goldman, "NDI: Tracking Interstate Movement of Decertified Police Officers," *Police Chief Online*, September 12, 2018, <https://www.police-chiefmagazine.org/ndi-tracking-decertified-police-officers/>.

87 The states have many different standards for certifying and decertifying officers. Some states, such as Massachusetts, do not require police officers to be certified before joining law enforcement. See American Civil Liberties Union of Massachusetts, *Peace Officer Standards and Training*, 2020, https://www.aclum.org/sites/default/files/field_documents/post_onepager_6_12_20.pdf. Forty-five states have processes in place to decertify police officers in light of misconduct or criminal convictions. See Laura Bowen, "Toughening Police Decertification an Uphill Battle for States," *The Crime Report*, September 15, 2020, <https://thecrimereport.org/2020/09/15/toughening-police-decertification-an-uphill-battle-in-the-u-s/>; and Nomaan Merchant and Reese Dunklin, "Police Officer Decertification by State," *The Morning Call*, November 1, 2015, <https://www.mcall.com/mc-a-50state-look-at-officer-decertification-for-sex-incidents-20151031-story.html>.

88 In 2003 England and Wales established a "Disapproved Register" for dismissed law enforcement officers. College of Policing, "Disapproved Register," accessed October 15, 2020, <https://www.college.police.uk/What-we-do/Ethics/integrity-and-transparency/Disapproved-Register/Pages/Disapproved-Register.aspx>. The United

States currently maintains the National Decertification Index (NDI), a national registry of license or certificate revocation actions based on officer misconduct, but reporting to NDI is voluntary and its coverage remains incomplete. See International Association of Directors of Law Enforcement Standards and Training, "About NDI," accessed October 15, 2020, <https://www.iadlest.org/our-services/ndi/about-ndi>; and Raymond A. Franklin, Matthew Hickman, and Marc Hiller, *2009 Survey of POST Agencies Regarding Certification Practices*, U.S. Department of Justice, 2009, <https://www.ncjrs.gov/pdffiles1/nij/227927.pdf>.

89 Law Enforcement Action Partnership, "Recommendations to Transform Policing," June 3, 2020, <https://lawenforcementaction-partnership.org/national-policing-recommendations/>; also see George Floyd Justice in Policing Act of 2020 § 201, H.R. 7120, 116th Cong. (2020), which would create a National Police Misconduct Registry, requiring federal law enforcement to report cases of misconduct and incentivizing states and localities to do the same by withholding Byrne JAG grant funding.

90 Tatiana Follett et al., "Law Enforcement Certification and Discipline," National Conference of State Legislatures, August 17, 2020, <https://www.ncsl.org/research/labor-and-employment/policing-oversight-and-new-legislation.aspx>. While Hawaii has committed to creating a decertification process under legislation effective in 2018, the Law Enforcement Standards Board has failed to meet deadlines to do so. Blaze Lovell, "Hawaii Ignores Deadline to Create New Standards for Cops," *Honolulu Civil Beat*, July 8, 2019, <https://www.civilbeat.org/2019/07/hawaii-ignores-deadline-to-create-new-standards-for-cops>.

91 See Ronal Serpas's Testimony to the President's Commission on Law Enforcement and the Administration of Justice, 12.

92 For example, this year Colorado Gov. Jared Polis signed SB 217, mandating, among other things, that law enforcement officers intervene if fellow officers are using inappropriate force against an individual. The failure to do so will result in the bystander officer's decertification, with certain exceptions. See Colorado SB 217 (2020), <https://leg.colorado.gov/bills/sb20-217>.

93 Ray, "What Does 'Defund the Police' Mean?"

94 See, for example, Tim Hegarty, "Community-Led Policing," National Police Foundation, accessed October 15, 2020, <https://www.policefoundation.org/community-led-policing/>.

95 Art Acevedo, Steven Casstevens, and Sylvia Moir, "Police Chiefs: 'We Can't Arrest Our Way Out of Societal Problems' — Invest in Families, Communities to Prevent Crime," *Houston Chronicle*, September 10, 2020, <https://www.houstonchronicle.com/opinion/outlook/article/Police-chiefs-We-can-t-arrest-our-way-out-15554272.php>; and Law Enforcement Leaders to Reduce Crime and Incarceration, *Ensuring Justice and Public Safety: Federal Criminal Justice Priorities for 2020 and Beyond*, Brennan Center for Justice, 2020, 12–14, http://lawenforcementleaders.org/wp-content/uploads/2020/04/2020_04_LEL_Policy_Report_Final.pdf.

96 Many police agencies — at least 56 percent across the country — currently rely on CompStat to track crime and measure progress toward departmental goals. However, CompStat and other traditional tools measuring police success use conventional metrics such as crime reduction. As the past months have shown, community expectations of policing are complex. Comprehensive departmental management tools that consider community satisfaction and positive community engagement — including, for example, CompStat360 — would be helpful to measure goals beyond crime reduction. See David Weisburd et al., "The Growth of CompStat in American Policing," *Police Foundation Reports*, April 2004, https://www.policefoundation.org/wp-content/uploads/2015/06/Weisburd-et-al.-2004-The-Growth-of-Compstat-in-American-Policing-Police-Foundation-Report_0.pdf; and "Welcome to CompStat360," accessed October 15, 2020, <https://www.compstat360.org/>.

