

## PREFACE

# INSTITUTIONS WORTH PROTECTING: SAFEGUARDING OUR LEGAL INSTITUTIONS BY BUILDING BIPARTISAN CONSENSUS FOR REFORM

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For the last eighteen months, the American people have watched their president routinely attack our legal institutions and the public servants who inhabit them. The criminal justice system, President Trump said, is a “joke” and a “laughingstock.”<sup>1</sup> Judges who rule against him or his policies have had their work dismissed as “ridiculous,”<sup>2</sup> “terrible,”<sup>3</sup> “political,”<sup>4</sup> and “a total disgrace;”<sup>5</sup> one judge was accused of bias because of his race.<sup>6</sup> The nation’s premier federal law enforcement agency has been described as “really, really disgraceful,”<sup>7</sup> its reputation in “tatters” and its former director a liar and a “leaker.”<sup>8</sup> The President has called for a suspect to face the death penalty less than twenty-four hours after the crime occurred;<sup>9</sup> he has

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1. Linda Qiu, *Trump Calls Terrorism Trial Process ‘a Joke,’ Despite Hundreds of Convictions*, N.Y. TIMES, Nov. 2, 2017, <https://www.nytimes.com/2017/11/02/us/politics/fact-check-trump-terror-convictions.html> [https://nyti.ms/2z8EY9O].

2. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realDonaldTrump/status/827867311054974976> [https://perma.cc/7R9Z-ARDA].

3. Matt Zapotosky et al., *Federal Judge in Hawaii Freezes President Trump’s New Entry Ban*, WASH. POST, Mar. 16, 2017, [https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1\\_story.html](https://www.washingtonpost.com/local/social-issues/lawyers-face-off-on-trump-travel-ban-in-md-court-wednesday-morning/2017/03/14/b2d24636-090c-11e7-93dc-00f9bdd74ed1_story.html) [https://perma.cc/9JNR-HYSZ].

4. Matt Zapotosky & Robert Barnes, *Trump Suggests Only Politics Could Lead Court to Rule Against his Immigration Order*, WASH. POST, Feb. 8, 2017, [https://www.washingtonpost.com/world/national-security/in-their-courtrooms-theyre-protected-by-people-like-me-dhs-secretary-weighs-in-on-legal-dispute-over-trump-ban/2017/02/07/5e37fc4e-ed4e-11e6-9662-6eedf1627882\\_story.html](https://www.washingtonpost.com/world/national-security/in-their-courtrooms-theyre-protected-by-people-like-me-dhs-secretary-weighs-in-on-legal-dispute-over-trump-ban/2017/02/07/5e37fc4e-ed4e-11e6-9662-6eedf1627882_story.html) [https://perma.cc/SU8K-Y3VR].

5. Jose A. DelReal & Katie Zezima, *Trump’s Personal, Racially Tinged Attacks on Federal Judge Alarm Legal Experts*, WASH. POST, June 1, 2016, [https://www.washingtonpost.com/politics/2016/06/01/437ccea6-280b-11e6-a3c4-0724e8e24f3f\\_story.html](https://www.washingtonpost.com/politics/2016/06/01/437ccea6-280b-11e6-a3c4-0724e8e24f3f_story.html) [https://perma.cc/9EAN-NTX6].

6. Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict,’* WALL ST. J. (Jun. 3, 2016), <https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442> [https://perma.cc/557K-2X5Y].

7. Anne Gearan & Devlin Barrett, *Trump Calls Conduct at the FBI ‘Disgraceful’ in Latest Criticism of Bureau*, WASH. POST, Dec. 15, 2017, [https://www.washingtonpost.com/world/national-security/trump-calls-conduct-at-fbi-disgraceful-before-appearing-at-quantico/2017/12/15/4f4a4fae-e1a7-11e7-bbd0-9dfb2e37492a\\_story.html](https://www.washingtonpost.com/world/national-security/trump-calls-conduct-at-fbi-disgraceful-before-appearing-at-quantico/2017/12/15/4f4a4fae-e1a7-11e7-bbd0-9dfb2e37492a_story.html) [https://perma.cc/G9A8-5L8E].

8. Julie Hirschfeld Davis & Glenn Thrush, *Calling Comey a Liar, Trump Says He Will Testify Under Oath*, N.Y. TIMES, June 9, 2017, <https://www.nytimes.com/2017/06/09/us/politics/trump-comey.html> [https://nyti.ms/2s3y178].

