

POLICING, PREJUDICE, AND POLICIES:  
THE SHAPING OF THE COVID-19 PANDEMIC  
BEHIND BARS

by

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## **An Abstract of the Thesis of**

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The intersection of two crises, the Covid-19 pandemic and mass incarceration, have culminated in an epidemic of unmatched proportions. While mass incarceration has made the correctional population more vulnerable to the spread of infection, creating and facilitating Covid-19's rapid spread behind bars, the pandemic has highlighted the nation's reliance on punishment and the unintended yet deadly consequences. This thesis uses Louisiana as a case study to better understand why prisoners were hit hardest by the Covid-19 pandemic and how mass incarceration has contributed. Looking back at the history of tough-on-crime policies enacted in the mid-20th century, deeply entrenched prejudice rooted within society, and policing on the basis of socioeconomic and racial characteristics, one can begin to understand how the effects of the Covid-19 pandemic, a supposedly natural phenomena, is almost entirely man-made.

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## **Introduction**

### **How did it come to this?**

I was first introduced to this topic last summer when I interned with the Fair Fight initiative in Georgia. There I began working with an amazing team of pro-bono lawyers whose mission was to help inmates in whatever way they could during the Covid-19 pandemic. Just a few weeks in and I was a part of a monumental case against the East Baton Rouge Parish Prison in Louisiana, seeking to improve conditions behind bars. My job was interviewing inmates about what they were experiencing behind bars and writing key witness declarations to be presented in court. The more inmates I spoke to, however, the more I realized that the story being told by governors, parole boards, and wardens was actually quite different from what I was hearing from the inmates themselves. I listened for hours, jotting down words I never thought imaginable: “rats bigger than possums,” “24 people in one room,” “poor medical care,” “no social distancing.” I asked myself: Why are inmates exposed to these kinds of conditions? Why does it feel like no one is helping them? How did it get this bad? My thesis looks to answer these questions.

### **A crisis of unmatched proportions**

Two crises – the pandemic and mass incarceration – have unveiled the existence of historically entrenched social injustices and health inequities within the prison system. While deeply rooted social inequities have left individuals vulnerable to racism, poor health, and poverty, political and social apathy and subsequent policies that govern opportunities and services have overfilled prisons with some of society's most

vulnerable. These vulnerable individuals, who often have the least political sway and voice, are overlooked by society, particularly in times of crisis. As a result, federal and state correctional institutions have both been decimated by Covid-19. Inmates have endured some of the pandemic's worst Covid-19 outbreaks and the highest cases of mortality in the United States. Covid-19, coupled with mass incarceration, exposes deeply entrenched social injustices, showing how decades of targeted policing, ingrained prejudice, and punitive policies have led to a criminal justice system and a society plagued with inequities. The two crises taken together have been nothing short of a human tragedy for incarcerated individuals.

In order to understand the crisis of mass incarceration, it's first imperative to ask: What is the purpose of incarceration? Is it retribution, incapacitation, deterrence, rehabilitation, or a combination of all four? Incarceration should be a balancing game where the ebb and flow of these outcomes shift with the crime committed. That said, today, retribution and incapacitation sit at the forefront of the criminal justice system leading to unfair and overly long sentences.

Society has become reliant upon incarceration as a way to deal with non-conformity. The current crisis of incarceration stems largely from society's use of confinement as a way to punish drug addiction, mental illness, poverty, and race just as much as crime itself. Who society punishes therefore has little to do with the criminal act and much more to do with how one looks and where one sits on the social hierarchy. Through my research, I have determined that policing, prejudice, and policies perpetuated the current model of incarceration.

Through police brutality, stop-and-search, or arrests, policing and the law enforcement agents who carry these actions out are often individual's introduction into the criminal justice system. Policing is therefore an essential part of mass incarceration. Which neighborhoods police target, which crimes are the focus of attention, or who police determine look "out of place" can ultimately determine who ends up behind bars (Welch, 2007). More often than not, on the receiving end are drug addicts, persons of a lower socioeconomic status, and minorities (Alexander, 2010). Incarceration diminishes life chances, takes away employment opportunities and familial connections, and leaves individuals caught in a cycle of poverty, illness, and, subsequently criminal behavior. Thus, policing is not only one of the ways the cycle of incarceration begins, but also how it is perpetuated.

Even during the Covid-19 pandemic, policing of low-level offenses has continued despite high rates of infection behind bars. The result of the constant cycling of individuals through correctional facilities has elevated rates of infections. Society's reliance on arrests to deal with individual transgressions has led to transmission of the virus into prisons and jails and back into the communities to which these individuals return.

Biases not only act as the basis of policing to help to determine who ends up behind bars but also inundates virtually every aspect of the criminal justice system helping to determine how long they remain. Within the system, juries, prosecutors, and judges make decisions informed by their implicit and explicit biases and are heavily influenced by those outside of general proceedings such as politicians and general



citizens. Racial and class-based prejudice shape society's perceptions of those behind bars as deadly criminals, regardless of the crime they've been accused of committing.

Whether during times of crisis or not, inmates are largely left to suffer in silence. During Covid-19, debates around vaccines and prison release have often been shaped as a debate of public health over public safety. Public safety won, and for many inmates their punishment became severely disproportionate to the original crime committed. Thus, prejudice has helped shape who remains behind bars, and in many cases who dies behind bars.

Using prejudice to fuel policing and policies, politicians have abetted the growth of prison populations into the overcrowded, underfunded, petri dishes we see today. An already vulnerable population found their resources stripped, medical care decreased, and their sentences lengthened to previously unheard of numbers. Poor physical conditions, untrained staff, and a nation bent on locking them up and "throw[ing] away the key" is the new normal for correctional institutions (Alfred, 1965). The cost of tough-on-crime politics is apparent as the nation's prison population is sicker and older than it has ever been. As a result, Covid-19 has spread behind bars like wildfire, and rates of infection and death have been unmatched.

## **Whose Behind Bars and Why are They Overrepresented?**

Rather than treat society's aversion to persons afflicted by poverty, racism, and substance abuse, those impacted by these issues are overwhelmingly stopped, arrested, and sentenced. Consequently, correctional settings house some of society's most vulnerable individuals – sometimes for life. During a pandemic, this has proven to have disastrous consequences. In order to understand how Covid-19 has come to affect those behind bars at disproportionately high rates, it is first essential to understand *who* is behind bars and *why* they are overrepresented.

### **Poverty leads to incarceration**

Compared to the rest of the United States population, people in prisons and jails are disproportionately impoverished. Adults whose income is at or below the poverty line are arrested approximately three times the rate of those whose incomes are twice that of the poverty line (Schmitt, 2017). At the same time, charges for persons afflicted by poverty have proven to be more severe. Individuals earning 150 percent or less of the federal poverty line are almost sixteen times more likely to be charged with a felony than those above that amount (Hayes, 2020). Today, over three-fifths of those entering the nation's justice system report their annual income as approximately \$11,000 – well below the federal poverty line (Sawyer, 2020). Likewise, 60 percent of men and 73 percent of women are determined to be impoverished prior to arrest, despite the national average of poverty being less than 12 percent of the population (Hayes, 2020).

Poverty's role in mass incarceration is essential to understand why it is overrepresented in the population behind bars.

Poverty has long been a heavily policed and punishable offense in the United States – from homelessness to the inability to pay court fines and bail – leading to an overrepresentation of the poor within the criminal justice system. While poverty is not a direct cause of crime, the circumstances which emanate from impoverishment create conditions which breed criminal behavior. The roots of poverty – economic, social, and familial – are complex and interrelated. Broadly defined, poverty is having a lack of financial resources; however, poverty also manifests itself in a lack of educational, employment, and housing opportunities. When it comes to conviction, persons with a college degree of any kind are found to receive sentences roughly eight percent shorter than those without a degree (Hayes, 2020). Because income level and educational level are highly correlated, this suggests that harsher sentences are imposed on persons from a lower socioeconomic status. In addition, coming from a lower income household can increase the likelihood of incarceration. A young boy whose family represents the lower ten percent of income distribution is 30 percent more likely to end up behind bars than a boy from the top ten percent (Schmitt, 2017). Even growing up in a single-parent home doubles the chance of imprisonment for children in these aforementioned income brackets (Schmitt, 2017). Children from poverty-stricken families even have a higher rate of developmental issues which can lead to poor impulse control and low educational attainment, both of which contribute to the likelihood of committing a crime. Lastly, individuals who grow up poor are more

likely to live in crime laden neighborhoods with high rates of unemployment and impoverishment, all factors which increase the risk of incarceration.

Poverty does not just predict the likelihood of incarceration, it is frequently the outcome. Incarceration has been found to increase the United States' rate of poverty by approximately 20 percent (DeFina, 2009). Time behind bars and subsequent lost wages results in reduced lifetime earnings by up to half a million dollars. Similarly, reduced lifetime earnings can be compounded through generations and helps to create generational wealth disparities (Moore, 2021). At the same time, criminal records can impinge on the ability to receive public benefits such as SNAP and housing assistance. Because SNAP has been shown to significantly reduce poverty, incarceration directly contributes to impoverishment. Incarceration and a criminal record can decimate opportunities by creating employment barriers. When presented with two identical resumes, the only difference being one includes a criminal record, research has shown that having a criminal record significantly decreases the chances of receiving a call back (Pager, 2003). A year after release the majority of formerly incarcerated remain unemployed (Rodriguez, 2011). The inability to get a job or governmental assistance means homelessness becomes the only option available for an incarcerated individual and their family. Over the past few years, laws that criminalize behaviors related to homelessness such as bans on begging, loitering, and sleeping in public or in one's car, have become more common (Bauman, 2014). The cycle between homelessness and incarceration is never ending as homelessness increases the rate of incarceration more than eleven times and

incarceration inflates the risk of homelessness by ten times (Hayes, 2020).

Incarceration can also have a ripple effect on the family they come from. By removing a primary earner through incarceration, the chance that the entire family falls below the poverty line is 40 percent greater (DeFina, 2009). Additionally, families are often forced to support an incarcerated family member by paying for commissary items, court fees, and phone calls (Kukorowski, 2013). The cycle between poverty and incarceration is almost impossible to break for many offenders.

Imprisonment for the inability to pay a debt or a fine owed to the courts has been ruled unconstitutional, yet a significant share of those behind bars have been arrested for the very inability to pay. Legal infringements are often punished by court fines and defendants are often required to pay for case-related jury, filing, and other fees (Hayes, 2020). In the vast majority of states, defendants are obliged to pay for their court-appointed lawyer regardless of guilt (Shapiro, 2014). Likewise, while forty-one states require sentenced prisoners to pay for room and board, every state requires home monitored convicts to pay for their monitoring device (Shapiro, 2014). A failure or inability to pay these fines often results in imprisonment or extending the stay for those already behind bars. For many municipalities, fees and fines have been a way to raise revenue and have increased considerably over the past twenty years. Local governments on average receive almost a quarter of their revenue by way of court fines and accrued costs (Atchison, 2019). In 2010, over 10 million individuals nationwide owed over \$50 billion in dues, expenses, and fines to the criminal legal system (Hayes, 2020).

The nation's growing levels of income inequality have also proven to predict crime rates. Studies have shown that greater inequality leads to greater levels of crime (Luther, 2017). Over the past few years, Louisiana has seen widening income inequities between the states richest and poorest as well as race-based differences in income levels. For instance, the state's federal poverty rate increased by almost one percent from 2018 to 2019, keeping Louisiana's poverty rate among the highest in the nation (LBP census, 2019). Last year, while the median income for Caucasian households was around \$62,000, African Americans household income was just half that, coming in at around \$32,000 (LBP census, 2019). Those living below half the federal poverty line (under \$13,000 for a family of four) increased to almost 9 percent in 2019, significantly higher than the national average which sits at 5.5 percent. Similarly, African American living in Louisiana were two times as likely to live in deep poverty (LBP census, 2019). A widening gap between the states poor and rich, black and white, helps explain disparities in crime rates between races, and also between the nation and Louisiana itself.

Bail is another way in which the criminal justice system punishes poverty. Without any financial incentive whatsoever, the vast majority of participants appear at court when required; however, the reason some do not is usually because of a lack of transportation, inability to miss work, or suffering from an illness (Smith, 2012). A quarter of those incarcerated in the United States are being held pre-trial, largely due to their inability to pay their bail bond (Liu, 2018). This is because the median price of bail amounts to almost \$12,000, the equivalent of

almost nine months' rent for a typical defendant (Liu, 2018). The majority of persons at the bottom quarter of the earning distribution don't own enough assets to put down even the bond premium – traditionally around 10 percent of the total bail amount – let alone the entire amount (Hayes, 2020). As a result, low-income defendants are significantly more likely to face the mental and physical harms of pre-trial confinement such as illness or violence. Bail amounts are also discriminatory against people of color who on average make less than the average Caucasian and who disproportionately receive higher bail amounts for similar crimes (Arnold, 2018). Even the likelihood of being assigned bail is almost four percent greater for African American defendants compared to Caucasians, and their average bail is over \$10,000 more for similar crimes (Arnold, 2018). It's easy to conclude that jails are a poor person's system; poor people are left to sit in jails while wealthy individuals roam free until their court date.

One might assume that pre-trial incarceration must aid in public safety or why else would it be a valid form of social exclusion. This, however, is not the case; in fact, pre-trial incarceration does just the opposite. It can lead to a greater risk of recidivism due in large part to a person's network becoming destabilized (Brinkley-Rubinstein, 2020). Nearly three-fourths of those held pre-trial are simply accused of low-level and non-violent crimes making them a minor threat to public safety (Sawyer, 2020). At the same time, inside jails there are almost three times as many people who have not been convicted of a crime than those who have (ACLU, 2019). With the assumption that one is innocent until proven guilty, these individuals would also represent a non-threat to those outside of prisons. Despite

findings that cash bail actually means a higher likelihood a defendant will fail to appear in court, and the lack of evidence that cash bail increases community safety, its use continues to grow nationwide (Liu, 2018).

In Louisiana, the decision to release pre-trial individuals is often based solely on how much money an individual has, not the danger they pose to society. Louisiana jails defendants at a rate of 381 per 100,000 residents, one of the highest rates in the nation, and significantly more than the national average of 229 per 100,000 (Skene, 2021). The median bail is almost \$25,000 in a state where the median annual income is just under \$27,000 (ACLU, 2019).

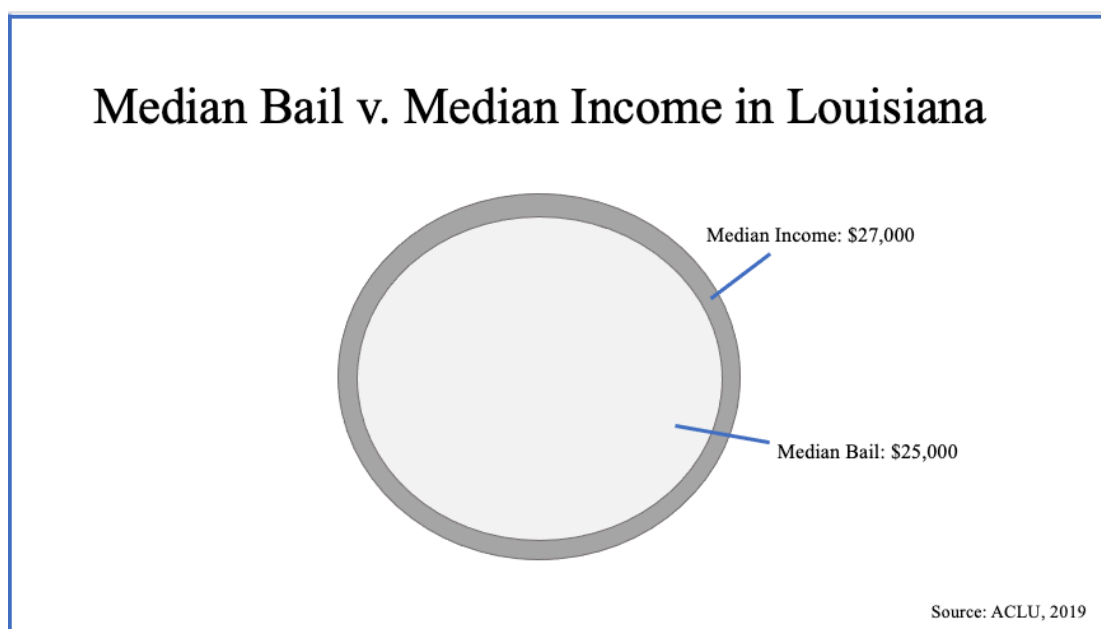


Figure 1: Median Bail v. Median Income in Louisiana

Because 20 percent of persons in Louisiana live below the poverty line, being jailed is an especially cruel punishment (ACLU, 2019). While formal charges across the country are typically filed within 48 hours, Louisiana prosecutor's offices spend approximately 20 times longer before reaching a decision (Moore, 2020). The



slowness of the pre-trial process clogs the system. Pre-trial detainees typically spending over a month behind bars before prosecutors even decide whether to move forward with the case (Toohey, 2019). The outcome is an exorbitant number of pre-trial defendants who remain behind bars far longer than they should, costing the state an estimated \$290 million extra per year not to mention the damage done psychologically, financially, and emotionally to each defendant (ACLU, 2019).

### **Poverty and the cycle of addiction**

The cyclical nature of poverty and drug use at times make them inseparable from one another. It is the incarceration of both which perpetuates this cycle between addiction and poverty; for instance, a person might use drugs to cope with financial burdens. Poverty can also be the result of a drug addiction which leads a user into immense debt (Hayes, 2020). Just ten years ago, almost half of all homeless adults had chronic substance use issues (Paquette, 2011). This number has continued to grow. Of inmates who were homeless prior to their incarceration, almost 80 percent showed symptoms indicating drug use or dependency (Paquette, 2011). People who struggle with unemployment also struggle with addiction at approximately twice the rate of full-time workers (Abraham, 2020). About 20 percent of those on welfare report illicit drug use each year, although that is likely undercounting the incidence (Abraham, 2020). Recovering from substance use is also statistically unlikely for those who are poverty-stricken. An individual who earns less than \$70,000 per year is over three times more likely to

recover from a substance abuse issue than someone who makes under \$20,000 annually (Hayes, 2020). A lack of fiscal and financial resources is often the number one reported reason for not receiving treatment. Recovering from drug use is difficult outside prisons due to the time and cost associated. It is almost impossible behind bars. In a 2017 report, nearly half of all inmates reported that, “It was easy to get drugs into their prison” (Bronson, 2017). In addition, the provisions for inmates suffering from drug addiction are entirely insufficient behind bars, creating a cycle of drug dependency and crime, and pushing people further into the criminal justice system.

### **Physical illness**

Nationally, the incarcerated population is more predisposed to illness than the general populace, with over four times the rate of physical health problems. Those with physical illnesses are not incarcerated due specifically to their health status, but one's socioeconomic status is highly correlated to a person's health and likelihood of incarceration (Beaudry, 2020). Where one lives, works, or how much they earn drastically affects whether one has access to acceptable health care and how likely one is to be incarcerated. Having less access to nutritious food, forced to live in unsanitary, crowded housing, and having little to no healthcare heavily influences how likely one is to contract an illness behind bars. Those behind bars face even higher risk due to their vulnerability. The burden of poor health outcomes means these inmates are more likely to suffer from airborne illnesses and infectious diseases like tuberculosis and HIV (Maruschak, 2015). Inmates are

roughly two times more likely to have high blood pressure, heart problems, or diabetes than those outside of prison (Maruschak, 2015). Almost 45 percent of inmates at any given time have a chronic condition compared to under 30 percent in the general populace (Maruschak, 2015). More shockingly, almost 22 percent of prisoners and 15 percent of jail inmates report having Tuberculosis or a sexually transmitted infection (STI) compared to just 5 percent in the general populace (BOJ, 2011). For every single infectious disease, inmates are more likely to contract it in prison no matter how long their stay, than someone who doesn't go to prison or jail during their lifetime. Alex Villanueva, a Sheriff in a Louisiana Parish Prison has described the jail population as vulnerable "just by virtue of who they are and where they're located" (Strassle, 2020). Due to correctional challenges such as resource limitations, overcrowding, and under trained staff, addressing these conditions is often challenging.

### **Mental illness**

For years, the criminal justice system has become the default solution to managing the nation's mentally ill. After arresting someone suffering from an untreated mental health crisis, law enforcement officers have relatively few options of where they can take them: to jail or an emergency room. This has created a significant strain on limited resources within both emergency centers and jails and has forced jails to become de facto behavioral crisis units. Today, approximately seventy percent of prisoners and seventy-five percent of all jail inmates have a mental health disorder (Batia, 2016). Drug use is heavily associated

with higher rates of poverty due to its effects at the educational, occupational and social level. While those with mental illness are not necessarily incarcerated due to their illness, many still find themselves behind bars at a much higher rate than those without a mental illness (Torrey, 2010). Because jails have become a place of punishment and retribution, jails have remained understaffed and ill equipped to handle such individuals. The resources needed to provide medical and behavioral health assessments and treatment behind bars are wholly missing. As a result, nearly one in five inmates diagnosed receive no mental health care while incarcerated, care which many desperately need. The lack of services and staff has resulted in tragic outcomes, including high rates of self-harm, suicide, and the exacerbation of mental illness (Batia, 2016). The rate of self-injury has doubled behind bars over the last ten years. Today, self-injury occurs at an average rate of 117 cases a day (Batia, 2016). The proper standard of care is only possible through frequent monitoring and the use of segregation units to ensure inmate safety, an impossibility given the current level of resources.

