

HOOKS INSTITUTE POLICY PAPERS

Reimagining The Criminal Legal System to Create a More Equitable Society

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**FEBRUARY 2024
NINTH EDITION**



THE UNIVERSITY OF
MEMPHIS

**The Benjamin L. Hooks
Institute for Social Change**

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INTRODUCTION OF GUEST EDITOR

The Benjamin L Hooks Institute for Social Change at the University of Memphis annually publishes its Policy Papers, dedicated to the analysis of racial, social, economic, and other disparities, along with proposed policy solutions. In this edition, Dr. Lindsey Raisa Feldman assumed the role of guest editor, the first in the history of this publication. Dr. Feldman played a pivotal role in shaping this issue. She meticulously crafted the thematic framework, curated a diverse group of contributors, and ensured that this edition, focusing on the criminal justice system, offers a blend of scholarly expertise and practical insights. Her commitment to the cause of criminal justice reform is deeply rooted in her extensive scholarly background, practical experience, and personal commitments. Dr. Feldman's work revolves around the objective of preventing people entangled in the criminal justice system from enduring long-term marginalization in various aspects of civic, economic, social, and national life.

Dr. Lindsey Raisa Feldman is an Assistant Professor of Applied Anthropology at the University of Memphis. She has spent much of her career attempting to unveil and uplift the lived experiences of mass incarceration in America. She is particularly interested in understanding the intersection of prison labor and gendered identity, as well as the impact of imprisonment on families with incarcerated loved ones. Dr. Feldman is an engaged scholar, and she attempts to draw her understandings of imprisonment out of the academy and into spaces where she can advocate for change and use her skillset to support community action.

Dr. Feldman began her work on imprisonment as a social worker, running a mentoring program for individuals being released from incarceration in Arizona. It was at this job when she initially heard of the phenomenon of incarcerated individuals being used to fight wildfires throughout the state. She returned to graduate school to understand the experiences of this program for those who lived it. She became a certified wildland firefighter and worked with prison fire crews for 15 months. In addition to publishing extensively on this work in the scholarly space, she has also advocated for material changes to the program through policy briefs and media appearances. She used photography as a key methodology in this work, and her images have been used to shed light on prison labor practices in media outlets throughout the country. Meanwhile, she stayed active in the local Tucson community, serving as a non-profit board member and community advocate for prison and reentry related issues.

Now at the University of Memphis, Dr. Feldman continues to use photography as a central methodology to understand the impacts of imprisonment on identity. She has worked inside of the prison in Memphis, Tennessee, to understand how incarceration shapes masculine identity, using portrait photography to elicit conversations about selfhood with imprisoned men. She has also worked in collaboration with the Memphis nonprofit Indomitable Families Affected by Incarceration to conduct a participatory photovoice project with women who have incarcerated loved ones, where women served as co-researchers to collect photographic data about the impact of prison on their daily lives. Dr. Feldman works in and for the Memphis community by serving on the Indomitable board of directors, and has served with MICA, the Memphis Interfaith Coalition for Action and Hope, on their justice equity taskforce. She is now collaborating with Dr. William Robertson and The Haven, a Memphis nonprofit dedicated to the health and wellbeing of the LGBTQ+ community, to understand the experiences of imprisonment on queer health and identity, with the goal of improving access to care for all. Thus, Dr. Feldman continues to expand her interest in understanding how people experience this era of mass incarceration, and she works to uplift these experiences, and advocate for change, through direct community action and support.



The editors of the policy papers extend their appreciation to Dr. Feldman for her exemplary efforts in bringing this edition to fruition.

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FOREWORD

Reimagining The Criminal Legal System to Create a More Equitable Society

What is justice? The 2023 edition of the Hooks Institute Policy Papers poses this simple question, which is in fact not simple at all. From this broad questioning of justice comes far more complex interrogations: of ourselves (do we move through the world treating each person justly?); of our communities (do we live in communities where each person has just access to resources and support?); and our nation (have our national institutions ever truly delivered justice for all?). In the United States the word “justice” seems to be reserved solely for the criminal legal system, and as the era of mass incarceration wears on, it is of utmost importance to question how justice so understood is conceptualized and practiced.

As each policy paper in this edition highlights, “criminal justice” in the United States is synonymous with punishment, and in particular, the punishment of certain groups of people—especially Black people, people of color, and people experiencing poverty through alienation and social stigmatization. History clearly details the direct link between enslavement and the overcriminalization of Black people in America, and history also shows America’s continued investment in prisons and policing rather than in quality education, access to mental health services, and cohesive communities for all. If the ‘criminal justice’ system enacts only punishment, then ‘justice’ here is a misnomer: there is no equity and fairness in the pursuit of safety, nor even a just response to harm. Instead what the system offers is a continued process of surveillance, exclusion, and stigmatization of increasingly marginalized communities.

Many of the crimes committed by people ensnared in the U.S. criminal legal system could be prevented—and even the definitional boundaries around the crimes themselves could be redrawn— if justice was taken up as a foundational tenet of our society and its institutions. This is not to elide individual responsibility, nor to ignore the complex relationship between harm and restoration, all of which must be approached using the true meaning of justice as its guide. What we must do is acknowledge that the system as it stands does not promote justice or safety in any meaningful way. Thus, beyond focusing on individual action, we must question the history, structure, and future of the criminal legal system. As Ruth Wilson Gilmore¹ implores us to consider, “Instead of asking whether anyone should be locked up or go free, why don’t we think about why we solve problems by repeating the kind of behavior that brought us the problem in the first place?”

The policy papers in this edition help us begin to answer Gilmore’s pertinent question. The series is arranged intentionally to engage with the criminal legal system from beginning to end—from its roots, to its policies and ideologies, to its lasting effects. Each paper focuses on one critical issue in the criminal legal system in the United States, and then presents a set of policy recommendations that could lead to real change.

The 2024 series begins with a paper addressing the foundations of the criminal legal system and its link to systemic racism. In the paper titled “Ending Mass Incarceration by Understanding Critical Race Theory,” Dr. Miriam Clark, a Research Associate at the Oregon Social Learning Center, describes why it is imperative we face systemic racism head-on when reimagining the criminal legal system. Dr. Clark makes the case to move beyond the political divisiveness of critical race theory, and explores the theory’s potential use in our educational system. Understanding systemic racism allows all citizens the opportunity to unpack the history of the criminal legal system, and the United States writ large, ultimately leading to all of our social institutions becoming more just.

¹ Gilmore, Ruth Wilson, quoted in Kushner, R. 2019. “Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind.” The New York Times. <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>



The next policy paper moves us from the systemic causes of mass incarceration to a person's initial contact with the criminal legal system, that of policing and the courts. Dr. Brenna Breshears, Assistant Professor of Clinical Mental Health Counseling at Eastern Michigan University, writes the paper titled "Identifying and Serving Those with Intellectual and Developmental Disabilities: An Equitable Approach for Jails and Prisons." Dr. Breshears calls for a more thorough and equitable approach to identifying Intellectual and Developmental Disabilities from the earliest interactions with the criminal legal system. Before offering policy recommendations, Dr. Breshears describes the current state of disability identification and care during police encounters and pre-trial detention, which leaves many individuals vulnerable to over-criminalization, violence, and a lack of support.

Moving further into the vast criminal legal system, the next policy paper encourages us to understand and advocate for change regarding jail practices in Shelby County, TN. The criminal legal system is a complex multi-stage process, and jails theoretically exist within this process to detain individuals before they are sentenced. Yet as Josh Spickler, Executive Director of the Memphis nonprofit Just City, describes in "No Escape: Jail and the Myth of Innocence," the actual role of jail has come to serve as a site of sanctioned violence and harm far beyond its stated purpose. This paper describes some of the work already being done to improve pre-trial detention practices in the Shelby County jail, and goes on to argue that more work is needed to ensure those not yet convicted of crimes have their constitutional rights upheld.

The fourth policy paper moves us from pre-trial detention to post-trial imprisonment, uncovering one facet of incarceration where change is needed. Dr. Lindsey Raisa Feldman, Assistant Professor of Anthropology at the University of Memphis, in the paper titled "Profiting from Punishment Drift: The Case for Abolishing For-Profit Prison Communication," describes the experience of social isolation for families of incarcerated loved ones. Drawing on ethnographic research with women in Memphis, TN, she argues that charging fees for communication between prison and the outside world causes undue harm, and calls to undo the for-profit communication regime currently at work in U.S. prisons. Although there are many features of the U.S. prison system that must be addressed, Dr. Feldman underscores that communication is fundamental to humanity, which is stripped away in this current era of mass incarceration.

This edition of the policy papers is rounded out with a critical discussion of the reentry time period when individuals return to society after imprisonment. Just as the first paper makes clear that mass incarceration begins far before any individual person is imprisoned, this paper underscores the fact that the criminal legal system does not simply end when a person is released from detention. The effects of the criminal legal system are vast and long-lasting. Dr. Crystal DeBerry is the Owner of DeNovo Clinical Strategies LLC and Founder of the Memphis nonprofit Indomitable Families Affected by Incarceration. In her paper titled "Mental Health Services as a Mandatory Necessity for Returning Citizens," Dr. DeBerry describes the importance of mental health resources and support for those impacted by incarceration. She argues that wrap-around mental health services, including counseling, supportive programs, and support for families of incarcerated loved ones, should be a mandatory component of reentry.

