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# CURRENT HISTORY

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## RETHINKING CRIMINAL JUSTICE

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# CURRENT HISTORY

November 2019

*“The role of exercising the state’s coercive authority makes the police both an instrument of power and a formidable political actor whose cooperation is needed by politicians.”*

## The Swinging Pendulum of Police Reform in the Americas

YANILDA MARÍA GONZÁLEZ

A few years back, when I interviewed a former Argentine official who had been brought in during the mid-1990s to clean house in the notoriously corrupt and violent police department of Buenos Aires province, he spoke of the force’s staunch resistance to his anticorruption measures. Shots were fired into his home. His office was put under surveillance. At a police gathering, his picture was affixed to a doll, and “one by one, the officers would pass by the doll and urinate on it.”

His candid account underscores not only the contempt with which many would-be reformers are regarded by police leadership and the rank and file, but also the capacity of police to disrupt or altogether dismantle reform efforts—and not just in Argentina. This man’s short tenure as the provincial secretary of security would usher in two decades of police reform and counter-reform in Buenos Aires. Ambitious reform measures were repeatedly discarded in response to police pressure, not long after being passed by the provincial legislature.

The police of Buenos Aires province—who came to be called the *maldita policia* (damned police) during this period due to their widespread and widely known malfeasance—leveraged extraordinary power in defense of their prerogatives. Similar legacies of stalled reform are common to police forces throughout the world, in developing and advanced democracies alike. In Buenos Aires province, as elsewhere, the ability of the police to thwart reform can be explained by a simple politi-

cal fact, summed up by the former security secretary, Eduardo de Lázzari: “Civilian officials come and go; the police will always be here.”

Advocates of police reform typically face an unfavorable political landscape. It is necessarily a long-term project, highly vulnerable to resistance from the police and changing political winds. Majority opinion can quickly swing from favoring the status quo to demanding reforms to accusing reformers of “handcuffing” police and limiting their ability to fight crime. These varying political pressures may, in turn, lead to considerable turnover of the political actors who hold formal responsibility for security policy and police governance. The police, in contrast, display a remarkable permanence regardless of shifting political conditions, making any potential reform efforts difficult to see through and sustain.

A cursory glance at the records of police forces around the world reveals the persistence of endemic problems, seemingly unchanged by the passage of time. In the United States, the 1968 Kerner Commission Report and the 2015 report of the President’s Task Force on Twenty-First Century Policing both decried racial bias in policing, noted that police were accorded low trust and legitimacy in communities of color, and raised concerns about aggressive strategies such as “stop and frisk” and militarization. Both commissions also recommended targeted recruitment to increase diversity in police forces and engagement in community service to improve relations with the public, among other measures.

In Chicago, a blue-ribbon panel concluded in the 1972 Metcalfe Report that police use of force was racially biased, to the extent that 75 percent

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of those killed by the city police were black. More than four decades later, the Police Accountability Task Force appointed by the mayor similarly found that three-quarters of victims of police shootings were black.

Across the Atlantic, a government commission convened following the 1993 murder of a young black man, Stephen Lawrence, determined that the London Metropolitan Police were “institutionally racist.” Two decades later, the department’s own chief declared that it “could take 100 years” for the police ranks to reflect the city’s diversity.

In Brazil, a key debate during the transition to democracy in the 1980s was whether to abolish the military police force and merge it with the civil police. When brutal repression of massive protests in 2013 put police violence back on the agenda, security experts, activists, and legislators once again debated abolition and unification. In the end, neither was enacted.

These recurring diagnoses and proposed remedies may give the impression of stagnant security policies, but the persistence of such conditions actually reflects the abrupt pendulum swings that often characterize police reform. In the span of just a few years after the 2014 police killing of a young black man, Michael Brown, in Ferguson, Missouri, official US policy shifted from concerted federal police reform efforts—including Justice Department investigations and consent decrees (court-enforced reform agreements)—to the withdrawal of these vigorous oversight instruments after Donald Trump succeeded Barack Obama as president, having campaigned on a “law and order” platform.

A few years earlier in Venezuela, sweeping pro-human rights police reforms that had been adopted following national outrage over a police abuse and corruption scandal gave way to official security policies that enabled rampant police violence, ushering in some of the highest rates of police killings in the region. In Brazil, since President Jair Bolsonaro took office in January 2019, federal programs to reform police and promote human rights have been supplanted by “anticrime” legislation whose only substantive provision is to effectively eliminate legal restrictions on police killings—which have predictably increased. Across these diverse contexts, governments have shifted, from one administration to the next, from resolute

commitment to reform to complete reversal, even as underlying conditions remain largely constant and the problems of policing remain largely unaddressed.

The failure of police reforms is often seen as the result of entrenched and insurmountable historical legacies, the lack of salience of policing issues in electoral politics, weak institutions incapable of holding police accountable or implementing reforms, or rogue, uncontrollable police forces impervious to political pressure and citizens’ demands. Such conditions are typically cited to explain the persistence of violent, discriminatory, corrupt, or ineffective police forces.

Yet the continuity of police institutions and practices is best understood not as an institutional failure or evidence of the unresponsiveness of democratic institutions, but rather as the result of what political scientists Peter Bachrach and Morton Baratz, in an influential 1962 article, called “nondecision-making,” the process by which consequential but contested issues are left

off the policy agenda. It is common to observe a swing from long periods of nondecision-making in the face of profound policing deficiencies to social and political mobilization in favor of ambitious reform, followed

by its rapid unraveling. This pattern reflects the ways in which police exercise their power to keep certain issues off the policy agenda, and how divided opinions over policing within society tend to shape politicians’ electoral incentives in a manner that diverts them from reform.

The fact that the fate of police reform is determined by ordinary democratic politics and robust contestation is often left out of the usual diagnoses of policing deficiencies. This leads to an incomplete assessment of the problems and yields policy proposals inadequate for resolving them. Recent discussions of police reform in the United States, for instance, after Ferguson and a spate of other police killings of unarmed black men that were captured on video, have tended to focus on diagnoses such as implicit bias (stereotypes that may unconsciously affect police actions) and poor police-community relations, and proposals for reform such as body-worn cameras and implicit bias training for officers. In Central America, where citizens must contend with the dual scourges of some of the highest homicide rates in the world

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*The strongest calls for police reform  
often come from social groups  
with the least political power.*

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and violent, corrupt police forces, some of the leading proposals focus on operational reforms such as “hot-spot” policing—targeting police resources and action in territories with a high concentration of crime.

Without rendering judgment on the effectiveness of these strategies, one can say that such an approach sidesteps the broader political and institutional context that endows police with considerable structural power to defend their prerogatives and thwart reform. High crime and inequality often shape public demands, creating a constituency for repressive and unaccountable policing. By narrowing the locus of the problem to promote technical fixes, we risk misdiagnosing entrenched deficiencies and constraining the scope of proposed solutions.

We can learn a great deal about the challenges of transforming policing by looking to recent cases in Latin America in which comprehensive police reform rose on the agenda only to unravel in the face of police and political resistance. As a region of young democracies grappling with high levels of crime and inequality, Latin America can be especially instructive about how these factors shape relationships between police and the politicians who ostensibly control them. It also shows how the fragmentation of societal demands can make consensus over police reform difficult to sustain. These cases offer broader lessons about the intersection of inequality, policing, and ordinary democratic politics.

## STRUCTURAL POWER

Accounting for the persistence of abusive and deficient police forces and their ability to resist reform requires understanding policing as a political resource that can be distributed toward electoral ends. Police are charged with carrying out central tasks of the state: the provision of security and the enforcement of the laws. In their exercise of the state’s coercive authority, police forces wield tremendous power over the daily lives of citizens. They are endowed with the authorization to use force on behalf of some citizens against others. This distribution of protection and repression is, of course, a central concern for citizens—a process that they will likely seek to influence and shape.

The importance of security to citizens gives politicians an incentive to use the distribution of protection and repression to achieve political objectives. But police forces also have considerable agency. They leverage their monopoly on “legiti-

mate” force to selectively serve the interests of elected leaders, but they can also threaten leaders by withdrawing their service of providing order and security.

The role of exercising the state’s coercive authority makes the police both an instrument of power and a formidable political actor whose cooperation is needed by politicians. This predisposes politicians to choose to accommodate their police forces, granting them greater autonomy in exchange for cooperation. Police are thus endowed with considerable structural power to constrain the policy options available to politicians and raise the threshold for reform.

When politicians do not accommodate them, police forces routinely withdraw their cooperation in defense of their interests, creating challenging or embarrassing political conditions to ratchet up the pressure. Police forces in the Brazilian states of Bahia and Espírito Santo created security crises when they went on strike to demand salary increases and other benefits, leading to dramatic spikes in homicides in 2014 and 2017, respectively. Rio de Janeiro’s police pressed a demand for increased salaries by embarrassing their state’s government on the world stage, greeting international visitors arriving at Rio’s airport for the 2016 Olympics with a sign that read: “Welcome to hell: Police and firefighters don’t get paid, whoever comes to Rio de Janeiro will not be safe.”

Such acts of police resistance can be quite successful in pressuring politicians to limit reforms. For instance, New York City Mayor Bill de Blasio was forced to temper his calls for police reform after the so-called blue flu of 2014, when many officers scaled back patrols and enforcement actions in response to the mayor’s criticism of the Police Department—and even turned their backs on him during a speech. These acts of resistance shaped local politicians’ approach to police reform for several years, and were used as justification for the passage of a watered-down reform bill in 2017. As the bill’s sponsor, Councilman Ritchie Torres, put it:

We all have searing memories of 2014, when there was an open revolt in the rank and file of the New York City Police Department. And so if we have an opportunity to pursue a path to police reform without provoking an upheaval in the New York City Police Department, then why not do it?

The fear of “provoking an upheaval” among police can serve as ample motivation for politicians to avoid measures intended to address glaring

ing deficiencies. This political calculus may well explain why many police forces are seemingly able to avoid external interference and resist pressure to reform despite exhibiting enduring structural problems, such as entrenched corruption, widespread extrajudicial violence, and incompetence in the face of rising crime. Even in moments of broad institutional transformation, police may be singularly able to evade reforms.

During the early 1990s in Colombia, for instance, a profound institutional crisis fueled by the protracted internal armed conflict, drug violence, and loss of state legitimacy led then-President César Gaviria to undertake what he called an “institutional shakeup” (*revolución institucional*). This entailed an ambitious, far-reaching, and at times controversial reform agenda across a range of policy areas. The shakeup, however, excluded the National Police, ignoring many years’ worth of evidence of profound deficiencies and warnings from various officials about the need for reform. As judges in the Council of State, Colombia’s highest administrative court, declared at the time in a verdict against the National Police for its failure to adequately sanction officers who tortured and burned alive two criminal suspects, “Something is failing in the recruitment, oversight, and administration of the Public Force.”

Despite these dire assessments, police reform bills languished in the Colombian Congress. Asked about the failure of one 1992 measure, the former minister of defense told me, “The police would say that it was taking corrective measures, and the Congress would not challenge the opinions of the institutions of the Public Force.” Tarnished by years of institutional decay, considerable infiltration by drug cartels, widespread corruption and extrajudicial violence, and incapacity to effectively address rising urban crime and violence, the Colombian National Police emerged unscathed from the “institutional shakeup.”

The reform attempts of Eduardo de Lázari, the security secretary of Buenos Aires province, met a similar fate in the mid-1990s. According to news reports at the time, following repeated clashes with the police chief, Lázari went to convey his displeasure to the governor in person, only to find the chief at the governor’s side. The would-be reformer was promptly replaced with a long-time political operative from the governor’s party. Police reform stalled in the province, despite a chorus, as in Colombia, of repeated warnings and calls for reform from other officials. One opposition legisla-

tor made an impassioned plea: “It’s time for this legislature to put on its big-boy pants” and start “to work immediately on the Organic Law of the Police, redesigning the police force if needed.” But legislators did not heed the urgent call to overhaul the provincial police, despite its routine extrajudicial killings and torture, incompetence in confronting rising crime, and extensive collusion with the province’s criminal networks.

From Argentina and Colombia to New York City, underlying what appears to be “nondecision-making” is actually a series of political calculations about the risks and benefits of police reform. These cases underscore the importance of recognizing that police are political actors, and of examining how they exercise agency in pursuit of their own prerogatives and act as a veto player, setting the limits of policy options available to politicians choosing between the status quo and reform. Such insights may help in designing reform measures that are better able to withstand police resistance.

## A SOCIAL MIRROR

Even as politicians eschew reforms in order to avoid the risks of alienating a police force on whose cooperation they depend, one could reasonably ask whether politicians might not also risk their electoral fortunes by failing to address societal demands for police reform. Such demands over policing, however, are often defined not by consensus but by contestation—in a way that renders police reform electorally disadvantageous. The absence or failure of police reform may result from inequalities that shape public opinion and politicians’ electoral incentives.

Politicians likely are not oblivious or indifferent to chronic problems in the police forces they ostensibly control. But a key reason that politicians may sometimes see more risk in enacting police reform than in avoiding it is the persistent fragmentation of public preferences over issues of policing and security. This fragmentation derives from social divisions along the lines of race, class, and geography. Different groups have varying levels of power to press the state to act on their demands.

Relatively privileged citizens facing crime and violence make demands for protection, mobilizing resources and political capital in favor of efforts to expand police authority in ways that may lead to the repression of other citizens disadvantaged by class, race, and location. Citizens from disadvantaged sectors, meanwhile, similarly demand protection from crime and violence—which they

are more likely to suffer—but also call for curbing police abuses to which they are disproportionately subjected.

In the face of these divided preferences and conflicting demands, politicians are unlikely to see taking on police reform as an electorally advantageous strategy. Instead, political leaders will be more likely to accede to the demands of more privileged social groups—and the police force—both of which favor the status quo.

Throughout the early 1990s, as President Gaviria undertook his “institutional shakeup” that excluded the country’s police force, marginalized citizens throughout Colombia protested against police abuses—unlawful detentions and searches, extrajudicial killings and massacres—from low-income urban districts such as La Iguaná, Medellín, and Ciudad Bolívar, Bogotá, to rural indigenous communities like Mingueo, La Guajira. At the same time, many Colombian business leaders rebuffed calls for robust police reform, warning against “extreme positions” and “permissive justice.”

Politicians in Buenos Aires province faced similarly contrasting demands. Throughout the 1990s, residents of low-income municipalities protested against “gatillo fácil” (trigger-happy) police after dozens of killings of young men. But in the context of Argentina’s deepening economic crisis and social unrest, other communities demanded more police authority to address the increasing insecurity, and celebrated *justicieros* (vigilantes) who took the law into their own hands. In one dramatic instance, residents of the well-to-do municipality of Pilar marched in defense of their police chief, Luis Patti—who was accused of having participated in torture, disappearances, and killings during the period of military dictatorship that lasted from 1976 to 1983—and subsequently elected him as their mayor.

Such differences in views of policing along the lines of social cleavages are common in the United States as well, even when the deficiencies of police forces are well known. In 2016, the same year that the Police Accountability Task Force issued a devastating diagnosis of the Chicago Police Department, a public opinion survey conducted by the *New York Times* found stark divisions along racial lines in Chicagoans’ assessments of the police. Among whites, 47 percent evaluated the police as

excellent or good, and only 16 percent as poor; these percentages were inverted among black residents. Similar disparities set apart views in the wealthier (and whiter) North Side from those in the South and West Sides.

Even in the cases of deeply troubled police forces, the status quo is often reinforced by the ways in which social inequality is channeled into conflicting demands. The strongest calls for police reform often come from social groups with the least political power, and constituencies in favor of the status quo tend to form among more powerful social groups. Since political leaders must also contend with the police’s structural power, their electoral calculations may well lead them to conclude that the risks of police reform far outweigh the benefits.

### ELECTORAL THREAT

Police reform may stall due to the constraints of police pressure and the conflicting demands of different social groups; both factors shift politicians’ incentives away from police reform. But politicians’ calculations about the risks and benefits of police reform can also shift in response to changing political conditions. When politicians perceive that a demand for police reform is broadly shared across social divides, and when they face a robust political opposition, they are more likely to enact reforms. This threat of losing the next election acts as a counterweight to the structural power that typically enables the police to thwart reform.

