



The legislative roots
of mass incarceration

SARAH FAWSON

LIKELIHOOD OF INCARCERATION IN AMERICA¹



AMERICAN SYSTEMS OF CONTROL

HISTORY REPEATING ITSELF IN AMERICA

An African American teen who was seen out running errands is accused of flirting with and making advances at a White woman. A few days later, the teen is found brutally murdered by a group of White men who knew the woman. When the murderers were tried in court, the all-White jury acquitted them of any wrongdoing and they all walked freely. The woman who the teen was accused of making advances at later admitted that the situation was entirely inflated. During the Jim Crow Era, many things that Black people did - especially Black men - were criminalized, even as small as talking back to a store owner or flirting with a White woman. White men often used vigilante justice to intimidate, threaten, hurt, or even kill Black men if they did not follow these rules. Sometimes this was under the name of the Ku Klux Klan or separate, but most often, these men exerted their control then walked freely.

100 years later, in present day, a Black father of 2 named was pulled over at a traffic stop for having a tail light out. The officer thought that he looked "suspicious" and searched the man's vehicle, although he had only been pulled over for a tail light being out. The officer found marijuana, which carries a felony conviction in his state. The man is put in jail and is awaiting trial. The judge posted bail, but he can't afford it. He then spends 14 months incarcerated and waiting for trial. By the time he was finally sentenced and placed in prison to serve his time, he had already been separated from his two children for over a year and had lost his job. After his time is served, he leaves prison, but has trouble finding a place to stay and a job. He has several interviews, but every time an employer sees that he has "checked the box" for a felony conviction, they swiftly end the conversation with him and don't call him back. He turns towards selling drugs to have an income again so he can pay rent and support his kids, but soon lands back in jail for this, with a larger sentence than before due to his previous conviction. The same system that locked him up had prevented him from getting back on his feet and put him back behind bars once again.

Although a century has passed, these stories look the same: people in institutions of power controlling people of Color for their own benefit. Starting with Slavery in America, to Jim Crow Laws, to our current system of Mass Incarceration and Over-policing, America's history of racial control is repeating itself under different names. In the words of civil rights activist Michelle Alexander, "we have not ended racial caste in America; we have merely redesigned it."

Most of us growing up in the United States were taught about the systems of slavery, Jim Crow, and maybe "tough on crime" policies that defined politicians around the 80's. These were probably taught in different classrooms or books as distinct and completely unrelated events, each of them part of a longer story of American progress towards racial equality and colorblindness. What isn't taught is that these systems have all operated in a continuous chain to control Black Americans, denying them the freedom that so many Americans have benefitted from.

For Black Americans - especially the most economically disadvantaged - the outcomes of these systems of control have looked mostly similar despite the many years that span between, even as outward appearance of the systems have moved away from overt racism and towards the touted ideal of "colorblindness." These outcomes are:

- Restricted or lack of employment opportunities
- Harsher legal punishments for crimes than any other race
- Infringement of political rights such as voting and jury duty
- Restricted access to housing and ownership of property

Today, Black men in America are 3 times more likely to be imprisoned in their lives than white men are. An enormous share of Black Americans are in prison or disenfranchised from basic human and civil rights for having a criminal record, no matter how small. It is even legal for states to restrict the right to vote, the right to serve on a jury, and the right to be free of legal discrimination in employment, housing, and public benefits like food stamps and public housing, if a person has a criminal record. These restrictions cripple formerly incarcerated people and often lead to desperation, crime, and recidivism, making it almost impossible to break the cycle of poverty and live productively and safely in civil society.

As the United States celebrates its colorblindness and recent "smart on crime" legislation, it is ever so apparent how its laws have actually enabled this systemic oppression at all levels. If we do not understand how these systems have continued to develop and exert control then we cannot understand how to dismantle them for lasting change. The following pages will illustrate the history of how systems of racial control have changed and maintained power over time, the lasting impact of these systems, as well as resources to help you know how you can get involved in dismantling these systems to finally create a just society for all.

WE DIDN'T GET HERE BY ACCIDENT

The U.S. has a long history of racially unequal legislation and interpretation of laws. Each period of racial control in the U.S. follows by small periods of progress before a new racial "order" is put into place. The periods of control are far more expansive than the time periods of progressive movement and policy.



1619 - 1865 SLAVERY

A NATION BUILT ON BLACK LABOR

In 1619, the first slave ship arrived at Point Comfort, which was where Virginia was in the American Colonies at the time. 20+ Africans were sold to colonists. For hundreds of years thereafter, enslaved people were bought and sold in America. At the point that the United States colonies declared independence from England, slavery was commonplace.

As the United States was formally becoming a country, they put their values on paper. The Colonies wanted to be "free of the shackles of England" while they all had slaves, and didn't even make any note of it in the constitution, but made some explicit decisions that contradicted their view of what the nation ought to be, such as in the 3/5 Compromise where slaves were counted as a partial person for political leverage, but not a full person. The Bill of Rights even contained language in its amendments that protected civil rights that would never apply to African Americans until they were free of the shackles of slavery, and even still was often not applied fairly or equally.