In sum, the 2023 edition of the Hooks Institute Policy Papers challenges us to think of mass incarceration and the criminal legal system from a holistic and humanistic perspective. The policy recommendations in each paper underscore the straightforward fact that human beings are entangled within this system, and as such, any approach to justice must put the dignity of all human life, and human rights for all, at the forefront. To ensure public safety and a just society, it is each of our responsibility to care about what happens in the criminal legal system, and to advocate for change within this system whenever possible.

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ENDING MASS INCARCERATION BY UNDERSTANDING CRITICAL RACE THEORY

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I started writing my PhD dissertation using the lens of Critical Race Theory (CRT) before this concept became politically divisive. Back then, it was a theoretical framework that helped me conceptualize the School to Prison Pipeline (STPP) and possible mechanisms for change. CRT is a theoretical perspective developed from legal scholars that examines the systemic nature of racism within the United States (U.S.). According to the theory, though the Civil Rights Era was crucial in changing laws to help establish more equity within the U.S., these laws did not solve all the problems of systemic racism. Rather, more work is needed in order to truly eradicate these issues. For CRT scholars, changing laws is merely the first step, but understanding the systemic nature of how racism permeates our culture is critical to making meaningful change (Crenshaw et al., 1995).

The work I do focuses on incarceration and risk factors for incarceration. The U.S. has an incarceration rate that far exceeds all other nations across the world (World Population Review, 2023a). More problematically still, individuals of color are systematically shuttled into the prison system at disproportionate rates compared to their White peers (Alexander, 2020). CRT is an important tool that can be used to understand this systemic shuttling in order to create meaningful solutions in society (Clark, 2022).

At the time I was writing my dissertation, people outside of academic circles weren't really talking about the theory. Now, a few years later, after completing my PhD and having worked as a Professor and a Research Associate, CRT is a buzz word used by many politicians to instill fear in constituents (Levin, 2022). Seven states, including Tennessee, have banned the teaching of CRT in schools and 16 more are considering bans (World Population Review, 2023b). Right-wing politicians note CRT as Anti-American (Gaudiano, 2021), "psychological abuse" (Brewster, 2021) and something worth fighting to the death to stop from being taught (Levin, 2022). Left-wingers often retort with phrases like "It's an academic concept. K-12 kids aren't being taught it anyway, so why the fuss" (Levin, 2022)?

In the NYTimes bestselling book *The New Jim Crow*, legal scholar Michelle Alexander (2020) makes the compelling argument that the issue of mass incarceration is a symptom of rampant systemic racism in America. The issue of mass incarceration, according to Alexander, is rooted in the fundamentals of our history since the United States was founded on the slave labor of Africans. When slavery became illegal, the racism that had fueled slavery did not dissipate. Instead, the U.S. turned to laws characteristic of the Jim Crow era. When those laws became illegal, the racism that fueled them also did not dissipate. Society, then, just came up with a new way to systemically disenfranchise Black (and other marginalized) individuals: mass incarceration. I use CRT to help understand this systematic disenfranchisement to seek solutions to the problem.

Thinking about my work within the context of the political era and the fear associated with CRT, I propose that following either the current Republican rhetoric (that it should be banned) or the current Democratic rhetoric (that it shouldn't be an issue) are both problematic. Instead, I suggest that in order to fix the issue of mass incarceration,



we all need to be studying CRT, no matter our age, to help arm us to think critically about our society, fight racism and become a democracy where freedom reigns.

One line of my research focuses specifically on the STPP [the idea that certain policies and practices in schools end up putting marginalized children unfairly at risk of future incarceration (Muñiz, 2021)]. For Black students, this is particularly troubling. Black students are more likely to get in trouble at school than white students for the same behavioral infractions (Delale-O'Connor et al., 2017) and they are 3 times more likely to be suspended/expelled than white students – even when doing the same things as the white students (Glock & Klapproth, 2017).

This isn't just secondary school we're talking about either. This starts young. In an experimental study of preschool teachers, researchers hooked teachers up to an eye-movement monitor and asked them to watch a video clip of preschoolers engaged in school. The researchers told the teachers to try to point out problem behavior as it was starting and before it escalated (there was no problem behavior in the videos). The results of the eye-movement monitors showed that the teachers' gazes were most likely to follow the Black boys around the classroom waiting for them to misbehave. This over-monitoring is likely one reason why Black children are 3.6 times more likely to be suspended or expelled from preschool than their White counterparts (Gilliam et al., 2016).

These disparities don't just stay within the educational institution. No, estimates suggest that the STPP accounts for 16% of racial disparity within the criminal justice system (Barnes & Motz, 2018). That is to say, when kids are forced out of the safe environment that schools provide through expulsion and suspension, they are likely to be unsupervised and on the street. They are then more likely to be stopped by police, enter the juvenile justice system, and eventually end up behind bars. In other words, our schools are unfairly putting Black children at risk of incarceration.

I could share similarly harrowing disparate statistics in most US institutions including healthcare (FitzGerald & Hurst, 2017), the workforce (Quillian et al., 2017), housing (Friedman, 2015), and religion (Brown, 2019). According to Alexander, these systemic inequities fuel each other – and for Alexander, mass incarceration is the crux of the issue. However, merely getting rid of mass incarceration will not solve the problem if the racism that fuels it continues. Judging by the historical contextual patterns, some other harrowing system will just replace it.

Making sense of statistics is where CRT comes in helpful – and allows us to start discussing meaningful change where we can not only abolish mass incarceration, but also create a system where no other systemically racist system can replace it. According to CRT scholar Charles Lawrence III (1995), racism should be thought of conceptually as a crime and a disease that permeates our whole society. When we conceptualize racism as a crime, it means that we see specific acts as wrong. We can assume that when a person is treated unfairly because of their skin color by another individual or an institution that this is the act of the crime. The statistics I wrote about above would all be parts of this crime. On the other hand, when we conceptualize racism as a disease, it means that there is an underlying contagion that permeates the society. This is a bit trickier to recognize – especially because, in actuality, everyone in society is contaminated by the disease of racism. It is so ingrained in the way that our societies are designed and structured, that we often do not even recognize this contamination. In fact, according to Lawrence, even solutions to the disease may get contaminated by the disease itself.

For example, interventions or policies may be implemented with the hope that they will fix issues of racism, but many times these policies are implemented without regard for what communities of color want or need. Taking these ideas of examining racism as both a crime and a disease together is crucial to understanding how racism permeates our society and continues to be perpetuated. Without this holistic framework, it would be tempting to blame the crimes of racism on a few bad teachers, a few bad cops, a few bad doctors – but the truth is that cast-



ing blame like that does nothing toward change. We need to step back and examine where the disease is flowing, how it is impacting individuals, and look for real cures.

Diseases are talked about. On an individual level, when my baby had RSV two winters ago, I rocked her in my arms, telling her she was sick and that we were helping her get better. On a familial level, when my grandpa had pneumonia, my kids sent cards in the mail. On a community level, when my (then) 8-year old's teacher was home supporting her husband through chemotherapy, we talked about the process (including how to survive 2nd grade with a substitute teacher). And on a worldwide level, when my school-age kids were thrust into quarantine in 2020, we talked about the global pandemic and our role in stopping the spread.

Thinking of racism as a disease would allow us to talk, share, learn, and look for solutions. The issue of mass incarceration cannot be solved until the systemic racism that perpetuates it is gone. My kids are young, but they are smart. They deserve to know about the disease of racism that plagues them and everyone around them. So we talk about it. We talk about what it means on an individual level, examining individual privilege. We talk about what it means on a familial level, discussing the intergenerational privilege that they were born into. We talk about it on a community level, trying to understand how privilege means our community isn't equal and how that negatively impacts us as a whole. And we talk about it on a worldwide level, looking at the systemic inequalities that plague all our institutions. We talk about it because they have to know. If children grow up oblivious, the disease will continue to destroy their lives and our entire country.

The discussions I lead at home are not possible for every family, but similar discussions could be led within school settings. Banning these conversations in schools is one way that policy makers are choosing to let the disease continue to spread. This can only be accomplished if we first remove the CRT bans in public schools and then implement CRT curriculum. Critics would argue that children are too young to understand and that it is too heavy of a topic for their young minds. I argue that children can learn (at an age-appropriate level) about the history of their nation and the repercussions of that today. I further argue that children not only *can*, but *should*, learn these things – as it is one method that can begin to cure the rampant disease of racism (Lawrence, 1995). If children grow up with the knowledge of the systemic inequities within their neighborhoods, they will be empowered to begin to make necessary changes for an overall systemic change – which is critical for ending mass incarceration.