My research in Argentina and Colombia showed the importance of electoral pressures in shifting politicians’ incentives and reviving the fortunes of reform: measures that were dead on arrival suddenly moved onto the fast track to implementation. In both cases, political leaders rapidly reoriented their decision-making from avoidance to the embrace of ambitious, comprehensive reform in response to short-term changes in public preferences and political competition.

The timing of these decisions strongly suggested that it was newly emerged electoral threats—and not the long trajectory of grave structural policing deficiencies—that prompted political leaders to reform their embattled police forces. In Colombia, following the failure of police reform bills in late 1992, Gaviria and congressional leaders an-

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*When politicians do not accommodate them, police forces routinely withdraw their cooperation.*

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nounced a joint legislative agenda for the remainder of the term on March 1, 1993. Although this agenda covered a range of policy areas, reforming the National Police was not on the list.

In the days that followed, however, news emerged of an egregious act of violence: the rape and murder of a little girl by an officer—in a police station. The scandal rocked Colombia, generating a convergence of public opinion in favor of reform and subjecting the National Police to unprecedented scrutiny. Within just a month of excluding police reform from the legislative agenda, Gaviria convened a commission of diverse political actors and civil society groups to study the matter and propose major reforms. With the 1994 presidential elections approaching, and Gaviria's Liberal Party facing the strongest political competition Colombia had seen in many years, the outrage over the police scandal convinced the president and congressional leaders to reintroduce and pass the reform bill that had failed in Congress the previous year.

A similar sequence of events unfolded in Buenos Aires province in 1997. The murder of a journalist at the hands of provincial police officers stirred widespread outrage, leading to several months of protest and calls for reform from diverse civil society groups. Although Governor Eduardo Duhalde's party created a special bicameral commission dedicated to investigating the case, he kept sidestepping the question of police reform, even firing his own reformist secretary of security. But a month after his party lost the midterm legislative elections in October 1997, Duhalde declared the provincial police to be in a state of emergency, appointed a civilian as chief, and solicited proposals for structural reform.

In both cases, just months following scandals and electoral shifts, the Colombian Congress and the provincial legislature of Buenos Aires enacted sweeping reform measures overhauling their police forces in remarkably similar ways. The legislation passed in Colombia in 1993 and in Buenos Aires province in 1998 sought to transform police training and upgrade standards for recruitment and promotion; advance decentralization, demilitarization, and specialization of the police; create stronger, novel mechanisms for internal and civilian oversight and accountability; and develop new institutions for citizen participation. Not long af-

ter calling their police "a source of pride for the country" and "the best police force in the world," the Colombian president and the Buenos Aires governor had been compelled to back dramatic restructuring measures in response to changing political conditions.

Such politically driven shifts in police reform outcomes have also occurred recently in the United States. In Chicago, reform of the city's long-troubled police department finally happened not as a direct result of its endemic structural deficiencies, but following a similar combination of scandal and electoral threat. After winning the first-ever runoff in a mayoral election by a relatively narrow margin in early 2015—the city had seen few competitive mayoral elections in recent decades—incumbent Mayor Rahm Emanuel faced a massive police scandal later that year following the release of long-withheld video footage of the fatal police shooting of Laquan McDonald, a 17-year-old black youth. Like his counterparts in Argentina and Colombia, within a month of the

video's release and the widespread protests that followed, the mayor convened the Police Accountability Task Force to study the options for police reform and make recommendations. Important civilian oversight reforms were enacted in

the months after the release of the Task Force's report the following year.

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*Politicians eschew reforms  
in order to avoid the risks  
of alienating police.*

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## THE PENDULUM SWINGS BACK

For all of the drastic institutional change that police reform laws promise, they are often unceremoniously revoked once political conditions return to the pre-reform status quo. In both Buenos Aires province and Colombia, the comprehensive reforms enacted following broad social and political mobilization were rolled back almost as soon as implementation began. Both settings saw a change in administration in the year following the enactment of reforms. Neither the new Buenos Aires governor nor the new Colombian president had much incentive to push ahead with their predecessors' difficult reforms in the face of police resistance.

Public opinion also shifted, as successful police operations against drug cartels in Colombia and rising crime in Buenos Aires province led majorities to oppose greater restrictions on police authority. Assisted by these changing political



winds, the police succeeded in resisting reform. The new mood was best encapsulated in a remark by Colombian President Ernesto Samper as he announced the rollback of external oversight measures in the mid-1990s: “Let’s let the police regulate itself.”

The structural power of the police is formidable. Police reform requires politicians to be convinced that avoiding action will cost them at the ballot box. Absent an electoral threat, they are unlikely to undertake the risks of reforming, and potentially alienating, the police forces whose cooperation they need.

Although such an electoral threat constitutes a potent counterweight to the structural power of the police, it may well fail to materialize or to endure in highly unequal societies, where conflicting demands pose another crucial obstacle to police reform. That is what happened in Colombia and Buenos Aires province, where reformist officials pointed the finger of blame at “erratic” public opinion, lamenting that the instability of

social and political consensus had prevented them from pushing through sweeping and sustainable reforms.

Cities like Chicago, and countries like Brazil, continue to grapple with containing police violence against marginalized communities while also providing meaningful security. Even the most urgently needed and well-designed reforms can lose public support. This underscores the importance of building enduring constituencies to sustain mobilization and pressure politicians to constrain police authority and protect disadvantaged citizens from police violence. A more stable societal consensus can shift politicians’ incentives, letting them know that there will be an electoral price to pay for continuing to accommodate the police. Such a shift in political conditions can also counterbalance the police’s structural power and capacity to resist reform. As one Colombian official told me, consistent social and political pressure acts as a warning to police: “We either reform ourselves, or they’ll reform us.” ■

“Prison officers and inmates reconcile tensions between formal and informal policies, rules, and practices.”

## How Inmates Help Run Philippine Prisons

CLARKE JONES AND RAYMUND NARAG

The Philippines has the most overcrowded prison system in the world. The detention centers managed by the National Police, the jail facilities overseen by the Bureau of Jail Management and Penology and the provincial governments, and the prisons and penal farms managed by the Bureau of Corrections (BuCor) register an average overcrowding rate of some 500 percent. Although it was already heavily congested even before President Rodrigo Duterte’s war on drugs, the inmate population has increased more than 67 percent (from 120,000 to 200,000) since 2016 as a result of the drug war. One remand jail facility in Manila, for example, has reached a congestion rate of 3,600 percent of capacity: jail cells that once housed 10 inmates now squeeze in more than 200. Making matters worse, the growth in the inmate population has not been matched by modernization of archaic facilities or increases in personnel and resources.

To put the Philippines’ correctional system in context, the United States has the largest prison population in the world, with approximately 2.3 million inmates behind bars, and overcrowding has become a serious problem in many US prisons. However, the US prison system is far from the worst—it sits at number 113 among all countries, according to the 2019 World Prison Brief, with an average occupancy level of around 104 percent nationwide.

Until recently, Haiti had the most overcrowded prison system in the world, but it is now second on the list, having recently been overtaken by the Philippines. Haiti’s prisons operate at 454 percent over capacity—80 to 100 prisoners fill each cell, and many of them have not even been convicted

of a crime. This severe overcrowding has resulted in malnutrition and the spread of disease among inmates. The United Nations has condemned the situation in Haiti, finding that inmates are subject to daily violations of their fundamental rights.

Regardless of where it occurs, prison overcrowding affects the physical and mental health of prisoners, creates tension and violence among inmates and between inmates and staff, and poses immense challenges for prison administrators. The risk of corruption multiplies when prisons are overcrowded and necessary services become unsustainable. Prisoners are left with no choice but to fight for access to the most basic resources, resorting to bribes and other coping measures that circumvent the rules. Such corruption creates a climate of chronic tension and unrest, dramatically increasing security risks. The sheer level of congestion in Philippine prisons provides a unique opportunity to research how a system continues to operate under such dire circumstances.

High levels of corruption in the correctional system have made it a constant source of embarrassment to the government. In the latest scandal, in August 2019 it was revealed that corrupt prison officials had conspired with inmates serving long sentences to sell time credits awarded for good conduct. Deep-pocketed inmates were able to purchase the credits and falsify their records to obtain premature release. Hearings conducted by the Senate have brought other forms of corrupt prison practices to light: hospital passes for sale, prostitutes for hire, drug dealing, and more. This led to the government firing the director general of BuCor and promising thorough reforms. It was the eleventh dismissal or resignation of a director general in the past ten years.

This latest scandal reflects a long history of deep-rooted problems. Prison gangs (*Pangkats*) have come to share the governance of many of the country’s jails and prisons since the early 1940s.

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We now estimate that around 95 percent of inmates are Pangkat members. The Duterte government, which took power in June 2016, has focused its efforts on combating the drug trade in the enormous New Bilibid Prison (NBP) on the outskirts of Manila, allegedly run by some of the larger Pangkats. To supplement the custodial guard force, Duterte has deployed 200 officers from the Special Action Force of the National Police. But these efforts are likely to have little effect due to the entrenched problems in the prisons. And those problems have been exacerbated by Duterte's policies—the overcrowding rate has doubled thanks to his drug war.

The Pangkat and inmate leadership (*Mayores*) systems play significant roles in the corrupt prison arrangements uncovered by Senate hearings and media exposés. If the government is serious about eradicating these practices, it must look at the structures that inmates and custodial officers have developed together. Without a holistic understanding of these informal structures, the sensationalized revelations will do nothing to change daily prison life.

We are in a position to provide rare insight into the realities of prison life in the Philippines and the Pangkats' highly secretive world. Both of us have conducted participant-observation studies over a ten-year period, watching both gang-to-gang and gang-to-staff interactions. We have also had informal discussions with prison and jail staff and inmates during numerous prison reform workshops and courses over this period. This will help contextualize some recommendations we consider necessary for sustainable reform.

By looking at the Philippine experience, we can see how correctional officers and inmates navigate erratic state policies. Developing countries with similar conditions may face similar corrupt practices that endure inside overcrowded correctional facilities.

## STRUCTURAL FLAWS

Our frame of analysis begins with structural characteristics, such as the living conditions in the prisons, particularly their capability to provide inmates with basic necessities like food, clothing, medicine, and shelter. Other structural factors include the number and quality of personnel assigned to securing and rehabilitating inmates, as well as the budgetary resources allocated to security, facility maintenance, and inmate programming—rehabilitation initiatives that help address the root causes of criminal behavior.

We also examine organizational characteristics—formal policies, rules, and practices promulgated to meet the correctional goals of providing safe custody and preparing inmates for their release as law-abiding citizens. These are formally laid out in the prison manual of operations. In response to the structural limitations in manpower and resources, however, prison personnel and inmates have developed certain coping mechanisms, which are regularized and become a functional characteristic of the prison organization. Prison officers and inmates reconcile tensions between formal and informal policies, rules, and practices.

The interplay between formal and informal systems creates the institutional culture of the prison. That culture consists of the different values, norms, language, and thinking patterns that are adhered to by both prison officers and inmates. Inmates and prison guards use cultural scripts or narratives to justify their behaviors in particular contexts.

Prison officers and inmates who are invested in the culture—those who actively participate in leadership roles and the informal economy—gain social and political power. This creates a hierarchy of status in the prison community, the delineation of particular roles, and a code that guides the behavior of inmates and officers.

Given the role that the *Mayores* and the Pangkats play in prison management, it is clear that the latest scandal cannot be blamed solely on individuals actively involved in the drug trade or the sale of time credits and hospital passes. Rather, it is a systemic problem that requires a holistic change. Although the informal systems are prone to abuse and corruption, removing these indigenous coping practices without addressing structural deficiencies may make the prisons even more volatile and violent.

In many developing countries with limited resources, such informal practices have kept the prisons running. Even in the United States, where correctional resources are more plentiful, prison gangs contribute to stabilizing the informal social and economic inmate system. As James B. Jacobs observed in a 1977 book about the Stateville Penitentiary in Illinois, there was a positive side to the gangs—they played a supportive and protective role, functioning as “buffers against poverty” for inmates.

This is also evident in the Philippine prison system, where many inmates' survival depends on basic financial support from more affluent Pangkat

members. Such aid becomes particularly crucial when inmates lose contact with family and have no outside support.

## CHALLENGING CONDITIONS

Prison conditions in the Philippines are challenging, to say the least. To take a notable example, the NBP is the world's biggest megaprison. It currently holds 27,000 inmates but was designed for just 8,000, registering a staggering 300-percent overcrowding rate. Its Maximum Security Compound, for those serving sentences of 20 years to life, currently holds 17,000 inmates; its recommended capacity is only 4,000. As many as 200 inmates are crammed into a cell designed for 20 people. They take turns sleeping on the limited floor space or in makeshift hammocks, share one toilet, and fight over ventilation and light.

BuCor has 2,568 personnel in its seven prisons across the country, of whom 1,328 are assigned to custodial functions and the rest to either rehabilitation programs or administration. The current officer-to-inmate ratio is 1 to 100; it could be even thinner in some shifts. The BuCor Modernization Law, which took effect in 2013, mandates a ratio of 1 to 7. Witnesses have testified of instances when only 30 prison guards were overseeing the NBP's 17,000 maximum security inmates.

Personnel quality is as sorely lacking as quantity. Training is inadequate and carried out on an ad hoc basis. Financial resources are also meager. BuCor's budget in 2014 was 4.9 billion pesos (\$110 million), 1.2 billion of which was allocated to personnel remuneration, 2.4 billion to maintenance and operating expenses, and 100 million to capital outlays. In aggregate, this translated to around 47,000 pesos per inmate per year, or 130 pesos per day—less than three US dollars.

The food budget is pegged at 70 pesos per day per inmate. Inmates are also allocated 5 pesos per day for medicine and 3 pesos to cover basic supplies like blankets, laundry, mats, and mosquito nets. By all accounts, such pittance is not enough to meet inmates' daily needs, let alone to reform and prepare them for release.

BuCor's prison facilities are inadequate in every respect. Inmates are punished not only by being deprived of their liberty, but also by the inhumane conditions of their confinement. Prison officers are neglected as well, receiving little support as they deal with daunting work conditions.

If such structural limitations were transposed to developed Western countries, their prisons would

collapse—inmates would demand better living conditions and riots would be a common occurrence. Given the Philippines' communal culture and traditional respect for authorities, however, inmates and prison officers have developed shared coping mechanisms. Although violence does erupt once in a while, the Mayores and Pangkats have devised ways to prevent and mediate conflict.

## INMATE LEADERSHIP

The Mayores system of inmate leadership has evolved in response to the inadequacies of prison personnel. In a cell of 20 or so inmates, a hierarchy develops for assigning roles, obligations, and social status. Depending on cell size, a mayor and vice mayor are appointed, and a host of other positions are created, such as *bastonero* (disciplinarian), chief *buyonero* (overseeing cleanliness), juries to investigate and mediate conflicts, coordinators (rehabilitation aides), trustees (administrative aides), and marshals (custodial aides). The inmate leaders are tasked with implementing a set of rules known as the *Patakaran ng Selda o Brigada* (Inmate Magna Carta), which outlines acceptable prisoner behavior.

These leaders assume responsibility for a range of functions, which include helping prison officers conduct inmate headcounts, maintaining cell order and hygiene, teaching student-inmates, and other tasks. The cells are usually grouped to form a brigade; an overall leader, the *Mayor de Mayores* (also called a commander or *Bosyong Pangkalahatan*), assumes a coordinating and supervisory role over the lower-level inmate leaders. The Mayor de Mayores serves as a representative of the inmates in discussions and negotiations with the prison management. There is also a Council of Elders, where the brigade commanders elect a spokesman or leader.

The prison management engages these inmate leaders in a give-and-take relationship. In exchange for their support in running the prison, privileges are extended and minor rule violations permitted. Anchored in traditional respect for authorities, the inmate leadership becomes an appendage of the custodial force.