97 Law Enforcement Leaders to Reduce Crime and Incarceration, *Ensuring Justice and Public Safety*, 12–14.

- 98** See Jessica Saunders, "Performance Metrics to Improve Police–Community Relations," testimony before a joint meeting of the California State Assembly and California State Senate Public Safety Committees, February 10, 2015, https://www.rand.org/content/dam/rand/pubs/testimonies/CT400/CT423/RAND_CT423.pdf.
- 99** For example, collection of accurate data among Latino people can pose special challenges. See "The Alarming Lack of Data on Latinos in the Criminal Justice System," Urban Institute, 2016, <https://apps.urban.org/features/latino-criminal-justice-data/>.
- 100** Jon Frank, "Justice Department Issues Changes to Largest Criminal Justice Grant," Brennan Center for Justice, January 8, 2016, <https://www.brennancenter.org/our-work/analysis-opinion/justice-department-issues-changes-largest-criminal-justice-grant>; and Eisen et al., *Reforming Funding*.
- 101** Measurements of success should be changed by removing the number of arrests and drug enforcement measures (including volume of drugs seized) as metrics and by adding measurements to indicate the change in crime rates, the change in the number of citations instead of arrests issued by police, the percentage of cases where prosecutors recommended alternatives to prison, and whether people attending mental health and drug treatment programs demonstrate improvement — as indicated, for example, by their recidivism rate, graduation rate, and their success at staying clean. See Frank, "Justice Department Issues Changes."
- 102** See Law Enforcement Leaders to Reduce Crime and Incarceration, *Ensuring Justice and Public Safety*, 8. Some cities have begun to assess how police can be better utilized and where armed law enforcement is not necessary. For example, San Francisco recently pledged to remove law enforcement from all noncriminal 911 calls, recognizing that unarmed professionals may be more appropriate for issues pertaining to mental health, homelessness, school discipline, and more. See Maura Dolan, "London Breed Pushes San Francisco Reforms: Police No Longer Will Respond to Noncriminal Calls," *Los Angeles Times*, June 12, 2020, <https://www.latimes.com/california/story/2020-06-12/san-francisco-police-reforms-stop-response-noncriminal-calls>.
- 103** Substance Abuse and Mental Health Services Administration (SAMSHA), "Criminal and Juvenile Justice," accessed October 15, 2020, <https://www.samhsa.gov/criminal-juvenile-justice>. The CAHOOTS Act, for example, would grant states enhanced federal Medicaid funding (a 95 percent federal match) for three years to provide community-based mobile crisis services to individuals experiencing a mental health or substance-use crisis. It also provides \$25 million for planning grants to states to help establish or build out mobile crisis programs. See CAHOOTS Act, H.R.7961, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/7961/text>; and S.4441, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/4441/text>. The act is named and modeled after the CAHOOTS (Crisis Assistance Helping Out on the Streets) program in Eugene, Oregon, which provides mobile crisis intervention by dispatching teams of medics and crisis workers with mental health expertise into the community. See "CAHOOTS," White Bird Clinic, accessed October 15, 2020, <https://whitebirdclinic.org/cahoots/>.
- 104** Noah Atchison, "Community Organizations Have Important Role in Lowering Crime Rates," Brennan Center for Justice, April 20, 2018, <https://www.brennancenter.org/our-work/analysis-opinion/community-organizations-have-important-role-lowering-crime-rates>.
- 105** Two bills in Congress could advance this recommendation. First, the Mental Health Justice Act of 2020, introduced by Rep. Katie Porter (D-CA), would authorize the secretary of Health and Human Services (HHS) to award technical assistance and grants to states and their subdivisions to hire, employ, train, and dispatch mental health professionals to respond to emergencies in advance of or in conjunction with law enforcement officers. See Mental Health Justice Act of 2020, H.R. 8639, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/house-bill/8639?s=1&r=2>. Second, the Community-Based Response Act, introduced by Sen. Chris Van Hollen (D-MD), would establish a Community-Based Emergency and Non-Emergency Response Grant Program, also administered by HHS, to provide community-based emergency responses (other than law enforcement) for covered populations with the goal of identifying the best professional intervention for the individual in crisis. See Community-Based Response Act of 2020, S. 4791, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/4791?s=1&r=4>.
- 106** U.S. Department of Justice, Community Oriented Policing Services, "Collaborative Reform Initiative Technical Assistance Center," accessed October 15, 2020, <https://cops.usdoj.gov/collaborativereform>; and Office of Community Oriented Policing Services, *Law Enforcement Solutions by the Field, for the Field: Collaborative Reform Second Annual Review*, U.S. Department of Justice, 2020, <https://cops.usdoj.gov/RIC/Publications/cops-w0897-pub.pdf>.
- 107** U.S. Department of Justice, Civil Rights Division, *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994–Present*, 2017, 50, <https://www.justice.gov/crt/file/922421/download>.
- 108** U.S. Department of Justice, "Department of Justice Announces Changes to the Collaborative Reform Initiative," press release, September 15, 2017, <https://www.justice.gov/opa/pr/department-justice-announces-changes-collaborative-reform-initiative>. See also Equal Justice Initiative, "Justice Department Ends Popular Police Reform Program," September 25, 2017, <https://eji.org/news/justice-department-ends-popular-police-reform-program/>; and Devlin Barrett, "Justice Department Ends Program Scrutinizing Local Police Forces," *Washington Post*, September 15, 2017, https://www.washingtonpost.com/world/national-security/justice-department-ends-program-scrutinizing-local-police-forces/2017/09/15/ee88d02e-9a3d-11e7-82e4-f1076f6d6152_story.html?itid=inline-manual_17.
- 109** Connections Health Solutions, "What We Do," accessed October 15, 2020, <https://www.connections-shs.com/what-we-do/>; Middlesex Sheriff's Office, "Middlesex County Restoration Center Commission Holds Inaugural Meeting," April 3, 2018, <https://www.middlesexsheriff.org/press-releases/news/middlesex-county-restoration-center-commission-holds-inaugural-meeting>; and Susan Pamerleau, "Jail Diversion Program a Huge Success," *San Antonio Express-News*, January 22, 2016, <https://www.mysanantonio.com/opinion/commentary/article/Jail-diversion-program-a-huge-success-6777745.php>.
- 110** LEAD (Let Everyone Advance with Dignity) started in Seattle in 2011 as "Law Enforcement Assisted Diversion," a program that provided law enforcement officers with an option to divert people with mental health or substance use challenges away from the criminal justice system rather than making an arrest. LEAD has since expanded to accept community-based referrals in some jurisdictions and relies on case managers who work closely with LEAD participants. "The LEAD National Support Bureau," accessed October 15, 2020, <https://www.leadbureau.org/>.
- 111** "The LEAD National Support Bureau."
- 112** LEAD National Support Bureau, "What Is LEAD?," accessed October 15, 2020, <https://www.leadbureau.org/about-lead>.
- 113** Codified at 10 U.S.C. § 2576a (2018), <https://www.law.cornell.edu/uscode/text/10/2576a>.
- 114** Daniel H. Else, *The "1033 Program," Department of Defense Support to Law Enforcement*, Congressional Research Service, 2014, <https://fas.org/sgp/crs/natsec/R43701.pdf>; and Brian Barrett, "The Pentagon's Hand-Me-Downs Helped Militarize Police. Here's How," *Wired*, June 2, 2020, <https://www.wired.com/story/pentagon-hand-me-downs-militarize-police-1033-program/>.

