

Ending Mass Incarceration: A Presidential Agenda

by Ames Grawert, Bryan Furst, and Cameron Kimble

Introduction

For many voters, the past two years have brought a new awareness of profound, continuing injustices in American society. Among them is the civil rights crisis of mass incarceration. Even with recent reforms, more than two million Americans remain behind the bars of jails or prisons.¹ Black men and women are imprisoned at roughly six times the rate of their white counterparts.² The overuse of incarceration perpetuates economic and racial inequality, two issues at the top of the public concern.³

Going into the 2020 election, contenders for the Democratic nomination — and the Republican incumbent — must have a plan to meet these challenges, or risk being out of step with the American people.

This report delineates how that can be done, outlining policies that would slash America's incarceration rate, put people back to work, and reduce racial disparities in the process, while keeping the country safe. These solutions can be a transformative piece of a presidential campaign and help define a new president's legacy.

Some consensus for these changes already exists. Late last year, Congress ended years of deadlock over federal sentencing reform by passing the FIRST STEP Act, which will reduce some of the most extreme and unjust sentenc-

es in the federal criminal code.⁴ These changes will put families back together, make prison more humane, and help restore trust in law enforcement.⁵

But the bill also raises the bar for any candidates seeking the Oval Office. President Trump is already treating the act as a signature accomplishment, touting it among his top achievements in his State of the Union address.⁶ Candidates who are serious about combating racial and economic injustice — and want voters to know it — will have to think bigger.

Rather than focusing on individual reforms, candidates for the presidency should commit to tackling some of the most pervasive and damaging parts of our criminal justice system, including overly punitive sentences, bail practices that favor the rich, and drug policies that unfairly target people of color. These aren't intractable problems, but they do call for sweeping changes, far more than what has been introduced to date. And enacting these in Washington can also spur more states to take action.

Incremental reforms will not make the history books. The time for bold action is now, and this report outlines precisely the type of transformative solutions that candidates can champion to define their campaign or cement their legacy.

Transformative Policy Solutions

1. End Imprisonment for Lower-Level Offenses

The next president should propose ending the use of prison entirely for lower-level offenses.

For too long, prison has been the default punishment for crime — even though the Brennan Center and others have demonstrated that the country’s sky-high incarceration rate has no appreciable effect on public safety. Over-incarceration is a mistake that our country and our communities can no longer afford. For one thing, prisons are extraordinarily expensive, costing more than \$30,000 per year to incarcerate someone in a federal prison.⁷ Prisons also impose significant collateral costs on incarcerated people and communities, severing ties between people and their families, making it harder to return to a normal life after release, and traumatizing children in the process.⁸ And prisons take people away from jobs, hurting their ability to earn a living wage and perpetuating economic inequality.⁹ These factors contribute to the “criminogenic” effect of prison: By stripping away a person’s support systems, prison may actually make it more likely for someone to commit a new crime upon release.

Much of the work of reducing this overuse of incarceration will have to be done by the states. But the federal prison system is an ideal starting place for reform and can serve as a national example. Even with recent changes, the federal government locks up more people than any single state.¹⁰ Since 1986, the federal prison population has grown fourfold, and prisoners today spend more than twice as long behind bars.¹¹ One might think that federal prison is reserved for serious offenders. But that’s not the case. In fact, around half of all federal prisoners are serving time for a drug crime, compared with just 15 percent of state prisoners.¹² And according to the U.S. Sentencing Commission, a minority of those offenders are serving time for an importation or leadership role. Far more are former street-level dealers or couriers.¹³

Reducing incarceration should be the top priority for any policymaker who cares about racial justice. And it doesn’t have to come at the expense of public safety. The Brennan Center’s 2016 report, *How Many Americans Are Unnecessarily Incarcerated?*, found that 25 percent of prisoners could better be sentenced to alternatives to prison.¹⁴ These alternatives are often more effective than prison.¹⁵ Common options — such as probation, electronic monitoring, treatment, community service, or fines calibrated to ability to pay — can cut recidivism and save government resources.¹⁶

Candidates seeking the presidency should also commit to applying these lessons to the federal system and campaign

on a plan to end the use of prison outright for lower-level federal crimes. Such legislation would change the default sentences for lower-level crimes to specific alternatives to incarceration, with a judge reserving the right to require a prison sentence in exceptional cases.

A forthcoming Center proposal will apply the 2016 report cited above to the federal prison population and identify crimes for which incarceration should no longer be the default sentence. For example, more than 30,000 people are currently incarcerated in federal prison on charges related to either the trafficking of marijuana or lower-level supporting roles in the trafficking of more serious drugs. Many of these individuals could be sanctioned by probation or, in the case of those engaging in the drug trade to support their own addiction, substance abuse treatment. Another estimated 10,000 people in federal prison are incarcerated primarily for an immigration offense and could be instead placed on supervised release while their cases are pending.¹⁷ Enacting a sentencing reform bill that diverts these offenders — some 40,000 people, according to our preliminary estimates — into alternative sentences could immediately cut the federal prison population significantly and save money in the process without posing serious risks to public safety.

A candidate seeking to adopt this proposal could also count on broad support; our report outlining the proposal was endorsed by *The New York Times* and other leading papers.¹⁸ It is precisely the type of bold, signature policy solution that can define a presidential campaign.

2. Shorten Overly Long Prison Sentences

Candidates for the presidency should also commit to reducing the sentences of those serving time for serious crimes.

How Many Americans Are Unnecessarily Incarcerated? found that at least 15 percent of people in prison nationwide are serving sentences that are far too long and can be safely shortened — even for more serious crimes.¹⁹ This over-punishment is rampant in the federal system. Four in ten people in prison are serving time under a mandatory minimum sentence.²⁰ These penalties substantially limit judicial discretion, meaning judges lose the ability to tie the punishment to the crime and find themselves forced into imposing sentences that many believe are unjust.²¹ In recent years, more than 70 percent of people sentenced for a drug crime under a mandatory minimum penalty were people of color.²²

Consensus is growing that these sentences are no longer necessary to preserve public safety. Research shows longer

prison sentences were not responsible for today's generally low crime rates and may actually cause crime to increase.²³ One reason for this is that America in general — and the federal system in particular — already incarcerates so many people that adding more has little additional effect on crime. Research by the Brennan Center, the Brookings Institution's Hamilton Project, and the National Academy of Sciences all leads to this conclusion.²⁴

The answer to the problem is simple: shorten sentences for federal crimes so they are proportional to underlying offenses, as recommended in the 2016 Brennan Center report mentioned above. Such a proposal should start with shortening sentences for two categories of federal offenders: people convicted of drug trafficking offenses and those convicted of nonviolent weapons offenses. People on average spend four to five years in prison for these crimes. Cautious sentencing reductions would reduce time served to an average of three to four years. This seemingly small change would have a significant effect: Around 90,000 people would receive shorter sentences immediately, and 26,000 of these — most approaching the end of their prison terms — would be eligible for release.

Polls have demonstrated broad support for eliminating mandatory minimum sentences entirely, with one state poll showing support especially strong among growing voter blocs, such as millennials, and key demographic groups like women of color.²⁵ Over the past decade, 27 states have shown that it is possible to reduce incarceration while holding crime rates stable.²⁶ This is a solution whose time has finally come.

Notably, if every state passed this proposal along with ending imprisonment entirely for lower-level offenses, the nationwide prison population could be safely reduced by 40 percent. The next president can lead a campaign to enact such changes at the federal level and encourage states to follow that example.

3. Pass a "Reverse" of the 1994 Crime Bill

The national prison population began growing rapidly in the 1970s, the outcome of a combination of policy choices that sent more people to prison for more time.²⁷ Most of this growth occurred at the state level.²⁸ But rather than tempering state efforts, the federal government helped accelerate them, offering grants to help fund more arrests, prosecutions, and imprisonment.

