

Criminal justice reform

NOTE: This document was originally prepared for a [November 2014 convening](#). It was current as of November 2014; Open Philanthropy Project's thinking and strategies on criminal justice have been updated significantly since that time.

Goal: To address the needs of high-crime/high-incarceration communities by reducing both crime rates and rates of unnecessary incarceration

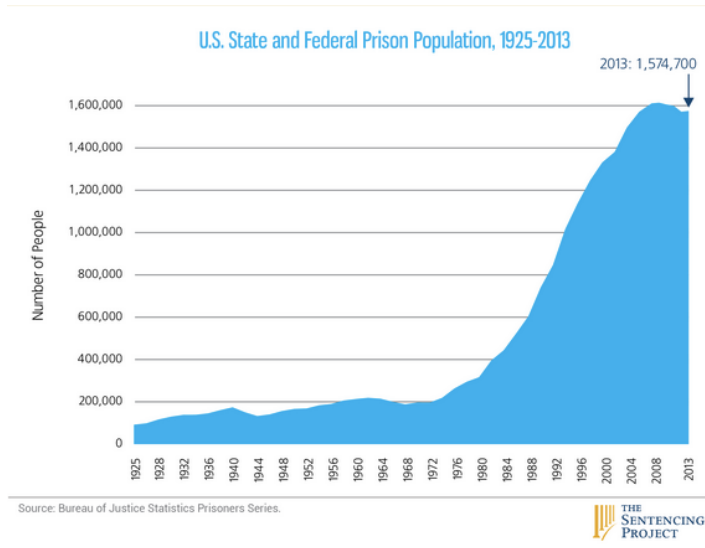
Amount of Work that We Have Done on this Issue So Far: Our investigation into criminal justice, while definitely ongoing and by no means close to being complete, is substantially deeper than any other investigation we have undertaken thus far. We have probably had between conversations with between 100 and 200 experts in the field about this topic.

What Changes We Seek

Mass incarceration is quickly becoming the cause de jour in criminal justice—and for good reason. Between 1972 and 2007, the U.S. incarceration rate nearly quintupled—and by 2012, the U.S. was incarcerating 2.23 million people and had the highest incarceration rate in the world.¹ But while we are extremely concerned about mass incarceration, we also recognize that crime and incarceration are inextricably linked. First, if incarceration goes down substantially, absent any other changes, the crime rate will likely rise somewhat (incarceration does serve an anti-crime function, at the very least by incapacitating people who are likely to reoffend; the fact that incarceration has been overused does not obviate the fact that some incarceration is necessary). Second, crime rates may at some point rise again on their own; crime rates rose in the United States from the 1960s to the 1990s, and there continues to be debate in academic circles about why crime fell dramatically in the 1990s and whether we currently have the tools to prevent large spikes in crime. If crime starts to rise again, it will be hard to continue progress on reducing unnecessary incarceration.

As a result, we seek to work on both crime and unnecessary incarceration, either in tandem or as separate interventions, with the goal of both building the political will to address unnecessary incarceration and discovering new tools to reduce crime, preferably those that do not involve long prison sentences.

¹ National Academy of Sciences, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014), 33.



Why We Are Interested in this Cause

We are especially interested in this area because there seems to be an unusual window of opportunity to achieve real policy change in this space. In particular, as a result of state fiscal crises, there has been increasing interest at the state level at cutting prison spending by reducing incarceration—including in Southern and conservative states. There has also been a wave of conservative interest in what has traditionally been a solely liberal cause, especially from libertarians who object to such massive growth in the size of the government. This has also led to some unusual partnerships on criminal justice efforts, including by Van Jones and Newt Gingrich as well as Cory Booker and Rand Paul.

We are considering potentially spending in the range of \$5 million to \$30 million annually on criminal justice issues, including some 501(c)(4) spending. We would start at the lower end of this range and potentially increase our investment as time goes on.