### **Racial disparities behind bars**

While poverty has proven to be an extensive part of the story of mass incarceration, data suggests that even after accounting for poverty, race disparities exist within the criminal justice system. The legal system continues to operate in a way that systematically disadvantages people of color (Smith, 2012). In virtually every element of the criminal justice system, minorities have more police encounters, and are burdened with higher bail amounts and longer sentences than

Caucasians (Kutateladze, 2014). African Americans in particular have been highly affected by mass incarceration, and make up a disproportionate number of people behind bars in virtually every state (ACLU, 2015). In the United States, while only 12 percent of citizens are African American, they make up over 44 percent of the incarcerated people in the nation. Today, 1 in 4 African American men from the age of 20 to 29 are subjugated under some form of correctional authority whether a correctional guard, a parole officer, or a judge (Austin, 2001). During his lifetime, his odds of incarceration becoming 1 in 3 contrasted directly with 1 in 25 for Caucasian men (Katz, 2000). The ethnic composition of the prison system continues to look substantially different from the demography of the nation. While African Americans comprised just 12 percent of the general population, they represented roughly a third of those behind bars (Gramlich, 2020). This is heavily contrasted with Caucasians who make up roughly 63 percent of the general population while accounting for less than a third of the incarcerated population (Gramlich, 2020). African Americans are therefore incarcerated at a rate nearly seven times higher than Caucasians (Nellis, 2021). For many young, African American men, criminal punishment has become the expectation rather than the exception. The fact that the criminal justice system processes a greater number of persons of color than universities do is quite troubling.

Poverty has also helped to shape social perceptions of race. Predominantly African American neighborhoods have higher rates of unemployment, substandard housing, and the residents suffer from poor health and drug addiction and are more likely to be driven to criminal conduct. These characteristics are directly

conflated with race and ethnicity leading to the pervasive idea of racialized poverty which takes away from systemic factors that result in racial and economic inequality. These sweeping generalizations obscure racial disparities rooted in systemic forms of racism that strip opportunities from the individuals within these communities. Racism and perceptions of race therefore play a significant role in the crisis of mass incarceration.

Minorities are not only overrepresented behind bars but have also been found to receive harsher sentences and serve more time behind bars than Caucasians – even when charges and criminal backgrounds were equal (Westerfield, 1984). The use of plea bargaining – where defendants are able to reduce charges leading to more lenient sentences – helps to explain the disparity. Caucasians plea bargain much more than African Americans due to deals they receive from prosecutors, deals which African Americans are not given. Judges also hesitate to sentence Caucasians to prison where they may be subject to extreme prejudice due in part to their status as minorities behind bars (Westerfield, 1984). The irony of this situation is that a system originally built to discriminate against minorities is now being used as a justification to protect Caucasians. Lastly, Caucasians are often assumed to be better candidates for programs meant to be rehabilitative. While much of this view is the result of deeply ingrained prejudice among judges and parole boards, it may also be due to the arrest record, crime of conviction, and personal characteristics such as poverty or prior employment status. This becomes a self-fulfilling prophecy as just one previous conviction or having a history of drug addiction prior to arrest can negatively impact the

likelihood of being sent to a rehabilitation program or home arrest rather than prison. Harsher and more severe sentences means minorities are overrepresented behind bars.

Racially unequal outcomes cannot be explained away by citing higher levels of criminal conduct because in most cases crime is highly correlated to high levels of policing in poor, minority neighborhoods and is thus skewed. Instead, looking at how African American's came to be disadvantaged is essential to understanding their propensity for poverty, poorer health, and as a result, falling victim to mass incarceration. Throughout United States history, African Americans have been condemned to substandard housing, economic insecurity, unemployment, and poor healthcare due to their racial identity. Residential segregation based on race is one of the strongest predictors of African American disadvantage (Williams, 2001). Red-lining, for instance, pushed African Americans into discriminatory housing and subsequently poverty, perpetuating economic inequality (Crawley, 2006). These neighborhoods have a concentration of unequal opportunities, poor education, and scarcity of resources, factors that help drive extreme poverty and criminal conduct. Because more minorities live within these neighborhoods, they are more often exposed to factors that increase the likelihood of crime more so than their Caucasian counterparts. The structural racism that sustains segregated neighborhoods, including mass incarceration, have led to pervasive beliefs about African Americans that shapes how society sees them. It's no doubt that over time, "The confluence of issues of race and class with the prison system have become a fundamental feature of the national landscape" (Mauer, 1999).

Racial and socioeconomic disparities permeate the criminal justice system not just at the federal level but also the state level. Racial disparities in prosecution, conviction, and arrests in Louisiana prisons and jails show firsthand the state's reliance on mass incarceration. The brunt of this reliance has been felt by the state's minority population. Louisiana's rate of incarceration is one of the highest of any state in the United States (Policy Initiative, 2017). Similarly, rates of incarceration of African Americans is over five times higher than Caucasians (Sakala, 2014). Despite Caucasians making up almost two-thirds of Louisiana's population, they make up less than a third of those incarcerated in the state (Policy Initiative, 2017). African Americans represent less than a third of the state's population yet comprise over two-thirds of the prison population (Policy Initiative, 2017). Within specific parish jails, this disparity is even more pronounced. Although Orleans Parish is 66 percent African American, almost 90 percent of the jail population is African American (Harden, 2016). A 2012 report on Louisiana prisons reported that, "One in 14 black men from New Orleans [are] behind bars, compared with one in 141 white men" (Simerman, 2012).



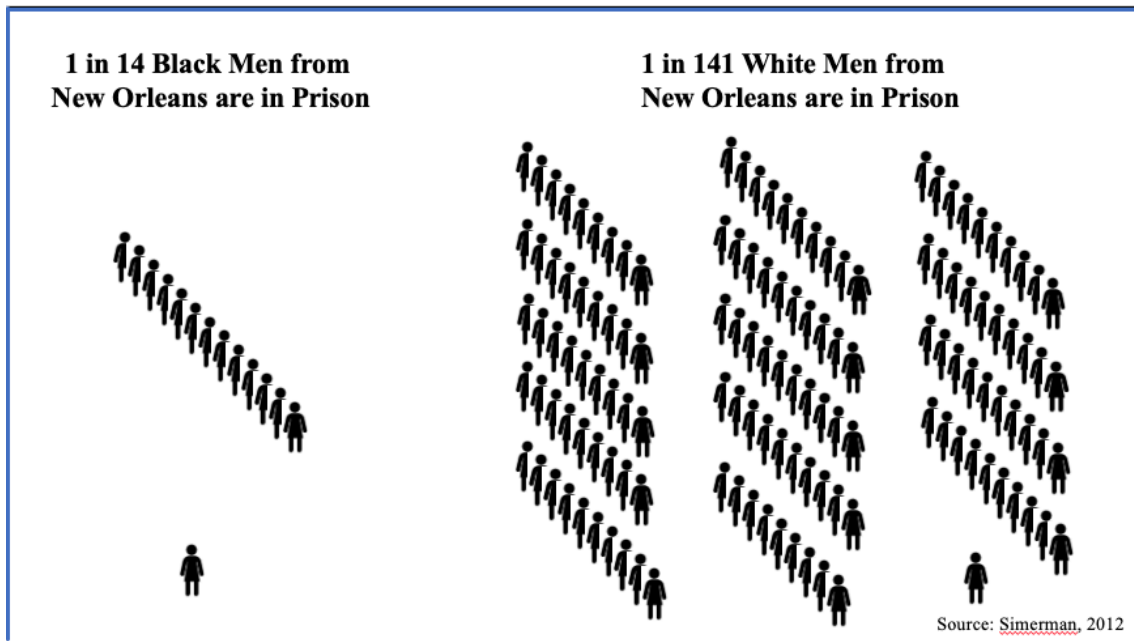


Figure 2: Racial Disparities in Louisiana’s New Orleans prison

Furthermore, “[o]ne in seven black men from the city is either in prison, on probation or on parole” (Simerman, 2012). As just one example, despite African Americans and whites using marijuana at about the same rates, 94 percent of marijuana possession arrests made in New Orleans are of African Americans (Harden, 2016). In Louisiana 85 percent of those arrested were indigent (Carroll, 2016). Approximately a fifth of all African American men in their late twenties are currently incarcerated, a significant portion of them for drug related charges (Furner, 2016).

Minorities are similarly overrepresented within the criminal justice system as a result of the nation’s War on Drugs. Over time, the consequence has become the pervasive association between race and illegal substances. Because drugs are commonly associated with other types of crimes such as assault or robberies, this helps reinforce the association even more. Despite persons of color being

incarcerated at greatly disproportionate rates, these disparities are not correlated with actual rates of drug use. Of those sentenced for drug related offenses, African Americans and Latinos make up almost 80 percent of those in federal prison and just over 60 percent in state prisons (Alexander, 2010). Nationally, drug use has been consistent among Caucasian and African Americans; however, the latter are significantly overrepresented in arrests for possession (almost three times as likely) and incarcerated for drug offenses (over ten times as likely). Marijuana use among African Americans in 2010 was thirty percent greater than Caucasians; however, they were arrested at a rate of 270 percent more than Caucasians (Starr, 2013). Today, usage rates are roughly equal, yet African Americans are significantly more likely to be arrested for marijuana possession – four times higher (Sukumar, 2022). Drug users are more likely to purchase drugs from someone of the same ethnic background (Hayes, 2020). Therefore, if users and dealers alike are arrested, prosecuted and sentenced equally the imprisoned population should reflect the racial composition of the public. This is clearly not the case.

Systemic inequities, which are highly correlated with incarceration, emphasize race and income-based health disparities as some of the fundamental indicators of disease (Nowotny, 2017). As a result, African Americans suffer from pre-existing health conditions, such as diabetes and obesity at higher rates, heightening their vulnerability to premature death (ACLU, 2020). Mass incarceration exacerbates already deadly health disparities. Because African Americans are more likely to come from more disadvantaged neighborhoods, have

less education, lower incomes, and a lower life expectancy, the ability to overcome the negative effects of incarceration is limited.

### **Rates of recidivism**

Once released, the stigma associated with incarceration acts to permanently exclude ex-offenders from mainstream society. Those released from jail or prison often find that the ability to begin living a proactive life is difficult and a criminal record often heavily impedes re-entry. Conviction and incarceration detrimentally affect if a person is able to secure welfare benefits, public housing benefits, and food support. Student loans are often denied based on the existence of a criminal record (Hayes, 2020). Similarly, the ability to participate in society through voting or jury service is hindered (Bradshaw, 2021). The process of exclusion is often multifaceted. Not having a permanent address means one may not receive a jury summons or meet residency conditions. Similarly, the inability to get to the courthouse for the lack of transportation, the inability to take the time off work, and or a lack of childcare is often more difficult for persons with a felony conviction as they are disproportionately indigent (Smith, 2012).

Recidivism should almost be expected as ex-offenders are heavily discriminated against both by the public and through legislation, preventing their reintegration back into society. A lack of funding dedicated to drug treatment, education, and work programs behind bars as well as prison lobbyists' interests to keep incarceration rates high makes recidivism much more likely (Bradshaw, 2021). Similarly, access to employment when saddled with a criminal record

becomes challenging, returning to school is difficult, and being accepted for public housing is oftentimes impossible. Employment restrictions include being ineligible to work in law enforcement, education, and healthcare (Bradshaw, 2021). African American applicants applying with a criminal record are hired at considerably lower rates than Caucasians with the same history. Even more appalling is the fact that African Americans *without* any record are hired at lower rates than Caucasians with a record (Pager, 2003).

In Louisiana, the ability to secure employment with a felony is incredibly hard. Nationally, convicted felons have around 123 employment restrictions. Those in Louisiana have almost 400 (Tarkington, 2017). Options are often limited to minimum wage jobs. Because of oppressive restrictions, it is nearly impossible for felons to find employment that pays enough to enable them to provide for themselves and their families (Hayes, 2020). As a result, many find decreased chances for a successful reentry, leading to a higher chance of recidivism. In Louisiana, almost half of those released from prison each year will find themselves back within just five years (Tarkington, 2017). For many ex-offenders, restrictions act as a way to subjugate an individual to the outskirts of society. Once labeled “felon,” persons are relegated to second-class status.

While individuals face the biggest hardships, the surrounding communities face burdens as well. When individuals are released, local communities are impacted if an inmate's long-term needs have not been properly met in correctional facilities. Some face worse health outcomes as a result. It is therefore not hard to see that mental illness has become a punishable offense for those who

are afflicted by it. Putting the mentally ill behind bars has damaging effects on both the individual and the communities from which they come.

For the families of the incarcerated, years behind bars can have detrimental effects, particularly for children. High levels of incarceration among minority communities has been shown to have negative impacts on children, including behavioral issues, low educational attainment, and poor economic resources. In 1990, one in 25 white children had an incarcerated parent compared to one in four African American children (Martin, 2017). The disparities in incarceration run not just along race lines but also gendered ones. For instance, with such high rates of incarceration among men, women are often left to provide for and raise children alone. While these women face a financial burden, they also face negative health consequences. Researchers in 2014 found links to familial incarceration and a woman's cardiovascular health (Lee, 2014).

The impact of incarceration comes at a high cost for individuals, their families, and the communities they come from. Individually, criminal convictions make access to employment and housing incredibly difficult. Consequently, the disproportionate incarceration of persons from low-income communities perpetuates a cycle of poverty, ongoing involvement with the criminal justice system, and makes incarceration a generational norm.

Drug addiction, mental illness, poverty, and minority status are not mutually exclusive; arrestees frequently represent a combination of all four. By pushing drug addicts, minorities, and persons from the lowest socioeconomic strata behind bars for longer than ever before, society has helped to create a

prison system where prisoners are highly susceptible to severe illness. During the Covid-19 pandemic, this has proven to be a recipe for disaster.

## **Just How Bad is Covid-19 in Prisons and Jails?**

For the past two years, dying from Covid-19 inside the nations correctional facilities is more likely than dying from the death penalty over the last half century. Covid-19 has disproportionately affected society's most disadvantaged individuals who are at the highest risk for complications if infected. Because correctional settings house some of society's most at-risk, these facilities have faced some of the worst outbreaks during the pandemic. While inmates' health risks are a significant part of the problem, the disregard of the prison population's wellbeing by society has proven to have some of the most serious consequences.

In times of crisis, vulnerable groups are the first to be overlooked due to their minority status and lack of cohesive voice. Inmates faced with medical vulnerability, find their needs unnoticed because of their status as criminals. Politically prisons are largely neglected during the pandemic as other less stigmatized and less vulnerable groups were prioritized. What often goes overlooked is that committing a crime does not, and should not, allow for the imposition of overly harsh punishments, however severe. Do inmates really deserve to die for possibly as little as public intoxication or petty theft? While holding people accountable for a crime they committed is an essential component of any criminal justice system, imposing a punishment that is not proportionate to the crime is unjustifiable. Today, the lack of comprehensive planning, ineffective communication, incomplete data reporting, and, most importantly, the deliberate indifference to this population by governmental agencies, prison administrators,

and society alike have led to infection, transmission, and death for vulnerable inmates.

### **Rate of infection behind bars**

Covid-19 has decimated the health of inmates and prison workers, far exceeding the infection rate in virtually every other population. Since the beginning of the pandemic, Covid-19 rates of infection in prisons have been considerably higher and have escalated at much quicker rates than in the general population. While initially lower, prison case rates quickly surpassed those of the general United States population in early April 2020 and continued to grow at a rate of almost 9 percent per day while the general population grew by just 3 percent (Saloner, 2020). Just a month later seven of the top ten Covid-19 clusters were inside or connected to correctional facilities and seventy percent of all federal inmates tested for Covid-19 were positive (Burkhalter, 2020).

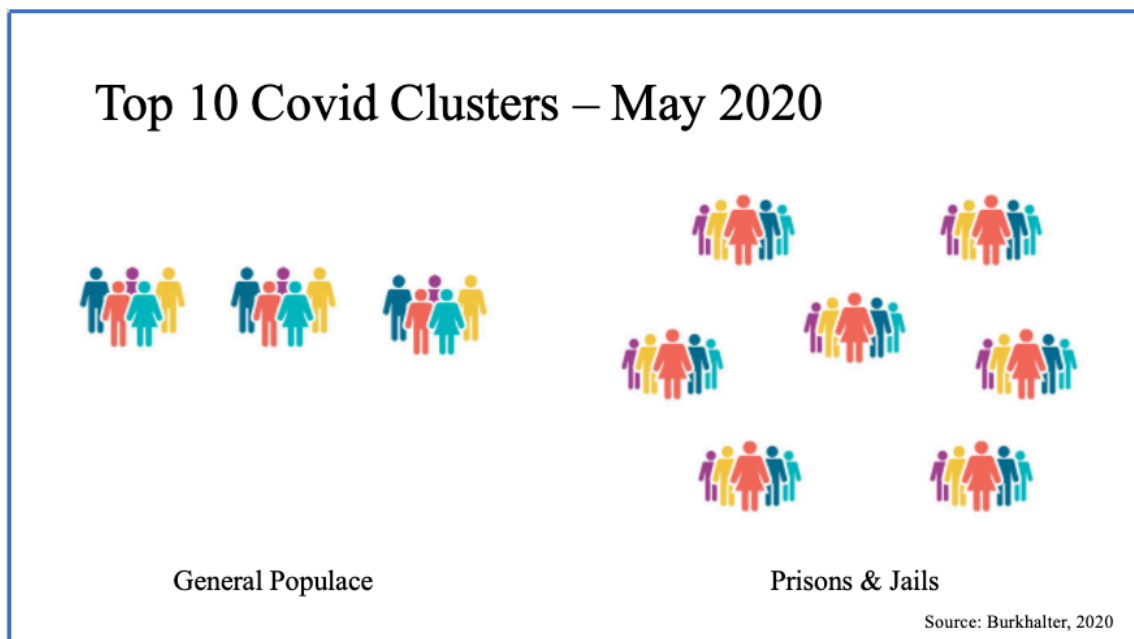




Figure 3: Top 10 Covid-19 Clusters as of May 2020

Six months after Covid-19 infected its first inmate, over 42,000 Covid-19 cases and 500 deaths had been counted (Barkan, 2020). At the time of this writing roughly two and a half years after the pandemic began, there have been almost 600,000 *reported* cases of Covid-19 among incarcerated individuals and almost 3,000 deaths.

While inmates were getting sicker, so were correctional officers, wardens, and other correctional workers. Throughout the first year of the pandemic, less than a quarter of cases reported were the result of staff infection, however, by mid-April 2021, staff accounted for almost half of new infections each week (Tyagi, 2021). Around the same time, it was calculated that over 110,000 prison staff had reported positive test results and 209 had died as a result of catching Covid-19 (Alonso-Zaldivar, 2021). So much is still unknown about correctional staff infection rates as prisons and jails that did collect this information stressed the fact that the numbers only included those who voluntarily reported their diagnosis. Similarly, few prisons have chosen to systematically test workers throughout the pandemic and even fewer have required testing. The result is that the numbers presented are severely incomplete. Despite this lack of information, it's quite clear that Covid-19 has been pervasive behind bars. Just over a year into the pandemic a combined 400,000 inmates and correctional staff had tested positive (Marshall project, 2021).

## **Covid-19 data lacking**

Despite appearing comprehensive, Covid-19 related data – rates of infection, transmission, and death – are largely incomplete in virtually every state and federally run correctional facility. Just weeks into the pandemic correctional facilities began publishing vital information tracking active cases, testing, and deaths. However, as Covid-19 cases and death rates reached some of their highest peaks behind bars, many correctional institutes began rolling back essential, publicly available information on the impact of Covid-19 within their facilities. Health officials called it a “deliberate cloaking of reality on the ground” (Ollove, 2021). In August of 2021, Louisiana had drastically reduced its data publishing to only include active case counts (Widra, 2021). When asked why they had stopped updating their data, the Florida Department of Corrections said that so few cases meant it wasn’t “operationally necessary” (Johnson, 2021). Yet, reported data just days leading up to the decisions shows 150 cases among staff and five among incarcerated persons (Johnson, 2021). The same can be said for Louisiana's Department of Corrections which reported information on infection and death behind bars until they inexplicably stopped on July 8. When asked why, the Louisiana Correctional Association explained that the hours spent reporting took away from the care of those behind bars (LCA, 2020). While this is true in part, it's also important to consider that many prisons are disincentivized to report because the worse Covid-19 hit, the more likely that the information will be used against them. This became even more apparent just a few days later as the Louisiana Department of Corrections announced visitation suspension due to the “latest

surge of Covid-19 cases in the state” (Blanc, 2021). Over two years into the pandemic and the Louisiana Department of Public Safety and Corrections has no information on how many inmates in the state’s prison population have been screened, tested, or vaccinated against Covid-19 (Chrastil, 2020). The same can be said for Covid-19-related deaths. As time went on, delayed and incomplete data became the norm for almost every correctional facility, not the exception. Even some of the most comprehensive and well-kept lists – such as the Prison Project – of the vital Covid-19 related information coming out of prisons and jails suspended publishing just a year and a half into the pandemic due to a lack of regularly updated information available from correctional facilities. While some facilities continue to post data, the number is few and far between. States like Louisiana have posted such little data throughout the pandemic that they were not even included in the Covid-19 Prison Project’s data set. After two years, what is left is severe undercounted and incomplete transmission and death counts within these facilities.

