



The Myth of the Incarcerated Nation Are More Major Reforms Needed? No

In December the U.S. Senate passed the FIRST STEP Act, later signed by President Trump. The First Step Act (the acronym stands for Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person) was one of the most substantive U.S. criminal justice reform measures passed in the last three decades. The act drew overwhelming bipartisan support, which is amazing given that little else can be agreed to in Congress today. The act expands job training and other programs aimed at reducing recidivism (that is, the problem of released prisoners reoffending and returning to jail), expands early-release programs, and modifies federal sentencing laws, especially mandatory minimum sentences for non-violent drug offenders.

The call for criminal justice reform has attracted an unlikely coalition of liberals and conservatives, radical progressives and libertarians. Criminal justice reform is taking place on the state and local levels as well. A well-orchestrated campaign has led to the election of new district attorneys in cities such as Philadelphia, Chicago and St. Louis who are dedicated to the principles of social justice and dismantling so-called mass incarceration. This means less prosecution, lighter sentencing and more early release.¹

While large numbers of people remain in prison, both the incarceration rate and the absolute numbers have been falling for many years.² Nevertheless, activists are still calling for a major overhaul of the criminal justice system. Their claims of overincarceration are highly debatable. No doubt the penal system can be improved, but we should be wary of radical reforms in the name of ending the “incarcerated nation”. Dismal facts about recidivism suggest that *most prisoners resume victimizing others after they are freed*. For example, a 2005 Bureau of Justice Statistics study of 404,638 prisoners in 30 states found that within three years of release, 67.8 percent were rearrested, and within five years of release, 76.6 percent were rearrested. Some 55 percent of released state prisoners were reincarcerated within five years.

Demands for criminal justice reform have been brewing for a long time. A huge literature on the “incarcerated nation” has emerged in criminal justice and sociology scholarship, as well as in popular literature. Much of this literature has been produced by left-wing scholars intent on showing that American democracy is flawed and our courts are racist because a disproportionate number of prisoners are “persons of color”—African Americans or Hispanics. An unusual alliance took shape composed of the American Civil Liberties Union, the American Conservative Union, the Koch brothers, the liberal Center for American Progress, Quakers and other liberal church activists pushing for criminal justice reform. This coalition was active at the national level and in many states and provided impetus for the First Step Act.³

Co-sponsors of the First Step Act included Senator Richard J. Durbin (D-IL), Charles E. Grassley (R-IA) and Mike Lee (R-UT). President Trump tweeted that the act would “keep our communities safer, and provide hope and a second chance to those who earn it.” Some law-and-order conservatives mounted an aggressive campaign to defeat the measure, warning that reducing sentences would have unintended consequences by releasing hardened criminals into their communities. Senators Tom Cotton (R-AR) and John Kennedy (R-LA) introduced amendments to limit the types of offenders eligible for early release and to water down some parts of the bill, but their amendments were voted down.

A Few Good Ideas

The First Step Act allows thousands of inmates to be eligible for immediate sentencing reductions and expands early-release programs. The act invests heavily in incentives and new programs to improve prison conditions and facilitate re-entry of prisoners into their communities. Additional features prohibit using restraints on pregnant inmates and restrict the use of solitary confinement for juvenile offenders.

Criminal justice reformers are actively working at the state level to replicate major criminal justice reform in states and local communities. Supporters of criminal justice reform and those who worry that it might go too far agree on many points. There is a consensus that recidivism is a problem that needs to be addressed. Those involved in law enforcement—police, prosecutors and prison officials—have undertaken a range of programs to address this problem. Prison programs include job training and various counseling efforts to address recidivism. Community programs aimed at preventing crime—adult and juvenile—have been established with active involvement of police, prosecutors and the public. Furthermore, most agree that mandatory sentencing should be revisited to allow judges some discretion in sentencing.

Where a consensus is lacking is over how “overincarcerated” the U.S. really is and just how much reform is needed. Critics accuse criminal justice activists of too often making criminals out as victims who continue to be victimized. An example of this sentiment is the effort to make prison inmates eligible to vote or to restore voting rights to former convicts.

Voting Rights for Prisoners and Felons

The call for convicted criminals to have voting rights comes from both Democrats and Republicans. The socialist presidential candidate Senator Bernie Sanders, for example, is outspoken in his belief that prisoners should be allowed to vote. Sanders in an April town hall meeting in Muscatine, IA told the audience that he “absolutely” supports allowing people with felony records to vote while they are in prison.⁴ He doubled down subsequently, insisting that even the 2013 Boston Marathon bomber should be able to vote from prison.