9. Peter Baker, *Trump Declares Suspect ‘Should Get Death Penalty,’* N.Y. TIMES, Nov. 1, 2017, <https://www.nytimes.com/2017/11/01/us/politics/trump-new-york-attack-schumer-visa.html> [https://nyti.ms/2iR3gkn].

discouraged police officers from being “too nice” to the people they arrest;<sup>10</sup> and he has continued to assert the guilt of individuals long after they have been exonerated.<sup>11</sup> His first exercise of the Pardon Power was, tellingly, for a sheriff who systematically violated the constitutional rights of Latinos and then disregarded court orders telling him to stop.<sup>12</sup>

Cynical as they may be, these actions and statements do more than hurt morale within law enforcement. They do real damage to our system of justice. Our country’s legal institutions are only as strong as the public’s confidence in them, and each attack from the commander-in-chief chips away at that trust. These broadsides have opened the rhetorical space for those aligned with the President to amplify and supplement his words with criticisms of their own, further sowing distrust and normalizing political attacks on institutions that once enjoyed bipartisan support.<sup>13</sup>

Our country deserves better. The nation’s founding principles—equality, liberty, and democratic self-governance—rely on our collective adherence to the rule of law. And the rule of law in turn depends on those who have sworn to uphold it, be they judges, prosecutors, or law enforcement officers. The President’s attacks on these public servants diminish both him and the office he holds.

Amidst the barrage, it is tempting to retreat to a defensive posture, one that seeks to preserve our institutions by reflexively resisting the President and his policies. But resistance alone will not end this crisis. Now more than ever, we need strong, durable institutions, backed by robust public support and capable of constraining officials who are otherwise inclined to disregard rules and norms. Our institutions will be better able to resist the current assault if, through constant vigilance and proactive improvements, they can show by word and deed that they are worthy of the respect of all Americans. We need people to have confidence that our legal institutions work—and that a system governed by laws is better than the alternative.

This is easier said than done. Americans’ trust in public institutions, including the criminal justice system, has deteriorated over the past half century, and scholars across the ideological spectrum agree that this decline contributed to the wave of antiestablishment politics that President Trump rode to the White House.<sup>14</sup> To

10. Brian Rosenthal, *Police Criticize Trump for Urging Officers Not to Be ‘Too Nice’ with Suspects*, N.Y. TIMES, July 29, 2017, <https://www.nytimes.com/2017/07/29/nyregion/trump-police-too-nice.html> [<https://nyti.ms/2hcaD5p>].

11. Benjy Sarlin, *Donald Trump Says Central Park Five Are Guilty, Despite DNA Evidence*, NBC NEWS, Oct. 7, 2016, <https://www.nbcnews.com/politics/2016-election/donald-trump-says-central-park-five-are-guilty-despite-dna-n661941> [<https://perma.cc/RLY9-NL4E>].

12. Megan Cassidy et al., *President Donald Trump Pardons Former Sheriff Joe Arpaio*, AZCENTRAL.COM, Aug. 25, 2017, <https://www.azcentral.com/story/news/local/phoenix/2017/08/25/donald-trump-pardons-sheriff-joe-arpaio/599835001/> [<https://perma.cc/3X5D-3MRU>].

13. Sharon LaFraniere et al., *Trump’s Unparalleled War on a Pillar of Society: Law Enforcement*, N.Y. TIMES, Feb. 3, 2018, <https://www.nytimes.com/2018/02/03/us/politics/trump-fbi-justice.html> [<https://nyti.ms/2GLTKXd>]; Ryan J. Reilly, *The ‘Law and Order’ Party Has Unleashed an Extraordinary Attack on Law Enforcement*, HUFFINGTON POST, Jan. 29, 2018, [https://www.huffingtonpost.com/entry/fbi-attack-trump-mueller-republicans\\_us\\_5a6b3fe7e4b0ddb658c5c3fd](https://www.huffingtonpost.com/entry/fbi-attack-trump-mueller-republicans_us_5a6b3fe7e4b0ddb658c5c3fd) [<https://perma.cc/7SQD-MVHX>].

14. See, e.g., Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES, Nov. 9, 2016, <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html> [<https://nyti.ms/2k4ISJa>]; C.K., *Verify, Then Trust: Why America Has a Trust Problem*, THE ECONOMIST, Apr. 25, 2017, <https://www.economist.com/blogs/democracyinamerica/2017/04/verify-then-trust> [<https://perma.cc/SZ4Y-KT9G>]; Jim Norman, *Americans’ Confidence in Institutions Stays Low*, GALLUP (Jun. 13, 2016), <http://news.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx> (showing that, in June 2016, twenty-three percent of poll respondents stated that they had “a great deal” or “quite a lot” of confidence in the criminal justice system; in June 2006, twenty-five percent of respondents answered similarly) [<https://perma.cc/GWG2-P3ZE>]; HARVARD UNIVERSITY INSTITUTE OF POLITICS, SURVEY OF YOUNG AMERICANS’ ATTITUDES TOWARD POLITICS AND PUBLIC SERVICE, 29th Ed., Apr. 25, 2016, [http://iop.harvard.edu/sites/default/files/content/160425\\_H](http://iop.harvard.edu/sites/default/files/content/160425_H)