Washington, in other words, played an important fiscal and symbolic role in shaping the state policies responsible for mass incarceration. It should play an equally important role in reversing them.

Toward that end, the next president should encourage Congress to pass legislation to revise all federal grant programs that support local law enforcement efforts and ensure they are working in tandem to incentivize reductions in incarceration along with other criminal justice reforms. Such a "Reverse Mass Incarceration Act" could ensure that federal dollars encourage and expand on rather than undermine state and local efforts to build a fairer justice system.²⁹

Federal dollars have helped buttress mass incarceration for years, most notoriously through the Violent Crime Control and Law Enforcement Act of 1994.³⁰ Otherwise known as the "1994 Crime Bill," this legislation offered money to states that adopted harsher sentencing laws. Of the more than \$3 billion that Congress appropriated to fund state incarceration efforts, \$2.7 billion was distributed over a six-year period.³¹

While those grants expired in 2001, similar incentives persist today.³² For example, the Edward Byrne Memorial Justice Assistance Grant Program ("Byrne JAG") sends around \$300 million to the states every year, using outdated performance measures that encourage rather than place a check on mass incarceration.³³ And Byrne JAG funding is just a drop in the bucket. Washington spends billions annually to support state and local justice systems — with many of those dollars allocated under outdated metrics designed to encourage arrest and incarceration.³⁴

Operating as a symbolic "reverse" of the 1994 Crime Bill, the Reverse Mass Incarceration Act (RMIA) would rewrite all these grant programs and the statutory guidelines for awards, ensuring that receipt of federal dollars is contingent on modern-day criminal justice goals. Alternatively, such a bill could authorize a new grant stream to do the same.

Under these new guidelines, states would receive money for safely reducing incarceration while reducing crime rates or holding them steady, rather than for meeting outdated benchmarks like higher conviction rates. Specifically, to receive an award, states would be expected to decrease their prison population by 7 percent over a three-year period while reducing crime rates or holding them stable. While ambitious, this is an achievable goal: Seven percent is only slightly greater than the average annual reduction in states already cutting their imprisonment rate.³⁵ And while the bill's focus must be on reducing incarceration, keeping crime low must be part of its formula to ensure political and practical viability. The past decade has shown we can reduce crime and incarceration together; they are not incompatible goals. By setting targets rather than dictating policy, the bill would allow each state to choose its own path to achieve these goals.

One version of this legislation was introduced in the last Congress and would have authorized \$20 billion over 10 years to support successful, innovative state criminal justice policies to reduce crime and incarceration.³⁶ That bill was supported by a broad array of civil rights and criminal justice groups, including the ACLU, Center for American Progress, #Cut50, Fair & Just Prosecution, Justice Action Network, Just Leadership USA, NAACP, R Street Institute, Texas Public Policy Foundation, and formerly incarcerated activist Chandra Bozelko.³⁷ The effort also received favorable media coverage in *The Atlantic*, *The New York Times*, *Vox*, and *The Washington Post*.³⁸

Some have argued that the RMIA could not singlehandedly achieve its stated goal of “reversing” mass incarceration. This is true: With 1.7 million people in prison nationwide, and 87 percent of them in state facilities, no single piece of legislation could accomplish such a sweeping goal.³⁹ But the question that the RMIA seeks to answer is this: What can be done at the federal level to spur state reforms?

With criminal justice reform increasingly popular nationwide, these grants would provide just the nudge needed to spark broad change. Reorienting federal grant streams may not seem like a monumental step, and the dollars involved may not appear large enough to change state or local policy. But for many states this push would come at a vital time. Reducing the prison population is a broadly popular goal nationwide, as evidenced by the 35 states that have, since 2007, participated in a federally funded program aimed at developing policies that reduce imprisonment.⁴⁰

But the process of implementing these strategies can prove politically fraught. For example, in 2017, Oklahoma Governor Mary Fallin introduced a package of bills aimed at reducing prison growth by 25 percent over 10 years, cutting the prison population an additional 7 percent, and saving the state almost \$2 billion.⁴¹ Despite broad support, the bills failed at the 11th hour. And while a compromise package passed the next year, the reforms were less sweeping than originally intended.⁴² Oklahoma’s experience highlights the real need for additional incentives. The promise of federal funding to support state reform efforts could have made the difference, helping get the original legislation across the finish line.

History has shown that states respond to financial incentives. Placing new conditions on federal grants is the same tool the Trump administration used in 2017 to try to force so-called sanctuary jurisdictions into compliance with his immigration agenda.⁴³ Backlash was intense — proving that federally-set funding goals matter to state

decisionmakers.⁴⁴ States have also used financial incentives to influence local policy. In 2009, California passed the California Community Corrections Performance Incentive Act, to provide funding to counties that reduced the number of people they sent to prison for violating probation.⁴⁵ In two years, the number of felony probationers sent to prison dropped by 32 percent, saving the state roughly \$284 million.⁴⁶

By encouraging state action, the RMIA could have a significant downstream effect. It is also smart politics. Scholars continue to debate whether the 1994 Crime Bill caused or even significantly contributed to the problem of mass incarceration. But this academic debate is beside the point for affected communities. Coming amid the prison boom of the 1990s, the 1994 Crime Bill is a powerful symbol of the era of mass incarceration, so potent that in 2016 its legacy cast a shadow over the presidential campaigns of Hillary Clinton and Bernie Sanders, and compelled former President Bill Clinton to express regret for the bill’s impacts.⁴⁷ And recently, announcing his support for the FIRST STEP Act last year, President Trump took great pride in claiming to “roll back some of the provisions of the Clinton crime law that disproportionately harmed the African-American community.”⁴⁸

By championing the RMIA, the next president can symbolically turn the page on this era, inaugurating a new one in which the federal government works hand in hand with states to reduce incarceration. And they’ll have broad support while doing it.

Current levels of incarceration represent a national crisis that demands a response at every level of government. The RMIA provides that response through one of most powerful federal tools for influencing state behavior: the power of the purse.

4. Modernize Federal Clemency

The president’s constitutional authority to pardon or commute federal prison sentences is an essential feature of the federal justice system. Without “easy access” to executive clemency, wrote Alexander Hamilton in *The Federalist Papers*, “justice would wear a countenance too sanguinary and cruel.”⁴⁹ More than 200 years later, though, presidents have gradually abdicated their responsibility to provide mercy to people convicted of federal crimes — just when it’s needed most.

The next president should reverse this trend. Previous Brennan Center reports have proposed streamlining the clemency process and using the power to commute the sentences of broad categories of offenders.⁵⁰ But the clemency process’s flaws are fundamental, demonstrating

the need for structural change. Toward that end, the next president should take executive action to restructure and streamline federal clemency — and then use it to restore fairness to federal sentencing.

Clemency originally provided a more frequent check on draconian prison sentences. President Lincoln pardoned hundreds of soldiers and civilians, for example, and from Truman to Carter, presidents issued more than 100 clemency grants, on average, per year.⁵¹ But after Carter, executive grants of clemency slowed to a trickle.⁵² Coincidentally or not, this decline overlapped neatly with the birth of mass incarceration. Today, after a brief revitalization under President Obama, clemency in the Trump administration has become little more than a tool for rewarding loyal allies, with only an occasional apolitical recipient.⁵³

Politics offers one explanation for the decline of federal clemency. But structural issues are also a factor. Currently the clemency process is overseen by the Office of the Pardon Attorney, a U.S. Department of Justice component supervised by the deputy attorney general. But Justice Department officials, and especially the deputy attorney general, have a vested interest in preserving federal convictions. Giving the deputy attorney general authority over clemency essentially asks this person to second-guess the policies and decisions of his or her own department, posing an inherent and counterproductive conflict of interest.⁵⁴

To fix these problems and revitalize clemency, the next president should take two steps through executive action. First, she or he should issue an executive order to remove the clemency office from the Justice Department. Second, she or he should create an independent commission to advise the president on clemency, drawing on expertise from across the criminal justice field.