THOMAS JEFFERSON
Jefferson had one of the loudest voices for freedom of almost anyone in American history, and was instrumental in the writing of the constitution explicitly dancing around anything relating to African Americans which he held as slaves himself.

In the case of Dred Scott v. Sandford, a Southern slave named Dred Scott argued that since he was taken into Northern free territory, that he should be a free man. The US courts established again that African Americans are not citizens, so he could not gain his freedom.

The nation was soon divided, and the Civil War started. Abraham Lincoln was quite troubled over how to end the Civil War and keep the United States intact. He was debating freeing all slaves as a way to force the South's dependence on the North so they do not leave the Union, but he struggled with what it might mean to suddenly free 4 million people. Lincoln invites 5 prominent Black men to his home in 1862 to discuss this initiative, and to try to make a deal: once Black people were free from slavery, they would all be shipped to a different country. The men declined this offer, as they felt that America was just as much their land as it was his. Years later, Lincoln still decided to end the Civil war this way and issued the Emancipation Proclamation to free all Southern slaves. Lincoln solved for his problem of integration by ordering that Federal troops will occupy the South to ensure they follow the rules: release their slaves and swiftly join back in the Union.



ABRAHAM LINCOLN
"Whether it's right or wrong, I need not discuss, but this physical difference is a great disadvantage to us both, as I think your race suffer very greatly, many of them by living among us, while ours suffer from your presence. In a word we suffer on each side."

1865 - 1877 RECONSTRUCTION ERA

THE 13TH AMENDMENT & ITS INTENTIONS

Reconstruction was the name of the period after the Civil War in America established to help the South become a part of the Union again. Federal troops occupied much of the South and progressive policy was passed to cement Lincoln's decisions.

Through the Reconstruction Amendments - the 13th, 14th, and 15th Amendments to the Constitution - African Americans were formally released from slavery, gained citizenship, and gained the right to vote. Blacks were also finally able to serve on juries and own land. What is specifically important to note in the 13th Amendment is that it declares slavery unconstitutional, "except as punishment for a crime," essentially providing the exact ammunition Whites needed to form their next racial caste: if you can criminalize people, you can put them back into slavery.

Reconstruction ended when President Elect Rutherford B. Hayes struck up a deal, known as the Compromise of 1877, to take federal soldiers out of the South, which led to Republicans fleeing to the North and Democrats to the electoral college in the South to gain more votes. As Reconstruction ended, Black equality completely regressed and the new racial order began under Jim Crow laws.



RUTHERFORD B. HAYES
Struck up the Compromise of 1877 by ending enforcement of integration and effectively started the use of the electoral college which was created to disenfranchise votes.

1877 - 1954 JIM CROW ERA

CONSTITUTIONAL AMENDMENTS

Throughout United States' history, certain laws have been repeatedly violated and enacted in new ways in response, particularly as it applied to African Americans being treated as equals under the law. These Constitutional Amendments are particularly applicable to this story, as their formation juxtaposed with history shows explicitly how racism, which is often hard to prove, actually does violate the text of the Constitution and the Law in the United States.

4 The 4th Amendment prevents unreasonable searches and seizures.

5 The 5th Amendment addresses criminal procedure and other aspects of the constitution, saying that no person can be tried for a crime without evidence.

These amendments have been violated throughout time and are still violated by police searching people under pretext of vaguely described "suspicions" even today.

A HISTORY OF RACIAL LEGISLATION AND CULTURE

As Michelle Alexander put it, "The very same playbook has been used over and over in this country, by those who seek to preserve racial hierarchy or to exploit racial resentments for political gain, each time, with similar results," perpetual systematic control and marginalization of the dispossessed.

