



BACKGROUND

Nearly 2 million people are confined in state prisons and local jails in the United States, with Black and Latino individuals, particularly young men, more likely to be sentenced to prison and for longer periods of time than their white counterparts.¹ Decades of punitive sentencing policies — such as harsh mandatory minimum, three strikes, and truth in sentencing laws — have led us to this point, where one in seven people in state prison are currently serving sentences of life, life without parole, life with parole, or virtual life (50 years or more).²

Despite these statistics and a growing understanding that incarceration often has a criminogenic effect, the U.S. continues to be the world's leading incarcerator.³ However, over the last several years, many states have reduced their incarceration rates by reforming their sentencing policies, showing that incarceration and crime can decline at the same time.⁴ With estimates that up to 40 percent of the U.S. prison population is incarcerated without a “compelling public safety reason,”⁵ states should continue reforming their sentencing laws and reducing unnecessary incarceration. When enacting reforms, states should also consider making changes retroactively applicable to those currently incarcerated.⁶

RECOMMENDATIONS

RECOMMENDATION 1: ELIMINATE OR REDUCE MANDATORY MINIMUMS

Rigid mandatory minimums eliminate judicial discretion, requiring one-size-fits-all sentences that can produce harmful outcomes in some cases. Additionally, long prison terms (often triggered by mandatory minimums), are not effective at reducing crime.⁷

Such rigid sentencing schemes are also costly for states. One study found that 45 states' total prison expenditures amounted to approximately \$43 billion.⁸ By requiring incarceration for a set number of years, mandatory minimums render state budgets inflexible, limiting investment in strategies that better promote healthy and safe communities.⁹

Several states have shown that, for many categories of crimes, mandatory minimums can be eliminated without harming public safety. For example, Rhode Island repealed all mandatory minimum laws for drug offenses in 2009. After doing so, its prison population and violent crime rate fell.¹⁰ After eliminating mandatory minimums for drug possession in 2010, by 2014, South Carolina's imprisonment rate dropped nearly 13 percent, and violent crime declined 17 percent.¹¹

In cases where mandatory minimums are appropriate, they should be tempered by safety valve and second look provisions (see *Recommendation 4*). Safety valve provisions allow judges to go below a mandatory sentence in certain circumstances or if statutorily-specified factual criteria are satisfied.¹²

¹ Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative, 2020; Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, National Institute of Justice, U.S. Department of Justice, 2000, 428.

² Lauren-Brooke Eisen, “Criminal Justice Reform at the State Level,” *Brennan Center for Justice*, January 2, 2020; Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, The Sentencing Project, February 17, 2021.

³ Michelle Ye Hee Lee, “Yes, U.S. locks people up at a higher rate than any other country,” *Washington Post*, July 7, 2015; Daniel S. Nagin, Francis T. Cullen, and Cheryl Lero Jonson, “Imprisonment and Reoffending,” *Crime and Justice* 38 (2009): 115; Lynne M. Vieraitis, Tomislav V. Kovandzic, and Thomas B. Marvell, “The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002,” *Criminology & Public Policy* 6 (2007): 589, 593.

⁴ Rebecca Silber, Ram Subramanian, and Maia Spotts, *Justice in Review: New Trends in State Sentencing and Corrections 2014–2015*, Vera Institute of Justice, 2016, 3.

⁵ Lauren-Brooke Eisen et al., *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 2016, 2.

⁶ Brandon Sample, “The First Step Act Applies the Fair Sentencing Act Retroactively — What Does That Mean?,” *Sentencing.net*, August 20, 2019.

⁷ Jonathan P. Caulkins, *Are Mandatory Minimum Drug Sentences Cost-Effective?*, RAND Corporation, 1997.

⁸ Chris Mai and Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010–2015*, Vera Institute of Justice, 2017.

⁹ Gregory Newburn, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, American Legislative Exchange Council, 2016; Inimai Chettiar, “Criminal Justice Reform Can Help With State Fiscal Woes,” *Center for American Progress*, January 11, 2012.

¹⁰ Lauren-Brooke Eisen, “Mandatory Minimum Sentences — Time to End Counterproductive Policy,” *Brennan Center for Justice*, June 9, 2015.

¹¹ See Corrections Statistical Analysis Tool — Prisoners, Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=nps> (South Carolina's 2010 custody population, including private prisons, was a rate of 496, dropping to 433 in 2014); see also FBI's Crime Data Explorer, <https://crime-data-explorer.fr.cloud.gov/explorer/state/south-carolina/crime> (showing South Carolina's violent crime rate falling from 602.2 in 2010 to 497.8 in 2014).

¹² Silber, Subramanian, and Spotts, *supra* note 4, at 7.

