

# DEMOCRACY BEHIND BARS

How money in politics, felony disenfranchisement  
and prison gerrymandering fuel mass incarceration  
and undermine democracy



*Holding Power Accountable*

## ACKNOWLEDGMENTS

The Common Cause Education Fund is the research and public education affiliate of [Common Cause](#), founded by John Gardner in 1970, and one of the country's most effective organizations working to reduce the influence of special-interest money in politics, breaking down barriers to participation, ensuring transparency in government, and protecting the free flow of information. We work to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process.

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## **FORWARD BY KAREN HOBERT FLYNN**

The pages that follow represent an effort to build on Common Cause's longstanding commitment to serve as a watchdog on government, defend and strengthen voting and civil rights and the ability for everyone to participate in our democracy, and ensure that the power of ideas rather than that of monied interests counts most in our country.

For many of the 2.3 million people in prisons and jails across the country and the millions more on parole or probation for criminal offenses, our civil society has failed. The criminal justice system too often delivers injustice to people of color, targeting, arresting, and incarcerating them at a far higher rate than white Americans.

Prison gerrymandering, which counts prisoners as residents of their prisons rather than their home communities, along with the political spending of wealthy private interests and laws that depress voter registration and turnout, magnifies the political power of rural and mostly white communities at the expense of their urban, predominately African-American counterparts. This deliberate combination of policies devastates neighborhoods, drives an additional wedge between police and the people they are supposed to serve, and breaks our Constitution's promise of "Equal Justice Under Law."

Racism, profiteering, and overreach in our criminal justice system hurt our democracy's ability to serve us and cost billions in tax dollars. Unless decisive action is taken, this injustice will continue to mushroom. Common Cause is committed to applying our experience in advancing democracy reform to assist individuals and organizations already working across America for a criminal justice system that will deliver a more just and equitable future for everyone.

*Karen Hobert Flynn, President*

# INTRODUCTION

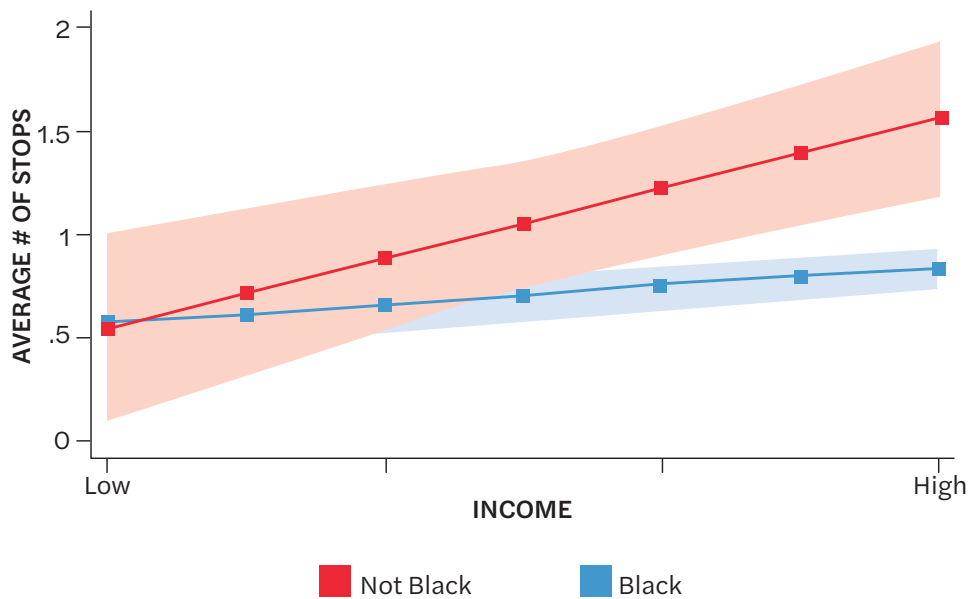
Thirty-eight percent of Americans – 124 million people – have been stopped by police at least once in the past five years.<sup>1</sup> In prison, on probation, and on parole, 6.7 million people live under court-ordered supervision.<sup>2</sup> Millions more convicted of felonies experience long-term or even permanent effects of their encounters with the criminal justice system through disenfranchisement<sup>3</sup> and housing and employment discrimination stemming from the required disclosure of their past convictions on applications. Mass criminalization and incarceration, often targeted at African-American and Latino communities, disenfranchises and disempowers millions of Americans and undermines the legitimacy of our democracy.<sup>4</sup>

Despite its broad reach, many Americans view our criminal justice system through a distorted lens. Popular understanding of the system follows narratives created by movies and television shows.

Programs like *Law and Order* tell their stories from the perspective of scrupulous detectives and prosecutors who exact tough justice on deserving criminals. The reality often is starkly different. The television shows typically do not feature scenes of officers arresting people of color for petty crimes only to boost arrest statistics and qualify themselves for promotion and their departments for state and/or federal funding. Nor do the shows use airtime to highlight how many communities are politically underrepresented because every 10 years the census counts incarcerated individuals as residents of their prisons rather than their home towns. And it rarely makes compelling television to depict a judge locking up a defendant simply to bolster the judge’s “tough on crime” reputation for their reelection campaign, or to show the judge raising campaign funds from special interests that profit from mass incarceration. All of these actions significantly hinder access to democracy for many communities, especially those suffering from poverty, communities of color, and persons with disabilities.

## Predicted Number of Police Stops by Race and Income

Thirty-eight percent of Americans – 124 million people – have been stopped by police at least once in the past five years



Source: Cato Institute, “Personal Contact with the Police and Justice System,” <https://www.cato.org/polic-ing-in-america/chapter-3/personal-contact-police-and-justice-system>.

The criminal justice system is neither as simple nor as just as depicted on television. On the contrary, it's a very broken system.

The system is shaped by many of the same political forces that distort and corrupt other areas of government policy and action: the influence of special interest money in elections and lobbying of our elected officials, partisan disputes over voting rights and redistricting, abuses of power, and ethical breaches.

Mass incarceration is a fundamental threat to democracy. A society that unjustly criminalizes and imprisons so many people, devastating our families and communities, and disproportionately targeting people of color and those impacted by poverty for policing and punishment, is not a society living up to its claim that everyone's voice matters. Between the mid-1970s and 2017, America's incarcerated population of 250,000 exploded to 2.3 million, the most in the world.<sup>5</sup> The 700-plus percent increase came as the nation's total population grew by less than 50 percent.<sup>6</sup>