On the other side of this quid pro quo, inmate leaders are tacitly allowed to generate income within their cell or brigade jurisdictions by setting up a store, requesting contributions from inmates with resources, and maintaining other legitimate businesses, like a furniture shop. Such exchange relationships are informal and unwritten; the pris-

on manual explicitly forbids them. These internal arrangements are well known to everyone in the prison community, yet formally denied in public.

Pangkats, sometimes erroneously called criminal gangs, are organizations formed by inmates to strengthen their negotiating power with prison authorities and their capacity to withstand the rigors of imprisonment. Based on the communal traditions of Philippine society, inmates tend to form groups according to their regional or ethno-linguistic affiliations, though the oldest Pangkat, the OXO (ex-convict organization), draws a national membership.

In the prison community, the Pangkats are seen as brotherhoods. They provide assistance to needy members who lack visitors and those who are sickly and elderly. In a collective mechanism called *kasalo*, inmates without resources such as food, clothes, and toiletries are grouped with better-provisioned inmates, who are expected to share with them. In this sense, inmates practice the Filipino cultural values of *damayan* and *bayanihan* (mutual and community support). They experience incarceration in a collective manner rather than an individualistic one. Injunctions like “do your own time,” prevalent in Western prisons, are seldom heard in the Philippines. Instead, the inmates recite mantras such as “a cell is a family” and “no one will help an inmate but a fellow inmate.” The Pangkat also serves as a community in which inmates develop a shared history and identity.

Pangkats demand obedience from their members and discipline those who violate the *Patakaran*. In the Maximum Security Compound of the NBP, almost 95 percent of the inmates are members of any of 12 Pangkats. Like the *Mayores*, the Pangkat system is informal, and its existence is officially denied.

The prevalence of the *Mayores* and Pangkat systems creates a cultural dynamic that orders the way of life in the prison community. All inmates are introduced to, and obliged to adapt to, this setup, one way or another. Inmates are given the option of which Pangkat they wish to join. They submit to the leadership of the *Mayor de Mayores* and his assistants, and obey the *Patakaran*, the code purportedly promulgated for their protection and the maintenance of cell order. In the Maximum Security Compound, prison officials follow a con-

centration policy: inmates belonging to the same Pangkat are housed together in the same brigade.

Inmates contribute either resources or labor to the group. They also recognize that their social and physical spaces are determined by their roles and status in the inmate hierarchy—those who gain ascendancy are more likely to have beds and cubicles, or even separate cottages on the prison grounds. Inmates can develop a career path and be promoted up the hierarchy. One of the former *Mayores* of the Batang City Jail started as a toilet cleaner and rose through the ranks by adeptly navigating the Pangkat rules and regulations.

Although they are helpful in meeting the day-to-day needs of the prison, the *Mayores* and Pangkat systems breed inequity and corruption. Their informal nature provides opportunities for prison officers to abuse these coping mechanisms. Officers can switch between formal and informal rules, a discretionary power they can leverage to make illicit profits.

For example, prison guards who are aware that

an inmate cell mayor draws income from the cell will expect a cut of this income. Failure to pay up will result in the withdrawal of privileges or a sudden, strict implementation of the rules—guards may randomly suspend visitations or un-

expectedly conduct raids. Inmate leaders are forced to play this game and give in to the extortion of the guards.

To avoid such hassles, Pangkat leaders work to develop patron-client relationships with sympathetic prison officers. This can take the form of supporting officers' careers and providing for their personal needs. Inmate leaders can help favored personnel by assisting with rehabilitation and custodial programs and enforcing obedience. They may also provide financial assistance. For example, inmates contributed funds to an officer whose wife was undergoing chemotherapy.

In some cases, prison officers become Pangkat members themselves. Inmate leaders may even extend their reach to external government agencies in an effort to secure favorable conditions inside the prison. One former deputy prison director asked for money from a Pangkat to use as a bribe for securing an appointment.

It is worth noting that a majority of inmates and prison guards do not get entangled in these ties. Most inmates choose a prison lifestyle that allows

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*Formalizing the shared  
governance model could  
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them to serve their sentences independently and with dignity, while most guards discharge their tasks professionally. But this majority is silenced by the power of the corrupt few. Inmates and prison officers who dare to go against the tide are punished—prisoners who refuse to pay a bribe may be transferred to distant penal colonies.

## WHEELING AND DEALING

The proliferation of drugs in Philippine prisons is made possible due to the involvement of a few Pangkat inmate leaders and compromised prison officials. When they receive news that a coveted, unaffiliated big-time drug dealer, usually a Chinese national, is about to be transferred to the NBP, Pangkat leaders are quick to work in cahoots with cooperative prison officials to recruit the newcomer. The prospective member soon learns of the privileges offered by the Pangkat. Manila-based Pangkats are usually at an advantage since some big-time dealers have already become affiliated with them in local jails.

Thanks to cellular phones, these newly arrived drug-dealing inmates can continue their outside trade. Cell phones are usually provided by enterprising inmate leaders who accumulate them through compromised officers. The new arrivals may also meet other big-time dealers or reacquaint themselves with old contacts, developing partnerships and loaning products to each other.

Drug dealers can also partner with fellow inmates who have links with organized crime, including gangs that specialize in kidnapping for ransom, bank robbery, and car theft. This fusion elevates the sophistication of the merged group.

It is expected that these drug-dealing inmates will contribute funds to the Pangkat leadership, who use this money to pay daily tribute to sympathetic prison officers. Pangkat leaders must efficiently disburse these funds to develop political and social capital for the protection of the group and its members.

During raids, the Pangkat structure and membership are used as shields to protect the drug-dealing inmates. Inmate leaders warn individual prison officers against confiscating cell phones and other contraband. But the Pangkat *asintado* (warriors) may also be called in to collect a payment from a drug dealer who has reneged on an outstanding loan. Lowly inmates unaware of the political struggles among the drug dealers are easily expendable pawns—they can be killed in inter-gang conflicts.

Nonetheless, a majority of the Pangkat members and leaders oppose drug sales and use inside the NBP. Pangkat chiefs try to keep the drug trade in check, aware that sensationalized media coverage of the issue can backfire on them. Most of the leaders penalize inmates who are caught using drugs in their cells. Punishments can vary from cleaning the cell to a serious beating with a bat—potentially resulting in a cracked skull.

In recent years, however, a handful of Pangkat leaders have accumulated considerable resources by disregarding these norms, tilting the balance of power in their favor. Instead of serving as protectors for drug dealers, they have taken over the trade themselves. They have also become more brazen, enjoying luxurious prison lifestyles with hotel-type quarters outfitted with Jacuzzis and sound systems, and bringing in high-powered weapons to stay on top of the arms race and monopolize the drug trade. These trends led to the recent scandal and the Senate investigation that uncovered the harsh realities of the Pangkat operations, the prison drug trade, and the corrupt practices supporting it.

## KEYS TO REFORM

Policy makers should recognize that the systemic corruption in Philippine prisons is so ingrained that a patch-up solution is not enough. Instead, they must cast a wider net to address the inter-related problems that plague the NBP and other prisons. The drug trade is just one of them.

BuCor's facilities need to be upgraded. Overcrowding should be mitigated by adding cells and buildings in various prisons. New regional prisons should be built, and existing ones strengthened. The Maximum Security Compound in the NBP, with its population of 17,000, is one of the few remaining megaprisons in the world. A facility of this size contributes to the flourishing of criminal practices and increases in violence and other disturbances.

The government is considering a plan to relocate the NBP to Nueva Ecija, approximately 190 kilometers north of Manila. It should also consider dispersing this huge inmate population among new regional prisons that ought to hold no more than 2,000 inmates each. Our discussions with prison officials suggest that they agree with this recommendation, since it would lower the cost of transferring convicts. Adding regional prisons would also increase inmates' accessibility to family visits, a key ingredient in successful post-release reintegration into society.

The number of personnel should be increased to meet the standard inmate-to-guard ratio. The remuneration of prison staff must be on par with similar agencies to attract and retain the best professionals. A training school is needed to professionalize the prison service and to improve the quality of personnel.

The subsistence cost for inmates' food, clothing, medicine, and other needs should be increased. The expectation that inmates' families will provide them with basic necessities is the starting point for the entry of contraband and the development of a black market. The lack of food and other necessities also empowers the Pangkats, which develop mechanisms to fill these deficiencies.

The national government must conduct an assessment of whether the minimal inmate food allowance meets basic standards of humane treatment. The Commission on Human Rights should be invited to determine if current prison conditions adhere to internationally accepted standards.

These structural reforms are necessary to redirect the prison culture toward rehabilitation and reintegration. But they must be complemented with improvements in organizational capacity. An updated BuCor manual should reset the standards for staff conduct and recognize the presence of informal practices such as the Mayores and Pangkat systems. These practices may facilitate drug dealing and other negative behaviors. Yet if they are recognized and utilized as legitimate forms of inmate self-governance, these coping structures could help make up for the lack of manpower, facilities, and programs. Adopting a guiding policy on these informal structures could curb the wide discretionary powers of prison guards and inmate leaders—and the opportunities for corruption. Informal privileges could also be tied to good behavior.

While structural and organizational change are key components of reform, the culture of corruption and other negative ingrained practices need to be addressed as well. Reforms could include new ethical standards and disciplinary rules for personnel. Officers should be required to pass accreditation exams before they are considered for promotion.

Reform efforts in these three key areas—structural, organizational, and cultural—should be supported by a sound financial plan. Reforms that are only partially implemented due to a lack of funding usually backfire and disrupt the institution even further. Building new prisons, hiring new personnel, and instituting new correctional standards can and should all be done simultaneously. Investing heavily in BuCor's modernization in the next five to ten years would eventually pay dividends, lowering the costs of running inefficient, crime-infested prisons. Society at large would benefit from more secure facilities that better support the reintegrative mission.

Our recommendations may be considered idealistic. It is politically easier to pin the blame for dysfunction on individual actors. But while officials come and go, conditions will remain the same, absent reform.

A long-term solution will be the only way to rectify the government's history of inaction. The Pangkats have become so entrenched due to over-

crowding that any short-term solutions, such as attempts to remove them, are likely to fail. And the Pangkat system has become a stabilizing presence in Philippine prisons. Inmates distrust the prison administration because of endemic corruption, and many are left vulnerable by the inadequate number of guards. They have turned to Pangkat membership for support and protection.

Formalizing the shared governance model could be part of the solution. If this practice is officially acknowledged and monitored, it could be redirected toward good use, curtailing abuses. A policy of merit-based selection and training of inmate leaders, setting out the scope and limits of their functions, could be introduced. Our research suggests that inmate leaders are willing to assume more responsibility.

A shared governance arrangement may well be unacceptable in Western countries. Yet overcrowding is becoming a major problem across many Western jurisdictions. For all its flaws, we could do worse than to look to the Philippines for inspiration. ■

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*Prison management engages  
inmate leaders in a  
give-and-take relationship.*

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“The same inequalities of sex, race, and class that pervade all aspects of life are particularly pronounced in the regulation of prostitution.”

## Decriminalization and the Dilemmas of Regulating Prostitution

SUSAN DEWEY

Since time immemorial and in nearly every country in the world, prostitution has been a matter of contention among policy makers, legislators, and a host of actors concerned with public health, social order, and behavioral norms. Prostitution remains a political lightning rod because it is an intrinsic part of wider debates about the role of the state in regulating sexual behavior. It raises profound philosophical questions about the limits of freedom and mutual respect in civil society. How are “normative” forms of adult sexual expression to be distinguished from others deemed “deviant”? What responsibilities does the state have to protect the vulnerable from sexual exploitation, while respecting people’s rights to bodily autonomy?

There are striking parallels between the global North and the global South in the broad array of ideological forces concerned with prostitution. Feminists, religious groups, and legislators all engage in debates about moral standards, sex trafficking, and related social questions. Each of these groups has different beliefs about what prostitution entails, who engages in it, and the rationales that inform their choices.

Those belief systems lend themselves to particular solutions to the “problem” of prostitution. Evangelical Christian groups regard prostitution as a sinful condition from which women need to be rescued. They support well-funded networks of safe houses for women leaving the sex trade. Radical feminists condemn prostitution as the ultimate form of patriarchal domination; they advocate for criminal justice solutions that rely on policing, arrest, and detention.

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Sex workers’ rights activists, for their part, view prostitution as a fundamentally economic issue. They argue that those who engage in sexual labor are entitled to protections under international human rights standards.

Sex workers throughout the world face centuries’ worth of stigmatization and discrimination enshrined in law, policy, and everyday practices. Women, men, and transgender people in the sex industry are treated as second-class citizens and left exposed to harassment and violence, with limited access to justice.

Yet sex workers’ rights groups all over the world have successfully mobilized—on their own and by working with community partners—to lobby for legislation that respects their rights to fair treatment under the law, equal access to health care services, and even long-term state support, such as pensions. These hard-won gains have almost always been made in political conditions that stigmatize and marginalize sex workers.

Sex workers’ rights groups have achieved these successes in conjunction with their near-universal advocacy for decriminalization. Decriminalizing prostitution is not just a matter of revoking laws that criminally sanction the exchange of sex for money between consenting adults. It requires integrating prostitution into existing legislative and regulatory frameworks, and treating it as a line of work like any other.

Sex workers’ rights advocates envision that decriminalization would enable anyone with the capacity to consent to exchanging sex for money to do so without being subject to criminal justice oversight. But laws would remain in place to protect minors and others who are unable to consent, and to punish third parties or customers who exploit or coerce them into prostitution. Zoning ordinances and other municipal regulations would



set the terms and locations for decriminalized prostitution, just as they do with other licit but stigmatized forms of trade on the margins of society, such as street vending, tarot-card reading, or small-scale money lending.

## ENFORCEMENT APPROACHES

Decriminalization is one of the four approaches most commonly proposed for regulating prostitution, along with criminalization, legalization, and some mixture of the three. Criminalization, the globally predominant approach, makes prostitution illegal and dedicates considerable criminal justice resources to policing, arresting, sentencing, and incarcerating people who buy and sell sex. But women are far more likely to be arrested for selling sex than men are for buying sex. Poor, minority, and migrant women are consigned to the worst-paid forms of sex work, which makes them most likely to be assaulted by clients and arrested by police.

When sex work is criminalized, police often take a public order approach to street prostitution. Arrests usually occur only in response to nuisance complaints from neighborhood residents or aggressive soliciting in public, as when sex workers disrupt traffic by flagging down cars. Police sometimes stage undercover operations, posing as clients in order to investigate and arrest escorts who work indoors. These operations may be portrayed as a means of rescuing women from third parties who have forced or trafficked them into prostitution against their will. Yet sex workers' rights groups contend that such "rescue" efforts offer no feasible economic alternatives to prostitution and leave sex workers in an even more disadvantaged position.

Legalization, the second most common approach to regulating prostitution, paradoxically resembles criminalization in devoting considerable state resources to managing the sex industry. Operating a legal prostitution venue entails meeting extensive requirements for zoning, licenses, and registration. Such regulations favor establishments with more privileged owners, managers, and sex workers. Public health rules, taxes, and many other regulations can be difficult to navigate without extraordinary business acumen. Sex workers who are undocumented, underage, or otherwise unable to fulfill the requirements to operate legally, or who engage in prostitution in

unsanctioned areas, still face arrest and the possibility of criminal charges.

The third most common regulatory approach to prostitution involves some mixture of criminalization, legalization, and decriminalization. Each element is applied differently depending on a sex worker's identity and location, and on the clients' socioeconomic status. The same inequalities of sex, race, and class that pervade all aspects of life are particularly pronounced in the regulation of prostitution.

After spending nearly two decades immersed in sex workers' lives, I sometimes still find it difficult to convey the tremendous diversity of experiences under the sex industry's umbrella, and the equally diverse impacts that particular regulatory approaches have on sex workers. I have stood on a street corner with a shivering woman who was desperately in need of heroin—which many of the women in my long-term study called "medicine" because it would stave off potentially deadly withdrawal symptoms—and who was willing to get into a car with any passing motorist who would pay her as little as twenty dollars for a sex act. Yet I have also spent considerable time with brilliant, well-educated, and passionate women who regard sex work as a choice they have made from a varied menu of life options. Such women rarely face arrest.