WE ARE IN THE ERA OF MASS INCARCERATION AND OVER-POLICING

3 STRIKES LAW

MANDATORY MINIMUMS

QUALIFIED IMMUNITY

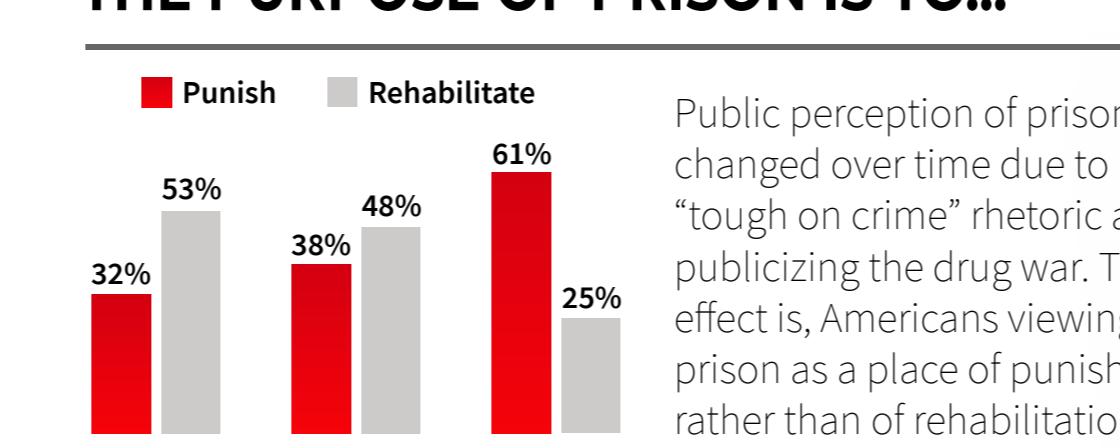
WAR ON DRUGS

STOP & FRISK

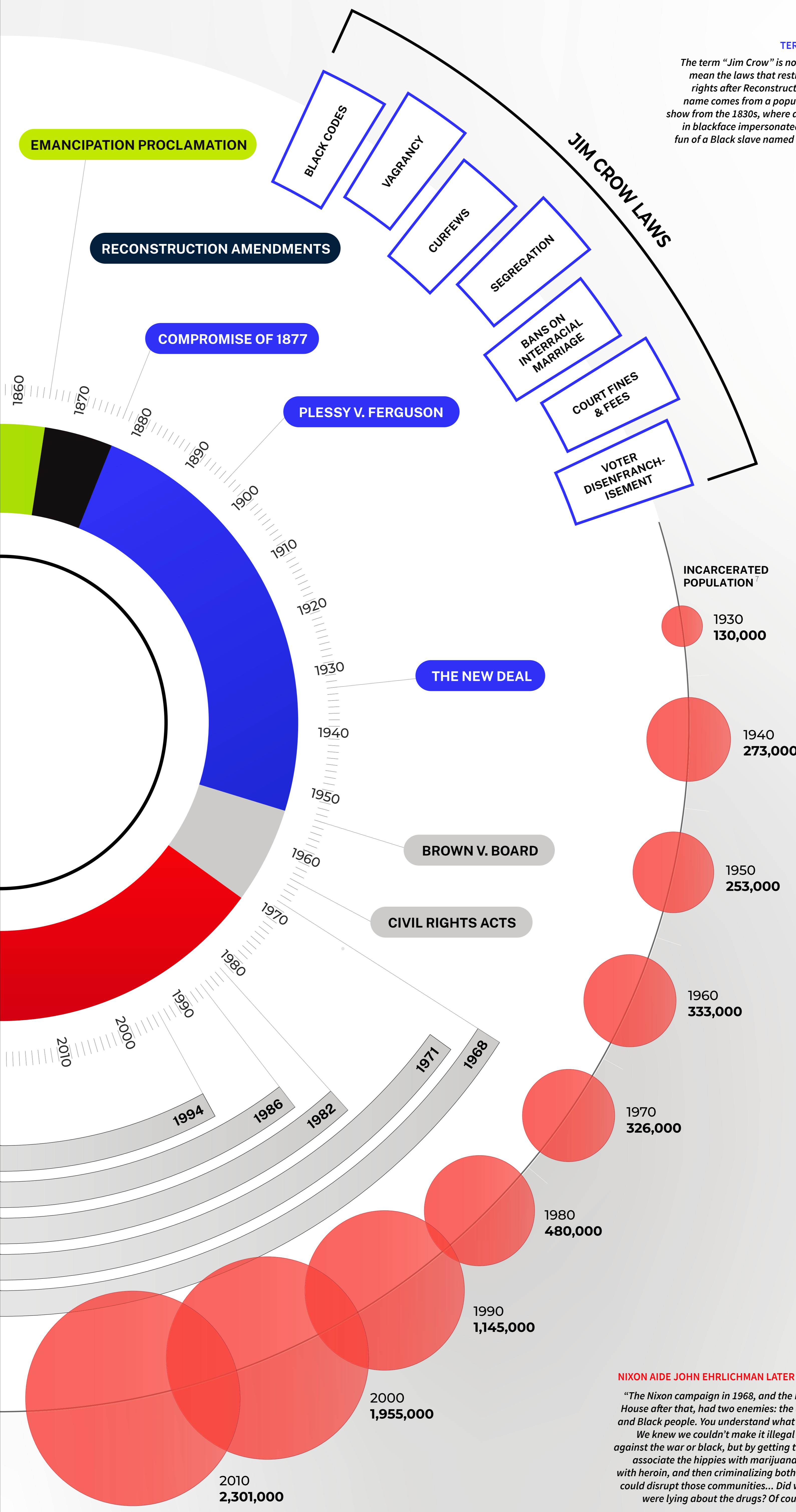
THE 2000'S AGENDA

The most recent presidential administrations have attempted to change the narrative from "tough on crime" to "smart on crime" by paying attention to the criminal justice system a different way - focusing on prison reform and putting funding towards prisoner programs focused on education and healing. However, with all of these tough on crime policies still in place, the system will not end anytime soon unless massive repeals go into place to dismantle the harm that earlier presidencies and courts have established.

THE PURPOSE OF PRISON IS TO...



Public perception of prison changed over time due to "tough on crime" rhetoric and publicizing the drug war. The effect is, Americans viewing prison as a place of punishment rather than of rehabilitation.⁶



TERMINOLOGY
The term "Jim Crow" is now known to mean the laws that restricted Black rights after Reconstruction, but the name comes from a popular minstrel show from the 1830s, where a white man in blackface impersonated and made fun of a Black slave named "Jim Crow."