RECOMMENDATION 2: RECLASSIFY MINOR CRIMES

Our nation’s jails hold thousands of people for crimes unrelated to public safety, such as drug, property, and other nonviolent offenses.¹³ To reduce this, state legislatures should consider reclassifying nonviolent felonies as misdemeanors or violations and eliminate petty or duplicative offenses.¹⁴

Some states have already started changing course. For example, Alaska, Connecticut, and Texas raised the threshold for certain theft, fraud, or property crimes to be treated as felonies.¹⁵ Additional states — including California, North Dakota, Louisiana, and Indiana — have reduced penalties for or reclassified nonviolent drug offenses.¹⁶ Following penalty reductions for property offenses in Texas, the state experienced a steady decline in property crime rates.¹⁷ In the case of Indiana, penalty reductions for certain drug offenses in 2014 were followed by a steep drop in property crime rates.¹⁸ States can reclassify certain crimes without harming safety.

RECOMMENDATION 3: OFFER SENTENCING ALTERNATIVES TO INCARCERATION

Our sentencing laws typically do not address the reasons people become involved in the criminal justice system — such as trauma, addiction, mental health, and poverty.¹⁹ By expanding available sentencing options and investing in community-based responses to crime, states can break harmful cycles of punishment and victimization.²⁰

State legislatures should explore meaningful alternatives to incarceration — expanding access to

and investing in diversionary programs, problem-solving courts, and community-based programs.²¹ As compared to a jail cell, treatment, care, secure housing, and other tailored services are more likely to help people resolve the underlying causes of criminal justice system involvement and better protect communities in the long run (see *Mental Health and Diversion Reform Principles* brief).²²

RECOMMENDATION 4: OFFER EARLY RELEASE CREDIT AND SECOND LOOK RESENTENCING

States should allow incarcerated people to earn credits for early release and parole eligibility, and consider the implementation of second look resentencing laws.²³

A growing number of states are evaluating or have enacted some type of second look resentencing laws, including California, Florida, Maryland, New York, and Virginia.²⁴ After a set number of years, such laws allow incarcerated people to have their sentences reviewed to determine whether they have engaged in sufficient rehabilitation to be eligible for sentence reduction or release.²⁵ It is well known that individuals often “age-out” of crime, meaning that lengthy sentences, especially those imposed on young people, are not always necessary to deter future crime and keep communities safe.²⁶ In addition to aligning with scientific findings on criminal offending and aging, second-look laws are very popular, with 69 percent of Americans, across partisan lines, in support of such policies.²⁷ Better sentencing policies that encourage rehabilitation will reduce crime by reducing recidivism.

While comprising only 5 percent of the world’s population, the United States houses 25 percent of the global prison population.²⁸ States should revisit their sentencing policies to reduce the number of people in prison and jail, which can be done without sacrificing accountability and public safety.

¹³ Eisen et al., *supra* note 5, at 25; Sawyer and Wagner, *supra* note 1.

¹⁴ “Restoring Balance to Criminal Laws,” Law Enforcement Leaders to Reduce Crime & Incarceration, accessed April 9, 2021.

¹⁵ Silber, Subramanian, and Spotts, *supra* note 4, at 20.

¹⁶ Silber, Subramanian, and Spotts, *supra* note 4, at 25.

¹⁷ See FBI’s Crime Data Explorer, <https://crime-data-explorer.fr.cloud.gov/explorer/state/texas/crime> (showing that between 2015 and 2019, Texas’s property crime rate fell from 2840.8 to 2390.7).

¹⁸ See FBI’s Crime Data Explorer, <https://crime-data-explorer.fr.cloud.gov/explorer/state/indiana/crime> (showing Indiana’s property crime rate fell from 2651 in 2014 to 1971 in 2019).

¹⁹ Eisen et al., *supra* note 5.

²⁰ Rachel Porter, Sophia Lee, and Mary Lutz, *Balancing Punishment and Treatment: Alternatives to Incarceration in New York City*, Vera Institute of Justice, 2002.

²¹ *Ensuring Justice & Public Safety*, Law Enforcement Leaders to Reduce Crime & Incarceration, 2020; Eisen et al., *supra* note 5, at 23.

²² Deborah Smith Bailey, “Alternatives to incarceration,” *American Psychological Association* 34 (2003): 54.

²³ Silber, Subramanian, and Spotts, *supra* note 4, at 29.

²⁴ “Second Chance Legislation in the States,” FAMM, accessed April 14, 2021, https://docs.google.com/spreadsheets/d/13a-FuNUNGaphzq-GsAd8E54veaZhU_nWkmh2gxy-iCs/edit#gid=0.

²⁵ Daniel Landsman, *A Second Chance Starts With A Second Look*, FAMM; Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2020*, Sentencing Project, 2021.

²⁶ Jeffrey T. Ulmer and Darrell Steffensmeier, “The Age and Crime Relationship: Social Variation, Social Explanation,” in *The Nurture Versus Biosocial Debate in Criminology: On the Origins of Criminal Behavior and Criminality* (SAGE Publications), 377–96.

²⁷ Kyle C. Barry et al., *Policies & Polling on Reducing Excessive Prison Terms*, Data for Progress, 2020.

²⁸ Lee, *supra* note 3.