Sanders’s declaration was not surprising given that he represents one of two states (Vermont and Iowa) that allow felons to vote while in prison. Sanders echoed Senator Elizabeth Warren (D-MA), who is also running for president. A month earlier in another Iowa town hall meeting, Warren came out in favor of allowing people to vote after they complete their sentences, adding, “While they’re incarcerated, I think that’s something we should have more conversation about.”⁵

Democrats are not alone in supporting prisoner or ex-con voting rights. Jared Kushner, President Trump’s son-in-law, appeared on Laura Ingraham’s Fox program to praise the First Step Act. He said in the interview that he supported ex-cons being granted suffrage. He asserted that in Florida many ex-cons being granted suffrage are registering as Republican: “We’ve had more ex-felons register as Republicans than Democrats, and I think they see

the reforms,” he said. “That’s the data I’ve seen. I think that will surprise a lot of people when they see the new coalition that President Trump is building for what the Republican Party has the potential to be.”⁶

Democrats remain convinced that inmates or former inmates will vote mostly Democratic. Progressives in other states are pushing voting rights for convicted criminals, also in the belief that this measure will increase their voter rolls. It remains to be seen whose prediction is correct.

Most states do not allow those in prison or felons released from prison to vote. Approximately 6.1 million people are prevented from voting due to a felony conviction. Florida’s amendment to allow released felons to vote lets more than one million people vote. While Florida is an experiment in progress, the U.S. Supreme Court has generally upheld voting restrictions on felons under the U.S. Constitution.

Both Democrats and Republicans are playing politics with prisoner or ex-con voting rights. In an op-ed published in the left-leaning British newspaper *The Guardian*, Arthur Rizer and Lars Trautman argue that the “lock ’em up and throw away the key” mentality of some conservatives has done great damage to the Republican Party.⁷ Both authors are policy wonks at the right-leaning R Street Institute in Washington, DC.

They argue that conservatives need to get on board with criminal justice reform in order to “court new constituencies and bring conservative messages to voting blocs that will dominate American politics in the future” (i.e., minority groups). By doing this, they maintain, conservatives can overcome the image that the Republican Party represents the “rich and powerful” and caters primarily to white Americans. The authors invoke the lesson of Jesus Christ, whom they describe as “a criminal in the eyes of the state, subject to a miscarriage of justice by an imperfect criminal justice system.”⁸

‘Incarcerated Nation’ Misconceptions

A sizeable movement in academia and activist circles emerged in the last decades decrying the so-called incarcerated nation. The roots of these studies began with the French left-wing post-modern guru Michel Foucault, author of *Discipline and Punish: The Birth of the Prison* (1975). Foucault contended that modern prisons were not about punishment or rehabilitation, but about the subjugation of the oppressed and control of their bodies. The prison, he argued, was one of many modern institutions, along with schools, hospitals and factories, in a larger “carceral” system. In the United States, studies of the “incarcerated nation” allege systematic racism, noting that blacks and Hispanics are disproportionately arrested, convicted and sent to prison in comparison with whites.

Yet the characterizations of “massive incarceration” can be misleading. By 2016, the U.S. incarceration rate fell to its lowest level since 1996. This is not to deny that large numbers of people are behind bars—1.5 million in federal and state prisons and more than 741,000 in local jails.⁹ But even the absolute number of inmates in the U.S. has gone down in recent years. The estimated 2,163,400 inmates of prison or jail at the end of 2016 were the fewest since 2004, when there were 2,136,600 inmates. Given the population growth, this is remarkable.

For reform advocates, this reduction in rates and numbers of prisoners is not nearly enough. Critics of the U.S. criminal justice system assert that the dramatic drop in crime rates during recent decades should lead to a correspondingly sharp drop in incarceration rates. But this is looking at the problem backwards. The drop in crime rates over several decades is surely a direct consequence of tougher sentencing. *To return to the very lenient sentencing of the 1970s risks returning to the much higher crime rates of a generation ago.* We have already seen homicide rates in U.S. large cities spike upwards after 2014, likely due to the “Ferguson effect” of police holding back from confronting violent criminals, out of a well-grounded fear of prosecution or career suicide if the confrontation results in the death of a suspect.

Drug Law Enforcement Has Eased

Even before the recent calls for criminal justice reform, there had been a significant reduction in prison sentences for thousands of inmates who were serving time for drug-related crimes. Criminal justice warriors have painted a picture of a huge number of inmates in prison because of drug possession charges. This is not the case. Most criminal jurisdictions have stopped enforcing laws against minor marijuana possession. Drug trafficking and drug possession are different crimes. More people are in prison for drug trafficking than drug possession. Furthermore, many of those convicted of drug possession (a lesser crime) are drug traffickers who have taken pleas to avoid longer sentences.