If we want real change, where every individual is allowed equal opportunity in society, and mass incarceration is dismantled (without a new Jim Crow taking its place), then we need to learn to embrace the discomfort, talk about the disease, and fully confront the systemic racism that plagues our institutions.

Recommendations

- Remove CRT bans nationwide.
 - The debate in public discourse about CRT has created a lot of confusion where many schools do not know what is acceptable curriculum and what is banned (Morgan, 2022). The bans are just another way to silence Black voices and perpetuate the status quo of structural racial inequity. Bans of this sort need to be removed at the federal level.
- Implement CRT curriculum in K-12 schools.
 - Finding and building curriculum for schools is a necessary step to teaching it, though a lot of this work has been started. For example, the American Psychological Association (Novotney, 2023) has partnered with PBS Kids (Public Broadcasting Services, n.d.) to find ways to help parents and children engage in meaningful discussions about racism. School curriculum could be based on this (and other similar) content.
- Require all public education teachers to receive diversity training that incorporates CRT.



- Requiring CRT be taught in K-12 schools would necessitate that public education teachers receive diversity training that incorporates CRT. Ideally, newly graduating teachers would have received this in college (see next policy recommendation), but teachers who have been in the field may not have. Additionally, all teachers (whether or not they studied CRT in school) would benefit from periodic trainings and discussions to continue their understanding and education. These trainings should not be the quick 30-minute webinars that teachers play in the background while grading papers at their desk (Chang et al., 2019). Rather, these should be moments of group discussion and learning together based in evidence-based programs for improving knowledge and skills. These trainings would likely help teachers to think about structural issues within the school and how they can reduce their contributions to the STPP.
- Teach CRT curriculum in all public universities as a requisite for graduation.
 - Though students who major in the social sciences may take classes that teach CRT, it is not guaranteed. Additionally, students outside of the social sciences often do not receive any classes that critically examine race relations in the United States. This is detrimental to students (as they may be left unaware of the devastating results of centuries of racism) and detrimental to society (as students go forth in their communities without the knowledge to fix the systemic issues they will face). To bridge this gap, some universities have begun implementing CRT curriculum for all students. For example, California State University implemented a diversity program that was for all undergraduate biomedical research students and rooted in CRT. The program, called Building Infrastructure Leading to Diversity/Promoting Opportunities for Diversity in Education and Research (or BUILD PODER), was developed with the hope of empowering students to understand issues surrounding racism, advocate for themselves, stand up for others, and overall change the campus curriculum (Saetermoe et al., 2017). Similar programs should be adopted at all public universities nationwide and for all majors within these universities. These programs would likely help students think about issues not just within the university setting, but within all institutions and the way they perpetuate issues such as mass incarceration.
- Require school and federal workplaces (including all criminal legal institutions) to hold diversity trainings that incorporate CRT.
 - In 2020, then President Donald Trump implemented a nation-wide ban on all federal workplace diversity trainings (NPR Staff, 2020) calling the idea of CRT (not racism) “a sickness that cannot be allowed to continue” (Schwartz, 2020). Current President Joe Biden has since reversed the ban, but this is only a first step toward what needs to happen (UCLA Law, 2021). State and Federal governments should require all employees to engage in meaningful diversity training that is rooted in CRT.

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IDENTIFYING AND SERVING THOSE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES: AN EQUITABLE APPROACH FOR JAILS AND PRISONS

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We have long known that those with intellectual and developmental disability (I/DD) are at higher risk of adverse experiences within the legal system, both in terms of incarceration rate and the difficulties faced once incarcerated (Sarrett, 2019). 2019 data shows 7.9 million children and adults have identified as having an I/DD (which includes individuals with autism, fetal alcohol syndrome, down syndrome, attention deficit disorder, and general cognitive impairments either present since birth or acquired through the lifespan). However, due to inadequate and ineffective screening, as well as a historical and continuous disregard for the unique needs of this community, the actual number of persons with intellectual and developmental disability in US jails and prisons is unclear.

Indeed, it is difficult to capture the true rate of any disability in carceral settings due to poor screening, fear of disclosure, and the high rate of comorbidity with mental health and substance use diagnoses. However, between 2011 and 2012, 30% of those held in state and federal facilities, and 40% of those held in jails reported having at least one disability (Bronson et al., 2015). These numbers only capture those who have self-reported, and likely the prevalence is much higher. While a distinct line has been drawn between the closure of state hospitals in the 1970's and the criminalization of mental health in the United States, no less important is the reality that those with disabilities, historically dehumanized and excluded from myriad social institutions, are also casualties of the mass incarceration epidemic. Subsequently, there is no question that people with disabilities are disproportionately arrested, charged and incarcerated compared to the general population (Urban Institute, 2021; Sarrett & Ucar, 2021; Murphy et. al, 2017).

The reasons for this over-representation are vast, and difficult to address. Ableism is the social norm in the United States, where institutional and social hierarchies related to cognitive functioning are easily accepted and directly feed into the ruthless meritocracy of capitalism. In addition, the experience of those with I/DD is an expected extension of the structural violence they face in other spheres such as education, housing, and employment. Furthermore, when considered through an intersectional lens, we recognize that those with disability who also hold other historically oppressed identities face compounded stigma and danger. For example, young boys of color are much more likely to be misdiagnosed with Oppositional Defiant Disorder (ODD) as opposed to their white peers who are diagnosed with ADHD based on similar behavioral markers. This assumption, that Black boys have a personality disorder rather than a neurodevelopmental concern, directly contributes to structural violence, stigma, and a higher likelihood of suspension and expulsion. The school to prison pipeline has long been paved with racism and ableism.

Lastly, the addition of disability identity within the already violent carceral system leads to cases such as Gilberto Powell, a young Black man with Down Syndrome who was viciously beaten by police when officers, failing to communicate concerns effectively or clearly, assumed his colostomy bag was a gun. Although Gilberto is just one



example, we know that police are more likely to use force against Black citizens as opposed to their white counterparts, and that police shootings kill Black citizens at twice the rates of whites (Urban Institute, 2021). As such, not only are those with I/DD disproportionality arrested and incarcerated, but they also often face increased threats in the community related to intersecting identities.

While these factors are deeply rooted in U.S. society and require significant shifts in policy, practice, and philosophy, one policy with the potential to make a meaningful difference in the lives of those with I/DD is the implementation of effective and consistent screening practices during early interactions with law enforcement, law practitioners, and correctional staff. Although calls for disability screening with justice involved youth have been growing over the last decade alongside increased understanding of the role protective factors play in reducing incarceration, screening for both youth and adults remains rare in jail and prison settings.

Importantly, this effort should be conceptualized as a shift in both early interaction and early intervention, with a focus on increasing competence of law enforcement on the street, as well as providing those who have subsequent contact during arraignment, trial, and incarceration with effective screening tools.

Many individuals would avoid arrest all together if law enforcement were properly trained to identify and accommodate those with I/DD. A recent qualitative study of justice involved individuals with I/DD found that participants felt if law enforcement had a better understanding of the ways they react to stress and anxiety, altercations (which often result in further charges) could be avoided. People with I/DD's "act differently under pressure and it doesn't automatically mean we're in trouble or anything like that" (Scarrett 2021). An autistic participant also explained that he was told to "Freeze. Don't move", which he pointed out as redundant, immediately before being told to get on his knees. In his mind he was telling himself, "But they just told me not to move." (Scarrett, 2021) The stories from this study, which barely scratch the surface of the lived disability experience in our country, illustrate the importance of policies which require law enforcement to recognize the unique needs of this community.

For example, contradicting instructions or the use of metaphor and colloquialism can cause those with I/DD to appear uncooperative, resistant, or defiant when in reality, they are simply processing instructions in a unique way. Furthermore, while most research on this topic draws on the perspectives of caregivers and service providers, when we incorporate the voices of those experiencing I/DD we can operate from a justice framework, as opposed to a treatment-based framework that sees, at best, a person's disability as problem to be solved. In fact most often, disability is perceived in legal settings as the driver of "criminal behavior" rather than an identity in need of support and accommodation.

Once a person with I/DD finds themselves arrested and involved in the booking process, another opportunity for early intervention is often missed. Although research is scarce, the scholars in this field agree that prevalence of formal screening for I/DD in jail settings is extremely low and inconsistent across states. One study of 80 jail administrators reported that "administrators varied widely in awareness of individuals with intellectual and developmental disabilities in their jails. Few jails (6%) used formal screening instruments for intellectual and developmental disabilities, others relied on officer observation and self-report (53%), and some provided no screening at all; in addition, officers received little training in this regard." (Scheyett et al., 2009). Even when screening is conducted, it is likely to be done in a public vs private setting, increasing the likelihood that individuals will not self-disclose disability status due to fear of stigma and violence. Edgerton coined the term "cloak of competence" in 1967 to describe the skill of disguising disability in order to fit in, known more commonly today as "masking." Masking is an adaptive protective trait, but may also result in those with I/DD being overlooked for services and support. Providing a private space to administer a brief screening tool in at this point could then drastically impact future legal proceedings such as arraignment, trial, and sentencing.



