

Commission on Criminal Justice

Final Report

Recommendations to overhaul the U.S. criminal justice system

INTRODUCTION

With a prison population of more than 2.2 million, the United States leads the world in incarceration. Numerous studies have demonstrated that the economic burden of incarceration far exceeds the cost of investing in preventative measures – high-quality education, community policing, and mental health services – and has long-term implications for individuals who have been incarcerated, their families and local communities.

An overhaul of the criminal justice system must include the adoption of community-based models, the decriminalization of substance abuse and an acknowledgment of the impact that institutional racism plays in the disproportionate profiling, arrest, prosecution, and sentencing of Black and brown people within America.

The Millennial Policy Initiative Commission on Criminal Justice (Commission) recognizes the discriminatory racial and socioeconomic factors that catapult youth as young as three years old into the school-to-prison pipeline, the dangers of monetizing freedom and criminalizing poverty through bail reform and other costs associated with arrest and conviction, and the obstacles that formerly incarcerated people face when reintegrating into society.

The members of this Commission convened for four months to assess and identify three key policy solutions to create greater equity within the criminal justice system:

1. **Implement positive behavioral interventions and supports (PBIS) within schools.**
2. **Enact the Pretrial Integrity and Safety Act and the No Money Bail Act.**
3. **Restore voting rights to formerly incarcerated persons and adopt Ban The Box policies.**

SCHOOL-TO-PRISON PIPELINE

The American Civil Liberties Union (ACLU) defines the school-to-prison pipeline as a national trend where children are funneled out of public schools and into the juvenile and criminal justice systems.¹ As a result of zero-tolerance policies and increased police presence in schools, suspensions, expulsions, and arrests for misbehavior in school have skyrocketed. During the 2013-2014 academic year, nearly 5.5 million students nationwide were suspended or expelled.² Police in schools increased 38 percent from 1997-2007, and by 2016, nearly 42 percent of high schools had School Resource Offices (SROs), resulting in more arrests.³ Schools with SROs arrest children for “disorderly conduct” at almost five times the rate of schools without SROs.⁴ A majority of these students are expelled or arrested for nonviolent first offenses, including throwing a temper tantrum, scribbling on a desk, and playing music on a cell phone.⁵

The school-to-prison pipeline disproportionately impacts students of color and those with mental health disorders. According to the Advancement Project, one out of every 20 White students will be suspended at least once, while the likelihood for Latino and Native American students increases to one in 14 and one in 13, respectively.⁶ The number skyrockets for Black students, where one out of every six youth will be suspended – more than three times the rate of their White peers.⁷ Although research has shown that there is minimal difference in behavior among youth, Black students routinely receive harsher punishments for less serious behavior.⁸ Students with disabilities and youth identifying as LGBTQ+ are also far more likely than other students to be suspended or

expelled.⁹

We must dismantle the school-to-prison pipeline. Administrators, educators, law enforcement officers, and policymakers can no longer rely on policies and practices that punish youth for normal adolescent behavior or for behavior that may be result from a disability.

Positive Behavioral Interventions and Supports (PBIS) is a comprehensive, evidence-based framework that improves school safety and promotes positive behavior among students.¹⁰ PBIS results in improved test scores, grade-point averages, time management, goal setting and problem-solving skills, lowers rates of absenteeism and suspensions, and can lead to a healthier school climate.¹¹ The Commission recommends that schools implement PBIS and that state and local governments provide them with the financial support and human resources to produce highly-effective programs.

PBIS is best practice for all students, including students with disabilities. The Individuals with Disabilities Education Act (IDEA) credits PBIS with preventing exclusion and improving educational outcomes for students with disabilities.¹² Unfortunately, the IDEA has not been reauthorized since 2004. The Commission recommends that IDEA be updated to respond to current data and findings on the use and impact of punitive measures, including instituting civil and criminal penalties when banned practices, such as restraints and seclusion, are used as discipline for minor infractions; limiting the use of suspension and expulsion as disciplinary measures; and mandating training on de-escalation and redirection in a crisis.