Under criminalization, a drug-addicted woman working the streets will likely have weeks or even months in which police officers ignore her presence. This may resemble a de facto form of decriminalization. Yet those weeks or months will inevitably be punctuated by periods in which she is embroiled in the criminal justice system, though she is unlikely to remain incarcerated long enough to receive any kind of meaningful drug treatment, whether or not she wants it. Even with effective treatment, the lack of social safety nets in many countries makes it likely that she will fall back on substance abuse, and the prostitution that funds her habit, once she is released.

Nor does legalization leave a drug-addicted woman with a viable alternative. She will not meet the criteria to work in legal prostitution establishments. Like most workplaces, they require punctuality and adherence to rules and standards of appearance—expectations impossible for someone deep in addiction to meet.

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*Sexual labor is a livelihood  
for many women struggling  
to make ends meet.*

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Unevenly applied approaches to regulating prostitution are also evident in the freedom from police surveillance enjoyed by well-paid escorts as well as from taxation and the scheduling restrictions imposed by most employers. They may earn a thousand dollars or more a night for their services, and spend the rest of their time on far less lucrative pursuits.

Some might believe that such an escort has an obligation to pay taxes and publicly register her status as a sex worker. Others may feel that the escort is engaging in immoral acts, or endorsing male privilege in problematic ways that society should not condone. Yet because she discreetly works indoors with wealthy clients who pay cash, she is unlikely to be arrested or serve jail time. Nor would she benefit from conducting her business in a third party–controlled environment, such as a brothel, that would require her to turn over more than half of her earnings to a manager, as is standard practice in such venues.

## WHY DECRIMINALIZATION?

As anyone familiar with the criminal justice system's everyday operations knows, law enforcement practices vary tremendously even within single cities or regions. Policing of prostitution reflects the types of services, where they are performed, and the social-class status of both the sellers and the buyers of sex. The woman on the street is more likely to be arrested because she is in public and providing services predominantly to low-income men, whereas the escort is able to operate much more discreetly with higher-paying clients.

Decriminalization lessens these disparities by providing sex workers with equal protection under the law. It also removes the burden of a permanent record of sex industry involvement. Such records are compiled under both criminalization, through publicly available criminal records, and legalization, through mandatory registration and health checks.

Decriminalization—despite its relative rarity and frequent dilution by other laws that prohibit conditions necessary for prostitution to take place—has several primary benefits for sex workers and society at large. Yet it is by no means a panacea for the myriad problems that surround the regulation of prostitution.

First, decriminalization improves public safety by encouraging police officers and sex workers to be allies rather than adversaries and to share information that can help reduce crime. When sex

workers fear arrest, such cooperation is difficult, if not impossible. Avoiding arrest consumes a tremendous amount of sex workers' time and energy. It forces them to conduct business in areas that are poorly lit, isolated, and give a client control of the encounter, increasing the risk of violence. Decriminalization allows sex workers to exercise greater control over their encounters with clients, and to foster positive collaborative relationships with police and social services that can benefit communities. This leads to the reduction or elimination of harassment and violence by clients who target sex workers for abuse, believing that they can act with impunity because their victims are unlikely to file police reports due to mutual mistrust.

A second benefit is that decriminalization treats sex workers and their clients as equals by exempting prostitutes (like their clients) from mandatory health screenings and the potential for public exposure that legalization, and sometimes even criminalization, brings.

Another benefit of decriminalization is that it eliminates the financial and social costs of arresting and incarcerating women for prostitution, while keeping laws in place to prohibit sexual exploitation. Sex workers thus can become law-abiding, tax-paying citizens.

Decriminalization's supporters invoke workers' rights, human rights, and the principles of the public health strategy known as harm reduction. Many scholars and activists who support decriminalization argue that prostitution is a form of labor and should be respected as such, with the same workers' rights that apply to other industries.

The sex workers' rights movement emerged from the sociocultural revolutions that swept North America and Western Europe in the 1960s and 1970s. The American activist Carol Leigh (also known as "Scarlet Harlot") first coined the phrase "sex work" around 1980 to describe a broad range of sexual services exchanged for cash. In its early years, with its motto "Outlaw poverty, not prostitution," the movement emphasized that sexual labor is a livelihood for many women struggling to make ends meet, and argued that women should have the right to exercise autonomy over their bodies, including the choice to sell sex. That argument has since expanded to include sex workers of all genders and sexual orientations.

From the workers' rights perspective, sex work is a service industry. Consenting adults who are ca-

pable of contracting with one another for the sale and purchase of sex should be able to act at their own discretion without fear of arrest, prosecution, incarceration, or citation in a public record, which may constrain their future job prospects.

Human rights activists claim that the historical oppression of sex workers through state control is akin to colonial regimes that justified their systematic oppression with discourses of benign protection. A 2016 Amnesty International declaration in support of decriminalization argued that it reduces stigma, violence, and the socioeconomic disenfranchisement that sex workers face under both legalization and criminalization.

Today, the sex industry's most disadvantaged participants face intensified policing measures because of their status as rural-to-urban or cross-border migrants, or as impoverished minorities with limited alternatives. Such policing measures are often justified by invoking the ostensible need to protect migrants from sexual exploitation, even though many migrants enter the sex industry precisely because xenophobia or irregular citizenship status excludes them from other forms of work. The discrimination that sex workers face only compounds forms of stigma and marginalization associated with other aspects of their identities.

Harm-reduction advocates support decriminalization as part of their belief that prostitution, illicit drug use, and other related and equally stigmatized behaviors will continue to exist irrespective of prevailing public opinion—and that people who engage in such behaviors should not be further marginalized and stigmatized. Harm reduction emerged in the wake of the HIV/AIDS epidemic in the 1980s as a strategy to help those engaged in “risk behaviors,” such as having sex without a condom and sharing needles, alter some aspects of their practices in ways that can save their lives.

This means making clean syringes available at no cost, and providing condoms to sex workers along with information about how to stay safe. Rather than moralizing about the inherent evils of prostitution and drug use, and simply telling people to give up those activities, harm reduction's philosophy of “meeting people where they are at” aims to protect public health by providing them with the tools to make informed decisions in very difficult circumstances.

## THE ABOLITIONIST CASE

Opponents of decriminalizing prostitution argue that it would reinforce the oppression of women, create insurmountable challenges for the criminal justice system, and fail to reduce the stigma associated with the sex industry. Supporters of decriminalization have often come into conflict with advocates of abolishing prostitution, who argue that the sex industry endorses violence against women. In the abolitionists' view, all women are degraded by the sex industry's continued existence, its inherent sexism, and the physical, emotional, and sexual abuse pervasive within it.

Advocates of abolition argue that it is immoral and discriminatory for the state to allow men to purchase sex from women. Decriminalization, they claim, would only further entrench a patriarchal labor system in which women earn less money than men for the same jobs and have less access to well-paid jobs and promotions. They argue that prostitution should not be regarded as a

legitimate form of work for poor and otherwise marginalized women—that doing so reinforces deeply rooted gender inequalities. Society has a responsibility to address prostitution as a byproduct of poverty, sexism, addictions,

and other deeply rooted social problems, rather than condone it, these advocates contend.

Opponents also contend that decriminalization is impractical from a criminal justice standpoint. In their view, women are more likely to be forced into prostitution when the state takes a *laissez-faire* approach to the sex industry.

Prostitution typically takes place in settings where questioning is difficult due to the sensory overload common in sex industry venues. Police officers encounter dim lighting, loud music, difficult-to-navigate building structures or street layouts, people under the influence of alcohol or illicit drugs, and a pervasive distrust of the police. On the streets, prostitution is often mixed in with illicit activities such as gambling and selling and using drugs.

Such settings make it difficult for police to distinguish women who are freely consenting to prostitution from victims of sexual exploitation. The power and control dynamic of the latter scenario is virtually identical to the dynamic between victims and perpetrators of intimate partner vio-

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*Sex workers' rights activists view prostitution as a fundamentally economic issue.*

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lence, which makes it unlikely that victims will file a police report.

Opponents of decriminalization also assert that it does not aid sex workers because it often results in an untenable situation in which prostitution itself is not illegal but all the conditions necessary to carry it out remain criminalized, such as advertising and third-party involvement. Critics further observe that stigma and discrimination persist regardless of the type of regulatory approach taken to prostitution. If it were the case that legalization or decriminalization removed the stigma from prostitution, they argue, the sex industry would not be staffed almost entirely by poor and working-class people who have few other opportunities to earn a similar income.

### NEW ZEALAND OR BRAZIL?

Despite provoking vibrant discussion and debate, the full decriminalization of prostitution under the law remains exceedingly rare internationally. New Zealand is the only country in the world to have decriminalized prostitution at the national level. But most national and local governments engage in some form of de facto decriminalization through tolerance zones and selective policing. This effectively amounts to decriminalization through inaction, leaving sex workers in limbo with a status somewhere between criminal, victim, and public nuisance.

The New Zealand Parliament voted to decriminalize prostitution in 2003. Many observers attributed this milestone to the country's small population (five million) and robust civil society. Decriminalization drew widespread support from sex workers' rights groups, churches, public health organizations, and women's groups. One former sex worker, Georgina Beyer, was a member of Parliament at the time and testified in support of decriminalization.

Under New Zealand's law, up to four sex workers can jointly operate from a venue without a license issued by the municipality. Venues with a greater number of sex workers must obtain a license, which is confidential and cannot be inspected by police. Sex industry venues operated by third parties also must be licensed, but otherwise are subject to the same laws and regulations as businesses in other sectors. More than fifteen years after decriminalization was implemented,

relations between sex workers and police are notably improved, sex workers have brought—and won—harassment cases in the courts, and their rights are enshrined in law and policy.

Decriminalization, like any policy, has complex layers that reflect the state of civil society, culture, and human rights in a given country. With the exception of New Zealand, all other extant forms of decriminalization at the national level are de facto and based on prevailing norms in the local cultural context.

Brazil is one example. Like New Zealand, Brazil has no laws prohibiting the exchange of cash for sex. Unlike New Zealand, however, laws remain in place to prohibit the operation of brothels and other forms of third-party involvement in prostitution that are often necessary for it to take place.

Yet brothels and other third-party operations are prevalent throughout Brazil. They are enabled by a cultural context in which the rule of law works very differently than in New Zealand. Brazilian police routinely take protection money from brothel

owners, whom they allow to operate under the pretext that such establishments are in the business of selling food and drink, and that what happens between sex workers and their clients is outside the management's purview.

Thailand criminalizes prostitution, yet its massive sex industry is internationally notorious. It first burgeoned during the Vietnam War and continues to generate enormous profits from foreign tourists and Thai men alike. Like many other countries, Thailand has de facto tolerance zones, such as Patpong in Bangkok, where the sex industry is concentrated and operates largely unregulated despite its illegality.

The reality in any country that criminalizes prostitution is that if police arrested sex workers every time they solicited a client, jails would be unmanageably overcrowded. Already-overburdened criminal justice systems would quickly collapse.

### NOT A PANACEA

Decriminalization is a pragmatic, harm reduction-oriented, and human rights-centered approach to prostitution, acknowledging the reality of an economic activity that is likely as old as humanity. Yet more prevalent approaches to regulating prostitution are still reliant on forms of state control. Criminalization and legalization have es-

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*Advocates of abolition argue that decriminalization would only entrench a patriarchal system.*

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entially the same impact in terms of restricting sex workers' autonomy over their bodies and their labor.

Decriminalization is by no means a panacea for these problems. For millennia, and in many different cultures, sex workers have been targets for persecution stemming from a wide array of ideological, political, religious, and other social anxieties.

I spent nearly a decade immersed in research with Colorado women involved in street prostitution. They regularly cycled through jail, mandatory stays in detox centers (usually after an arrest for public intoxication) until their bodies were clear of drugs and alcohol, hospital emergency rooms (their primary health-care providers), the few drug treatment centers that accept Medicaid (the US government health-insurance program for the eligible poor), and halfway houses.

A few of the woman I knew had been arrested more than a hundred times in their years on the street. Some had served prison sentences for prostituting while HIV positive, a felony offense that went on the books in Colorado during the AIDS paranoia of the 1980s and remains in effect today because sex workers have few powerful legal advocates. Most of the women I knew had been "doing time on the installment plan," as they characterized their multiple months-long stints in correctional facilities, usually county jails, for prostitu-

tion and drug crimes. Most were struggling with addiction and had lived in extreme poverty long before taking to the street.

Working for years with so many women profoundly affected by mass incarceration complicated my support for decriminalization. I understood that the evidence shows that decriminalization has positive impacts on sex workers' health, safety, and overall well-being. I still believe strongly that decriminalization is a human rights issue. Yet as I contemplated how the lives of women I knew might change if prostitution were decriminalized, I realized that the laws in place that criminalize addiction and homelessness would still condemn them to frequent trips to jail and, for some women, prison sentences.

Prostitution is criminalized in most of the world. Where it is legal, the conditions in which it is practiced are subject to stringent restrictions that exclude many sex workers. They continue to be treated as criminals because they cannot participate in the legal economy.

Local governments worldwide must stop arresting, prosecuting, and incarcerating sex workers for actions they resort to because they are poor or lack the right to work legally. For the vast majority of sex workers, prostitution is an economic solution to economic needs. They are trying to pay the rent, to feed themselves and their children, and, just maybe, to have a better life. ■

“When the local police cooperate with immigration authorities, arrest on suspicion of any crime can lead to deportation.”

## US Immigration Law Enforcement in the ICE Era

TANYA GOLASH-BOZA

A president of the United States broke several records in the arena of immigration law enforcement during his first year in office. The largest number of people ever were deported from the country. Immigration and Customs Enforcement (ICE) made its largest monthly number of noncustodial arrests on record. And in that same month, ICE arrested over 15,000 people directly from local jails—another record.

That month was July 2009. As the African American community continued to celebrate the historic achievement of Barack Obama in becoming the first black president of the United States, the immigrant community was under siege by a federal agency that few had heard of at the time.

ICE—an agency that has only recently come under public scrutiny—was established in 2003, as part of the newly created Department of Homeland Security (DHS). In response to the terrorist attacks on the United States on September 11, 2001, President George W. Bush launched the War on Terror and created DHS. This new department of the federal government was designed to have authority over all aspects of domestic security. It subsumed several smaller agencies, including the Immigration and Naturalization Services (INS), the Secret Service, the Marshals Service, and the Coast Guard.

Although the primary mission of DHS is to prevent terrorism, the creation of the department led to unprecedented amounts of money being funneled into immigration law enforcement. In 2019, the DHS budget was \$75 billion. Most of this funding was allocated to agencies directly involved with immigration: 22 percent to Customs and Border Patrol (CBP), 12 percent to ICE, and 16 percent

to the Coast Guard. Since Donald Trump took office, congressional appropriations for DHS have increased 11 percent each year. The average annual increase under Obama was 2 percent.

The creation of ICE in 2003 led to a significant increase in deportations, although deportations had already been rising fast due to laws passed in 1996 when another Democrat was president—Bill Clinton. These laws expanded the grounds on which immigrants could be deported, narrowed the grounds for appeal, and eliminated due process in some deportation proceedings. ICE's creation brought a massive infusion of funds into immigration law enforcement, and a 27 percent increase in the number of deportations from 2002 to 2003. Deportations continued to rise for the remainder of the Bush administration.

When Obama took office in 2009, he inherited this well-oiled deportation machine. He appointed the governor of Arizona, Janet Napolitano, to head DHS, and she kept the machine moving full speed ahead. Soon, activists were denouncing Obama as the “deporter-in-chief.” In the first five years of his administration, deportations reached a total of two million people—more than the sum total of all deportations prior to 1995.

Calls to abolish ICE were heard in immigrant rights communities during Obama's presidency, but they did not make the mainstream news until the election of Trump to the White House in 2016. Trump campaigned on a promise to build a wall and to keep Mexican criminals and rapists out of the United States. One of his first actions as president was to order an entry ban targeting travelers from Muslim-majority nations.