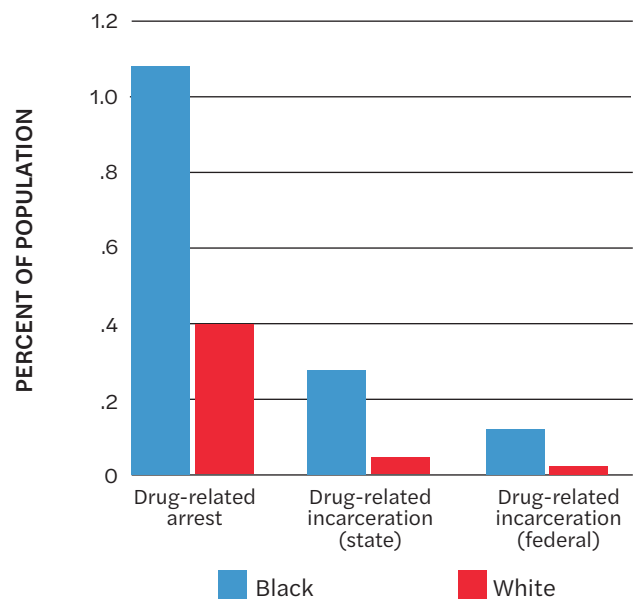
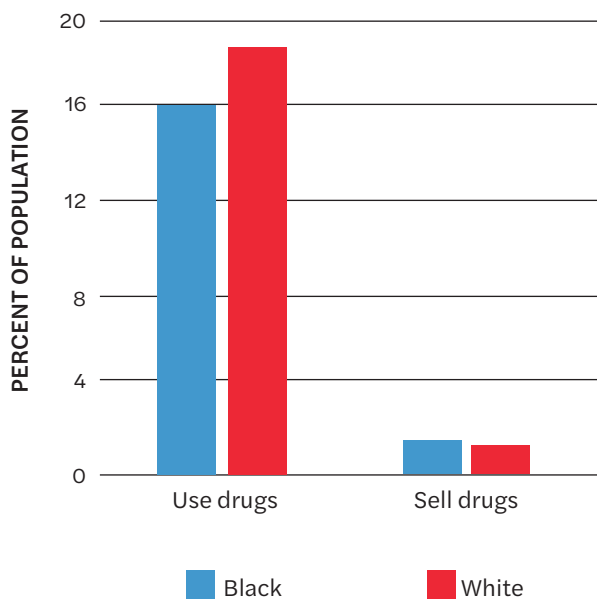
Many policy choices are responsible for the steep increase. Mandatory minimum sentences give judges few options to tailor punishments to individual defendants' circumstances; truth-in-sentencing laws limit parole eligibility – even for people who have been rehabilitated – and “three strikes” laws can inflict disproportionately extreme sentences on those convicted of three crimes.<sup>7</sup>

Though violent crime in the United States has decreased by 51 percent and property crime has fallen by 43 percent since 1991, incarceration rates do not reflect this decline.<sup>8</sup> And while the number of people incarcerated has dropped roughly one percent per year since 2007, the US still imprisons more individuals than were enslaved in the antebellum south.<sup>9</sup>

### Rates of Drug Use and Sales, by Race

### Rates of Drug-Related Criminal Justice Measures, by Race

Blacks are 2.7 times as likely as whites to be arrested for a drug-related crime, and receive sentences that are almost 50 percent longer. Furthermore, blacks are 6.5 times as likely to be incarcerated for drug-related offenses at the state level.



Source: Diane Whitmore Schanzenbach, Ryan Nunn, Lauren Bauer, Audrey Breitwieser, Megan Mumford, and Greg Nantz, “Twelve facts about incarceration and prisoner reentry,” Brookings (October 21, 2016), <https://www.brookings.edu/research/twelve-facts-about-incarceration-and-prisoner-reentry/>

There's little evidence this high rate of incarceration explains the decrease in crime; in fact, research shows that incarceration is more likely to increase the likelihood of relapse into criminal behavior.<sup>10, 11</sup>

America's mass incarceration does not affect all communities equally; Black men without high school diplomas are three times more likely to be imprisoned than white men of the same education level. And though Americans of all ethnicities use and sell illegal drugs at similar rates, black men are 2.7 times more likely to be arrested and 6.7 times more likely to be incarcerated than are whites.<sup>12</sup> Black Americans also receive harsher sentences than whites when controlling for the seriousness of the offense and criminal history of the offender.<sup>13</sup>

This report spotlights the way the criminal justice system treats those who lack political and financial power. We examine the effects of every stage of the system on our communities, highlighting how undemocratic policies and moneyed interests pervert justice and prey on the vulnerable, all while soaking up public funds desperately needed for other programs. The policies and practices detailed in this report are a sampling – not a complete picture – of the dirty politics of mass criminalization. Past Common Cause work, such as Common Cause Maryland's 2017 study of the bail bond industry's pay-to-play politics,<sup>14</sup> touched on portions of the system and future reports will focus on aspects of the prison industrial complex not covered in this report.

The influence of anti-democratic policies and the corrupting effects of corrections industry money are directly linked to mass criminalization and incarceration. Felony disenfranchisement – the denial of voting rights to persons with felony records – robs those most deeply affected by the system of a voice in changing it, while prison gerrymandering stacks the political deck against the medium-sized and large cities where most prisoners lived before running into the criminal justice system. Meanwhile, the increasingly profitable industries that service many American prisons use their wealth and influence to obtain lucrative contracts, lobby for industry-friendly legislation, and help elect candidates supportive to their cause – more prisons filled with prisoners.

The effects of these forces are evident throughout the criminal justice system. People of color stopped by police often encounter officers incentivized to make more stops and more arrests to secure millions of dollars in local and state appropriations, federal grants, and asset forfeiture proceeds for their departments. Those officers are enforcing laws passed by legislators influenced by prison industry campaign contributions and lobbying or by political imperatives – the need to be seen as “tough on crime” – in their re-election campaigns. Arrested individuals may be charged by prosecutors and sentenced by judges who similarly seek harsher penalties under the pressures of re-election. And while in prison, citizens are at the mercy of powerful industries able to grossly overcharge them for a can of food or even a few moments with their families.

Despite this bleak picture, more examples of reform are emerging as Americans become aware of the realities of mass incarceration. It is an imposing, but not impossible democratic challenge.

# MASS INCARCERATION UNDERMINES DEMOCRACY

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## Felony Disenfranchisement

Our government ought to work for everyone – but far too often, the legal system is working against us. Mass incarceration presents a unique democratic challenge: those most affected by it are unable to express their grievances at the ballot box. The culprit is felony disenfranchisement, the process by which an individual convicted of a felony loses the right to vote.

The practice has a long history; the British citizens who came to colonial America brought with them the policy of “civil death” – the loss of property, voting and other civil rights for those convicted of serious crimes<sup>15</sup> and the tradition took hold. Today, most western-style democracies permit some or all convicted persons to vote while in prison,<sup>16</sup> but only two U.S. states allow it.<sup>17</sup>

As of 2016, 6.1 million incarcerated and formerly incarcerated Americans were legally denied the right to vote.<sup>18</sup>

Felony disenfranchisement laws also have a racially tainted legacy; many were passed in South in the aftermath of the Civil War to exclude free black men from the ballot box. Even so, the Supreme Court has held that so long as the laws are facially neutral – applying to *all persons convicted of felonies* – they are valid and not subject to strict scrutiny – the most stringent standard of judicial review.<sup>19</sup>

Until very recently, the racial impacts of felony disenfranchisement had not affected the legal analysis. But the impact is stark. Though only 1.8 percent of the non-black population of the United States is disenfranchised due to a felony conviction, the rate for African-Americans is 7.8 percent, more than four times higher.<sup>20</sup>

While felony disenfranchisement laws have survived judicial scrutiny, they do not stand up to common sense tests. Traditionally, Americans have seen time in prison as an offender’s payment of a debt to society. People in prison retain their citizenship and we expect that having paid their debt, they will return to communities as productive citizens. But while calling on them to be good citizens, our system generally denies or erects barriers to their exercise of citizenship’s core right – the right to vote.