There are a number of strategies to reduce school arrests, including removing SROs from schools and eliminating law enforcement responses to misbehavior that can be better addressed by school counselors, nurses, and school psychologists.¹³ In Clayton County, Georgia and Jefferson County, Alabama, stakeholders from the school system, law enforcement, and the juvenile court have developed protocols requiring a series of graduated responses to youth misbehavior in schools before a referral is made to the juvenile justice system.¹⁴ The Commission recommends that other jurisdictions adopt similar protocols.

To end the school-to-prison pipeline, schools must put an end to zero tolerance policies, but they cannot stop there. Suspension, expulsion, and arrest must become the rare exception, rather than the norm, and should be replaced with strategies that create a positive, supportive and inclusive school environment.

BAIL REFORM

Many people who are charged with a crime must post bail in order to be released from jail while they await court hearings. This type of secured bond is called “cash bail” or “money bail.”¹⁵ The purported twin goals of bail are to keep dangerous people off of the streets and ensure that those accused of a crime show up to their court dates. A judge or magistrate will typically set the bail amount or it will be determined by an algorithm called a risk-assessment tool. Individuals who are deemed to be a danger to the public or a flight risk are charged higher rates to obtain their freedom.

To post bail, an individual promises to the court that if he or she does not show up at the next court hearing, he or she will pay the court a certain sum of money. The accused can promise to pay the full amount themselves, or if they cannot afford to do so, they can use a bail bondsman. Bondsmen charge those accused of a crime a fee, often 10 percent of the bail amount¹⁶, and in exchange, the bondsman agrees to pay the full bail amount to the court if that individual does not show up to his next hearing and even if he or she is acquitted of all charges. In most cases, he or she will have forfeited the fee to the bail bondsman even if he or she does appear at the next hearing. Individuals can pay the bail amount in full or if they cannot afford the full amount, they can pay a smaller bond to a bail bondsman who will pay the remainder to the court.¹⁷ When an accused person relies on a bail bondsman, he or she must eventually repay the debt over a period of months or, in some cases, years. This creates a system where the bail bond industry generates billions of dollars each year at the expense of individuals who are likely already under-resourced.

Many people accused of crimes cannot afford to pay a bail bondsman. Those who cannot make bail must wait in jail for their court date. As many as 400,000 people are held in local jails every day awaiting trial, which is more than the 293,000 people who are held in local jails following conviction.¹⁸ Research shows that those who remain

incarcerated while awaiting their trial are less likely to win their court cases. They are more likely to be convicted of a felony, receive a sentence of incarceration, and be sentenced to a longer length of incarceration.¹⁹ Thus, the bail system disfavors low-income people and helps create a criminal legal system that, as social justice advocate Bryan Stevenson said, “treats you better if you’re rich and guilty than if you’re poor and innocent.”²⁰

Another challenge with the bail system is that it produces and perpetuates racial disparities, whether it be the implicit bias of a judge or a risk assessment tool that sets the bail amount or requires pretrial detention. Judges, like all people, can be racially biased and may rely on dangerous racial stereotypes to assess risk, either consciously or subconsciously. Risk assessment tools can also further racial disparities since many rely on factors that are closely related to socioeconomic status and race, including the number of previous arrests and prior failures to appear in court, both of which are tied to the fact that marginalized communities are more heavily policed and people from these communities may encounter added obstacles to attending court.