Contrary to the public narrative, the majority of convicts (52 percent) are in prison for violent crimes, such as murder, armed assault, rape and so forth.¹⁰ Of course, states should look for ways to safely reduce the remaining 47 percent of inmates incarcerated for non-violent crime, and flexible sentencing might lower this number. Yet reformers should keep in mind that redefining some felony crimes as minor felonies or misdemeanors does not mean that actual crimes have not been committed. Telling victims of these crimes that they were victimized by minor felonies or misdemeanors (instead of major felonies) won't make them feel any better. Furthermore, flexible sentencing does not address the big question of what is the best way

to prevent crime in the first place. There is good evidence that putting more cops on the street and enforcing the law even for minor crimes of public disorder reduce serious crimes as well.¹¹

Racism and the Incarcerated Nation

Blacks and Hispanics do account for a disproportionate number of inmates relative to the general population – though not relative to the statistics for commission of crimes by race. And reform advocates who criticize the racial composition of prisons and jails often leave out another shocking number: *26 percent of federal prisoners are “criminal aliens”.* Controlling our southern border would radically reduce crime and incarceration.

The build-up of the criminal justice system which began in the 1970s has been falsely characterized as a plot to undo the civil rights movement. Those who think that the response to rising crime rates in the 1970s was excessive should look at homicide rates. Homicide rates doubled between 1960 and 1980 and did not begin a consistent decline until the mid-1990s.¹² From 1970 to 2005, a staggering 673,993 Americans were murdered. As criminal justice professor emeritus Barry Latzer notes, more Americans were murdered in these years than died in any war since World War II. Nearly half of these homicide victims were blacks. Sixty percent of suspected perpetrators were black, even though blacks constitute only about 12 percent of the population.

The crime rate in those years led Americans—white and black—to demand a crackdown on crime. Politicians responded to popular demand. Crime in those years was rapidly escalating, especially in large cities.

Incarceration took violent criminals off the streets. Moreover, many studies show that harsh penalties deter crime. Take capital punishment. According to one study conducted by Emory University researchers, each execution deters an average of 18 murders. Other studies have estimated that on average 3, 5 or 14 murders are deterred by each execution.¹³ Similarly, a National Bureau of Economic Research study showed that harsher penalties in California “helped reduce crime.” Why? “Because convicted criminals were serving longer sentences. . . rather than out on the streets committing crime.” California Governor Gavin Newsom might have learned from these studies. Instead, he announced a moratorium on capital punishment in his state and temporarily stayed the execution of 737 inmates on death row, many having been convicted of horrendous murders.¹⁴

Figures can be misused; and one study can be refuted by another. Still, comparing Fairfax County in Virginia to the demographically similar Montgomery County in Maryland suggests that tougher enforcement and harsher penalties do

deter crime. In 1979, both counties had a similar violent crime rate. Virginia responded with stronger measures, while Maryland remained generally more permissive. Today Virginia's Fairfax County has a much lower crime rate than does neighboring Montgomery County. In fact, Montgomery saw a 25 percent increase in serious crime recently. The rate of violent crime in Montgomery is 235 per 100,000 residents; in Fairfax it is 78 per 100,000 residents. Overall, Maryland is one of the most dangerous states in the nation. In 2007-2010, Maryland's gun-related homicide rate was much higher than Virginia's with its tougher laws.

The argument that the entire police and judicial system is racist finds expression in the National Football League player Colin Kaepernick's recent denunciation of the justice and police system as "institutional racism."¹⁵ Yet his and others' accusations belie the facts. Heather Mac Donald at the Manhattan Institute showed that in police fatal shootings of 233 blacks, only 16 of the black males were unarmed. Harvard economics professor Roland Fryer found in a 2016 study that police were more hesitant to use deadly force against blacks than whites. His findings confirmed a 2014 study by researchers at Washington University in St. Louis.

Justice and a Well-Ordered Society

Reform of the criminal justice system is warranted where appropriate. Recidivism is a major problem that should be addressed—and is being addressed in many states and local communities. Sentencing laws are worthy of re-examination. Yet, we should be cautious. John Paul Wright, a professor at the University of Cincinnati, observes that "the most effective strategies to reduce crime involve police focusing on crime hot spots, targeting active offenders for arrest, and helping solve local problems surrounding disorder and incivility. Putting predatory, recidivist offenders in jail or in prison remains the best way to protect the public."¹⁶

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Society flourishes when the rule of law prevails and people trust the system. Reducing crime in a neighborhood allows local businesses to prosper and attracts law-abiding customers and residents, which in turn further reduces crime. Thriving businesses create job opportunities for locals. This is the case for neighborhoods and nations. As Christians, we appreciate the importance of mercy and redemption, but given the perennial existence of human imperfection and evil in this world, we have a duty to protect the public while seeking justice for all.

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