The size and scope of the criminal justice system has also impeded Covid-19 effective data keeping and preventive measures behind bars. Every state and federal facility seemed to have a different Covid-19 testing and treatment plan as well as record keeping systems. This has led to inconsistent mitigation strategies across differing correctional facilities, putting inmates at high risk. While most other states keep incarcerated individuals in state-led facilities, Louisiana is unusual in that it houses its jail population in about 100 local facilities operated independently by sheriffs. When sheriffs across the entire state were asked about

their handling of the Covid-19 pandemic within their parish jails, only six out of the 64 asked even responded (O'Donoghue, 2021). The result was no comprehensive statewide grasp on how Covid-19 was handled within these facilities or how incarcerated individuals fared as a result. Similarly, several state correctional facilities experienced rates of infection and morbidity significantly higher than the state average (Saloner, 2020). This lack of consistent communication and planning across facilities created serious confusion and had detrimental effects during a health crisis as large as Covid-19. At the same time, before the pandemic, most correctional facilities had various emergency preparation systems in place, although they were often criticized as inadequate. While some emergency planning was available, they were rarely appropriate for outbreaks of airborne viruses like Covid-19. Instead, potential terrorist attacks and natural disasters were typically anticipated (Hoffman, 2009). The lack of planning and preparation heavily contributed to the emergence and spread of the virus behind bars. As Covid-19 entered the facilities, the lack of emergency preparedness plans, training, drills, etc., as well as the lack of resources for vulnerable populations have also raised ethical questions about inmate rights. Should vulnerable populations' needs be prioritized over other groups? Should inmates' societal worth be a consideration when determining resource allocations? These ethical questions remain unresolved.

The virus has taken a disparate toll on persons of color most acutely seen in the uneven death rates between ethnic groups in the United States. When prison officials from every state were asked about the racial disparities in Covid-19

related testing, diagnoses, or mortality rates, forty-three would not or could not provide the information (Chammah, 2020). While some correctional institutions simply do not track this form of data, others refuse to make it public. The failure to track and share such data is what Monik Jimenez, an epidemiologist at Harvard describes as “another form of structural racism” (Jimenez, 2020). By not releasing data, correctional facilities have efficiently hampered the speed and efficiency of the Covid-19 response, impeded effective decision making, and has almost certainly resulted in sickness and death for inmates, staff, and the communities they both return to.

Prison and jail systems have largely neglected to document the race of those infected. Demographic data on inmates was often excluded in official reporting meaning ethnicity and race could not be consistently or accurately accounted for in cases of infection or deaths, leaving the already vulnerable groups even more susceptible to infection. Without relevant data, health officials have struggled to find culturally relevant interventions or respond to higher levels of preexisting conditions within particular minority communities (Jiménez, 2020). While only a few states keep race-based statistics about their prisons, those that do show glaring disparities along ethnic lines. For instance, Missouri’s correctional system determined that 58 percent of the positive tests were found in its African American population despite comprising only about a third of the state's prison population (Zindzuwadia, 2020). In Vermont, where nine percent of the prison’s population is African American, they made up almost twenty percent of positive inmate tests (Zinzuwadia, 2020).

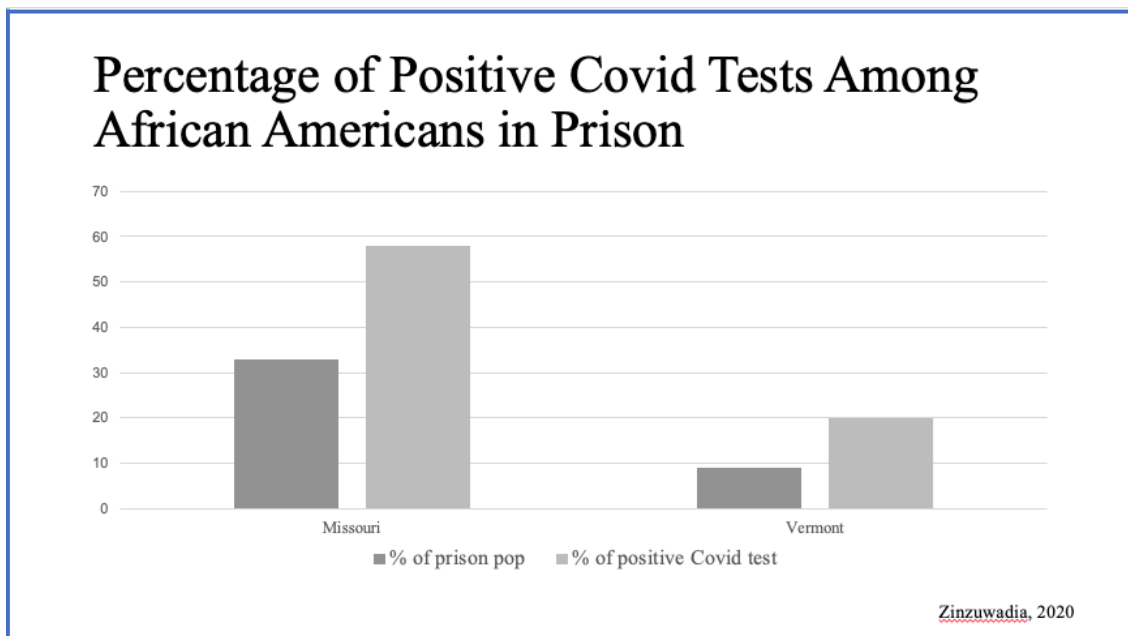


Figure 4: Percentage of Positive Covid Tests Among African Americans in Prison

Lastly, in Michigan, where African American residents make up 14 percent of the state’s population and roughly half of the prisoner population, almost half of those behind bars who died were African American compared to less than 40 percent of those who died in the state overall (Chammah, 2020). Within prisons the missing data was a chasm; outside of correctional facilities, there was a considerable amount of data about cases by race and ethnicity. Despite the fact that Louisiana's African American population makes up just 32 percent of the state's population, they account for over 70 percent of Covid-19 related deaths (Barron-Lopez, 2020). Since over two-thirds of the state's incarcerated population is African American, it's not a stretch to infer that behind bars, where Covid-19 has spread at rates significantly higher than in the general population and where the population is much more vulnerable than that of the general populace, similar rates of infection

are more racially significant. However, without this crucial information coming from the majority of facilities, inferring is just about as certain as we can be.

Without clear and comprehensive data, the spread of misinformation both about the virus and its effects behind bars was rampant leaving medical personnel, families of the prisoners, and the public to guess what was going on. Family members of incarcerated persons and correctional staff describe delays in receiving critical information increasing both uncertainty and fear about the possibility of infection (Suhomlinova, 2021). Keeping inmates informed was especially important during pandemic restrictions as isolation meant feelings of alienation from the outside world and facilitated the rapid spread of false information. Over-information had the same effect, making it harder for incarcerated individuals and their families to take meaningful steps to protect themselves effectively and minimize harm (Sturm, 2020).

### **Poor containment protocols**

While the majority of state correctional systems struggled to contain the virus due in part to the glaring holes in testing and containment protocols, Louisiana's struggles in containment acts as a case study. During the first nine months of the pandemic, the majority of inmates within the Louisiana prison system did not receive a single Covid-19 test (O'Donoghue, 2021). Louisiana is one of many states who chose not to perform mass testing. Until November 2020, 60 percent were never tested despite many displaying symptoms. Because of the facilities' communal living arrangements, lack of prevention supplies and tactics

put in place, and the vulnerability of those inside, widespread testing should have been mandated. In some of the facilities that did engage in mass testing, prevalence reached upwards of 87 percent (Saloner, 2021). The median increase in the number of cases identified by symptom-based testing was over 12 times as high (O'Donoghue, 2021). The immense prevalence of Covid-19 within these facilities suggests that cases were much worse than previously thought. Even today, the majority of Louisiana prisons and jails have neglected to conduct widespread testing. In one Western Louisiana prison, the Federal Correctional Institute, Oakdale, had some of the worst outbreaks of any prison in the United States. The United States Department of Justice inspector general report found that there were “numerous failures in Oakdale officials' response to the Covid-19 outbreak” (Chrastil, 2020). These failures effectively undermined the ability to contain the spread of the disease such as isolating inmates who were symptomatic, being able to provide enough personal protective equipment, and limiting movement around the facility. The testing of only those with symptoms indicates prison staff and officials were blissfully unaware of how Covid-19 spreads and the severity of it. Hundreds if not thousands of asymptomatic inmates likely passed the virus on to other vulnerable inmates. Of the steps that were made to mitigate the spread, many did not go far enough. The prison justice initiative argues that prisons and jails around Louisiana were “woefully inadequate to contain the virus and properly identify and treat those infected with it” (Chrastil, 2020). By only testing symptomatic inmates, neglecting to implement preventive measures, failing to provide protection for both inmates and guards, and lacking proper medical care



and equipment to those experiencing symptoms, Louisiana opened up mass infection and death for far too many behind bars.

Even while medical advisors and concerned citizens alike advocated for the decarceration of the prison population by releasing those imprisoned for misdemeanors, low-level crimes, and drug offenses, many prison officials instead chose compulsory isolation for the inmates under their protection. The strategy of solitary confinement, lack of visitation, few meaningful activities, and an underwhelming number of resources to handle the new reality, put immense physical and psychological strain on inmates. The suspension of inmates' human rights have raised questions about the balance between public health and human rights in times of emergency. While mitigation strategies inside prisons helped to curtail the spread behind bars and local communities, the cost came at the expense of inmates. Prison mitigation strategies have led to some of the most restrictive measures for inmates and run the risk of infringing on human rights. Inmates lose much bodily autonomy and freedom after being arrested, charged, and imprisoned for a crime; does this justify inmates being subjected to autocratic administrative procedures that risk both their physical and physiological wellbeing in the process?

### **Restricting inmate's rights**

As infection and death permeated prison walls, prison officials restricted inmate movement through the use of solitary confinement to curtail the spread. In doing so, inmates rights were often ignored. In late March 2020, the Bureau of

Prisons announced that prisoners would be placed on a two-week lockdown to curb the spread (BOP, 2020). As Covid-19 dragged on and lockdowns were extended, these conditions were the equivalent of solitary confinement (Suhomlinova, 2021). According to the United Nations Standard Minimum rules for the Treatment of Prisoners, confinement for up to 22 hours per day for extended periods of time amounts to “torture or other cruel, inhuman or degrading treatment or punishment” (WHO, 2020). The UN and the WHO both publicly stated that the use of prolonged solitary for the sole purpose of curbing the spread was “unacceptable” and violated the Mandela Rules (Smith, 2016). Inmates often described these conditions as ‘prison in a prison’ as it prevented normal human contact and any form of stimuli (Suhomlinova, 2020). While deprivation of liberty through solitary confinement has already been linked to forms of depression, lethargy, anxiety, and self-harm, the unknown of Covid-19 magnified these emotions for many (Haney, 2018). ‘Unvarying sameness’ made some inmates turn to drugs and others to further withdraw from socializing (Haney, 2018). Isolation was also used as a way to quarantine inmates who exhibited Covid-19 symptoms or who tested positive. For many inmates, however, the thought of isolating oneself further was seen as a punishment, so fewer inmates reported symptoms.

A few weeks after federal and statewide prison lockdowns, specialty out-of-cell activities such as work training, religious services, sports and educational programs were severely limited by prisons officials, a trend which continued long into the pandemic. From the initial lockdown until today, educational program completions dropped by over half (O’Donoghue, 2021). While the general populace

turned online, prisons often lacked the resources to handle online learning. The inability to attend educational and behavioral programs produced devastating effects for many inmates such as the inability to demonstrate progress made behind bars. For many, this reduced their ability to earn credit toward an early release since they could not demonstrate good behavior or rehabilitation to the Parole Board (Heard, 2021). Some inmates' releases actually depended on the completion of these programs. With nothing to inform relevant risk assessments or recommendations made by teachers or behavioral specialists, some inmates remained behind bars for months longer for reasons outside of their control. The halt in programs undermines the original function of prisons, that of rehabilitation, and further supports the idea that prisons are simply for punishment. For others, work and programs made sentences more tolerable, giving them a purpose each and every day. Without it, inmates found themselves suffering from imposed idleness: "Tomorrow I have a little art-in-cell work which will take me a couple hours. After that, I'll be doing nothing again until sometime next week" (Suhomlinova, 2021). Others describe themselves as doing "Nothing but sleep" to pass the time or "rearranging their cells just for something to do" (Heard, 2021).

With the onset of Covid-19 came a displacement of any sense of daily routine. A sense of hopelessness and anxiety arose as the result of the lack of activity. For others came a sense of panic. Work for many inmates had been an important source of income to buy commissary items or to send home to one's family. Losing this source was a significant stressor for many inmates. Inactivity and the lack of educational, social, and work opportunities led to both adverse

mental and financial consequences for inmates. While a sense of isolation and idleness have been two of the hardest parts of the restrictive measures placed on inmates, it has been exacerbated by the lack of social contact as visitation was suspended in virtually every correctional facility. From the moment the pandemic began, prisons closed their doors, abruptly depriving inmates of contact with loved ones, legal teams, and other supporters. Even before the pandemic, prisoners described the loss of regular contact with a close network of family and friends as one of the worst parts about being behind bars. Visitations provide a source of hope; without them, some described feeling as if they were experiencing a “double sentencing” (Heard, 2021). Even as socialization-based restrictions were lifted within the wider society, they frequently endured behind bars. Halting visitation as a way to contain the virus had long lasting and severe effects on inmates.

As bad as the suspension of family visits is for the emotional wellbeing of inmates, the suspension of visits from lawyers often proved to have worse long-term consequences. Regular contact with legal representation is important when applying for parole because without it, eligible inmates are not able to present a strong case to the parole board (Amman, 2020). No visitations also meant that inmates often had to call lawyers at their own expense for legal advice – an expensive prospect when working inmates make less than a dollar an hour (Fair, 2021). Even courts shutdown to prevent the spread of Covid-19, an incredibly ironic decision as inmates were left to sit behind bars for weeks if not months longer as a result, increasing the chance of contracting Covid-19 as a result. More time behind bars has proven to have detrimental effects on the emotional

wellbeing of inmates who fear the longer they remain in prisons and jails, the more likely they will fall victim to Covid-19.

Correctional facilities' failure to mitigate the spread of Covid-19 behind bars has put not only incarcerated persons at risk but also prison staff and the general public. While some correctional institutes have done more than others, high rates of infection and death among incarcerated individuals points to a systemic failure. Little to no infection control and containment, nonexistent mass testing and no transparency of what was going on behind bars suggests a deliberate indifference to protecting incarcerated individuals. The consequences are that everyone's lives are at risk.

## **Policing, Prejudice, and Policies**

Inmates' vulnerability coupled with deliberate indifference to their lives has led to the high rate of transmission of Covid-19 behind bars. This, however, isn't the full story. Why have so many inmates been disproportionately affected during Covid-19? Why have prisons and jails been so unprepared to handle both crises? To begin answering these questions, it is essential to look at the state of the nation's correctional facilities – under-equipped, underfunded, understaffed, poor medical care, and overcrowded – and reflect on how decades of targeted policing, deeply ingrained prejudice, and punitive policies have largely shaped how class, race and social disparities are punished. The history of mass incarceration opens the door to some of the answers.

### **Targeted policing**

Policing is essentially the start of the story of mass incarceration as the majority of individuals within the correctional system were at one point arrested before being taken to jail, charged, sentenced, and incarcerated. Police usually determine what communities and neighborhoods to heavily police and which crimes to pursue over others. Society's reliance on incarceration, beginning with arrest, is essential to understand why Covid-19 continues to spread from prisons and jails into the communities to which inmates return. Understanding the who, what and where of policing helps to explain why prisons and jails are overfilled with vulnerable inmates even during times of crisis such as Covid-19.

Since the 1970s, policing has historically targeted locations where drug activity and low-level street crimes occur. This specific reduction strategy, while thought to produce a “racially neutral rationale for targeting neighborhoods of high poverty and crime,” has instead led to high policing of low-income communities of color (Strassle, 2020). A 2016 report found that rates of law enforcement in precincts in New York City were positively correlated with higher rates of minority residents (ACLU, 2015). Originally, these practices arose in the 1980s and combined with the “broken windows” model, focused law enforcement efforts on low-level crimes (Hinton, 2018). This type of policing, however, evolved to target poor, minority communities that were deemed “more prone to crime” (Higginbotham, 2002). Once a certain area or community is labeled as crime-ridden, regardless if this is actually the case, and more police are dispatched to patrol, these communities become further entrenched. As a result, communities of color have been condemned to a vicious cycle of terrible housing conditions, unemployment, and income inequality driven in large part by over-policing. The strategy of targeting areas determined to have higher levels of crime, disparately impacts entire poor and minority communities and keeps them from advancing socially.

While poverty is often an outcome of over-policing, it is also one of the most quantifiable measures to determine criminal conduct. As a result, there remains a cycle of policing around impoverished urban neighborhoods with some of the nation’s highest crime rates. African Americans comprise an inordinate share of those living in underdeveloped and underfunded communities where economic

and social vulnerabilities have contributed to high crime rates. As many as 63 percent of African Americans live in segregated neighborhoods where a high degree of violent crimes play out (Nellis, 2021). In comparison, the majority of Caucasians live in neighborhoods that experience low rates of crime. The disparate living conditions actually provoke societal problems such as crime itself. The cycle of policing, poverty, and crime is therefore almost impossible to break.

Because poverty and drug use are so highly correlated, communities with a higher prevalence of poverty often have a higher presence of drugs. The enforcement of places where drugs are typically sold, such as parks, near underpasses or out of cars, is targeted by law enforcement (Beckett, 2005). Police have been found to disproportionately target African American open-air drug markets over Caucasian ones (Hinton, 2018). Despite African Americans only delivering half of all crack cocaine in these markets, they make up almost eighty percent of those placed under arrest (Beckett, 2006). Caucasians who deliver about 42 percent of crack cocaine drops, constituted only nine percent of the arrests (Beckett, 2006).



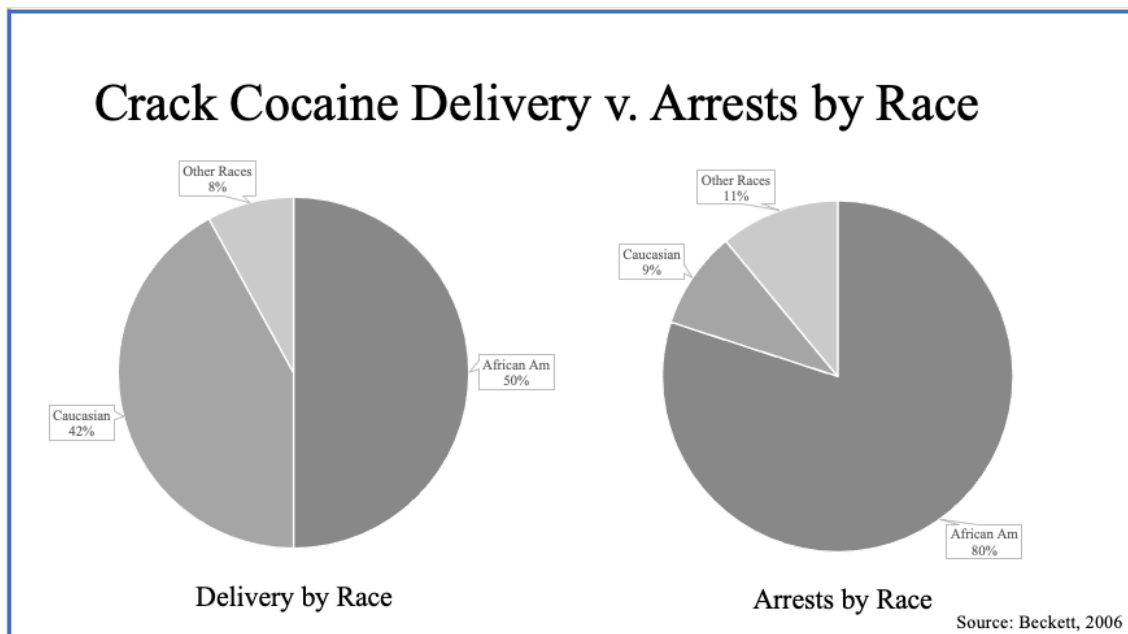


Figure 5: Crack Cocaine Delivery v. Arrests by Race

Despite different ethnic groups using marijuana at comparable rates, African Americans were three times more likely to be arrested over their lifetime for drug use in Louisiana than Caucasians (Ross, 2014). Nationally, African Americans are arrested almost four times more often for marijuana possession (Sukumar, 2022). Controlling for both drug offenses and petty neighborhood crime, racial disparities in arrests and policing still persist.

The perception that police stop-and-search minorities in a racially biased way is pervasive throughout the minority community. In a survey of young African American and Hispanic men, 80 percent reported being stopped and searched by police at least once (Casimir, 1994). Researchers confirm that “Nothing has been more damaging to the relationship between the police and the black community than the ill-judged use of stop and search powers” (Grant, 2002). The perception is very much grounded in reality as statistics from street stops show a pattern of

discrimination (NAACP, 2000). A report from the New York State attorney general's office in 2000 showed that African Americans were almost seven times as likely to be stopped and searched than Caucasians; Hispanics were almost five times as likely (Attorney General, 2000). The majority of the time, police were found to lack sufficient evidence to justify the stop (Attorney General, 2000). Pedestrian street stops by police also show a disparity in searches and arrests for minorities who also experience these stops at a higher degree of severity. For instance, a study based on the years 2002 to 2011 found that fourteen percent of African Americans stopped on the street have experienced the use of force by law enforcement compared with only seven percent of Caucasians (Hyland, 2015).

