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REPORT

# How Many Americans Are Unnecessarily Incarcerated?



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Nearly 40 percent of the U.S. prison population — 576,000 people — are behind bars with no compelling public safety reason, according to a new report from the Brennan Center for Justice at NYU School of Law. The first-of-its-kind analysis provides a blueprint for how the country can drastically cut its prison population while still keeping crime rates near historic lows.

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While mass incarceration has emerged as an urgent national issue to be addressed, the reforms currently offered are dwarfed by the scale of the problem. The country needs bolder solutions.

How can we significantly cut the prison population while still keeping the country safe? This report puts forth one answer to that question. Our path forward is not offered as the only answer or as an absolute. Rather, it is meant to provide a starting point for a broader discussion about how the country can rethink and revamp the outdated sentencing edifice of the last four decades.

This report is the product of three years of research conducted by one of the nation's leading criminologists, experienced criminal justice lawyers, and statistical researchers. First, we conducted an in-depth examination of the federal and state criminal codes, as well as the convictions and sentences of the nationwide prison population (1.46 million prisoners serving time for 370 different crime categories) to estimate how many people are currently incarcerated without a sufficient public safety rationale. We find that alternatives to incarceration are more effective and just penalties for many lower-level crimes. We also find that prison sentences can safely be shortened for a discrete set of more serious crimes.

Second, based on these findings, we propose a new, alternative framework for sentencing grounded in the science of public safety and rehabilitation.

Many have argued that regimented sentencing laws should be eliminated and replaced with broad judicial discretion. Others counter that this would reinstate a system wherein judges are free to deliver vastly divergent sentences for the same crime, potentially exacerbating racial disparities and perpetuating the tradition of harsh sentences.

This report proposes a new solution, building on these past proposals. We advocate that today's sentencing laws should change to provide default sentences that are proportional to the specific crime committed and in line with social science research, instead of based on conjecture. These defaults should mandate sentences of alternatives to incarceration for lower-level crimes. For some other crimes that warrant incarceration, they should mandate shorter sentences. Judges should have discretion to depart from these defaults in special circumstances, such as a defendant's criminal history, mental health or addiction issues, or specifics of the crime committed. This approach is grounded in the premise that the first principle of 21st century sentencing should be to protect public safety, and that sentences should levy the most effective, proportional, and cost-efficient sanction to achieve that goal. It aims to create more uniform sentences and reduce disparities, while preserving judicial discretion when needed.

Our proposed sentencing defaults for each crime weigh four factors:

**Seriousness:** Murder, for instance, should be treated as a far graver crime than writing a bad check.

**Victim Impact:** If a person has been harmed in the commission of a crime, especially physically, weight toward a more serious sentence.

**Intent:** If the actor knowingly and deliberately violated the law, a more severe sanction may be appropriate.

**Recidivism:** Those more likely to reoffend may need more intervention. Our findings and recommendations, determined by applying the four factors above to the prison population, are detailed below. (The rationale for these factors and our full methodology is described in Appendix A.)

## **Our Findings**

As depicted in Figure 1, this report finds the following:

Of the 1.46 million state and federal prisoners, an estimated 39 percent (approximately 576,000 people) are incarcerated with little public safety rationale. They could be more appropriately sentenced to an alternative to prison or a shorter prison stay, with limited impact on public safety. If these prisoners were released, it would result in cost savings of nearly \$20 billion per year, and almost \$200 billion over 10 years. This sum is enough to employ 270,000 new police officers, 360,000 probation officers, or 327,000 school teachers. It is greater than the annual budgets of the United States Departments of Commerce and Labor combined.

Alternatives to prison are likely more effective sentences for an estimated 364,000 lower-level offenders — about 25 percent of the current prison population. Research shows that prison does little to rehabilitate and can increase recidivism in such cases. Treatment, community service, or probation are more effective. For example, of the nearly 66,000 prisoners whose most severe crime is drug possession, the average sentence is over one year; these offenders would be better sentenced to treatment or other alternatives.

An estimated 212,000 prisoners (14 percent of the total population) have already served sufficiently long prison terms and could likely be released within the next year with little risk to public safety. These prisoners are serving time for the more serious crimes that make up 58 percent of today's prison population — aggravated assault, murder, nonviolent weapons offenses, robbery, serious burglary, and serious drug trafficking.

Approximately 79 percent of today's prisoners suffer from either drug addiction or mental illness, and 40 percent suffer from both.<sup>35</sup> Alternative interventions such as treatment could be more effective sanctions for many of these individuals.

## Recommendations

Based on these findings, this report issues the following recommendations to safely reduce the prison population. As shown in Figures 1 and 2, these recommendations will decrease the total prison population but ensure that those who have committed the most serious crimes remain behind bars. The majority of prisoners remaining in the new system would be violent offenders (59 percent), up from less than half in the current system (46 percent).

