

## ENDING MASS INCARCERATION

The phrase “Mass Incarceration” refers to the tremendous increase in the number of persons incarcerated for crimes as well as the lengths of their sentences. The United States now leads the world in the number of citizens it incarcerates per 100,000 of population. There are more persons serving sentences of Life Without the Possibility of Parole now than were in prison for all crimes in 1970. The prison population has increased seven-fold during this time period. For the following reasons, this increase was unwarranted and is unsustainable.

### I. Reasons to Reduce Mass Incarceration

#### 1. Origin of Mass Incarceration

Some believe that mass incarceration arose in direct response to increasing crime rates. And it is true that crime rates rose in the U.S. in the mid-1960s and early 1970s. But by the mid 1970s, they began a decline that has continued to this day. However, skyrocketing incarceration rates took off in the *late* 1970s and have continued to rise ever since. See *About Time: How Long and Life Sentences Fuel Mass Incarceration in Washington State*, Katherine Becket and Heather Evans, (2020), Exec. Summary, pg. 3. “From 1986 through 2016, the violent crime rate fell by 31%. By contrast, the rate at which life and long sentences were imposed increased by 175 percent.” *Id.*

Some have said that this more retributive approach was driven by the belief that rehabilitation did not work. This raises the question of how that belief suddenly came to the fore in the 1970s. It appears it was not driven by careful studies showing that rehabilitation was unachievable. While there have been more studies on the efficacy of incarceration since the 1970s, their findings are not substantially different than those published by the National Research Council in 1978 and the early 1980s. As stated by the National Research Council more recently: “The evidence base on sentencing is broader and deeper now than in the 1980s and 1990s *but the primary findings have not changed significantly since they were disseminated in a series of National Research Council reports between 1978 and 1986.*” *The Growth of Incarceration in the United States; Exploring Causes and Consequences* (2014) (Hereinafter “NRC Rpt.”), Ch. 3, pg. 102 (Emphasis added.). The focus on retribution to the exclusion of alternate responses was driven by deeper social and political forces which were primarily racial and law and order politics. NRC Rpt, Ch. 3, pg.102.

A recent study revealed that beliefs about the importance of retribution and beliefs about race are inextricably intertwined in America. It showed that the level of support for retribution as the primary justification for harsh punishment correlates with bias against African Americans. See *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, Levinson, Smith, and Hioki (2019). The authors explained that:

... moral panics, most of them racialized and driven by retributive discourse,

contributed mightily to the punishment excesses of the past few decades. These moral panics saw pundits and professors alike warning at one time, for example, of a “new breed” of merciless juvenile “superpredators” and the horrors of “crack babies.” Because of the tight connection between moral panics and criminal sentencing, hundreds of thousands of Americans are spending decades – or even their whole lives – in prison based on baseless legislative assumptions.

*Id* at pg. 843.

Lest there remains any doubt about the racial purpose in making our criminal justice system more punitive, statements from those at the highest political levels during the formative years of the modern war on crime should put them to rest.

First, in 1968, Richard Nixon began the modern war on crime by campaigning with racist appeals to “law and order”, the “silent majority”, and promising a “war on drugs.” After winning the election, John Erlichman became his Assistant for Domestic Affairs. Erlichman, like so many in the Nixon Administration, was eventually convicted of conspiracy, obstruction of justice and other felony crimes and served time in federal prison. In 1994, Erlichman was interviewed by writer Dan Baum for Baum’s book about the politics of drug prohibition. Erlichman quickly got to the point of Nixon’s war on drugs when he told Baum:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the anti-war left and black people. You understand what I’m saying? 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. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Dis we know we were lying about the drugs? Of course we did.

After his election, Nixon was responsible for increasing the penalties on marijuana possession by the passage of The Controlled Substance Act in 1970. This law placed marijuana on Schedule One, which made it equivalent to heroin and amphetamines in terms of abuse potential and lack of medical use, and greatly increased penalties for drug possession.