1877 - 1954 JIM CROW ERA

BLACK CODES, SEGREGATION, & VIOLENCE

Though 4 million Black Americans had legally gained their freedom, the question of freed Blacks' status in the South was still very much unresolved. After Reconstruction, states in the South passed Jim Crow Laws that legalized racial segregation, marginalization, and violent discrimination. These laws denied African Americans the right to vote, hold jobs, get an education or other opportunities. Those who attempted to defy Jim Crow laws often faced arrest, fines, jail sentences, violence, or even death.

The Ku Klux Klan (KKK) was founded right after the Civil War ended as well, and the terrorist group used extreme violence and threats to target newly freed African Americans during the Jim Crow Era as well, working to enforce white supremacy and suppress integration and African American rights.

In the 1896 case of Plessy v. Ferguson, The Supreme Court upheld the constitutionality of racial segregation laws for public facilities as long as the segregated facilities were equal in quality, a doctrine that came to be known as "separate but equal." This decision cemented segregation for decades to come.

Though progress had previously been mandated during the Reconstruction Era, laws during the Jim Crow Era often didn't move forward the need of racial justice at all. For example, FDR's New Deal, industry codes and fair labor standards act prohibited child labor and established minimum wages. However, these laws explicitly excluded many jobs primarily worked by African Americans. Additionally, Jim Crow Laws explicitly put into writing a way to ensure a cheap labor force that they lost when slavery was abolished. Under "Black Codes," many states required blacks to sign yearly labor contracts that ensured a cheap labor force for Whites again; if they refused, they risked being arrested, fined, and forced into unpaid labor. These explicit and implicit laws forced Blacks back under White control for almost a century.

1954 - 1971 CIVIL RIGHTS ERA

SEGREGATION ENDS, CIVIL RIGHTS MOMENTUM BUILDS

Black Americans were part of the Constitution, had individual laws protecting their freedoms, were serving in positions like in the military along with Whites, but were still severely discriminated against. In 1941, thousands of Black people threatened to march on Washington to demand equal employment rights, afterwards, President Franklin D. Roosevelt responded by issuing an Executive Order to open military and government jobs to all Americans regardless of race, creed, color or national origin. Then, as the Cold War began, President Harry Truman initiated a civil rights agenda, and in 1948 issued an Executive Order to end discrimination in the military. These events helped set the stage for grassroots initiatives and year-long protests that followed, all focused on the goal of enacting racial equality legislation to finally guarantee Blacks their rights as equal Americans.

Finally, the Supreme Court ruled in the 1954 case of Brown v. Board of Education that racial segregation of children in public schools was unconstitutional. Schools did not start to become integrated until years later with kids like the "Little Rock Nine" and Ruby Bridges paving the way. As schools and facilities started to desegregate, there was often resistance and violence in response. A series of protests of African Americans and allies followed in order to build on the momentum that ending segregation gained.

The Civil Rights Acts of the 1960's formally dismantled Jim Crow Laws, outlawed discrimination on the basis of race, color, religion, sex, or national origin, required equal access to public places and employment, and enforced again the desegregation of schools and the right to vote. This racially progressive policy created a sense of uncertainty and unease in the White community, particularly in poor Whites, who felt neglected of government help too. Politicians knew this, and sought to use it to their advantage to end the Civil Rights Movement and put another racial order into place, without explicitly calling out race as the issue this time.

KEY PLAYERS THAT BRING RISE TO A NEW ERA



1971 - NOW MASS INCARCERATION

TOUGH ON CRIME POLICIES TARGET BLACK AMERICANS

As the Civil Rights Movement gained traction, many White Americans grew nervous. Politicians decided to cash in on this fear by creating a series of "tough on crime" policies that ultimately criminalized Black communities and placed them within a new racial order: behind bars and away from society. President Nixon started this trend in 1971 by declaring a "War On Drugs" by dramatically increased the size and presence of federal drug control agencies, and leading the way for future presidents to put into place harmful laws that are still in act today. It was clear that this policy was aimed at Black communities. For example, the harsh sentences on crack cocaine use disproportionately affect Black Americans, while powder cocaine, used more by Whites, faced lesser criminal sentences.

President Reagan took what Nixon started and flew with it, expanding legislation and highly politicizing the drug war. In 1986, Reagan signs into law the Anti-Drug Abuse Act, which created Mandatory Minimum Sentences. Reagan mastered the art of inciting anger on racial issues, without explicitly calling them racial issues. Reagan's wife, Nancy, also took a role in publicizing the War on Drugs, leading the "Just Say No" Campaign that portrayed issues leading communities to drug use as "criminals" who have plenty of other options and opportunities available to them.

In 1988, an ad accuses a then-Presidential candidate of being "soft on crime" because a major crime by a Black man occurred when he was Governor. The "Tough on Crime" rhetoric starts to be used heavily in politics as a way for his opponent to scare voters into not voting for him. Democratic strategist Jimmy Williams later admitted, "It made white Americans – especially white southerners – raise and eyebrow and think, 'We can't have a man from Massachusetts releasing 'Black criminals' all across the country and letting them rape our white women and children.' That was the point of that ad."

Police funding and credibility grew stronger as they "fought" drug use in the U.S. The government and those carrying out the laws gained more power through this as well. One example that is still used to day is Qualified Immunity, which states that by default, all government officials are immune from liability if they violate your rights.