**Eliminate Prison for Lower-Level Crimes Barring Exceptional Circumstances:** State legislatures and Congress should change sentencing laws to mandate alternatives to prison as the default sentences for certain lower-level crimes. These include drug possession, lesser burglary, minor drug trafficking, minor fraud or forgery, minor theft, and simple assault — offenses that now account for 25 percent of the prison population. Alternative sanctions — such as community service, electronic monitoring, probation, restitution, or treatment — should be the default for such crimes instead. Judges should have flexibility to depart and impose a prison sentence if certain enumerated factors are present — for example, repeat serious offenses or heinous circumstances of the crime.

**Reduce Sentence Minimums and Maximums by Law:** State and federal legislatures should reduce the current minimums and maximums prison stays set by laws, or guidelines. These ranges should be proportional to the crimes committed, with judges retaining discretion to depart when appropriate. We recommend that legislators consider a 25 percent cut as a starting point to determine how to reduce sentences for the six major crimes that make up the bulk of the current prison population: aggravated assault, murder, nonviolent weapons offense, robbery, serious burglary, and serious drug trafficking. Sentences would be shorter, but still substantial. For example, the average inmate convicted of robbery now serves 4.2 years. A 25 percent cut would reduce the prison stay to 3.1 years. A similar analysis can be applied to other crimes for which prison may be warranted to determine whether sentences can be safely shortened.

**Retroactively Apply Reforms:** Current inmates should be permitted to petition judges for retroactive application of the two reforms above, on a case-by-case basis. This would allow for safe release of prisoners

whose sentences no longer serve a justifiable public safety purpose.

**Complementary Recommendations:** Prosecutors should use their discretion to seek alternatives to incarceration or shorter prison stays in line with the recommendations of this report. Further, the nearly \$200 billion in savings from implementing this report's recommendations can be reinvested in proven crime prevention tactics and in alternatives to incarceration proven to reduce recidivism.

While the first steps many states have taken toward prison reform are welcome, they have not gone far enough. It took roughly four decades to build mass incarceration. Yet, at current rates of decline, it will take even longer to undo it.

This report provides evidence-based findings and puts forth one approach to rethink sentencing that will reduce the disproportionate impact on communities of color, while maintaining hard-won gains in public safety and saving cash-strapped states significant sums. Our goal is to jump-start a conversation about how the country can implement specific reforms that are audacious enough to truly end mass incarceration.

*Inimai Chettiar is the director of the Justice Program at the Brennan Center for Justice. She directed the research team conducting this report.*

### **Foreword by Cornell William Brooks**

In 1963, the March on Washington marked a turning point in the long fight for civil rights for African Americans. A century after President Lincoln issued the Emancipation Proclamation, hundreds of thousands converged at his memorial to celebrate a century of liberation and to protest what Rev. Dr. Martin Luther King, Jr. called “the manacles of segregation and the chains of discrimination.” In the intervening fifty years, we have come a remarkable distance, but the shackles of systemic racism continue to bind communities of color.

We stand on the frontlines in the fight to build a society free from racial discrimination. In 2015, we honored the sacrifices of our forbearers and galvanized international attention to systemic discrimination with a “Journey for Justice” from Selma, Ala. to Washington, D.C. While national support for this effort provides hope the tide may be turning, it also belies a sad truth: Many of the grave inequalities we fought decades ago still persist, more than fifty years after the Civil Rights Act. The single greatest injustice that threatens our safety and hinders our progress? Mass incarceration. People of color bear the brunt of our criminal justice system in disproportionate and devastating numbers. This is in part because racial disparities exist at all stages of the system, which relies on corrosive practices that harm people of color. Our communities have already suffered from historic and systemic economic injustice and racially targeted criminal justice policies. These wounds have not healed and have been aggravated by the staggering number of people trapped in prisons over the past forty years. Today, an estimated 2.2 million people are locked inside jails and prisons. African Americans make up roughly 13 percent of the U.S. population but 37 percent of the nation's prisoners.<sup>1</sup> People with dreams and aspirations suffer in airtight cells of prison and poverty. But the injustice does not end there. More than half of formerly incarcerated Americans are unemployed a year after release. Communities of color are over policed, over-prosecuted, over-incarcerated and yet underemployed.

If we do not take steps now, Americans of color will forever be relegated to a penal and permanent underclass, and mass incarceration will continue to cage the economic growth of our communities. We have reached a crisis point, and we need solutions. This groundbreaking report from the Brennan Center for Justice offers a pathway to reduce our prison population and its tragic racial disparities. It documents the number of people behind bars

without rationale, and reveals the unnecessary trauma this causes. It recommends real solutions that can help end over-incarceration. I urge lawmakers to give deep consideration and deeper commitment to this report's findings and recommendations.

This nation must continue to march forward, toward a day when all people are treated based not on the color of their skin but on the content of their character, uncolored and un-stigmatized by a criminal record. It is time that we end the plague of mass incarceration.

*Mr. Brooks is the President and CEO of the National Association for the Advancement of Colored People.*

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