The president's anti-immigrant and overtly racist rhetoric has galvanized his supporters and made racism acceptable again. It has also created an atmosphere of fear and vulnerability in immi-

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grant communities. At the same time, his vitriol has prompted a resurgence of anti-racist and pro-immigrant activism. Yet Trump's immigration law-enforcement apparatus is not nearly as robust as Obama's was. Many Democratic activists who have mobilized against Trump's anti-immigrant words and actions seem to be unaware of the intensity of federal enforcement operations before Trump's election.

A change in the party affiliation of the president will not necessarily lead to significant changes in how immigrants are treated in the United States. Democratic and Republican leaders alike have created terror in immigrant communities.

## HOME RAIDS

Maximo, a Dominican construction worker in his twenties, woke up early one morning in San Juan, Puerto Rico, to loud banging on his front door. He tried to ignore it—he wanted to sleep in and wasn't expecting anyone. But the banging persisted and became increasingly louder, so Maximo got out of bed and made his way toward the door. When he arrived in the entryway, he heard what sounded like a blast and saw the door smashed open from the outside.

The ICE agents who had broken down the front door pointed their weapons at Maximo and his two roommates. Maximo was from the Dominican Republic. One of his roommates was Puerto Rican, and the other was Venezuelan. The agents told the three men to sit on the floor. One by one, they were ordered to stand up, get their identification papers, and put on their clothes. Maximo gave the agents his Dominican passport. They asked if he was in the country illegally, and he admitted that he was.

The agents arrested Maximo and his Venezuelan roommate and took them to an immigration detention center. Maximo, who had been working in construction for four years, signed a voluntary departure form and was deported to Santo Domingo two days later.

This raid happened in 2003, the same year ICE was created. I spoke to Maximo in Santo Domingo in 2010, when I was conducting research for my book *Deported: Immigrant Policing, Disposable Labor, and Global Capitalism*. Home raids have continued unabated since then across the United States. They cause profound fear in immigrant communities.

Immigrants' rights organizations have started organizing "know your rights" training sessions to explain what you should do if ICE comes knocking at your door. They have also organized rapid response teams—groups of volunteers who commit to showing up and recording videos of ICE agents' actions if a raid happens in their town.

These nongovernmental organizations advise undocumented migrants and their family members to avoid opening the door if ICE agents pay a visit. Since those agents almost never have a warrant signed by a judge, if you don't open the door, they cannot legally break in and arrest you. In Maximo's case, they broke the door down. But in immigration cases, there is no such thing as inadmissible evidence—so Maximo was not able to prevent his deportation by arguing that the agents acted illegally. One goal of the rapid response teams is to prevent ICE agents from carrying out a raid without a warrant, simply by being present at these home raids and capturing them on video.

Maximo had entered Puerto Rico illegally. However, he had never been apprehended by immigration authorities or arrested for another crime, so it was highly unlikely that ICE agents were looking for him when they knocked on his door. It was next to impossible that they would have had a warrant for his arrest. Instead, they may have been looking for his roommate from Venezuela. They may have been looking for a previous occupant. Or they simply may have had the wrong address.

Since Maximo was not the direct target of this raid, he was swept up by what is called a collateral arrest. Once Maximo acknowledged to the ICE agents that he was not in the United States legally, they could arrest him. One goal of "know your rights" training is to teach immigrants not to answer these questions. Of course, when armed federal agents are in your house, it is difficult if not impossible to refuse to cooperate with them, no matter how well you know your rights.

In July 2019, I attended a rapid response meeting at a church in Washington, DC. There were over 100 people present. All of them had come to learn how to help if and when there was an ICE raid in the community. I signed up for a text messaging service that would notify me when an ICE raid happened. A week later, I received a text message indicating there was ICE activity near downtown

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*Some are arrested and handed over to ICE without ever being charged with a crime.*

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Washington. Twenty minutes later came another message that ICE had left the scene and no more responders were needed. As of this writing in September 2019, I have not received any additional messages about ICE activity in DC. This is likely because home raids are relatively uncommon.

## JAILHOUSE ARRESTS

ICE home raids stir deep fear in communities, but they are one of the least common ways in which immigrants are apprehended in the United States. TRAC Immigration—an agency based at Syracuse University that tracks enforcement actions—lists 25 different types of ICE arrests. It breaks down the 143,604 ICE arrests in 2018 into three main categories: cooperation with law enforcement (69 percent), community arrests (25 percent), and other arrests (6 percent). ICE home raids fall under community arrests—a category, also referred to as noncustodial arrests, that includes any arrest involving a person who is not in the custody of another agency. Home raids comprise only a fraction of noncustodial or community arrests.

The number of community arrests has fluctuated, but has not steadily risen or decreased, since TRAC first began tracking them in 2009. The largest number of community arrests recorded in a single month occurred in July 2009, when there were 6,001. The lowest number was in February 2015, when there were 1,676. In the first few months of 2017, when Trump took office, the number of community arrests remained steady at just over 3,000 per month—about equal to the average of 3,219 per month during the Obama administration. The data, which go up to June 2018, do not point to an increase in the number of community arrests during the first year of Trump administration.

Custodial arrests usually involve cooperation with local and state law enforcement. The data show a decline in the number of arrests that involve such cooperation. In July 2009, for example, ICE arrested 15,283 people directly from local jails. That is the largest number of jail-based arrests in the past decade, and three times as many as there were each month in the Trump administration's first six months.

Overall, immigration arrests through cooperation with law enforcement are still by far the most common. Nearly two-thirds of the 143,604 ICE arrests in 2018 involved people apprehended

directly via the Criminal Alien Program at local, state, and federal jails and prisons. This program serves as a mechanism by which authorities at correctional facilities notify ICE when they plan to release a noncitizen. If ICE believes that someone is in the United States illegally, or is deportable due to a criminal conviction, the jail or prison hands the person over to ICE agents.

These arrests at local jails have garnered some attention from activists, though training sessions on strategies for keeping ICE out of the jails tend not to attract the same number of people as sessions on preventing home raids. Yet arrests at local jails also sweep up people who—like many arrested in home raids—may not have been convicted of a crime. Nationwide, about half of all people in jails are pre-trial detainees—those who have been charged but not yet tried.

I met Sergio, a man in his early thirties, in Guatemala City in 2009, about a month after he had been deported from the United States. Sergio had been living in Nebraska with his wife, their two

children, and two more children that she had had before they met. One evening, Sergio had come home from his job at a warehouse after having a few beers with his fellow workers. His wife was upset that he had been drinking, and they began

to argue. After the argument became heated, she called the police, hoping that they would calm the situation down. Instead, the police arrested Sergio.

Once he was in jail, the authorities realized he was undocumented and informed ICE that he was in their custody. Sergio's wife came to the police station to try to get him released, but it was too late. ICE had already placed a hold on him due to his immigration status. She had not realized that her call to the police could lead to his deportation.

Once Sergio was deported to Guatemala, his wife faced heavy financial and emotional challenges. She had to raise four children on her own. Sergio had been the sole breadwinner in their household. Whereas he had earned \$20 an hour, her job in a secondhand shop paid only \$7.25 an hour. She had to go on public assistance to make ends meet.

Fully half of all ICE arrests over the past decade have been these kinds of jailhouse arrests. Those who are swept up include noncitizens with a wide variety of criminal backgrounds. In some cases, they are arrested and handed over to ICE without

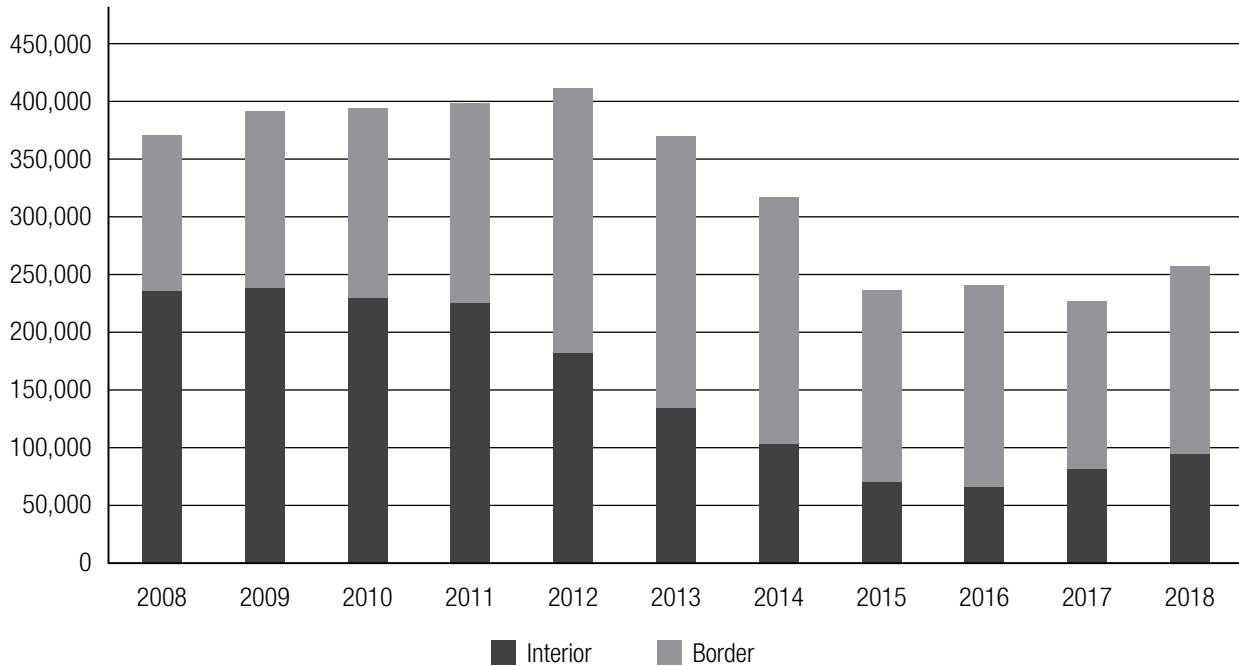
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*Racial disparities in  
policing lead to racial  
disparities in deportations.*

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## ICE Removals, 2008–18



ever being charged with a crime. In other cases, people are arrested and found to have a serious past criminal conviction, which leads to an ICE hold even in so-called sanctuary states such as California. But the majority of people who pass through jails have been arrested and convicted of misdemeanors such as driving under the influence, disorderly conduct, or drug possession. When the local police cooperate with immigration authorities, arrest on suspicion of any crime can lead to deportation.

### DEPORTATION TRENDS

ICE arrests lead to what the agency calls an “interior removal”—the kind of deportation that happens to a person living in the United States. This is in contrast to a “border removal,” which involves the deportation of someone caught trying to enter the country. In 2013, according to the Office of Immigration Statistics, the number of removals (both border and interior) reached an all-time peak of 433,034.

Some supporters of Obama have argued that the number of deportations during his presidency was not actually as high as it seems because many of them were border removals. However, the data reveal that interior removals also reached a record high during the Obama administration.

Interior removals are particularly devastating, since they often involve the deportation of a long-term resident. As in Sergio’s case, deportees are

nearly always men and are often the sole or primary breadwinners in their homes. In my research in the Central Valley of California, I met children who had been left to fend for themselves after the deportation of one or both of their parents.

DHS statistics do not break down pre-2003 deportations into “interior” and “border” categories. Nevertheless, we do know that there had never been more than 50,000 removals of any kind in any year before 1995. In 1984, for example, there were 18,696 deportations. The number of removals increased steadily thereafter, reaching 189,026 in 2001—ten times the figure for 1984.

The number of removals has decreased since its apex in 2013, and was down to 256,085 in 2018. The chart above provides a visual representation of interior versus border removals between 2008 and 2018. Note that these numbers are for ICE removals, which are slightly lower than overall DHS figures because ICE does not report on CBP removals. (This is why the peak year for deportations on the chart is 2012 rather than 2013.) I use ICE removals for this chart because DHS data do not break down removals into border versus interior. The data only go up to 2018 because, as of this writing, fiscal year 2019 has just ended, and data are not yet available for interior and border removals.

Border removals fluctuate in relation to the flow of migrants attempting to enter the United States. In contrast, interior removals fluctuate according

to how many resources the federal government decides to allocate to deporting people who live in the United States—people like Maximo and Sergio—and how much cooperation it is able to secure from local and state agencies.

Interior removals reached a peak of 237,941 in 2009, and have declined since, reaching a low of 65,332 in 2016. When Donald Trump became president, he vowed to increase such deportations. Although the Trump administration has not been able to match the all-time highs under Obama, the number of interior removals rose to nearly 100,000 in 2018.

Yet even if the federal government were able to achieve the record 2009 deportation numbers again, it would take 42 years to remove the ten million undocumented migrants living in the United States. At the current rate of 100,000 interior removals a year, it would take 100 years. Despite the rhetoric spouted by anti-immigrant politicians, the goal of interior enforcement evidently is not to remove all undocumented migrants. Instead, we may surmise that the goals are twofold: 1) to make immigrants more exploitable by deepening the fear and vulnerability in communities where undocumented noncitizens live; and 2) to appease anti-immigrant Americans who accept the argument that our economic woes are caused by a massive influx of foreigners.

## TARGETED MINORITIES

The tactics that the federal government currently uses to apprehend undocumented migrants disproportionately target black and Latino immigrants. Nearly all deportees—98 percent—are from Latin America and the Caribbean. Even though about 25 percent of undocumented migrants in the United States are from Asia and Europe, people from those regions are rarely deported. The vast majority of deportees—90 percent—are men, even though about half of all noncitizens are women. These are clear racial and gendered dimensions of the increased intensity of immigration law enforcement.

There are historical precedents to the current situation. In the early 1930s, when the Immigration and Naturalization Service mounted a repatriation campaign, over 400,000 people of Mexican origin were deported to Mexico. In 1954, the Border Patrol carried out massive roundups

of Mexicans, which came to be known as Operation Wetback and resulted in the return of about a million Mexicans to their home country. These operations were directed specifically at Mexicans. Today, however, Mexicans are not the only ones being deported.

Mass deportation is affecting Central Americans, South Americans, and people from the Caribbean. Instead of mass raids in central plazas in Los Angeles, we see raids of meat-processing plants in Mississippi and other workplaces across the country. ICE can't raid a factory just because everyone who works there is Mexican. But it can launch a raid based on reports that the workers are all undocumented, and nearly all of them just happen to be Guatemalan.

Cooperation between local law enforcement and ICE not only deepens the vulnerability of vulnerable communities; it also leads to disproportionate targeting of black and Latino migrants. This is because police officers spend more time patrolling black and Latino communities, stop and frisk black and Latino people more than they do whites or Asians, and are more likely to arrest blacks and Latinos than whites or Asians.

Racial disparities in policing lead to racial disparities in deportations because most deportations are the result of some level of cooperation between ICE and local law enforcement. In some cases, this cooperation is direct—for example, some local law enforcement officers are deputized by ICE under Section 287(g) of the Immigration and Nationality Act, and can question anyone arrested by local police about their citizenship status. In other cases, since local law enforcement agencies share all arrestees' fingerprints with the Federal Bureau of Investigation, the latter in turn shares the fingerprints of noncitizens with ICE. ICE uses this information to arrest people when they are released from local custody. Home raids are carried out directly by ICE, but they often rely on information from law enforcement agencies to target immigrants with criminal convictions.

## LOCAL REMEDIES

There has been talk of “comprehensive immigration reform” for the past two decades, but this has led to little or no action by Congress. While lawmakers have extensively debated but failed to provide a path to legalization for immigrants in

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*Trump's immigration  
law-enforcement apparatus  
is not nearly as robust  
as Obama's was.*

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the United States, the executive branch has steadily ramped up its efforts to deport as many people as it can—including many who would have been eligible for legalization under the various immigration reform proposals in Congress.

Local law enforcement agencies have been the primary means by which immigrants are funneled into the deportation system. In response, some states have begun to place limits on this pipeline to deportation. In 2014 (during the Obama administration), California passed a law called the TRUST Act that limits cooperation between local law enforcement and immigration authorities. If a similar law had been in place in Nebraska, Sergio could have avoided deportation.

