

## Aging Out of Criminal Justice

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A 100-year life expectancy will radically change our American criminal justice system – much for the worse and, hopefully, some for the better. It will require us to consider who we send to prison, for how long, and how we treat those in prison, knowing that most will be released someday to become our neighbors. It will also require us to consider what is a just punishment, considering that life sentences become harsher the longer the life.

The US already has the world's highest incarceration rate.<sup>1</sup> If every single state were a country, most would incarcerate “more people per capita than virtually any independent democracy on earth.”<sup>2</sup> This “mass incarceration” problem began in the 1980s and has only abated slightly over the past decade.<sup>3</sup> Mass incarceration means we house nearly 2 million people in thousands of prisons, jails, and juvenile correctional facilities.<sup>4</sup> This results partially from the US sentencing people to prison for more types of crimes and for longer periods than most other countries. Once incarcerated, people in prison are subjected to an incredibly violent prison system with little rehabilitation programming prior to their release. Consequently, people leave correction systems and reenter society worse off, rather than corrected.

It was once thought that our incarceration rate was inversely proportional to our crime rate. But criminologists and economists now believe that the link between higher incarceration and lower crime rates is not nearly as strong as previously thought.<sup>5</sup> Because there were many variables (such as increased economic opportunities) that led crime to decline in the 1990s, criminologists now believe that

<sup>1</sup> Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sep. 2021), <https://www.prisonpolicy.org/global/2021.html>.

<sup>2</sup> *Id.*

<sup>3</sup> See E. Ann. Carson, *Prisoners in 2020: Statistical Tables*, BUREAU JUST. STAT. (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

<sup>4</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

<sup>5</sup> See Don Steman, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. JUST. (July 2017), 1–2, [https://www.vera.org/downloads/publications/for-the-record-prison-paradox\\_02.pdf](https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf); David Roodman, *The Impacts of Incarceration on Crime*, OPEN PHILANTHROPY

increased incarceration had no “statistically significant effect” on reducing violent crime in the 1990s and the 2000s.<sup>6</sup> These views from experts studying our system holistically are borne out by recent data showing that, between 2007 and 2017, thirty-four states reduced both their crime rates and their prison populations.<sup>7</sup> So expanding our criminal justice and prison systems has not made us any safer.

Longer lifespans could greatly expand our mass incarceration problem. Over 7 million Americans have at some point been imprisoned; over 12 million Americans have been convicted of a felony but not been imprisoned; and about 45 million Americans have been convicted of misdemeanors.<sup>8</sup> It is also estimated that over 113 million Americans have had someone in their close or immediate family who has been incarcerated during their lifetime.<sup>9</sup> Our communities, especially communities of color, are also more heavily policed now than in the past.<sup>10</sup> As people live longer, and as our neighborhoods are increasingly policed, people will have more contact with our criminal justice system, and there is a serious concern that we will incarcerate even greater numbers of citizens.

The expansion of our criminal justice and prison systems comes at great cost to impacted families. People with felony or misdemeanor convictions see their annual earnings significantly reduced. People who have served time in prisons have their annual earnings reduced by 52 percent over the course of their lives. Those earning losses entrench poverty and worsen already large economic disparities between different races and socioeconomic classes.

Prison also takes a toll on the physical and mental health of incarcerated people. Around 600,000 people leave American prisons each year. Few people leaving our prison systems escape trauma. Our prisons are often understaffed, which increases the amount of violence within our prison systems.<sup>11</sup> Prisons do not provide adequate

PROJECT (Sep. 2017), 7, [https://www.openphilanthropy.org/files/Focus\\_Areas/Criminal\\_Justice\\_Reform/The\\_impacts\\_of\\_incarceration\\_on\\_crime\\_10.pdf](https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf).

<sup>6</sup> Roodman, *supra* note 5.

<sup>7</sup> Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. FOR JUST. (Aug. 6, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem>.

<sup>8</sup> Terry-Ann Craigie, Ames Grawert & Cameron Kimble, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sep. 15, 2020), 2, <https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport.pdf>.

<sup>9</sup> Christal Hayes, “*This Isn’t Just Numbers – But Lives*: Half of Americans Have Family Members Who’ve Been Incarcerated”, USA TODAY (Dec. 6, 2018), <https://www.usatoday.com/story/news/politics/2018/12/06/half-americans-have-family-who-have-been-jailed-new-study-shows/2206521002>.

<sup>10</sup> See Alan Feuer, *Black New Yorkers Are Twice as Likely to Be Stopped by the Police*, DATA SHOWS, N.Y. TIMES (Sep. 23, 2020).