- 115** Eisen and Boyer, "What the Federal Government Can Do to Help Fix Policing"; and Tom Jackman, "Trump to Restore Program Sending Surplus Military Weapons, Equipment to Police," *Washington Post*, August 27, 2017, <https://www.washingtonpost.com/news/true-crime/wp/2017/08/27/trump-restores-program-sending-surplus-military-weapons-equipment-to-police/>. For President Obama's executive order, see Executive Order 13688, "Federal Support for Local Law Enforcement Equipment Acquisition," 80 Fed. Reg. 3451 (January 16, 2015), <https://www.federalregister.gov/documents/2015/01/22/2015-01255/federal-support-for-local-law-enforcement-equipment-acquisition>. For President Trump's order rescinding EO 13688, see Executive Order 13809, "Restoring State, Tribal, and Local Law Enforcement's Access to Life-Saving Equipment and Resources," 82 Fed. Reg. 41499 (August 28, 2017), <https://www.federalregister.gov/documents/2017/08/31/2017-18679/restoring-state-tribal-and-local-law-enforcements-access-to-life-saving-equipment-and-resources>.
- 116** Else, *The "1033 Program,"* 3–4.
- 117** Taylor Wofford, "How America's Police Became an Army: The 1033 Program," *Newsweek*, August 13, 2014, <https://www.newsweek.com/how-americas-police-became-army-1033-program-264537>.
- 118** Paul D. Shinkman, "Ferguson and the Militarization of Police," *U.S. News & World Report*, August 14, 2014, <https://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization>.
- 119** Edward Lawson Jr., "TRENDS: Police Militarization and the Use of Lethal Force," *Political Research Quarterly* 72, no.1 (2019): 177–89, <https://journals.sagepub.com/doi/pdf/10.1177/1065912918784209>; and Chris Joyner and Nick Thieme, "Police Killings More Likely in Agencies that Get Military Gear, Data Shows," *Atlanta Journal-Constitution*, October 9, 2020, <https://www.ajc.com/news/police-killings-more-likely-in-agencies-that-get-military-gear-data-shows/MBPQ2ZE3XFHR5NIO37BKONOCGL/>.
- 120** As an alternative to a complete ban, Sens. Brian Schatz (D-HI), Kamala Harris (D-CA), Lisa Murkowski (R-AK), and Rand Paul (R-KY) proposed an amendment to the National Defense Authorization Act, which would have eliminated the transfer of certain offensive military-grade equipment — including but not limited to tear gas, grenades, bayonets, drones, and combat vehicles — to law enforcement. However, that effort was rejected by the U.S. Senate in July 2020. See Senate Amendment 2252, 116th Cong. (2020), <https://www.congress.gov/amendment/116th-congress/senate-amendment/2252/actions?q=%7B%22search%22%3A%5B%22schatz%22%5D%7D&r=5&s=4>.
- 121** Sue Rahr and Stephen K. Rice, "From Warriors to Guardians: Recommitting American Police Culture to Democratic Ideals," *New Perspectives in Policing*, Harvard Kennedy School Executive Session on Policing and Public Safety, April 2015, <https://www.ncjrs.gov/pdffiles1/nij/248654.pdf>.
- 122** For example, this power was described in Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978): "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Additionally, "a prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." See *U.S. v. Goodwin*, 457 U.S. 368, 382 (1982). However, recognizing the prosecutor's broad enforcement and discretionary power, the American Bar Association created a rule in its Model Rules for Professional Responsibility suggesting that prosecutors have a special duty not to seek conviction but to advance justice — to protect the rights of the accused, to disclose mitigating evidence, and even to remedy wrongful convictions. See "Model Rules of Professional Conduct: Rule 3.8," American Bar Association, accessed October 18, 2020, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/.
- 123** For an explanation of the oft-overlooked historical and enduring power of the prosecutor, see John Pfaff, "The Man Behind the Curtain," in *Locked In: The True Causes of Mass Incarceration — And How to Achieve Real Reform* (New York: Basic Books, 2017), 127–60.
- 124** See, for example, Don Stemen, *The Prison Paradox*, Vera Institute of Justice, 2017, 4, <https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer> (demonstrating the lack of correlation between crime rate and incarceration rate in the 50 states from 2010 to 2015). Also see Lauren-Brooke Eisen and James Cullen, *Update: Changes in State Imprisonment*, Brennan Center for Justice, 2016, <https://www.brennancenter.org/sites/default/files/analysis/UpdateChangesinStateImprisonment.pdf>; and Kimble and Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration*.
- 125** Lauren-Brooke Eisen and Inimai Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 26, https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal%20Justice%20Agenda.pdf.
- 126** Brennan Center for Justice, Fair and Just Prosecution, and the Justice Collaborative, *21 Principles for the 21st Century Prosecutor*, 2018, https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf. Some have also played a role in reducing economic inequities by issuing directives to their attorneys to stop requesting bail for lower-level offenses except in exceptional circumstances. See, for example, Chesa Boudin, "Policy: No Cash Bail," San Francisco District Attorney, accessed October 18, 2020, <https://www.sfdistrictattorney.org/policy/no-cash-bail/>.
- 127** Brennan Center for Justice, Fair and Just Prosecution, and The Justice Collaborative, *21 Principles*.
- 128** Brennan Center for Justice, Fair and Just Prosecution, and The Justice Collaborative, *21 Principles*.
- 129** The attorney general does not have direct power over local prosecutors but can set the tone for how they are perceived by the public and by the law enforcement officers who work with them. Attorney General Barr has used this influence to criticize reform-minded, elected prosecutors and undermine their relationships with police. For example, in one speech to the Fraternal Order of Police in New Orleans, Barr criticized "'social justice' reformers, who spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law. . . . They have been announcing their refusal to enforce broad swathes of the criminal law." See "Attorney General William P. Barr Delivers Remarks at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference," U. S. Department of Justice, August 12, 2019, <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th>. Barr's language is out of step with what the communities who elected these prosecutors want from their justice system.
- 130** In 2017, Attorney General Jeff Sessions rolled back Obama-era guidelines on charging and directed federal prosecutors to pursue the most severe penalties possible, including mandatory minimum sentences, unless explicitly directed otherwise. Prosecutors wishing to seek less than the maximum possible sentence must gain approval from a supervisor. Memorandum from U.S. Attorney General Jefferson Sessions to All Federal Prosecutors, "Department Charging and Sentencing Policy," May 10, 2017, <https://www.justice.gov/opa/press-release/file/965896/download>. Attorney General Eric Holder's 2010 direction to federal prosecutors was that they make decisions on charging, plea agreements, and advocacy at sentencing based on "the merits of each case, taking into account an individualized assessment of the defendant's conduct and criminal history and the circumstances relating to the commission of the offense (including the impact of the crime on victims), the needs of the communities we serve, and federal resources and priorities." See Memorandum from Eric Holder, U.S. Attorney General, to All Federal Prosecutors, "Department Policy on Charging and Sentencing," May