While any individual with a marginalized identity faces an increased risk during the intake and adjudication process, those with I/DD are more likely to have a limited understanding of legal terms and processes, and when combined with difficulties processing information, this may result in that person giving up rights without understanding the consequences and in turn putting them at risk of wrongful conviction (Scheyett et al., 2009). Everington & Folero found that when those with I/DD currently on probation were tested with measure of comprehension of Miranda rights, they were less likely to fully comprehend their rights, and were significantly more likely to respond to suggestive questioning (i.e., changing their answers during interrogation). The same study notes that those with I/DD are often eager to please, especially those in authority (Everington & Folero, 1999). This is yet another example of the ways in which masking, developed as a safety and survival mechanism (Miller et al., 2021), can have extremely harmful effects in the carceral setting.

The issue is then compounded when those with I/DD find themselves incarcerated where processing and sensory difficulties impact their ability to follow rules, resulting in longer sentences, an increased threat of solitary confinement, and a lower likelihood of being granted parole (Scheyett et al., 2009).

In the past, the argument against consistent screening for I/DD has rested in the belief that a full-scale neuropsychological assessment and/or IQ test has been necessary to determine I/DD status. As we know, IQ test are problematic in that they focus on intelligence rather than function and include significant racial bias (Weiss et al., 2020; Zoref et al., 1980) and neuropsychological assessment is not a realistic goal as a first step because it is time consuming and must be administered by a licensed psychologist. However, the Hayes Ability Screening (HASI), designed to be administered by non-psychologists, is a brief screening tool that does not diagnose, but identifies those who may need to be referred for further testing (Hayes, 2002).

Currently, many jails depend on the “observation” of un-trained jail officials, or rely on questions such as “have you ever had an individualized education plan (IEP),” (Scheyett et al., 2009). The HASI, however, is an effective, brief, standardized, and validated tool. If adopted by jail and prison officials, those with I/DD who were not provided supports in school, or who may be masking in order to conform and avoid notice might have the opportunity to receive supports and accommodations. In addition, this would provide jail and prison employees with a reliable tool to simply identify needs, eliminating the reliance on subjective observation and leaving formal diagnosis in the hands of those trained to provide it.

Recommendations

Below are recommendations for implementing I/DD screening within the criminal legal system, presented in chronological order.

- Increased training and awareness for police in order to reduce unnecessary “resistance charges” and decrease the chances of violence.
- Post arrest/pre arraignment implementation of the HASI screening tool in a private setting.
- Communication of screening results with individual and attorney prior to arraignment
- Referral to licensed practitioner for formal assessment pre trial
- Communication by assessor of results with individual and attorney
- Collaboration with social worker or similar practitioner to provide resources, supports, and/or accommodations.
- A consistent emphasis on autonomy, privacy, and informed consent.



Implementing the HASI would not require significant time or financial resources. However, referring individuals to formal assessment will. And yet, a shift in interaction and intervention in those with intellectual and developmental disability means a reduction in incarceration costs. Just as we've seen with the success of diversion courts, when we spend more money up front supporting and identifying those who needs services, we spend less incarcerating them for years to come.

The most compelling argument for consistent I/DD screening is not an economic one. It is that centering autonomy, support, privacy, individuality, and recognition of structural violence across the lifespan is beneficial to everyone involved in the United States legal system. While The Rules of the Tennessee Corrections Institute, Rule 1400-1-.17(3) states that "inmates with disabilities, including temporary disabilities, shall be housed and managed in a manner that provides for their safety and security," without consistent screening, there is no meaningful way to ensure this rule is equitably enforced. Furthermore, the increase in mental health and substance use screening in jail over the last decade has resulted in thousands of individuals receiving treatment instead of incarceration. Where might we be in ten years if screening for intellectual and developmental disability were the norm rather than the exception? In sum, we need to prioritize proactive policy that reduces the number of people incarcerated as we work towards a future where prison and jails are unnecessary by building communities of care and disassembling punitive carceral systems.

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NO ESCAPE: JAIL AND THE MYTH OF INNOCENCE

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Recently, a young Black man, who we'll call Cal, was driving down a busy Memphis street with his friend in the passenger seat. Familiar blue lights flashed behind them, and Cal pulled over. He was stopped for not wearing his seatbelt, an offense frequently used as the basis for traffic stops in certain neighborhoods. What happened next is also very common; based on the officers claim that he could smell the odor of marijuana, Cal and his friend were removed from the car. The car was searched, and the officers found a baggie of marijuana. This is not the place for an examination of the constitutionality of the traffic stop, search, and resulting arrest and seizure of Cal and the drugs, but there was plenty about the incident that would trouble even a first-year law student.

In the two decades since my first year of law school, I've represented more people in Cal's position than I care to remember. But since I became the executive director at Just City in 2015, I've tried to focus on the collective and systemic impact of cases like Cal's instead of the individual cases themselves. At Just City, we believe there is a better way to address harm and substance abuse and mental health challenges in our community, and it does not depend on incarceration and excessive punishment. The Shelby County Jail is the clearest example of those abuses and has been one of our main focus areas for most of a decade now.

After the traffic stop, Cal was charged with possession of marijuana and a seatbelt violation, arrested, and transported to the Shelby County Jail. His car was released to his friend. When he arrived at the jail, he was interviewed by Shelby County Pretrial Services, which recommended that he be immediately released on his own recognizance. Instead, the judicial officer responsible for making jail release decisions set a bond of \$2,000, meaning that in order for him to be released, Cal's family would either have to deposit \$2,000 with the clerk of the court or pay a bondsman 10% of that amount plus fees. Unable to secure his own release, Cal spent two nights in jail, and when an assistant district attorney first saw his case on a Thursday morning, they immediately dismissed the charges. Cal was released several hours later.

While some may hear about a case like this and criticize our country's draconian and antiquated drug laws, others may be angry and argue that Cal was not held accountable for possessing an illegal substance. Regardless, Cal spent 48 hours in jail for a nonviolent drug offense - his first ever contact with the criminal legal system. His experience is not unusual, and it cost him two days of his life and created a public record of the arrest. Hundreds of people have had a similar experience. And each year, it adds up to thousands of jail days and millions of dollars in costs and lost economic opportunities. According to the Vera Institute for Justice, Shelby County spent nearly \$140 million on its jails in 2019, representing 31% of its total budget and a cost of \$148 per county resident (Vera Institute for Justice, 2021).

The purpose of a jail is to detain people prior to determination of their guilt or innocence, but only if there is a concern they will not return to court or are a threat to public safety. Yet, people like Cal are detained unnecessarily all the time. Even short jail stays like his add up to a growing jail population. On any given day, there are approximately 2,200 people in the Shelby County Jail which encompasses three different facilities, one each for men,



women, and children; 2,000 of them are men, and 86% of those men are Black. According to Just City's observations more than 500 people in the jail have been there for at least 500 days, and 93% of the people there for more than 500 days are Black, an even more disparate percentage. If a person is Black, they are more likely to be held in jail longer. The longer a person is in jail, the more likely they are to be Black. Of all of the racial disparities identified in the American criminal legal system, this one is maybe the most damning. Black people, men in particular, are subject to harsher sentences, more frequent use of capital punishment, and many, many other penalties attributable only to the color of their skin. But the rights to be considered innocent until proven guilty and have a speedy trial are perhaps the most fundamental principles of the American system of jurisprudence, and they are denied Black men most often.

While they await a determination of their guilt, people in jail face conditions notoriously worse than prisons, where people go to serve a sentence once convicted. The Constitution prohibits cruel and unusual punishment, and courts have naturally extended and enhanced those protections for people in pretrial detention because most of them have yet to be convicted and, therefore, can't be punished at all. Without a doubt, the conditions and lengths of stay at our local jail in Shelby County do not meet constitutional standards. The public record is full of documented cases of death, dismemberment, serious illness and injury, and unacceptable delay (Moore, 2020; Testino, 2020; Avi-Yonah & Wheeler, 2022; Neus, 2023).

Despite being ignored or downplayed by some media outlets, there is a pattern of negligence and abuse in the Shelby County jail that has led to a disproportionate amount of injury and death. By continuing to overuse the jail, we risk more litigation, we spend way more than necessary, and we regularly violate the constitutional rights of people in the jail. That is why a group of advocates including Just City, ACLU, ACLU-TN, and many others sent a letter to Shelby County government in December 2021 in which we clearly demonstrated the constitutional and legal shortcomings of its current bail setting system. We included facts discovered during our investigation over the previous 18 months and legal precedent from the growing body of law around pretrial detention.

Instead of dismissing or challenging our assertions as some local governments have done when faced with similar letters, Shelby County agreed to sit down and discuss a path forward in lieu of litigation. They agreed to make changes, and together, we developed a new way—an improved process for screening people for release from jail. As we argued in our letter, the fewer people who are held in jail, the better the conditions; it takes fewer staff and less resources to supervise, feed, clothe, and care for the people living there.