counteract this decline, we must focus our energy on building support for lasting reforms—ones that tackle the structural weaknesses in our system and that enhance public safety while also promoting fairness and equity. This will require hard work, and especially a willingness to address the racial and socioeconomic disparities that we have failed thus far to eradicate from the criminal justice system. These efforts demand the type of sustained commitment that a more reflexive defense of our institutions does not. But in the long run, the best way to protect our institutions is to ensure that the American people believe our institutions are worth protecting.

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In many ways, our criminal justice system is the envy of the world.<sup>15</sup> For more than two centuries, our legal institutions have administered justice and protected the public while enforcing the constitutional protections of the accused, including the presumption of innocence, the protection against self-incrimination, and the right to counsel. Over time, we have broadened not just the scope of these protections but also expanded meaningful access to them. Just as importantly, our legal institutions are populated with individuals who care deeply about doing the right thing—and whose intuitions are reinforced by long-standing norms that promote fairness and equal justice. Every day, all across our country, prosecutors and law enforcement officers go to work dedicated not only to keeping us safe, but to upholding the law and the Constitution.<sup>16</sup> They do their work out of the spotlight, making decisions day in and day out driven only by the facts, the law, and their responsibility to seek justice.

While our criminal justice system does many things right, it also faces a long list of challenges. This article does not attempt to catalogue every shortcoming or analyze every possible solution. Rather, it identifies three areas that are particularly ripe for reform—sentencing reform, prison reform, and excessive fines, fees, and bail—all issues where there is broad bipartisan consensus that change is both necessary and possible. These areas provide a starting point for broader institutional reforms, with the goal of strengthening confidence in the criminal justice system and, in turn, strengthening the system itself.

**Recalibrating federal drug sentences.** From the ACLU to the Koch brothers, advocates across the political spectrum recognize the need to recalibrate federal drug sentences.<sup>17</sup> After three decades of increasingly harsh laws, a bipartisan coalition has formed to restore proportionality to our federal drug-sentencing regime. The arguments for reform are practical, fiscal, and moral.

Our current laws date to the 1980s, when in the midst of the crack epidemic, Congress began requiring long sentences for drug traffickers. Over the course of several years, Congress abolished parole, established mandatory sentencing guidelines, and imposed new mandatory minimum sentences for certain drug offenses. The legislative history makes clear that the harshest of these laws were originally in-

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arvard%20IOP%20Spring%20Report\_update.pdf (showing that, in spring 2016, forty-seven percent of poll respondents expressed “none” or “not much” confidence in the U.S. judicial system’s ability to fairly judge people without bias for race and ethnicity) [<https://perma.cc/CF73-QAUH>].

15. See generally Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VANDERBILT L. REV. 1099 (2014).

16. See, e.g., Letter from Andrew D. Goldsmith & John F. Walsh to Editors of Georgetown Law Journal regarding *Annual Review of Criminal Procedure* (Nov. 4, 2015), <https://georgetownlawjournal.org/articles/157/justice-department-s-response-to/pdf> [<https://perma.cc/3NQG-2F2M>].

17. Jake Miller, *An Unlikely Alliance Forms Between Koch Brothers and Liberal Groups*, CBS NEWS, Feb. 19, 2015, <https://www.cbsnews.com/news/koch-brothers-conservative-liberal-groups-unite-on-criminal-justice-reform> [<https://perma.cc/4SN9-5FLN>].

tended to target cartel leaders and other high-volume traffickers.<sup>18</sup> But as crime rates continued to rise, Congress kept amending the drug laws to expand their reach and increase their penalties.

One of the guiding principles of this approach—to deter criminals by creating clear, consistent penalties—turned out to be one of its greatest weaknesses. The new laws limited the sentencing discretion of judges, instead linking a defendant’s mandatory prison term to the weight of the drugs involved, often to the exclusion of every other factor, including the dangerousness of the offender. The new laws swept broadly, unable to effectively distinguish between the truly dangerous criminals who required long sentences and the low-level, non-violent offenders who did not.