<sup>11</sup> See Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe>.

mental health care, and when people with mental illness have an episode, the system often uses solitary confinement to manage the problem, even though it has been shown to exacerbate mental illness.<sup>12</sup> With lifespans increasing, we might unintentionally create or exacerbate mental health problems in those released from our prisons.

And it is not just our prisoners who are impacted. Over half of those in American prisons are parents. Incarceration fractures relationships between parents and children. Parents in state prisons reported “roughly 1.25 million minor children, meaning the number of people in state prison almost exactly mirrors the number of impacted minor children.”<sup>13</sup> The results are often disastrous, as children with an incarcerated parent have higher suicide rates, more antisocial behavior, more mental health problems, and a higher chance of someday committing crimes and experiencing incarceration. Put differently, there are a number of social harms that come with being the world’s largest cager of human beings.

Our mass incarceration problem is driven by an abundance of life without parole sentences. One in seven people currently in a US prison is serving a life sentence – meaning either life without parole, life with some sort of parole, or virtual life (a sentence of fifty years or more).<sup>14</sup> In 2021, there were over 200,000 people serving life sentences.<sup>15</sup> Already, over 30 percent of lifers are fifty-five years old or more, making our prisons geriatric centers.<sup>16</sup> Worse yet, over 8,000 people are serving virtual life sentences for crimes committed as minors, despite research on adolescent brain development that reveals that minors’ younger age leads to a diminished capacity to comprehend the risks and consequences of their actions.<sup>17</sup>

Take one case as an example of this phenomenon: Joe Ligon was fifteen when he met four other teenagers in South Philadelphia. They started drinking, and Ligon drank alcohol for the first time. They looked for money to buy more wine, and their escapade ended with Ligon’s codefendants fatally stabbing two men. A judge sentenced him to life in prison without the possibility of parole. After the US Supreme Court ruled that all juvenile life sentences without parole were unconstitutional, a judge ordered Ligon’s release after he had served an unfathomable sixty-eight years in prison. Ligon entered prison when Dwight D. Eisenhower was president and left prison, at the age of eighty-two, during the Biden administration. As people live

<sup>12</sup> See Tiana Herring, *The Research Is Clear: Solitary Confinement Causes Long-Lasting Harm*, PRISON POL’Y INITIATIVE (Dec. 8, 2020), [https://www.prisonpolicy.org/blog/2020/12/08/solitary\\_symposium](https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium).

<sup>13</sup> Leah Wang, *Both Sides of the Bars: How Mass Incarceration Punishes Families*, PRISON POL’Y INITIATIVE (Aug. 11, 2022), [https://www.prisonpolicy.org/blog/2022/08/11/parental\\_incarceration](https://www.prisonpolicy.org/blog/2022/08/11/parental_incarceration).

<sup>14</sup> Ashley Nellis, *No End in Sight, America’s Enduring Reliance on Life Sentences*, SENT’G PROJECT (Feb. 17, 2021), 4, <https://www.sentencingproject.org/app/uploads/2022/08/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

longer, these life (or majority-of-life) sentences will only increase our mass incarceration problem, filling our prisons with people who, if they commit their crimes as juveniles, could serve decades in custody before their release.

The number of older people in our prisons has grown exponentially. Between 1999 and 2016, the number of prisoners fifty-five years and older grew by 280 percent.<sup>18</sup> Incarceration itself accelerates aging due to inadequate medical care before prison and substandard care in prison, in addition to the stress linked to prison violence. And although we are incarcerating more people over the age of fifty-five, those older adults have the lowest rates of rearrest after release from prisons, meaning they pose some of the lowest risks of reoffending.<sup>19</sup> Imposing long sentences on people less likely to reoffend (those over fifty-five years old) thus means an expansion of our criminal justice system without any positive societal gain in public safety.

The consequences of expanding our mass incarceration problem and turning prisons into geriatric centers are profound. The annual cost of incarcerating people over the age of fifty-five is roughly three to five times as much as incarcerating younger people. In 2009, California spent more than \$42 million in one year on medical care and the continued incarceration of just thirty-two older prisoners who were chronically ill.<sup>20</sup>

These costs strain our law enforcement budgets. Total US government expenses on prisons and jails are roughly \$80 billion. In the federal system alone, mass incarceration has led to the Federal Bureau of Prisons' (BOP) ever-growing budget. BOP's budget has grown so much that it has begun "crowding out" other Department of Justice (DOJ) priorities, such as hiring additional federal law enforcement officers to investigate and prosecute lawbreakers.<sup>21</sup> The more people there are living longer in prison, the more it will cost to maintain prison systems. With longer lifespans, it will be vital for us to reduce the number of aging people in our prisons.