- 19, 2010, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>. During Holder's tenure as attorney general, federal prison populations dropped by more than 26,000. See E. Ann Carson, *Prisoners in 2016*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2018, 3, <https://www.bjs.gov/content/pub/pdf/p16.pdf>.
- 131** In 2013 Attorney General Eric Holder instructed U.S. attorneys to adjust charging policies to reserve mandatory minimum penalties "for serious, high-level or violent drug traffickers." Memorandum from Attorney General Eric Holder to United States Attorneys and Assistant Attorney General for the Criminal Division, "Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases," August 12, 2013, <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drug-cases.pdf>. See also U.S. Department of Justice, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century*, 2013, 3, <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>.
- 132** Zoe Tillman, "There Are 93 US Attorneys. Seven Are Women and Only Two Are Black." *Buzzfeed News*, June 28, 2020, <https://www.buzzfeednews.com/article/zoetillman/trump-us-attorneys-lack-diversity-justice-department>.
- 133** Tillman, "There Are 93 US Attorneys."
- 134** Leigh Courtney et al., *A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prisons*, Urban Institute, 2017, 1, https://apps.urban.org/features/long-prison-terms/a_matter_of_time.pdf ("Since 2000, average time served has risen in all 44 states that reported complete data to the National Corrections Reporting Program. In states with more extensive data, we can trace the rise back to the 1980s and 1990s.").
- 135** National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: The National Academies Press, 2014), 72–73, 76, <https://doi.org/10.17226/18613>. For more information on the introduction of stiffer penalties, see Ram Subramanian and Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, Vera Institute of Justice, 2014, 5–8, https://www.vera.org/downloads/Publications/playbook-for-change-states-reconsider-mandatory-sentences/legacy_downloads/mandatory-sentences-policy-report-v3.pdf.
- 136** For information on the prison population as of December 31, 2012, see E. Ann Carson and Daniela Golinelli, *Prisoners in 2012: Trends in Admissions and Releases, 1991–2012*, Bureau of Justice Statistics, 2014, 39, <https://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>. For information on the 1972 prison population, see Patrick A. Langan et al., *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925–86*, Bureau of Justice Statistics, 1998, 11, <https://www.bjs.gov/content/pub/pdf/hspsfy25-86.pdf>. For a discussion of the upsurge in interest in sentencing reform, see William Sabol and Miranda Baumann, "Justice Reinvestment: Vision and Practice," *Annual Review of Criminology* 3 (2020): 317–39, <https://ssrn.com/abstract=3519757> (discussing the widespread sentencing reform movement under the federally funded Justice Reinvestment Initiative).
- 137** Indeed, states have served as laboratories of innovation in sentencing and corrections reform. See, for example, Rebecca Silber, Ram Subramanian, and Maia Spotts, *Justice in Review: New Trends in State Sentencing and Corrections 2014–2015*, Vera Institute of Justice, 2016, <https://www.vera.org/downloads/publications/state-sentencing-and-corrections-trends-2014-2015-updated.pdf>.
- 138** Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, The Sentencing Project, 2020, <https://www.sentencingproject.org/wp-content/uploads/2020/01/Top-Trends-in-State-Criminal-Justice-Reform-2019.pdf>. See also Silber, Subramanian, and Spotts, *Justice in Review*.
- 139** See, for example, Subramanian and Delaney, *Playbook for Change?*, 14 (discussing successes in California, Michigan, and New York).
- 140** See Nathan James, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues, and Options*, Congressional Research Service, 2013, http://www.fedcure.org/documents/CRS_FederalPrisonPopulationBuildup_R42937-220113fc.pdf; and "Bipartisan Support for Criminal Justice Reform Still Strong," Equal Justice Initiative, December 20, 2018, <https://ejj.org/news/bipartisan-support-criminal-justice-reform-still-strong/>.
- 141** The two major federal criminal justice reform laws passed in the last decade are the Fair Sentencing Act and the First Step Act. Fair Sentencing Act of 2010, Pub.L. 111–220, <https://www.govinfo.gov/content/pkg/PLAW-111publ220/pdf/PLAW-111publ220.pdf>; and First Step Act of 2018, Pub.L. 115–391, <https://www.govinfo.gov/content/pkg/PLAW-115publ391/pdf/PLAW-115publ391.pdf>. For examples of federal criminal justice reform efforts that have not materialized as law, see the Justice Safety Valve Act (introduced in both houses of Congress in 2013 [H.R. 1695], 2015 [H.R. 706], 2017 [H.R. 2435], and 2019 [H.R. 1097]) and the Smarter Sentencing Act (introduced in 2013 [H.R. 3382], 2014 [S. 1410], 2015 [S. 502], 2017 [S. 1933], and 2019 [S. 2850]).
- 142** First Step Act of 2018; Clerk of the United States House of Representatives, Roll Call 448, Bill Number: S. 756, December 20, 2018, <https://clerk.house.gov/Votes/2018448>.
- 143** Ames Grawert, *What Is the First Step Act — And What's Happening with It?*, Brennan Center for Justice, 2020, <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>; Kara Gotsch, *One Year after the First Step Act: Mixed Outcomes*, The Sentencing Project, 2019, <https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/>; and Keith Humphreys, "We Have Nothing to Fear from Federal Sentencing Reform," *Washington Post*, November 27, 2018, <https://www.washingtonpost.com/business/2018/11/27/we-have-nothing-fear-federal-sentencing-reform/> ("[M]ore than 1,700 people leave U.S. prisons every single day. The First Step Act would be equivalent to having about three or four extra days of prison release during the year that the law passes, with even smaller effects from then forward.").
- 144** Federal Bureau of Prisons, "Statistics," accessed October 12, 2020, https://web.archive.org/web/20201012174638/https://www.bop.gov/about/statistics/population_statistics.jsp (noting 219,298 "total federal inmates" [including "federal inmates in BOP custody," "federal inmates in privately managed facilities," and "federal inmates in other types of facilities"] in 2013 and 155,197 as of October 2020).
- 145** Fair Sentencing Act of 2010; and U.S. Sentencing Commission, *Report to the Congress: Impact of the Fair Sentencing Act of 2010*, 2015, 26, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf (estimating that the Fair Sentencing Act's prospective and retroactive effects have "a total savings of 29,653 bed-years to the BOP").
- 146** This policy reduced by two levels the base offense levels assigned in the Drug Quantity Table, effectively changing the sentence assigned to offenses involving certain types and volumes of drugs. For information on "Drugs Minus Two," see U.S. Sentencing Commission, *Guidelines Manual*, appendix C, amend. 782 (effective November 1, 2014), made retroactive by USSC appendix C, amend. 788 (effective November 1, 2014), 2018, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/APPENDIX_C_Supplement.pdf; U.S. Sentencing Commission, *Retroactivity & Recidivism: The Drugs Minus Two Amendment*, 2020, <https://www.ussc.gov/research/research-reports/retroactivity-recidivism-drugs-minus-two-amendment>. With the changes subsequently applied retroactively from 2015, more than 31,000 people to date have qualified for sentence reductions averaging two years, thus also qualifying for earlier release based on their recalculated prison term.

U.S. Sentencing Commission, *U.S. Sentencing Commission 2014 Drug Guidelines Amendment Retroactivity Data Report*, tables 1, 3, and 7, <https://www.usssc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20180201-Drug-Retro-Analysis.pdf>.