A practical problem quickly emerged: the Federal Bureau of Prisons (BOP) did not have enough beds for all the new inmates. With more prisoners serving longer sentences, the federal prison population exploded, growing nearly 800 percent between 1980 and 2013.<sup>19</sup> BOP struggled to keep up. The agency’s budget grew during that time from \$330 million to \$7.5 billion, but even those increases were not enough to maintain existing staffing levels.<sup>20</sup> BOP scaled back inmate services and reassigned staff from rehabilitation programs to more traditional patrol duties.<sup>21</sup>

This trend had serious consequences for public safety. As an agency within the U.S. Department of Justice, BOP’s ever-growing costs began to crowd out resources for the Department’s other law enforcement priorities. As of 2017, prisons and other detention costs accounted for nearly a third of the Department’s \$27 billion budget, and every dollar spent incarcerating a non-violent drug offender for longer than necessary was a dollar not spent on new investigations, grants to state and local law enforcement, or critical prevention and reentry work.<sup>22</sup>

But the human costs were just as significant. Tens of thousands of Americans spent more years in federal prison for drug crimes than was necessary for public safety. More than five million children have had a parent behind bars at some point in their lives, including one out of every nine African-American children.<sup>23</sup> The growth in incarceration disproportionately affected minority communities, many of whom lived in the urban areas that the drug laws of the 1980s and 1990s were supposedly designed to help.

This isn’t how our criminal justice system is supposed to work. It is not enough to hold wrongdoers accountable; we must also ensure that the punishment is proportional to the harms caused. Imposing prison terms for longer than necessary under-

18. U.S. SENTENCING COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23–25 (2011), [https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_02.pdf](https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf) [<https://perma.cc/T3EJ-4GXN>].

19. Fed. Bureau of Prisons, *Past Inmate Population Totals*, [https://www.bop.gov/about/statistics/population\\_statistics.jsp#old\\_pops](https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops) [<https://perma.cc/6RLV-48PT>].

20. CONGRESSIONAL RESEARCH SERVICE, APPROPRIATIONS FOR THE BUREAU OF PRISONS (BOP): IN BRIEF 1–2 (2018), [https://www.everycrsreport.com/files/20180129\\_R42486\\_ff5241bf6ab3433f3b4686617b2c351a18259279.pdf](https://www.everycrsreport.com/files/20180129_R42486_ff5241bf6ab3433f3b4686617b2c351a18259279.pdf) [<https://perma.cc/BV3Z-QYHA>].

21. U.S. GOV’T ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 77 (2012), <https://www.gao.gov/products/GAO-12-743> [<https://perma.cc/LX5A-R69M>].

22. CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, CONSEQUENCES OF GROWTH IN THE FEDERAL PRISON POPULATION (2015), <https://www.urban.org/sites/default/files/publication/52636/2000221-C-consequences-of-growth-in-the-federal-prison-population.pdf> [<https://perma.cc/BV3Z-QYHA>].

23. ANNIE E. CASEY FOUNDATION, A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES 1–2 (2016), <http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> [<https://perma.cc/KFS3-BWQU>]; Danielle Paquette, *One in Nine Black Children Has Had a Parent in Prison*, WASH. POST, Oct. 27, 2015, <https://www.washingtonpost.com/news/wonk/wp/2015/10/27/one-in-nine-black-children-have-had-a-parent-in-prison/> [<https://perma.cc/VGM8-BGBM>].

mines the public's confidence in the fairness of the system and demands that we take action.

In the final years of the Obama Administration, a bipartisan coalition of senators made great progress towards sensible reform. The Sentencing Reform and Corrections Act, which among other things would give federal judges greater discretion to impose drug sentences below the existing mandatory minimum terms, easily passed the Senate Judiciary Committee, only to die on the floor of the Senate. One of the few legislators to speak out against the very idea of such legislation was then-Senator Jeff Sessions, and his opposition to the proposal presaged the regressive approach he would later promote as President Trump's attorney general.<sup>24</sup>

But opposition from the current president and attorney general cannot impede all progress. All across the country, in red states and blue states, officials have enacted a wide range of criminal justice initiatives, and legislators from both parties increasingly recognize the need for, and benefits of, such efforts.<sup>25</sup> President Trump may be unlikely to sign a criminal justice reform bill. But in the meantime, policymakers and advocates continue studying what has worked in the states, gradually building evidence and momentum for action on the federal level.

