

The Prisoner Dilemma

Ending America's Incarceration Epidemic

By *Holly Harris*

During the past decade, a time of intense political polarization in [the United States](#), criminal justice reform has emerged as an unlikely unifier. Democrats and Republicans have reached across the aisle, compelled by a shared recognition that flawed legal codes and sentencing laws (among other features of the criminal justice system) have destroyed lives, drained billions of taxpayer dollars, and failed to provide Americans with the public safety they deserve. This broad agreement led to the introduction, in 2015 and 2016, of bipartisan legislation in [the U.S. Congress](#) that would have produced comprehensive reform at the federal level—including changes to mandatory minimum sentencing laws, which have contributed to the explosion in U.S. incarceration rates by reducing judges' discretion in sentencing. Supporters of the legislation represented an extraordinarily wide ideological spectrum: from Speaker of the House Paul Ryan of Wisconsin, former Speaker Newt Gingrich of Georgia, and the billionaire donor Charles Koch on the right to [President Barack Obama](#), the American Civil Liberties Union (ACLU), and the philanthropist George Soros' Open Society Foundations on the left.

But last September, the bill, which had seemed certain to pass in the Senate, died without ever reaching the floor after opposition from a handful of high-profile GOP senators apparently convinced Senate Majority Leader Mitch McConnell of Kentucky not to bring it up for a vote. "I think that Senator McConnell understandably did not want to tee up an issue that split our caucus right before the 2016 election," remarked Republican Senator John Cornyn of Texas, one of the bill's most vocal proponents, in [an interview with *The New York Times*](#).

Of course, 2016 was no ordinary election year. During the presidential campaign, [Donald Trump](#), the eventual GOP nominee, painted a grim portrait of the United States. "Crime is out of control, and rapidly getting worse," he tweeted in July. "When I take the oath of office next year, I will restore law and order to our country," he pledged in his acceptance speech at the Republican National Convention later that month, to thunderous applause.

It is no wonder that Trump's message on this issue resonated with many voters: television news reports, newspaper headlines, and social media feeds have left Americans with the distinct impression that crime is on the rise. Media attention tends to focus on a small number of high-profile incidents, leading many pundits and politicians to declare that the country is entering a new period of lawlessness that harks back to the years between the mid-1980s and the early 1990s, the last time that violent crime rates rose nationwide. Public opinion reflects the impact of such rhetoric: a Gallup poll published last April found that 53 percent of Americans worried "a great deal" about crime—a 15-year high.

Such fears are misplaced. Last September, the FBI released its annual crime statistics report. It showed that although violent crime increased nationwide by 3.9 percent in 2015, the broader trend has been in the opposite direction: the violent crime rate in 2014 was 0.7 percent lower than in 2011 and 16.5 percent lower than in 2006. The long-term trend is even more striking. In 1991, authorities reported 758 violent crimes per 100,000 Americans. By 2015, that number had dropped to 373: a decrease of more than 50 percent. And although data for 2016 will not be available for another year, it is likely that crime rates will continue to hover at or near their current historically low levels. Early signs already indicate that many cities in which crime rose during 2015, including Baltimore and New York City, experienced declines in 2016.

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The idea of a new crime wave is a myth. What is real, however, is an epidemic of incarceration. The numbers are staggering. According to a report published last year by the Prison Policy Initiative, U.S. penal authorities “hold more than 2.3 million people in 1,719 state prisons, 102 federal prisons, 942 juvenile correctional facilities, 3,283 local jails, and 79 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, and prisons in the U.S. territories.” Over the course of a single year, more than 11 million people will be admitted to an American prison or jail.

It wasn’t always like this. In 1972, for every 100,000 U.S. residents, 161 were incarcerated. By 2015, that rate had more than quadrupled, with nearly 670 out of every 100,000 Americans behind bars. That is slightly lower than the peak rate, which was reached in 2007–8, but it is still shockingly high. Among industrialized nations, the United States has by far the highest rate of incarceration. The conviction and imprisonment of so many Americans has resulted primarily from more than three decades of “tough on crime” policies that legislators began to favor in the early 1980s, persuaded by the deceptively simple logic of reducing crime by locking up as many offenders as possible. Defenders of this approach credit it with producing the marked decline in crime rates that began in the early 1990s. But according to research published by the urban policy scholar William Spelman and the economist Steven Levitt, the rise in incarceration has been responsible for only about 25 percent of the decrease in crime rates. The rest of the decline, they argue, has stemmed from a complex combination of economic and social trends, innovative policing tactics, and other factors.