Police have consistently exercised their authority in stop-and-searches within these communities or over minority groups in communities where they "don't belong" (Yardly, 2000). Courts have condoned stops of persons whose racial makeup differed from the neighborhood in which they appeared. The Arizona Supreme Court remarked that "[T]he fact that a person is obviously out of place in a particular neighborhood is one of several factors that may be considered by an officer and the court in determining whether an investigation and detention is reasonable and therefore lawful" (Weaver, 1992).

Traffic stops yield similar disparities. Law enforcement has been found to both question and search African American drivers at disproportionately higher rates than Caucasian drivers despite finding less contraband on average (Gelman, 2007). A study based out of New York found that African Americans make up over half the stops conducted – 23 percent more than Caucasians – despite only making

up 26 percent of the population in New York (Gelman, 2007). In Chicago, a Police Accountability Task Force determined that law enforcement searches minority drivers at almost four times the rate of Caucasian drivers despite the fact that contraband is found on Caucasian drivers almost twice as often as minority drivers (Epp, 2014). A study conducted by Stanford University developed a threshold test which quantified how police initiated searches. It found that in North Carolina law enforcement used a lower threshold for ethnic minorities than it did for both Asians and Caucasians. They searched minorities at a rate of 5 and a half percent compared to only three percent of Caucasians (Andrews, 2016). The United States Supreme Court has also upheld a traffic stop on the basis of race saying that “to the extent that the Border Patrol relies on apparent [racial] ancestry...that reliance clearly is relevant to the law enforcement need to be served” (Yardly, 2000).

At the same time, policing also poses a significant physical and mental health risk to entire communities of color. Most obviously, law enforcement's use of force kills hundreds of persons of color each year and injures thousands more (Bailey, 2021). Physical and verbal abuse by police has resulted in unnecessary injury and premature death, especially for African Americans. While physical symptoms are often the result of forceful interactions, over time, the violence manifests itself as a decrease in trust of police (Smith, 2012). Similarly, constant surveillance and the threat of violence can indirectly affect a person of color's physical and mental state (Yimgang, 2017). The heightened presence of police directly increases the likelihood for a police encounter which has been shown to raise blood pressure, diabetes, and asthma (Sewell, 2016).

A serious consequence of over-policing is the absolute number of offenders swept into the criminal justice system as a whole. Policing pushes offenders into the system where they are made vulnerable to infection and violence. Once released, opportunities for advancement are restricted. Policing and subsequent arrests have become such an ingrained part of how society seeks to punish transgressors that even during a health crisis, police continue to arrest for minor offenses. Before Covid-19, the consequences were an overfilled, understaffed cesspool of a correctional system. During the pandemic the consequences have been severe ranging from transmission of the virus to growing rates of infection and even death. Incarceration, starting with arrests, have heavily contributed to a significantly elevated rate of infection behind bars and eventually into the communities from which they come.

Targeted policing at traffic stops and within poor neighborhoods and drug prone areas has disproportionately affected communities of color that are swept into the criminal justice system – some never to return back home. While policing affects those who are arrested, it also affects the families they are taken from, the neighborhoods where they live and to which they return, and the community as a whole. The more policing that takes place within a specific area, the more arrests that will inevitably occur and the more impoverished the entire community becomes.

### **Skewed arrests: policing during Covid-19**

Throughout the pandemic, police officers have struggled to weigh public health and public safety when deciding who to arrest. In many places arrest rates remained the same as pre-pandemic, with people cycling in and out of jails despite the health risk the pandemic caused. Unfortunately, more arrests have ultimately been found to increase the rate of Covid-19-related deaths. A few months into the pandemic, ACLU analytics projected the fatality rate in the United States to be approximately 200,000 deaths higher than current estimates largely due to the omission of jails from most public models (ACLU, 2020). The constant cycling of inmates through the correctional system has meant that being put behind bars poses a significant challenge to Covid-19 mitigation strategies.

During the pandemic, the use of policing to enforce pandemic-related health instructions have produced racially significant arrest rates. For the first few months of the pandemic, crime rates fell considerably as the nation was ordered to shelter in place and avoid large gatherings of people. Law enforcement agencies across the nation issued public advisories stating that violations of limited social gatherings would result in arrests, jail time, and financial penalties. Arrest data indicated, however, that they were not perpetrated evenly between different ethnic groups. Already severe racial disparities in arrests worsened. In New York, over 73 percent of court sanctioned summons were for African Americans despite them making up only 24 percent of the general population (Li, 2020). Across the nation arrests of Caucasians dropped 17 percent farther than African Americans and over 21 percent more than Hispanics (Li, 2020). Stay-at-home order violations

around the nation were similarly skewed. In cities like New York, more than 80 percent of arrests for stay-at-home order violations were issued to African Americans (Li, 2020). A similar story occurred in Ohio where African American residents were four times likelier to be charged with this form of violation than Caucasians (Beard, 2020). The disparity in arrests is in part due to who remains on the street during quarantines and curfews: persons of color are more likely to be homeless or frontline workers who cannot work from home. Inequities in arrests during Covid-19 mimic long-existing policing patterns of law enforcement – communities of color and poverty-stricken communities are more heavily enforced than Caucasian communities. The over-policing of poor communities of color therefore bears some responsibility for the racial disparities in Covid-19 cases behind bars. The increased rate of Covid-19 infection is heavily exacerbated by pervasive health inequalities within these communities. Data about arrests made during Covid-19 have exposed the blatant disparities in arrest rates of persons of color.

Police officers' continued arrests actually contributed to the cycling of Covid-19 inside of facilities and back out into society, hurting communal wellbeing and health. Jails and prisons are not isolated from the surrounding communities. People travel between the greater community and these facilities each day: correctional staff go to and from the work, legal teams visit inmates, inmates get arrested and released. For inmates, jails act as revolving doors admitting almost 11 million people every year or one person every three-seconds (ACLU, 2020).

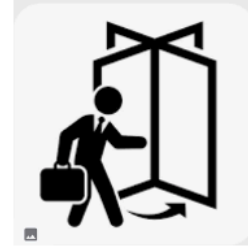
## Jail-to-Community Cycling



A new person is admitted to jail every 3 seconds



Annually this represents 11 million people



Revolving jail door rapidly spreads disease to communities of color

Source: ACLU, 2020

Figure 6: Jail-to-Community Cycling

Over the course of a year, 700,000 presumed offenders are released back into the communities from which they came (Zeng, 2020). Jails have been shown to act as vectors of infection both inside and out into the surrounding communities with high rates of turnover linked to high rates of communal infection. In Chicago, for instance, it was found that Covid-19 cases were higher in ZIP codes with arrest and release rates from the Cook County Jail (Reinhart, 2020). Jail-to-community cycling is a predictor of Covid-19, accounting for over 55 percent of cases in Chicago and almost forty percent of those in Illinois. Therefore, jail churn has serious implications for individuals and their communities. The issue also applies to the staff who work inside these facilities. By simply traveling to and from work, these workers help to inadvertently aid in Covid-19's spread into local communities. In the United States there are over 400,000 correctional staff who commute to and from jails into their communities daily, posing a serious risk to those behind bars

and at home. Staff go to work each day where they are exposed to Covid-19 that, when they return home, has the possibility of infecting their families and the community. The porous nature of prisons and the subsequently high potential to carry infection back home has serious consequences on the surrounding communities (Hooks, 2020). However, it's important to note the reverse is also true: the facilitation of prisoner transmission is often through the initial transmission from correctional staff. Thus, the cycle is never-ending. Smaller facilities often do not have the proper medical facilities, staff, or supplies to deal with the influx of sick incarcerated people. Jail facilities are forced to transfer highly contagious patients to prisons or hospitals to get treated, further spreading Covid-19 behind bars and within other facilities.

Just as inmate release is seen as an effective way to slow the spread in prisons, jails, and neighboring communities, shifting law enforcement efforts away from arrests is vital to protecting public health during a pandemic. A focus on arrest practices not only helps inmates' health and wellbeing but also that of the general public and should thus be considered when discussing society's ethical responsibility to protect inmates. Release efforts which center on prisons are important but incomplete as ongoing arrest and pre-trial detention practices in jails contribute to the spread of Covid-19 within communities. Prison health is rarely thought of as public health despite the porous boundaries between them and local communities. Outbreaks within this setting have the potential to overwhelm local hospitals and emergency rooms where inmates who are severely affected by Covid-19 end up. Because prisons release an estimated 30 million



people each year, they are often seen as vectors for transmission (Kinner, 2020). Despite this, prisons are often excluded from health plans focused on the general populace, making mass incarceration the Achilles heel of the nation's recovery efforts.

### **Deeply ingrained prejudice**

The process of police stops and arrests, as alluded to earlier, is fraught with disparities both in who, what and where is targeted. However, these disparities go much deeper than just policing. From biased police stops and arrests, to partial juries, prosecutors, and judges, as well as ill-informed citizens and politicians, racial and class-based prejudice inundate virtually every aspect of our criminal justice system. Biases, both explicit and implicit, shape who is pushed into the criminal justice system and how harsh their treatment will be. In particular, biases about class and race are often central in every element of the process, from stops, to arrests, pre-trial detention, sentencing and finally incarceration. Recognizing how prejudice influences the individual actors within the criminal justice system is important to understand how these same biases have shaped who remains behind bars during a pandemic.

The stereotyping of racial minorities through explicit forms of biases has a profound impact on persons of color in the criminal justice system. For many, the belief that minorities have simply failed to convert opportunity into success has caused some to overlook racial forms of discrimination as a source of this inequality (Henry, 2002). This form of resentment is one of the best predictors of

punitiveness (Barken, 1994). Racial resentment shapes explicit biases within the criminal justice process and within the American public leading to higher levels of stops, arrests, and sentences for largely poor persons of color (Hinton, 2016). Because of how synonymous crime and race have become, minorities are particularly stigmatized as criminals. Punitive views often seep into furloughs, sentences, and policies, all of which greatly affect minorities (Bradshaw, 2021). These stereotypes can also have serious consequences. For instance, stereotypical associations of persons of color impact social perception of race and can lead someone to interpret ambiguous behavior as hostile (Miranda, 2021). The process of memory uses stereotypes in a judgment of guilt, meaning recall of a crime, and often brings forth negative assumptions about low-status individuals (Eberhardt, 2004). Stereotypes also have irreversible effects on one's behavior. When simulations of police encounters were done both by the public and the police, researchers found that strong racial biases affect decision making skills and cause persons of color to get shot at far more often than Caucasians (Payne, 2001). Similar effects are noted when people were made to distinguish blurred weapons when they were primed with photos of African American faces. Higher levels of biases by criminal justice actors have contributed to high arrest rates and levels of incarceration within communities of color, increasing financial strain and inhibiting wealth creation (Stemen, 2008).

Biases among law enforcement officials coupled with the strategic patrolling of predominantly minority communities increases the likelihood that minorities will encounter police. The outcomes can range from stops and searches,

use of force, and eventually arrests. Because law enforcement is often the first actor in a multi-stage process into the criminal justice system, biases in arrests often trickle down. The cumulative effect of biases at this stage is compounded, negatively and disproportionately affecting minorities. Law enforcement officers have been shown to possess implicit forms of biases which affect decision making processes towards minority individuals (Russell-Brown, 2017). In one study, when primed with photos and the question “Who looks criminal?”, more often than not officers chose minority faces (Eberhardt, 2004). When asked to think about words like “violent”, “arrest” and other job specific wordings, then shown a series of photos, the enforcement officers were quicker to focus on images of minority faces with stereotypically African American features such as darker skin or a broad nose (Eberhardt, 2004). Despite the majority of the responses being the result of implicit biases, these biases have extreme negative effects for minority populations (Welch, 2007). The typification of African Americans as threats often condones police tactics that exploit race and class.

Society has played one of the most damning roles in condemning those in the lower class and minorities, sometimes to a life of incarceration. Beginning in the 1990s, crime was deemed one of the most pressing public concerns. However, the growing public preoccupation with crime was in no way proportionate with changes in crime rates. In fact, violent crime and property crime rates had fallen steadily since the mid-80s. In 1996, victimization rates were among the lowest ever recorded (Bureau of Justice Statistics, 1997). Violent crime reached a ten-year low the same year, representing a five-year downward trend. The murder rate

dropped to its lowest point in over 25 years (Schmid, 1997). As crime rates stabilized, and in many cases declined, support for capital punishment and citizens' punitive attitudes towards crime only increased.

How can one explain society's deeply ingrained opinion about high rates of crime if it isn't based in fact? Public outcry was, and still is, based largely on prejudice about criminality and the perpetrators of crime. A second and more complete explanation for the discrepancy is due to the public's perception of race and racial prejudice. The racial stereotyping of minority men as dangerous criminals has endured throughout history. Racial prejudice is largely based on the idea of protecting the value of whiteness coupled with negatively stereotyping persons of color who are deemed 'other' (Welch, 2007). Attitudes towards crime among Caucasians is tied largely to racist stereotypes of African Americans, specifically as being characteristically more violent (Welch, 2007). The idea that crime is committed overwhelmingly by young minority men is so pervasive within society that it often shapes how individuals conflate crime with race. The familiarity with the image of a thug as more violence prone and menacing is typified everywhere and helps to fuel this belief. In fact, presumed racial identity is so ingrained within public consciousness that connections can be drawn to race without it explicitly being mentioned. The connection is so pervasive that "talking about crime *is* talking about race" (Barlow, 1998).

Racial biases are deeply rooted within the history of the United States and have resulted in the diminishing of life chances for persons of color. Following emancipation, African Americans became the target of policing and sentencing

through the enactment of Black Codes which capitalized on the loophole in the 13th Amendment enabling re-enslavement if someone was convicted of a crime, effectively forcing former slaves back into exploitative labor systems (Taylor, 2020). Vagrancy laws at the heart of these codes allowed for the enslavement of those convicted of “crimes” such as “looking suspicious” which were used to target African Americans, especially in the South (Blackmon, 2019). Ordinances, while they made punishing and surveilling the lives of African Americans easier, they also were one of the first linkages from race to crime (Alexander, 2010). After Reconstruction, scholars, policymakers, and citizens alike all looked towards the disproportionate rate of imprisonment of African Americans when shaping the nation's discourse about race. These notions of criminality helped to shape policy decisions which have had lasting effects up until today.

The largest contributor to the perception of African Americans as criminals is the sheer number of minorities represented in crime statistics and behind bars compared to their percentage within the general United States population. For many, the overrepresentation of minorities in both categories is proof that they are dangerous criminals. This overrepresentation readily ignores the fact that the neighborhoods where these people reside are over-policed. Poverty is actually a much better indicator of criminal behavior than race. A deeper look into statistics shows that Caucasians actually comprise a higher percentage of criminals and convicts than any other race. Despite committing more crime and having fewer factors such as poverty contributing to incarceration, the common perception remains that the majority of crime is committed by minorities. Higher rates of

policing and subsequently higher arrest rates of minorities also permeates public consciousness and further conflates race with crime (Barlow, 1998).

The same racism that pervades social consciousness has not been lost on politicians. In fact, politicians have been using “racially coded” language to describe crime and to allow them to inexplicably use racial animosity to their advantage (Hurwitz, 1997). Fighting crime has long been a narrative about maintaining white privilege over poor, racial minorities. When discussing crime, politicians often use strong racial rhetoric as a way to invoke ideas about morality, authority, power, and race to a crucial group of white voters (Edsall, 1991). Most recently, in the 2016 election, President Trump re-emphasized concern for the rise in crime and a need to maintain law and order, heavily mirroring ideas about the “war on terror” from past presidential elections (Czochanski, 2021). Such pervasive rhetoric reflects harsh political stances on crime by using crime to divide and victimize. By distinguishing the “us” from “them,” politicians can deceptively link poverty and race with criminality that is difficult to describe as racist because of careful race neutral wording.

One way in which politicians have been able to reinforce criminal imaginings for public consumption is through campaign ads. Racial politics conveyed through advertisements was especially crucial in the 1960s when the civil rights movement was at its height. “Get tough” rhetoric was employed by conservative and liberal politicians alike as a way to fear monger in the hope of gaining votes. The most iconic was an ad featuring a still image of Willie Horton, an African American man who raped a woman while on a work furlough from prison.

George Bush's campaign used this single image in virtually every one of his campaign ads trying to show Michael Dukakis's permissive stance on crime (Kinder, 1996). The Willie Horton ad was one of the most explicitly racialized tactics of the 1988 Bush campaign, culminating in the intersection of modern politics, racism, and law and order. It was even more effective than intended, however, as the message actually conveyed to viewers was even more powerful – that of fear. It served as a visual representation that this young African American man, or any African American man for that matter, was responsible for pervasive violence in the United States (Mendelberg, 1997). Criminal predators like Horton were a threat to public safety. Instead of simply appealing to the public's growing concern about crime, it activated racial prejudice and resulted in "greater resistance to government efforts to address racial inequality, heightened perceptions of racial conflict, and greater resistance to policies perceived as illegitimately benefiting African Americans" (Mendelburg, 1997). By 1989, when George Bush purported that drug abuse was "the most pressing problem facing the nation," polls indicated a whopping 64 percent of participants agreed, contrasting sharply with the 2 percent concerned with drug abuse only two decades before (Turkington, 2017). Despite high levels of governmental and societal concern, they were weakly correlated with actual drug and crime rates but were instead simply partisan appeals (Alexander, 2010). Politicians have therefore directly contributed to the leading of persons of color and those from a lower socioeconomic status towards mass incarceration.

Obviously, this has had serious ramifications to the present day. Just like the federal government, states began cracking down on drugs and crime. As a result, prisons and jails began to overflow. Louisiana, for instance, took the War on Drugs in stride, imprisoning more of its residents than virtually any other state in the nation or country in the world. Prior to the War on Drugs, Louisiana had only the thirteenth highest rate of incarceration. By 1986 it was the fifth; four years later it was the third, and by 2000 it became the second highest (Quigley, 2017). By 2016 its rate of imprisonment was 816 per 100,000, the highest of any state (Quigley, 2017). Just as nationally, Louisiana's reliance on imprisonment has not acted as a deterrent for crime as its crime rate is still the highest in the United States (Turkington, 2017). Carrying over from tough on crime policies enacted in the 70s and 80s, some of the nation's toughest drug laws continue in Louisiana (Crisp, 2017). Today, one in four inmates in Louisiana have been incarcerated for drug offenses (Smith, 2021). Drug use and other non-violent crimes make up almost half of pre-trial detainees in Orleans parish prisons on any given day. Even possessing small amounts of narcotics carries a felony charge. Possessing a larger amount can result in the imposition of severe mandatory minimums (Alexander, 2010). The state's high incarceration rate can in many ways be explained by the adoption of the federally waged war on drugs.

Media has proven to be one of the head actors in the conflation of race and crime. Historically, the media has often chosen to circulate highly sensationalized stories of dangerously violent criminals and rising crime rates, despite the fact that this isn't the case. The idea that public safety is threatened as a result has



undoubtedly contributed to social pressure for politicians to be “tough on crime” and to criticize leniency. Politicians soon enlisted the help of mass media to cover the War on Drugs (Hurwitz, 1997). Racial differences in coverage quickly emerged in the portrait of drug offenders. As police efforts shifted to crack from powder, so did the media's focus from suburban Caucasian users who needed rehabilitation to predominantly ghettoized African American users who needed punishment. As a result, racial prejudice and mass incarceration are both heavily linked to mass media aggrandizement of crime and those who engage in it.

The media's presentation of crime as race specific rather than individual determinant is another form of racial prejudice and discrimination. News stories which featured African Americans or other minorities, regardless of context, often did so in a negative light. The depiction of these individuals is often done without denoting a personal identity such as the name of the person arrested or convicted of a crime (Entman, 1990). In doing so, viewers often struggle to humanize the nameless persons on screen. The nameless images represent qualitative aspects of crime and race and the frequency of them in news stories consequently shapes how people see young minority men. Similarly, this practice of homogenizing an entire group by not naming a picture suggests that the visual representation of an African American man can be assimilated into an undifferentiated, stereotypical outgroup from which they come. The faces of these minority males effectively demonize them in many crime-based stories which use mugshots and court drawings in connection with their cases (Gerbner, 2003). In a study focused on the press coverage of African American defendants, researchers determined that the

coverage contained almost four times as many dehumanizing references per article than those that covered Caucasian defendants (Goff, 2008). The correlation between the number of inhuman or animalistic references made in an article and the probability that a defendant is sentenced is direct and strong (Eberhardt, 1994). By dehumanizing the individuals and linking minorities to crime, the media may actually encourage the social construction of minorities as threatening.