The costs of overuse, poor conditions, injury, and death in our jail are unsustainable. But limiting the amount of time people spend in pretrial detention also makes our community safer. Staying in jail for even a few days leads to harsher sentences and a higher likelihood of future justice system involvement (Digard & Swavola, 2019). However, much of the trauma heaped upon overly incarcerated communities cannot be measured; it separates families, strains budgets, and guts social support systems. We should reserve our jail cells only for those who pose a risk of missing court or who may threaten public safety.

Decades of data show that the vast majority of people released from pretrial detention appear in court and are not accused of crimes while they are released. Risk assessment tools built on that data are very good at predicting future risk among similar groups of people charged with crimes. As Spurgeon Kennedy, a national expert in pretrial services, shared at a one-day conference in Memphis recently, "We have yet to identify a group of people who fail [during pretrial release] more than they succeed." The empirical evidence is indisputable: we know who can be safely released from pretrial detention. We just have to do it.



Recommendations

With these changes in mind, Shelby County and bail reform advocates developed a new, Constitutional approach to pretrial release built on data and consistent with Tennessee state law. It will help safely reduce the jail population, speed up case disposition, and restore faith in this critical part of the criminal legal system. Recent changes, agreed upon in February 2023, are simple:

1. Guaranteed bail hearings within 72 hours of arrest, with an attorney present;
2. Consider ability to pay before a bail amount is set; and
3. Order detention only when no other alternative will suffice.

It is now up to the County to see that these changes are implemented faithfully. In addition, the following recommendations would address many of the remaining problems with pretrial detention in our community:

- Make Appearing in Court Easier
 - Invest in and promote additional pretrial release options, such as daily check-ins, telephone check-ins, or community-based services as viable alternatives to detention.
 - Provide transportation and childcare support on the day of court appearances.
 - Schedule court appearances at specific times, which would limit time away from work and family and improve courtroom efficiency.
- Improve Jail Conditions and Oversight
 - Continue the practice of regular and independent inspections of the Shelby County Jail, begun during COVID-19, to ensure compliance with constitutional standards and adequate living conditions.
- Increase transparency by publicly reporting jail conditions, instances of abuse, neglect, or death, and efforts made to address problems.
 - Allocate resources to enhance mental health services, medical care, and educational and rehabilitative programs within the jail to promote better outcomes for people in custody.
 - Establish an oversight body or independent monitor to assess the jail's operations, investigate complaints, and hold responsible parties accountable for any constitutional violations or abuses.
- Address Racial Disparities and Implicit Bias
 - Implement training programs for law enforcement officers, deputy jailers, judges, and court personnel to raise awareness of implicit bias and its impact on decision-making.
 - Monitor and track racial disparities at all stages of the criminal legal system, including arrests, bail decisions, case disposition, and sentencing, to identify and address discriminatory practices.
 - Promote diversity within the justice system by encouraging equitable representation of marginalized communities, including racial and ethnic minorities, in positions of authority and influence.

The case of Cal and so many like him—disproportionately Black men—highlight the need for a new approach to pretrial detention in Shelby County. By implementing these additional policy recommendations, we can ensure that fewer people like Cal will be held in jail, less harm will come to those who remain in custody, and the entire system will function more efficiently, fairly, and safely.

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PROFITING FROM PUNISHMENT DRIFT: THE CASE FOR ABOLISHING FOR-PROFIT PRISON COMMUNICATION

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Understanding Punishment Drift

The term “punishment” in the U.S. criminal legal system is defined as “The intentional administration of consequences considered unpleasant to an offender for [their] offence...imposed and administered by an authority constituted by a legal system against which the offence is committed” (Condry & Minson 2021). Scholars who adhere to this legal definition of punishment thus argue that the harms of incarceration felt by family members of people in prison who are not themselves incarcerated, while severe, cannot technically be considered punishment, as they are not the ones behind bars for the crimes of their kin.

Yet there is a tangled relationship between harm and punishment, and the effects of punishment are felt starkly in communities across America. Scholars like Lippke (2016) argue that there is documented “punishment drift” in the American criminal legal system. That is, there is a failure to confine punishment to those who have committed crimes, extending outward to families and communities. Lippke notes that this punishment drift “comes perilously close to punishment of the innocent and is at odds with other legal doctrines and broader penal practices that hold offenders, and offenders alone, responsible for their crimes” (2016: 645).

The concept of punishment drift underscores the inherent relationality of both crime *and* punishment and forces us to see the prison as situated within broader social webs of connection. It also leads to a question: if families and communities of incarcerated people are being harmed, or punished, in every definition except its legal one, should lawmakers—who purportedly care deeply about upholding the constitutional rights of citizens—sit by, as punishment becomes meted out to those who are innocent?

I detail one form of punishment drift for families and communities impacted by incarceration: the financial burden that comes with paying for phone calls, video calls, and other forms of virtual communication with incarcerated people. This paper primarily addresses virtual ways that individuals maintain connection to imprisoned people. Although in-person visitation is a critical part of maintaining connections with incarcerated loved ones, I focus specifically on virtual forms of communication, as they have become a burgeoning source of revenue for private corporations, exponentially so during COVID-19.

I argue that the financial burden of prison communication results in significant emotional and financial harms for incarcerated people, their families, and their kin. The burdens associated with prison communication can result in breakdowns of relationships, disruptions of family ties, and increased financial strain. The lack of free and fair access to communication with incarcerated loved ones thus sustains patterns of inequality, profoundly impacts the intergenerational social fabric of our society, and shapes the way Americans perceive the value of human relationships – and who has a right to them.



The financial and emotional harms resulting from for-profit prison communication thus constitute a form of “punishment drift.” non-incarcerated people experience social and emotional harms, which follow directly from punishing the incarcerated person. This phenomenon must be addressed at the policy and legislative level. The state has a duty to justify if and how the harms experienced by families of incarcerated loved ones exist independently from the punishment that gave rise to these harms (Comfort 2007). And, if these harms cannot be materially distinguished from legal punishment, thus violating the human rights of those citizens not serving time, the government has a duty to ameliorate these harms, which is possible in part through making communication between prison and community free and accessible to all.

What are Common Communication Strategies Between Prison and Community?

A common trope in popular media is the “one call from jail” scenario—when a character gets arrested and then makes their one allotted phone call, and the phone rings, and rings...with any number of scenarios arising from who does, or doesn’t, pick up. Indeed, so ubiquitous is the trope in American society that we even use it to assess the closeness of friends or family members. You might joke with kin, for example, that you trust them enough for them to be the one call you get from jail, either because you know they’re available to help, or at least they’re always near their phone.

For many Americans, this is the end of their consideration of prison communication. And yet, for the millions of Americans behind bars, and the millions more who are connected to them through familial, kin, or community ties - the “one call from jail” addresses only the first in a long series of restricted communication a person has after they are arrested – even before they are convicted of a crime. If a person is detained in jail before their trial, and if that person is sentenced and imprisoned, then there may be weeks, months, and years where families and kin will maintain contact through a variety of communication strategies.

Beyond in-person visitation, there are four major virtual communication options available to detained people and those who want to talk to them: phone calls, video calls, emails, and instant messaging. All of these options exist in both jails (where individuals are detained prior to sentencing) and prisons (where people are incarcerated after sentencing). In many states, like Tennessee, every virtual form of communication requires incarcerated people to pay to use them. Phone calls have been ubiquitous in jails and prisons for decades. Prior to phone calls, letter writing was the most common form of communication, and is still used, although it is a highly surveilled form of communication. Video calls, sometimes called video visitation, is a newer phenomenon. Although it is not available at every prison or jail complex across the country, it has become more common during COVID-19, when in-person visitation was shut down for months and at some detention facilities, years.

Two communication options that have become more prevalent in the last few years is email and instant messaging. Emails have, in part, taken over the role that letter writing previously held. Similar to texting, instant messaging is another communication strategy that individuals can use to send short messages, often to communicate logistical issues (quick missives to family or friends about finances, visitation schedules, etc.). In sum, communication strategies are becoming far more diverse than the historical communication options, which were simply letters or in-person visits. Importantly, as I will discuss in the next section, each of these newer virtual options come with associated fees, which can result in immense financial and emotional burdens for incarcerated loved ones and their families.



The Current Problem: Ever-Evolving Costs of Communication

Critical context for the current state of prison communication is the signing of the Martha Wright-Reed Just and Reasonable Communications Act in January 2023. The Act accomplished two main goals: it confirmed the FCC's authority to regulate in-state calls from prisons and jails, and it clarified the agency's authority to regulate video calls in prisons and jails.

In 2015, the FCC attempted to impose rate caps for both in- and out- of state phone calls in detention facilities. Yet, telecom corporations sued the FCC, and a federal court ultimately ruled that the FCC could only cap out-of-state calls. They set the cap at \$.25 per minute for collect calls and \$.21 per minute for prepaid calls. The 2023 Wright-Reed Act allows the FCC to impose caps, and more tightly regulate, all fees for in-state phone calls, which are the majority of calls made between imprisoned people and their families.