Meanwhile, the explosion in incarceration has had significantly harmful effects on U.S. society: dangerously overcrowded prisons, abysmal recidivism rates, and the creation of profound racial, economic, and gender disparities in the criminal justice system. And the price of industrial-scale incarceration in economic terms is massive. The average annual cost

to house, feed, and care for an American inmate now exceeds \$30,000. Between 1980 and 2013, federal spending on prisons rose more than sevenfold, from \$970 million, adjusted for inflation, to nearly \$7 billion, adjusted for inflation. The National Association of State Budget Officers reports that state general-fund spending on corrections grew from an inflation-adjusted \$10.6 billion in 1987 to \$50.9 billion in 2015, a 380 percent increase. According to [the Hamilton Project at the Brookings Institution](#), combined state and federal corrections expenditures more than quadrupled in the last three decades, from approximately \$17 billion (adjusted for inflation) in 1980 to more than \$80 billion in 2010.

Although comprehensive federal reform has proved elusive, lawmakers at the state level—in red, blue, and purple states—have managed to achieve significant change. Although their details vary, a raft of state initiatives have demonstrated that smart reforms can save money, lower crime rates, and give offenders the chance to rejoin society as productive, law-abiding citizens. This matters a great deal, since in 2015, out of the roughly 1.5 million people incarcerated in prisons in the United States, 1.35 million were housed in state facilities. Nevertheless, federal reform is still imperative. A study by the U.S. Sentencing Commission (a bipartisan, independent federal agency) found that in 2005, nearly half of all the federal offenders who were either released from federal prison after serving a sentence or placed on a term of probation were rearrested within eight years, either on new charges or for some other violation of their probation or terms of release. Additionally, the composition of the federal inmate population makes it fertile ground for the kinds of effective treatment programs that reformers have championed as a way to make prison more rehabilitative. More than half of federal prisoners are incarcerated for drug offenses, compared with just 16 percent of state prisoners.

Now that the 2016 election is over, Democrats and Republicans in Congress should once again take up the cause of commonsense sentencing and recidivism-reduction reforms. If Trump wants to make the country safer, the best way to do so would be to study successful reforms in states from Connecticut to Georgia and advocate transformational changes to the broken federal system.

THE (VERY) BIG HOUSE

The U.S. incarceration system is literally bursting at the seams. One recent analysis from the Government Accountability Office found that the spike in prison populations has led to overcrowding in nearly 40 percent of federal facilities. States are also struggling. In 2015, the Bureau of Justice Statistics found that 19 states' systems had exceeded their maximum capacities. Illinois' correctional facilities, for example, were designed to hold just under 28,000 prisoners but were housing more than 46,000.

Looking at these numbers, one might conclude that U.S. cities and towns were overrun by so many dangerous criminals that the country had run out of places to put them all. But consider

who actually fills all those cells. In 2015, around 93 percent of federal prisoners were nonviolent offenders, most of whom were serving time for drug-related offenses. The situation in many state prison systems is similar; between 2009 and 2015, 59 percent of the offenders in the custody of the Louisiana Department of Corrections had been convicted of nonviolent crimes.

Yet there is little evidence that doing time in U.S. prisons makes inmates more responsible citizens. An influential 2011 study published by the criminologists Francis Cullen, Cheryl Jonson, and Daniel Nagin found that regardless of what kind of offense an inmate has committed, prison does not reduce his or her recidivism any more than alternatives such as drug treatment and mental health counseling. Indeed, the researchers found that prison time might even increase recidivism, particularly among low-risk offenders.

Spending time behind bars also makes it much harder for someone convicted of a crime to live a productive life once released, because most ex-convicts struggle to find work. According to a 2010 study conducted by the Pew Charitable Trusts, on average, men who have been incarcerated work nine fewer weeks per year and take home 40 percent less annual pay than other men. Such struggles contribute to recidivism, as ex-convicts turn to crime to earn money. According to the Administrative Office of the U.S. Courts, of the 262,000 people who were released from federal prison between 2002 and 2006, half of those who could not secure any employment during the period of their supervised release (usually a period of two to five years) committed a new crime or violated the terms of their release and were sent back to prison. In contrast, only seven percent of those who did find work wound up behind bars again.