Most states give people with criminal convictions a pathway to recovering their rights, although the process is often burdensome. In 12 states however, people with felony convictions can never regain the right to vote, even after imprisonment, parole, and probation are complete.<sup>21</sup> The largest disenfranchised populations are found in these 12 states. In Florida alone, 1.6 million people are denied the right to vote,<sup>22</sup> though in February 2018 a federal district court ruled that Florida’s felon disenfranchisement system violates the U.S. Constitution, a decision the state will surely appeal.<sup>23</sup> Nationwide, 77 percent of disenfranchised individuals have completed their prison sentences.<sup>24</sup> They pay a price long after their debt to society is supposedly satisfied.

## Prison Gerrymandering

The U.S. Census counts incarcerated persons as residents of their prisons, not their home communities. This occurs even though people in prison are unable to vote and are not legal residents of the jurisdictions where they are incarcerated.<sup>25</sup> And it persists even as most states have constitutions or statutes that say explicitly that incarceration does not change individuals’ residency.<sup>26</sup>

Rather than address this longstanding flaw in its counting, the Census Bureau announced in February 2018 that it will continue in the 2020 census to count people in prison where they are incarcerated.<sup>27</sup>

In America’s early days, this defect was less problematic: the census was only used to apportion seats in the House of Representatives, which required a count of the total population of each state, with no record of where each person lived within the state. Today, though most of those incarcerated are confined within their home states, the “one person, one vote” rule established by the Supreme Court requires that mapmakers draw legislative districts that are equally populated, so each person needs to be counted in the correct place within each state.

Counting the incarcerated as residents of their prisons while denying them the right to vote undermines the principle of equal representation. Prison gerrymandering effectively gives communities around prisons, which are disproportionately white and rural, additional representation while shortchanging the home communities – which are generally in urban areas – of those in prison.<sup>28</sup>

When a district includes the prison population, it has fewer voters and so fewer votes are needed to elect its officials; but the district enjoys the same representation as districts with more eligible voters. This can produce results that are unfair, even absurd. To take an extreme example, in Anamosa, Iowa, the city's second ward included the state's largest prison, which accounted for 96 percent of the ward's population.<sup>29</sup> Thus, four percent of the second ward's residents cast all its votes, giving the second ward's voting residents twenty-five times as much political influence as residents of other city wards.<sup>30</sup> In 2005, when there was no candidate for city office in the second ward, write-in votes by a candidate's wife and neighbor were enough to win the election.<sup>31</sup>

## Corrections Industry Money in Politics

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**The injustices that people face when they are incarcerated affect them and their families. Is the purpose of incarceration to rehabilitate offenders, punish them, or help the economy profit from the prison system? Sadly, incarceration has shifted from a form of rehabilitation to a business.**

*— Rosely Disla, New York City resident*

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As the American prison population began exploding in the early 1980s, many of our communities – particularly in rural areas with high unemployment – welcomed new prisons, which were often touted as lucrative economic investments.<sup>32</sup> Today, despite little conclusive evidence that prisons stimulate local economic growth,<sup>33</sup> prison facilities support 5.2 million jobs nationwide and lawmakers still face political pressure for new prison construction.<sup>34</sup>

Private (a.k.a. contract) prisons and jails have become the most visible and infamous face of the incarceration industry. Such facilities, operated by private companies contracted by state governments and localities, have become increasingly common since the 1980s; they sell themselves to state governments as cheaper-to-operate than publicly-owned facilities. Given that the profits of private prison companies depend on a steady flow of newly incarcerated people, policies spurring mass incarceration clearly are in their economic interest.

Sixty-five percent of private prison contracts have “occupancy guarantee” clauses, promises by the state that a specified number of people will be housed there.<sup>35</sup> It is not clear that private facilities actually save taxpayers money; multiple studies have concluded that the cost and quality of confinement in public and private prisons is approximately equal, though public prisons provide marginally better skills training and suffer from fewer safety and security issues, such as physical assaults, and grievances from incarcerated people.<sup>36,37,38</sup>

This is not to say that private prisons are responsible for mass incarceration. Public and private prisons alike respond to market pressures.<sup>39</sup> Indeed, because they are government entities, public sector prisons and the officials who run them often have easier access to the politicians who control prison policy and appropriations.<sup>40</sup> Private prisons also comprise a much smaller portion than their public counterparts of the incarceration landscape. The profits of the entire private prison industry are only one percent of the payroll for public corrections employees.<sup>41</sup>

Overall, the American system of mass incarceration – policing, prosecution, running prisons, and even fees to families – costs taxpayers \$182 billion per year.<sup>42</sup> That gives the recipients of every dollar a vested interest in preserving the status quo and maintaining a steady flow of people into the correctional system.

Those billions of dollars provide construction jobs, prison guard jobs, contracts for prison phones and commissaries, and investment opportunities for everyday citizens. To cite just two examples, the City of Philadelphia has invested



\$1.2 million of its pension fund in private prison companies; New York City has previously invested \$48 million.<sup>43</sup>

The corrections industry is big business and has invested effectively to promote its interests. Since 1989, the two biggest for-profit prison companies in the US – Corrections Corporation of America (CCA) and the GEO Group – have spent more than \$35 million on lobbying and campaign contributions.<sup>44</sup> In 2016, the GEO Group donated \$225,000 to a super PAC supporting then-candidate Donald Trump, in violation of the federal prohibition on federal contractors making political contributions.<sup>45</sup> Rather than having to pay a fine or losing its right to do business with the government, GOP was rewarded by the Trump administration with a \$110 million contract for construction of an immigrant detention center in Texas,<sup>46</sup> where most of the occupants will be people of color from Mexico and Central America.

Through the American Legislative Exchange Council (ALEC), some of the nation’s largest companies – including the private prison industry – invest millions of dollars each year to pass state laws putting corporate interests ahead of the interests of ordinary Americans. ALEC was extremely successful in promoting the private prison industry and helped pioneer some of the toughest sentencing laws on the books today, including mandatory minimums for non-violent drug offenders, “three strikes” laws, and “truth in sentencing” laws designed to curb parole and keep people in prison longer.<sup>47</sup>

ALEC’s Truth in Sentencing laws have been signed into law in more than 25 states.

In all, the corrections industry contributed \$2.5 million during the 2013 and 2014 election cycles to 360 candidates for state office.<sup>48</sup> In 2014 alone, the industry contributed at least \$5,000 to each of 30 candidates for governor, lieutenant governor, comptroller, attorney general, or state legislature; 27 of them won.<sup>49</sup> And due to loopholes in campaign finance disclosure laws across the country, we have no way of knowing exactly how much money the corrections industry has funneled into elections through so-called “social welfare” groups and other nonprofits.

# HOW FELONY DISENFRANCHISEMENT, PRISON GERRY-MANDING AND CORRECTIONS INDUSTRY POLITICAL SPENDING FUEL MASS CRIMINALIZATION

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Corrections industry political spending, felony disenfranchisement and prison gerrymandering combine to effect and reinforce a mass criminalization and incarceration system of entrenched interests and abuses of power. Their influence looms like a dark cloud over virtually every aspect of the American criminal justice system. Let us consider each stage of that system in order.