The 2023 Act allows the FCC to regulate video calls. This is crucial because video visitation is quickly becoming the preferred form of communication between incarcerated people and their families. Until the Act is enacted, video calls from prisons and jails have no federal oversight. The Act does not address oversight for emails or instant messaging, and as such the fees for these newer services are still determined by telecom corporations in conjunction with local municipalities. This demonstrates the constant emergence of new 'opportunities' for incarcerated people to communicate with family, which in reality means more fees that individuals have to pay, to produce revenue for telecom companies and detention facilities that contract with them.

Since the first round of regulations for out-of-state phone calls were imposed in 2015, fees for phone calls have decreased, to align with FCC-mandated caps. As you can see below in Figure 1, rates for phone calls have trended downward over time:

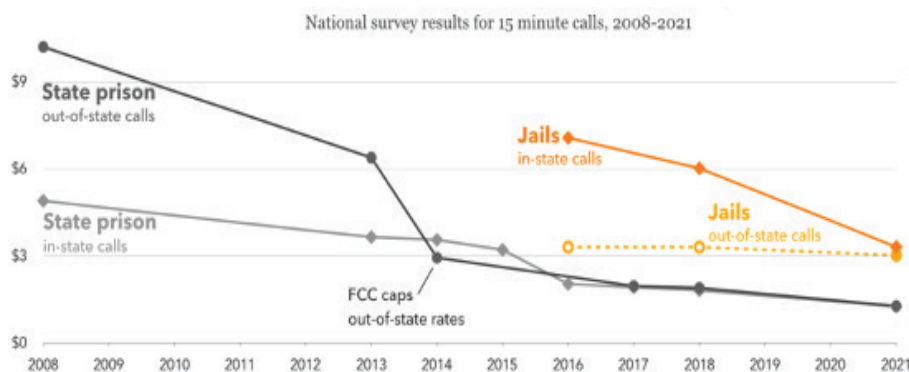


Figure 1 Retrieved from PPI: State of Phone Justice 2022
<https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html>

Although advocacy and regulation have lowered phone call rates, a trend that will hopefully continue when the Wright-Reed Act is enacted, prices still range between 1-4 dollars for a fifteen-minute phone call. Figure 2 below shows how widely rates of communication still vary:



Average cost of a 15-minute call from a local jail by state

Rates as of late 2021. The average jail charges about \$3 for a 15-minute call.

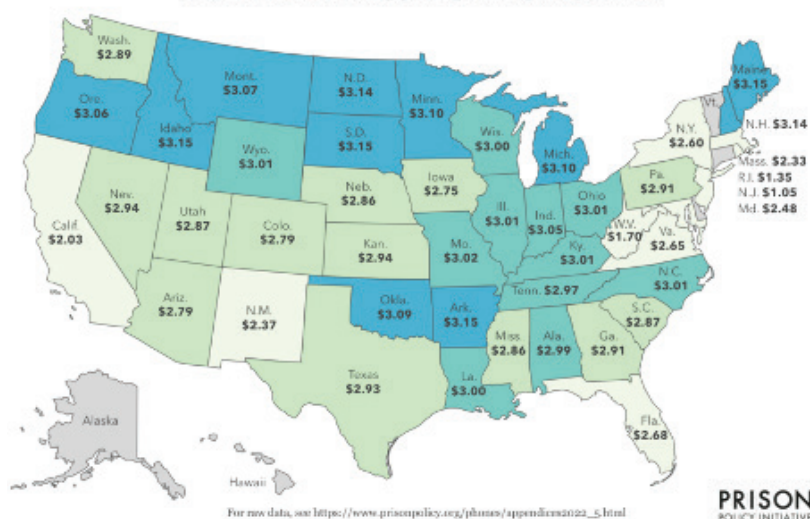


Figure 2 Retrieved from PPI: State of Phone Justice 2022

https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html

In Tennessee, the average rate for a 15-minute phone call in jail is \$2.97. In Tennessee prisons, a 15-minute phone call averages \$1.65. Though this may seem like a small amount to some Americans, it is important to note that in Tennessee state prisons, most incarcerated people are paid an average of \$.05-\$.50 per hour for their labor. So, it might cost a person close to a half a day's wages to speak briefly with their families. And if they have not earned enough to pay for it, the family is then responsible for adding money to the incarcerated person's "books," or spending accounts in the prison. Importantly, families of incarcerated people represent a subsection of the poorest in the country (Lee et al., 2015). These fees thus result in significant financial burdens for many who are entangled in the web of for-profit prison communication.

The rates of video calls are of even more critical to address. As seen in Table 1 below, taken from the Shelby County Division of Corrections website (2023), the current cost of at-home video visitation is significantly more expensive than phone calls.

- Remote Video Visitation 10-minute visitation session \$2.50 per session
- Remote Video Visitation 25-minute visitation session \$6.25 per session
- Remote Video Visitation 50-minute visitation session \$12.50 per session
- In-House Video Visitation 50-minute visitation session No Fee

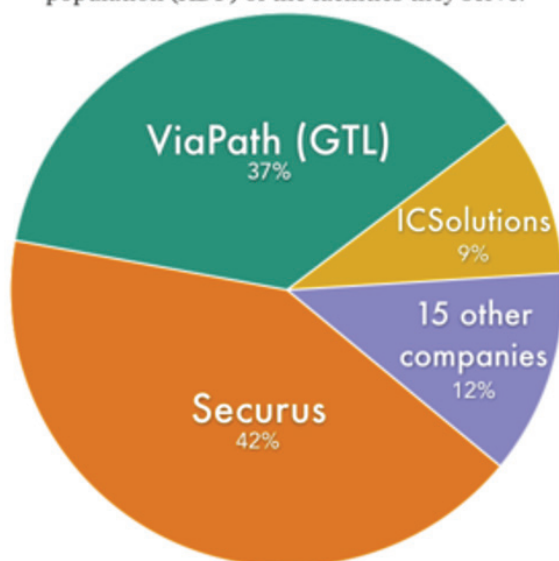
Even with the passing of the Wright-Reed Act, it is unclear what dollar amount the FCC will land on to cap video calls or in-state phone calls, or what data they will use to determine this cap. Further, there is no official date for the enactment of these new regulations, although there is a targeted date of 2024 to enact new fee caps and regulatory measures. At this transitional moment when rates are in flux and more eyes rest on the issue of for-profit prison communication than ever before, I argue now is the time to push for new legislation at the state level to shape the future of fees for prison communication.

The cost of communication between prison and community has been, and continues to be, financially harmful for those on both sides of the bars. Moreover, beyond fees for the communication itself, incarcerated people and their loved ones shoulder the cost of ancillary fees to use virtual communication technology, resulting in more revenue



for corporations and detention facilities. Telecom companies have established profitable contracts with both prisons and jails across the country to use their technologies. As seen in Figure 3, there are three major companies that provide 88% of communication technologies in prisons and jail

Percent of marketshare held by each company based on the average daily population (ADP) of the facilities they serve.



For detailed data,
see https://www.prisonpolicy.org/phones/appendices2022_9.html

Figure 2 Retrieved from PPI: State of Phone Justice 2022
<https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html>

Over the course of the last few decades, telecom companies have begun paying commission rates to detention facilities to win contracts with them. Prisons and jails have become dependent on the additional revenue they earn from telecom commissions. For example, in 2014 in Knox County, TN, the sheriff's department established a new contract with Securus, which provided the prison with video visitation software. The prison then ended all in-person visitation, citing security concerns for this decision, and shifted to a fully virtual visitation program using Securus equipment. The sheriff's office agreed to a 50% commission for these video calls, with incarcerated people and their families being charged \$6 per visit. Over four years, the sheriff's office made \$70,000 on video visitation commissions, until the program was shut down in 2018 due to the significant increase in assaults and unrest that emerged from the complete physical isolation of individuals from their families and social networks (Styf, 2023).

Telecom corporations have thus created a for-profit prison communication ecosystem that earns revenue either by communication fees directly, or in the case that those dollars go to the correctional facilities through commission rates, that earns revenue by charging "end users," i.e. incarcerated people and their families, a wide variety of fees associated with virtual communication. These additional fees include, but are not limited to, third-party transaction fees, deposit fees, paper bill statement fees, and so on. As contracts between telecom companies and correctional facilities continue, the fees that incarcerated people and their families pay continue to expand and evolve. Although the FCC did cap some of these fees in 2015 along with out-of-state phone call rates, new services like email and instant messaging are not regulated, and other transaction fees continue to emerge. It is of critical importance that states and local municipalities that oversee correctional facilities address their relationships with telecom corporations, are transparent about commission and fee structures, and address the inherent harm that ever-expanding fees cause to incarcerated people and their families.

A Case Study: Women with Incarcerated Loved Ones

The data in the above section paint a picture of economic hardship experienced by incarcerated people and their families, while telecom corporations and those in charge of correctional facilities reap in profit from communication fees. In this section, I briefly turn to the lived experience of this financial and emotional burden for women in Memphis, TN.