**Reorienting our prisons towards rehabilitation.** There is also a growing consensus that we need to adjust not just how much time inmates spend in prison, but also how they spend that time. More than ninety-five percent of all prisoners are eventually released back to the community, and it is increasingly clear that our criminal justice system needs to do a better job of using an inmate's prison term to prepare that individual for his or her return to society. Doing so not only makes our communities safer by reducing the likelihood of recidivism, it also gives the public greater confidence that the sentences imposed on defendants are designed, in the words of former Attorney General Eric Holder, "to punish, deter, and rehabilitate—not merely warehouse and forget."<sup>26</sup>

Here too, the drug laws of the 1980s and 1990s have tied the federal government's hands.<sup>27</sup> In 1950, BOP housed fewer than 17,000 inmates nationwide, with those sentenced for drug crimes constituting only a small fraction of prisoners.<sup>28</sup> At the time, BOP focused its efforts on rehabilitative services, and over the next several decades, Congress provided the federal prison system with additional tools to assist inmates' reintegration to society.

Then things changed. As the number of drug inmates increased, the availability of services decreased. The federal prison population grew at a far faster rate than the number

24. Carl Hulse, *Unity Was Emerging on Sentencing. Then Came Jeff Sessions.*, N.Y. TIMES, May 14, 2017, <https://www.nytimes.com/2017/05/14/us/politics/jeff-sessions-criminal-sentencing.html> [<https://nyti.ms/2qfX5Z1>]; Tom Jackson, *Sessions Takes Federal Crime Policy Back to the '80s*, WASH. POST, May 12, 2017, <https://www.washingtonpost.com/news/true-crime/wp/2017/05/12/sessions-takes-federal-drug-policy-back-to-the-80s> [<https://perma.cc/2V57-DGQD>].

25. Adam Gelb, *Congress Should Study the States as It Considers Reviving Criminal Justice Reform*, PEW CHARITABLE TRUSTS, Oct. 30, 2017, <http://www.pewtrusts.org/en/research-and-analysis/analysis/2017/10/30/congress-should-study-the-states-as-it-considers-reviving-criminal-justice-reform> [<https://perma.cc/TR4C-8A47>].

26. Attorney General Eric Holder, Remarks to Am. Bar Ass'n House of Delegates (Aug. 12, 2013) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>) [<https://perma.cc/SKU8-65F9>].

27. See generally Deputy Att'y Gen. Sally Q. Yates, Remarks to Criminal Justice Policy Program, Harvard Law School (Jan. 9, 2017) (transcript available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-harvard-law-school-sentencing-and>) [<https://perma.cc/M443-GHJ5>].

28. MARGARET WERNER CAHALAN, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES 1850–1984, 146 tbl.6–3, 154 tbl.6–9 (1986), <https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf> [<https://perma.cc/PX5V-KFWG>].

of correctional officers, making it difficult for BOP staff to fulfill even its basic security duties. As the inmate-to-officer ratio increased, prison violence spiked, and BOP increasingly turned to solitary confinement as a tool for managing the inmate population.<sup>29</sup> Overwhelmed by the overcrowding, BOP eventually began contracting with private prisons to house inmates it lacked the capacity to house itself.<sup>30</sup> Taken together, these trends meant that most federal prisoners were unable to access the type of rehabilitative services necessary to ensure their success after leaving prison.

The shift away from rehabilitation had a direct impact on public safety. One of the best ways to prevent crime is by reducing recidivism, and BOP's inability to invest in effective recidivism-reduction programs limited the agency's ability to fulfill its broader societal mission. Nowhere was this clearer than BOP's approach to education. Research is clear that inmates who participate in meaningful correctional education have forty-three percent lower odds of returning to prison than those who do not, and that every dollar spent on prison education saves four to five dollars on the costs of re-incarceration.<sup>31</sup> Yet despite the security and fiscal benefits of such programs, until recently BOP offered only minimal education programming, most of which was geared towards those seeking a GED.

Going forward, broader improvements are only possible if BOP can reduce the inmate-to-officer ratio and redirect staff and resources to rehabilitative services. Given that Congress is unlikely to allocate additional funds to BOP's already substantial budget, the agency's ability to undertake lasting reforms depends on a reduction in the federal prison population.

Things looked promising during the final years of the Obama Administration. In 2013, for the first time in decades, the federal prison population began to decline—the result of various drug reform efforts, including adjustments to the federal sentencing guidelines and revised charging policies for federal prosecutors.<sup>32</sup> Within three years, BOP's inmate population decreased more than ten percent from its 2013 peak. This reduction eased some of the pressures on BOP, freeing the agency to make changes that would have been far more difficult even a few years earlier. In 2016, for example, BOP announced a series of reforms, including an overhaul of its inmate education program,<sup>33</sup> the phasing out of its private prison contracts,<sup>34</sup> and significant

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29. U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 7–8 (2016); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 21, at 64–83.

30. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MONITORING OF CONTRACT PRISONS 1 (2016), <https://oig.justice.gov/reports/2016/e1606.pdf> [<https://perma.cc/LS4U-9XYH>]. The Inspector General's 2016 report highlighted the risks of relying on private contractors to house federal inmates, finding among other things that privately-operated prisons provided substandard safety and services. *See also* Memorandum from Sally Q. Yates to Acting Director of the Federal Bureau of Prisons 1 (Aug. 18, 2016), <https://www.justice.gov/archives/opa/file/886311/download> [<https://perma.cc/F5Q9-HKAK>].

31. Doug Irving, *The Case for Correctional Education in U.S. Prisons*, RAND CORP.: RAND REV. (Jan. 3, 2016), <https://www.rand.org/blog/rand-review/2016/01/course-correction-the-case-for-correctional-education.html> [<https://perma.cc/KES5-LGZX>]; LOIS DAVIS ET AL., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS at xvi (2013) (ebook).

32. Sari Horwitz, *Justice Dep't Set to Free 6,000 Prisoners, Largest One-Time Release*, WASH. POST, Oct. 6, 2015, [https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6-000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699\\_story.html](https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6-000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html) [<https://perma.cc/525B-9DU8>].

33. Carrie Johnson, *Justice Dep't Announces New Package of Federal Prison Reforms*, NPR (Nov. 30, 2016, 4:29 PM) <https://www.npr.org/2016/11/30/503902372/justice-department-announces-new-package-of-federal-prison-reforms> [<https://perma.cc/YW9U-MK8Q>].

34. Charlie Savage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES, Aug. 18, 2016, <https://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html> [<https://nyti.ms/2k6xhbq>].

reductions in its use of solitary confinement.<sup>35</sup>

These policy changes were commonsense measures designed to reduce recidivism and increase public confidence in the prison system—and then were significantly reversed by the Trump Administration.<sup>36</sup> But support for prison reform remains bipartisan. As with sentencing reform, advocates must continue building the case for prison reform, making clear that these policies strengthen public safety and enhance confidence in the system.

**Ensuring equal justice regardless of race or wealth.** The promise of equal justice is the very foundation of our democracy. Our Declaration of Independence proclaims that “all men are created equal,” and our Constitution promises equal protection of the laws. But as our history reflects, simply reciting this promise does not make it so. Hundreds of thousands of men and women remained enslaved in our country even as our Founders ratified the Constitution. Not so long ago, all across the Jim Crow South, our country’s founding principles were defiled by lynchings, the burning of Freedom Riders’ buses, and the systematic disenfranchisement of African-American voters. Even today, we have yet to realize fully our nation’s promise of equal justice.

Nothing is more essential to the legitimacy of our criminal justice system than the public’s confidence that the system treats all people fairly. And nothing threatens that confidence more than the impact of race in our system. As of 2016, nearly 2.2 million people were behind bars in America, and the impact has fallen disproportionately on African-Americans, who are incarcerated at a rate more than five times that of whites and two and a half times that of Latinos.<sup>37</sup> The reasons for these racial disparities are complicated, but are no doubt influenced by a number of historical and present-day trends, including the school-to-prison pipeline, unconscious biases at various points in the criminal process, and aspects of our policing, charging, and sentencing practices. In addition, too many communities of color in America still face significant barriers to adequate educational, medical, and mental health services, all of which are correlated with higher rates of incarceration.<sup>38</sup>

In particular, a lack of economic opportunity leaves too many Americans in poverty, a trend that both leads to and results from greater involvement in the criminal justice system. Unfortunately, research shows that an individual’s socioeco-

35. Juliet Eilperin, *Obama Bans Solitary Confinement for Juveniles in Federal Prisons*, WASH. POST, Jan. 26, 2016, [https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8\\_story.html](https://www.washingtonpost.com/politics/obama-bans-solitary-confinement-for-juveniles-in-federal-prisons/2016/01/25/056e14b2-c3a2-11e5-9693-933a4d31bcc8_story.html) [<https://perma.cc/XA2E-8USQ>].

36. Ryan Reilly & Julia Craven, *Federal Bureau of Prisons Fires Head of an Obama-Era Education Effort, Putting Reform Under Trump in Doubt*, HUFFINGTON POST, May 19, 2017, [https://www.huffingtonpost.com/entry/bureau-of-prisons-education-reform\\_us\\_591f2289e4b094cdba53c398](https://www.huffingtonpost.com/entry/bureau-of-prisons-education-reform_us_591f2289e4b094cdba53c398) [<https://perma.cc/63EX-WM6G>]; Eric Lichtblau, *Justice Department Keeps For-Profit Prisons, Scrapping an Obama Plan*, N.Y. TIMES, Feb. 23, 2017, <https://www.nytimes.com/2017/02/23/us/politics/justice-department-private-prisons.html> [<https://nyti.ms/2mdok52>].