Racial disparities in the bail system have long been studied. One recent study found that both Black and White judges in Miami and Philadelphia show bias against Black people who have been accused of crimes.²¹ According to the study, Blacks are 2.4 percentage points more likely than Whites to be detained while awaiting their court dates.²² It also found that the average bail for Black people accused of crimes is \$7,281 higher than that of their White counterparts.²³ Similarly, a recent study examining New York courts found that while 54 percent of Whites were released without bail, only 37 percent of Blacks and 32 percent of Latinos had the same fortune.²⁴

These studies are consistent with other research in this area showing that low-income people of color pay higher bail rates, which translates to greater economic barriers and further deprivation of wealth. For example, a 2017 report by UCLA’s Million Dollar Hoods Research team found that from 2012 to 2016, the Los Angeles Police Department imposed \$19 billion in cash bail against people it arrested.²⁵ During this time, people of color who could pay bail were more likely to pay higher bail deposits to bail bondsmen for their release. Latinos paid \$92.1 million in deposits and Blacks paid \$40.7 million; Whites paid just \$37.9 million during the same period.²⁶

The cash bail system monetizes freedom, which is antithetical to the ideals of a democracy, particularly one that values liberty above all else and proclaims to give a presumption of innocence in the justice system. It also discriminates against low-income people and people of color, especially low-income people of color. Hence, the Commission recommends that the use of cash bail cease and that the pretrial detention system be corrected.

At the state and local level, jurisdictions should end cash bail. Jurisdictions should implement low-cost, individualized methods to ensure that people accused of crimes are present for their court dates, such as sending text message reminders. Pretrial detention should be considered a last-resort, and should only be imposed following a thorough hearing that respects the presumption of innocence.

Many jurisdictions are turning to algorithmic risk assessment instruments (RAI) to determine who is released and who is detained pre-trial. Some jurisdictions have seen significant decreases in pretrial detention as a result of the RAIs; however, de-carceration is not an automatic outcome of risk assessment instruments. Further, most RAIs depend on data that appears objective, but is itself, seeped in racial bias. For example, static factors – such as age at first arrest and number of prior arrests – are heavily influenced by how a community is policed. In a predominately-Black community, a young person may be regularly stopped (e.g., “stop and frisk”) resulting in a marijuana possession charge. However, a young person with marijuana in a predominantly-White community that is not overpoliced is unlikely to be stopped, and therefore, unlikely to be criminally charged for the same behavior. That discrepancy in policing translates into a higher score on the RAI for the young person from a predominantly-Black community.

If risk assessment instruments are used, they should be specifically designed to reduce unwarranted racial disparities. Individuals who score as “high-risk” on an RAI should be recommended for a pre-trial hearing with appropriate procedural safeguards; they should not be automatically recommended for detention. All RAIs should be transparent about the underlying algorithm; individuals who are detained should be told how they were determined to be “high risk” and should be able to challenge this label in court.²⁷

In January 2017, New Jersey implemented the Criminal Justice Reform Act, eliminating cash bail for most defen-

dants. After a challenge by the bail bond industry, the constitutionality of the legislation was upheld by the United States Court of Appeals for the Third Circuit in July 2018. The District of Columbia and City of Atlanta, Georgia have enacted similar measures.

Members of Congress must support bail reform efforts at the federal level, beginning with supporting the Pretrial Integrity and Safety Act of 2017 (S. 1593 in the Senate and H.R. 4019 in the House) and the No Money Bail Act introduced by Sen. Bernie Sanders (I-VT) in the Senate and Rep. Ted Lieu (D-CA) in the House. The first bill would replace bail systems that rely on cash bail with fairer, individualized pretrial assessments and implement a National Pretrial Reporting Program to collect data on the processing of defendants across U.S. courts. The latter bill would end money bail in federal criminal cases and provide grants to states that want to implement alternatives to money bail in the pretrial system. It would also withhold grant funding from states that continue to use money bail, a critical first step.

BARRIERS TO REENTRY

Upon release from prison, formerly incarcerated persons (FIPs) face legal barriers that limit opportunities for employment and training, restrict access to housing and student loans, and deny civic engagement by barring voting. The barriers to reentry following incarceration are compounded by stereotypes of untrustworthiness and dangerousness that make employers and educators inquire early on in selection processes about criminal backgrounds, and less inclined to extend opportunities if a criminal background is discovered.