In 2022, I conducted a participatory photovoice project with women who have incarcerated loved ones. Over the course of several weeks, the women took pictures based on a variety of themes related to the experience of having an incarcerated loved one. Each week, the women met and showed each other their pictures, discussed how these pictures fit the themes, and had conversations about their shared experiences. As an anthropologist, I transcribed these group interviews, occasionally interjected to note an emergence of an ethnographic theme with the women, then coded these group interviews to assess these themes in more detail.

One theme that emerged from the photovoice project was the intersecting financial and emotional harm of having an incarcerated loved one. At each turn, women were met with a new financial burden: first, the myriad fees and fines they encountered in the courts, next, the burden of becoming a sole provider, and finally, the anxiety of what the financial future holds if their loved one is released and cannot find work. As each of these financial realizations emerged, an emotional strain was felt as well. Emotional harms of loss, stress, and stigma compounded with each financial anxiety. One woman, whose husband is incarcerated for 25 years due to a drug-related offense, described that she felt utterly trapped by the emotional and financial burden of the criminal legal system. “They know they got us,” she said, referencing the prison, “They got our money, and our time, and our heart while he’s in there.”

To capture the theme of “emotions of my loved one being incarcerated” one woman took a picture of herself at her laptop. Her son had logged on to the GTL-sponsored video visitation software used by the Shelby County Division of Corrections. When she described the picture and why she took it, she drew a connection between the emotional burden of her son being isolated at the correctional facility, and the financial burden of putting money on his books to pay for video visitations so they could maintain their close bond. On the outside, he was her closest child, and they spent hours together each day. She helped watch his children, they made plans to open a small business together, they supported each other on trips to the doctor and the store. Now that he is incarcerated, they have tried to cobble together some semblance of this closeness, and she pays hundreds of dollars—nearly half of her paychecks, some months, to see her son over video. She also described how she pays her son’s communication fees to talk with his lawyer about his case, and she pays ancillary fees like deposit fees to put money on his GTL account. She described the financial harms she felt from these fees, but then stated, “What am I supposed to do? Let my baby be alone? He’s a people person...He’s a guy in the community people look up to and want to be around. Now he’s in there...he needs his mama. He needs to be loved.”

As she shared her story, other women who have incarcerated husbands, fathers, and brothers nodded, and the conversation unfolded regarding the psychological toll of maintaining emotional connection through physical separation, made only harder by the financial burden of affording to talk to loved ones. Another woman, whose father had been in and out of local jails most of her life, said, “It’s like we are being punished when they are locked up. So much falls on us. Bills.. emotions...the women are punished. The babies. And the cycle goes on.”

This is one small snapshot of data from my project supporting the claim that paying to maintain emotional connection to incarcerated people, through fees associated with communication, actively harms individuals in communities as they grapple with the reality of imprisoned family and kin. It is important to note who is harmed, both at the granular, individual level as my ethnographic data shows, and at the broader, systemic level. As many scholars



have demonstrated, there is a stark criminalization and over-incarceration of African Americans and People of Color in America. This results in one in four African American children at risk of parental imprisonment by the time they reach the age of 14, compared to one in thirty white children (Wilderman 2014). Lee et al. (2015) show that national estimates of 'connectedness to prisoners' is 44% for Black women, compared to 12% of white women. Thus, systemic patterns of pre-existing inequality and marginalization intersect in particular ways for individual prisoners' families. For Black women, like those I quote above in my photovoice project, the harms of racism and gender disadvantage are entangled and are felt in immediate and material ways. And as the participant above notes, this veers very close to punishing the innocent, who are attempting to shoulder these burdens alone.

Recommendations

Prisons and jails in the United States have been, and remain, an inextricable part of the economic fabric of American society. In addition to labor being extracted from incarcerated workers, corporate and state revenue is generated in an enormous financial ecosystem that includes every facet of the criminal legal system: from jail bonds, to court fines, to lost wages, to felony stigmas after incarceration—and as this paper shows, through fees simply to communicate with the outside world. A central part of punishment in the American criminal legal system is thus imposing financial strain, and I show over the course of this paper, this punishment cannot be contained to the imprisoned individual. Communication is, by its nature, relational and multi-pointed. Incarcerated people are not the only ones punished when family members must piece together fees for phone calls, video visitation, emails, and messages. As such, I put forward a series of recommendations, at both federal and state levels.

My overarching recommendation is to **abolish all costs and fees associated with virtual communication or visitation in prisons and jails across the United States**. Even with the promising passage of the Wright-Reed Act to cap in-state phone call fees and to regulate video call fees, I argue that any sort of fee structure that families and loved ones must pay into, to communicate with an incarcerated person, results in harms to all parties that are indistinguishable from punishment in its legal sense. This thus violates the rights and dignity of innocent citizens grappling with the experience of incarceration from the outside-in.

Below are further recommendations that can be acted upon now and can serve as incremental recommendations, scaffolding up to a total abolition of pay-for-communication in American detention facilities.

- **Congress should enact the Wright-Reed Act as soon as possible to regulate and cap rates for in-state phone calls and video calls.** Now that it has been signed, the Wright-Reed Act must be implemented as soon as possible, to impose fee caps for in-state calls and to regulate video calling fees and their attendant software fees, which are currently much higher than phone calls, and currently unregulated.
- **The FCC should lower rate caps for all forms of virtual communication, including phone calls, video calls, emails, and instant messaging to align with data on poverty rates and prison labor rates.** Families of incarcerated are some of the poorest in the country. Incarcerated people across the country on average earn less than 50 cents per hour for their labor. Fees associated with communication are thus overly burdensome, even when capped. The FCC should conduct research when planning to enact the Wright-Reed Act that analyzes poverty rates of families of incarcerated people, as well as incarcerated people's labor rates, to cap fees much lower than they are now.
- **The FCC should penalize companies if they do not accurately and clearly disclose all ancillary fees associated with communication.** Telecom companies should clearly publish all rates and fees on their websites so that individuals and incarcerated people can make informed decisions about the financial burden of communication.
- **The State Legislature of Tennessee should enact legislation to provide "agency-sponsored communi-**



cation” for incarcerated people in both prisons and jails across the state. Some states and cities have enacted legislation that requires governments that incarcerate people to have to pay for their communication costs. Tennessee should enact similar legislation, using one of the several models already in existence that allows for individuals to communicate for free. This should include phone, video, and all other forms of virtual communication.

- **The State Legislature of Tennessee should negotiate contracts with telecom agencies to lower all fees associated with virtual communication.** Government agencies have the power to negotiate each dimension of telecom contracts, and should negotiate for lower ancillary fees, as well as lower fee rates for calls, even below FCC rates.

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MENTAL HEALTH SERVICES AS A MANDATORY NECESSITY FOR RETURNING CITIZENS

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The problem

Incarceration was supposed to provide rehabilitation for those committing crimes, but the social intervention of incarceration has failed to reach its intended goals of deterrence and rehabilitation (Fong et al., 2018). In the modern era there is no expectation for the prison system to rehabilitate the individuals they house, as the social narrative associated with this population is that they are unteachable. It is important to note that the “unteachable” incarcerated people are more likely to be African American men, especially in the U.S. South. This remains a significant problem because, “on any given day, nearly 13 million people cycle in and out of American prisons and jails each year” (Fong et al., 2018).

Stemen (2007) notes that research regarding the link between incarceration and further criminogenic behavior provides confusing and even contradictory guidance for policymakers, as data does not show a decrease in crime even with high incarceration rates. It can be assumed, therefore, that incarceration is criminogenic, as Clear (2007) notes by stating succinctly, “Incarceration has increased rather than decreased crime”. The invisible revolving doors of prisons and jails nationwide indicate that current practices to “re-integrate” returning citizens is failing. Visher (2007) reported that “two-thirds of released prisoners will be rearrested, and over half will be reincarcerated for new crimes within three years of release” (Housing Committee Report, 2007).

Recidivism, the term to describe the re-incarceration of individuals during this time period, is often due to addiction and drug abuse, violating probation or parole, negative environmental factors, unemployment, poverty, and mental illness. When addressing the needs of returning citizens, re-entry—the period of time after a person is released from incarceration—must be addressed as there is an inseparable union between re-entry and incarceration. Incarceration is the perfect storm of individual and community upheaval as the experience of incarceration and the potential of recidivism does more damage than good for all members of society (Clear, 2007). Incarceration has become part of its own dynamic, and produces social problems that cause individuals to become re-incarcerated and labeled repeat offenders.

Another response to deter crime needs to be developed as incarceration is not the solution. According to Valera et al. (2017), “This population has more mental health concerns versus those in the general population” (2017). Mental illness rates are about 4 to 7 times more common in prison than in the community according to Simpson (2023). The reentry process needs to be modified to include mental health services as a valuable, mandatory resource to thrive after release.



The Need for Mental Health Services

Before incarceration, the population that is most criminalized in our society encounters other traumas. Lee (2015) describes that most traumas begin in childhood as the parents or caretakers of this population struggle financially, have engaged in substance abuse, often have untreated mental health diagnoses, experienced homelessness, hunger, and were incarcerated as well. As Lee notes, “These experiences are all traumatic and stem directly from social and economic policies that perpetuate inequality” (Lee, 2015).