Though this was once a radical idea, progressive and conservative advocates now broadly agree that the Justice Department is ill suited for the doorkeeper role it plays in the federal clemency process.⁵⁵ The changes we recommend could be executed quickly. The Office of the Pardon Attorney was created by executive order, and clemency authority can be transferred out of it and into another body just as easily.⁵⁶

The clemency process should be supervised and supported by an independent board or commission operating under the president's authority, with final grants of clemency reviewed and approved by the president.⁵⁷ This type of system, where the pardon power is exercised by an executive-appointed board, is currently used in Alabama, Connecticut, Georgia, Idaho, South Carolina, and Utah. The boards in these states issue pardons at regular inter-

vals, and 30 to 60 percent of applicants get some form of relief — a very high rate compared with the federal system, likely due to the boards' independence from politics.⁵⁸ Commissioners could be drawn from a broad range of fields, such as sociology, criminology, and law professors, to ensure that clemency decisions are based on a full understanding of the justice system. In Connecticut, for example, the Board of Pardons & Paroles is composed of individuals from diverse backgrounds, ranging from the director of a homeless shelter to a former police chief. Each year it issues approximately 400 clemency grants—twice the number issued by President George W. Bush during his entire eight years in office.⁵⁹ This expert guidance would help craft clemency grants that would then be submitted to the president for review.

With a revitalized pardon process, the next president can work to temper overly harsh prison sentences while negotiations on legislative solutions continue. As the lone individual entrusted with the power to unilaterally exercise the government's mercy, the president has a responsibility to offer a helping hand.

5. Additional Solutions

Candidates can also consider the proposals below to address other problems in the criminal justice system and remedy specific injustices.

- **Fully fund the FIRST STEP Act.** As noted earlier, Congress passed an overhaul of the federal prison system in December 2018. Once implemented, portions of that act would offer incarcerated people significantly greater access to education, job training programs, and tools to help them overcome challenges that may have led them to prison in the first place.⁶⁰ But the bill does not work on autopilot. The next administration — and the current president — must commit to ensuring its success. For one thing, while the FIRST STEP Act authorized the creation of recidivism reduction programs and allows the Justice Department to seek up to \$75 million annually to carry them out, it does not actually fund these efforts itself.⁶¹ Congress must still directly appropriate the funds each year before the Bureau of Prisons can begin to spend them. Additionally, while the Act purports to reward prisoners for their participation by transferring them from prisons to residential reentry centers (or halfway houses), these centers lack the space to house new transfers.⁶² The next president can fix both these problems by insisting that future appropriations bills include adequate funding for prison reform initiatives. Specifically, the president should press Congress to include appropriations for FIRST STEP Act implementation in every budget and to

fully fund the expansion of residential reentry systems until the need is met.

- **End the ban on federal college grants for prisoners.** The 1994 Crime Bill is justly criticized for encouraging states to build and fill new prisons.⁶³ But the harmful role it played in cutting off prison education programs has received less attention. By making incarcerated people ineligible for Pell Grants, a common type of financial aid to attend college, the legislation caused prison enrollment in college programs to plummet, dropping by almost half in the first year after implementation.⁶⁴ In 2015, the Pell Grant ban was partially relaxed by a pilot program that allows people incarcerated at some facilities access to grants.⁶⁵ The next president should take the next step and ask Congress to end this ban outright. Education is a proven method for reducing recidivism and will ensure that people return to their communities ready to build a new life.⁶⁶ Recent research by the Vera Institute and the American Enterprise Institute confirms these findings.⁶⁷
- **Abolish money bail.** Setting bail is the practice of holding people charged with crimes in jail before trial unless they pay a certain amount of money. Fifty years ago, President Lyndon Johnson largely abolished cash bail at the federal level, calling it “archaic” and “unjust.”⁶⁸ Even so, federal courts sometimes still require unsecured bail bonds — where defendants agree to forfeit a certain amount of money if they fail to appear for trial — and many states continue to use cash bail. The time is right for change. We now know that money bail in any form disproportionately hurts the working class and communities of color, and that cash bail can even lead to people pleading guilty to crimes they didn’t commit.⁶⁹ Ending bail nationwide requires state action, but the federal government can help lead the way. One model for that action is the No Money Bail Act of 2018, which would prohibit the use of bail in any form in federal courts and provide incentive funding for states to do the same. The Act calls for states to base pretrial release decisions on public safety rather than wealth.⁷⁰ The next president can champion similar legislation and could count on bipartisan support if he or she does so.⁷¹
- **End federal prohibition on marijuana.** Two-thirds of Americans broadly support legalizing marijuana, and consensus is growing in Congress, too.⁷² The federal government has two options for meeting this demand. First, it could clarify that federal marijuana laws do not apply in states that have legalized the drug. The Republican-led Respect State Marijuana

Laws Act of 2017, introduced in the last Congress, would accomplish that goal.⁷³ Alternatively, the next president could choose to support a bolder strategy and advocate for an end to the federal prohibition on marijuana. Several bills would accomplish this goal, such as the Marijuana Freedom and Opportunity Act and the similar Marijuana Justice Act, which would also incentivize state legalization efforts.⁷⁴

- **Reverse the incentives of federal prosecutors.** The next president will wield considerable influence over how the Department of Justice operates during her or his tenure. But the past two years have shown just how fleeting such administrative changes can be. To make a more permanent shift, the next president should call on Congress to overhaul how federal prosecutors operate. Currently, federal prosecutors are promoted and rewarded on the basis of how many convictions and prison sentences they secure. There is broad agreement that those incentives need to shift. In cities as diverse as Houston and Philadelphia, voters have elected progressive prosecutors committed to rethinking imprisonment and its overuse.⁷⁵ The next president should spearhead a national effort to change how prosecutors operate, by calling on Congress to create a program that would provide bonus funds to U.S. Attorneys’ offices that reduce incarceration, crime, and recidivism in their districts. Similar incentives have successfully changed behavior at the state and county levels.⁷⁶ Major legislation like this would more permanently change the Department of Justice, establishing a firewall against future regressive attorneys general. It would also encourage states to adopt similar funding structures for local prosecutors — one more way for Washington to support the national movement for prosecutorial reform.
- **Provide a national response to the opioid crisis.** The Trump administration has taken some steps to confront the opioid crisis, from declaring a national emergency to signing the SUPPORT for Patients and Communities Act, which will help expand treatment options for people struggling with addiction.⁷⁷ But with more than 70,000 overdose deaths each year, it is not enough.⁷⁸ And some responses could make the problem worse. First and foremost, the next president should listen to the experts and commit to vetoing any effort to resurrect the “war on drugs” rather than treatment as a response to the opioid crisis. Next, current law does not appropriate enough money to truly meet the need for addiction treatment.⁷⁹ The next president should confront this challenge by asking Congress to provide additional funding. The next president should also advocate for states to ex-

pand aspects of the social safety net — like Medicaid — that, pursuant to the SUPPORT Act, now cover more addiction treatment services.⁸⁰

Executive Actions for Day One

The next president should commit to making the sweeping changes outlined above to reduce mass incarceration. But these changes will take time, and candidates for the presidency should also commit to taking steps on Day One through executive action.