President Clinton's 1994 Crime Bill allocated more money for prisons and issued harsher sentences, including a Three-Strikes Law. Clinton issued a slew of crime bills following this that absolutely devastated communities of color and cemented the U.S. as the country with the highest incarceration rate in the world for years to come.

THE IMPACTS OF OUR LEGISLATION

THE U.S. HAS THE HIGHEST INCARCERATION RATE IN THE WORLD

2.2 MILLION

PEOPLE ARE CURRENTLY INCARCERATED IN US PRISONS AND JAILS AS OF 2016

90% MEN

OF INCARCERATED PEOPLE IN THE UNITED STATES ARE MEN

70 MILLION

AMERICANS HAVE A CRIMINAL RECORD AND ARE THEREFORE DISENFRANCHISED FROM SOCIETY

2.2 million people are incarcerated in the United States. The U.S. puts people behind bars at a higher rate than any other country in the world. In 2016, the incarceration rate in the U.S. was 698 people per 100,000.⁸

The increase in sentencing is directly attributable to the War on Drugs and Tough on Crime policies made prevalent in the 70's, 80's, and 90's. Even during periods when crime rates have declined, the number of people sentenced to prison for other crime types has also increased.⁴

The number of people incarcerated for drug offenses in the U.S. skyrocketed from 40,900 in 1980, soon after Nixon declared the iron-fist policies, to over 450,000 in 2017. Today, there are more people behind bars for a drug offense than the number of people who were in prison or jail for any crime in 1980, and the people who are most affected are Black.³

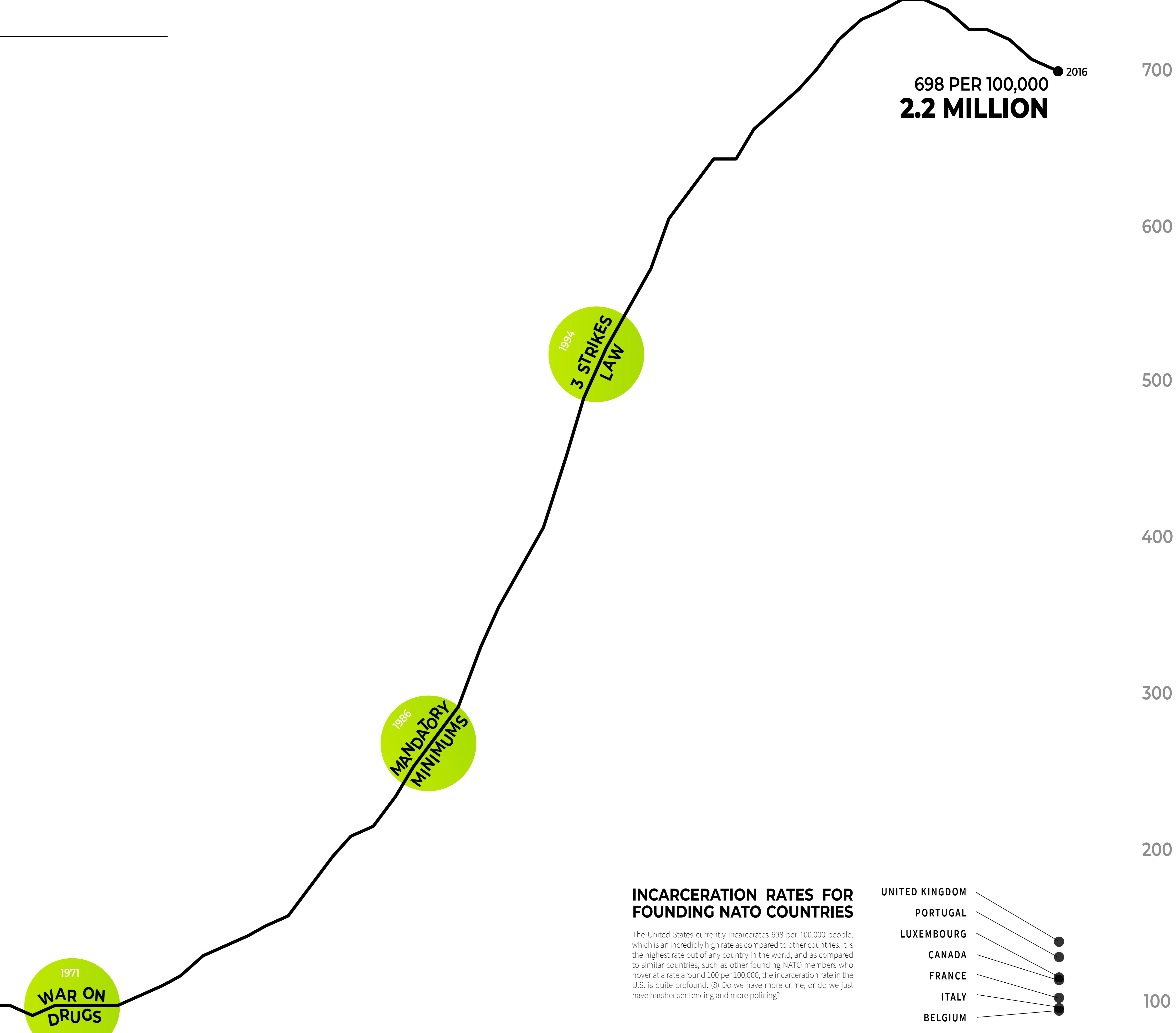
Some might ask, "Well shouldn't we lock up criminals?" Well, most people in state prisons for drugs have no history of violence or significant selling activity. In fact, the majority of people arrested for drugs are for relatively minor crimes. In 2005, four out of five drug arrests were for posession, and only one out of five was for sales.³ So we must ask ourselves: What is this all for?