147 U.S. Department of Justice, Office of Public Affairs, "Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates," *Justice News*, August 12, 2013, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>; U.S. Department of Justice Archives, "The Attorney General's Smart on Crime Initiative," last updated March 9, 2017, <https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative>; and Office of the Inspector General, *Review of the Department's Implementation of Prosecution and Sentencing Reform Principles under the Smart on Crime Initiative*, U.S. Department of Justice, 2017, iii, 21–27, <https://oig.justice.gov/reports/2017/e1704.pdf> (finding significantly fewer mandatory minimum sentences and recidivist enhancements being imposed in drug cases nationwide based on sentencing data from 2010 to 2015). Holder's successor, Jeff Sessions, reversed this policy decision in May 2017, and the percentage of drug cases receiving a mandatory minimum sentence rebounded to more than 65 percent in FY 2019. Memorandum from Attorney General Jefferson B. Sessions to All Federal Prosecutors re: Department Charging and Sentencing Policy, May 10, 2017, <https://www.justice.gov/opa/press-release/file/965896/download>; and U.S. Sentencing Commission, "Interactive Data Analyzer," accessed October 16, 2020, <https://ida.usssc.gov/analytics/saw.dll?Dashboard> (demonstrating that 54.7 percent of federal drug trafficking cases in 2017 and 34.3 percent of such cases in 2019 did not have a mandatory minimum sentence; therefore, the percentage of cases that were subjected to mandatory minimums was 45.3 percent in 2017 and 65.7 percent in 2019).

148 Damini Sharma et al., "Prison Populations Drop by 100,000 During Pandemic," *Marshall Project*, July 16, 2020, <https://www.themarshallproject.org/2020/07/16/prison-populations-drop-by-100-000-during-pandemic>. Federal responses to the pandemic have included increased use of home confinement and limited use of compassionate release. Federal Bureau of Prisons, "COVID-19 Coronavirus," October 8, 2020, <https://web.archive.org/web/20201012204242/https://www.bop.gov/coronavirus/> ("Since the release of the Attorney General's original memo to the Bureau of Prisons on March 26, 2020 instructing us to prioritize home confinement as an appropriate response to the COVID-19 pandemic, the BOP has placed 7,822 inmates on home confinement."); and Keri Blakinger and Joseph Neff, "Thousands of Sick Federal Prisoners Sought Compassionate Release. 98 Percent Were Denied." *Marshall Project*, October 7, 2020, <https://www.themarshallproject.org/2020/10/07/thousands-of-sick-federal-prisoners-sought-compassionate-release-98-percent-were-denied> (noting that federal prison wardens approved 156 applications for compassionate release during the Covid-19 pandemic).

149 Glenn R. Schmitt and Amanda Russell, *Fiscal Year 2019 Overview of Federal Criminal Cases*, U.S. Sentencing Commission, 2020, 8–9, https://www.usssc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf.

150 Of all the federal offenses that are prosecuted to completion, drug- and immigration-related offenses make up the largest categories of crimes. U.S. Sentencing Commission, "Interactive Data Analyzer," <https://www.usssc.gov/research/interactive-data-analyzer> (noting that for FY 2019, immigration offenses made up 38.4 percent and drug offenses made up 26.6 percent of federal convictions by type of crime). Also see E. Ann Carson, *Prisoners in 2018*, Bureau of Justice Statistics, 2020, 21, 23, tables 13, 15, <https://www.bjs.gov/content/pub/pdf/p18.pdf> (detailing that the largest conviction categories for people incarcerated in state prisons in 2018 were violent crimes [55.7 percent] and property crimes [16.8 percent]; the largest categories for federal

prisons were drug crimes [47.1 percent] and public order offenses, including immigration and regulatory offenses [39 percent]); and Charles Doyle, *Mandatory Minimum Sentencing of Federal Drug Offenses*, Congressional Research Service, 2018, 6, table 1, <https://crsreports.congress.gov/product/pdf/R/R45074>.

151 The Federal Bureau of Prisons (BOP) maintains weekly counts of people in federal custody. As of March 1, there were 175,135 people in federal custody, 146,293 of them in the custody of BOP. On October 1, the BOP reported a population of 155,530 (126,659 in BOP custody). See Federal Bureau of Prisons, "Population Statistics," archived March 1, 2020, at https://web.archive.org/web/20200301204714/https://www.bop.gov/about/statistics/population_statistics.jsp, and archived October 2, 2020, at https://web.archive.org/web/20201002042936/https://www.bop.gov/mobile/about/population_statistics.jsp.

152 For information on federal cases, see Schmitt and Russell, *Fiscal Year 2019 Overview*, 4. For information on the federal prison population, see Federal Bureau of Prisons, "Statistics, Offenses," accessed October 16, 2020, https://web.archive.org/web/20201012211436/https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp. For information about the types of federal sentences people are convicted of, see U.S. Sentencing Commission, *Quick Facts: Mandatory Minimum Penalties*, 2018, 1, https://www.usssc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY17.pdf ("Drug trafficking offenses accounted for . . . 67.8% of the offenses carrying a mandatory minimum penalty . . .").

153 Doyle, *Mandatory Minimum Sentencing*, 6, table 1.

154 For research demonstrating racial disparities in drug arrests, see, for example, Ojmarrh Mitchell and Michael S. Caudy, "Examining Racial Disparities in Drug Arrests," *Justice Quarterly* 32, no. 2 (2013): 288–313, 309–10 <https://www.tandfonline.com/doi/full/10.1080/07418825.2012.761721>; and Katherine Beckett, Kris Nyrop, and Lori Pfingst, "Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests," *Criminology* 44, no. 1 (2006): 105–37, https://www.thestranger.com/images/blogimages/2010/10/28/1288284332-beckett_criminology_race_drugs_and_policing.pdf. There is voluminous research examining racial disparities in sentencing. For a meta-analytic synthesis of empirical research assessing the influence of race/ethnicity on noncapital sentencing decisions in U.S. criminal courts, see Ojmarrh Mitchell, "A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies," *Journal of Quantitative Criminology* 21, no. 4 (2005): 439–66, <https://www.jstor.org/stable/23367476?seq=1> (finding that of 85 studies reviewed, Black and Latino people were sentenced more harshly, on average, than white people. The magnitude of this race effect was statistically significant but small and highly variable, and larger estimates of unwarranted sentencing disparity were found in studies that examined drug offenses, imprisonment, or discretionary sentencing decisions and in recent analyses of federal court data.). For an earlier review, see Cassia Spohn, "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process," in *Policies, Processes, and Decisions of the Criminal Justice System: Criminal Justice 2000*, volume 3, Julie Horney, ed. (Washington, DC: National Institute of Justice, 2000), 427–501, https://www.ncjrs.gov/criminal_justice2000/vol_3/03i.pdf. Also see, The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, 2018, 7–8, <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> ("Federal prosecutors, for example, are twice as likely to charge African Americans with offenses that carry a mandatory minimum sentence than similarly situated whites."); and Paul J. Hofer et al., *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform*, U.S. Sentencing Commission, 2004, 119–125, https://www.usssc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf.