## Police Stops

### Police Funding

Powerful financial incentives make over-policing attractive to many local governments and police departments. Departments often rely on federal funding for anti-drug and anti-terrorism efforts and to train and equip employees. The Department of Homeland Security distributed \$35 billion to state and local police between 2002 and 2011,<sup>50</sup> and federal grants such as the Byrne-JAG program allocate \$376 million to police annually.<sup>51</sup>

This money comes with conditions. The amount of federal support frequently is determined by arrest statistics and the value of confiscated contraband, which pressures police to arrest more low-level offenders.<sup>52</sup> As much of the funding is designated for “high-crime” areas, police have a de facto incentive to make more arrests, while not necessarily mitigating crime.<sup>53</sup> Inflated arrest rates simply perpetuate the area’s status as a high-crime area.

Civilian police have grown increasingly militaristic since the development of Special Weapons and Tactics (SWAT) teams in the 1960s, forces initially designed to respond to active violence.<sup>54</sup> Since then, the number of SWAT teams in the US has exploded; just from the mid-1980s to the late 1990s, the number of towns of more than 50,000 residents with a SWAT team doubled to about 89 percent.

The use of SWAT teams has changed dramatically as well: over the same period, SWAT deployments increased 1,400 percent,<sup>55</sup> and in recent years, about 80 percent have been conducted as proactive drug raids rather than as responses to violence.<sup>56</sup>

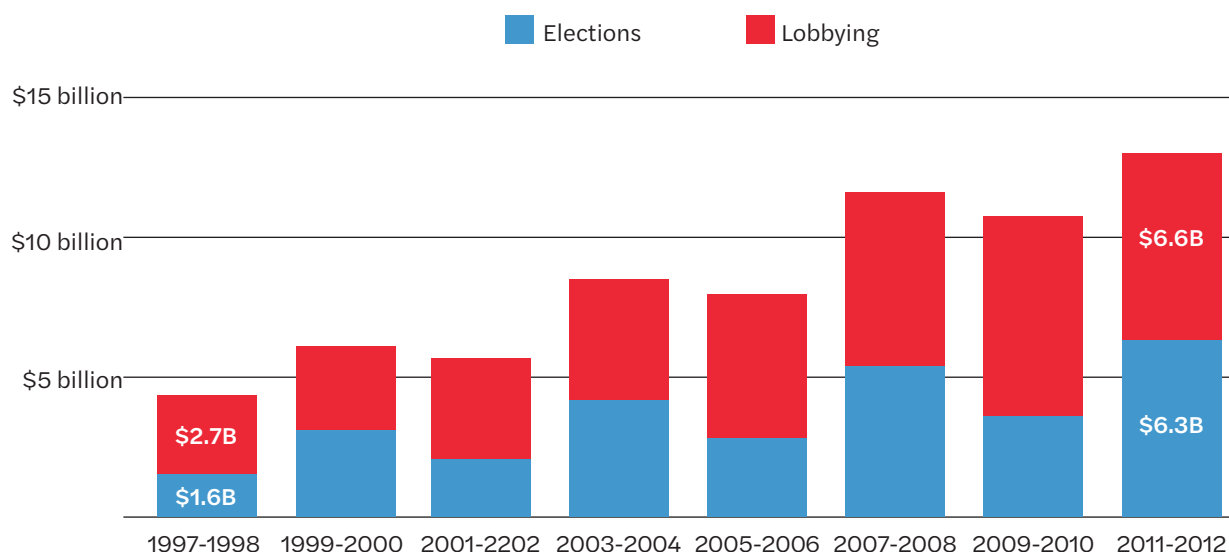
Federal funding has fueled much of this shift toward militarized police forces. Citing gang violence and drug crimes, Congress began funneling money and surplus military gear to localities in the 1990s.<sup>57</sup> The most visible example is the 1033 Program, a Department of Defense initiative that has transferred \$5 billion in military surplus gear including automatic rifles, Humvees, and Mine Resistant Ambush Protected vehicles (MRAPs) since 1990.<sup>58</sup>

In 2015, the Obama administration placed restrictions on the transfer of military vehicles, weapons, and explosives, and conditioned many transfers on community-oriented training and federal oversight.<sup>59</sup> However, President Trump rolled back these reforms in August 2017, arguing that police needed military surplus equipment to fight crime. Announcing Trump’s executive order to the Fraternal Order of Police, Attorney General Jeff Sessions said, “[w]e will not put superficial concerns above public safety.”<sup>60</sup>

Many police groups lauded the Trump Administration’s decision, but there is little consensus among experts about the 1033 Program’s effectiveness at reducing crime. Instead, researchers have found an association between 1033 transfers and police-related shootings, concluding that an increase in military equipment leads to an increase in civilian casualties, annual changes in civilian casualties, and the number of dogs killed by police.<sup>61</sup>

According to the Center for Responsive Politics, military contractors spent more than \$125 million in 2017 lobbying the federal government to buy more military equipment.<sup>62</sup> Their success in selling their wares to the Pentagon means the military has more vehicles, weapons and protective gear – among other items – with useful life available for transfer to police departments.

## Spending on Federal Elections & Lobbying Has Soared



Source: Andrew Prokop, "40 Charts that Explain Money in Politics," Vox (July 3, 2013), <https://www.vox.com/2014/7/30/5949581/money-in-politics-charts-explain>

Though less visible than the 1033 Program, DOJ's Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) is the largest provider of federal funds to state and local jurisdictions; it provides aid to all components of the criminal justice system, including drug task forces, courts, corrections, and information-sharing initiatives.<sup>63</sup> Congress has authorized grants of up to \$1.095 billion per year, though only about half of that usually is spent.<sup>64</sup>

Legally, the DOJ cannot place goal-based conditions on JAG grant recipients: the statute conditions funds on specific, quantifiable performance measures that indicate increased police activity rather than reduced criminality.<sup>65</sup> These statutory provisions ask grant recipients to report the amount of drugs that jurisdictions seize, but do not inquire about the implementation of successful drug programs; they ask how many cases are prosecuted but not whether prosecutions reduce the number of petty criminals sent to prison.<sup>66</sup> The system works to encourage policy choices that perpetuate or exacerbate police violence and mass incarceration.