Second, Lee Atwater was a famous Republican political operative. He served as the Chairman of the Republican National Committee, worked as a political operative for President Reagan, and as campaign manager for the first President Bush. In an interview with political scientist Alexander Lamis in 1981, he explained how Republicans used racial antagonism to court racist white voters as follows:

You start out in 1954 by saying ‘Nigger, nigger, nigger.’” By the late 60’s, “that hurts you, backfires. So, you say stuff like ‘forced bussing, states’ rights,’ and all that stuff, and you’re getting abstract. Now you’re talking about cutting taxes and all these things you are talking about are totally economic things and a byproduct of them is, blacks get hurt worse than whites.”

Finally, there was President Ronald Reagan. Reagan continued the Republicans’ overt appeals to southern white racists. He kicked off his presidential campaign with an appearance at the

Neshoba County Fair in Philadelphia, Mississippi, the place where three civil rights workers were murdered in 1964. There he gave a speech that included the primary racial dog whistle of that era by stating "I believe in states' rights." Additionally, Reagan repeatedly used the racist trope of the lazy, African American, Cadillac driving, taxpayer abusing, welfare cheat. And not coincidentally, Reagan contributed to the use of the criminal justice system to punish African Americans by signing two pieces of legislation that turbocharged the war on drugs. The first was the Comprehensive Crime Control Act of 1984. That expanded penalties for marijuana possession, established mandatory minimum sentences for drug possession and sale, and established a system of civil asset forfeiture for drug crimes. The Anti-Drug Abuse Act of 1986 was sponsored by Speaker of the House Tip O'Neill and signed into law by Reagan. It increased the number of crimes facing mandatory minimums as well as creating the tremendous disparity in penalties for use of crack cocaine (used primarily at that time by African Americans) and powder cocaine (used at that time primarily by white Americans). This legislation had the effect of increasing the average prison sentences for drug crimes by 50%.

The reason to point out the racial and political origins of mass incarceration is not to impugn the motives of any current practitioners in the system that perpetuates it. It is simply to show that the current system, which feels normal to all of us who practiced most of our careers under it, has its genesis in racial politics. This may be, perhaps, the most important reason to profoundly alter it. As stated by Cornell William Brooks, former President and CEO of the NAACP, "The single greatest injustice that threatens our safety and hinders our progress? Mass Incarceration." *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice (2016), (Hereinafter "Brennan Center Study"), Forward.

## 2. Unnecessary for Public Safety

Increased incarceration rates and longer prison sentences have not made society safer. *They do not deter crime or lower recidivism rates.* These are the findings of almost every state and national study on the issue. In recognizing key research findings by Washington's Council of State Governments (CSG), Washington's Sentencing Guidelines Commission (SGC) found in its latest report that:

- Prison does not deter crime and can even have a criminogenic effect.
- [A] meta-analysis of 57 studies by CSG found that those sentenced to prison have a 7% higher recidivism rate than those who were sentenced to supervision. ... Data from Idaho showed that "*regardless of risk level*, those sentenced to probation-only sentences had lower recidivism rates." These results parallel the findings of a 2004 study by the Washington State Institute for Public Policy : "The results clearly indicate that prison does not reduce felony recidivism, and, may increase it by 5 to 10 percentage points."

*Review of the Sentencing Reform Act*, (2019) by the Washington State Sentencing Guidelines Commission, (Hereinafter "SGC Rpt."), pg. 26. (Emphasis added).

As a result of these studies, the SGC recommended to "Make alternatives to confinement available to the sentencing judge." SGC Rpt., pg. 32. That is because it found that "The research is clear that probation is as successful as, and less expensive than, confinement for some individuals." SGC Rpt., pg. 32.

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That long prison sentences do not reduce crime rates or recidivism were also the findings of the NRC. It stated that:

There is little convincing evidence that mandatory minimum sentencing, truth-in-sentencing, or life without the possibility of parole laws had significant crime reduction effects. But there is substantial evidence that they shifted sentencing power from judges to prosecutors, . . . , exacerbated racial disparities in imprisonment; and made sentences much longer, prison populations much larger, and incarceration rates much higher.”