For a discussion of the impact of incarceration on communities, see, for example, Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2009).

155 The Pew Charitable Trusts, *Federal Drug Sentencing Laws Bring High Cost, Low Return*, 2015, <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/08/federal-drug-sentencing-laws-bring-high-cost-low-return> (“The increased imprisonment of drug offenders has helped drive the explosive overall growth of the federal prison system, which held nearly 800 percent more inmates in 2013 than it did in 1980.”).

156 Lisa D. Moore and Amy Elkavich, “Who’s Using and Who’s Doing Time: Incarceration, the War on Drugs, and Public Health,” *American Journal of Public Health* 98, no.5 (2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2374804/> (“Since 1972, the number of people incarcerated has increased 5-fold without a comparable decrease in crime or drug use.”); and Paul A. C. Duijn, Victor Kashirin, and Peter M. A. Sloot, “The Relative Ineffectiveness of Criminal Network Disruption,” *Scientific Reports* 4 (2014): 13, <https://www.nature.com/articles/srep04238> (“[A] delicate criminal process, such as cannabis cultivation, is organized in a flexible and adaptive network structure, which is highly resilient against network disruption.”).

157 See, for example, Daniel S. Nagin, “Deterrence in the Twenty-First Century,” *Crime and Justice in America 1975–2025* 42, no. 1 (2013), https://kithub.cmu.edu/articles/Deterrence_in_the_Twenty-First_Century_A_Review_of_the_Evidence/6471200/1 (“First, there is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs . . . Second, . . . there is little evidence of a specific deterrent effect arising from the experience of imprisonment compared with experience of noncustodial sanctions such as probation. Instead, the evidence suggests that that reoffending is either unaffected or increased.”).

158 See, for example, Doug McVay, Vincent Schiraldi, and Jason Ziedenberg, *Treatment or Incarceration? National and State Findings on the Efficacy and Cost Savings of Drug Treatment Versus Imprisonment*, Justice Policy Institute, 2004, http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01_rep_mdtreatmentorincarceration_ac-dp.pdf (finding drug treatment a promising alternative to drug offense–related incarceration, given that drug treatment can be less expensive than imprisonment and can reduce substance abuse and recidivism); Pew Research Center, *America’s New Drug Policy Landscape*, 2014, <https://www.pewresearch.org/politics/2014/04/02/americas-new-drug-policy-landscape/> (“67 percent of Americans say that the government should focus more on providing treatment for those who use illegal drugs such as heroin and cocaine.”); and Steve Horn, “Voters Want Big Changes in Federal Sentencing, Prison System,” Pew Charitable Trusts, February 12, 2016, updated March 8, 2016, <https://www.pewtrusts.org/en/research-and-analysis/articles/2016/02/12/voters-want-changes-in-federal-sentencing-prison-system> (“61 percent of survey respondents believe prisons hold too many drug offenders. . . . More than 80 percent of survey participants support programs and reforms that reduce prison terms under certain circumstances.”). For a brief discussion of the impact of the opioid and methamphetamine epidemics on incarceration, see, for example, Steve Horn, “Opioid Epidemic Impacts Prisons and Jails,” *Prison Legal News*, September 5, 2019, <https://www.prisonlegalnews.org/news/2019/sep/5/opioid-epidemic-impacts-prisons-and-jails/> (detailing several studies demonstrating the outsize impact opioids have had on the incarcerated population); Frances Robles, “Meth, the Forgotten Killer, Is Back. And It’s Everywhere,” *New York Times*, February 13, 2018, <https://www.nytimes.com/2018/02/13/us/meth-crystal-drug.html>; and Andy Mannix, “Even as Meth Offenders Fuel a Boom in Minnesota’s Prison Population, Treatment Resources Remain Scarce,” *MinnPost*, November 30, 2015, <https://www.minnpost.com/politics-policy/2015/11/even-meth-offenders-fuel-boom-minnesotas-prison-population-treatment-resour/> (noting a dramatic

increase in prison beds dedicated to people incarcerated for drug-related offenses due to the meth epidemic). Also see generally Don Stemen, “Beyond the War: The Evolving Nature of the U.S. Approach to Drugs,” *Harvard Law and Policy Review* 11, no. 2 (2017): 375–418, https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1026&context=criminaljustice_facpubs.

159 Reforms in the First Step Act included amendments to the stacking provisions of 18 U.S.C. § 924(c) — a process by which an additional mandatory minimum sentence is imposed and “stacked” with any other sentence if a firearm is involved — and expanding the “safety valve” provisions that allow judges to sentence people below a mandatory minimum sentence if certain factors apply. First Step Act of 2018.

160 See 21 U.S.C. § 841(b) (2018) (listing drug quantities and corresponding required penalties). For an overview of federal drug offenses subject to mandatory minimums, see generally Doyle, *Mandatory Minimum Sentencing*, 6. For information about the provisions of the First Step Act that affected mandatory minimum sentences, see Nathan James, *First Step Act of 2018: An Overview*, Congressional Research Service, 2019, <https://crsreports.congress.gov/product/pdf/R/R45558>; and U.S. Sentencing Commission, “First Step Act,” *ESP Insider Express Special Edition*, February 2019, 2, <https://www.ussc.gov/sites/default/files/pdf/training/newsletters/2019-special-FIRST-STEP-Act.pdf> (noting that “[t]he First Step Act not only reduced the mandatory minimum penalties [under 21 U.S.C. § 851 (2018)], but also changed the conditions under which they apply” in terms of the definition of a person’s prior conviction and his or her prior length of imprisonment). For the outsize impact of drug exclusion zones around schools on communities of color, see Judith Greene, Kevin Pranis and Jason Zeidenberg, *Disparity by Design: How Drug-Free Zone Laws Impact Racial Disparity — and Fail to Protect Youth*, Justice Policy Institute, 2006, http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03_rep_disparitybydesign_dp-ij-rd.pdf. For research discussing the disparate racial impact of mandatory minimum sentences generally, see, for example, Sonja B. Starr and M. Marit Rehavi, “Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker,” *Yale Law Journal* 123, no. 2 (2013): 28–29, <https://www.yalelawjournal.org/pdf/1206-ecd3dkoj.pdf> (“After controlling for the variables above, we found black men were still nearly twice as likely to be charged with an offense carrying a mandatory minimum sentence.”).

161 People convicted of minor trafficking of serious drugs and drug possession generally pose a low threat to public safety, and therefore these cases are better suited to alternatives to incarceration. Austin et al., *How Many Americans Are Unnecessarily Incarcerated?*, 26–27, 29–30.