- **Repeal draconian, Sessions-era law enforcement directives.** During his time as attorney general, Jeff Sessions broke with the bipartisan consensus for criminal justice reform in several key ways. He repealed an Obama-era order that directed prosecutors to seek lower sentences for lower-level drug offenders when appropriate, and instead instructed federal prosecutors to seek the most serious charge possible in every case.⁸¹ He also repealed another directive that offered some modicum of respect for state marijuana laws.⁸² Candidates can commit to instructing their attorney general to reverse these actions, among others.
- **End federal private prisons.** In the waning days of the Obama administration, then-Deputy Attorney General Sally Yates directed the federal Bureau of Prisons to wind down, and eventually terminate, its use of private prisons. Yates cited serious concerns about the safety of inmates and corrections officers in private prisons.⁸³ Sessions repealed the Yates directive almost immediately after his confirmation.⁸⁴ Since then, evidence that private prisons are badly run and more prone to violence has only grown, to say nothing of the concern that private prisons create financial incentives that perpetuate mass incarceration.⁸⁵ The next president can meet these challenges by promising to reinstate the Yates Memorandum or, better yet, by committing to an even faster wind-down of federal private prisons. Alternatively, a more moderate approach would involve changing the financial incentives of private prisons, insisting that they reduce recidivism and meet safety goals to preserve their contracts.⁸⁶
- **Change federal prosecutor incentives.** As an alternative to legislation to change prosecutor behavior through financial incentives, the president can achieve a similar result through executive action. The president can direct the attorney general to change how the Justice Department evaluates U.S. Attorney Offices and how prosecutors are evaluated and promoted. Metrics, as laid out in a 2014 Brennan Center

report, *Federal Prosecution for the 21st Century*, should include measurable reductions in crime and recidivism rather than increases in convictions and prison sentences.⁸⁷ Such a change to prosecution practices could cut imprisonment and save between \$10 billion and \$20 billion over 10 years.⁸⁸

- **Revitalize the Sentencing Commission.** The U.S. Sentencing Commission both provides vital research on the federal justice system and helps set sentencing policy. Sentencing guideline amendments issued by the commission can have a significant impact. For example, one amendment from 2014 led to the “largest one-time release of federal prisoners” ever, with nearly 10,000 people benefiting.⁸⁹ Unfortunately, the terms of two commissioners recently expired, leaving the Commission with five out of seven seats vacant. Without a quorum of four members, the Commission cannot issue new guidance, jeopardizing the body’s ability to improve fairness in federal sentencing.⁹⁰ Worse, President Trump’s prior nominees to the Commission held archaic views on criminal justice, and if confirmed would have turned the Commission into an anti-reform body.⁹¹ The next president should reverse course by nominating commissioners who believe in building a fairer justice system, leading to a fully staffed Commission that can effectively do its job. Notably, while the commission must by law include people from different political parties, there is no shortage of people from across the political spectrum who support criminal justice reform.
- **Use clemency to reduce unfair sentences.** Even before restructuring the clemency process, the next president can use his or her power to commute the sentences of people left behind by the FIRST STEP Act. Originally, all parts of the FIRST STEP Act would have been retroactive, to ensure that no one remained stuck in prison serving a sentence that Congress had just determined was unfair. But retroactivity for several provisions was removed from the Act during the compromise process, meaning around 3,700 people are still serving time under outdated laws.⁹² Previous Brennan Center proposals have advocated for a “categorical” use of the clemency power, where the president systematically commutes the sentences of nearly all offenders who meet certain criteria, to solve such problems.⁹³ The same solution should be adopted here. Such use of the clemency power will help restore faith in the justice system and set the tone as the president weighs how to truly revolutionize executive clemency.

Conclusion

With racial and economic inequality front and center in the national debate, leaders aspiring to the Oval Office must articulate a clear, ambitious vision for building a more just society. Candidates will likely disagree over the most direct path toward that goal. But ending mass incarceration remains an essential component of any vision for a stronger American society. Reducing our unacceptably high prison population will strengthen communities, reinvigorate the economy, and address continuing racial disparities in our justice system.

That means developing a comprehensive criminal justice platform should be an early goal for any candidate hoping to demonstrate a commitment to racial and economic justice. Considering the broad popularity of reducing incarceration, candidates must think big or risk being forgotten by the wayside in the contentious election season. Half measures won't meet the need or the urgency of this moment. But the solutions proposed in this report will.

Endnotes

- 1 E. Ann Carson, *Prisoners in 2016*, United States Department of Justice, Bureau of Justice Statistics, 2018, 4, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6187>.
- 2 James Cullen, “Despite Progress, Prison Racial Disparities Persist,” Brennan Center for Justice (blog), August 19, 2016, <https://www.brennancenter.org/blog/despite-progress-prison-racial-disparities-persist>.
- 3 *Economic Perspectives on Incarceration and the Criminal Justice System*, Council of Economic Advisers, Executive Office of the President, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice>; Leila Morsy and Richard Rothstein, *Mass Incarceration and Children’s Outcomes*, Economic Policy Institute, 2016, 15, <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/>.
- 4 First Step Act of 2018, Pub. L. No. 115-391 (2018). Ames Grawert, Tim Lau, “How the FIRST STEP Act Became Law — and What Happens Next,” Brennan Center for Justice (blog), January 4, 2019, <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next>.
- 5 Juliet Martinelli, “Matthew Charles, Nashville Man Who Gained National Attention, Is Released From Prison Again,” Nashville Public Radio, January 3, 2019, <https://www.nashvillepublicradio.org/post/matthew-charles-nashville-man-who-gained-national-attention-released-prison-again#stream/0>.
- 6 The White House, Special Guests for President Trump’s Second State of the Union Address (Feb. 4, 2019), <https://www.whitehouse.gov/articles/special-guests-president-trumps-second-state-union-address/>.
- 7 Ken Hyle, *Annual Determination of Average Cost of Incarceration*, U.S. Department of Justice, Bureau of Prisons, 2018, <https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration>.
- 8 Eric Martin, “Hidden Consequences: The Impact of Incarceration on Dependent Children,” National Institute of Justice, *NIJ Journal* 278 (2017), <https://www.nij.gov/journals/278/pages/impact-of-incarceration-on-dependent-children.aspx>; Peter van Agtmael, “More on Incarceration’s Impact on Kids and Families,” Vera Institute, The Human Toll of Jail, <http://humantollofjail.vera.org/the-family-jail-cycle/>.
- 9 *Economic Perspectives on Incarceration and the Criminal Justice System*, Council of Economic Advisers, Executive Office of the President, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice>.
- 10 E. Ann Carson, *Prisoners in 2016*, 4.
- 11 E. Ann Carson and Joseph Mulako-Wangota, “Corrections Statistical Analysis Tool (CSAT) — Prisoners,” U.S. Department of Justice, Bureau of Justice Statistics, accessed January 23, 2018, <https://www.bjs.gov/index.cfm?ty=nps>. U.S. Department of Justice, Office of Justice Programs, *Federal Criminal Case Processing, 1982–93*, 1996, <https://www.bjs.gov/content/pub/pdf/Fccp93.pdf> (for 1988 data listing, respectively, the number of persons incarcerated in the federal system by offense, and the mean time served by offense); U.S. Department of Justice, Bureau of Justice Statistics, *Federal Justice Statistics, 2014 - Statistical Tables*, by Mark Motivans, 2017, tbl. 7.9, tbl. 7.11, <https://www.bjs.gov/content/pub/pdf/fjs14st.pdf> (listing, respectively, the number of persons incarcerated in the federal system by offense, and the mean time served by offense); U.S. Sentencing Commission, *Quarterly Data Report — 3rd Quarter Release*, 2018, tbl. 6, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_3rd_FY18.pdf.
- 12 E. Ann Carson, *Prisoners in 2016*, 13.
- 13 U.S. Sentencing Commission, *An Overview of Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System*, 2017, 45, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf.
- 14 Lauren-Brooke Eisen et al., *How Many Americans Are Unnecessarily Incarcerated?* Brennan Center for Justice, 2016, <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated>.