Similarly, the young, male person of color has been routinely re-enforced as a criminal through mass media. Through the inundation of visual portrayals of African Americans as criminals, the viewer makes a connection that is quickly formed either consciously or subconsciously between race and crime. While the number of minorities who are arrested, sentenced, and incarcerated is disproportionately high, public perceptions of Black criminality continue to exceed the truth. Depictions of criminality have been accessible through many forms of media, television, radio, and most recently forms of social media such as Tik Tok and Instagram. Because of how accessible these depictions have become, they easily and readily shape perceptions about crime and subsequently race. However, not all media sources accurately or fairly portray suspects or criminals in the same way. For instance, crime news often portrays a seemingly endless number of minority men who are arrested or placed behind bars. While the quantity with which persons of color appear on screen or within social media influence how the public perceives these criminals, it's also the manner in which they appear. When an African American appears on screen in any role, they are significantly more likely to appear as a suspect unlike a Caucasian who is more frequently

represented in positive roles such as law enforcement officer, news commentator, prosecutor, or victim (Chiricos, 2002). The “criminal typification of race” occurs almost two and a half times more than the criminal typification of non-minorities (Chiricos, 2004). Through depictions of crime and its links with race, the media has constructed skewed definitions of both. Media has therefore played a significant role in shaping how society understands race and in doing so further stigmatizes and stereotypes minorities.

Individual actors within the justice system – judges, juries, prosecutors – have their own biases and as a result can heavily influence who ends up behind bars and for how long. For some, their acts are the result of their own individual prejudices and racist views, while others are influenced by implicit biases. Implicit bias is the “automatic positive or negative preference for a group, based on one’s subconscious thoughts” and can unknowingly influence actions and reactions. It can also produce discriminatory behavior despite an individual being unaware that this form of thought processes is the basis for their decision making (Hinton, 2018). While implicit biases influences everybody, the implications within the criminal justice system are especially severe and have innate consequences.

Prosecutors often reflect public sentiment for harsher punishments, and as a result, disproportionately punish the crimes that persons of color commit over those most commonly committed by other ethnic groups. Some of society’s most serious crimes, such as first-degree murder and manslaughter, are prosecuted much harsher, with the death penalty being disproportionately sought against African Americans (Hurwitz, 1997). Prosecutors have also been shown to use

racial stereotypes such as characterizing African American defendants in court as prone to criminality or violence as a way to push a particular narrative that benefits their case. As a result, there are higher conviction rates of young African American males compared to Caucasian males of a similar age. When questioning prospective jurors, prosecutors often do so with race in mind. Studies highlighting the striking of specific jurors documents a statistical correlation between race and a prosecutor's use of peremptory challenges (Bourke, 2003). While the strikes have disproportionately excluded African Americans in virtually every state, Louisiana documents some of the worst rates of the exclusion of ethnic groups. In particular, Jefferson Parish prosecutors have disqualified minority jurors over three times more often than Caucasian jurors despite persons of color making up over 30 percent of those living within the area (Bourke, 2003).

Similarly, Louisiana's policy on non-unanimous jury verdicts has severely limited racial minority participation within the criminal justice process. Prior to 2020, Louisiana was one of two states to allow non-unanimous juries when sentencing (Cohen, 2017). As a result, the majority of criminal trials effectively have no minority representation as white jurors are able to ignore the voices of one or two jurors of racial minorities. In 2017, a report from the Equal Justice Initiative noted that over four-fifths of trials held in the rural Jefferson Parish in Louisiana had no African American representation despite this population being dramatically higher within Louisiana parishes (Equal Justice, 2010). The exclusion of minority citizens, particularly in Louisiana, is at least partially to blame for the continued disparities in sentencing. And because the Supreme Court ruling on non-

unanimous juries did not retroactively apply to old cases, almost 2,000 inmates remain incarcerated under the Jim Crow era law (Cohen, 2017).

The Louisiana Supreme Court has dismissed claims of discrimination against minority jurors except in cases where racial bias is explicit. However, prosecutors have easily been able to circumvent this issue with the use of more sophisticated questions. For instance, in *State v. Miller*, jurors were asked to rate their affinity for Jefferson Parish's correctional Sheriff and law enforcement officers (Smith, 2012). The prosecutor struck four African American jurors but no Caucasian jurors based on the response to this question alone. While presenting as race-neutral, the question indicated to the prosecutor how distrustful a minority was of law enforcement (Bowers, 2014). Because racialized policing heavily affects minorities at inexplicably higher levels than Caucasian citizens and disproportionately contributes to feelings of unease or fear, prosecutors can use this as justification to strike minority jurors. Questions about the death penalty often permeate jury qualification meetings. Prosecutors often ask questions around "death-qualification," asking prospective jurors if their views on the death penalty will impair them from being able to fairly consider evidence presented at trial (Clark, 2016). Because the majority of African Americans oppose the use of capital punishment due to the links between death penalty and lynching, this is yet another race-neutral way to exclude them from juries.

The outcome of omitting minorities from juries is shocking. Juries with only two or more minority jurors have a significantly higher death sentencing rate than those where less than half of those jurors are Caucasian (Bowers, 2004). Even one

African American juror can significantly alter the outcome of a case such as cutting the death sentencing rate by over 30 percent (Bowers, 2001).

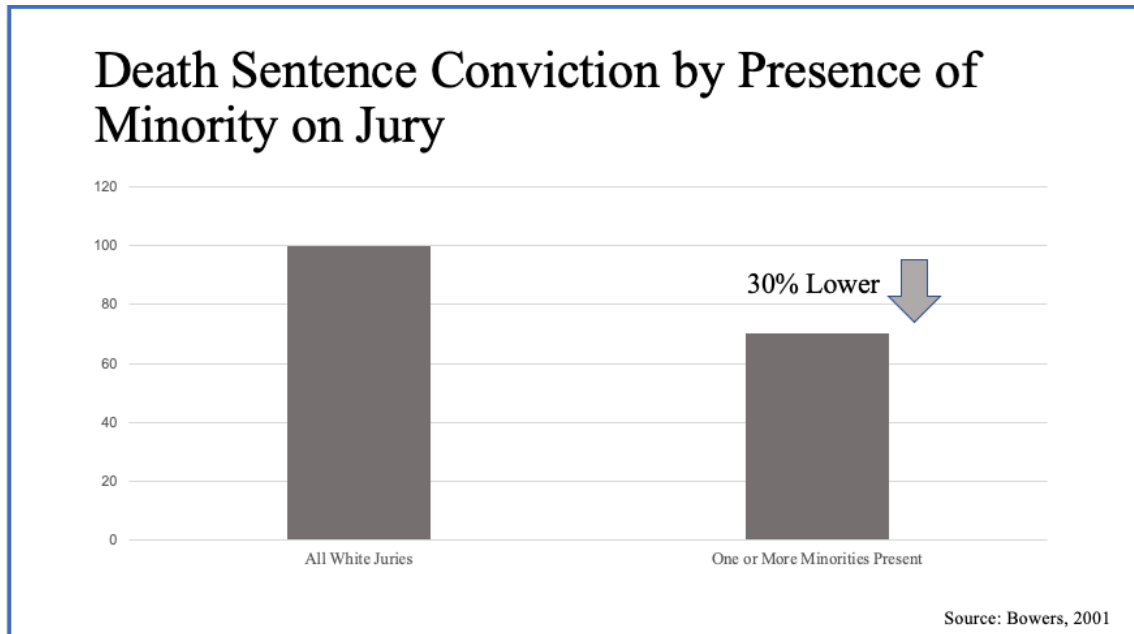


Figure 7: Death Sentence Conviction by Presence of Minority on Jury

Within juries themselves, it has been shown that biases against minority groups are present in case verdicts, mock jury experiments, and sentencing decisions.

When examining the racial composition of juries and race of the defendant, implicit biases are often present in the decision-making process, particularly in cases with few minority jurors and when the juror's race differs from that of the accused. In particular, juries disproportionately sentence African Americans to execution; those who are accused of murdering white victims are sentenced at an even higher rate (Pierce, 2011). The race of a defendant has even been shown to affect how a jury remembers an event and interprets evidence.

Without a jury that accurately represents the surrounding community, stereotyping can be observed in sentencing patterns of persons of color. For

instance, displays of Afro-centric features increased the probability of a death sentence for African American defendants when the victim was white. When mock juries were made to decide sentences, white participants gave persons of color sentences that were disproportionately longer than white defendants for similar offenses (King, 1993). Studies show, however, that much of the biases of juries is implicit in sentencing decisions. That said, they still have severe and sometimes deadly implications for defendants. A study on mock juror sentencing decisions found notable differences in decision making when a defendant's race differed from the race of the juror (Powers v Ohio, 1991). Jurors were more likely to provide a guilty verdict and a longer sentence in those cases, suggesting leniency towards one's own ethnic group, a phenomenon known as in-group biases. Another study found that mock jurors displayed greater bias towards darker-skinned persons in cases with ambiguous evidence than for persons with lighter complexions, evidence of a greater indication of guilt (Levinson, 2010). Rating the level of guilt a defendant displayed garnered similar results as darker-skinned persons were deemed to be more guilty. Remarkably, these same mock jurors often couldn't recall the race or complexion of the accused individual, suggesting an implicit evaluation of their guilt on the basis of race. In cases where the victim was Caucasian and the accused was a person of color, defendants who had more stereotypically African American features were twice as likely to receive a death sentence than those who were perceived to be less stereotypical African American (Eberhardt, 2006). When both were persons of color, the accused's appearance

made no difference. Not surprisingly, Louisiana's death row is almost 70 percent African American, the highest percentage in the United States (NAACP, 2020).

Judges are similarly complicit in tougher sentencing outcomes for persons of color, particularly African Americans. The link between race and a judge's sentencing severity is well documented. When comparing Caucasians and African Americans, the latter were sentenced more severely even when controlling for criminal histories. Almost seventy percent of studies which focused on sentencing at the federal level found a racially discriminatory sentencing outcome in the incarceration decision and the length of the sentence. A study focusing on how racialized factors influence judges' rulings found that when the defendant's race was implied but not explicitly told, the judge imposed more extreme sentences (Rachlinski, 2008-2009). Across the United States, studies have documented that judges in state, federal and juvenile proceedings have been more likely to charge those involved in using or dealing with crack cocaine than powder cocaine (Katz, 2000). Because minorities, particularly African Americans, use crack at a higher rate, extreme sentencing disparities have occurred based on race (Miranda, 2021). Studies have found that sentencing guidelines departing above the recommended range are applied to persons of color, and sentences below this range are often recommended for Caucasian defendants (Nellis, 2021). Harsher sentences of persons of color including the decision to incarcerate and the length of the sentence indicates that judges and juries might both rely on racial stereotypes such that persons of color are more dangerous than other ethnic groups. Attributable stereotypes can heavily influence how decision-makers view



defendants, specifically, they can increase how great a public safety threat these defendants are perceived to be. Because judges have command over virtually every single point in the court proceedings, their biases have profound effects in pre-trial detention and sentencing.

An individual's perceived appearance and skin color also shapes the harshness of a judge's ruling. Darker skin has been shown to be highly correlated with harsher punitive sentences (Westerfield, 1984). When controlling for type of criminal offense and previous record, lighter-skinned African American males got sentences almost four months longer and darker-skinned African American men received prison sentences almost two years longer than Caucasians (Hochschild, 2007). In addition, factors surrounding class can also influence judges' rulings. For instance, whether a defendant was held in custody pre-trial helped to determine how long a defendant was sentenced. Those held behind bars received, on average, sentences almost nine months longer than those released before their hearing (Sutton, 2013). Because poverty heavily determines who remains behind bars and who doesn't, poor persons are more likely to receive harsher sentences than those who were able to afford bail and other court-related costs (Bailey, 2021). Pre-trial detention has also increased the probability of a guilty plea; both pre-trial imprisonment and a guilty plea affect sentencing outcomes. Consequently, persons of color are often subject to pre-trial detainment at a higher rate and have bail set to a higher amount than Caucasians facing similar criminal charges (Jones, 2013). Because judges are explicitly interlinked in the process of determining and setting

bail amounts, judges are complicit in the racial and class-based disparities in bail practices.

From striking jurors on the basis of race to pre-trial detention and imposing the death sentence, racialized and class-based prejudice has been documented at virtually every stage leading up to incarceration, showing just how much race and class matter within the criminal justice system. Implicit and explicit biases both within the American public and within the criminal justice system have served to strengthen stereotypes of persons of color as a threat. In turn this has helped to fuel practices of policing, more prejudice, and eventually has led to the implementation of policies which continue the cycle of incarceration of persons of color from lower socioeconomic statuses. While the criminal justice system has been used to “make society safer,” studies have shown that concentrated incarceration has detrimental effects on communities by eroding resources and actually increasing levels of crime (Hinton, 2018).

### **Public safety vs public health: A biased argument**

Since the start of the pandemic, schools have shut down, public gatherings have been limited, non-essential stores have closed, and people have begun working from home; however, the incarceration system has done virtually nothing to diminish the densely populated facilities that puts those behind its bars at serious risk. Governmental response at the local, statewide, and federal level has been disorganized and ineffective at best and barbarically nonexistent at worst. The line between unprepared and disorganized and deliberate indifference is thin

and leads one to question what role society and government play in protecting inmates. While those behind bars have a legal and moral right to safety while confined by the United States government, the government is also obliged to protect the public from possible violence (Strassle, 2020). This debate is at the center of why inmates have consistently been ignored and overlooked during times of crisis. The government's refusal to take action to help society's most vulnerable shows just how entrenched this belief is. The core of the issue is the allocation of vaccines for inmates and their early release.

The novelty of the pandemic and the lack of information about how to stop the spread meant that initially conclusive action was almost impossible behind bars. However, as more information was uncovered, public health officials began ringing alarm bells, warning wardens that prisons needed to take extreme precautionary measures. Having the inability to social distance, insufficient hygiene practices, and extreme overcrowding, prisons and jails became petri dishes for Covid-19. Even after the novelty wore off, few prisons heeded the warnings. The typical prison response remained disorganized, ineffective, and oftentimes dangerous. Rather than adapting to handle Covid-19 once it entered these facilities, many aimed their efforts at keeping it out. Business as usual continued as prisons transferred inmates from facilities, failed to enforce mask wearing by guards, failed to supply sanitation supplies so inmates could protect themselves, and deliberately chose not to release inmates. This ultimately led to the rapid and deadly spread of Covid-19 behind bars. Even then, correctional officials only began taking note and shifting behaviors once prisons and jails were

inundated with cases and afflicted by heavy death tolls. Because of policymakers' failures to take preventative steps to contain the spread once inside correctional institutions, prison and jail outbreaks topped *The New York Times'* list of largest outbreaks for months during the initial spreading.

In late March of 2020, the death of Patrick Jones within Louisiana's Oakdale correctional facility marked the first federal inmate to die from Covid-19 (Abraham, 2020). At the time, he was just 49 years old, serving a 27-year sentence on a non-violent drug charge. He, like millions of other incarcerated individuals, was poor, a minority, and had pre-existing health conditions, making him predisposed to Covid-19 infection. He was also just one of the many unfortunate incarcerated who were not released before their Covid-19 related death. His death marked to many the point of no return; once Covid-19 began spreading behind bars the only thing left to do was release vulnerable inmates to mitigate the risk of infection. Efforts to thin these populations and jails have been hampered by the efforts of political officials, cumbersome processes for release, societal pressure, and few reentry opportunities.

Inmate release has been deemed a balancing act of competing goals pitting “public health versus public safety” against one another and effectively leaving inmates' health out of the equation entirely (Strassle, 2020). The shadow of Willie Horton looms large over these decisions (despite the fact that Horton was released on furlough, not parole) so that even the smallest risk that someone might pose a threat to the public means they are often left behind bars. These fears are heavily politically motivated and established under the belief that “it is better [for Governors] to have 20 coronavirus deaths in prison than to have one furloughed inmate commit a crime” (Strassle, 2020).

The Texas Attorney General Ken Paxton for example, applauded the Fifth Circuit for “prioritizing the needs of medical professionals and blocking the unreasonable demands the district court imposed on the Texas Department of Criminal Justice” (Paxton, 2020). Similarly, he noted that “The district court ha[d] no authority to overrule Texas’s decisions about how to manage its scarce resources, and my office will continue to defend the prioritization of medical professionals on the frontline of the battle against Covid-19” (Paxton, 2020). The district court’s injunction limited inmate transfers, access to masks, and cleaning supplies for inmates. Similarly, under President Trump, the Department of Justice fought Covid-19-related requests for compassionate release. Government lawyers called this form of release a “Get Out of Jail Free Card” (Neff, 2020). States have also tried to balance the competing goals of public safety and the rights of individuals behind bars, setting up communities designed to maintain public safety and promote public health by determining who posed the least risk to society if released. However, the qualifications for release are stringent with the threat of public safety determined first before the risk to incarcerated health and wellbeing is considered. Even Attorney General William Barr, one of the more pro-release lawyers in the nation stated that “While we have an obligation to protect B.O.P. personnel and the people in B.O.P. custody, we also have an obligation to protect the public” (Barr, 2020).

The threat of possible recidivism has made efforts to effectively release inmates seemingly impossible. Politicians continue to play devil's advocate listening to the views of victim rights groups and law enforcement officers as they lament release and denounce inmates as dangerous. Just a few weeks into the pandemic the District

Attorneys Association of Oregon, when explaining their hesitancy to release individuals, said that they were “already hearing from victims expressing worry about these potential releases” (Strassle, 2020). For some victims and their families, it feels like “a slap in the face . . . Just the fact that he’s out there living, doing whatever he wants to do, and yet my daughter is never going to be able to do that again” (Eligon, 2020). Similarly, law enforcement officers have been especially vocal when criticizing release proposals. Many have complained that any and all incarcerated persons are dangerous to the general public and release would burden both the communities they are reintroduced to as well as to officers struggling to manage policing during Covid-19 (Strassle, 2020). The president of Houston’s police union said that he didn’t think mass releases would be “a viable solution for the safety of our community,” noting that “As much as we have to balance the dangers that coronavirus poses to the community, we also have to balance that against the danger of letting violent criminals back out on the streets” (Blakinger, 2020). Attorney General William Barrcrassly conferred stating that while “Covid-19 presents real risks... so does allowing violent gang members and child predators to roam free” (Barrcrassly, 2020). As a result, criminal justice actors and elected officials have chosen to ignore the pleas for release of the medically vulnerable, elderly, non-violent offenders, and of the poor. The justification for the lack of action is that saving the lives of “criminals” behind bars is not worth the possibly dangerous cost of their release (Wagner, 2020).

One argument is that release will result in an uptick in preventable violence. As history shows, this is plainly untrue. Prior to the pandemic, research pointed to the possibility of mass reductions of incarcerated populations without an increase in crime.

New York, Massachusetts, California, and Connecticut have all sustained collective prison releases of their incarcerated populations without a rise in crime rates (Council, 2020). One of the most notable examples was between 1968 and 1972, when California's incarceration rate was reduced by over a third with no measurable effects on violent crime rates (Wagner, 2020). At the same time, reducing the jail population has proven not to increase violence because of how few commit violent crimes and how many are eventually charged (Council, 2020). For instance, about 42 percent of those behind bars pre-trial are eventually found not guilty of the allegations for which they were originally arrested (Shapiro, 2014). Likewise, over 95 percent of jail detainees are held for non-violent offenses and almost 40 percent are held for things such as petty theft and therefore pose no threat to the general public's safety (Shapiro, 2014).

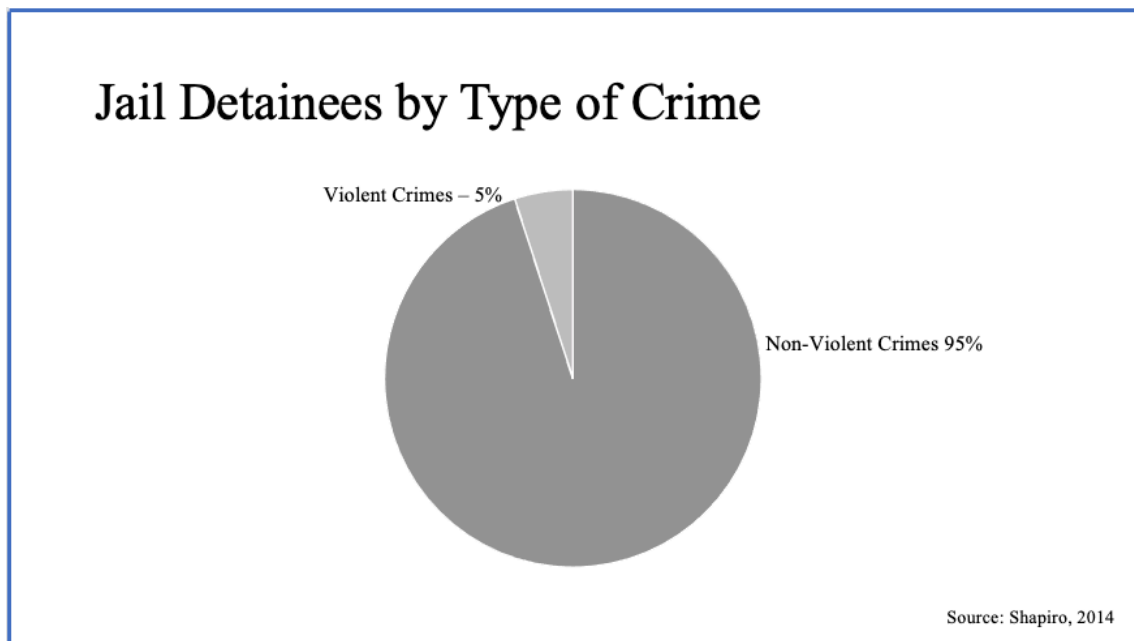


Figure 8: Jail Detainees by Type of Crime

Therefore, the proportion of people jailed under the pretense of public safety is disproportionate to the rate of dangerous persons behind bars. Even those who were

released during the pandemic were found to be rearrested, rebooked, and eventually incarcerated less frequently than before the pandemic. This suggests that those released from jails during the pandemic pose no greater risk than those released prior.