NRC Rpt., Ch. 3, pgs. 101-02.

Lastly, as found by the Brennan Center Study, pg. 5:

It is tempting to look at this data and assume that mass incarceration caused this decline in crime. But this is not the case. Rigorous social science research based on decades of data shows that increased incarceration played an extremely limited role in the crime decline. It finds that social and economic factors, and to some extent policing, drove this drop. Though this truth is counter-intuitive, it is real.

### 3. Not Desired By Most Victims of Violent Crime

Some feel that society owes it to victims to be as punitive as possible. However, long prison sentences are not the wish of the majority of crime victims. “A recent survey found that 61% of those who have experienced interpersonal violence favor shorter prison terms and enhanced spending on rehabilitation and prevention: only 25% preferred sentences that keep people in prison as long as possible.” Becket and Evans, pg. 8. This survey was conducted nationally as well as in 5 states - California, Texas, Florida, Michigan, and Illinois. The results were similar in every state.

More recently, leaders of 45 coalitions in 34 states of survivors of violent and sexual violence, including the Washington State Coalition Against Domestic Violence, signed an open letter of regret for their previous cooperation with a criminal justice system that relies on incarceration as the primary response to violence. They stated that: “We have promoted false solutions of reforming systems that are designed to control people, rather than real community-based solutions that support healing and liberation. . . We have held up calls for ‘victim safety’ to justify imprisonment and ignored the fact that prison hold some of the densest per-capita populations of trauma survivors in the world.” They called for divestment in prisons and reallocation of those resources to community-based responses to violence. *Moment of Truth: Statement of Commitment to Black Lives*, (6-30-20) <https://wscadv.org/news/moment-of-truth-statement-of-commitment-to-black-lives>.

### 4. Devastating to Those Incarcerated, Their Families, and Communities

Long prison sentences are devastating for the persons imprisoned, their families, and communities. They are harmful to the persons imprisoned because prison, as it exists in the United States, is dangerous, deprives inmates of necessary medical and mental health services,

permanently and significantly damages their ability to work and earn money, and is degrading. NRC Rpt., Ch. 6, pg. 200. Solitary confinement, which is widely used, is considered torture by most societies, and often permanently damages the confined person's mental health and ability to function in society.

Incarceration often creates and always exacerbates employability and housing problems upon release. Lifetime earnings are 52% less for those who have been incarcerated for felonies than their non-convicted peers. *Conviction, Imprisonment, and Lost Earnings*, Craige, Grawert and Kimble, Brennan Center for Justice (9-15-20). "Increased rates of incarceration may have altered the prison experience in ways that are, on balance, appreciably harmful to some prisoners and undermine their chances of living a normal life when released." NRC Rpt., Ch. 6, pg. 200.

Incarceration of parents is devastating for children who had a good relationship with them, especially young boys whose fathers are taken away. While it is difficult to parse out cause and effect, removal of so many young men from black and poor communities almost certainly exacerbates the communities' pre-existing problems. NRC Rpt., Ch. 10, pgs. 301-02.

#### 5. Incompatible with Our Values

Washington's prison population remains at an unprecedented level. **The number of prisoners currently serving life sentences alone is greater than the entire prison population in 1970.** *People Serving Life Exceeds Entire Prison Population of 1970*, The Sentencing Project, (2-20-20). Our prison population grew by 337% between 1980 and 2019. Becket and Evans, pg. 2. The incarceration rate is three times higher than the average rate of more than 30 member countries of the Organization for Economic Development. *Id.* at 1. Washington is one of only 8 states in the U.S. whose prison population grew in the 2010s. *Id.*

This increase was fueled in large part by the increase in very long and life sentences. *Id.* at pg. 2. 41% of Washington's prison population are serving sentences of 10 years or more. 17% are serving life sentences. *Id.*

These extremely high incarceration rates should be reduced to at least the level of the early 1970s because they are largely incompatible with fundamental and widely shared ideas about just punishment in the United States and other Western countries. NRC Rpt., Ch. 3, pgs. 323-24. Those ideas include that the suffering and damage caused by imprisoning human beings is inherently a bad thing. Therefore, it is a necessary evil that must be: 1) proportionate to the seriousness of the crime; 2) never more severe than necessary to achieve the retributive and preventative purposes for which it is imposed; 3) with rare exceptions, not so severe as to permanently cripple or terminate the offender's membership in civil society; and, 4) promote, not undermine, broader social justice goals. NRC Report, Ch. 12, pg. 323.