37. E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, 8 tbl.8 (Dec. 2012), <https://www.bjs.gov/content/pub/pdf/p11.pdf> [<https://perma.cc/C234-FEVW>].

38. See, e.g., CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 1–2, 6 (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf> [<https://perma.cc/PC7B-8M99>]; DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf> [<https://perma.cc/4Z8M-X4JH>]; DAVID CLOUD, VERA INSTITUTE OF JUSTICE, ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION 4–5, 15–16 (2014), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy\\_downloads/on-life-support-public-health-mass-incarceration-report.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf) (discussing the negative effects on physical and mental health and educational outcomes for communities most heavily impacted by mass incarceration, including racial minorities) [<https://perma.cc/LG2K-U6M3>].

conomic status continues to affect his or her access to justice. Despite the Supreme Court's admonition that the Constitution does not permit "punishing a person for his poverty,"<sup>39</sup> in recent years it has become clear that, in some places, judges are still imposing fines and then incarcerating those who don't pay, without examining ability to pay. In these places, court fines, fees, and other financial obligations can trap people in a cycle of poverty and unnecessary incarceration.<sup>40</sup>

The Justice Department's 2015 report on the Ferguson Police Department shined a harsh light on these practices. The investigation showed that, in a city of 21,000, Ferguson's courts issued arrest warrants for more than 9,000 people in 2013, mostly for low-level offenses. In one example, a 67-year-old woman living on a fixed income was arrested for failure to pay a trash-removal citation, after which the court charged her \$1,000 in fines.<sup>41</sup> The report also revealed that the African-American community bore the brunt of these practices. From 2012 to 2014, although African-Americans made up 67% of the population, they constituted 85% of those subjected to a vehicle stop, 90% of those who received a citation, and 93% of those arrested.<sup>42</sup> Moreover, the city used policing as a means to generate revenue, issuing multiple citations with excessive fines and fees for minor violations. When people living in poverty failed to pay the fees, they were repeatedly arrested and jailed, highlighting how, far too often, the financial burdens of the criminal justice system fall disproportionately on minority communities.

Similar concerns arise in the bail system. More than sixty percent of all inmates in county jails are awaiting trial, often for non-violent offenses.<sup>43</sup> Low-income defendants often remain in pre-trial detention for weeks or months, not because they pose a particular danger to the community, but because they lack the ability to make even low-dollar bail payments. Attorney General Robert Kennedy recognized this in 1964, when he testified before Congress to express his concern that bail had "become a vehicle for systemic injustice," stating that far too many men and women remained in jail simply because they "cannot afford to pay for their freedom."<sup>44</sup> Today, we have an even greater appreciation for the collateral consequences of pre-trial detention—from losing a job and housing, to missing school, to defaulting on debts—and how it can undermine an individual's reintegration to the community.<sup>45</sup>

These practices inevitably shape the way our society views the criminal justice system. The perception that there are two systems of justice—and that one's socioeconomic status determines whether one remains in jail or goes free—undermines confidence in the fairness of the system. There is, of course, no single solution, and the issues of class and race have shaped our system of justice for centuries. But forward-thinking policies can help address the problem. As a starting point, a number of state and local governments have worked to reform the bail system, whether by

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39. *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

40. Sally Q. Yates, *Poverty Is Not a Crime*, U.S. DEP'T OF JUSTICE (Dec. 2, 2015), <https://www.justice.gov/archives/opa/blog/poverty-not-crime> [<https://perma.cc/V4JL-54FQ>].

41. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEP'T 42 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/G83A-RXC3>] (hereinafter "DOJ FERGUSON REPORT").

42. *Id.* at 4.

43. Zhen Zeng, *Jail Inmates in 2016*, BUREAU OF JUSTICE STATISTICS, 4 tbl.3 (Feb. 2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf> [<https://perma.cc/3YRL-3EH7>].

44. *Federal Bail Procedures: Hearings Before the Subcomm. on Const. Rights and the Subcomm. on Improvements in Judicial Mach. of the S. Comm. on the Judiciary*, 88th Cong. 27 (1964) (statement of Hon. Robert F. Kennedy, Att'y Gen. of the U.S.).