Prejudice still shapes how inmates have been viewed during the pandemic. When release is considered, racial disparities in who gets out of prison pervades the decision-making process. Support for decarceration through release was heavily determined by the racial makeup of the prisoner (Miranda, 2021). For instance, in a study that asked participants to express their level of agreement to the release of hypothetical prisoners, participants were less favorable of the release of African American inmates over White inmates, particularly if they had committed a “stereotypically Black crime” (Miranda, 2021).

Even parole decisions and the risk assessment tools they use often do not tolerate risk of any kind when making their determination and therefore discriminate against persons of color. When determining who should be released, prioritization was given to inmates who received the lowest score on PATTERN, a risk assessment algorithm. However, while appearing colorblind, this system is built upon the basis of racial biases which are inherent in virtually every part of the criminal justice system (Hager, 2020). The algorithm itself is another version of the appraisals judges conduct each and every day: looking at a person's criminal past to determine the likelihood of recidivism. However, unlike a judge, the algorithm is not programmed to look at an inmate's life circumstances: age, chronic illness or other health risks, time served, and conduct while in prison (Hager, 2020). It is therefore not able to determine if an offender has taken steps towards change. Since a poor score on the PATTERN



assessment often mitigates all other factors, risk assessment tools used to determine the likelihood of recidivism are quite flawed. At the same time, the rating system itself holds implicit biases likely programmed in, for it deems white-collar offenders, who are overwhelmingly Caucasian, as safer for release, while drug users or those with a history of prior non-violent offenses, disproportionately persons of color, not safe for release (Hager, 2020). While using the PATTERN algorithm, it found that a third of Caucasian men in federal prisons were low-risk enough to be released while only 7 percent of African American men were given the same designation (Chourreau-Lyon, 2020). Despite advancements, algorithms used to predict future crime have made it difficult to break cycles of criminalization (Abraham, 2020). Risk assessment tools actively reinforce racial disparities already pervasive within the criminal legal system.

Parole boards also largely do not recognize an inmate's capacity to change and instead focus too much on a person's crime of conviction, regardless of the evidence that an individual has changed or the time elapsed since the crime was perpetrated (Elijah, 2015). Despite research showing that inmates who commit violent crimes have some of the lowest rates of reoffending, they often consider this group to be the highest risk (Elijah, 2015). Similarly, there is overwhelming evidence that criminal conduct declines with age which both parole boards and risk assessment tools fail to take into account. As shown acutely during this pandemic, mental and physical health risk factors are often ignored during assessment leaving some of the most vulnerable inmates behind bars. The debate over inmate release shows just how deeply ingrained prejudice is in how we think about public safety versus public health.

The Louisiana release panel was particularly conservative. Advocacy groups said that the panel “only ha[d] the voices of pro-law enforcement, pro-incarceration, and really nothing to counterbalance those voices” and therefore the criteria was too stringent and in no way based on prisoner’s health risks or how bad Covid-19 had gotten within a particular facility (Chrastil, 2020). A panel with no public health officials, doctors, or someone to make assessments about the potential risk meant that release was based solely on risk to the public rather than risk to the incarcerated person. As Covid-19 continued to spread within Louisiana correctional facilities, over 600 state prisoners were set to be released early. As the state entered phase two of reopening, however, the panel was suspended due to “the lack of need for the committee” and would “reconvene if there [was] an unexpected uptick in the number of cases” (Pastorick, 2020). Just four days later over 900 inmates had been tested in prisons around the state and almost 600 had tested positive. The few that had been released prior to the panel's suspension were an insignificant .3 percent of the state's prison population (Chrastil, 2020). An attorney at the ACLU of Louisiana warned that despite a downtick in the state’s Covid-19 rate, the uptick inside prisons would have detrimental effects on the state’s recovery efforts. “The review panel was a woefully inadequate response to this public health crisis, and it’s disheartening to see the Department of Corrections return to business as usual with outbreaks continuing to rage through our state prisons” (Chrastil, 2020).

Throughout the juggling act between public safety and inmate’s rights, some remain on the inmates side, asking politicians to seriously consider release for sick and elderly inmates who are severely overrepresented within the criminal justice system and

pose some of the highest risks to Covid-19. From an ethical standpoint to the question of release, does society owe protection to more vulnerable populations in crisis? When someone is incarcerated many rights are taken away as a result of their conviction, yet they still retain certain rights. During the pandemic, the virus has been shown to have differential impacts on vulnerable populations because of factors that correlate to disadvantage like age, exposure to Covid-19, and pre-existing health conditions. In response, retirement and nursing homes have been prioritized in the fight along with masks and other forms of personal protective equipment to frontline workers, and allocation of the vaccine to those with pre-existing conditions. However, incarcerated individuals who are one if not the highest risk population before and during the pandemic, have been largely overlooked. Morally, people ask if prisoners are deserving of the risk they pose by being behind bars and if the punishment is proportionate to the crime. If society has the duty to protect vulnerable populations from the pandemic, shouldn't they treat incarcerated people with the amount of care they have given to other high-risk groups?

While morally one could argue for release for incarcerated persons during the pandemic, there are also several practical reasons as well. Epidemiological evidence such as rate of infection behind bars remain one of the most important (Strassle, 2020). Models estimate that if release rates doubled and arrests were limited to serious offenses during the pandemic, over 100,000 deaths of incarcerated and non-incarcerated persons could be avoided (Akiyama, 2020). The WHO has stated that “the risk of rapidly increasing transmission of the disease within prisons or other places of detention is likely to have an amplifying effect on the epidemic, swiftly multiplying the number of

people affected. Efforts to control Covid-19 in the community are likely to fail if strong infection prevention and control measures, adequate testing, treatment and care are not carried out in prisons and other places of detention as well” (WHO, 2020). Reducing the incarcerated population has thus been shown to not just help those behind bars but also those in the general community.

The penal system's role is the protection of the general public from dangerous persons by deterring and incapacitating persons convicted of crimes in the hopes they are unable to commit new crimes; however, Covid-19 has arguably made criminal punishment disproportionately severe and unjustifiable in accordance with one's crime. Pre-trial incarceration is an example of this. As the pandemic hit, tens of thousands of jail inmates were left stuck behind bars awaiting trial as courts shut down to prevent the spread of the virus. Inmates were unable to post bail during this pause and were left behind bars where there was a heightened risk of exposure. Even as inmates were denied release, new intakes continued, bringing in the virus and increasing its spread behind bars (Strassle, 2020). The churn of inmates often meant jails had some of the largest outbreaks in the nation. The use of pre-trial detention to detain those who pose a threat to the public, however, often ignores the fact that the medical risks associated with packing people behind bars during a pandemic is incredibly high (Sawyer, 2020). The misuse of pre-trial detention has been one of the biggest barriers to reducing prisoner numbers behind bars and lessening community spread of Covid-19 (Strassle, 2020). This juggling act was not lost on many lawyers, who described this form of containment as “inhumane.” Attorney General William Barr wrote in a

memo that, “Each time a new person is added to a jail, it presents at least some risk to the personnel who operate that facility and to the people incarcerated therein” (ACLU, 2020). Marilyn Mosby, Baltimore’s chief prosecutor, despite the serious concern for public safety “we don’t want to prescribe someone with substance-use disorder to a death sentence” (Mosby, 2020). The chairman of the New York City federal public defender's office stated that, “By keeping more people in the jails, you are increasing the overall number of people who contract the virus”... effectively “playing roulette with people’s lives” (Williams, 2020). The long delays in the criminal justice system have resulted in extended periods behind bars for millions of people and a higher risk of contracting Covid-19 and other forms of illness.

The few completed releases that have been made are plagued with contradictions. Many have been quick to criticize the release process particularly after federal inmates like Paul Manafort, Corrine Brown and Michael Cohen were released despite not meeting the Bureau's release criteria (Herbert, 2020). Those that have managed to be released from prisons and jails often have something in common: connections. On the other hand, Eddie Brown, who had already served a significant portion of his sentence and had severe health problems was denied release, raising important questions about the fairness of the process (Neff, 2020). Like thousands of other prisoners, Eddie Brown cannot afford the help prisoners like Cohen and other inmates who have been released have received. Inmates, many of whom meet the criteria of release, languish in prison without legal help because of the lack of connections, finances, or an understanding of the complex proceedings and processes.

In total, less than 18,000 inmates were released from federal and state prisons, amounting to an insufficient .8 percent of the 2.2 million people currently behind bars in the United States (Hayes, 2020).

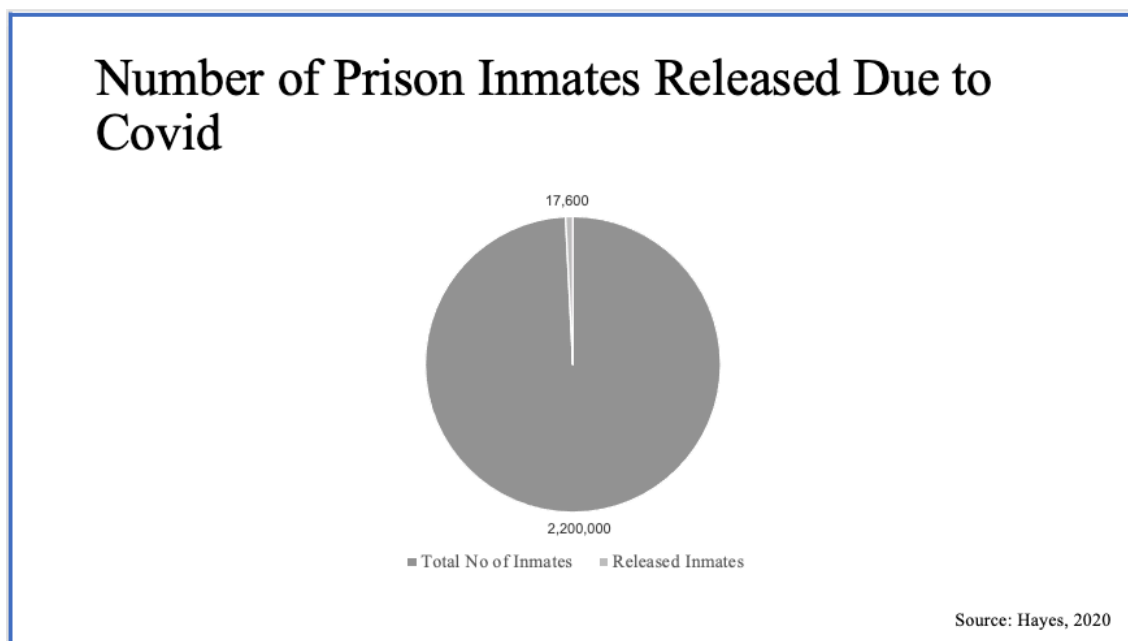


Figure 9: Number of Prison Inmates Released Due to Covid

Even release for prisoners who are particularly vulnerable to the virus, bear no risk to the public, or have yet to be convicted, has been supposedly considered throughout the pandemic yet rarely enacted (Abraham, 2020).

Even after an inmate's release, many face high unemployment rates and a shortage of resources and services to help them successfully reenter society. Release can be a stressful time for former inmates. High rates of mortality after release have been found, especially for persons with a history of injection drug use. After the first two weeks of release, formerly incarcerated individuals were upwards of 40 times likelier to die from an overdose than someone from the general populace (Shabbar, 2018). Diminished tolerance, the stress of trying to obtain housing, find work, and reintegrate

back into one's community heavily contribute to this statistic. During the pandemic, rates of drug-related deaths after release were some of the highest they have ever been largely because of the magnification of stressors coupled with the pandemic.

As the vaccine was approaching its initial rollout, the same ethical and practical considerations for release were used to determine vaccine status. With a variety of Americans at significant risk of exposure, severe infection, and high rates of mortality, people questioned ‘who should receive the first dose?’ Even early in the pandemic it was a known fact that people in jails and prisons were four times as likely to be infected and twice as likely to die from the virus (Bazelon, 2020).

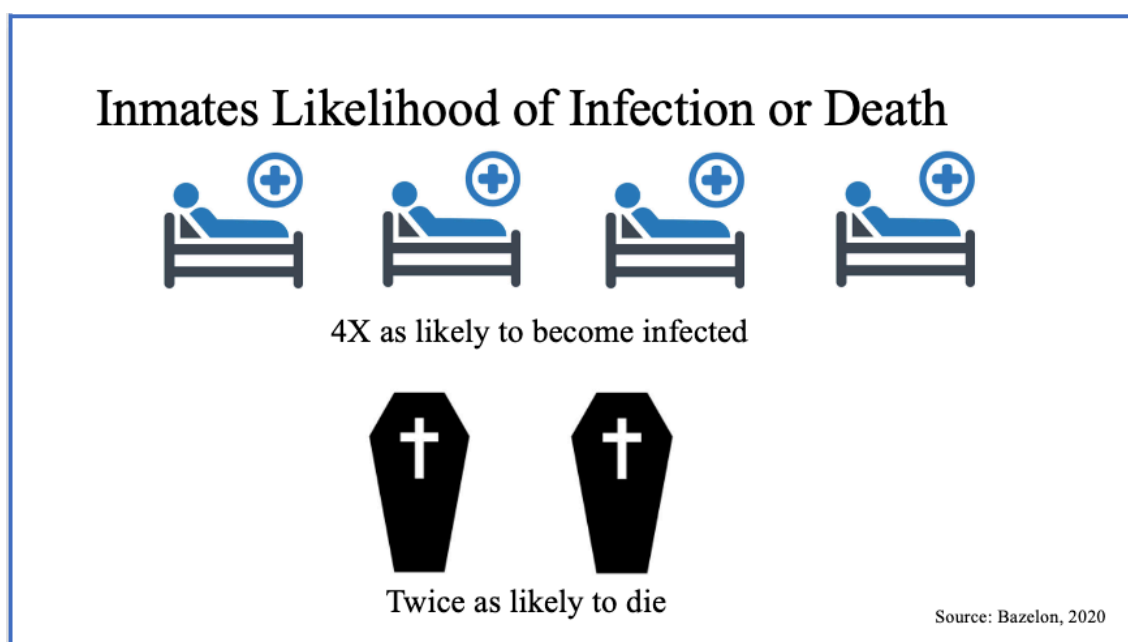


Figure 10: Inmates Likelihood of Infection or Death

Incarcerated persons were determined by medical and public health experts to be a “critical population” for early vaccination (Douliery, 2020). The recommendation underscored the fact that inmates have little to no control over access to protective equipment nor do they have the ability to socially distance behind bars. Not only that

but prison outbreaks pose serious threats to surrounding communities. Preventing the virus from spreading behind bars benefits society as a whole.

While medical professionals stress infection and mortality rates to determine risk to both inmates and society, politicians often weigh the stigma and public perception of criminals in their determination of who should get the vaccine. As governors determined who to prioritize, it soon became a crucial test between public health and ethics. For many states, when finalizing vaccine prioritization, political unpopularity took precedence and led the public health benefits of incarcerated vaccination to largely be ignored. (Pauly, 2020). Pressed on their decision-making processes, politicians often heard statements like “Why are we providing medical care, or doing this or that for people who have committed crimes?” (Polis, 2020). Colorado’s vaccine plan was particularly attacked by critics who pushed back on Governor Polis’s plan to vaccinate inmates first. A district attorney wrote in the Denver Post, who “would give the life-saving vaccine to a person who puts a loaded gun to grandma’s head, before he would give it to grandma” (Brauchler, 2020). A few days later a Fox news segment aired stating: “Killers and rapists set to get Covid-19 vaccines before Granny” (FOX News, 2020). Just a week later, when Polis was asked about the Denver Post column in a press conference, the governor said, “Colorado’s public health department will de-prioritize prisoners when it finalizes its vaccination plan” (Polis, 2020). He followed up with, “There’s no way it’s going to go to prisoners before it goes to the people who haven’t committed any crime. That’s obvious” (Polis, 2020). This attitude has frustrated medical experts. The director of the Yale



Institute for Global Health described any plan not focused on the mitigation of infection and poor public health outcomes as “immoral.” “It's not our job and shouldn't be our job to say who is more quote–unquote valued by the society or not" (Omer, 2020).

Once vaccines did become available, public and political antipathy made politicians reluctant to prioritize inmates. While almost four-fifths of all states addressed incarcerated people in their vaccine plans, virtually all chose to prioritize other seemingly less vulnerable groups over inmates. Eleven states had no plans for incarcerated populations at all (Montgomery, 2021). This posturing breaches the duty of the government to protect the health of those under its care. The president of the Vera Institute of Justice postulated that, “Immunizing incarcerated people is not only a moral imperative, it’s a practical necessity to stop the spread of Covid-19” (Bazelon, 2020). Of the states that addressed correctional institutions in their vaccine plans, all prioritized correctional staff over inmates. Despite correctional staff being put at the front of the line, a significant portion refused to take the vaccine. This has raised even more ethical questions about inmate safety and correctional responsibility in protecting those behind bars. Medical experts have consistently voiced support for vaccine mandates for health care workers, pointing to the ethical obligation of medical professionals to insure the well-being of those they are entrusted to protect. Prison staff are appointed to protect the health and wellbeing of those behind bars and should therefore be held to a similar standard. However, as variants surged and infection rates continued to rise, vaccine rates remained inadequate. It’s hard to believe these trends are unrelated. By December of 2021, 71 percent of adults in the United States had received the vaccine while less

than half had taken just one dose (Montgomery, 2021). In many southern states staff vaccination rates are significantly lower than national averages. For instance, Alabama and Georgia prisons had less than a quarter of staff report being vaccinated (Tyagi, 2021). The suspension of prison educational programs, restriction on visitation, and inmate isolation continues behind bars even though vaccine rates among incarcerated persons are higher than the national average. These low vaccination rates are concerning because incarcerated persons are unable to protect themselves from infection. For as long as prison staff refuse the vaccine, inmates continue to be vulnerable to infection, strict isolation measures, and even death.

Despite vaccines being highly accessible and deemed safe, many incarcerated people remain unvaccinated because they doubt the vaccine's safety. Those working close to prisoners described prisoner reluctance as a reflection of an inherent distrust of prison health care and the American government, particularly among prisoners of color (Xaviar Moore, 2021). A guard at the New York Correctional Institution agreed: "I think there is this very real perception among some people in prison, particularly people who have been in prison for a long time," she said, "that prisons are not to be trusted with their health" (Scaife, 2020). Behind bars, prisons and jails do not have a good track record of vaccine administration. Among African Americans, mistrust in the Covid-19 vaccine is significantly higher than Caucasians. Because African Americans are not only more vulnerable to contracting and dying of Covid-19 but are also disproportionately behind bars, this is cause for concern. The historical traumas of medical distrust, such as the Tuskegee Study of Untreated Syphilis in the Negro Male, provide context for today's vaccine hesitancy among minorities (Gamble, 1997). Even

if someone is unaware of this history, however, many minorities today find their pain ignored, conditions misdiagnosed, or treatment withheld from a medical community sworn to do them no harm (Zinzuwadia, 2020). The lack of confidence that minorities have for the medical establishment both behind bars and outside of them directly results in vaccine hesitancy that makes them more susceptible to illness.

Inmates have an ethical and legal right to safety while confined, and yet inmates were easily overlooked in favor of the general public's presumed safety. Despite both the release and vaccine rollout being thought of as a balancing act, the public's concern for safety heavily trumped health risks posed by inmates. Months after the pandemic began, and release allocation from both prisons and jails were still being made on a case-by-case basis which were slow, unevenly and not suited for times of crisis. A year later virtually all state and federal committees had only approved a minuscule and insignificant percentage of those behind bars despite the fact that a vast history of large-scale releases were determined to not endanger public safety. At the same time, a small proportion of staff report being vaccinated putting inmates at increased risk. Not only have efforts to reduce this population remained insignificant to interrupt transmission but the overwhelming opposition for release shows just how pervasive the assumption that criminality is heavily linked with threats of danger.

### **Punitive policies**

While individual prejudices, both implicit and explicit, have greatly contributed to the shaping of mass incarceration, it is the laws and policies created by the government and sanctioned by societal norms that cement racism and classism as normal. These policies have had long lasting consequences. In the mid-1970s punitive

policies included mandatory minimums, three-strike laws, and parole restrictions designed to “stomp out crime.” Persons of color and drug addicts were disproportionately swept up in the frenzy, and are now disproportionately represented behind bars. In addition, acts such as the Violent Crime Control and Law Enforcement Act and the Personal Responsibility and Work Opportunity Reconciliation Act have taken away valuable resources for inmates leaving them susceptible to infection. The implications are essential to understanding why today's prisons are overcrowded, and why inmates are older than ever and vulnerable to severe illness from infection.

In 1965, President Lyndon B. Johnson declared the nation's first “War on Crime” in which he labeled crime “a crippling epidemic hindering the progress of the nation” (Hinton, 2018). Rather than targeting criminal behavior the war sought to end the sociological and economic consequences that led to criminality. According to President Lyndon B. Johnson’s Commission on Law Enforcement and the Administration of Justice, law enforcers such as judges, police officers, and prosecutors were responsible for the observation of “poverty, racial antagonism, family breakdown, [and] the restlessness of young people” (Hinton, 2018). A few short years later and the War on Crime pivoted slightly and grew to encompass drug use. Despite public opinion polls from the early 1970s indicating that only two percent of respondents viewed drug use as a critical problem facing the nation, President Richard Nixon declared drugs “America’s public enemy number one” (Cigdem, 2011). In the process Nixon formed the Drug Enforcement Administration and effectively increased the breadth of federal drug control agencies by imposing mandatory sentences for drug related offenses at the federal

level (Tinlin, 2020). And so, the “War on Drugs” began. The culmination of these two “Wars” were the start of one of the most dramatic expansions of policies bent on inhibiting illegal behavior, and in the process spurring immense growth and racial disparities within the criminal justice system.