Under the TRUST Act, a sheriff is not permitted to hold people for ICE unless they have been convicted of serious offenses. This has led to a reduction in the number of people deported from California since the law's implementation. If other states were to follow suit, ICE would be seriously limited in its ability to deport large numbers of people. Under the Trump administration, some federal agencies have withheld grant funding from cities that fail to cooperate with immigration au-

thorities. This may have a chilling effect on efforts to disentangle immigration law enforcement from policing.

In addition to ending cooperation with ICE, local law enforcement agencies should stop using arrests and jail stays as their primary ways of ensuring safety in communities. Arresting Sergio may have seemed like the best way to resolve the argument he was having with his wife, but it is likely that Sergio required help with his drinking problem and with his relationship—help that jails are ill-equipped to provide. Jail populations are disproportionately composed of people who are homeless, mentally ill, and dealing with substance abuse and poverty. Jails are not the solutions to any of these societal problems, and neither is deportation.

Nor is deportation a viable solution to problems associated with undocumented migration. There are over ten million undocumented migrants in the United States. The vast majority of them have no pathway to legalization. Creating paths for undocumented migrants to earn legal status is the easiest, cheapest, and most humane way to solve the immigration “problem.” ■

“The vast majority of the world’s judicial executions occur in a handful of nations.”

# The Death Penalty’s Continued Decline

DAVID T. JOHNSON AND FRANKLIN E. ZIMRING

Ten years ago, our book *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* was published. On the first page, we argued that Asia would be “the next frontier” in the two-century debate about execution as a criminal punishment, because 90 percent of the world’s executions take place in the region, making it a laboratory for learning what influences death penalty policy and practice in the rest of the world. We concluded the book with the observation that “the rate of executions and the prevalence of executing nations in Asia are declining and probably will continue to decline,” and that democratic reforms and human rights concerns are key drivers of death penalty downsizing in Asia and the rest of the world.

Lately, though, some other observers are saying that times have changed. In 2016, for example, Amnesty International reported “a dramatic global rise in the number of executions,” with “more people put to death in 2015 than at any point in the last quarter-century.” In 2018, the historian Samuel Moyn claimed that “the human rights movement has failed” and that “nearly every country seems to be backsliding.” And in 2019, Freedom House announced that in the previous year, more countries became more oppressive than more free—the 13th consecutive year of more decline than progress, according to its ratings.

Many well-regarded books have described and lamented these trends, with titles such as *How Democracies Die*, *How Democracy Ends*, *On Tyranny*, *The Road to Unfreedom*, and *Democracy May Not Exist But We’ll Miss It When It’s Gone*. As some democracies erode and human rights claims are challenged by authoritarian and populist forces, is a

sustained resurgence of capital punishment inevitable?

## ABOLITIONIST TRENDS

In most cultures and most of human history, the death penalty was taken for granted and applied to a wide range of offenders. In ancient Israel, execution was the punishment for everything from murder and magic to blasphemy, bestiality, and cursing one’s parents. In eighteenth-century Britain, more than 200 crimes were punishable by death, including cutting down a tree and robbing a rabbit warren.

But in the past half-century, use of the death penalty has declined dramatically. As of 1970, only 21 nations (about 1 in 8) had abolished the death penalty for all crimes or for “ordinary offenses” (meaning all crimes except insurrection and offenses committed in wartime). Today, the total is 114. Twenty-eight more nations retain the death penalty in law but have not executed anyone for at least 10 years.

At present, therefore, nearly three-quarters of all nations have abolished the death penalty in law or practice. The trend has continued in the most recent years. As Table 1 shows, the percentage of countries retaining capital punishment dropped by half over the past three decades, from 56 percent in 1988 to 28 percent in 2018. The proportion of retentionist countries continued to fall during the latest part of that period, from 32 percent in 2007 to 28 percent in 2018.

Although the trend toward abolition continues, it is also true that the pace has slowed since the 1990s. As Table 2 shows, 37 countries abolished the death penalty in the 1990s, compared with 23 countries in the 2000s, and 12 in the 2010s. Thus, the most recent two decades combined have produced less abolition than occurred in the 1990s.

The pace of abolition has slowed for several reasons, including the decline of democracy and the

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Table 1. The Number of Abolitionist & Retentionist Countries, 1988–2018

	Completely Abolitionist	Abolitionist for Ordinary Offenses	De Facto Abolitionist	Retentionist	Total Number of Countries
1988	35 (19%)	18 (10%)	26 (14%)	101 (56%)	180
1995	58 (30%)	14 (7%)	30 (16%)	90 (47%)	192
2000	76 (39%)	11 (6%)	36 (19%)	71 (37%)	194
2007	91 (46%)	10 (5%)	33 (17%)	63 (32%)	197
2018	106 (54%)	8 (4%)	28 (14%)	56 (28%)	198

Source: Amnesty International reports.

retrenchment of human rights in many countries. But the slower pace of abolition is also a statistical inevitability: by the year 2000, much of the lowest-hanging fruit had already been picked. Most notably, there will never be another cascade of abolition like the one that occurred in Central and Eastern Europe after the fall of the Berlin Wall in 1989.

During the long decade from 1989 to 2001, 23 European countries abolished capital punishment. Some did so as part of an effort to draw free from the legacy of political domination by the Soviets and their collaborators. Others abolished the death penalty because membership in the Council of Europe (an organization that promotes democracy and human rights) was made conditional on the renunciation of capital punishment.

### HEAVY USERS

The world is not neatly bifurcated into countries that have abolished capital punishment and those that still use it. Nations that retain the death penalty use it at very different rates. Consider the contrast between China and India, the two most

populous nations. Both retain capital punishment, but the total number of judicial (legally established) executions in India over the past 70 years (around 3,500) is less than China's annual average over the same period. And since 2000, India has executed only four people, giving it a per capita rate of execution that is approximately 1/25,000th the rate in China over the same two decades.

The vast majority of the world's judicial executions occur in a handful of nations. In 2018, for example, 78 percent of all confirmed executions occurred in just four countries—Iran, Saudi Arabia, Vietnam, and Iraq. (This count excludes China, for which accurate figures are difficult to discern, as we explain below.) In 2016 and 2017, the top four executing nations accounted for 87 percent and 84 percent of the world's executions, respectively.

In short, an empirical approach to capital punishment must put things in proportion. The most frequent practitioners of execution are more important than all the others put together. So what are the trends in recent years among the world's heaviest users of capital punishment?

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*Capital punishment is almost kaput in several regions of the world.*

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Table 2. Number of Countries That Abolished the Death Penalty by Decade, 1980s–2010s

	Abolished All	Abolished Ordinary	Total Abolished	% of Countries Abolished in Decade
1980s	11	3	14	8%
1990s	33	4	37	19%
2000s	18	5	23	12%
2010–18*	11	1	12	6%

\*This count remains the same as of August 2019. Source: Amnesty International reports.

Table 3. Heavy Users of Capital Punishment: number of people executed in 29 countries in 1994–98 and 2013–17, with the annual rate of execution per million population in parentheses.

Country	Executions 1994–98 (rate)	Executions 2013–17 (rate)
China	n.a. (see text for explanation)	n.a. (see text for explanation)
Iran	505 (1.59)	2709 (6.68)
Saudi Arabia	465 (4.65)	627 (3.81)
Iraq	n.a., but probably in the 100s	469 (2.78)
Ukraine	389 (1.55)	0
Turkmenistan	373 (14.92)	0
United States	274 (0.20)	145 (0.09)
Texas	93 (0.94)	53 (0.37)
Virginia	37 (1.08)	4 (0.09)
Nigeria	248 (0.41)	7 (0.007)
Singapore	242 (13.83)	18 (0.63)
Belarus	168 (3.20)	9 (0.19)
Russia	161 (0.22)	0
Kazakhstan	148 (1.74)	0
Vietnam	145 (0.38)	429, for 3 years from 8/13 to 7/16 (1.50)
Egypt	132 (0.43)	116 (0.24)
Taiwan	121 (1.13)	18 (0.15)
Congo	100 (0.43)	0
Yemen	88 (1.10)	45 (0.32)
Sierra Leone	71 (2.84)	0
Kyrgyzstan	70 (2.80)	0
South Korea	57 (0.25)	0
Jordan	55 (2.12)	28 (0.58)
Pakistan	34 (0.05)	480 (0.49)
Afghanistan	34 (0.36)	24 (0.14)
Libya	31 (1.17)	0
Japan	24 (0.04)	21 (0.03)
India	24 (0.02)	2 (0.0003)
Rwanda	23 (0.58)	0
Zimbabwe	22 (0.37)	0
Indonesia	4 (0.02)	23 (0.09)

Sources: Oxford University Professor Roger Hood in *Punishment & Society* (2001, p. 336), Amnesty International reports, and the Death Penalty Database of the Cornell Center on the Death Penalty Worldwide.

Table 3 presents the number of executions in 29 countries for the periods 1994–98 and 2013–17. All but one of these countries executed at least 20 people in the first five-year period. The exception is Indonesia, which we include because it has the fourth-largest population in the world and the largest Muslim population of any nation. The main

pattern in Table 3 is major decline among most of the world's heaviest users of capital punishment.

Start with China, which has long led the world in the number of executions. In 2009, Amnesty International stopped publishing estimates of the minimum number of executions per year in China, because the lack of transparency made reliable

counts impossible. But other sources (including the Dui Hua Foundation) indicate that executions in China have declined dramatically in the past two decades, from 15,000 or more per year in the late 1990s and early 2000s to approximately 2,400 in 2013 and 2,000 in 2016.

Much attention has been focused on the broad and sustained offensive against human rights under Xi Jinping, who became general secretary of the Chinese Communist Party (CCP) in 2012 and president of the People's Republic of China (PRC) in 2013. Nonetheless, the best available evidence suggests that over the past two decades, the number of judicial executions in the PRC has declined by more than 80 percent—and this decline has continued during Xi's presidency. In absolute terms, this is one of the most dramatic declines in judicial executions any country has ever experienced.

Of the other 28 countries in Table 3, executions ended in 11 (Ukraine, Turkmenistan, Russia, Kazakhstan, Congo, Sierra Leone, Kyrgyzstan, South Korea, Libya, Rwanda, and Zimbabwe), 9 had their execution rate decline by more than half (the United States, Nigeria, Singapore, Belarus, Taiwan, Yemen, Jordan, Afghanistan, and India), and 2 had modest declines (Saudi Arabia and Egypt). In total, 23 of the 29 heaviest users of capital punishment in the latter half of the 1990s reduced their usage of execution in subsequent years. Of the remaining six nations, the execution rate rose significantly in four (Iran, Vietnam, Pakistan, and Indonesia) and remained stable in one (Japan). The rate change for Iraq cannot be determined because reliable figures for the 1990s are unavailable.

The execution rate increases in Table 3 deserve some discussion. The big rise in Iran gives it the highest per capita execution rate in the world for 2013–17, with nearly 7 executions per one million population per year. This is more than four times higher than the estimated rate for China (1.5) in the same period, but it is just three-fifths the peak execution rate (11.5) in China during the “Strike Hard” campaign of 1998–2001, when the CCP harshly cracked down on crime. It is also less than half of Singapore's rate (13.8) for 1994–98, when Prime Minister Lee Kuan Yew's government routinely used the death penalty against drug traffickers and users. Even so, the number of people

executed in Iran has increased so markedly over the past two decades that if we set China aside (for lack of reliable data), the total number of executions for all heavy users of capital punishment in 2013–17 (4,701) was actually greater than the total number of executions for all heavy users in 1994–98 (4,032).

Over the same quarter-century, the execution rate in Vietnam increased fourfold or more (from 0.38 to 1.5, though the latter rate is based on only three years of data). But this rise could be more apparent than real, since Vietnam seldom disclosed executions in the 1990s. In Pakistan, the execution increase was tenfold, from 0.05 to 0.49. These are both large increases, but Vietnam's rate in the 2010s would not have ranked it among the top 10 executing nations in the 1990s, while Pakistan's present rate would not have ranked it among the top 15 executing nations two decades earlier.

And then there is Indonesia. Since we completed our study of capital punishment in Asia a decade ago, Indonesia has executed 23 people—20 for drug trafficking, 17 of whom were foreigners. Over the past two decades, executions in Indonesia rose largely because of their political currency in the country's war on drugs.

At present, however, Indonesia's execution rate is the same as that for the United States (midway between the rates for Japan and Taiwan), and less than 1/70th the rate for Iran. To put this in perspective, the total number of executions in Indonesia between 2013 and 2017 was approximately the same as the number of executions in Iran during a typical two-week period in the same interval. Even after the recent rise, executions in Indonesia account for less than one-half of 1 percent of all the executions in Asia.

## REGIONAL STRONGHOLDS

Capital punishment is almost kaput in several regions of the world. All of Europe has abolished the death penalty except for Belarus, where President Alexander Lukashenko has maintained dictatorial rule since 1994. In Central and South America, 18 countries have abolished the death penalty and only 2 retain it, Belize and Guyana. In North America, Canada and Mexico have abolished capital punishment while the United States retains it. In Africa, 16 of 54 nations retain capital punishment, but only a few perform executions in

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*Executions in China have declined dramatically in the past two decades.*

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any given year. In 2018, just 4 countries—Egypt, Somalia, South Sudan, and Botswana—carried out all of the continent’s 65 executions.

There remain three death penalty strongholds in the world today: the United States, Muslim-majority nations, and Asia. Yet even in these places, many jurisdictions do not use the death penalty, and where it does exist there have been significant declines in its usage.

In the United States, 29 states retain capital punishment, but governors in 4 of them—California, Colorado, Oregon, and Pennsylvania—have declared official moratoria on executions. Thus, half of the 50 states have either abolished capital punishment or suspended executions. As in the world generally, the great majority of US executions are concentrated in a handful of places. Since 1977, more than half of them have been carried out by the three southern states of Texas, Virginia, and Oklahoma—and more than a third by Texas alone.

The death penalty is also retained in the US federal and military criminal justice systems, but there have been no executions in the latter for more than half a century. In the federal system, no executions have been carried out since 2003. In July 2019, however, Attorney General William Barr ordered the head of the Bureau of Prisons to carry out executions in the months to come. His stated aims were to bring the “worst criminals” to justice and to deliver relief to victims and their family members, but his move has reignited legal challenges to federal capital punishment. At the time of this writing in August 2019, it remains to be seen whether the 16-year federal moratorium on executions will end.

In the Islamic world, religious beliefs often shape death penalty policy and practice. Some Islamic states even claim that capital punishment must be practiced because it is divinely ordained. (Similar claims have been made in the United States by some Christian leaders.) There are 50 Muslim-majority nations in the world as of 2019, and 26 of them retain capital punishment. They account for nearly half of the 56 nations in the world that currently retain the death penalty.

Retention of capital punishment is especially prevalent among three kinds of Muslim-majority nations: those (like Iran and Saudi Arabia) that have formally established Islam as the ideological foundation of the state (5 of 6 nations retain);

those (like Pakistan and Iraq) that have endorsed Islam as their state religion (12 of 18 nations retain); and those (like Indonesia and Bangladesh) where the official position on religion is either unclear or unstated (4 of 4 nations retain).

Among the 22 Muslim-majority nations that have secular constitutional systems, with a formal separation between government and religion, only 5 retain the death penalty (Chad, Gambia, Lebanon, Nigeria, and the Palestinian territories). Another 13 have abolished capital punishment in law (including Turkey and Turkmenistan); 11 have abolished it in practice (including Sierra Leone and Tajikistan). While the death penalty remains strong in many Muslim-majority nations, there is almost as much abolition in this region of the world as there is within the United States.

What about Asia, the focus of our book ten years ago? Approximately 60 percent of the world’s population lives in Asia, and in recent years most of the world’s judicial executions have continued to occur in this region—the large majority of them in China.

In 2009, we described the status of the death penalty in the 29 jurisdictions that constitute Asia. At that time, 9 jurisdictions had abolished the death penalty for all crimes, 7 had abolished it de facto by

not executing anyone for 10 or more years, and 13 retained the death penalty and continued to carry out executions. Ten years later, the distribution is almost the same. The only change occurred in Mongolia, where the death penalty was abolished in 2016 following an eight-year moratorium on executions.