An ever-expanding lifespan will also require us to reevaluate what is an adequate punishment for particular crimes, including the length of sentences and what crimes are worthy of sending someone to prison. Right now, the US sends more people to prison for more offenses and imposes longer sentences than any country

<sup>18</sup> Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, PEW CHARITABLE TRS. (Feb. 20, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>.

<sup>19</sup> See Emily Widra, *The Aging Prison Population: Causes, Costs, and Consequences*, PRISON POL'Y INITIATIVE (Aug. 2, 2023), <https://www.prisonpolicy.org/blog/2023/08/02/aging>.

<sup>20</sup> Ashley Demyan, *Elderly People in Prison Present Little Risk, but Staggering Costs*, VERA INST. JUST. (July 6, 2015), <https://www.vera.org/news/elderly-people-in-prison-present-little-risk-but-staggering-costs>.

<sup>21</sup> See Sally Q. Yates, *McNamara Memorial Lecture at Fordham University* (Nov. 14, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-mcnamara-memorial-lecture-fordham>.

on the planet. Prior to the 1980s, prison sentences were reserved mostly for violent offenses. But starting in the 1980s, the US began prosecuting and seeking decades-long sentences for nonviolent and property offenses, thereby creating a system of mass incarceration.

As people, including those in prison, live longer, we will have to reevaluate the length of prison sentences. One result might be that our policymakers increase sentences as people live longer. If a person lives to 100, then a sentence of ten years does not seem as large a punishment. The hope, however, is that, as people live longer, our policymakers will shorten sentences and focus on more efficient and fair ways to reduce crime. That hope was signaled by an ACLU telephone poll in 2016 that showed 72 percent of Americans would be more likely to vote for politicians who support eliminating harsh mandatory minimum sentencing laws, and 71 percent agree that incarceration is often counterproductive to public safety.<sup>22</sup>

Despite the increased number of people serving life or virtual life, approximately 95 percent of people who are incarcerated will one day be released and return to our communities. With 100-year lifespans, we will have to radically change the conditions in our prisons. Current prison conditions are awful. American prisons are incredibly dangerous, with the ever-present threat of violence, including sexual violence. Many prisons are grossly understaffed and overpopulated. A DOJ report found that, in a single week, the Alabama prison system had four stabbings (resulting in one death), three sexual assaults, several physical assaults, and one person's bed set on fire as he slept.<sup>23</sup> As the *New York Times* noted, "One prisoner had been dead for so long that when he was discovered lying face down, his face was flattened. Another was tied up and tortured for two days while no one noticed. Bloody inmates screamed for help from cells whose doors did not lock."<sup>24</sup>

Right now, the great irony of the criminal justice system is that the longer someone spends in "corrections," the less likely they are to come out a corrected, law-abiding citizen. By that I mean, the longer a person spends in prison, the more traumatized and unstable their return to society will be, due to the harshness of being incarcerated. The last thing society needs is for people in custody to do life imprisonment on the installment plan, whereby people go to prison, return to the community, commit new offenses (while creating new victims), and then return to prison, to be repeated as long as they live.

Many of our criminal justice systems track recidivism rates, which measure how many people released from prisons will be rearrested again within three years.

<sup>22</sup> 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds, AM. C.L. UNION (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds>.

<sup>23</sup> See Katie Benner & Shaila Dewan, *Alabama's Gruesome Prisons: Report Finds Rape and Murder at All Hours*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/us/Alabama-prisons-doj-investigation.html>.

<sup>24</sup> *Id.*

A study in 2012, tracking thirty-four states, showed that 62 percent of people released from state prisons were rearrested within three years, and 71 percent rearrested within five years.<sup>25</sup> To make matters worse, 81 percent of prisoners twenty-four or younger were rearrested within five years of release.<sup>26</sup> That is an extraordinary amount of failure – failure that directly leads to increased crime and victimization.

With ever-expanding lifespans, we need to double down on rehabilitation programs inside our prison systems. One reason our prisons are so violent is the idleness that occurs in them. As mass incarceration grew, many states rejected the role of rehabilitation and reduced the number of available rehabilitation and educational programs. In Florida, with the nation's third largest prison system, there are virtually no education programs for prisoners, even though research shows that those programs reduce violence in prison and the recidivism rate for those released from prison. Prisons lessen personal autonomy and increase institutional dependence. This leads people to rely upon a virtual welfare state with free room and board that only a prison can offer, thus rendering them less able to cope with economic demands upon release. We need robust educational and vocational training in prisons to train people to live successful and law-abiding lives post-prison. As prisoners age and the prison population thereby grows, prison will become less useful as a “rehabilitation device” for those who might benefit from one, which could, in turn, increase recidivism, but not among the prisoners who are living longer in prison.