Other funders in this space (partial list)

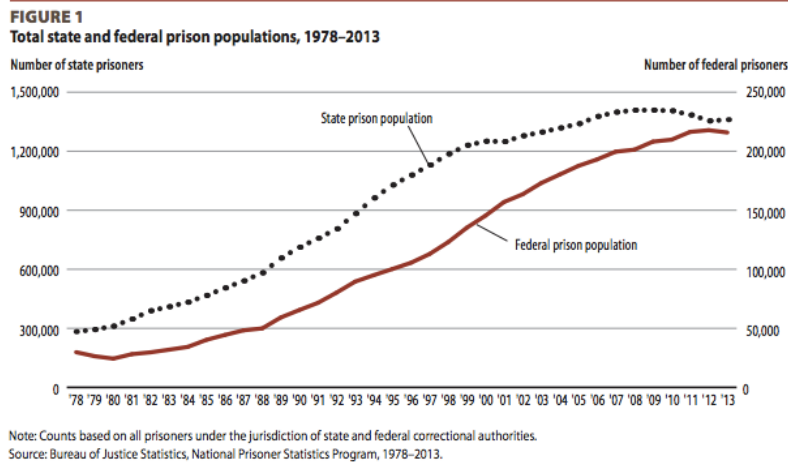
- Open Society Foundations
- MacArthur
- Arnold Foundation
- Ford Foundation
- Public Welfare Foundation
- Pew Charitable Trusts
- Smith Richardson Foundation

Atlantic Philanthropies also used to fund in this space, but is winding down its 501(c)(3) giving.

The primary funder of research on crime is the Federal government, especially the National Institute of Justice at the Department of Justice, which gave \$159,873,645 in funding in FY 2013 (370 awards) and \$233,536,728 in funding in FY 2014 (418 awards), covering a wide range of topics. NIJ research grants can be substantial (several million dollars per project) but applications are complicated and bureaucratic and NIJ research funding priorities shift regularly.

Landscape:

Criminal justice is largely a state and local issue; only about 14 percent of all prisoners in the United States are in Federal prisons.²



This means that the vast majority of campaigns on criminal justice issues will be at the state and local level. We are still surveying the state-based landscape on criminal justice, but note that the capacity of state-based criminal justice groups varies tremendously by state (not surprisingly). Many national groups also have state affiliates.

Examples of national criminal justice groups:

- *ACLU*
- *Sentencing Project*
- *Drug Policy Alliance*
- *Right on Crime*
- *Justice Fellowship*
- *Pew Charitable Trusts*
- *Council on State Governments*
- *Vera Institute*
- *Families Against Mandatory Minimums*

Non-traditional allies are increasingly becoming interested in the criminal justice space as well. For example, the AFL-CIO has spoken out against mass incarceration and is

² E. Ann Carson, U.S. Department of Justice, “Prisoners in 2013,” <http://www.bjs.gov/content/pub/pdf/p13.pdf>

funding some campaign work around the issue as well as member education and the inclusion of formerly incarcerated individuals in community benefits agreements. The national faith-based community organizing group PICO has made reducing mass incarceration one of its key campaigns. The conservative group ALEC, which promotes legislation for state legislators, has also been doing some work to reduce prison size, reversing its previous position of support for mandatory minimums and other bulwarks of mass incarceration.

As already mentioned, state fiscal crises are driving a lot of criminal justice reforms. There is also increased public support for the idea that the United States has too many people in prison,³ although that has not translated into many substantial sentencing reforms. New York, New Jersey, and California have seen the greatest drops in their prison populations.⁴

To understand what kinds of interventions will have the most impact on reducing crime and unnecessary incarceration, it is worthwhile to look at some of the factors maintaining the current levels of incarceration and crime:

- Mass incarceration is the status quo—in most cases, inaction leads to continued high levels of imprisonment, and in some cases actually ensures higher rates.
- Lack of knowledge about how to reduce crime
- Prosecutors, sheriffs, and some victims' groups oppose reform efforts, and their opinions are well respected by the public and policymakers.
- Misaligned incentives:
 - Politicians (including prosecutors), especially Democrats, still do not feel that supporting decarceration is entirely risk free
 - Police officers judged by numbers of arrests, stop/frisks, etc. (also influence of social norms)
- Public attitudes not aligned with realities of what is public safety enhancing (e.g., people don't understand that you age out of crime, or that there are ways to confine people without incarcerating)
- We don't have sufficient intermediate options between prison and letting people live completely independent lives—and as a result, we incarcerate large numbers of people who could probably leave confinement if there were highly supervised alternatives to prison.
- People who leave prison have trouble reintegrating into society, which may make them more likely to commit crimes again
- Segregation means that there's a disjuncture between the political influence of high-crime/high-incarceration communities, and communities that make the political decisions (e.g., Philadelphia and Pittsburgh have most of the crime and

³ Public Opinion Strategies and the Mellman Group, *Public Opinion on Sentencing and Corrections Policy in America* (2012), http://static.prisonpolicy.org/scans/PEW_NationalSurveyResearchPaper_FINAL.pdf.

