

## Confronting Mass Incarceration A Talk with Professor Rachel Barkow

### The Mass Incarceration Problem in the U.S.

- Overview
  - The U.S. has nearly 25% of the world's prison population and incarcerates more people than any other country. According to a Bureau of Justice Statistics report, there were nearly 2.2 million adults in jails and prisons in 2016.<sup>1</sup>
  - The prison system costs taxpayers an estimated \$80 billion per year. It's an expensive response to crime and public safety, yet studies have shown a modest relationship at best between incarceration and crime rates.
  - Significant demographic disparities in incarceration rates
    - As with other aspects of the American criminal justice system, mass incarceration disproportionately impacts people of color and lower income individuals. In 2017, for example, the rate of black men in state prisons was almost six times that of white men.<sup>2</sup>
- How we got here
  - A “tough on crime” approach to rising crime
    - Starting with the Nixon administration in the ‘70s, lawmakers began adopting a “tough on crime” attitude to a rise in violent crime. In subsequent administrations, that trend continued. In both the federal and state systems, lawmakers campaigned on and adopted policies that imposed harsher sentences and incarcerated more people. Under the Reagan administration in particular, the prison population doubled.
    - Under the Clinton administration, the Violent Crime Control and Law Enforcement Act, or the 1994 Crime Bill, passed with widespread bipartisan support. The Act authorized billions in funding for police, new prisons, and federal law enforcement agencies. It also enacted criminal provisions like the “three strikes” and introduced “truth in sentencing” initiatives that were already underway in many states.
  - Sentencing legislation
    - Mandatory minimum sentencing
      - Mandatory minimum penalties can be triggered when certain characteristics of the offense are met, by reference to another

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<sup>1</sup> *Correctional Populations in the United States, 2016*, Bureau of Justice Statistics 2018 report: <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>

<sup>2</sup> *Prisoners in 2017*, Bureau of Justice Statistics 2019 report: <https://www.bjs.gov/content/pub/pdf/p17.pdf>

underlying offense, or by the defendants' criminal history (e.g. "three strikes laws").

- When certain characteristics are met
  - Many federal drug laws carry mandatory minimums when certain characteristics are met. For example, under 21 U.S.C. § 841(b), distributing 500 grams of powder cocaine triggers 5 years mandatory minimum and 5 kg triggers 10 years; distributing 28 grams of crack cocaine triggers 5 years and 280 grams, 10 years.<sup>3</sup>
- Related to another underlying offence
  - E.g. under 18 U.S.C. § 924(c), mandatory consecutive terms are triggered for possession or use of a firearm in connection with certain underlying offenses, like violent crime or drug trafficking.
- Three-strikes laws: when a defendant's criminal history includes certain qualifying prior offenses
  - For example, under 18 U.S.C. 924(e), if the defendant commits a firearms offense and has previously been convicted of 3 or more violent felonies or serious drug offenses, a 15 year mandatory minimum is imposed.
  - Under 18 U.S.C. § 3559(c), if the defendant commits a serious violent felony and was previously convicted of two or more serious violent felonies or at least one serious violent felony and one serious drug offense, the mandatory minimum is life imprisonment.
- Truth in sentencing initiatives
  - As part of the '94 Crime Bill, the federal government created a truth-in-sentencing program which awarded grants to states that passed laws requiring offenders of certain violent crimes to serve at least 85% of their sentences.
  - Though some states already had variations of the law, the initiative increased participation in the program. By 1998, 27 states and D.C. had adopted truth-in-sentencing programs requiring 85%.<sup>4</sup> Many states also abolished parole board release.
- The myth of the "war on drugs" as central to mass incarceration

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<sup>3</sup> 21 U.S.C. § 841: <https://www.govinfo.gov/content/pkg/USCODE-2011-title21/pdf/USCODE-2011-title21-chap13-subchapl-partD-sec841.pdf>

<sup>4</sup> *Truth in Sentencing in State Prisons*, Bureau of Justice Statistics Special Report, 1999: <https://bjs.gov/content/pub/pdf/tssp.pdf>

- Drug offenders make up a small percentage of the general prison population and an even smaller percentage of state prisons. In 2017, 55% of state prisoners were incarcerated for violent offenses.<sup>5</sup>
    - Overcharging and mandatory minimums for drug-related crimes continue to feed into mass incarceration, but drug offenses are just one of the many factors that contribute.
  - Prosecutors' role
    - Many prosecutors are elected officials. As a result, “tough on crime” attitude permeated among prosecutors as well.
    - Prosecutors hold immense power and discretion in deciding the fate of a defendant in the criminal justice system. They can decide whether to charge, what to charge (and whether to bring a charge that will trigger mandatory sentencing), what level to charge, or whether to offer a plea deal.
    - In the 1990s, overall crime rates began falling along with the number of arrests and prosecutions. However, the number of felony cases continued to rise. Prosecutors continued to overcharge defendants in a disproportionate response to crime rates.
- High recidivism rates and a revolving door of incarceration
  - Despite our staggering levels of incarceration, recidivism remains high. According to the Bureau of Justice Statistics, in a study following state prisoners released in 2005, about 68% were re-arrested within 3 years, 79% within 6 years, and 85% within 9 years.<sup>6</sup>
  - Incarceration affects employment, housing, and educational opportunities. People with conviction records have difficulty obtaining and retaining jobs. Many report pervasive discrimination based on their criminal record. A lack of stable employment increases the likelihood of re-arrest. Many lack the social support, resources, or financial means that would enable them to survive outside of prison. The social and economic impact of recidivism is significantly higher in poor communities of color.

## Breaking the Cycle

- What accounts for the changing tide
  - High-profile police shootings
    - In recent years, there have been number high-profile police shootings. Increased attention to police shootings of black Americans has

<sup>5</sup> *Prisoners in 2017*, Bureau of Justice Statistics 2019 report: <https://www.bjs.gov/content/pub/pdf/p17.pdf>

<sup>6</sup> 2018 Update on Prisoner Recidivism: A –Year Follow-up Period (2005-2014): <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>

- highlighted the racial biases and injustices inherent in our criminal justice system.
- As a result, the discussion around criminal justice reform has entered the national arena and the problem of mass incarceration is at the forefront of that discussion.
  - Changing prosecution trends
    - In recent years, more and more prosecutors are elected, e.g. Larry Krasner of Philadelphia and Kim Foxx of Chicago, whose approaches are less “tough on crime” and more “progressive.” They call for an end to mandatory minimums or increased prosecutorial accountability.
  - Alternatives
    - Diversion programs
      - States have begun adopting diversion programs for certain low-level offenses. May include first-time offenses of petty theft, personal possession of certain drugs, and DUI. Other states may include assaults with no injuries, domestic violence, or child neglect.
      - Defendants may be diverted into the program early on in their proceedings. Some may require that the defendant plead guilty or no-contest.
      - Programs emphasize counseling or treatment rather than punishment. As part of the program, they may attend classes, perform community service, take drugs tests, and make restitutions to victims.
      - There are usually costs associated with participation in the programs.
    - Prison reform
      - Effective prison reform requires incorporating educational, vocational, and counseling programs with an eye toward social reintegration for the more than 90% of people who will eventually be released. Requires improved and meaningful opportunities for work, expanded educational and vocational programming, better mental health and behavioral counseling, increased access to computers, and keeping individuals closer to their families or social networks.

**Additional Resource:**

Professor Rachel E. Barkow’s *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*. The Belknap Press of Harvard University Press, 2019  
<http://www.hup.harvard.edu/catalog.php?isbn=9780674919235>