Since Byrne JAG began, arrests for drug trafficking have increased by 126 percent. An event-study found that arrests for drug dealing increased to 164 of every 100,000 black individuals in each jurisdiction, in contrast to 98 per 100,000 whites; and for every \$100 increase in Byrne JAG funding, an additional 22 of every 100,000 white residents were arrested for drug trafficking, compared to an additional 101 arrests per 100,000 black residents.<sup>67</sup>

In 2014, DOJ removed "number of arrests" from its annual questionnaire for Byrne-JAG recipients; but by asking about the number of criminal cases opened or the amount of contraband seized, the survey still signals to police forces that the federal government wants more arrests, drug busts, and prosecutions.<sup>68</sup> As Kara Danksy of the ACLU notes, "there has been virtually no oversight of police militarization, [and the] federal government requires local law enforcement agencies to provide very little information to justify their requests for military equipment or funding."<sup>69</sup>

Police departments also fund their operations through civil asset forfeiture. Under this policy, property that could plausibly be related to criminal activity may be confiscated by the police and subsequently sold, with the police department keeping the proceeds.<sup>70</sup> Generally, the person whose property is seized need not even be convicted of a crime. Only three states – Nebraska, New Mexico, and North Carolina – require that a person be found guilty before their property is seized, and many departments in other states rely on forfeitures for a significant portion of their funding.<sup>71</sup> In Texas for example, one study found that the largest law enforcement agencies relied upon

forfeiture for 37 percent of their annual budgets; in smaller agencies it was as high as 65 percent.<sup>72</sup>

Despite widespread complaints about the how the seizures impact people who ultimately are acquitted or never charged with crimes, Attorney General Jeff Sessions announced an expansion of the program in July 2017.<sup>73</sup>

Between 2001 and 2013, state and local governments deposited about \$23 billion to various federal forfeiture funds, which redistribute nearly all the money;<sup>74</sup> the federal Seized Asset Fund now holds about \$6 billion.<sup>75</sup> An analysis in 2014 of 500 civil forfeiture cases found that in 80 percent, the original property owner was not charged with a crime,<sup>76</sup> and individuals are rarely able to successfully contest the confiscation of their property.<sup>77</sup>

Despite data clearly indicating that federal funding for the militarization of local police forces results in increased incarceration of black citizens for nonviolent crimes, and despite the fact that civil asset forfeiture doesn't even require conviction for a crime in most states, few elected officials or candidates for office are willing to challenge the ways we fund our criminal justice system. Doing so would require weathering an intense storm of prison-industrial complex election spending. And felony disenfranchisement, prison gerrymandering, and corrections industry political spending have enabled elected officials to avoid accountability to politically underrepresented communities harmed by these funding practices.

### **Stop and Frisk**

In the 1990s, many metropolitan police departments began utilizing a strategy known as “stop and frisk,” in which police officers approach pedestrians they deem suspicious to search for weapons and drugs. Given the incentives to increase arrests and contraband seizures, the adoption of this policy is unsurprising. Stop-and-frisks are now so common that the tactic has become the “modal form of police-citizen contact for many urban residents.”<sup>78</sup> During the height of New York City's stop and frisk program in 2011, police searched approximately 684,000<sup>79</sup> individuals, though more than 85 percent of these stops found nothing illegal.<sup>80</sup>

In 1967, the Supreme Court said in *Terry v. Ohio* that stop-and-frisks are constitutionally valid, holding that officers may stop and search anyone who the officer reasonably believes may be engaged in criminal activity and armed and dangerous. This immunized the policy against further constitutional challenge. Racial asymmetries in stop-and-frisks have been pronounced: while 18 percent of white people report being stopped by police twice or more in the past five years, the total nearly doubles for African-Americans.<sup>81</sup>

Though authorities say they have cut back on such searches in recent years, a 2011 study of the New York City police found that 90 percent of those stopped were people of color,<sup>82</sup> over half<sup>83</sup> of whom – according to a department memo – were stopped for exhibiting “furtive movements.”<sup>84</sup> A federal judge in New York ruled in *Floyd et al. v. City of New York* that the use of this term and the larger pattern of racial discrimination that accompanied it violated the 14th Amendment.<sup>85 86</sup> Despite this, other jurisdictions, such as Detroit and Oakland, have begun to adopt the practice.<sup>87</sup>

Stop and frisk policies are ineffective and dangerous. In New York, most individuals stopped were never charged, and despite the intent of the program to remove weapons from the street, guns were recovered in only 0.1 percent of all stops.<sup>88</sup> Multiple analyses also found no correlation between stop and frisk programs and felony crime rates,<sup>89</sup> and crime rates have remained at historic lows since the program was restricted significantly in New York.<sup>90</sup>

What the policy has achieved is heightened tensions between communities and local police forces. Overly aggressive police contact creates an unfavorable perception of law enforcement, especially in communities of color,<sup>91</sup> where the majority of stop-and-frisks tend to occur.

Evidence in Chicago suggests that mistrust of police can lead to increased crime rates;<sup>92</sup> a study published in 2016 of 1,200 young men stopped in the city found lasting signs of “trauma,” “anxiety,” and “depression” stemming from racial differences and use of non-lethal force by police. Even assuming full compliance with police, black individuals were 21 percent more likely than whites to suffer the use of force.<sup>93</sup> Despite public approval of police falling to a 22-year low, officers still perceive very little intradepartmental pressure to follow legal guidelines on stop-and-frisks.<sup>94</sup>

Monthly arrest quotas set by some departments are a major factor in the uptick in stop-and-frisks.<sup>95</sup> While quotas are banned in states including New York, Illinois, and California, the practice is still pervasive in departments

## Davon Woodley



Freedom after incarceration. What does that look like? Most people cannot fathom the thought because they focus on their felony rather than their freedoms. Whether someone is directly or indirectly affected by mass incarceration, the answer to “what does freedom look like?” should involve a commitment to preventing the creation of environments that foster recidivism.

After being sentenced to serve my four years, I survived years of mental anguish and trauma that should never have been introduced to anyone, let alone a first-time offender. Serving time based off your crime does not mean that you can’t serve time to become a better person. I decided to become better and not bitter. I was a recluse in order to protect my mental state. But

I realized that people often turn to what they know rather than find out how far they can stretch their true measure.

I decided to get more involved with the general population by helping to offer resources that will help reduce their recidivism rate. I helped with referrals for several different types of programs from drug rehabilitation, to housing, all the way to finding programs for gainful employment. My role in prison was not to show that my incarceration has broken me. My role was to leave a better man than when I first came in.

As we all know, prison has a way of breaking you down. It diminishes you as a human being and degrades your worth. Unfortunately, not all citizens returning to society are released with the tools necessary to help build our success. The disenfranchisement we endured during our incarceration plays a huge role in how we value our self-worth. Not being able to call or see your family when you would like to, not being able to have the most basic rights to freedom of speech without fear of being attacked or killed behind bars. Most importantly, not being able to vote and enact change within the world I live in. These injustices have created a system of broken men and women. These injustices should not foster a world that believes in ‘Us against Them’.

Overall, I’m proud of where I am today and how far I have come since coming home no less than eighteen months ago. Since being released I have had the opportunity to turn my test into a testimony. I now use my story as a cautionary tale to all my clients that we offer services to at Strive International.

around the country.<sup>96</sup> Even in departments without official quotas, police often feel pressured to meet department standards to secure positive evaluations, vacation time, desirable assignments, and promotions.<sup>97</sup> Quotas encourage police to be more aggressive in order to meet monthly standards, even as excessive policing undermines their relationships with citizens, who view the resulting arrests as unnecessary, arbitrary, and illegitimate.<sup>98</sup> In departments with no formal quota system, officers often perceive the act of making an arrest, regardless of its legitimacy, as a way to demonstrate a strong work ethic.<sup>99</sup>

Felony disenfranchisement, prison gerrymandering and corrections industry political spending have exacerbated the problems with stop and frisk. When the communities most affected by these policies are disenfranchised and gerrymandered – and elected officials are supported by corrections industry money and afraid to be labeled “soft on crime” – police departments are shielded from democratic accountability and have little reason to change their practices.