⁴ Sentencing Project, "Fewer Prisoners, Less Crime: A Tale of Three States," http://sentencingproject.org/doc/publications/inc_Fewer_Prisoners_Less_Crime.pdf.

incarceration in Pennsylvania, but decisions about whom to put in prison are made in large part by officials from the rest of the state).

- The fact that former felons do not vote in many places
- Rates of illegal gun ownership in high crime communities make crime committed much more dangerous
- Racial attitudes affect how White Americans feel about both crime and incarceration
- The current criminal justice system employs large numbers of people, who have significant personal investments in the current system and who have been shaped—however uncomfortably—by it.
- Many interlocking issues associated with poverty

Possible Sketch of a Strategy on this Topic

As already mentioned, it seems like there is an unusual political window of opportunity on criminal justice reform, which is part of what makes this a potentially interesting program area. That said, since this area is changing rather rapidly, it also seems premature to create a single theory of the case for how social change is likely to occur. As a result, we envision putting our money in several different places, and potentially adjusting that as time goes on and the dynamics of the “window” start to clarify a bit further.

As of now, it looks like our strategy on this issue will likely be divided between four general areas:⁵

- A) Efforts to improve the behavior of prosecutors
- B) Broad institution building
- C) Mass incarceration campaigns
- D) Research on crime prevention

While our funding on these issues could easily be spread out across the country, one possibility worth discussing is whether we should “go all in” on a few states to be able to make the most impact and get better feedback about how our grants are working on the ground.

A. Efforts to Improve the Behavior of Prosecutors

When we speak to people about important players in the criminal justice system, they routinely point to prosecutors. First, prosecutors have tremendous amounts of discretion (and some use that discretion better than others): deciding whether to charge someone for

⁵ While many of the other funders are also trying multiple approaches to criminal justice reform at the moment (rather than taking a singular theory of the case), it is worth noting that our approach includes two things that other approaches do not: a focus on prosecutors, and some attention to researching alternatives to incarceration.

a particular offense, what to charge, what to recommend for sentencing, etc. Second, prosecutors are routinely the political force most opposed to sentencing reform (in part because it takes away their discretion); changing that dynamic would go a long way towards increasing the chances for substantial sentencing reform. That said, very little work is currently done on prosecutors and mass incarceration; very few foundations put substantial funding into work on prosecutors, and very little research is done on prosecutorial decisionmaking. Prosecutors are notoriously closed offices, and figuring out how to change their behavior and/or how to work with them more productively is extremely difficult.

Hypotheses about prosecutors:

- *Neither prosecutors nor the public know what it means to be a “good prosecutor;” while some prosecutors’ offices may have their own metrics to judge employee performance, those are not the same as the metrics that people who care about incarceration would likely use. At the same time, the political incentives for prosecutors are often in the direction of charging up, since being a “tough as nails prosecutor” is a well-trodden strategy for upward political mobility.*
- *We still do not know enough about how prosecutors currently behave, which makes it harder to figure out the best interventions*
- *Prosecutors are sufficiently political that scaring them at the polls could impact the way they behave once in office*

Possible types of interventions (note: to identify the best interventions or brainstorm new ideas, we intend to convene a meeting of prosecutors and academics who study prosecutors):

- 1) Research on prosecutors
 - Additional research/data gathering, aimed at figuring out at a more granular level what prosecutors’ offices currently do and why
 - Quantitative work on variation in prosecutorial behavior as well as political science work looking at what sort of prosecutorial behavior leads to upward political mobility. In addition, qualitative/ethnographic work that would allow us to better understand how prosecutors understand their jobs and the institutional processes that lead to prosecutorial stringency.
- 2) Efforts to change the culture of the profession
 - Develop a more concrete vision of what it means to be a good prosecutor
 - Provide training/curricula covering what it means to be a good prosecutor. This could be aimed at people in their first year of being a prosecutor.
 - Score-card for ranking prosecutors
 - Promote/highlight good prosecutors; develop and share best practices (including, potentially, through mechanisms like a trade journal for these new kinds of prosecutors)
- 3) Institutional changes/efforts to change the way prosecutors offices function

- Work with behavioral economists to create nudges to change the incentives for prosecutors. Give prosecutors information about the cumulative impacts of their work, to help them make better ad hoc decisions.
 - Encourage offices to use new metrics of success (which take into account mass incarceration) when determining the promotion prospects of individual prosecutors
- 4) Political efforts
- Campaigns against targeted prosecutors, including testing whether fiscal messages can counter tough on crime messages, especially in conservative jurisdictions
 - Score-card for ranking prosecutorial candidates during elections and prizes for innovative prosecutors

B. Institution Building

In general, the hypotheses on institution building are still preliminary, because we have much more of a sense of the national field than we do of state-level dynamics. Institution-building grants will tend to be general operating support (rather than campaign or program specific-grants), and are intended to build the field of criminal justice reform over time rather than achieve short-term policy objectives.