- 15 Francis T. Cullen et al., “Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science,” *The Prison Journal* 60S (2011): 91.
- 16 For information on recidivism, see Joan Petersilia and Susan Turner, *Prison Versus Probation in California: Implications for Crime and Offender Recidivism*, Rand Corp., 1986, vii-viii, <https://www.rand.org/content/dam/rand/pubs/reports/2007/R3323.pdf> (finding the percentage of probationers incarcerated within two years of release to be 34 percent lower than the percentage of prisoners incarcerated in the same time period); Paul Gendreau and Claire Goggin, *The Effects of Prison Sentences on Recidivism*, Centre for Criminal Justice Studies, 1999 (“The results were as follows: [Relative to shorter sentences and alternative sanctions] prison produced slight increases in recidivism”); for information on cost, see Jenifer Warren, *One in 31: The Long Reach of American Corrections*, Pew Center on the States, 2009, 13, http://www.pewtrusts.org/-/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf; Joan Petersilia and Susan Turner, *Prison Versus Probation in California*, 1986, 186 (“[I]n programs where offenders received both surveillance (e.g., drug tests) and participated in relevant treatment, recidivism was reduced 20–30 percent.”); John K. Roman et al., *The Costs and Benefits of Electronic Monitoring for Washington, D.C.*, District of Columbia Crime Policy Institute, 2012, 6, <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412678-The-Costs-and-Benefits-of-Electronic-Monitoring-for-Washington-D-C-.pdf> (analyzing seven evaluations of electronic monitoring and finding that those under monitoring had an average rearrest rate 23.5 percent lower than that of standard probationers and parolees). An evaluation by the National Center on Addiction and Substance Abuse found that participation in the DTAP program reduced rearrest rates by 26 percent; see *Crossing the Bridge: An Evaluation of the Drug Treatment Alternative-to-Prison (DTAP) Program*, National Center on Addiction and Substance Abuse at Columbia University, 2003. An independent evaluation of Seattle’s Law Enforcement Assisted Diversion found that participants had a 58 percent lower chance of arrest than a control group. See Susan E. Collins et al., *LEAD Program Evaluation: Recidivism Report*, University of Washington, 2015, 3, http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf?token=x-TmZUgmkb4HTY3bnogXuOI8Uows%3D. Vermont’s cognitive self-change program, targeting violent offenders with treatment in and out of prison, reduced the rate of new criminal charges by 21 percent relative to a comparison group. See Kris R. Henning & B. Christopher Frueh, “Cognitive-Behavioral Treatment of Incarcerated Offenders: An Evaluation of the Vermont Department of Corrections’ Cognitive Self-Change Program,” *Crim. J. & Behavior* 23 (1996): 522, 534.
- 17 While some members of this group may also be incarcerated on secondary, minor charges, this figure excludes incarcerated aliens convicted of more serious crimes. See U.S. Department of Homeland Security, *Alien Incarceration Report Fiscal Year 2018, Quarter 1*, 2018, 5-6, <https://www.justice.gov/opa/press-release/file/1069281/download>.
- 18 The Editorial Board, “Cutting Prison Sentences, and Costs,” *New York Times*, December 24, 2016, <https://www.nytimes.com/2016/12/24/opinion/sunday/cutting-prison-sentences-and-costs.html>. Timothy Williams, “Four Violent Crimes: You Decide the Sentence,” *New York Times*, December 9, 2016, <https://www.nytimes.com/interactive/2016/12/09/us/brennan-center-report-sentence-length.html>; Christopher Ingraham, “How to Cut the Prison Population, Save \$18 Billion a Year and Keep America Safe,” *Washington Post*, December 12, 2016, https://www.washingtonpost.com/news/work/wp/2016/12/12/how-to-cut-the-prison-population-save-18-billion-a-year-and-keep-america-safe/?utm_term=.be35a81e8a4a.
- 19 Lauren-Brooke Eisen et al., *How Many Americans Are Unnecessarily Incarcerated?*, 2016.
- 20 U.S. Sentencing Commission, *Mandatory Minimum Penalties for Drug Offenses*, 6.
- 21 See *United States v. Dossie*, 851 F. Supp. 2d 478, 479-81, 484-89 (E.D.N.Y. 2012) (Gleeson, J.) (“The only reason for the five-year sentence imposed on [the defendant Jamel] Dossie is that the law invoked by the prosecutor required it. It was not a just sentence. To avoid similar injustices in other cases, I respectfully urge the Attorney General to lead the way forward by altering DOJ’s charging policies in the manner described above”); see also Ram Subramanian, “Judge Gleeson on Mandatory Minimum Sentences,” Vera Institute of Justice (Blog), June 15, 2012, <https://www.vera.org/blog/judge-gleeson-on-mandatory-minimum-sentences>; Shira A. Scheindlin, “I Sentenced Criminals to Hundreds More Years Than I Wanted To. I Had

- No Choice,” *Washington Post*, February 17, 2017, https://www.washingtonpost.com/posteverything/wp/2017/02/17/i-sentenced-criminals-to-hundreds-more-years-than-i-wanted-to-i-had-no-choice/?utm_term=.50823bf72a84; Mallory Simon and Sara Sidner, “The Judge Who Says He’s Part of the Gravest Injustice in America,” CNN, June 3, 2017, <https://www.cnn.com/2017/06/02/politics/mandatory-minimum-sentencing-sessions/index.html>.
- 22 U.S. Sentencing Commission, *Mandatory Minimum Penalties for Drug Offenses*, 25.
- 23 See Jeremy Travis and Bruce Western, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, National Research Council, 2014, 138; Stephen Raphael and Michael Stoll, *A New Approach to Reducing Incarceration While Maintaining Low Rates of Crime*, Brookings, 2014, 9, <https://www.brookings.edu/research/a-new-approach-to-reducing-incarceration-while-maintaining-low-rates-of-crime/>; Oliver Roeder and Lauren-Brooke Eisen, *What Caused the Crime Decline?*, Brennan Center for Justice, 2015, 15, <https://www.brennancenter.org/publication/what-caused-crime-decline> (including a detailed review of other existing research on the topic). See also Joan Petersilia and Susan Turner, *Prison Versus Probation in California*, 1986, vii-viii (noting that prison markedly increased recidivism for persons convicted of property crimes); Gerald Gaes, “Unintended Consequences: Experimental Evidence for the Criminogenic Effect of Prison Security Level Placement on Post-Release Recidivism,” *J. Experimental Criminology* 5 (2009): 139, <http://link.springer.com/article/10.1007/s11292-009-9070-z>; Daniel S. Nagin and G. Matthew Snodgrass, “The Effect of Incarceration on Re-Offending: Evidence From a Natural Experiment in Pennsylvania,” *J. Quantitative Criminology* 29 (2012): 601, 642.
- 24 Jeremy Travis and Bruce Western, *The Growth of Incarceration in the United States*, 2014, 138; Stephen Raphael and Michael Stoll, *A New Approach to Reducing Incarceration*, 2014, 9; Oliver Roeder and Lauren-Brooke Eisen, *What Caused the Crime Decline?*, 2015.
- 25 “91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds,” ACLU, last modified November 16, 2017, <https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds>. “ACLU of Georgia Releases Poll Showing Voters More Likely to Support Candidates Who Take Strong Positions Favoring Smart Justice,” ACLU, last modified September 26, 2018, <https://www.aclu.org/news/aclu-georgia-releases-poll-showing-voters-more-likely-support-candidates-who-take-strong>.
- 26 *News Analysis: States Lowered Crime and Incarceration Rates Simultaneously*, Brennan Center for Justice, last modified June 8, 2016, <https://www.brennancenter.org/press-release/new-analysis-states-lowered-crime-and-incarceration-rates-simultaneously>.
- 27 See generally Jeremy Travis and Bruce Western, *The Growth of Incarceration in the United States*, 2014.
- 28 William Sabol, Heather West, and Matthew Cooper, *Prisoners in 2008*, U.S Department of Justice, Bureau of Justice Statistics, 2010, <https://www.bjs.gov/content/pub/pdf/p08.pdf>.
- 29 Lauren-Brooke Eisen and Inimai M. Chettiar, *The Reverse Mass Incarceration Act*, Brennan Center for Justice, 2015, <https://www.brennancenter.org/publication/reverse-mass-incarceration-act>.
- 30 Lauren-Brooke Eisen and Inimai M. Chettiar, “Analysis: The Complex History of the Controversial 1994 Crime Bill,” MSNBC, April 14, 2016, <http://www.msnbc.com/msnbc/analysis-the-complex-history-the-controversial-1994-crime-bill>.
- 31 U.S Department of Justice, Office of Justice Programs, *Violent Offender Incarceration and Truth-in-Sentencing Incentive Formula Grant Program*, 2012, 2, <https://www.bja.gov/Publications/VOITIS-Final-Report.pdf>.
- 32 Inimai Chettiar et al., *Reforming Funding to Reduce Mass Incarceration*, Brennan Center for Justice, 2013, 2, <https://www.brennancenter.org/publication/reforming-funding-reduce-mass-incarceration>.
- 33 United States Department of Justice, Bureau of Justice Assistance, *Edward Byrne Justice Assistance Grant (JAG) Program Fact Sheet*, 2018, 1, <https://www.bja.gov/publications/2018-JAG-Fact-Sheet.pdf>; United States Department of Justice, Office of Justice Programs, *FY 2019 Program Summaries*, 2018, 26, <https://www.justice.gov/jmd/page/file/1039211/download>.
- 34 Ames C. Grawert, Natasha Camhi, and Inimai Chettiar, *A Federal Agenda to Reduce Mass Incar-*