The burgeoning U.S. prison population reflects a federal criminal code that has spiraled out of control. No one—not even the government itself—has ever been able to specify with any certainty the precise number of federal crimes defined by the 54 sections contained in the 27,000 or so pages of the U.S. Code. In the 1980s, lawyers at the Department of Justice attempted to tabulate the figure “for the express purpose of exposing the idiocy” of the criminal code, as one of them later put it. The best they were able to come up with was an educated guess of 3,000 crimes. Today, the conservative Heritage Foundation estimates that federal laws currently enumerate nearly 5,000 crimes, a number that grows every year.

Overcriminalization extends beyond the law books, partly because regulations are often backed by criminal penalties. That is the case for rules that govern matters as trivial as the sale of grated cheese, the precise composition of chicken Kiev dishes, and the washing of cars at the headquarters of the National Institutes of Health. State laws add tens of thousands more such crimes. Taken together, they push the total number of criminally punishable offenses in the United States into the hundreds of thousands. The long arm of the law reaches into nearly every aspect of American life. The legal scholar Harvey Silverglate has concluded that the typical American commits at least three federal felonies a day, simply by going through his or her normal routine. If you package and ship certain food in plastic rather than cardboard containers, you might be in violation of the Lacey Act. If you call in sick to work

in order to go to a ball game, you might be breaking laws that prohibit schemes to defraud a company. And if you get lost while riding a motorbike in the forest and accidentally wander onto protected land, you might run afoul of the Wilderness Act.

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Another problem is that in recent years, by writing laws that lack a so-called *mens rea* requirement (named after the Latin term for “guilty mind”), legislators have made it more likely that people will break the law without intending to. A study conducted by the Heritage Foundation and the National Association of Criminal Defense Lawyers found that 40 percent of the nonviolent federal crimes established between 2005 and 2011 had “weak” intent requirements. This can lead to some appalling injustices, such as the case of Lawrence Lewis. As the chief engineer at a retirement home for U.S. military veterans in Washington, D.C., Lewis dealt with a backed-up sewage system by diverting its flow to a storm drain that he believed linked up to the city’s sewage-treatment system. Instead, the sewage entered a creek that ultimately joined with the Potomac River. Without intending to, Lewis had violated the Clean Water Act. He pleaded guilty in 2007 and received probation, a \$2,500 fine, and—perhaps worst of all—a criminal record.

To protect against such outcomes, states such as Michigan and Ohio have recently established default *mens rea* standards for all state laws that do not already include an intent requirement. But reform advocates and activists disagree about whether to pursue such a step at the federal level. Proponents back the idea as a way to ward off injustices that inevitably occur owing to the expansiveness of the criminal code. Opponents, on the other hand, fear that implementing such a standard would make it more difficult to prosecute environmental and financial crimes. The issue is a complicated one that even splits the Republican leadership in Congress. Bob Goodlatte of Virginia, chair of the House Judiciary Committee, passed a default *mens rea* bill through his committee and made it clear that any reform package that goes to the floor must include it. But Chuck Grassley of Iowa, chair of the Senate Judiciary Committee, opposes the policy and omitted it from his own reform package. If any reform legislation is to reach the president’s desk, it will likely require a compromise on *mens rea*, such as an agreement to apply any new default standard only to future legislation or to limit the offenses to which it would apply.

Finally, perhaps the most pernicious problem is the existence of so many laws requiring mandatory minimum sentences. During the 1980s and 1990s, at the height of the “[war on drugs](#),” federal and state lawmakers created a host of new statutes that required that offenders receive specific prison sentences based on the nature of their crimes. Although these laws were generally intended to help reduce crime by creating stronger deterrents, they have often ended up doing far more harm than good. By restricting judges’ ability to consider all the facts of a case, they force courts to ignore mitigating evidence and have resulted in unduly harsh punishments that frequently do not fit the crimes. By putting more people in prison for

more time, they have also contributed to the explosion in prison populations. As of 2010, roughly 40 percent of federal inmates were subject to mandatory minimum sentences. There is no parole in the federal system, and inmates are required to serve at least 85 percent of their sentences before they become eligible for release. For those reasons and others, the federal prison population has grown from 24,640 in 1980, before Congress enacted the Anti-Drug Abuse Act of 1986, which established the basic framework for mandatory minimum sentencing, to just under 220,000 in 2013, the year in which the federal prison population peaked.