Rates of childhood and adult trauma are high among the incarcerated population. Wolff and Shi (2012) note, “In addition to criminality, childhood trauma is associated with the risk for emotional disorders (e.g., depression and anxiety) and co-morbid conditions such as alcohol and drug abuse and antisocial behaviors in adulthood” (Wolff & Shi, 2012). Trauma experienced during childhood may result in profound and long-lasting negative effects that extend well into adulthood. These effects are associated with longer-term consequences, including risk for further victimization, delinquency and adult criminality, substance abuse, poor school performance, depression, and chronic disease (Wolff & Shi, 2012).

After incarceration, returning citizens face many barriers to establishing a successful life trajectory, including finding stable employment, public assistance, and social support. These barriers include low levels of human capital and a high prevalence of mental health problems and substance abuse, all which make economic stability a challenge (Harding et al., 2014).

Returning citizens need mental health support to address histories of trauma as well as the trauma of serving time. This is because, according to Fong et al (2018), “Imprisonment is a traumatic experience, and incarceration can amplify the negative psychological symptoms of trauma and cause problems during and after incarceration” (Fong et al., 2018). Imprisonment is detrimental to mental and emotional functioning, intellectual abilities, and social competencies (Munn, 2011).

Hopkins et al (2018) explain that continuity of mental health services was identified as the first barrier towards successful reintegration after incarceration, and that lack of mental health support causes a higher risk of suicide during the first month of release for those with a mental health condition. They also show that rates of re-offending are higher for those with co-occurring substance use disorders (2018). According to Fabian et al.(2021), the convergence of a substance use disorder and a mental health disorder is termed a co-occurring disorder (COD). In 2006, the BJS reported that 42% of state prison inmates and 37% of federal inmates met criteria for a COD. Mental health has a significant impact on recidivism rates. If mental health could be addressed this would increase self-worth, self-efficacy, self-value, and circumvent relapse and slow the revolving doors of incarceration. Listwan (2006) encourages the use of Cognitive Behavioral Therapy (CBT) to target criminogenic needs such as anti-social attitudes, poor problem-solving skills, self-management, self-efficacy, and impulsivity. Through CBT, people are taught to identify and manage thoughts that contribute to emotional problems, altering their behavior in the process (Barch, 2021). As further described by Barch, CBT is a highly effective treatment for depression, anxiety disorders, alcohol and drug use, marital problems, eating disorders, and severe mental illness. It has also been shown to reduce violence and other criminal behavior (Barch, 2021).

Lack of Mental Health Support: A Collateral Consequence

Is freedom truly granted after incarceration? “Collateral consequences include a multitude of legal restrictions not handed down by the court...best known is the inability to vote, unofficial social stigmas, and trouble finding a job” (Laird, 2013). Collateral consequences create obstacles between ex-offenders and a new life, and may encourage



recidivism. Hubbard (2015) reports there are more than 45,000 state and federal collateral consequences nationwide.

Laird (2013) notes collateral consequences can create a practical barrier that can make the already difficult situation of community integration more difficult. If we expect offenders to play fair and abide by the laws, society must play fair when they return to their communities, with respect and without bias.

If the above social norms are not addressed, those formerly incarcerated will continue to be discouraged and return to a life of crime. However, if overcoming social stigmas and addressing mental health concerns are effective, returning citizens would display more motivation and learn to control negative emotions associated with how society believe them to be.

The Solution

Re-entry requires motivation, and unmanaged mental health symptoms can rob one of that. Maruna (2016) clearly explains that once an individual has the label of an “ex-con” no matter how long the prison sentence, the effect of the stigma has the same damaging affect. “An “ex-con” is an “ex-con” regardless of whether she or he served one month or one decade” (Maruna, 2016). No matter the length of the prison term served, the label of being an “ex-con” can cause self-image and self-esteem concerns causing depression.

The re-entry process needs to be reassessed, redefined, and redesigned. It is not just about providing employment. A successful solution entails a program design addressing mental health barriers to target criminogenic behaviors such as anti-social attitudes, poor problem-solving, self-management, self-efficacy, and impulsivity. The development of a successful reintegration program that includes mental health services for every re-entering citizen is needed as recidivism rates are still high and the mental health needs of those formerly incarcerated are not being met.

As the founder of a local 501c3 non-profit, Indomitable Families Affected by Incarceration (IFAM), which provides mental health and life skills support to those released from prison and their families, I believe that the re-entry process needs to prioritize and ensure mental health services are received while providing access to items needed for daily living. In 2015 IFAM began offering case management services with a focus on helping men overcome reentry challenges such as: securing identification, finding a job, and setting up housing. We placed six men with a local agency paying more than minimum wage and received health/dental benefits beginning their first day. Within 3 months all six men had quit or were terminated. All the reasons provided for quitting or the events that led up to their termination stemmed from unmanaged mental health symptoms affecting job performance, attendance, and unhealthy conflict resolution skills with co-workers. This was the catalyst that led to the organization wanting to understand what part of the re-entry process was failing our members.

In 2016 we surveyed 36 of our members about services needed to help with their re-entry process. 21 noted “therapy” would have been beneficial. All 36 participants noted no prior mental health services were received prior to release. 17 noted therapy was recommended post-release, but there was no follow-up. The same 17 participants reported they were not knowledgeable about how to access mental health services. Most non-profit agencies have some type of community service focus and strive to address some type of social problem. Non-profits are described as service providers, having a role in advocacy by identifying unaddressed needs and bringing them to the attention of society, playing a role in community building, and working with other agencies to meet the physical needs of the people (Vetter, 2012). Because of this non-profit organizations have a better understanding of solving social challenges.



Re-entry services will not be effective if returning citizens' needs are not understood on an individualized basis as they return to different communities, have different day to day living needs, and varying environmental obstacles. If re-entry efforts do not address the mental health concerns facing this population collectively and individually, re-entry will continue to be "re-entry" back to prison. Offenders with untreated mental illness have a higher recidivism rate and a greater number of criminogenic risk factors than those without mental illness. Findings indicate a 32.4% recidivism rate for those with untreated mental health symptoms as reported by Shishane et al. (2023).

As part of my non-profit work, I have developed the "Incarcerated to Indomitable" (I2I) app to assist individuals in accessing mental health resources during the reentry period. I developed the app in order to fill in the gap I mention above—providing mental health resources in a targeted way, to serve members of the justice-impacted community in a way that uniquely addresses their mental health needs. The Incarcerated to Indomitable app creates a desire to engage in mental health and life skill interventions by offering basic life essentials for daily survival that this population cannot always afford or obtain. The Incarcerated to Indomitable app will be utilized by the members of Indomitable Families Affected by Incarceration and will include a motivational component that will encourage returning citizens to engage in mental health and life skill interventions. As the member completes therapeutic assignments and life skill courses, they will earn points redeemable for items needed for daily living while navigating their reentry process. The I2I app will help the client visually monitor their progress, track points, earn rewards, and to take ownership of their clinical process. The incentives throughout the program assist the members with daily needs include free haircuts, gas cards, bus passes, grocery store vouchers, assistance with child support, court fees, utilities, and rent financial assistance. The above necessities will motivate the member to engage in mental health services and feel empowered. When people feel empowered there is a desire to improve themselves, overcome obstacles, and win at life.

The Incarcerated to Indomitable app is just one example of taking mental health needs of incarcerated people seriously and treating each re-entering citizen as unique individuals with their own hopes, goals, and mental health needs. Below are a series of other policy recommendations that non-profits, state and county agencies, and correctional facilities can engage in to address mental health and improve recidivism rates across the country.

Recommendations

- Nationally, the prison system should establish a partnership with outpatient providers and start weekly therapy sessions six months before release and to conduct a criminogenic risk assessment. This type of collaboration could utilize grant funding from the local, state, and federal level.
- Judges should require psychological testing and order mental health counseling for all individuals returning from prison/jails no matter the length of stay.
- Federal halfway houses should develop or incorporate a more formalized process ensuring new "tenants" are connected with a mental health therapist and are seen weekly since suicide rates are higher when released from prison.
- Parole/Probation agencies should employ therapists and require those coming for appointments with their parole/probation officer meet with a therapist before or after their meeting with their parole/probation officer, if the returning citizen does not already have a mental health therapist.
- Police officers should not only be trained in crisis prevention, but also have symptom training of various diagnoses. In addition, police officers should have mental health resource kits to give to individuals/families in need of mental health support.
- Within communities and families, there should be a normalization of mental health wellness and a decrease in stigma associated with mental health interventions.
- Re-entry agencies and non-profits should employ or partner with mental health therapists to provide mental



health support for individuals and families impacted by incarceration. They could utilize the Incarcerated to Indomitable app or an app with a gamification component to foster involvement with mental health services. Gamification benefits have shown to increase extrinsic motivation, encourage engagement, and improve attention.

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