- ceration, Brennan Center for Justice, 2017, 3, <https://www.brennancenter.org/sites/default/files/publications/a%20federal%20agenda%20to%20reduce%20mass%20incarceration.pdf>. For some examples of these grant programs, see “2018 Request Compared With 2017 Annualized Continuing Resolution and 2016 Obligations,” U.S. Department of Justice, Justice Management Division, <https://www.justice.gov/jmd/page/file/968421/download>; and *High Intensity Drug Trafficking Areas (HIDTA) Program*, Library of Congress, Congressional Research Service, 2018, <https://www.everycrsreport.com/reports/R45188.html>.
- 35 Lauren-Brooke Eisen and Inimai Chettiar, *The Reverse Mass Incarceration Act*, 8-9.
- 36 Reverse Mass Incarceration Act of 2017, S. 1458, 115th Cong. (2017).
- 37 Letter from Brennan Center for Justice et al. to Attorney General Eric Holder (Dec. 19, 2013), <https://www.brennancenter.org/sites/default/files/publications/Letter%20of%20Support.pdf>; letter from Mark A. Levin, Director, Center for Effective Justice, Texas Public Policy Institute, to Denise O’Donnell, Director, Bureau of Justice Assistance (Dec. 20, 2013), <https://www.brennancenter.org/sites/default/files/publications/Marc%20Levin%20Letter%20of%20Support.pdf>; letter from Eli Lehrer, President, R Street Institute, to Attorney General Eric Holder (Jan. 28, 2014), <https://www.brennancenter.org/sites/default/files/publications/Eli%20Lehrer%20Letter.pdf>; Chandra Bozelko, “Incarcerated Women Need the Dignity of Freedom More Than Free Tampons,” NBC News, March 8, 2018, <https://www.nbcnews.com/think/opinion/incarcerated-women-need-dignity-freedom-more-free-tampons-ncna854631>; Glenn E. Martin, “We Must Pass the Reverse Incarceration Act if We Want Prison Reform,” *The Hill*, October 6, 2017, <https://thehill.com/opinion/criminal-justice/354288-we-must-pass-the-reverse-incarceration-act-if-we-want-prison-reform>; Hilary O. Shelton and Inimai Chettiar, “Want to Shrink Prisons? Stop Subsidizing Them,” *Washington Post*, Nov. 1, 2016, https://www.washingtonpost.com/news/in-theory/wp/2016/11/01/want-to-shrink-prisons-stop-subsidizing-them/?utm_term=.39772f3d74a1; Hilary O. Shelton and Lauren-Brooke Eisen, “How to Get States to Reduce Crime and Incarceration at Once,” *TIME*, October 4, 2017, <http://time.com/4963479/crime-rates-mass-incarceration/>; Holly Harris, “The Prisoner Dilemma,” *Foreign Affairs*, Mar. 2017, <https://www.foreignaffairs.com/articles/united-states/2017-02-13/prisoner-dilemma>; Lauren-Brooke Eisen and Miriam Aroni Krinsky, “America’s Justice System Has the Wrong Goals,” CityLab, April 26, 2010, <https://www.citylab.com/equity/2018/04/americas-justice-system-has-the-wrong-goals/558761/>; Mike Crowley and Ed Chung, *Congress Can Lead on Criminal Justice Reform Through Funding Choices*, Center for American Progress, 2017, 4, <https://cdn.americanprogress.org/content/uploads/2017/09/07054711/DOJGrant-brief.pdf>.
- 38 Juleyka Lantigua-Williams, “Crime Is Down, Sort Of,” *The Atlantic*, June 7, 2016, <https://www.theatlantic.com/politics/archive/2016/06/crime-imprisonment-rates/486014/>; Peter Eavis, “Debate Over Prison Population Turns to the States,” *New York Times*, April 12, 2016, <https://www.nytimes.com/2016/04/12/upshot/debate-over-prison-population-turns-to-the-states.html>; German Lopez, “If Democrats Want to Repent for the 1994 Crime Law, Here’s One Way to Do It,” *Vox*, October 13, 2015, <https://www.vox.com>; German Lopez, “Republicans Should Debate These Black Lives Matter and Criminal Justice Questions,” *Vox*, December 15, 2015, <https://www.vox.com/>; Hilary O. Shelton and Inimai Chettiar, “Want to Shrink Prisons? Stop Subsidizing Them,” *Washington Post*, November 1, 2016.
- 39 E. Ann Carson, *Prisoners in 2016*, tbl. 2.
- 40 *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, Pew Charitable Trusts, 2018, https://www.pewtrusts.org/-/media/assets/2018/07/pspp_reform_matrix.pdf.
- 41 *Oklahoma Justice Reform Task Force Final Report*, Oklahoma Justice Reform Task Force, 2017, [https://s3.amazonaws.com/content.newsok.com/documents/OJRTFFinalReport%20\(1\).pdf](https://s3.amazonaws.com/content.newsok.com/documents/OJRTFFinalReport%20(1).pdf).
- 42 Ben Botkin, “Study Finds Justice Reform Bills Would Bring 14% Prison Growth. Is That a Success?” *Oklahoma Watch*, April 17, 2018, <https://oklahomawatch.org/2018/04/17/advocates-prosecutors-see-promise-in-revised-criminal-justice-reform-bills/>.
- 43 U.S. Department of Justice, press release, “Attorney General Sessions Announces Immigration Compliance Requirements for Edward Byrne Memorial Justice Assistance Grant Programs,” July 29, 2017,