The following hypotheses shape our current thinking about the kinds of institutions we would likely fund; that said, as mentioned already, this thinking is still definitely evolving. Where the hypotheses do not inherently specify the kinds of organizations we would fund, we list examples of the types of organizations below.

Hypothesis: The criminal justice field could use more national groups with the capacity to organize and mobilize large numbers of people.

Hypothesis: Effective state-based groups in key states could use more capacity, especially field capacity and political capacity

Hypothesis: Effective litigation in strategic locations could help to spur reductions in prison populations

Hypothesis: States need more voices with intimate knowledge of the criminal justice system to counter the testimony of prosecutors

Possible places to invest:

- Policy offices of public defenders

Hypothesis: If business groups could be made more interested in reentry, that could help expand coalitions for CJR

Possible places to invest:

- Chamber-of-commerce-like business affinity groups for criminal justice
- Direct investment with state chambers of commerce to increase their willingness to lobby directly on criminal justice issues, especially connected with state budget questions

Hypothesis: The burgeoning conservative interest and/or faith-based interest in criminal justice needs to be strengthened; in particular, both groups need to coalesce around a fuller policy platform that would actually make a dent in incarceration, and need to develop their mobilization capacity at the state level.

Possible places to invest:

- Creation of a national conservative think tank/center on criminal justice or of state conservative think tanks (particularly covering criminal justice budget issues).
- Invest in the field capacity of conservative faith-based groups
- Fund multiracial evangelical or faith-based organizing groups working on criminal justice issues.

Hypothesis: Public attitudes are not aligned with realities of what is public safety enhancing (e.g., people don't understand that you age out of crime, or that there are ways to confine people without incarcerating); better media and education could affect these attitudes

Possible places to invest:

- Journalism investments
- Effort to put on more TV stories about incarceration (does not currently exist). Since Americans get a lot of their sense of crime and its danger from TV, one could imagine a concerted effort to counter that by creating more TV programming about incarceration.
- Paid media campaigns
- Evangelical groups that seek to tell stories about what they have witnessed in prisons
- Organizations that seek to relay anecdotes about individuals who were diverted from prison (into drug courts or other programs) and thrived.
- Organizations that seek to relay, in a visceral way, the high cost to communities of having so many people in prison, helping to clarify why the current system is not working.
- Organizations that will sponsor public education campaigns on appropriate punishment for sex offenders or violent offenders, since it will be impossible to dramatically reduce prison populations without addressing approaches for more politically unpopular offenders

C. Campaigns to Reduce Mass Incarceration

Given the increasing consensus around the fact that mass incarceration is a problem, one way to address that may be through campaigns to reduce incarceration levels in key states. This could be done either on a national scale or through smaller state-by-state campaigns that we could help fund on an ad hoc basis (for example, investing in California Proposition 47, as Cari and Dustin did earlier this year).

D. Research on Crime Prevention

Given our goal of reducing crime as well as reducing unnecessary incarceration, it seems important to invest in increasing the number of proven interventions to combat crime. The kind of research we fund would likely fall into one of two categories: descriptive/qualitative research intended to help people better understand what drives certain parts of the criminal justice system (e.g., studies of how prosecutors make certain decisions, or studies of how gang members get their guns); or efforts to work directly with government and researchers to develop certain innovations in government and study their effectiveness.

Procedurally, one option is to fund certain criminal justice research centers at universities, giving them general operating support. Another option would be to fund individual academics whose research agendas we support; we would not fund projects on a case-by-case basis. Should we choose to fund individual academics, we would be particularly interested in those who work on alternatives to incarceration and parole/probation reform; police procedures; and gun enforcement, which are parts of the criminal justice system that we think could make a big difference in reducing crime or reducing the severity of crime (see also the description of what makes our approach different, at the start of the strategy section).

Risks and reservations about this cause:

- Prosecutors are a risky space to work—it is clear they are important to criminal justice reform but very unclear whether anything we do could make an impact on their behavior (for example, it is not clear that even guidance from the Attorney General is enough to shift dramatically the behavior of individual Federal prosecutors)
- The government already funds substantial amounts of research on criminal justice (and it has still been hard to make progress on proven interventions to reduce crime); will our additional funding really make an impact here?