As a result of the exclusive focus on retribution, sentences have become cruelly excessive, socially damaging, and run counter to most of the accepted goals of punishment.

#### 6. Tremendously Expensive

The cost of mass incarceration is incredibly high for virtually no return on the investment in public safety. "Spending on corrections more than tripled between 1985 and 2017. In 2017,

Washington spent more than one billion dollars . . . on corrections . . .” Becket and Evans, pg. 6.

In light of the best available research on the inefficacy of long prison sentences, the main question that proponents of minor tweaks to the current system of mass incarceration must answer is the following: if the reasons our historically high incarceration rates arose were racial politics; they do not make society safer and probably make it less safe; they exacerbate racial disparities in society; are permanently devastating to those who are incarcerated, their families, and communities; are tremendously expensive with no return on the investment; are not wanted by most victims; and, are incompatible with our most fundamental and widely shared ideas about just punishment; then why in the world would we want to continue them?

## **II. Sentences for Violent Crimes Must Be Addressed to Reduce Mass Incarceration**

In the federal prison system, rising incarceration rates were caused largely by sentences for drug crimes. However, in Washington state, most prisoners are incarcerated for violent crimes such as assault, robbery, murder, and sex crimes. See the 2016 report entitled “Washington in the Era of ‘Mass Incarceration’ “ by the Washington State Minority and Justice Commission and presented by Stacey Smith, its Executive Director and David Boerner, Professor of Law Emeritus, Seattle University School of Law and one of the original drafters of the SRA sentencing grid. Current statistics are similar.

Approximately 70 percent of prison inmates in Washington are serving time for violent crimes. *Id.* Of those prisoners, 35 percent are in for assault, 14 percent for robbery, 22 percent for murder, and 29 percent for sex crimes. *Id.* Concerning the lengths of violent crime sentences, 20 percent are 5 to 10 years, 24 percent are between 10 years and life, and 15.4 percent are for life. *Id.*

Of the increase in incarceration rates from 1990 to 2015, the largest by far was for violent crimes. Of the increase in incarcerations rates for violent crimes in the same time period, the largest increase was for assaults. *Id.* Consequently, the primary current driver of mass incarceration in Washington is the increased use of incarceration, and length of sentences, for violent crimes. *Id.* *Therefore, any attempt to address mass incarceration in Washington must address the extremely long sentences for violent crimes.*

### **1. Real World Example**

Not all violent crimes are equal. However, they are often treated similarly by front line prosecutors. For example, several years ago, a WACDL attorney defended a young (19 years old) man against a charge of Drive-by Shooting. No one was injured, there was no evidence that his client fired the gun or that anyone in the client’s car intended to do anything other than frighten the people in the car that was chasing them.

The client had no criminal history or any prior contact with police. He had a part-time job and lived at home with his family. Nevertheless, he was held in jail pending trial on \$500,000 bail.

If convicted as charged, the client faced a prison sentence of 15 to 20 months. However, if the client went to trial, the prosecutor said that he would amend the charge to 4 counts of Assault 2, each count with a separate firearm enhancement (one count for each person in the chasing

car). If convicted of those four counts, the client would have faced a mandatory sentence of 15 years (33 to 43 three months for the underlying 4 counts of assault and 12 years for the firearm enhancements (3 years for each count) for a standard range of 14 years, 9 months to 15 years, 9 months).

The prosecutor could also have chosen to charge the client, with the gross misdemeanor of Unlawful Discharge of a Firearm. The sentencing range would then have been 0 to 12 months and, given a lack of criminal history, the court would probably not have imposed more than 30 days incarceration.