- <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial>.
- 44 Ilya Somin, “Federal Court Rules Against Trump in Sanctuary Cities Case Brought by Seven States and New York City,” *Reason*, December 4, 2018, <https://reason.com/volokh/2018/12/04/federal-court-rules-against-trump-in-san>
- 45 California Senate Bill 678 (2009).
- 46 Judicial Council of California, *Report on the California Community Corrections Performance Incentives Act of 2009: Findings From the SB 678 Program*, 2013, 17, <http://www.courts.ca.gov/documents/lr-SB-678-April-2013.pdf>.
- 47 Vanessa Williams, “1994 Crime Bill Haunts Clinton and Sanders as Criminal Justice Reform Rises to Top in Democratic Contest,” *Washington Post*, February 12, 2016, https://www.washingtonpost.com/news/post-politics/wp/2016/02/12/1994-crime-bill-haunts-clinton-and-sanders-as-criminal-justice-reform-rises-to-top-in-democratic-contest/?utm_term=.4c85da7905b1. Peter Baker, “Bill Clinton Concedes His Crime Law Jailed Too Many for Too Long,” *New York Times*, July 15, 2015, <https://www.nytimes.com/2015/07/16/us/politics/bill-clinton-concedes-his-crime-law-jailed-too-many-for-too-long.html>. See also Clinton’s essay in Michael Waldman et al., *Solutions: American Leaders Speak Out on Criminal Justice*, Brennan Center for Justice, 2015, v-vi, <https://www.brennancenter.org/publication/solutions-american-leaders-speak-out-criminal-justice>.
- 48 Jonathan Allen and Hallie Jackson, “Trump Backs Sentencing Reform, Hits Bill Clinton for 1994 Crime Bill,” *NBC News*, November 14, 2018, <https://www.nbcnews.com/politics/politics-news/trump-backs-sentencing-reform-hits-bill-clinton-1994-anti-crime-n936406>.
- 49 Alexander Hamilton, “Federalist No. 74: The Command of the Military and Naval Forces, and the Pardoning Power of the Executive,” *New York Packet*, March 25, 1788, <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-74>.
- 50 Ames C. Grawert, Natasha Camhi, and Inimai Chettiar, *A Federal Agenda to Reduce Mass Incarceration*, 2017.
- 51 Paul J. Larkin, “Revitalizing the Clemency Process,” *Harvard Journal of Law & Public Policy* 39 (2016): 855, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862705##; see also Mark William Osler, “The Ford Approach and Real Fairness for Crack Convicts,” *Federal Sentencing Reporter* 23 (2011), 228.
- 52 Rachel E. Barkow and Mark William Osler, “Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal,” *University of Chicago Law Review* 82 (2015): 9, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5856&context=uclrev>.
- 53 For clemency statistics generally, see U.S. Department of Justice Clemency Statistics, last modified December 18, 2018, accessed January 22, 2019, <https://www.justice.gov/pardon/clemency-statistics>. For President Trump’s use of the pardon power to reward political loyalists, see Phillip Rucker, Josh Dawsey, and John Wagner, “Trump Pardons Conservative Pundit Dinesh D’Souza, Suggests Others Also Could Receive Clemency,” *Washington Post*, May 31, 2018, https://www.washingtonpost.com/politics/trump-offers-pardon-to-conservative-pundit-dinesh-dsouza-for-campaign-finance-violations/2018/05/31/b4939a08-64d5-11e8-a768-ed043e33f1dc_story.html?utm_term=.0bf38e3b917f. For a positive, merciful use of the pardon power, see Jeremy Diamond and Kaitlan Collins, “Trump Commutes Sentence of Alice Marie Johnson,” CNN, June 6, 2018, <https://www.cnn.com/2018/06/06/politics/alice-marie-johnson-commuted-sentence/index.html>.
- 54 Rachel E. Barkow, “Clemency and the Unitary Executive,” New York University School of Law, Public Law & Legal Theory Research Paper Series 14-38 (2014): 21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484586.
- 55 Rachel Barkow, Mark Holden, and Mark Osler, “The Clemency Process Is Broken. Trump Can Fix It,” *The Atlantic*, Jan. 15, 2019, <https://www.theatlantic.com/ideas/archive/2019/01/the-first-step-act-isnt-enough-we-need-clemency-reform/580300/>; see also Paul J. Larkin, “Essay: A Proposal to Restructure the Clemency Process — The Vice President as Head of a White House Clemency Office,” *Harvard Journal of Law and Public Policy* 40 (2016): 253, http://www.harvard-jlpp.com/wp-content/uploads/2017/04/Larkin-VP-and-Clemency_F.pdf

- (describing an alternative proposal not endorsed in this report).
- 56 See Exec. Order No. 11,803, 39 Fed. Reg. 33,297 (Sep. 17, 1974) (creating a “clemency board to review certain convictions” related to the Vietnam War).
 - 57 Barkow and Osler, “Restructuring Clemency,” 20.
 - 58 Margaret C. Love, “Reinvigorating the Federal Pardon Process: What the President Can Learn From the States,” *University of Saint Thomas Law Journal* 9 (2013): 744, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283979https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283979.
 - 59 “Current Board Members,” State of Connecticut Board of Pardons and Paroles, accessed January 22, 2019, <https://www.ct.gov/bopp/cwp/view.asp?a=4330&q=508528>. U.S. Department of Justice Clemency Statistics, last modified December 18, 2018, accessed January 22, 2019, <https://www.justice.gov/pardon/clemency-statistics>.
 - 60 FIRST STEP Act of 2018 § 101(a) (codified at 18 U.S.C § 3633); FIRST STEP Act of 2018 § 102(a) (codified at 18 U.S.C § 3621(h)).
 - 61 FIRST STEP Act of 2018 § 104(a).
 - 62 Congressional Budget Office, “Cost Estimate — H.R. 5682 FIRST STEP Act,” August 20, 2018, 7, <https://www.cbo.gov/system/files?file=2018-08/hr5682.pdf> (noting the limited impact of certain parts of the FIRST STEP Act and the Bureau of Prisons’ inability to build new residential reentry centers without further congressional authorization).
 - 63 Lauren-Brooke Eisen and Inimai M. Chettiar, “Analysis: The Complex History,” April 14, 2016.
 - 64 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20411, 108 Stat. 1796, 1828 (current version at 20 U.S.C. § 1070a(b)(6)). For the impact of the Pell Grant ban, see Mary C. Wright, “Pell Grants, Politics and the Penitentiary: Connections Between the Development of U.S. Higher Education and Prisoner Post-Secondary Programs,” *Journal of Correctional Education* 52, No. 1 (2001): 14.
 - 65 Gerard Robinson and Elizabeth English Smith, *The Second Chance Pell Pilot Program: A Historical Overview*, American Enterprise Institute, 2017, tbl. A1, <http://www.aei.org/wp-content/uploads/2017/09/The-Second-Chance-Pell-Pilot-Program.pdf>.
 - 66 Lois Davis, Robert Bozick, and Jennifer Steele, *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, Rand Corp., 2013, v, https://www.rand.org/pubs/research_reports/RR266.html; see also Gerard Robinson and Elizabeth English Smith, eds., *Education for Liberation: The Politics of Promise and Reform Inside and Beyond America’s Prisons* (Lanham: Rowman & Littlefield Publishers, 2019).
 - 67 Patrick Oakford et al., *Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison*, Vera Institute of Justice, 2019, 17. See also Gerard Robinson & Elizabeth English Smith, eds., *Education for Liberation: The Politics of Promise and Reform Inside and Beyond America’s Prisons* (Lanham: Rowman & Littlefield Publishers, 2019).
 - 68 Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214; Lyndon B. Johnson, “Remarks at the Signing of the Bail Reform Act of 1966” (Speech, The White House, June 22, 1966), <https://www.presidency.ucsb.edu/documents/remarks-the-signing-the-bail-reform-act-1966>.
 - 69 Jennifer Doleac, “To Reduce Wrongful Convictions, Reform the Bail System,” Brookings, June 22, 2018, <https://www.brookings.edu/opinions/to-reduce-wrongful-convictions-reform-the-bail-system/>.
 - 70 No Money Bail Act, S. 3271, 115th Cong. (2018).
 - 71 Kamala Harris and Rand Paul, “Kamala Harris and Rand Paul: To Shrink Jails, Let’s Reform Bail,” *New York Times*, July 20, 2017, <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html>.
 - 72 Justin McCarthy, “Two in Three Americans Now Support Legalizing Marijuana,” Gallup, October 22, 2018, <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx>.
 - 73 Respect State Marijuana Laws Act of 2017, H.R. 975, 115th Cong. (2017).
 - 74 Marijuana Freedom and Opportunity Act, S. 3174,