## Effects on Prosecutions

### Prosecutor Elections

Local prosecutors are among the most powerful and least recognized officials in the legal system. There are 2,344 local prosecutor's offices in the US, handling 2.3 million felony cases each year – 95 percent of all criminal prosecutions.<sup>100,101</sup> Prosecutors make the initial judgment about whether police have collected enough evidence to support a conviction and how harsh the charges will be; when a case comes to trial, the prosecutor represents the state. Their choices have played a critical role in America's mass incarceration crisis.

Plea bargaining has become the primary method for resolving criminal cases over the past few decades, with only about one in 40 federal felony cases going to trial, compared to about one in 12 in the 1970s.<sup>102</sup> At the state level, 94 percent of convictions are the result of guilty pleas.<sup>103</sup>

Defendants face enormous pressure to plead guilty, as prosecutors can threaten to pursue the charges with the harshest sentences possible, usually ones carrying minimum sentencing guidelines. This practice, referred to by scholars as “trial penalty,” makes it easier to get convictions while saving limited court resources.<sup>104</sup> In May 2017, Attorney General Jeff Sessions effectively made this practice Department of Justice policy, ordering federal prosecutors to pursue the maximum penalties against suspects.<sup>105</sup>

Some human rights advocates contend that plea bargaining effectively deprives individuals of a truly substantive judicial procedure, as prosecutors can leverage the threat of additional or tougher charges to intimidate defendants. If the prosecutor decides to pursue a charge that bears a mandatory sentence and the defendant is convicted, judges have no discretion in sentencing. As Human Rights Watch notes, “Prosecutors, in effect, sentence convicted defendants by the charges they bring.”<sup>106</sup>

Prosecutors began charging increasing numbers of arrestees with felonies in the 1990s, even as crime rates fell. In 1994, one in three arrests turned into a felony case; by 2009, the rate had jumped to two in three.<sup>107</sup> One explanation is prosecutors' desire to appeal to voters. To bolster their chances at the polls, prosecutors have been known to pursue felony charges to shift the financial burden of housing prisoners from local jails – where minor offenders typically are confined – to state prisons, cultivating a reputation as both tough on crime and fiscally responsible.<sup>108</sup>

Citizens in 45 states vote directly for their local top prosecutor. Though the process is designed to encourage accountability, incumbent prosecutors rarely are challenged for reelection; 85 percent run unopposed.<sup>109</sup> This does not mean re-election is far from prosecutors' minds. A study in North Carolina found the number of cases taken to trial increased 9.7 percent during years incumbents faced reelection.<sup>110</sup> When there was a challenger, the number rose an additional 14.7 percent.<sup>111</sup>

The content of prosecutor election campaigns does little to encourage effective, responsible job performance. When campaigns focus on prosecutors' records, they more frequently emphasize the *quantity of cases brought to trial rather than qualitative measures of conduct or the ideological framework that shapes how the prosecutor approaches the job.*<sup>112</sup>

Even more frequently however, campaigns center on candidates' character rather than specific competence in criminal justice.<sup>113</sup> Low public interest and uncompetitive elections, combined with disenfranchised communities, produces prosecutors who don't reflect their constituencies: nationally, 95 percent are white and 75 percent are men.<sup>114</sup> Once in office, the pressures of reelection make too many of them agents of mass criminalization, whether unwittingly or consciously.

### Judicial Elections

Judicial independence, a central tenet of the American judicial system, is grounded in the principle that judges should be able to make decisions that uphold the rule of law without the corrupting influence of political pressure.<sup>115</sup> While polls<sup>116</sup> demonstrate that some Americans value their ability to elect judges, about 80 percent of the electorate does not participate in judicial elections; just as many believe that the election process influences judges' decisions,<sup>117</sup> impacting judicial independence. Judges often face electoral challenges for making unpopular decisions.

When asked if reelection influenced his decisions, Justice Otta Kaus of the California Supreme Court conceded, “to this day, I don’t know to what extent I was subliminally motivated by the thing you could not forget – that it might do you some good politically to vote one way or the other.”<sup>118</sup>

Significant statistical evidence confirms that elections influence judges’ reasoning on the bench. Contrasted with appointed judges, who in one study were found to reverse death sentences 26 percent of the time, judges facing competitive elections did so in only 11 percent of cases.<sup>119</sup> Because voters are more likely to learn about under-punishing than over-punishing, elected judges are afraid of being seen as “weak on crime” and consequently issue harsher sentences.<sup>120</sup>

This effect is especially pronounced as Election Day nears.<sup>121</sup> A study of the Pennsylvania Justice System found that judges became especially punitive in the year immediately preceding an election; stunningly, it found this effect was responsible for an additional 2,000 years of incarceration in the observed timeframe.<sup>122</sup> A similar 2017 study found that judges imposed 2.4 percent longer sentences in the six months preceding elections, but the effect was concentrated almost exclusively among black defendants.<sup>123</sup> White defendants did not appear to suffer from this increase, which was stronger in districts with higher numbers of racially prejudiced voters and judges elected as Democrats.<sup>124</sup>

Campaign spending in judicial elections has exploded over the past two decades. From the 1990s to the 2000s, judicial campaign fundraising more than doubled – from \$83.3 million to \$206.9 million.<sup>125</sup> During the latter period, business groups contributed \$62.6 million and lawyers and lobbyists another \$59.3 million, for a combined 58 percent of the total.<sup>126</sup> Interest groups also were behind the lion’s share of spending on television advertisements, which have become increasingly common in judicial elections; such ads appeared in 43 percent of races in 2002, but 62 percent by 2012.<sup>127</sup> That year, campaigns spent \$33.7 million on TV ads alone.<sup>128</sup> And the interest group spending we know about is only a fraction of actual interest group spending in judicial elections. Weak campaign finance disclosure laws allow massive undisclosed judicial election spending by interest groups.

Studies reveal not only *whether electoral concerns influence judges, but also in whose favor they are influenced. An analysis of 403 cases decided by elected judges in states with high campaign spending levels found that courts ruled in favor of corporations 71 percent of the time.*<sup>129</sup> A separate study comparing 2,345 state supreme court decisions between 2010 and 2012 with data on 175,000 contribution records found a positive relation between contributions from businesses and decisions in favor of business litigants.<sup>130</sup> This effect was only found in competitive electoral districts, and the study concluded that a justice receiving half of his contributions from business lobbyists was predicted to favor business interests in court nearly two-thirds of the time.<sup>131</sup>

## Effects in Prisons

### **Prison phone providers**

Connections to friends and family often are the only lifeline people in prison have to the outside world; frequent communication with relatives decreases the chance of recidivism.<sup>132, 133</sup> In recent years however, the prison industry has found several ways to minimize exchanges between people in prison and their families, ranging from exorbitant fees for phone calls to replacing in-person visits with video calls.