Although it costs a lot of money to incarcerate people, it turns out the drug war is still quite a financially lucrative business for the U.S. government. The budgets of law enforcement agencies soared after the War on Drugs began. Between 1980 and 1984, the FBI's anti-drug funding increased 12 times over: from \$8 million to \$95 million. In the ten years from 1981 to 1991, Department of Defense anti-drug allocations increased roughly 300%, from \$33 million in 1981 to over \$1 billion. During that same ten year period, DEA anti-drug spending grew from \$86 million to \$1 billion.

By contrast, funding for agencies responsible for drug treatment, prevention, and education, was dramatically reduced during this time. The budget of the National Institute on Drug Abuse for example was reduced from \$274 million to \$57 million from 1981 to 1984 and anti-drug funds allocated to the department of education were cut from \$14 million to \$3 million.³

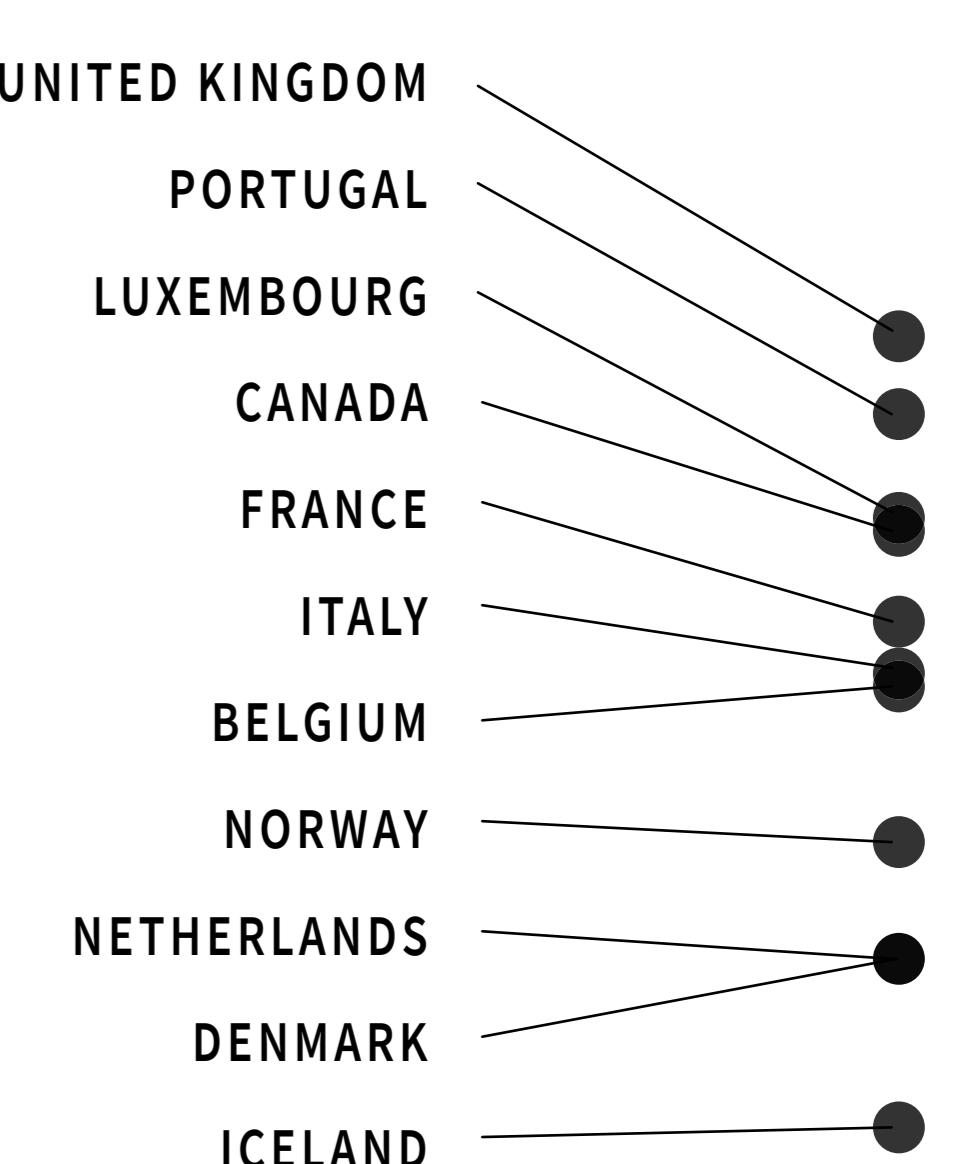
U.S. PRISON POPULATION

INCARCERATION DATA STARTED BEING COLLECTED IN 1925 IN THE UNITED STATES



INCARCERATION RATES FOR FOUNDING NATO COUNTRIES

The United States currently incarcerates 698 per 100,000 people, which is an incredibly high rate as compared to other countries. It is the highest rate out of any country in the world, and as compared to similar countries, such as other founding NATO members who hover at a rate around 100 per 100,000, the incarceration rate in the U.S. is quite profound. (8) Do we have more crime, or do we just have harsher sentencing and more policing?