- 115th Cong. (2018); Marijuana Justice Act of 2017, S. 1689, 115th Cong. (2017).
- 75 Emily Bazelon and Miriam Krinsky, “There’s a Wave of New Prosecutors. And They Mean Justice,” *New York Times*, December 11, 2018, <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.
- 76 Lauren-Brooke Eisen and Inimai Chettiar, *The Reverse Mass Incarceration Act*, 6-7.
- 77 The White House, “The Opioid Crisis,” last modified October 26, 2017, <https://www.whitehouse.gov/opioids/>. SUPPORT Act Sec. 1006(b), codified at 42 U.S.C. 1396a(a)(10)(A) & 42 U.S.C. 1396d(a)(28)-(29), (ee).
- 78 German Lopez, “Congress Is on the Verge of a Bipartisan Opioid Package. But Experts Have Big Concerns,” *Vox*, September 12, 2018, <https://www.vox.com/policy-and-politics/2018/9/12/17847358/senate-opioid-crisis-response-act>.
- 79 Ibid.
- 80 See SUPPORT Act § 1006(b), codified at 42 U.S.C. 1396a(a)(10)(A) & 42 U.S.C. 1396d(a)(28)-(29), (ee).
- 81 Ames Grawert, *Criminal Justice in President Trump’s First 100 Days*, Brennan Center for Justice, 2017, 13, <https://www.brennancenter.org/publication/criminal-justice-president-trumps-first-100-days>.
- 82 Matt Zapotosky, Sari Horwitz, and Joel Achenbach, “Use of Legalized Marijuana Threatened as Sessions Rescinds Obama-Era Directive That Eased Federal Enforcement,” *Washington Post*, January 4, 2018, https://www.washingtonpost.com/world/national-security/sessions-is-rescinding-obama-era-directive-for-feds-to-back-off-marijuana-enforcement-in-states-with-legal-pot/2018/01/04/b1a42746-f157-11e7-b3bf-ab90a706e175_story.html?utm_term=.0be11bd9ef8b.
- 83 Matt Zapotosky and Chico Harlan, “Justice Department Says It Will End Use of Private Prisons,” *Washington Post*, August 18, 2016, <https://www.washingtonpost.com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons/>.
- 84 Attorney General Jeff Sessions, “Memorandum for the Acting Director, Federal Bureau of Prisons: Re-cession of Memorandum on Use of Private Prisons” (Washington, D.C., Feb. 21, 2017), https://www.justice.gov/oip/foia-library/attorney_general_memorandum_advising_the_federal_bureau_of_prisons_that_the_department_will_continue_to_use_private_prisons.pdf/download.
- 85 Timothy Williams, “Inside a Private Prison: Blood, Suicide and Poorly Paid Guards,” *New York Times*, April 3, 2018, <https://www.nytimes.com/2018/04/03/us/mississippi-private-prison-abuse.html>; Michael Cohen, “How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About,” *Washington Post*, April 28, 2015, https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/?utm_term=.66ec7d351eb8.
- 86 Lauren-Brooke Eisen, “Down Under, More Humane Private Prisons,” *New York Times*, November 14, 2018, <https://www.nytimes.com/2018/11/14/opinion/private-prisons-australia-new-zealand.html>.
- 87 See Lauren-Brooke Eisen et al., *Federal Prosecution for the 21st Century*, Brennan Center for Justice, 2014, 47, https://www.brennancenter.org/sites/default/files/analysis/Federal_Prosecution_For_21st_Century.pdf (shorthand table of performance metrics); see also Lauren-Brooke Eisen and Inimai Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, 2018, 23-25, https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_CriminalJustice_pdf.pdf (describing a similar proposal).
- 88 Nicole Fortier, *Federal Prosecution for the 21st Century: Fiscal Impact Statement*, Brennan Center for Justice, 2015, 4, <http://www.brennancenter.org/publication/federal-prosecution-21st-century-federal-cost-savings-estimate>.
- 89 *Great News! Nearly 10,000 Federal Prisoners Have Received Sentence Reductions Under All Drugs Minus Two*, FAMM, 2015, <https://famm.org/great-news-nearly-10000-federal-prisoners-have-received-sentence-reductions-under-all-drugs-minus-two/>; “What You Need to Know About the Federal Prisoner Release,” The Marshall Project, October 29, 2015, <https://www.themarshallproject.org/2015/10/06/what-you-need-to-know-about-the-new-federal-prisoner-release>. For

total impact, see U.S. Sentencing Commission, *2014 Drug Guidelines Amendment Retroactivity Data Report*, 2015, tbl. 1, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/drug-guidelines-amendment/20150624-Drug-Retro-Analysis.pdf/>.

- 90 United States Sentencing Commission, press release, “U.S. Sentencing Commission Publishes for Comment Proposed Amendments to the Federal Sentencing Guidelines: Holds Final Public Meeting of the Current Commission,” Dec. 13, 2018, <https://www.ussc.gov/about/news/press-releases/december-13-2018>.
- 91 Justin George, “If You Can’t Kill It, Join It,” *The Marshall Project*, March 15, 2018, <https://www.themarshallproject.org/2018/03/15/if-you-can-t-kill-it-join-it?ref=collections>; Matt Ford, “The Man Who Hates Criminal Justice Reform,” *New Republic*, May 7, 2018, <https://newrepublic.com/article/148307/man-hates-criminal-justice-reform>.
- 92 Specifically, § 401 and § 403 of the FIRST STEP Act were adapted from § 101 and § 104 of the Sentencing Reform and Corrections Act of 2017.

But while the former are not retroactive, the latter provided for retroactive effect in some cases. Compare Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. §§ 101-05 (2017), with FIRST STEP Act of 2018 §§ 401-04. The number of people left behind by the FIRST STEP Act’s lack of retroactivity can therefore be inferred from the number of people who would have benefited under the retroactive elements of § 101 and § 104 of the Sentencing Reform and Corrections Act. Those figures are provided by earlier Sentencing Commission reports. See U.S. Sentencing Commission, *Sentence and Prison Impact Estimate Summary — S. 1917, The Sentencing Reform and Corrections Act of 2017* (Washington D.C., 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/March_2018_Impact_Analysis_for_CBO.pdf.

- 93 Michael Waldman and Inimai Chettiar, *A Federal Agenda to Reduce Mass Incarceration*, 2017, 11; Michael Waldman and Inimai Chettiar, *15 Executive Actions*, Brennan Center for Justice, 2014, 19, <https://www.brennancenter.org/publication/15-executive-actions>.

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