The National Inventory of Collateral Consequences has identified tens of thousands of state and federal statutes that impose limitations. “[Collateral consequences] have become more pervasive and more problematic in the past 20 years for three reasons: they are more numerous and impactful, they affect more people, and they are harder to avoid or mitigate.”²⁸ Collateral consequences continue to punish FIPs after release and threaten efforts to rehabilitate and comply with parole requirements, contributing to a 68 percent re-arrest rate among those released from prison.²⁹

Collateral consequences resulting from a criminal record thrive due to associated biases. Efforts to eliminate collateral consequences should therefore prioritize people-centered language instead of terms such as “ex-felons” which stigmatize and re-create the vicious cycle.

Tackling housing challenges that affect FIPs is paramount in building a comprehensive criminal justice reform movement. In 1998, Congress passed the Quality Housing and Work Responsibility Act, which enabled Public Housing Authorities (PHAs) to determine whether a housing applicant was a potential safety risk. Subsequent laws have given PHAs increasingly broader power to ban and evict individuals with criminal records.³⁰

PHAs exclude FIPs from housing by 1) using excessively long “look back periods”; 2) failing to consider mitigating circumstances that would make the housing applicant’s profile more favorable; and 3) “one strike” policies to automatically deny housing.³¹ Reform must remove these barriers. Federal entities must also provide more prescriptive guidance that discourages overly exclusive housing screening policies.³²

Supportive housing models combine permanent, affordable housing with supportive services. One example is the Oxford Housing Model, which combines peer-led recovery with housing.³³ Research shows that individuals with substance abuse histories living in Oxford Houses are less likely to reoffend and use substances, and more likely to be employed.³⁴

FIPs experience a 27 percent unemployment rate – higher than the total U.S. rate during any historical period, including the Great Depression.³⁵ Ban The Box policies, adopted in 31 states and 150 cities, are designed to give applicants a fair chance at employment by delaying employer inquiries about an applicant’s criminal record.³⁶ Additionally, some jurisdictions have incorporated guidance from the 2012 U.S. Equal Employment Opportunity Commission on the use of arrest and/or conviction records in employment. The Commission recommends adopting comprehensive, fair hiring practices, in addition to creating educational and employment training opportunities in correctional facilities.

Restoring the right to vote is a crucial piece of reintegration.³⁷ In 2016, 2.47 percent of Americans and 7.44 percent of African Americans were disenfranchised, or unable to vote because of a conviction,³⁸ with 27 percent

residing in Florida.³⁹ Legislation in California and Illinois would mandate voter education and in-person and absentee voting in jail for all eligible incarcerated voters. Similar initiatives should be championed across the nation.

Expungement and sealing provide mechanisms to reduce the consequences and stigma of a criminal record. Thousands of FIPs are ineligible based on charge, and others do not take advantage of this opportunity because they don't know how to access it or it's too expensive. Some states charge \$500 or more for an expungement. Between 2009 and 2014, 31 states and the District of Columbia passed more than 55 pieces of legislation to expand or facilitate expungement and sealing.⁴⁰ At the legislative level, the Commission recommends that states enact more statutes to broaden eligibility to include more misdemeanors and felonies, reduce the waiting period, make expungement more widely available for juveniles at little to no cost, and reduce the cost to apply. More civil legal aid groups are needed to increase access to expungement and help FIPs navigate the process cheaply. Cities should partner with these groups to do outreach and host expungement events.

CONCLUSION

The criminal justice system disproportionately and unjustly targets people of color, those with disabilities, and individuals who are low-income. Comprehensive reform must include mitigating the role that racial and implicit biases play in the suspension, expulsion and arrest of students at the elementary and secondary level; removing economic incentives for the criminalization of individuals who are low-income; and providing formerly incarcerated persons with meaningful opportunities to enjoy the unabridged rights of citizens, including the right to vote, to gain employment, and to live in safe and adequate housing.

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