The case of Weldon Angelos illustrates some of the injustices inherent in system. On two occasions in 2002, the 22-year-old father of three sold half a pound of marijuana worth about \$350 to a confidential informant in Utah. The informant alleged that Angelos was carrying a firearm during the second transaction (although that testimony was disputed). In Angelos' home, police later found guns, drug paraphernalia, and evidence suggesting that he was involved in drug trafficking and money laundering. In 2004, Angelos was convicted of 16 charges, several of which carried mandatory minimums. Even though he was a first-time, arguably nonviolent offender, he received a staggering 55-year sentence, with a projected release date of 2051. The shocking unfairness of the sentence was obvious even to Judge Paul Cassell, the federal judge who handed it down. Cassell, a George W. Bush appointee, delivered a 67-page ruling in which he called the sentence "unjust, cruel, and even irrational." But due to federal mandatory minimum sentencing laws, he had no choice but to apply it. Last May, after Angelos had served 12 years in prison, a federal court granted him an immediate sentence reduction and released him. In a show of compassion, the effort to free him was led by none other than the federal prosecutor who had helped put him away in the first place.

A MOVEMENT FOR CHANGE

Americans of all political and ideological backgrounds have recently taken up the cause of criminal justice reform. Unlikely coalitions have formed to push for change. Conservative and faith-focused groups such as the Louisiana Family Forum are working alongside the progressive ACLU. In Ohio, the conservative think tank the Buckeye Institute is spearheading many reforms also supported by the National Association for the Advancement of Colored People. Due in large part to this unprecedented cooperation, since 2007, at least 31 states have enacted bipartisan legislation designed to safely reduce prison populations. Between 2008 and 2013, dozens of states reduced both their incarceration rates and their crime rates, proving that smart reforms can make communities safer and also save taxpayers' money.

In Texas, where in 2007 the legislature adopted alternatives to incarceration for many low-level, nonviolent offenders, the prison population decreased by 14 percent and crime dropped by 29 percent, reaching the lowest rate the Lone Star State has enjoyed in 40 years. Both red and blue states have also reduced their prison populations by decreasing or

eliminating mandatory minimums for crimes stemming from addiction. Oklahoma, a red state, has increased its focus on programs that help people with criminal records get the kinds of treatment and services that can make it easier for them to avoid drugs and crime. In 2015, Connecticut, a blue state, passed legislation intended to foster what its proponents called a “Second Chance Society,” allowing judges to divert nonviolent offenders into mandatory rehabilitation or treatment programs. Crime in Connecticut has reached a 50-year low, and the state’s prison population is the smallest it has been in two decades. And in the red state of Georgia, the legislature recently passed its third round of reforms, making the Peach State perhaps the most reform-minded in the country when it comes to incarceration. In recent years, under the leadership of Republican Governor Nathan Deal, Georgia has given judges more discretion in sentencing, instituted innovative programs to help ex-convicts reenter society, reduced its prison population by more than ten percent, and saved taxpayers roughly \$264 million.

Such bold leadership has yet to be matched at the federal level, but there have been some positive developments there, too. In 2008, [President George W. Bush](#) signed the Second Chance Act, which expanded job-training and job-placement services for ex-convicts. In 2010, Obama signed the Fair Sentencing Act, which eliminated disparities in sentencing between crimes involving crack and those involving powder cocaine—differences that had led to some severe racial inequalities, as black defendants (more often convicted of crack-related offenses) received far harsher punishments than white defendants (more often convicted of crimes relating to powder cocaine). And in 2013, in the absence of comprehensive sentencing reform legislation, Attorney General Eric Holder issued a memo declaring a major change in Justice Department policy, instructing federal prosecutors to consider charging certain low-level, nonviolent offenders in drug cases in ways that would avoid mandatory minimum sentences. (The memo, however, did not carry the force of law or offer the permanence of reform legislation.)

By 2015, the country seemed poised for a decisive turn, as federal representatives and senators from both parties introduced a number of bills that, among other things, would have limited or reversed the growth of the criminal code, restored judges’ discretion in sentencing for certain offenses, and increased the use of educational and vocational programs to reduce recidivism. Many of these bills built on policies that states had successfully pursued over the past decade.

Sentencing reform enjoys the backing of law enforcement officers and agencies all over the country.

The most comprehensive of these bills was the Sentencing Reform and Corrections Act. Among its features were reductions in mandatory minimum sentences for some drug and firearm-possession offenses (along with the establishment of new mandatory minimums for providing aid to terrorists and for some crimes of domestic violence), a provision that would

make the Fair Sentencing Act retroactive, and new requirements for the Federal Bureau of Prisons to offer more programs to help inmates successfully reenter society. The act was approved by the Senate Judiciary Committee in November 2015 and appeared destined for passage. A poll conducted in January 2016 by my organization, the U.S. Justice Action Network, found broad support for the bill's measures among likely voters in battleground and bellwether states such as Florida, Kentucky, Missouri, Nevada, North Carolina, and Wisconsin. Large majorities of those we surveyed agreed that federal prisons house too many nonviolent offenders, and nearly 70 percent agreed that the federal government spends too much tax money keeping them behind bars. Nearly 75 percent favored changing the way nonviolent offenders are sentenced, allowing judges to use their discretion to impose a range of sentences instead of relying on one-size-fits-all mandatory minimums.