Astoundingly, some correctional facilities have eliminated direct contact between people in prison and their families. According to one report, 75 percent of jails offering video calls ultimately banned in-person visits and more than 500 correctional facilities in the United States have some form of video visitation.<sup>134</sup> Beyond this, many correctional facilities have implemented a system that charges individuals a fee for contact with their families. If visitors come to the jail, they can make video calls free of charge; if they call from home, they can be charged \$1 per minute.<sup>135</sup> Because most people in prison are held in facilities an average of 160 miles from their homes, many families are unable to visit in person and must pay for video calls alone.<sup>136, 137</sup>

Ordinary phone calls also are problematic. Phone companies typically obtain exclusive contracts to administer prison phones, paying hundreds of millions of dollars in concession fees called “commissions.”<sup>138</sup> Carriers earn \$1.2 billion per year from prison phone calls; while cell phone plans sold commercially typically permit unlimit-

## Rosely Disla

Rikers is a place that will forever leave a scar in my life. I have a spouse who is incarcerated and waiting to go on trial. Throughout this difficult obstacle in our life, we see how something so simple, such as phone calls, is designed to take money from desperate families eager to support their loved ones.

Phone calls are one of the few connections incarcerated people have to the outside world. This allows them to receive mental support from their families. They call us and we ease their suffering with our words, at least for the moment. When they speak to us, they are no longer in the Day room speaking from a phone on the wall or trapped in their four walls. They are right in front of us.

These emotions are so powerful that these phone calls often end in silent tears.

When prison and jail phone providers jack up fees for calls, the families are the ones affected most. Some families can afford it. Many can't, leaving the person who is incarcerated helplessly disconnected from the outside world. When my husband has no more money for calls, he calls me using a collect call. I rush to my purse and grab the first credit card I see since I wouldn't want to miss an important message from him or make him feel at any moment as if we have abandoned him.

My husband describes being in Rikers as being dead but alive in your own hell. Anything can happen at any given moment in that violent environment. We are always living with the worry and suspense that something bad is going to happen to our loved one and that we are going to get that one unexpected news of a tragedy.

One collect phone call is almost \$5, but this is why, no matter the price, we are willing to pay it.

We already feel helpless and powerless since we can't prevent the pain and suffering he is going through, so we try to do whatever is possible to help – even if we can't completely eliminate the injustices he faces everyday.

ed calling at a flat rate, the Federal Communications Commission (FCC) has found examples of families paying \$17.30 for a single, 15-minute interstate call.<sup>139, 140, 141</sup> Phone providers justify their price policies by citing the cost of commissions paid to obtain their contracts. Prison officials justify the commission charges by citing the additional manpower they need to monitor the calls.<sup>142</sup>

Two phone carriers dominate the prison market. Global Tel Link (GTL)'s recent takeover of Telmate left GTL with a market share of more than 50 percent.<sup>143</sup> Combined with Securus's market share (20 percent), the two providers control nearly three quarters of the industry, leaving prisons with an extremely limited choice of carriers.<sup>144</sup>

In September 2015, the FCC attempted to lower ICS (Inmate Calling Service) costs. Then-FCC Chairman Tom Wheeler and Commissioner Mignon Clyburn issued a series of reform suggestions, including caps on calling rates, reduction of service charges, elimination of commissions, ending flat-rate calling, and improved access for persons with disabilities.<sup>145</sup>

Major phone providers argued strongly against the proposed regulations; the CEO of GTL called the proposition "financially borderline catastrophic." The FCC voted 3-2 in favor of the regulations. The limited rates partially prevailed until 2017, when the cost limitations were struck down in federal court and the composition of the FCC changed. Under the chairmanship of Ajit Pai, who formerly represented Securus, the majority of the FCC now opposes the 2015 reforms.

Prison phone carriers have opposed alternate reform efforts as well. To lobby for the Cell Phone Contraband Act of 2010, which prohibits people in prison from possessing cell phones, Securus Technologies alone spent approximately \$75,000.<sup>146, 147</sup> Century Link, fighting to increase its market share, quadrupled its lobbying expenditures



from roughly \$1 million in 2012 to \$4.1 million in 2014.<sup>148</sup> GTL contributed \$58,000 to candidates in the 2013-2014 cycle; since 2007, its lobbying expenditures have risen from \$20,000 to \$114,000.<sup>149</sup>

The exorbitant price of prison phone calls has more than monetary effects; it hurts people in prison and their families. The lack of parental contact often has long-term effects on child development, with symptoms ranging from separation effects like poor self-concept and acute traumatic stress to intergenerational crime and incarceration.<sup>150</sup> For incarcerated persons, several studies have shown that limited contact with loved ones dramatically increases the chances of recidivism.<sup>151</sup> Such effects may be beneficial for the system of mass incarceration, but not for rehabilitation or public safety.

### **Prison Commissaries**

Prison commissaries were established to allow people in prison or jail to purchase hygienic or food supplies beyond the bare necessities prisons provide, while preventing the spread of contraband. Today, they are a profitable business.<sup>152</sup> The industry earns an estimated of \$1.6 billion per year.<sup>153</sup> Much like the prison phone market, commissaries in U.S. prisons are run by a handful of companies. The industry leader, with a 30 percent market share, is the Keefe Group, which alone earns \$1 billion per year in revenue.<sup>154</sup>

Prisons are reducing their investment in meals for incarcerated people.<sup>155</sup> Because prisoners typically cannot bring in their own food or receive it from visitors, many turn to commissaries for snacks and other supplemental food items.<sup>156</sup> A 2016 study links the rise of ramen noodles as the most popular trading good in prison to the deterioration in quality and quantity of prison food.<sup>157</sup> Before recent budget cuts in food services, luxury goods such as tobacco and stamps were the most popular traded items among incarcerated people. As more and more prisons have denied people in prison adequate meals, individuals have turned to the commissaries or black markets, to the point that ramen noodles, canned fish, and coffee have become unofficial currencies in many prisons.<sup>158</sup>

For the prisons, cutting costs on food has been a zero-sum choice. Lower food costs mean lower quality, fostering violence and the expansion of the black market, which forces prison administrators to increase spending on security measures.<sup>159</sup>

Meanwhile, the commissaries can take advantage of their monopoly position and the desperation of people in prison to raise prices.<sup>160</sup> Basic commissary items like cereal and canned soup can cost as much as five times the retail price.<sup>161</sup> With annual revenue of more than \$1 billion, the Keefe Group has been careful to protect its position in American prisons. Over the last 10 years, the company has spent more than \$ 1.6 million on lobbying.<sup>162</sup>

In another way, the combination of felony disenfranchisement, prison gerrymandering, and the industry's continued political spending demonstrates how the ability to buy government contracts and avoid democratic accountability leads to unconscionable abuses of power. Through deliberate policy choices, companies can charge obscene rates for basic human needs – food and human contact – and the people most affected are voiceless to stop it. There is some small consolation: deliberate choices produced these results, which mean those choices can be reversed.