Given the lack of evidence that the client committed *any* crime at all, you may wonder why he didn't just go to trial. The answer is that trials are risky. It was possible that the co-defendant could have been enticed to testify with promises of leniency. Then the client would have been faced with gambling 15 years of his life on whether the jury would believe the co-defendant. Most rational people do not take such risks even when they are innocent. People accused of crimes face these choices every day in our Superior Courts. This type of charging and negotiating is the rule, not the exception.

The previous example also demonstrates what is known as the "trial penalty" paid by those who do not give in to prosecutors' demands to plead guilty. "In 1986, the average sentence imposed after trial in Washington was 64 months longer than the average sentence imposed via plea deal in cases involving violent crime. By 2016, this 'trial penalty' was 174 months (more than 14 years)." Beckett and Evans, pg. 4.

## 2. Effective Solutions

The twin pillars of mass incarceration are higher incarceration rates and longer sentences. Beckett and Evans, pgs. 2-4 and NRC Rpt. Ch. 2, pgs. 68-69. The specific sentencing changes that drove more frequent and longer prison sentences were many and varied. They include mandatory minimums,<sup>1</sup> life without parole, three strikes laws, truth-in-sentencing (which reduced or eliminated good time credit reductions in sentences for good behavior and programming), mandatory consecutive sentences, mandatory sentencing enhancements and longer sentencing ranges.

The steps necessary to reduce mass incarceration must then, necessarily include eliminating or greatly limiting the tools that enabled it. These include the following:

1. Reducing the high and low ends of the standard ranges by at least half;<sup>2</sup>

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<sup>1</sup> In essence, the entire SRA sentencing grid is a scheme of mandatory minimums due to its framework of minimum sentences that judges must impose in the vast majority of cases.

<sup>2</sup> The high and low ends of the standard ranges must be drastically lowered even if they become advisory. That is because experience in the federal system shows that judges will probably continue to impose sentences within the sentencing guidelines, even if they are not mandatory. SGC Rpt., pgs. 14-15. Therefore, if the main reason for the current high levels of incarceration is extremely long sentences, and one of the primary reasons for those long sentences is that the standard ranges have increased significantly since the inception of the SRA, then any solution to mass incarceration must include significantly lower standard ranges.

2. Transferring sentencing power back to the courts where it is more transparently exercised by making standard ranges advisory;
3. Eliminating enhancements, consecutive sentences, multipliers, life without parole, and mandatory minimums. These are perhaps the most powerful means by which prosecutors impose extreme trial penalties, force pleas, lengthen sentences, and constrain judges' sentencing options;
4. Increasing Earned Early Release Time back to 33% for all crimes; and,
5. Making these changes retroactive.

These recommendations are similar to those made in the previously cited Brennan Center study. Anything less will simply be tinkering around the edges, which the Chair of the Sentencing Guidelines Commission previously stated will be ineffective. "We make a mistake when we view the current SRA, the one in use every day court is in session, as a system that can be tweaked." SGC Rpt., Introductory Note from the Chair, pg. 11.

Mass incarceration is not normal and we shouldn't allow ourselves to be used to it. It is historically unprecedented and unnecessary for public safety. It is inconsistent with our most fundamental ideas about just punishment. As stated more eloquently by the NRC:

The new penal regime of tougher criminal sanctions, high rates of incarceration, and severely reduced opportunities for millions of people with a criminal record has not yet drawn widespread public concern. [Although this is less true now than it was in 2014 when this was written.] That is partly because these developments have been legitimized so that they appear to be natural, inevitable, necessary, and just, despite the social and political inequalities that result. The net result is that the American criminal justice system will advance social control at the expense of social justice.

NRC Rpt., Ch. 11, pg. 318.

Our sentencing scheme must profoundly change if we are to remain true to our long-held concepts of justice which include moderation, rehabilitation, mercy, and fairness in the criminal justice system. Therefore, we must dismantle the regime of mass incarceration in this state.