During the past decade, we have seen little legal change in Asia, some significant declines in executions (as in China and Singapore), and a few increases (as in Vietnam, Pakistan, and Indonesia). In our view, Asia is still the next frontier in the worldwide debate over the death penalty. We remain optimistic that capital punishment in Asia will continue to decline in the years to come.

## BEYOND ABOLITION

Despite the lack of legislative change in Asia over the past decade, there are three areas in which recent Asian death penalty developments are encouraging. First, the number of judicial executions in Asia has almost certainly declined significantly. The drop in China all by itself probably reduced

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*The drop in China all by itself probably reduced the worldwide total of executions by half.*

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the worldwide total of executions by half since the start of the new century, and this suggests a decline in East Asia of at least two-thirds.

Second, there is broad stability in both *de facto* abolition and reduced execution rates, despite political circumstances that encourage the aggressive use of force by governments in the region. In the Philippines, where capital punishment has been abolished twice (in 1987, after Ferdinand Marcos was deposed, and in 2006, after it was reinstated in 1993), the explicitly bloodthirsty regime of President Rodrigo Duterte has tried to reinstitute the death penalty once again. But so far it has failed, despite Duterte's control over the legislative and executive branches of government. Judicial reluctance and a complex legal framework have diverted state violence into informal drug war carnage.

Similarly, a retrograde military regime in Thailand and an aggressively populist government in India have not interrupted relatively stable policies of near-zero executions. Even the recent surge in executions in Indonesia could be a sign of the problematic status of state killing in contemporary Asia. Why else would that state execute drug offenders almost exclusively while making sure that 85 percent of those put to death are foreign nationals?

The third encouraging sign is that execution can no longer be considered just another criminal sanction in Asia. In most of the region, as in most of the non-fundamentalist Islamic nations in the world, a strong stigma attaches to execution as an act of criminal punishment. This stigma is well established in most developed nations and in the discourse of human rights and international law. While it may be difficult to formally abolish the death penalty in many of the nations where it remains, there are significant barriers to restoring it to business as usual. In the immortal words of the US Supreme Court, death is different.

It would be premature to regard state execution as an endangered species of governmental policy worldwide, given the current political environment. Yet the practice remains under sustained attack by

both domestic and international opponents, and it seems inconceivable that modern governments will ever again use execution as a standard part of their administration of criminal justice. The Chinese reform of 2007, which requires death sentences to be reviewed by the Supreme People's Court, was a culminating indication that death is different in Asia as well. Progress toward the universal abolition of capital punishment may take much longer than the human rights movement desires, but the eventual outcome seems clear. The question is not "if," but "when."

Once that happens, will the campaign against capital punishment be seen as a freestanding triumph in the evolution of human rights? Or will those who have succeeded in stigmatizing premeditated and judicially sanctioned state killing recognize the links between judicial execution and the less formally sanctioned but much more common practice of extrajudicial killing by police and military personnel?

The abolition of capital punishment in the Philippines is a remarkable achievement, but tens of thousands of citizens in that country have been deliberately killed in an openly declared war on drugs led by Duterte. And in the United States, the annual number of judicial executions has dropped to less than 25 in recent years, but 40 times that many civilians are killed every year through the use of lethal force by police.

The main advantage of treating the campaign against capital punishment as a single-issue crusade is that doing so has built widespread support among governments and educated publics. But the main problem with a single-issue approach is that lower-visibility state violence produces a much higher death toll. If an isolated campaign against judicial execution coincides with or provokes higher levels of police and military killings, the number of unjustified killings could actually increase. In the long run, a successful campaign against judicial execution could seem quaint if it does not connect with concerns about other types of state violence. ■

# Lessons on the Drug War from an Enemy

MAZIYAR GHIABI

“**W**e’re wasting our time if we don’t get tough with drug dealers, and that toughness includes the death penalty,” said US President Donald Trump on March 18, 2018, in a speech in New Hampshire outlining his administration’s response to the opioid epidemic. By “drug dealers,” the president evidently did not mean to refer to the pharmaceutical corporations, such as Purdue Pharma, involved in the production and marketing of opioid painkillers like OxyContin, responsible for more than 200,000 deaths in the United States to date.

Trump has been more concerned with traditional criminal justice approaches targeting illicit drug dealers, while rejecting the growing cannabis legalization movement. His speech was later fleshed out by then–Attorney General Jeff Sessions, who urged federal prosecutors to seek the death penalty for large-scale drug traffickers. Hypothetically, that policy could end up sending legal cannabis growers to death row, because US federal law still classifies cannabis as an illegal substance, though a number of states have legalized it.

Nothing new on the Western front, we might say: Trump’s approach to illicit drugs is reminiscent of his closest ideological predecessors, Ronald Reagan and Richard Nixon. Their Republican administrations erected the global infrastructure of the War on Drugs, an expression first coined by Nixon in a now-historic speech in 1971.

This ideological approach had little to do with Americans’ health and well-being. In a 1994 interview, Nixon’s Watergate co-conspirator and domestic policy adviser John Ehrlichman said, “The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. . . . We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.”

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Drugs embodied the public’s anxieties amid social transformation—but more than that, they were instrumental in the game of distraction and destruction of social groups challenging state interests. From the 1980s onward, the US government enforced a more powerful form of drug criminalization, undertaking a systemic crack-down on drug users, especially precarious minorities, which resulted in mass incarceration: about half of all prisoners are drug offenders, including disproportionate numbers of blacks and Latinos. This crackdown was also a major impetus for the militarization of policing, which broadened the scope of intervention by heavily armed police forces against minor instances of petty drug dealing.

The list of side effects of these policies is endless, from the crack and methamphetamine epidemics to the opioid crisis. By now, it is a near-impossible task to find commentators willing to argue that the War on Drugs has been a success. Except for Trump, who demands ever-tougher measures.

## THE RELIGION OF PROHIBITION

Religion plays an underlying role in many campaigns against drugs. Condemnation of drugs as “evil” has been recurrent throughout the world, from the Philippines, where President Rodrigo Duterte’s violent crackdown has left thousands of people dead (though he has acknowledged having personally been treated with fentanyl, a powerful opioid), to China and Russia. One could look at the War on Drugs as America’s most potent ideological export (together with capitalism’s chronic consumerism): it has had a powerful homogenizing effect on many countries’ domestic policies and has shaped people’s lives across the globe.

This rhetoric about the evil nature of drugs has also been embraced by the Holy See, even during the current progressive tenure of Pope Francis. In 2014, the Vatican released a communiqué criticizing the trend toward regulation and legalization of drugs (including cannabis), insisting that “drugs are an evil and with evil there can be neither surrender nor compromise.”

The policy of prohibition gained influence even among America's archenemies, like the Islamic Republic of Iran. In 1979, anticipating the fight against crack cocaine and Nancy Reagan's "Just Say No" campaign, Iran's revolutionary leadership under Ayatollah Ruhollah Khomeini banned all drugs, including alcohol. (Trump, being a teetotaler, might have agreed with the ayatollah.) The Islamist cadres in Iran denounced drug traffickers as "merchants of death" whose "evils" would be punished with severe sentences, including the death penalty, under the republic's new criminal code. But prohibition backfired: in the 1990s, Iran faced a surge in heroin consumption, paralleling the US crack epidemic.

It seems that prohibition is the universal religion of our era, the opium of power. Yet while countries with secular forms of government such as the United States, Russia, and China have adopted religiously observant policies of drug prohibition and repression, Iran changed its mind following its initial infatuation with prohibition in the 1980s.

### UNLIKELY REFORMER

In 2017, the Islamic Republic's parliament approved a drug law amendment suspending the application of the death penalty for drug offenders, sparing the lives of at least 5,000 people awaiting execution. (Up to then, Iran was the world's top issuer of death sentences—aside from China, for which reliable counts are lacking—and 80 percent of those sentences were imposed on drug traffickers.) This change was part of a longer-term shift in Iran's approach to criminal justice and public health.

With neighboring Afghanistan producing enormous amounts of opiates, especially since the US-led invasion in 2001, Iran has been at the front line of antinarcotics operations, winning the praise of the United Nations Office on Drugs and Crime. But law enforcement strategies did not prove effective. By the early 2000s, Iranian officials—including the supreme leader, Ayatollah Ali Khomeini, the country's highest religious and political authority—realized that the drug war was causing more harm than benefit.

Drug offenders filled the prisons, and up to 70 percent of them were users. A severe HIV/AIDS epidemic in the prison population, caused by unsafe practices like sharing needles, posed a risk of

spreading to the general population. Public officials, in tandem with numerous grassroots organizations, agreed that in order to tackle the health risks of an uncontrollable drug market, public institutions had to introduce so-called harm reduction policies.

By the end of the 2000s, after a few years of underground initiatives to counter the HIV/AIDS epidemic, Iran had scaled up programs for distributing needles to drug users (initially also in prisons), decreasing the risk of disease spreading through shared paraphernalia; it allowed private methadone clinics to provide substitution treatment for opiate users; and it supported addiction recovery groups, establishing a multi-layered system of rehabilitation. The government is now debating whether to roll out an overdose-prevention program that will provide naloxone, a life-saving drug, to opiate users.

This harm reduction mentality spilled over to other areas of drug policy. Authorities in Tehran have discussed the possibility of decriminalizing

and regulating the sale of drugs such as cannabis and opium. Both substances are part of a medicalization trend in Iran. State clinics already distribute opium tincture (which was widely used as a medicine in the first half of the twentieth

century) to elderly opium smokers unable to give up their habit. As for cannabis, clerical authorities have not indicated that they would veto its medical use if scientific evidence confirms its utility for treating health problems.

State policy on illicit drugs has progressively adopted a tolerant approach to consumption, while combating trafficking organizations. In particular, cannabis use is widely tolerated, while policing is diverted to what Iranian officials define as "more dangerous substances," such as heroin and crystal meth. But the police do not automatically arrest users, even those caught with drugs in their possession; they are usually sent to state-run treatment centers. These centers, however, are compulsory rather than voluntary, and often have degrading conditions and a lack of medical supervision.

Thus it appears that a theocracy, as commentators often call the Islamic Republic, finds it easier than the United States to evolve its approach to drugs. That should not be too surprising, since the Islamic Republic has a history of experimentation on health questions, including state support for

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*It seems that prohibition is the universal religion of our era, the opium of power.*

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sex-reassignment surgery, stem-cell research, and birth control. Religious authorities in Iran have upheld the principle of public utility. Rather than presenting an impediment to legal reform, they legitimized a drug policy that had little or no public support.

## UNCLENCHING THE FIST

As Iran's experience shows, adopting harm reduction policies allows the state to achieve a truce in the War on Drugs. In Iran, this new approach has enabled nationwide health interventions reducing the rate of HIV/AIDS contagion and facilitating the creation of an addiction recovery system. But what happens when a state refuses to accept a truce in order to reduce harm and violence?

In 2003, under a pro-US conservative president, Francisco Flores, the government of El Salvador introduced its *mano dura* (iron fist) plan for cracking down on criminal gangs. Its effects won Flores a dubious place in history. The prison population doubled, and overcrowding reached 320 percent. Prisons turned into headquarters for competing gang leaders. Homicide rates increased by almost two-thirds, and El Salvador topped the list of the world's most violent countries.

A small group of mediators worked to negotiate a truce among rival gangs as well as the state, with the principal objective of reducing the violence. The resulting truce, though effective in bringing down homicide rates, proved unpopular, just as harm reduction had been contentious elsewhere.

Violence continues to plague El Salvador and other Central American countries, leading to humanitarian emergencies and emigration to the United States. The migrants Trump calls criminals and drug dealers are actually fleeing from the violence generated by US-sponsored *mano dura* policies.

Proponents of drug policy reform face formidable challenges in most countries. Politicians

like Trump and much of the right, eager to create an easy consensus, promise a tough-on-crime approach with more severe penalties and ever-larger law enforcement budgets. Their policies tend to intensify the violence, but rhetorically they have the upper hand against those attempting to tackle the complexity of health problems caused by drug use, violence, and crime with more holistic approaches. Progressives risk looking complacent about illegal behavior and criminals, and few would dare to do so in an election campaign.

In order to reduce violence and harm, the hot air of tough-on-drugs-and-crime political rhetoric must be confronted with bold, innovative arguments. A truly radical change in drug policy would mean going beyond cannabis legalization, which remains a calculated concession to the white middle class. It has to address the racist rationales behind policing that overwhelmingly punishes minority communities. It is not enough to reject the War on Drugs; we must also reject the moral panics at the heart of these policies.

The solution is not to be found in what the late Mark Kleiman, an eminent criminal justice scholar and advocate of cannabis legalization, defined as a drug policy informed by a "grudging toleration." Toleration maintains the legal ambiguity that always comes at the expense of those sectors of society prioritized by law enforcement—the working class, the poor, minorities, and other marginal groups. Nor does the solution lie in market liberalization, whose effects are all too visible in the pharmaceutical opioid crisis.

In fact, drug policy reform is not ultimately about solutions. Confronting the social and political costs of addiction, incarceration, and violence, we can only try to find ways of failing better, failing more humanly. This means not shying away from the radical implications of changing paradigms, embracing examples from across the globe, and—why not?—being ready to take a lesson from the enemy. ■

## Time to Rein in the Prosecutors?

LISA L. MILLER

For three decades, talking about reducing prison sentences or curtailing prosecutorial power was virtual political suicide in the United States. The relentless march toward longer sentences, harsher prison conditions, and punitive post-incarceration sanctions seemed to have become a new normal by the late 1990s.

But then, in the second decade of the twenty-first century, with crime rates at a fifty-year low, criminal justice reform went mainstream. Bipartisan support for reform, especially newfound Republican backing, helped to push the issue onto political agendas in unexpected places, like Texas and Alabama. In late 2018, even the Republican Congress passed, and President Donald Trump signed, the First Step Act, which reduces the length of some federal sentences and creates opportunities for early release and re-entry programs for federal inmates.

Books that once sought to explain mass incarceration and its apparent permanency have given way to books aimed at studying and promoting criminal justice reform. Rachel Elise Barkow's *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* is a unique contribution to this literature because it is rooted in Barkow's expertise in criminal law administration. (She is a law professor at New York University, where she is also the faculty director of the Center on the Administration of Criminal Law.) Parts One and Three, which bookend *Prisoners of Politics*, walk the reader through a detailed discussion of the most pathological features of the US criminal justice system and offer specific, achievable reform strategies and goals. For criminal justice professionals and any interested reader, the book can serve as a valuable treatise on the quagmire we find ourselves in, and viable pathways out of it.

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**Prisoners of Politics: Breaking the Cycle of Mass Incarceration**  
by Rachel Elise Barkow  
Harvard University Press, 2019

In Part One, Barkow chronicles where the era of mass incarceration has left us. Although much of this has been documented before, Barkow's emphasis is not on lawmakers and public policy but on the details of the criminal law and its consequences. In a chapter entitled "Misleading Moniker," she provides illustrations of state and federal criminal laws and sentences that, on their face, are at best illogical, at worst downright cruel.

For example, most states have felony murder rules, which allow prosecutors to charge anyone involved in a felony with first-degree (premeditated) murder if someone dies in the commission of the crime, even if that individual had nothing to do with the death. Most states also have mechanisms that allow prosecutors to try juveniles as adults in certain cases. At the intersection of these laws are genuine miscarriages of justice. Barkow offers the example of a teenager who "stole a van with some friends," went to a house where someone was shot (not by the defendant), and was sentenced to life without the possibility of parole.

Barkow also illustrates what she calls "collateral calamities," like those caused by a 1996 federal law that prohibited states from providing some forms of federal aid—such as food stamps—to people with drug-related felony convictions. Not surprisingly, this has a disproportionate effect on African American and Latino communities. Moreover, given that collateral consequences are usually codified separately from other criminal sanctions, "defendants often have no idea that these consequences will follow from their guilty pleas or convictions."