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**Now that I have been released, I have learned that I am much stronger than any of my circumstances. This is not to be worn as a badge of honor, but as a Band-Aid to help supplement the scars I carry within myself day to day. Unfortunately, there are several individuals that will come home and not have the same coping abilities. In fact, like them, I still suffer from anxiety and stress just thinking about it. But most will never know what it truly means to heal from the monster that is mass incarceration.**

**– Devon Woodley**

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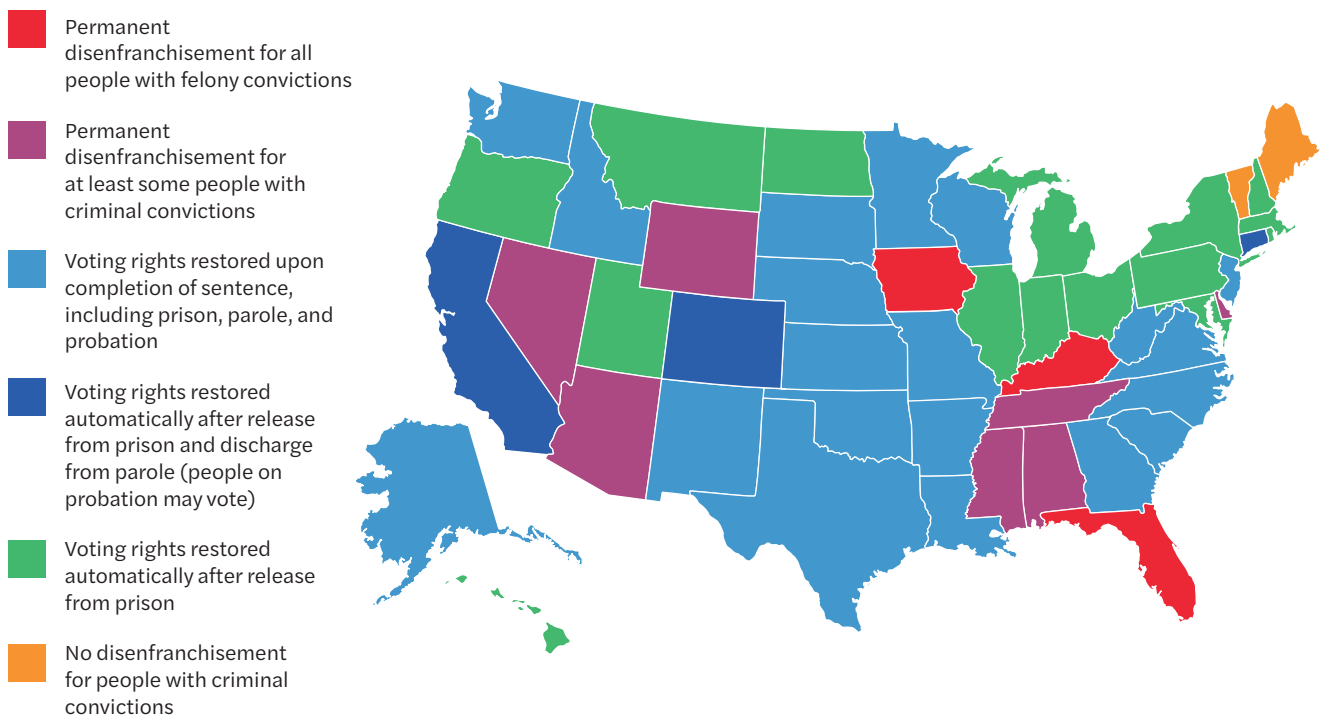
## OPPORTUNITIES FOR REFORM AND CONCLUSIONS

We cannot access democracy when so many of our communities are barred from the process. The reality of mass criminalization and incarceration is a horror and an embarrassment to American society. Even so, there are flickers of reform nationwide that provide cause for optimism. Recent public opinion surveys report that eight in 10 Americans support restoring voting rights to citizens who have completed their prison sentences; two-thirds support restoring voting rights earlier, to those on probation or parole.<sup>163</sup> Just in the past year, multiple states have moved to fight felony disenfranchisement.

- Wyoming simplified the process offenders use to regain their right to vote.<sup>164</sup>
- A Nebraska legislator introduced a bill that would have removed the state from the infamous list of 12 states that make disenfranchisement permanent.<sup>165</sup>
- The Florida Supreme Court approved the final text of a ballot initiative that, if voters agree, will amend the state constitution to restore voting rights to those who have completed their sentences.<sup>166</sup> And a federal judge struck down Florida's scheme of disenfranchisement as unconstitutional, ordering that the system for voter restoration be changed as soon as possible.<sup>167</sup>
- Colorado recently passed preregistration for parolees, so that they are automatically registered to vote after completing their sentence.<sup>168</sup>

Four states – California, Delaware, Maryland, and New York – have passed legislation to create special state-level censuses to properly record the addresses of people in prison.<sup>169</sup> Even tiny Anamosa, Iowa – the city cited earlier in this report to illustrate the absurd impacts of prison gerrymandering – switched to an at-large system of elections after citizens demanded an end to district lines that had residents of one ward enjoying 25 times as much

### Criminal Disenfranchisement Laws Across the United States



Brennan Center for Justice, "Criminal Disenfranchisement Laws Across the United States," last updated April 18, 2018, <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>

political influence as their neighbors.<sup>170</sup> Until the U.S. Census Bureau decides to count incarcerated persons as residents of their home cities, state- and local-level reforms can undo many of the ills of prison gerrymandering.

Strengthened campaign finance disclosure laws can shine more light on corrections industry influence on elections and public policy. And public financing of elections and contribution limits can reduce prosecutors' and judges' bias in favor of big donors and promote diversity on the bench. In New Mexico, a study of the impact of public financing on the judiciary found more women and nonincumbents run when public funding is available; there was no significant change in ethnic minority, third-party or opposed candidates, however.<sup>171</sup> North Carolina's public financing system for judicial elections produced judges who were 60 percent less likely to rule in favor of litigants who had contributed money to their campaigns within the previous eight years.<sup>172</sup> Regrettably, North Carolina repealed the system in 2013, but its results provide a model for future reform.

Popular support has spurred many reforms. In New York City, the confluence of Mayor Bill De Blasio's administration, a lawsuit, and a public advocacy campaign has significantly reduced the number of stop-and-frisks from a peak of 686,000 stops in 2001, to 15,000 by 2016.<sup>173</sup> Local activists in Portland, OR, and Dallas, TX, have overturned bans pushed by the video visitation industry on in-person prison visits.<sup>174</sup> In the 2016 elections, motivated voters in Oklahoma passed ballot initiatives to reduce drug and property crimes from felonies to misdemeanors.<sup>175</sup> Also in that year, prosecutor candidates who explicitly campaigned on eliminating mass incarceration and racial disparities won in Houston, Birmingham, and Tampa.<sup>176</sup>

Mass criminalization and incarceration can be remedied. In the last decade, Alaska, California, Connecticut, New York, New Jersey, and Vermont have reduced their incarcerated populations by more than 20 percent.<sup>177</sup> Another 10 states have seen prison populations drop 10-20 percent.<sup>178</sup> All this has been achieved without an increase in crime rates.<sup>179</sup> These results show that there is nothing inevitable about mass incarceration. Felony disenfranchisement, prison gerrymandering and special interest money make reform harder, but not impossible. Motivated citizens can overcome even these obstacles. Telling stories of the other side of the criminal justice system, of people in prison, can be a call to action for the nation. An end to mass criminalization will not just open prison cells; it is the key to unlocking real democracy for millions of Americans.

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# **Common Cause**

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