But over the course of 2016, vocal opposition to the measures emerged from a handful of Republican senators in the midst of a GOP primary season and presidential campaign that featured archaic "tough on crime" posturing and appeals to restore "law and order." With McConnell's decision to delay bringing the legislation to the floor, the momentum of recent years appeared to come to a halt.

BETTER LAWS, MORE ORDER

There are still reasons for optimism, however. The presidential campaign is finally over, and the GOP now controls the White House and Congress. Safe in their seats, some of the Republican lawmakers who initially opposed or failed to take a position on the Sentencing Reform and Corrections Act might now be willing to take a second look; the bill's supporters may also manage to convince Trump to back it or support similar efforts. One of the president's greatest challenges will be to unify an American public suffering from the deep social divisions that have surfaced or widened in recent years. In addition to improving an often flawed and unjust system, criminal justice reform would create a badly needed point of unity and help build trust between law enforcement agencies and the communities they serve.

Further, this legislation would help realize Trump's desire to be a "law and order" president. After all, sentencing and corrections reforms enjoy the backing of law enforcement officers and agencies all over the country that would prefer for the justice system to focus on the most serious threats to society, such as mass shootings and acts of terrorism, rather than on low-level, nonviolent offenders. Law enforcement support for the legislation has come from the International Association of Chiefs of Police, the Major County Sheriffs' Association, the National District Attorneys Association, the Association of Prosecuting Attorneys, and the Council of Prison Locals, which represents more than 28,000 federal prison guards.

The Trump administration should support sentencing reforms for low-level offenders that would free up prison beds and focus resources on the most dangerous criminals. The cost savings from sentencing reforms would allow for more vocational training, addiction counseling, and mental health treatment to help ex-convicts returning to society find jobs, support their families, and turn away from crime. The new administration can also work to

curb government overreach and put more people to work by supporting legislation that would remove statutory and regulatory obstacles to employing former prisoners and that would seal the records of former prisoners who have stayed crime free for a significant amount of time. Such steps have been backed by business groups in some conservative-leaning states, such as Kentucky and Louisiana, which struggle with a dearth of skilled labor.

Finally, the Trump administration can hold government accountable by backing federal incentives for states that safely decrease their prison populations and reconsider ineffective sentencing regimes. Such an initiative would represent a stark reversal of legislation signed into law by [President Bill Clinton](#) in 1994, which did just the opposite, offering federal dollars to states that imposed harsher criminal penalties and built more prisons, which contributed to the explosion of incarceration rates during the past two decades.

Many high-profile Republican leaders in Congress remain committed to passing comprehensive criminal justice reform legislation, including senators such as Cornyn, Grassley, Thom Tillis of North Carolina, and Mike Lee of Utah and representatives such as Ryan, Goodlatte, Trey Gowdy of South Carolina, and Jason Chaffetz of Utah. If Trump chooses to support reform or simply defer to congressional leadership on these issues, these Republicans could enjoy a wide-open field. And with Obama out of the picture, the bill might become more palatable to some Republicans who had found it politically difficult to support reforms backed by a president they opposed on almost every other issue. On the other hand, Trump's choice for attorney general, Senator Jeff Sessions of Alabama, might pose an obstacle: in the past, Sessions has resisted changes to mandatory minimum sentencing, although during his confirmation hearing in January, he pledged to "follow any law" that Congress passes. And perhaps the greatest challenge for advocates will be to ensure that criminal justice reform remains a top-tier issue during a time when fights over judicial nominations, the Affordable Care Act, and immigration will likely take center stage on Capitol Hill.

Meanwhile, large-scale reform packages are now moving forward in states such as Illinois, Ohio, Pennsylvania, and even McConnell's home state of Kentucky. At some point, so many states will have enacted policies that safely reduce prison populations, save money, and lower crime and recidivism rates that Congress will have no choice but to act. There's no reason for Washington to wait.

CORRECTION APPENDED (February 15, 2017)

An earlier version of this article misidentified the state that Senator Chuck Grassley represents. It is Iowa, not Ohio.