162 Fair Sentencing Act of 2010; and First Step Act of 2018.

163 See, for example, U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy*, 1995, iii, <https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/199502-rtc-cocaine-sentencing-policy/EXECSUM.pdf> (“Among other problems, the 100-to-1 quantity ratio creates anomalous results by potentially punishing low-level [retail] crack dealers far more severely than their high-level [wholesale] suppliers of the powder cocaine that served as the product for conversion into crack.”); U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, 2002, 90–102, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf (noting the 100:1 crack/powder cocaine sentencing disparity exaggerates the relative harmfulness of crack cocaine, sweeps too broadly, applies most often to lower-level offenders, and mostly impacts minorities); U.S. Sentencing Commission, *Report to the Congress: Impact of the Fair Sentencing Act of 2010*, 2015, 3, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf (“[Crack cocaine penalties] swept too broadly and

applied most often to lower level offenders”); and Jelani Jefferson Exum, “Forget Sentencing Equality: Moving from the ‘Cracked’ Cocaine Debate Toward Particular Purpose Sentencing,” *Lewis & Clark Law Review* 18, no. 1 (2014): 95, 105–10, <https://law.lclark.edu/live/files/17115-lcb181art3exumpdf> (“[R]egardless of congressional intent, the disproportionate consequences of the 1986 Drug Act on minority communities are undeniable. This racial disparity is a main reason that the U.S. Sentencing Commission has repeatedly urged Congress to reduce the 100:1 sentencing ratio — mostly to no avail.”).

164 U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (2002), 90–102.

165 Sen. Cory Booker (D-NJ) has proposed legislation that would eliminate the disparity between crack and powder cocaine. Next Step Act of 2019, S.697, 116th Cong. (2019), <https://www.congress.gov/bills/116th-congress/senate-bill/697>.

166 United States v. Diaz, No. 11-CR-00821-2 JG, at *1, *4 (E.D.N.Y. January 28, 2013) (Gleeson, J.), <https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2014/03/Gleeson-opinion.pdf>.

167 See, for example, United States v. Dossie, 851 F. Supp. 2d 478 (E.D.N.Y. March 30, 2012), <https://sentencing.typepad.com/files/us-dossie-opinion.pdf> (discussing why using drug quantity as a proxy for defendant’s role can produce unfair outcomes). For an in-depth discussion of why quantity is a poor indicator of criminal seriousness, see Dan Honold, “Note: Quantity, Role, and Culpability in the Federal Sentencing Guidelines,” *Harvard Journal on Legislation* 51, no. 2 (2014): 389–413, https://harvardjohl.com/wp-content/uploads/sites/17/2014/06/Sentencing_Note_Cropped1.pdf. For a discussion of why substance weight is a poor metric because many drugs are distributed through carrier substances, see Joanna Keenan, “Note: Which Weight Matters in Drug Offense Cases?” *Suffolk Journal of Trial and Appellate Advocacy* 19, no. 2 (2014): 344, 351–52 (“The First, Fifth, and Tenth Circuits hold if a detectable amount of narcotic is contained in a material, even if such material is not ingestible, then it should be included in the total weight for sentencing. Even though this method is easy to apply in practice, it has great potential to lead to absurd results. In *United States v. Salgado-Molina*, the court held that including liquid waste for purposes of determining sentence length was no more logical than including the weight of the Atlantic Ocean when calculating the sentence of a hypothetical defendant who floated cocaine across the water.”).

168 U.S. Sentencing Commission, *Guidelines Manual*, 2018, § 2D1.1, <https://www.usc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-2-d#NaN>. One suggestion is to identify the person involved as a “kingpin,” “manager or leader,” “manufacturer,” or “distributor” and decrease or increase levels of culpability accordingly. See Honold, “Note: Quantity, Role, and Culpability,” 389.

169 18 U.S.C. § 3553 (e), (f) (2018). The U.S. Federal Sentencing Guidelines also have a “safety valve” provision. Unlike the statutory safety valve, the guidelines safety valve applies even if a defendant has not been convicted of a drug trafficking offense carrying a statutory mandatory penalty. U.S. Sentencing Commission, *Guidelines Manual*, § 2D1.1(b)(17).

170 First Step Act of 2018; and U.S. Sentencing Commission, *The First Step Act of 2018: One Year of Implementation*, 2020, 17–33, https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf (detailing how the safety valve provision has functioned in the first year of the First Step Act).

171 Ellen E. Cranberg, “A Definition Out of Reach: Clarifying Constructive Possession in Federal Sentencing Guideline 2D1.1(b)(1),” *Iowa Law Review* 105, no. 4 (2020): 1799, 1801, <https://ilr.law.uiowa.edu/assets/Uploads/ILR-105-4-Cranberg-v3.pdf> (“The Guidelines [Section 2D1.1(b)(1)] and the courts have permitted constructive possession of a dangerous weapon, rather than actual possession, to warrant this two-level increase [in a person’s calculated offense level]. . . . [C]onstructive possession without

temporal and spatial proximity contravenes the Sentencing Commission’s intent because it permits Section 2D1.1(b)(1) to punish conduct that did not represent an increased danger.”).

172 For a discussion of the impact of making criminal justice reforms retroactive, see Subramanian and Delaney, *Playbook for Change?*, 14 (discussing California, Michigan, and New York). Also see U.S. Department of Justice, *First Step Act Implementation Fact Sheet*, 2019, <https://www.justice.gov/opa/press-release/file/1184751/download> (stating that after six months, the First Step Act’s retroactive application of the Fair Sentencing Act of 2010 had resulted in 1,691 sentence reductions).

173 Nathaniel W. Reisinger, “Note: Redrawing the Line: Retroactive Sentence Reductions, Mass Incarceration, and the Battle Between Justice and Finality,” *Harvard Civil Rights—Civil Liberties Law Review* 54, no. 1 (2019): 299, 301, <https://harvardcrl.org/wp-content/uploads/sites/10/2019/03/Reisinger.pdf> (“[R]etroactively applying sentence reductions matches an intuitive — and statutorily suggested — sense of justice.”). Also see Deborah M. Ahrens, “Retroactive Legality: Marijuana Convictions and Restorative Justice in an Era of Criminal Justice Reform,” *Journal of Criminal Law & Criminology* 110, no. 3 (2020): 379–440, <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7671&context=j-clc> (arguing that the American policymaking apparatus should acknowledge and move to redress both the failings of the prior system of drug regulation and the social and economic disparities in current law by embracing a concept of “retroactive legality” in order to restore to full civic equality all those prosecuted in the past for activity that would be legal in the present).