In Part Three, Barkow brings her extensive legal expertise to bear on the problems outlined in Part One as she skillfully explains obstacles to reform in prosecutorial and judicial agencies—and potential ways of overcoming them. She argues that prosecutors' authority should be limited to policy areas that are within their core law enforcement

responsibilities, thus reducing their influence over matters such as forensics, corrections, and clemency. In addition, Barkow calls for the elimination of mandatory minimum sentences, which allow prosecutors to essentially control sentencing by manipulating the charging process. She also urges active, “back-end” reviews of sentences and outcomes in order to ensure that resources are focused on public safety, not inordinate punishment for its own sake.

Perhaps Barkow’s greatest contribution is bringing the insights of administrative law to criminal justice reform. Prosecutors, she notes, “have all the powers of traditional civil regulators—and then some—but none of the checks designed to ensure they make rational, nonarbitrary decisions.” Because prosecutors control both charging and plea-bargaining decisions, they are, in effect, law enforcers and adjudicators, thus acting as judges in their own cause. Barkow explains that this is not a new problem but, in fact, one that was a key concern for Congress when it established administrative agencies. The result was the Administrative Procedure Act of 1946, which “specifically disallows ‘an employee or agent engaged in the performance of investigative or prosecution functions for an agency’ from also participating in the formal adjudicatory proceedings.”

Something akin to this law could help limit the influence of prosecutors in ways that push them toward focusing more on public safety and less on simply securing convictions at every turn. Using sentencing commissions as a model for establishing prosecutorial boundaries, Barkow says that such bodies are most effective when they emphasize best practices and cost-effectiveness.

Barkow also makes a strong case for common-sense coordination of public policy across multiple issue areas, such as education, mental health treatment, and child care. This is a perennial problem in US politics, where policymaking and implementation are spread across multiple and overlapping jurisdictions. But Barkow is right to highlight its highly inefficient and unproductive consequences for the criminal law.

## WHAT ABOUT VIOLENCE?

While Parts One and Three of *Prisoners of Politics* offer important insights, Part Two is more problematic. This section offers explanations for

the political and institutional dynamics that led to the problems outlined in Part One. In doing so, Barkow relies on what is known as the penal populism framework. According to this perspective, the public is by nature punitive, politicians deliberately seek electoral advantage by exploiting high-profile crimes, and media outlets are more than happy to help them.

But the penal populism framework, which emerged from the extremely punitive 1990s, has been substantially challenged by more recent work. Most importantly, scholars have found that the punitive nature of the public is overstated, and that real crime rates—not irrational publics—underlie most political attention to crime.

Barkow does acknowledge the rise of violent crime between the late 1960s and 1980, citing Peter Enns’ book *Incarceration Nation* in the process. But she does not engage with Enns’ key finding: that lawmakers enacted harsher criminal justice policies because rising crime rates had driven the public toward more punitive views.

Barkow largely waves off the crime wave with the penal populist assumptions that the public “tends to overestimate the threat of crime” and that “most voters have no direct contact with crime.” These are both accurate statements,

but they overlook the length, scope, and severity of the violent crime wave. Between 1960 and 1980, homicide rates more than doubled and violent crime more than quadrupled. Then, violence lingered at these extremely high rates for another fifteen years.

Moreover, my own research shows that during this period—roughly 1965 to 1995—violent crime diffused across every state and across racial groups and genders, placing all Americans at much higher risk of victimization than their peers in any other developed nation. One need not have had a close relative killed or robbed at gunpoint to know that the risk of being victimized had risen.

By the end of the first decade of the twenty-first century, the decline in crime began to feel like more than just a temporary phenomenon; public concern about and political attention to crime both fell substantially. As David Dagan and Steven Teles argue in their 2016 book *Why Conservatives Turned Against Mass Incarceration*, the crime decline did not necessarily make rethinking harsh criminal justice policies inevitable, but it was a

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*Real crime rates—not irrational  
publics—underlie most  
political attention to crime.*

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crucial condition for the proliferation of reform across parties.

Barkow's lack of attention to the crime wave and changing levels of political attention to crime has important implications for some of her proposed reforms. Limiting prosecutorial reach, creating stronger criminal justice oversight bodies, and coordinating across related issues are all worthy ideas. But until those changes occur, what alternatives are there—here and now—if another violent crime wave descends upon us?

To be fair, Barkow's reform proposals are rooted in her expertise in the rules and procedures of the administration of criminal justice, not in public safety and harm reduction. But the relative inattention to crime rates speaks to a serious problem in the criminal justice reform literature. It is all well and good to talk about alternatives to incarceration, crime prevention policies, and so on, but until those programmatic changes are made (and they will not be easy), what should people do? Politicians cannot ask people living in fear to just wait it out.

In fact, to do so would hurt vulnerable communities the most. African Americans are victims of violence at much higher rates than white Americans—and as Michael Fortner demonstrates with devastating clarity in his 2015 book *Black Silent Majority: The Rockefeller Drug Laws and the Politics of Punishment*, African Americans do not want to live around crime and violence any more than anyone else does. If law enforcement and longer sentences are the only solutions on offer, we can hardly blame the public for demanding more of them when violence becomes a social crisis.

Barkow does emphasize the importance of keeping public safety at the forefront of all goals for criminal justice agencies. But because she does not engage with violent crime, it is not clear how prosecutors and other criminal justice agents might accomplish that mission without relying so much on police and prisons.

To put violence reduction at the heart of criminal justice reform, we might consider, for example, the work of Danielle Sered, whose new book *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair* grapples earnestly and practically with the origins and consequences of violence. Sered's organization, Common Justice, is a model for how communities, municipalities, and, ultimately, the nation as a whole might move beyond simply reacting to violence and work instead to prevent it. Unlike many in the legal academy and social sciences, Sered does not shy away from the realities of American violence.

None of this precludes addressing the real problems of racial bias in all aspects of criminal justice and the exceptionally high levels of punitive policing, prosecutions, and imprisonment to which racial minorities, especially African Americans, have been subjected. But as Sered explains, by not acknowledging violence, we normalize it—and this normalization hurts the poor and racial minorities the most.

Despite these criticisms, I found Rachel Barkow's book a highly readable account of the criminal justice morass in which we find ourselves, combined with a set of important and achievable policy solutions. I just hope we can achieve them before the next crime wave. ■

## September 2019

**AFGHANISTAN**

Sept. 7—US President Donald Trump says he was about to meet with representatives of the Taliban at the presidential retreat at Camp David, Maryland, to complete a peace agreement that would allow for the departure of US troops from Afghanistan. But he calls off the previously secret meeting and scraps further talks after a bombing in Kabul claimed by the Taliban kills a dozen people including a US soldier.

Sept. 28—Taliban threats and attacks fail to stop a presidential election, but turnout is down by half from 2014. Final results are not due until November. The incumbent, Ashraf Ghani, faces the government's chief executive, Abdullah Abdullah, in a rematch of the 2014 election, which ended with no clear victor and was finally resolved with a power-sharing deal.

**AUSTRIA**

Sept. 29—The conservative People's Party, headed by former Chancellor Sebastian Kurz, finishes 1st in parliamentary elections with 37% of the vote, a 6-point increase from the previous election in 2017. Kurz's government was ousted by a vote of no confidence in May, amid a corruption scandal involving the far-right Freedom Party—whose share of the vote falls to 16%, from 26% in 2017. Kurz is expected to explore a range of possible coalitions, including a reprise of the previous one, or another involving the resurgent Green Party.

**EGYPT**

Sept. 23—Lawyers and human rights activists assert that about 500 people have been arrested by security forces cracking down on a rare outbreak of public opposition to the autocratic rule of President Abdel Fattah el-Sisi. Small protests broke out Sept. 20 in Cairo and other cities in response to videos posted online by Mohamed Ali, an Egyptian businessman living in self-imposed exile in Spain, accusing Sisi and his regime of corruption.

**EL SALVADOR**

Sept. 6—President Nayib Bukele announces that he is forming an international commission to investigate corruption. The launch of the independent panel, backed by the Organization of American States, comes less than a week after a similar UN-backed commission is shut down in Guatemala; it drew the ire of President Jimmy Morales by investigating him and his family for corruption. Bukele won a February election on a platform of rooting out corruption, though recent news reports have linked him to Venezuelan money laundering.

**ISRAEL**

Sept. 17—In a do-over of an April election that ended in an impasse, neither Prime Minister Benjamin Netanyahu of the right-wing Likud Party, nor Benny Gantz, a centrist former army chief of staff and head of the Blue and White party, wins enough seats in the Knesset to form a majority. Likud takes 32 of the 120 seats in the Knesset, 1 less than Blue and White.

Sept. 25—After talks on forming a unity government fail, President Reuven Rivlin announces that he will give Netanyahu up to 6 weeks to form a governing coalition, since Likud has a slight lead in pledges of support from other parties.

**PERU**

Sept. 30—President Martín Vizcarra exercises seldom-used executive authority to dissolve the opposition-controlled legislature

and call elections. Lawmakers respond by voting to suspend Vizcarra. The opposition is headed by the right-wing Popular Force party, whose leader Keiko Fujimori is in jail awaiting trial on corruption charges.

**RUSSIA**

Sept. 8—In local elections, President Vladimir Putin's United Russia party and its allies lose 1/3 of their seats in Moscow's city assembly but still hold 25 of the 45 seats. Opposition leader Alexei Navalny calls the result a victory due to a voting strategy whereby liberals cast votes for the Communist Party, which wins 13 seats. Election officials had barred most liberal candidates from running, setting off mass protests. However, just 22% of eligible voters in Moscow turn out to cast ballots, and United Russia's gubernatorial candidates prevail in most other parts of the country.

**SAUDI ARABIA**

Sept. 14—Missiles and drones strike 2 major oil installations, setting them ablaze and temporarily cutting Saudi oil production by more than 50%. Iran-backed Houthi rebels in Yemen, more than 500 miles from the targets, claim credit for the attack—they have been fighting a Saudi-led coalition for 4 years. But Saudi officials immediately blame Iran.

Sept. 16—Trump says the evidence appears to suggest that Iran was involved in the attack but declines to definitively assign blame. He says he would prefer to avoid war with Iran over the incident, which follows months of rising tensions since Trump tightened sanctions on Iran.

**SOUTH AFRICA**

Sept. 1—A wave of violent unrest against immigrant workers and foreign-owned shops begins in Johannesburg and lasts for several days, leading to at least 12 deaths. Several African nations whose citizens were attacked recall their ambassadors in protest, including Nigeria, which also pulls out of a Cape Town conference on implementation of the African Continental Free Trade Area agreement. Nigeria announces Sept. 9 that it will evacuate 100s of its citizens from South Africa, which has seen recurring incidents of violent xenophobia in recent years.

**UNITED STATES**

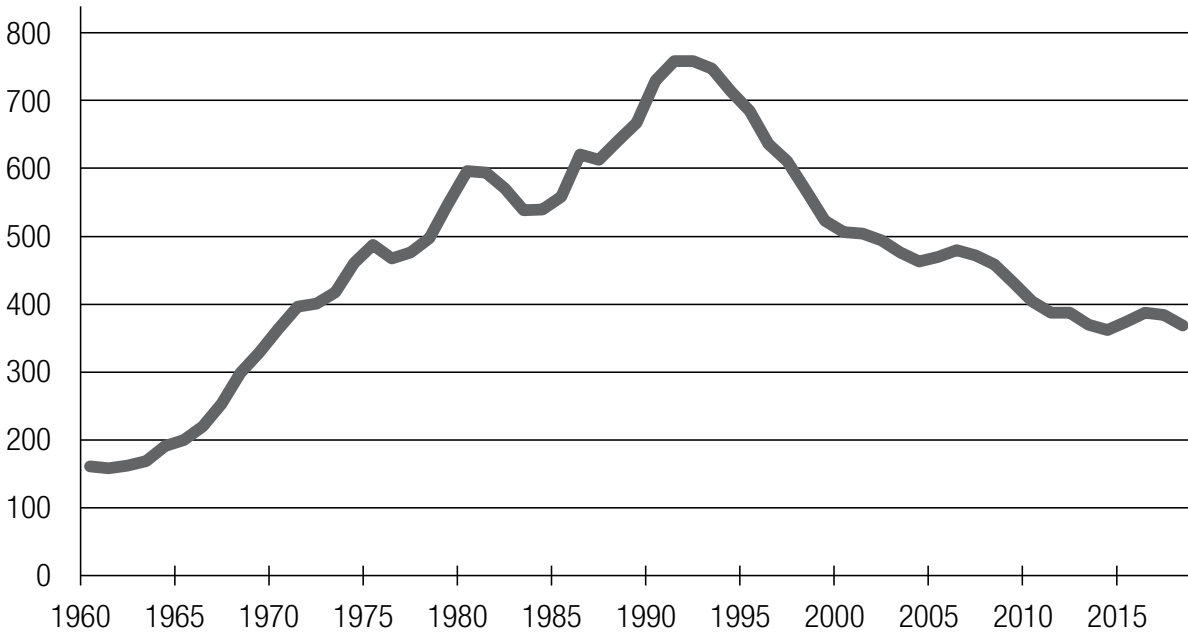
Sept. 24—Speaker Nancy Pelosi of the US House of Representatives announces a formal impeachment inquiry into allegations that Trump violated the Constitution by pushing the Ukrainian government to investigate former Vice President Joe Biden, a leading candidate for the Democratic nomination to challenge Trump in the 2020 presidential election. Pelosi says Congress will probe a whistleblower's report that Trump, in a July 25 phone call, pressured President Volodymyr Zelensky to investigate claims that Biden and his son Hunter engaged in corruption in Ukraine. Days earlier, the Trump administration had frozen \$391 million in previously authorized US military aid for Ukraine, which is fighting Russia-backed separatist rebels.

**ZIMBABWE**

Sept. 6—Robert Mugabe, a leader of the struggle against white-minority rule in the former British colony of Rhodesia who became Zimbabwe's 1st president, dies in a Singapore hospital at the age of 95. He was ousted by the army in November 2017 after 4 decades of increasingly autocratic rule that left the country in economic collapse. ■

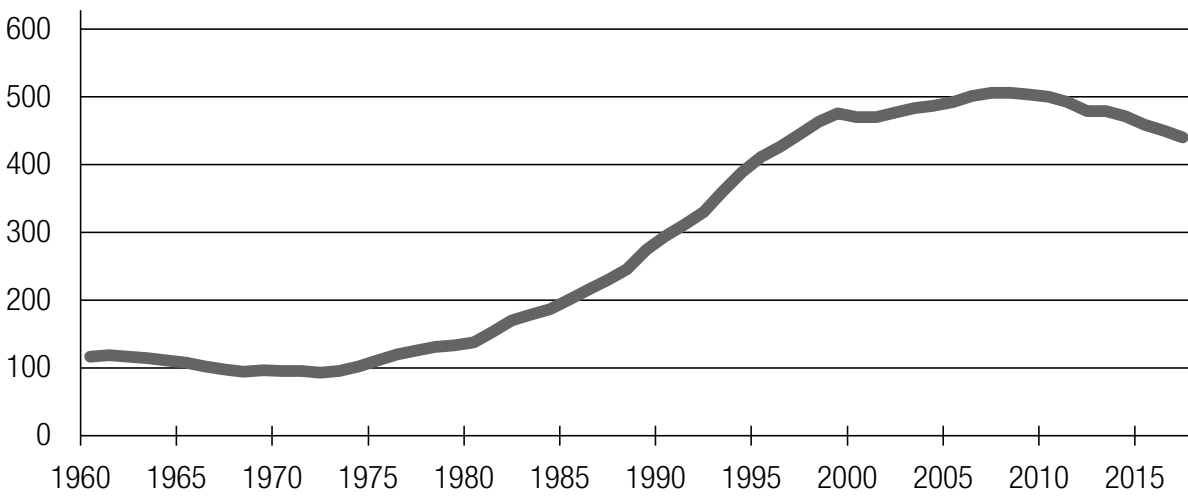


### US Violent Crime Rate, 1960–2018



Violent crimes per 100,000 population  
Source: FBI, Uniform Crime Reports

### US Imprisonment Rate, 1960–2017



State and federal prisoners per 100,000 population  
Source: Bureau of Justice Statistics