Less than a decade later, Ronald Reagan won the presidential election under the promise to fight pervasive crime and drug use throughout the United States. Over the next few years, he expanded the budget of federal law enforcement agencies. The DEA launched with a budget of \$75 million in 1972. It nearly quadrupled in just ten years (Alexander, 2010). By 2020, more than \$3.1 billion was spent by United States taxpayers (Murch, 2016).

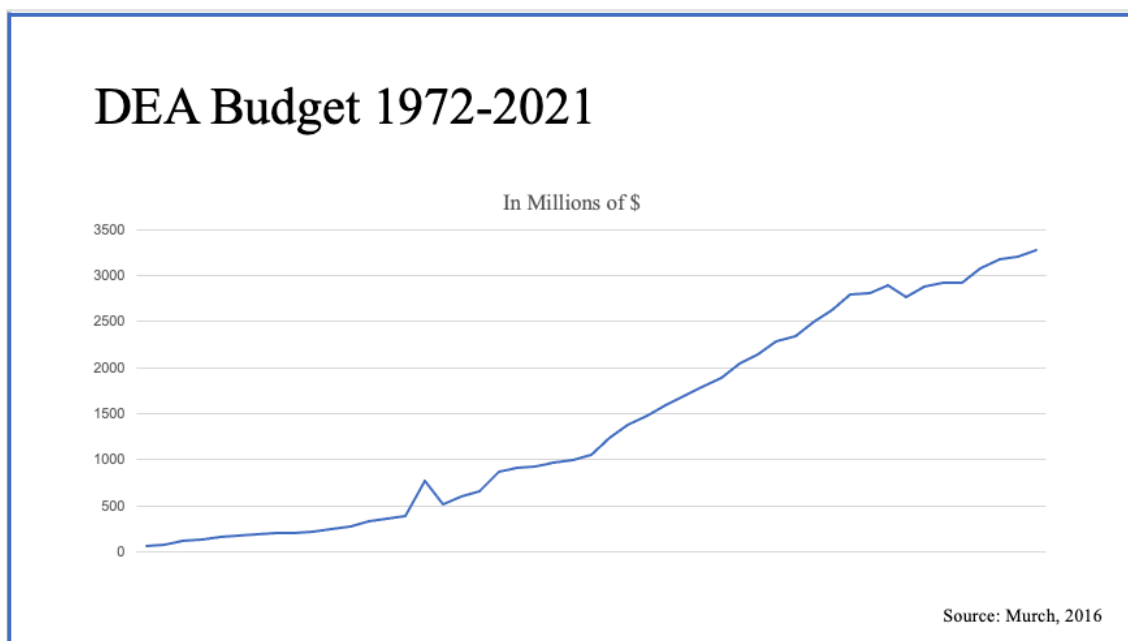


Figure 11: DEA Budget 1972-2021

Legislation under the Reagan administration reinforced the idea that drugs were the biggest threat facing America and that the situation required a federal response. In 1986 laws allotted over \$2 billion to the war on drugs (Alexander, 2010). Some laws

permitted the use of illegally obtained evidence to be used at trial for drug related crimes (Tinlin, 2020). The same year, Reagan signed the Anti-Drug Abuse Act setting federally mandated minimum sentences for the distribution of cocaine. All drug laws passed during the Reagan administration were punitive in nature, permitting public housing the authority to evict anyone who allowed “drug-related criminal activity to occur on or near public housing premises” (Alexander, 2010). Similarly, convicted drug offenders were excluded from receiving many federal benefits like SNAP or student loans. Even first-time offenders weren’t excluded from mandatory minimums set by the administration. From 1985 to 1989, drug offenses doubled (Alexander, 2010). Political rhetoric escalated into the 1990s culminating in the 1994 political campaign featuring crime as its central theme.

Politicians who sought to win votes through “tough on crime” rhetoric benefited considerably from this imprisonment boom (Hanganu-Bresch, 2020). By preying on the fears of Caucasian citizens about African American criminality, politicians sought to and often did win votes (Bailey, 2021). President Lyndon B. Johnson’s War on Crime effectively became a “Guerrilla warfare-style attack in poor urban black neighborhoods” (Hinton, 2018). Law enforcement officers flooded the streets leading to racialized criminalization of African American youth. At the same time, the true motive of Nixon’s War on Drugs was, as John Ehrlichman, one of Nixon’s advisors, put it, to criminalize “the antiwar left and black people” (Ehrlichman, 1994). Ehrlichman noted that, “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then

criminalizing both heavily, we could disrupt those communities" (Ehrlichman, 1994). Both "wars" caused the prison population to explode in size. Just a few years later, the rate of African American incarceration was over five times the rate of that for Caucasians (Bailey, 2021). The Reagan administration passage of strict crack cocaine laws significantly impacted the African American population by funneling them into the criminal justice system (Austin, 2001). Crack is an inexpensive drug primarily used by poverty stricken racial minorities as opposed to powder cocaine pervasive within white communities, a drug rarely acknowledged by law enforcement officers (Welch, 2007). It was only once the drug had changed forms into a relatively inexpensive and accessible one used primarily by minorities that the crack epidemic was born. Crack became the prioritization of policing and policy makers alike.

Beginning around the 1970s, both federal and state authorities enacted mandatory minimum sentences for drug crimes and other serious offenses (ACLU, 2012). Mandatory minimum laws are a one-size-fits-all sentencing model that requires automatic and often disproportionate sentences for the committal of some crimes. This form of punishment doesn't allow a judge to tailor a sentence to better fit the seriousness of a crime, the consideration of the individual's role in an offense, or the likelihood of their recidivism. Some of the strongest supporters of retributive justice advocated for the replacement of indeterminate sentencing with mandatory sentencing arguing that increased severity and certainty of punishment acts as a deterrent. Similarly, by taking discretion away from possibly lenient judges or other liberal enforcement officers, the rehabilitative model was stripped

from the framework of the criminal justice system. Mandatory sentences, however, not only fail to act as a deterrent, they reallocate rather than reduce discretion. Through the enactment of mandatory sentences, judges no longer have discretion to determine circumstances of a case, grant probation, or if an inmate has been rehabilitated. Instead, mandatory minimums helped shift power to prosecutors. Having sole authority to select a criminal charge, prosecutors use lengthy sentences as threats over defendants' heads, who are in many cases made to settle to avoid years behind bars for even minor crimes. Thus, mandatory minimums act as coercive tools with enormous potential for exploitation (Westerfield, 1984). Mandatory sentences do not prevent crime, and have drastically increased the number of incarcerated individuals. As more mandatory sentences were enacted across the nation throughout the 1980s, prison growth required the building of more and bigger prisons than ever before.

Louisiana's mandatory minimum sentencing laws heavily mirrored the extremely punitive measures taken by the federal government and acted as the primary driver of the state's high incarceration rate. One of the most striking facts is that between 2009 and 2015, over half of all mandatory sentences were for non-violent crimes (Smith, 2020).

Public outcry over mounting crime led to the enactment of habitual offender laws. These laws were presented as a way to stop irreparable, dangerous criminals from reoffending by requiring lengthy, sometimes life sentences for a third felony offense. These laws often triggered an extreme conviction for even minor, non-violent felony-level offenses. Because of the expansion of the felony category, many offenses such as



petty theft, cashing a stolen check, or drug possession have put prisoners behind bars for life terms (Civil Liberties, 2013). Inmates are often left to age and even die in prison despite no longer posing a threat. The gap between sentencing with and without the habitual offender law is tremendous. Under Texas's habitual offender law, for instance, a person with two prior minor convictions receives a sentence of over a half century long for drug possession despite the crime traditionally carrying a sentence of two to ten years (Langdon, 2010). Habitual offender laws allow prosecutors to up sentences to life even for a non-violent crime. Over three-fourths of cases in which habitual offender laws were used were for non-violent crimes (Sawyer, 2020). The severity of these sentences are often disproportionate to the crimes themselves.

Louisiana's habitual offender laws are among the toughest in the nation (Armus, 2021). Louisiana imposes some of the most severe drug-related sentences in the world. Today, more than half of all prison sentences are for possession alone (Simerman, 2016). According to state law, possession of marijuana carries a penalty of six months in jail. A fourth offense of any kind – non-violent, drug related, or even petty theft – is punishable by up to 20 years behind bars (ACLU, 2012). In New Orleans, Bernard Noble was sentenced for possession of a single joint of marijuana (Policy Alliance, 2014). Under the habitual offender law he was sentenced to over thirteen years behind bars without the possibility of parole.

Abolishing the possibility of parole has fueled excessive sentences and heavily contributed to mass incarceration. In the 1980s and 90s, politicians competed with one another over who could be “toughest on crime”. One way they sought the prize was by eliminating parole opportunities for offenders. Punitive laws at the federal and state

level all passed with the intent of significantly increasing the guaranteed prison time an inmate was forced to serve before becoming eligible for parole. By 1984, on a federal level parole was abolished (Skene, 2021). By the year 2000, 16 states had also abolished it, with 28 states requiring an inmate to serve almost ninety percent of their sentence before becoming eligible for release (Hughes, 2001). Good time credits that enabled prisoners to earn their early freedom were rolled back in many places (ACLU, 2012). The expansion of life imprisonment is also the result of an increase in the number of crimes it fell under. From 1986 to 1995, the total persons sentenced to 25 years or more tripled and from 1984 to 2002, the total serving life more than quadrupled (ACLU, 2012). Prisoners released through parole often face strict regulations that have forced a significant number of prior convicts to return to prison for technical violations.

Over the last few decades, the steadfast expansion of life imprisonment happened as a result of these same punitive policies such as the limiting of parole and increasing sentence length. Before violent crime rates rose in the 1980s and 90s, life sentences began to accrue. Despite 1975 marking an almost 10 percent downturn in crime rates, many states implemented such severe mandatory sentencing laws as to be life-sentences. This shift is largely in accordance with the public's perception that drugs were causing crime to run rampant.

Louisiana's criminal justice system in particular inflicts life without the chance of parole at one of the highest rates in the nation. Almost a fifth of Louisiana prisoners are serving life without the chance for parole (ACLU, 2013). When considering other long sentences for violent crimes, drug offenses, and the like, almost one in three Louisiana prisoners will die before their release date. While many states make an

inmate eligible for parole after 25 years, in Louisiana “life means life” (Skene, 2019). Just five United States – Pennsylvania, California, Florida, Michigan and Louisiana – hold over half of the nation's lifers, but the state with the highest impact on communities of color continues to be Louisiana. Almost three-fourths of the 4,500 Louisiana lifers are African American (Skene, 2019). Certain crimes carry an automatic life sentence without input from judges, juries, or other parties within the criminal justice system. In 2017, Louisiana lawmakers considered enacting major criminal justice reform. Specifically, it was discussed that lifers who hit 30 years behind bars and reached the age of 50 be eligible for parole (Tarkington, 2017). However, the Louisiana District Attorney’s Association opposed all measures arguing that release would pose a serious threat to public safety.

In 1994, President Clinton initiated a One-Strike policy allowing federally assisted public housing authorities to deny residency to anyone with a felony or even a minor criminal background (Department of Housing, 1997). In many cases, the outcome was that entire families had few options other than homelessness. Like mandatory minimums, habitual offender laws led to overcrowded prisons with people who committed low-level offenses and remained until well into old age when they no longer posed a threat. Clinton continued the trend by imposing some of the toughest drug and crime legislation in history which “escalated the drug war beyond what conservatives had imagined possible a decade earlier” (Alexander, 2010). In 1994, Clinton signed a \$30 million bill mandating life sentences for a third federal offense known as the three-strikes law, and allocated almost \$20 billion for state prison grants and expanded law

enforcement efforts to fight the war (Vitiello, 1997). Under his supervision, the nation saw the largest increase in prison inmates in American history.

One of the most troubling expansions of the drug war and the enactment of mandatory minimums is the exorbitant number of people serving a life sentence – many of whom happen to be persons of color (Newman, 2016). From 1986 to 1995 – the apex of these tough on crime policies – the number of individuals sentenced to prison doubled while the number sentenced to 25 years or more tripled (Newman, 2016). Over the next few years, tough on crime policies fueled an almost 400 percent increase in the total number of Americans in prisons from just over 200,000 in 1980 to over 1.5 million by 2009 (ACLU, 2012).

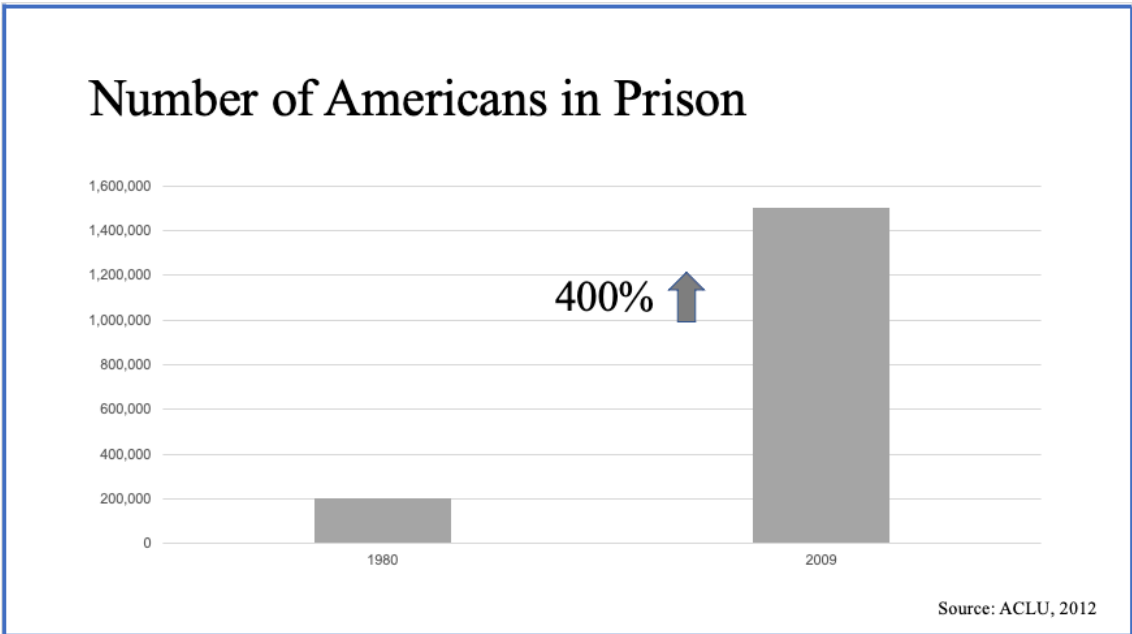


Figure 12: Number of Americans in Prison

Policy changes have affected sentencing length for prisoners over the last three decades with average time served before release almost 40 percent higher than those released in 1990 (Law Institute, 2011). Today, the United States holds almost half of the entire

world's life sentenced population; one in seven United States prisoners are serving life behind bars. Almost 90 percent of those serving life do not have a chance of parole.

The series of punitive policies resulting from an era of being tough-on-crime hit African Americans particularly hard as they were disproportionately swept into the criminal justice system. For instance, the use and sale of crack cocaine carried a heavier criminal penalty than those assessed for most other drug possession charges, including powder cocaine. As a result, not only were African Americans arrested and charged at higher rates as a result of their relationship with this drug, but were also given longer sentences. Minority offenders are significantly more likely to be charged with a crime that carries a mandatory minimum sentence (Hayes, 2020). Correspondingly, sentences given to the minority population are almost twenty percent longer than those given to white persons who commit a similar crime (Elijah, 2015). One in five Hispanic men can expect to be incarcerated during their lifetime. Furthermore, African Americans were 22 percent less likely to receive a shorter sentence than that which was suggested or required by the sentencing guidelines (Hayes, 2020). The high arrest and sentencing rate of African Americans ensures their underrepresentation in societal participation and condemns them to a cycle of incarceration and impoverishment. Today, one in three African American men can expect to be incarcerated in their lifetime compared to one in seventeen Caucasian men (Bryan, 2022). For African American women, the disparity is similar: one in eighteen compared to one in one hundred and eleven white women (Bryan, 2022). The Wars became synonymous with a war on African American crime and African American drug use. Despite African Americans accounting for about 13 percent of illegal drug users and Caucasians almost 75 percent, a rate proportional to

their size of the population, African Americans account for over three-fourths of the nation's drug prisoners (Katz, 2020).

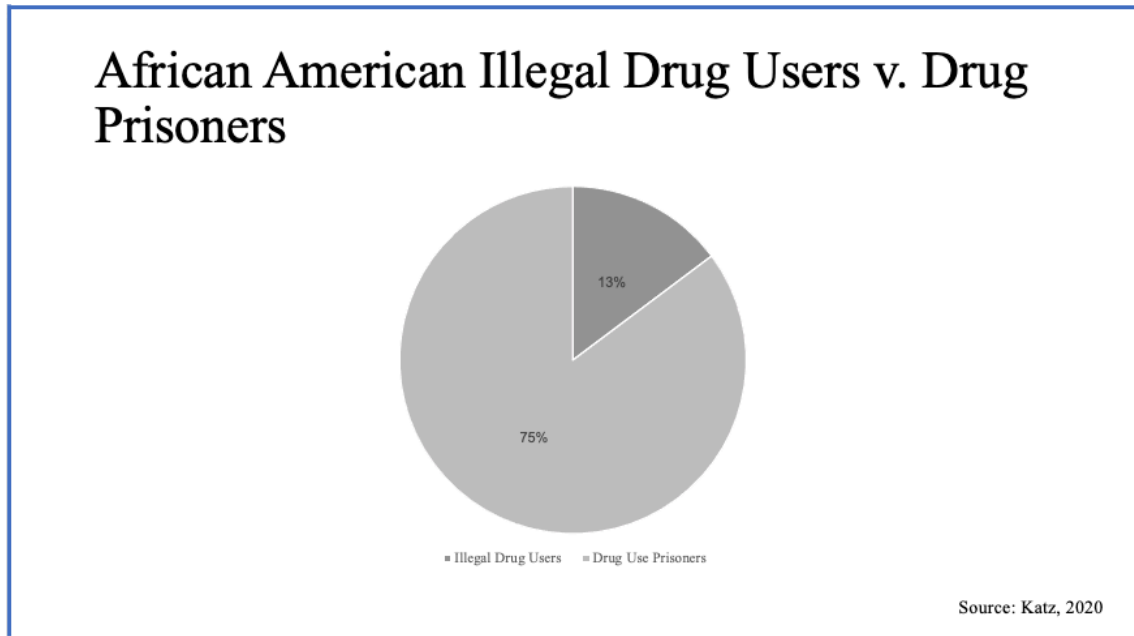


Figure 13: African American Illegal Drug Users v. Drug Prisoners

While the Wars appear to be neutral at their face, both were actually deeply discriminatory against people of color and produce racialized outcomes.

The war on drugs and crime have not only had severe political and social implications, but also health implications. Policies enacted during the late twentieth century have directly resulted in the spread of illnesses of all kinds behind bars. Viruses, infections, and diseases have always spread throughout correctional facilities at rates not experienced by the public. The unmatched spread of HIV, H1N1 influenza, and tuberculosis behind bars has made the possibility of infection and even death due to extreme illness a relatively normal part of incarceration. For instance, HIV/AIDS shows how physical contact behind bars allows for the rapid spread of blood-borne diseases.

Due to close proximity, the spread of airborne illnesses has been even more pervasive behind bars.

In 2009, the H1N1 influenza pandemic ravaged incarcerated persons and exposed the failure to include correctional facilities in crisis planning efforts. Just a year after its spread, a vaccine was widely accessible to the general public; however, most jails never received it. Despite inmates being at high risk for infection and transmission, their status as criminals left them largely ignored. Not surprisingly, H1N1 ravaged the prison population (Akiyama, 2020).

The influenza pandemic of 2009 shows an across-the-board failure to include incarcerated populations into pandemic response planning. Some of the worst outbreaks behind bars in the United States have been from tuberculosis (Bailey, 2021). In the early 1900s, tuberculosis hit the United States and seeped into overcrowded jails, prisons, and poverty-stricken neighborhoods nationwide. By 1960, tuberculosis had been widely eradicated. Twenty years later, however, it was somehow back and spreading predominantly behind bars and back into the communities to which incarcerated persons returned (Thompson, 2020). Medical experts looked at the outbreak in disgust as tuberculosis is fully preventable. Overcrowded, under-managed, and under resourced facilities with poor medical care created the conditions that encouraged its spread. Even at the time of the tuberculosis outbreak in the 1990s, it was largely deemed “not a fluke or a mystery but the predictable outcome of a glaring social failure... America ha[d] essentially cultivated the contagion” (Thompson, 2020).