In an age of Google searches and an ever-expanding criminal justice system, many people released from prison are punished long after they serve their sentences. As we live longer, we also need a reexamination of the collateral consequences of a felony conviction. Collateral consequences are legal penalties that take away rights, access to services, or impose some other disadvantage. Currently, people with a felony conviction can be legally discriminated against in employment, housing, welfare, and voting and are barred from certain professions. These lifelong punishments are not factored into our sentencing practices. And these collateral consequences often lead to high unemployment and large amounts of homelessness for those returning to the community from a custodial sentence, thereby increasing the chance of recidivism. Formerly incarcerated people, of course, need stable employment and housing to live successful and law-abiding lives. And when those returning to the community feel like they have employment opportunities and upward mobility, they reoffend at much lower rates.

One area where federal courts might increase protections for those serving draconian sentences is the Eighth Amendment arena. Whether a punishment is

<sup>25</sup> Matthew R. Durose & Leonardo Antenangeli, *Recidivism of Prisoners Released in 34 States in 2012: A 5-Year Follow-Up Period (2012–2017)*, BUREAU JUST. STAT. (July 2021), at 1, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf>.

<sup>26</sup> *Id.*

“cruel and unusual” is generally determined using a proportionality test that weighs the severity of the offense committed against the harshness of the punishment. So far, the Supreme Court has not used the prohibition on cruel and unusual punishment to strike down long sentences for adults. In *Ewing v. California*,<sup>27</sup> the defendant challenged a twenty-five-years-to-life sentence under California’s notorious three-strikes law for stealing three golf clubs valued at \$399 each. The Court found that this sentence was neither cruel nor unusual and upheld it.

But in recent years, the Court has cut back the potential punishments facing juveniles, including the death penalty and life without parole sentences, even for homicide crimes. In doing so, the Court applied an “evolving standards of decency” test, finding that the death penalty and life without parole for juveniles were against the consensus of state practices and that the death penalty was a disproportionate punishment for juveniles.<sup>28</sup> The Court largely based its ruling on the idea that juveniles are not as culpable as adults who commit similar crimes and receive similar sentences due to their lack of maturity and underdeveloped sense of responsibility in considering the long-term consequences of their actions. The Court later struck down mandatory life without parole sentences for juveniles convicted of murder.<sup>29</sup> A life sentence without parole ignores that someone who commits a violent act at seventeen is unlikely to commit the same act at forty.

Brain science has advanced since these decisions. Scientists have concluded that reckless and impetuous behavior is a characteristic not just of minors but also of young adults. Young adults (those eighteen to twenty-five) are often in a transition phase and lack the maturity and foresight needed to refrain from risky behavior, such as committing crimes. There is hope that, as brain science advances, the Supreme Court will one day forbid long sentences even for those who reach the age of twenty-five due to their lessened culpability and maturity.

As for older adults, there is growing body of literature suggesting that people continue to change throughout adulthood depending, in part, on external stimuli.<sup>30</sup> Even adults can “age out” of crimes and be rehabilitated. If adults have the capacity to change, and if character is not static, maybe one day our policymakers will determine that longer prison sentences are not necessary to keep us safe. State legislatures and Congress should reexamine sentencing schemes with a focus on data-driven sentencing and public safety rather than mere punitiveness.

As people live longer, policymakers must also reconsider scaling back our criminal justice system; otherwise, we could see an even greater expansion of jails and prisons. Policymakers could do so by reclassifying some felonies as misdemeanors, which would reduce the length of sentences. They also could decriminalize some

<sup>27</sup> 538 U.S. 11 (2003).

<sup>28</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>29</sup> *Miller v. Alabama*, 567 U.S. 460 (2012).

<sup>30</sup> See M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENVER L. REV. 151, 171–185 (2019).

actions, such as simple drug possession, thereby reducing the risk of violent confrontations between police and citizens. They could invest in alternatives to incarceration, such as probation, home confinement, and community service. On the back end of the system, policymakers could reduce collateral consequences that lead to higher rates of recidivism, such as barriers to employment and stable housing options. Or they could pass clean-slate legislation that removes the stigma of a criminal conviction once someone has returned to society and demonstrated rehabilitation.

The gift of a longer life is ultimately the gift of time. Longer lifespans will likely lead to more overpopulation, more crowded urban centers, and fewer resources and economic opportunities for the majority of people, all of which increase crime. Questions about how best to keep the public safe will abound. The hope is that, the longer we live, the more wisdom we will acquire and the more we will realize that a system of mass incarceration is inconsistent with our values of fairness and public safety.