174 While the First Step Act has done a great deal of good, it also is lacking in areas that cannot be remedied through executive or legislative action. For example, DOJ’s risk and needs assessment tool, PATTERN, has unfortunately perpetuated racial biases in sentencing decisions rather than ameliorating them. For more information on the problems with PATTERN, see Ames Grawert, *Brennan Center’s Public Comment on the First Step Act’s Risk and Needs Assessment Tool*, Brennan Center for Justice, 2019, <https://www.brennancenter.org/our-work/research-reports/brennan-centers-public-comment-first-step-acts-risk-and-needs-assessment>. For an evaluation confirming concerns about racial disparity in application, see Melissa Hamilton, “Written Testimony of Melissa Hamilton to the United States House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security Oversight: Hearing on the Bureau of Prisons and Implementation of the First Step Act,” October 17, 2019, 11–12, <https://docs.house.gov/meetings/JU/JU08/20191017/110089/HHRG-116-JU08-Wstate-HamiltonM-20191017.pdf>.

175 U.S. Sentencing Commission, *The First Step Act of 2018: One Year of Implementation*, 5–6 (“Since authorized by the First Step Act, 2,387 offenders received a reduction in sentence as a result of retroactive application of the Fair Sentencing Act of 2010. Offenders’ sentences were reduced, on average, by 71 months, from 258 months to 187 months.”).

176 Neena Satija, Wesley Lowery, and Josh Dawsey, “Trump Boasts That His Landmark Law Is Freeing These Inmates. His Justice Department Wants Them to Stay in Prison.” *Washington Post*, November 7, 2019, https://www.washingtonpost.com/investigations/trump-brags-that-his-landmark-law-freed-these-inmates-his-justice-department-wants-them-to-stay-in-prison/2019/11/07/5f075456-f5db-11e9-a285-882a8e386a96_story.html (“[F]ederal prosecutors are arguing in hundreds of cases that inmates who have applied for this type of relief [under the First Step Act] provision addressing the disparity between crack and powder cocaine] are ineligible, according to a review of court records and interviews with defense attorneys. In at least half a dozen cases, prosecutors are seeking to reincarcerate offenders who have been released under the First Step Act.”).

177 First Step Act of 2018.

178 Grawert, “What Is the First Step Act?”

179 Statement of David E. Patton, Executive Director, Federal Defenders of New York, Oversight Hearing on “The Federal Bureau of Prisons and Implementation of the First Step Act” before the Judiciary Committee of the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security, October 17, 2019, <https://docs.house.gov/meetings/JU/JU08/20191017/110089/HHRG-116-JU08-Wstate-PattonD-20191017.pdf>. The First Step Act’s own Independent Review Committee has cast doubt on the quality of BOP’s programming, and particularly its data collection, raising further red flags that the act is not following through on its promises. James M. Byrne, *The Effectiveness of Prison Programming: A Review of the Research Literature Examining the Impact of Federal, State, and Local Inmate Programming on Post-Release Recidivism*, First Step Act Independent Review Committee, 2019, 6–8, <https://firststepact-irc.org/the-effectiveness-of-prison-programming/>.

180 Office of the Attorney General, *The First Step Act of 2018: Risk and Needs Assessment System — UPDATE*, U.S. Department of Justice, 2020, 19–20, <https://nij.ojp.gov/sites/g/files/xykuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf>.

181 Consolidated Appropriations Act, 2020, H.R.1158, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/1158/>; and Testimony by John Walters, Chief Operating Officer, Hudson Institute, and Director, Hudson Institute Political Studies, Oversight Hearing on “The Federal Bureau of Prisons and Implementation of the First Step Act” before the Judiciary Committee of the House of Representatives Subcommittee on Crime, Terrorism, and Homeland Security, October 17, 2019, <https://judiciary.house.gov/legislation/hearings/oversight-hearing-federal-bureau-prisons-and-implementation-first-step-act> (“[M]y personal estimate of what’s going to be needed here . . . is somewhere in the neighborhood of \$300 million to begin with, and then programming along the line, at \$500 million.”).

182 Testimony by John Walters.

183 Grant Duwe, *The Use and Impact of Correctional Programming for Inmates on Pre- and Post-Release Outcomes*, National Institute of Justice, 2017, 6–17, <https://www.ncjrs.gov/pdffiles1/nij/250476.pdf>.

184 “A State-by-State Look at Coronavirus in Prisons,” *Marshall Project*, updated November 20, 2020, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>; and Federal Bureau of Prisons, “COVID-19 Coronavirus.”

185 First Step Act of 2018; and Compassionate Release, a Project by Brandon Sample, “How the First Step Act Changed Federal Compassionate Release,” accessed October 18, 2020, <https://compassionaterelease.com/first-step-act-compassionate-release/>.

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- 269** The president would retain final decision-making authority, per the Constitution; however, creating an independent board with diverse membership, clear guidelines for applicants, and reasoned explanations for grants or denials would greatly support the public’s confidence in the process. Grawert, Furst, and Kimble, *Ending Mass Incarceration*, 5.
- 270** Professors Mark Osler and Rachel Barkow have suggested a clemency board with diverse membership in terms of professions

and expertise. Osler, "Clemency," 437–38. See also Grawert, Furst, and Kimble, *Ending Mass Incarceration*, 5.

271 President Gerald Ford impaneled an 18-member clemency board to help process pardon requests from applicants charged with crimes related to avoiding the draft during the Vietnam War. That board was diverse and bipartisan, and it ultimately recommended more than 13,000 pardons. See, for example, Executive Order 11803 — Establishing a Clemency Board to Review Certain Convictions of Persons Under Section 12 or 6 (j) of the Military Selective Service Act and Certain Discharges Issued Because of, and Certain Convictions for, Violations of Article 85, 86, or 87 of the Uniform Code of Military Justice and to Make Recommendations for Executive Clemency with Respect Thereto, 39 Fed. Reg. 33297, <https://www.presidency.ucsb.edu/node/268748>; see also Elmer B. Staats, *The Clemency Program of 1974*, U.S. Government Accountability Office, 1977, <https://www.gao.gov/assets/120/117627.pdf>; and Charles Shanor and Marc Miller, "Pardon Us: Systematic Presidential Pardons," *Federal Sentencing Reporter* 13, no. 3-4 (2001): 139, 142, <https://online.ucpress.edu/fsr/article-abstract/13/3-4/139/42556/Pardon-Us-Systematic-Presidential-Pardons> ("An example of what may have been systematic, non-wartime, drug offense pardons appears, in brief form, in the Annual Reports of the Attorney General issued during the Kennedy administration."). For an overview of the contemporary landscape of pardon policy across the country, see Restoration of Rights Project, "50-State Comparison: Pardon Policy & Practice," accessed October 4, 2020, <https://ccresourcecenter.org/state-restoration-pro-files/50-state-comparisoncharacteristics-of-pardon-authorities-2/>.

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