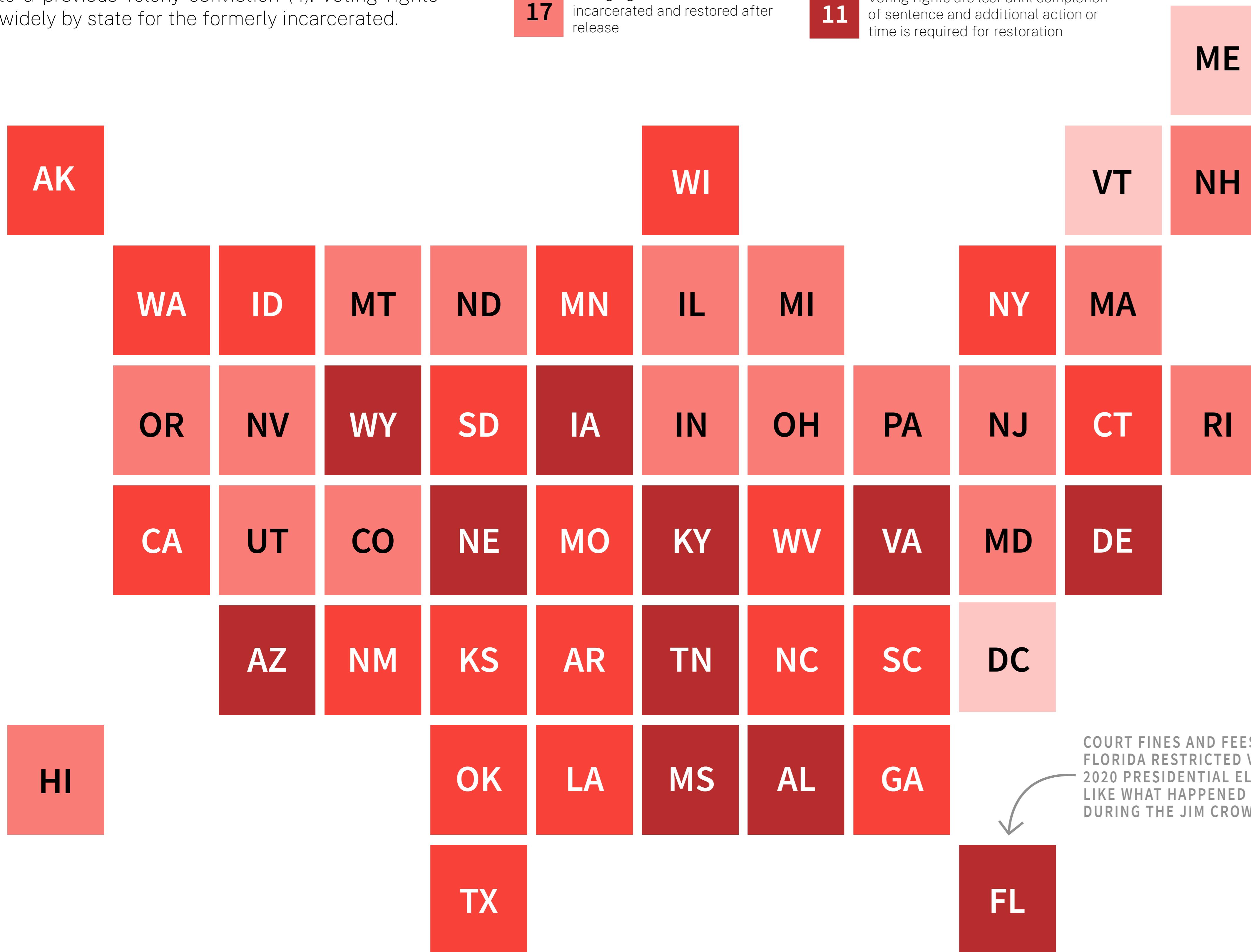


LIFE AFTER PRISON IN THE UNITED STATES

VOTING RIGHTS VARY BY STATE

An estimated 5.2 million people could not vote in 2020 due to a previous felony conviction (4). Voting rights vary widely by state for the formerly incarcerated.

- 3 People labeled felons never lose voting rights, even while in prison
- 20 Voting rights are lost until completion of sentence, including parole and/or probation
- 17 Voting rights are lost while incarcerated and restored after release
- 11 Voting rights are lost until completion of sentence and additional action or time is required for restoration



COURT FINES AND FEES DUE IN FLORIDA RESTRICTED VOTES IN THE 2020 PRESIDENTIAL ELECTION, JUST LIKE WHAT HAPPENED IN THE U.S. DURING THE JIM CROW ERA.¹³

DISCRIMINATION IS CLEARLY STILL LEGAL TODAY

IF YOU ARE LABELED A FELON, WHEN IS YOUR TIME FINALLY SERVED?

