

Pandemic Should Propel New Prison Reforms

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Of the numerous coronavirus lessons learned, some are silver linings in a very gray cloud.

Most businesses can incorporate work-from-home as part of their programs that add productivity, reduce commuting stress, lower office space costs, and promote energy efficiency and a cleaner environment; business travel can be exchanged by video conferences that also lessen stress and expenses, and also improve the environment; doctors can provide telemedicine that can expand access to medical care and reduce costs; and families can recreate an era-gone-by to sit down together for dinner.

One more thing is clear—we do not need as many people in jail.

Our prison-as-a-first-resort model is outdated, growing from a flawed belief that jails could rehabilitate prisoners and provide public safety when they really became warehouses for a variety of social problems. The result was an intentional or inadvertent disproportionate impact on minorities. Then, so-called sentencing reform aimed at evening out the racial imbalance sent more nonviolent defendants to prison, rather than the opposite.

Jail as the common denominator was reinforced by the 1980's federal sentencing guidelines with predictable and staggering results. Under the new guidelines regime with its numbering system, the base level of points for any offense and a dozen or more additional factors—e.g., number of victims, amount of loss, degree of planning—were calculated in a fashion that reduced the availability of straight probation or home arrest.

In August, the Sentencing Project reported that there were as many as 2.2 million Americans in jail in 2018.[1] In the “America First” era, this actually makes us number one. To put this in perspective, our country has about 5% of the world's population but nearly 25% of the world's prisoners.[2] The company we keep in jailing so many people includes China, Russia, Turkey and Iran—hardly countries to emulate. And then came COVID-19.

From the beginning of the virus' spread, for public health reasons, federal, state and local officials of both major parties and from across the political spectrum have supported programs to thin prison populations. Just as less air,

car travel and consumption of fossil fuels have resulted in fish being seen after years in the canals of Venice, Italy or the Los Angeles skyline being visible for miles, so has the release of prisoners identified unexpected benefits.

Prisons and their employees have fewer inmates who require staffing for security and supervision. And, people released can start their reentry into jobs and the community, and return to being productive members of society. There is no disagreement that individuals who are real dangers to themselves and others will still need to be imprisoned—although what that confinement should entail is another subject—but we now have proof that many nonviolent criminals do not have to be jailed.

The coronavirus cause for evaluating who needs jail followed one of the only recent bipartisan legislative achievements—the First Step Act. That law, intended to remedy the overuse of mandatory minimum sentences, disparities created by the federal sentencing guidelines—especially for some drug offenses—and improving conditions in and transition out of prison has had a significant impact.

As Federal Bureau of Prisons officials reported, 3,100 people have been sent home from prison after demonstrating good behavior. In addition, a little over 2,100 people have received sentence reductions because an earlier law—the Fair Sentencing Act—was made retroactive.[3] Past inequities in original sentences, for example between those convicted of crack versus powder cocaine violations, have been corrected.[4]

However, the new laws are not being applied equally by judges and prosecutors, and long-standing systemic biases and politics can affect the decisions about who is released early.

As one example, the first federal inmate to die of the coronavirus had been sentenced to 27 years in prison for a nonviolent drug charge because of an enhancement for acting within 1,000 feet of a junior college. The person died a month after a judge denied his First Step application, citing his criminal history where many others released in this same period also had prior offenses.[5]

The other often-cited statistic about the impact of our go-directly-to-jail system is its costs. Estimates are that we spend an average of about \$33,000 per person per year for each person in jail.[6] It does not take a lot to imagine better uses for those funds in real rehabilitation, treatment, training, education and reentry programs or to relieve other needs in state and local budgets. This reevaluation could also lessen the influence of the private prison industrial complex—businesses that capitalize and flourish in a system that has to privatize jailing because the demand is greater than resources.

So, what would new legislation—the Second Step Act—include? Sentencing guidelines—which too many judges still apply as mandatory—would expand supervised probationary, nonjail sentences before incarceration kicks in, and judges would have more discretion to change the jail-first paradigm by using work, rehabilitation and other alternatives to traditional sentences. Every mandatory minimum statute would be reevaluated because, with the proper sentencing criteria, serious offenses can be addressed without that rigid method.

Government agencies with penal responsibilities would work with legislatures to reformulate budgets away from bars and guards, and toward employment, training or retraining, and health and psychological programs for an inmate's future. Employers who provide work and landlords who provide housing for ex-offenders could be given tax credits or other incentives to do so.

We would create a transparent, fair and equitable process, for example modeled on civilian review boards, to review every application for release and sentence reevaluation and encourage the president and governors to use their powers of executive clemency if existing laws or sentences did not allow merited releases.

Post-COVID-19, there will likely be more use of alternative fuels and transportation, a means to provide health care to more people, a greater use of virtual teaching, meetings, business and legal proceedings, and better preparation for the next global-health crisis. Another result should be the gains from fewer people in jail.

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