45. See Deputy Att'y Gen. Sally Q. Yates, Remarks at the Right to Counsel National Consortium Second Annual Meeting (Oct. 25, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-right-counsel-national-consortium> [<https://perma.cc/LZD8-2F4D>].



simplifying the bail payment process, developing better risk assessment tools for pre-trial decision-making or, in some cases, abolishing cash bail entirely.<sup>46</sup> State and local governments should also adequately fund public defenders, legal aid lawyers, and other community organizations that help lower-income Americans navigate the complexities of our court system. In New Orleans, the public defender office got so overloaded that it had to stop taking new clients, briefly leaving the accused without their constitutional right to counsel.<sup>47</sup>

In 2016, the Justice Department sent a “Dear Colleague” letter to chief judges and court administrators in all fifty states, to explain and help them address the impacts and potential legal consequences of imposing excessive fines and fees and bail on low-income defendants that often leads to an inescapable cycle of debt and incarceration.<sup>48</sup> In late 2017, Attorney General Sessions rescinded the letter, describing it as an example of improper executive overreach.<sup>49</sup> But given that the DOJ under every president routinely nudges state and local law enforcement on various issues, it is hard not to conclude that this administration simply supports the status quo when it comes to fines and fees. The Trump Administration’s dismissiveness towards this concern highlights the need to continue educating stakeholders about racial and socioeconomic disparities in the criminal justice system.

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These are by no means the only three areas where change is needed, or where reform is possible. Rather, they are a place to begin, in part because the support for these reforms is broad-based and bipartisan. Progress will hopefully build trust for examining a wider range of improvements across the system.

For more than two centuries, Americans have relied on the criminal justice system to protect the public and hold wrongdoers accountable. The system’s continued success depends on the decency and integrity of the many people who comprise it—judges, lawyers, law enforcement agents, probation officers, and many more. At its best, our court system administers justice in a way that is fair, proportional, and blind. And like any human institution, the system has weaknesses that need to be addressed. But the strength of our criminal justice system should not be measured

46. ELISE WHITE ET AL., CENTER FOR COURT INNOVATION, NAVIGATING THE BAIL PAYMENT SYSTEM IN NEW YORK CITY: FINDINGS AND RECOMMENDATIONS 9–11 (2015), <https://www.courtinnovation.org/sites/default/files/documents/Bail%20Payment%20in%20NYC.pdf> [<https://perma.cc/H9QR-DUJ6>]; Lisa Foderaro, *New Jersey Alters Its Bail System and Opens Legal Landscape*, N.Y. TIMES, Feb. 6, 2017, <https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html> [<https://nyti.ms/2kHb7Ao>].

47. Ben Myers, *Orleans Public Defender’s Office to Begin Refusing Serious Felony Cases Tuesday*, TIMES-PICAYUNE, Jan. 11, 2016, [http://www.nola.com/crime/index.ssf/2016/01/orleans\\_public\\_defenders\\_to\\_be.html](http://www.nola.com/crime/index.ssf/2016/01/orleans_public_defenders_to_be.html) [<https://perma.cc/TC9U-7CGK>].

48. As the letter explained:

Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape. Furthermore, in addition to being unlawful, to the extent that these practices are geared not toward addressing public safety, but rather toward raising revenue, they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents.

Dear Colleague Letter, Vanita Gupta & Lisa Foster, U.S. Dep’t of Justice, Civil Rights Div., *Fines and Fees in State and Local Courts 2* (Mar. 14, 2016), available at [http://www.tmcecc.com/files/7614/8517/9751/00\\_-\\_Regan\\_\\_Robby\\_BINER\\_Special\\_Session.pdf](http://www.tmcecc.com/files/7614/8517/9751/00_-_Regan__Robby_BINER_Special_Session.pdf) [<https://perma.cc/RSH3-Z5ZN>].

49. Matt Zapotosky, *Sessions Rescinds Justice Dept. Letter Asking Courts to Be Wary of Stiff Fines and Fees for Poor Defendants*, WASH. POST, Dec. 21, 2017, [https://www.washingtonpost.com/world/national-security/sessions-rescinds-justice-dept-letter-asking-courts-to-be-wary-of-stiff-fines-and-fees-for-poor-defendants/2017/12/21/46e37316-e690-11e7-ab50-621fe0588340\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-rescinds-justice-dept-letter-asking-courts-to-be-wary-of-stiff-fines-and-fees-for-poor-defendants/2017/12/21/46e37316-e690-11e7-ab50-621fe0588340_story.html) [<https://perma.cc/GAH7-L4Q3>].

solely by what it does well and what it does poorly, but also by the willingness of its participants to identify shortcomings and fix them.

At a time when our legal institutions are under threat, it is all the more important that the legal community unite around common goals. Just because the President's criticisms of law enforcement are unwarranted and destructive doesn't mean that all critiques of law enforcement are. We must recommit to the principles of justice and fairness that all Americans expect from the criminal justice system and take whatever steps necessary to ensure we live up to those expectations. By demonstrating our capacity to self-correct, we bolster confidence in our system of justice—and we protect the system from those who seek to destabilize it.