The impacts of mass incarceration extend beyond prison walls. Even after someone has served their time in prison, many economic and political privileges of citizenship are off limits to someone because they are labeled a felon. Discrimination, stigma, and exclusion become legal for returning citizens, and they live in what can only be known as a second-class citizenship for the rest of their lives due to new rules and restrictions that now govern their lives. Their restrictions include voting rights, the right to serve on a jury, employment discrimination, restrictions on opening a bank account or getting a student loan, restrictions from obtaining business licenses, life insurance, and even food stamps.

People with a felony conviction have a 27% unemployment rate.¹⁴ For people who have been

incarcerated, 75% will still not have a job one year after their release.¹⁵ Recidivism is fed by the system of laws set up to legally discriminate people who have served time.

Consider the story of Antwan McLaren, a 23-year-old father of two, who was jailed for two months in 2018 because he missed his probation officer's calls. His cell phone service had been turned off when he couldn't afford to pay his bill. The rules that governed his life after being released from prison led him directly back.¹⁶

Antwan is not alone. In fact, 28% of people in 2018 coming into prison were due to a parole violation rather than a new conviction.¹⁷

"DON'T LOOK AT ME LIKE I'M NOTHING. STILL RESPECT ME AS A HUMAN BEING. I CAN'T EVEN PAY A PHONE BILL."

ANTWAN MCLAREN

TOGETHER WE END RACIAL CASTE SYSTEMS AND MASS INCARCERATION IN THE U.S.

The impact of decisions made in the criminal justice system-types of laws, sentencing decisions, legalized discrimination- affect the most basic of human rights. The problems that racially discriminatory policies have created cannot be solved at once, the systemic discrimination must be dismantled from all angles. Use the following guide to begin to take action to end systemic racial control and mass incarceration.

WAR ON DRUGS & TOUGH ON CRIME LAWS

It is evident that we are still in the era of mass incarceration. This will not end until massive repeals are made on the legislation that led us here. Progress must be made on state and federal levels to address these unjust laws. To start, contact your state representatives to ask them to:

- REMOVE MANDATORY MINIMUM SENTENCES
- REMOVE THE 3 STRIKES LAW STILL IN PLACE IN MANY STATES
- LEGALIZE MARIJUANA, AND ERASE FELONY CONVICTIONS FOR NON-VIOLENT DRUG USERS WHO HAVE BEEN PUT IN PRISON IN YEARS PAST

POLICE BRUTALITY & OVER-POLICING

The United States continues to witness ongoing police brutality and injustice, particularly people of color. How can victims get justice, and how can we hold the system, and particular people who violate human rights accountable? Contact your state and local representatives to ask them to:

- END QUALIFIED IMMUNITY
- END STOP AND FRISK POLICIES
- END THE USE OF NO-KNOCK WARRANTS
- INCREASE POLICE ACCOUNTABILITY WITH BODYCAM MANDATORY

DISENFRANCHISEMENT IN SOCIETY

Serving time should end in prison, yet discrimination is perfectly legal for anyone branded a felon. There are a couple of ways you can help. Contact your state representatives to ask them to:

- 'BAN THE BOX' ON EMPLOYMENT APPLICATIONS
- ALLOW INCARCERATED PEOPLE TO RETAIN THEIR CIVIL RIGHTS

You can also donate to or volunteer with one of the many organizations helping previously incarcerated people integrate into society:

- RESTORATIVE JUSTICE
- FLORIDA RIGHTS RESTORATION COALITION
- PRISONER REENTRY NETWORK
- ROOT & REBOUND

"EVERY SYSTEM OF INJUSTICE DEPENDS ON THE SILENCE, PARALYSIS, CONFUSION, AND COOPERATION OF THOSE IT SEEKS TO ELIMINATE OR CONTROL."

MICHELLE ALEXANDER

"THE BURDEN BELONGS TO THE NATION, AND THE HANDS OF NONE OF US ARE CLEAN IF WE BEND NOT OUR ENERGIES TO RIGHTING THESE GREAT WRONGS."

W.E.B. DU BOIS

"POWER CONCEDES NOTHING WITHOUT A DEMAND; IT NEVER HAS AND IT NEVER WILL"

FREDERICK DOUGLASS

"ONCE A PERSON HAS SERVED THEIR TIME, THEY SHOULD NOT BE MADE TO CONTINUE PAYING FOR THEIR PAST MISTAKES."



DESMOND MEADE
ACTIVIST AND FORMER PRISONER

SOURCES AND CREDITS

I cannot begin to pretend I did this on my own. The following sources of information played a monumental role in my understanding of the criminal justice system and racialized legislation and culture in the United States since its founding. The ‘Credits’ section contains books, podcasts, documentaries, and media sources that have been instrumental in my understanding of these topics. They are not all that has informed me, but I consider them to have educated me the most. Please use them as a source of recommended reading if you would like to learn more about the topics I have displayed.

DATA SOURCES

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