These outbreaks were as much the result of political problems as medical ones. They were in no small part the result of significant welfare cuts, as well as the newly

waged war on drugs which swelled the prison population. As the Reagan administration increased funding for the DEA, the administration cut funding for drug education and treatment. For instance, the National Institute on Drug Abuse saw its budget decrease by over \$200 million over a three-year stretch (Tarkington, 2020). The shifting of focus forced addicts who previously might receive drug rehabilitation to face incarceration. Because of how accessible drugs are in prisons, was exacerbated and users cycled through, perpetuating addiction and poverty. Prison populations exploded with an influx of “criminals” whose crime was simply drug addiction.

In 1994, Congress presented the Violent Crime Control and Law Enforcement Act which committed to maintaining policing and prison operations in the United States. The law dictated stricter punitive policies and led to an explosion in the prison population by enforcing mandatory sentences, making the crisis of overcrowding in both federal and state prisons more pronounced than ever. The social health impact of the \$30 billion act was profound. Correctional facilities were ill prepared for the explosion of inmates that followed. While politicians were arguing for the allocation of more finances to go towards the building of prisons, few arguments were made about prison healthcare services. All healthcare reform proposed in 1994 excluded prisoners outright, ensuring funding for prison health would be excluded from health care preparation (Berkman, 1995). As a result, prisons built around this time lacked education, treatment, and healthcare. As time went on, less money was used to care for an increasingly vulnerable population.

In August 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), effectively gutting what was left of



Reagan-era welfare systems (Thompson, 2020). Once a safety net for millions of Americans, the act took away much needed income from indigent, minority communities and made care for basic needs hard if not impossible for entire communities of people. The reform had particularly detrimental effects on health insurance, primarily for women and their children (Thompson, 2020).

These major legislative pieces made inmates more susceptible to infection than ever before. Prison populations expanded rapidly. The inmates, were in poorer health when they arrived, and they were held longer. By ravaging America's safety net, many of the nation's poorest – both inside and outside of prisons and jails – were left vulnerable to dangerous infections. Political efforts to get tough on crime and to inhibit welfare dependency perpetuated a system of mass incarceration plagued with poverty and health disparities. At the same time, the drug and crime laws passed in the late 1980s and early 1990s drastically altered the federal prison population both in size and composition. Punitive policies acted to move discretion away from the legal system. In place of personalized assessment that allowed for post-conviction adjustment, jurisdictions implemented laws that create a form of permanent punishment and take away exit points from the criminal justice system. Likewise, sentences can be disproportionate to the seriousness of the crime and impose heavy costs onto both minorities and taxpayers, with diminished returns to public safety. In addition, the penal system has grown considerably since the 1960s due in large part to criminal justice legislation focused on crime and drug use rather than offending patterns or an increase in actual crime rates. The consequence has been a dramatic expansion

in the number of people behind bars, and a socioeconomic and racially disparate population. Lastly, policies have led to the incarceration of offenders for longer than ever before. As a result, today Louisiana has one of the nation's oldest prison populations with approximately a quarter of all inmates over the age of 50. These policies have directly contributed to the aging and overcrowding of the prison population and has put predominantly incarcerated minorities in extreme danger during the pandemic, including increasing the risk of infection and death.

### **Overcrowding, sickness, and an elderly prison population**

While the majority of laws enacted during the tough-on-crime era were originally rendered to curb a perceived uptick in drug abuse and crimes, the rate of both have remained virtually unchanged. What these laws have done instead is to create and perpetuate mass incarceration. Even at the onset of the pandemic, the outcomes have proven to be deadly. The prison industrial complex has had a host of challenges that fuel Covid-19 rates: from limited movement to severe overcrowding, poor sanitation, and low public prioritization of correctional health and wellbeing. Policies meant to be tough on crime have instead made the prison population larger, more minority filled, sicker, and older than ever before. The physical conditions, staffing capabilities, and financial capacity of these prisons have also made it difficult to maintain the needs of this overfilled and ever-changing population. These punitive policies have heavily contributed to Covid-19 spreading behind bars and infecting an increasingly vulnerable population. The pandemic has turned the nation's reliance on incarceration into a national epidemic.

Since the onset of the war on drugs and tough-on-crime policies, the United States incarcerated population has increased by over 400 percent. With over 2 million people behind bars, the prison population growth rate has exceeded both that of the general population and United States crime rates (Abraham, 2020). Decades of race and class-based punitive policies have directly caused prison overcrowding and led to widespread infection behind bars. While it isn't the sole cause for the rise in mass incarceration, it is indisputable that public and political perception of drug use, crime, and those involved with both, have led to both the unrivaled rate of incarceration and the exorbitant number of persons in prison today. These policies contributed to longer sentences and limited options for release, directly leading to mass incarceration and making today's prison population more vulnerable and elderly than ever before.

Overcrowded correctional facilities have been shown to increase violence, weaken healthcare services, and reduce rehabilitation opportunities (Nowotny, 2020). In *Brown v. Plata*, overcrowding was viewed as the potential driver of a lack of quality medical care, resulting in higher levels of self-harm and suicide (Nellis, 2021). While California's prisons were designed to hold 85,000 inmates at the time of the ruling, they held approximately twice that number (Psick, 2017). The Supreme Court determined that the California prison system had violated the Eighth Amendment rights of the inmates and upheld that the system had to release approximately 50,000 inmates to function effectively (Nellis, 2017). The criminal justice policies in place at the time led to cuts in prison budgets and staff numbers leading to overwhelmed facilities where the bare minimum was no longer provided to inmates. While overcrowding had been an issue for years, it wasn't

until it was brought before the Supreme Court in 2011 that it was finally recognized as a primary cause of inmates' inadequate care.

Overcrowded prisons have poor sanitation due to the sheer number of inmates, the lack of funds for maintenance, and ineffective cleaning supplies that can facilitate the transmission of communicable diseases. The existing conditions behind bars has made infection control almost impossible (Pistor, 2020). In part, this is due to resource limitations as a result of so many people behind bars; more people mean fewer resources. A lack of preventative measures and essentials has led to mass transmission between inmates, staff, visitors and the community. In many prisons and jails, outdated ventilation systems and facilities with only a few working sinks means that inmates have no infection control. Standard personal protective equipment – masks, oxygen, and life support supplies – have been limited at correctional institutions, especially in the beginning of the pandemic as priority was given to healthcare facilities (Oladeru, 2020). For months, inmates did not receive sufficient supplies of soap, masks, and sanitizing supplies, magnifying the threat of contracting highly contagious diseases by an already vulnerable population. These factors have created an 'imperfect storm,' putting those behind bars at an elevated risk of contracting and dying from the virus (Byrne, 2020). Coupled with the fact that those behind bars are in much poorer health than the general population, individuals are at an increased risk of infection every day they remain behind bars (Strassle, 2020). Crowded and unsanitary prison conditions have facilitated the swift spread of the virus, putting those behind bars at exceptional risk of infection making the ability to “flattening the curve” virtually impossible. During the pandemic, overcrowding has meant that operating at normal levels can have deadly consequences.

Even before the start of the pandemic, the federal prison system and over a fifth of the state prisons were operating at over 100 percent capacity (James, 2020). A recent study on prison capacity and Covid-19 infection rate found that prison crowding correlated with the viral spread of infection. Prisons holding between 94 and 102 percent their designed capacity had significantly higher infection and mortality rates than prisons operating at just 85 percent their capacity (Widra, 2020). Even after release was deemed essential to mitigate the spread, four-fifths of states were still operating at 75 percent or more of their designed capacity; the majority of federal facilities continued to operate at over 100 percent capacity (Widra, 2020).

The lack of properly trained and healthy staff members made inmates vulnerable to infection. As prison staff contracted the virus, their absence was felt heavily by inmates who depended on their care or for the transportation of the critically ill to area hospitals. Louisiana, in particular, found that Covid-19 exacerbated their staffing problems so much that untrained probation and parole officers were used to oversee sick inmates (O'Donoghue, 2021). The lack of staff prompted many facilities to ask employees to come to work even if they tested positive but remained asymptomatic (DOJ, 2020). Continuing to work despite being sick meant that the disease spread fast. Staff absences throughout Covid-19 also forced inmates to clean communal spaces such as bathrooms, telephones, and cafeterias on their own, often without proper cleaning supplies or masks. Inadequate staffing levels forced further restrictions on already stretched provisions of rehabilitation, education, and work. A shortage of staff further stretched the deterioration of the prison healthcare system, leading to much of the healthcare previously provided such as dental visits, eye visits, or general checkups

being suspended. Inmates' physical and mental health suffered as a result. As the general public's health services turned to telecommunication, prisons struggled to keep up, but with poor access to digital technology behind bars, this stopgap measure remained inaccessible for inmates. Prisons and jails are not designed to be hospitals. As widespread infection broke out during Covid-19, prisons and their staff were underprepared and under equipped to handle the influx of cases.

Within the overcrowded population is a massive wave of gray. Today's elderly prisoners were among the first generation of criminals in an era of mass incarceration who were dragged into the criminal justice system, and are currently incarcerated for crimes they committed decades prior. As a result, the elderly incarcerated population is the fastest growing demographic within the United States prison system (Skarupski, 2018). In the late 70s and early 80s, the beginning of tough-on-crime sentencing policies, about 1 percent of the prisoners had spent 20 years or more behind bars. However, by 2012, this percentage had grown substantially larger (ACLU, 2012). From 1993 to 2013, the prison population aged 55 and older grew over 400 percent and the median age grew from 30 to 36 (Carson, 2016). Over a ten-year span between the mid 1990s and early 2000s, the elderly prison population increased by almost 150 percent, a significantly higher rate of growth than the total prison population. The direct result of the growth was younger people receiving longer sentences and then aging behind bars. Louisiana's post-conviction population averaged 36 years just five years ago; today it has increased to 40 years old (Armstrong, 2021). Louisiana's lifer population averages fifty-five years old. The warehousing of elderly prisoners is a notorious outgrowth of the war on drugs and tough on crime policies.

Elderly prisoners are very much a distinct group of incarcerated individuals because the rate they experience chronic illness or disability is significantly higher than people their same age or sometimes even older in the general populace (Abraham, 2020). Inmates are physically and mentally older than those of the same age who do not reside behind bars. First, those who engage in crime are typically of poorer physical and mental health as damaging life habits such as substance abuse, unhealthy diet, and underlying poor health affect them. Second, the experience of prison ages individuals due to the high-stress environment. Medical conditions that traditionally develop later such as cancer and dementia are more prevalent within a single year of incarceration. By just 50 years old, inmates are already considered elderly whereas non-incarcerated citizens are not legally considered senior until age 65 (Wennerstrom, 2020). The mental and physical wellbeing of elderly inmates is of concern as there are well established correlations between mental illness and the mental and physical decline that occurs with age. In the United States, studies have found that rates of depression among incarcerated men who were 55 and older were over 50 times higher than men in the general population (Chui, 2010). Stressors behind bars such as the threat of violence or dying in prison leads to deteriorating mental health. Age-related health problems combined with poverty and drug abuse can lead to complex health issues. Increased medical risks are difficult to detect and manage behind bars, putting this elderly population along with others with chronic illnesses at higher risk. The aging population also exhibits high rates of underlying health conditions which make them more susceptible to infection from Covid-19. While the pandemic has disproportionately jeopardized the lives of those behind bars, older inmates face the worst wrath from

Covid-19. For instance, while inmates aged 65 years or older comprised only 3 percent of the United States population compared with 16 percent in the general prison populace, the elderly population comprised 81 percent of Covid-19 deaths in the United States population (Hinton, 2018). The adjusted death rate in the prison population was 3 times higher than expected if sex and age were equal in the general United States population.

Conditions of confinement have also been shown to exacerbate health risks for the elderly and even perfectly healthy inmates. Weeks into the pandemic the CDC sent out an article explaining to the public how to *Protect Yourself* and others by “flattening the curve” (CDC, 2020). In it they discussed vaccine efficacy, mask wearing protocols, social distancing, disinfecting and cleaning, and proper ventilation. While schools and businesses have largely heeded this information, prisons and jails have struggled due to extreme overcrowding, a lack of space, and lack of resources to sanitize and ventilate (Wildra, 2020). Social distancing in particular has proven to be difficult behind bars, largely due to prison overcrowding. Once it was well established that Covid-19 is spread through close contact, it was clear an escalating and dangerous spread was imminent in prisons and jails. Prisons and jails are breeding grounds for Covid-19 as they have extremely high concentrations of people with little to no ability to isolate from one another. As one health expert explained, “The more people behind bars, the more transmissions you are going to have” (Rich, 2020). The very nature of correctional facilities restricts mobility and the use of communal spaces presents limited options for isolation. The inability to sequester makes inmates more susceptible to Covid-19. Correctional facilities' use of communal spaces – sleeping quarters, bathrooms,



recreational areas – has meant that once it enters facilities the spread of Covid-19 fast (Nowotny, 2020). Without the ability to socially distance, inmates found themselves at a heightened risk of contracting the deadly disease. Prison overcrowding has made it impossible to implement much needed isolation practices behind bars.

At the same time, facilities also didn't take the risk posed to their staff and inmates seriously and chose not to ask for these forms of protective equipment for months into the pandemic (Wildra, 2022). By the time they asked, masks were in short supply. The CDC has suggested that to reduce the risk of exposure and infection, avoid close contact with infected parties, disinfect surfaces, and use alcohol-based cleaning supplies (CDC, 2020). Many of the recommended hygiene and protective measures, however, are difficult if not impossible for incarcerated individuals who have little to no resources, poor infrastructure, and cannot socially distance themselves from one another. The CDC acknowledges that, "Many facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants" (CDC, 2020). Because of the ethanol, cleaning supplies and hand sanitizer is a form of contraband in the majority of jails and prisons due to the assumption that inmates will drink it due to its high alcohol content (Nelson, 2020). Before Covid-19, prison infirmaries were only stocked to deal with colds, cuts, and other relatively simple medical emergencies.

Another contributor to the vulnerability of the physical health of those being bars is the lack of nutritious food. Once incarcerated, an individual is forced to rely on the correctional facility for their health needs. A fundamental condition for physical wellbeing is adequate nutrition. Food also supplies emotional contentment. For years on end, incarcerated inmates can expect to receive meals high in salt, sugar, and

carbohydrates with little to no essential nutrients. The lack of nutrients makes inmates more susceptible to infection (Suhomlinova, 2020). Prisons act as “out-of-sight food deserts, perpetuating patterns of poor health in communities that already experience profound inequities” (Brown, 2022). The low-income communities from which inmates frequently come also have less access to affordable and healthy food (Sawyer, 2020). While low-quality food can have immediate impact, sustained nutritional issues have long term consequences for both the individual while incarcerated and for the communities to which they return. For instance, diets lacking essentials leave people with poor metabolic health and weakened immune systems and thus more vulnerable to infection. Communities are forced to support their formerly incarcerated friends and family as they return home in worse health, and as is the case during Covid-19, infected. Even food quality deteriorated during Covid-19. The choice of good, quality food in prison has always been almost nonexistent. As Covid-19 entered facilities, it declined even further. Mitigation strategies made having a hot meal difficult and the canteen, which previously had supplemented poor quality food, was often shut down or stocked with less as time went on (Suhomlinova, 2021). Likewise, healthy food items fell off the list as supply chain issues prevented fresh fruit, vegetables, and eggs from arriving. Food poisoning was common and sometimes arrived “covered in rat urine and poop” (Suhomlinova, 2021). “We thought it couldn’t get worse. With lockdown it did” (Suhomlinova, 2021). The lack of good food has made inmates susceptible to illness and has also introduced questions about prisons using Covid-19 as an excuse to further diminish the quality of the food.

Despite the fact that prisons were not designed to be nursing homes, hospitals, or hospices, they are expected to house and care for an aging prison population (Burkhalter, 2021). Over the last half century, as the number of elderly inmates has increased, so have the demands placed on correctional facilities. First, prisons were designed with younger inmates in mind, not for elderly inmates with chronic diseases or disabilities. Elderly inmates often have trouble performing daily tasks on their own – dressing themselves, cleaning themselves, and even feeding themselves – and individualized assistance such as specialized diets and easy access to toilet facilities are often not available or are plainly ignored by correctional staff (Elijah, 2015). Prisons are not architecturally designed for walkers, nor do they have funds to pay for hearing aids or other accessibility resources. Mobility issues are often overlooked as those requiring walkers and oxygen tanks struggle to navigate crowded and narrow halls and close-packed cells (Carson, 2016). Even wheelchair use is restricted by stairs and other obstacles, and sometimes are unable to fit in prison cells due to the confined space. Correctional staff are trained to manage violence, dictate rules, and keep general order. Few are experts in geriatric care and lack the ability to provide basic care for people with advanced and complex medical problems such as Alzheimers, arthritis, dementia and other age-related illnesses (Elijah, 2015). The needs of the elderly incarcerated population have been acknowledged by the UN as critical because not addressing their needs has serious health and human rights implications.

Once incarcerated, inmates must rely on the facilities in which they reside for their sole medical care including routine, emergency, and chronic disease care. That said, the overwhelming number of inmates coupled with their growing age has meant

poor medical care quality. The housing and care of an overcrowded population of aging inmates comes at an enormous fiscal cost to the facilities and the nation as a whole. State and federal spending on inmates has increased from \$10 billion in 1988 to almost \$70 billion twenty years later (Elijah, 2015). The biggest increase in expenditures is healthcare costs. According to the Bureau of Justice Statistics, 12 percent of state prison operational expenditures, the second largest in correctional operating budgets, is allocated towards healthcare spending (Roberts, 2015). Despite increasing healthcare needs, many states continue to provide the constitutional bare minimum. In 2015, the typical state department spent on average \$5,700 per inmate for healthcare services (McKillop, 2017). While states like California, Vermont, and Wyoming spent more than \$10,000 per inmate, states like Alabama, South Carolina, and Louisiana spent less than \$3,500 per inmate (McKillop, 2017). Louisiana's prison system spends less per inmate on healthcare than any other state. In 2010, Louisiana spent less than \$1,400 annually per inmate. Despite increasing their budget by 56 percent in 2015, they still remain the lowest spender of any state (McKillop, 2017).

The financial cost of housing and caring for aging or elderly inmates has grown incredibly high. Federal facilities spend approximately five times as much on medical care for elderly inmates as they do for younger ones (Hayes, 2020). A nationwide cost analysis found that health care spending on inmates aged 55 and up was almost 40 percent higher in the states with the highest share of inmates over age 55 (Psick, 2017). These budgets will only continue to grow as inmates continue to age, leading to worse health outcomes. As elderly inmates take the majority of correctional healthcare budgets, the burden rests on the shoulders of

every other incarcerated individual who receives significantly lower quality healthcare as a result. As inmates age, rates of illness tend to increase and medical costs become upwards of nine times higher than for younger incarcerated inmates (Maruschak, 2001). While less than a quarter of inmates age 24 or younger have any type of medical condition, the percentage increases to half age 45 or older (Maruschak, 2001). While the number of elderly inmates constitute less than a quarter in the majority of facilities, they constitute a significant percentage of the cases of diabetes, asthma, and hypertension (Barrón-López, 2020). These inmates require more frequent hospitalizations than the general prison population, taking up a significant portion of healthcare costs. When elderly inmates are sent to receive medical treatment outside of prisons, the government is required to pay for the care, transportation costs, and overtime pay for officers who must accompany them, a sizable portion of total correctional healthcare costs (Gubler, 2006). Because so much funding is spent on elderly healthcare needs, healthcare behind bars for the rest of the inmates is often substandard and fuels the growing infection and death rate. During Covid-19, poor healthcare has contributed to the high rate of infection and death behind bars.

Both the death penalty or life imprisonment are different from an inmate dying of Covid-19 during incarceration; however, the basic mechanisms that bring both about are rooted in structural inequities. The policies that engulfed the 1980s and 1990s have not only made the United States prison population larger and older but have increased the risk of infection and mortality for those behind bars. The inability to socially distance and maintain a clean environment contributes directly to this risk. The

circulation of Covid-19 within prisons and jails is the result of poorly equipped, unsanitary conditions where inmates, once infected, are unable to receive efficient or even adequate medical care. If the overcrowded correctional facilities were not filled with elderly inmates incarcerated years prior under unjust sentences, if they had access to personal protective equipment or could isolate themselves from others, hundreds if not thousands of infections would have been prevented. A combination of all three has meant death for tens of thousands of incarcerated individuals.

## **Conclusion**

The culmination of Covid-19 and mass incarceration have led to a crisis behind bars, creating and perpetuating inequities and vulnerabilities for thousands within the incarcerated population. While mass incarceration has unquestionably played an enormous role in creating unsanitary, overcrowded prisons filled with sick, aging prison inhabitants, the policing, prejudice, and policies enacted during the tough-on-crime era helped to create this crisis and set the stage for the Covid-19 pandemic to exacerbate an already critical situation. The Covid-19 pandemic has therefore unveiled and exacerbated systemic problems deeply rooted within not just the criminal justice system but society as a whole.

As unfortunate as it may be, the Covid-19 pandemic has given society the opportunity to question our reliance on mass incarceration as a primary form of punishment. While originally designed to inhibit crime and drug use, mass incarceration has never effectively served that purpose. Instead, inmates are sentenced to spend years behind bars, even their entire lifetimes, for as little as petty theft or drug use. Keeping inmates in these facilities with complete disregard for their emotional and physical well-being, especially during times of crisis, is cruel and unusual punishment. Recognizing the fact that mass incarceration and Covid-19 are entirely man-made means that society can similarly begin looking towards finding a man-made solution. Shifting how we as a society punish is the first step in making sure incarcerated populations are better protected and prepared during the next pandemic.

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