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TWENTY  
YEARS

HOW MANY AMERICANS ARE  
UNNECESSARILY INCARCERATED?

Dr. James Austin and Lauren-Brooke Eisen  
with James Cullen and Jonathan Frank

Preface by Inimai Chettiar

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## ACKNOWLEDGEMENTS

The Brennan Center gratefully acknowledges Laura and John Arnold, Marguerite Casey Foundation, Democracy Alliance Partners, Jason Flom, Ford Foundation, The Margaret and Daniel Loeb — Third Point Foundation, Open Society Foundations, Public Welfare Foundation, Rockefeller Family Fund, and William B. Wiener, Jr. Foundation for their support of the Justice Program.

The authors are grateful to Inimai Chettiar for guiding this report's analysis, methodology, and writing; Michael Waldman and John Kowal for their insights; Ames Grawert, Vivien Watts, Holly Harris, and Fritz Schwartz for their assistance; and Brennan Center Board member Stephen Schulhofer for his insights.

The authors are especially appreciative to the author of this report's foreword, Cornell Brooks.

They also thank Julia Bowling, Natasha Camhi, Brenna Christensen, Brittany Cohen, Jessica Eaglin, Patrick Feeney, Nicole Fortier, Matthew Friedman, Nia Itoh, Morgan Lingar, Will Lockwood, Jason O'Conner, Adureh Onyekwere, Eva Torres, and Bianca Tylek for their research assistance; Kate Robards for her comments; Rebecca Autrey, Theresa Jefferson, Jim Lyons, Jeanine Plant-Chirlin, and Erik Opsal for their communications assistance; and Beatriz Aldereguia, Nicole Austin-Hillery, Steven Hawkins, Tanisha McClellan, Ngozi Ndulue, Kia Pearson, Mary Price, and Magdalene Zier for their assistance.

## EXPERT REVIEWERS

The authors are indebted to the sentencing experts who carefully reviewed this report and its methodology, and provided invaluable detailed feedback:

- John Gleeson, former U.S. District Judge, Eastern District of New York; Partner at Debevoise & Plimpton LLP; and
- Carol Steiker, Henry J. Friendly Professor of Law at Harvard Law School.

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## FOREWORD

*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.*





## PREFACE

*By Inimai Chettiar*

United States incarceration statistics are well-known by now, but they still stun. Although the U.S. has only 5 percent of the world's population, it has nearly 25 percent of the world's prisoners.<sup>2</sup> There are 2.2 million people in prisons and jails in this country.<sup>3</sup> With an incarceration rate of 693 per 100,000 people, the United States trails only the Seychelles in the frequency with which it deprives its residents of liberty, and vastly outpaces that of Iran, Zimbabwe, and even notoriously punitive Singapore.<sup>4</sup>

This level of incarceration, hidden for so long in plain sight, has massive societal consequences. It drives and reinforces deep seated racial inequity and disproportionately punishes African Americans. It ruins people's lives and breaks up families. Now it has become widely understood that this exorbitant incarceration rate is not needed to keep the public safe. With the ascendancy of Donald Trump as president, we hope the trans-partisan nationwide effort for criminal justice reform will continue. And so we face a challenge as a nation: how can we reduce this prison population without endangering public safety?

### How We Got Here

In 1974, the country's imprisonment rate was 102 per 100,000. By the turn of the century, it had quadrupled, reaching 138 in 1980, 295 in 1990, and 470 in 2000. The surge continued. By 2007, the imprisonment rate reached its peak of 506.<sup>5</sup>

Since then, the rate has decreased marginally to 471 prisoners per 100,000 Americans.<sup>6</sup> While the downward trend is welcome, a yearly declining rate of 1 percent is modest at best. At this pace, it would take nearly 75 years to return to the 1985 incarceration rate of 200 per 100,000.<sup>7</sup>

Like other failed social experiments, mass incarceration was not a spasm without a cause. It was the result of sustained policies beginning in the mid-1970s and campaigned on even earlier.

As early as 1964, Republican Presidential nominee Barry Goldwater promised "a government that attends to its inherent responsibilities of maintaining . . . and enforcing law and order."<sup>8</sup> Four years later, after riots in major cities including Chicago, Los Angeles, and Washington, D.C., and growing protests against the Vietnam War, there was a palpable sense among many Americans that "order" had to be restored. In 1968, Republican presidential candidate Richard Nixon appealed to what we would later call the "silent majority." In one campaign commercial, a series of still photos of angry protesters and burning buildings appeared over a soundtrack of a snare drum and dissonant piano chords. "Let us recognize that the first civil right of every American is to be free from domestic violence," Nixon intoned. "So I pledge to you, we shall have order in the United States."<sup>9</sup>

To a large extent, what average Americans saw on their television screens squared with their own experiences. From 1960 to 1980, violent crime soared 270 percent. It continued to increase, peaking

at 758 violent offenses per 100,000 people in 1991.<sup>10</sup> African American and Latino communities bore the brunt of this crime rise. By the late 1970s, people of color were crime victims at a rate 24 percent higher than white Americans.<sup>11</sup>

In response, states and the federal government enacted a series of laws that dramatically lengthened sentences for many crimes, and also created entirely new crimes.

One early example is the passage of the “Rockefeller Drug Laws” in 1973. Named after New York Gov. Nelson Rockefeller, the laws imposed mandatory minimum 15-year terms for possession of marijuana and other drugs.<sup>12</sup> Michigan adopted similar sanctions, and other states began to follow suit, setting mandatory sentences for various crimes. In the next decade, Washington state adopted the nation’s first “truth-in-sentencing” law, which required inmates to serve at least 85 percent of their sentences before becoming eligible for parole. Then, 27 other states imposed similar requirements. Three states — Idaho, New Hampshire, and Nevada — went even further, requiring that prisoners serve 100 percent of their terms. Meanwhile, 14 states, including Florida, Illinois, North Carolina, and Ohio abolished the ability of parole boards to release inmates.<sup>13</sup>

Similar events unfolded in the nation’s capital. In 1984, Congress created the U.S. Sentencing Commission. Driven by concerns that judges retained too much discretion, resulting in disparate treatment of defendants and overly lenient sentences, Congress charged the Commission with crafting sentencing guidelines that limited the discretion of federal judges and resulted in stiffer penalties.<sup>14</sup> Then Congress abolished parole and enacted harsher sentences for federal crimes, particularly drug offenses, over the next decade.<sup>15</sup>

By the end of the 20th century, yet another strict approach to sentencing had taken hold. This time, it was “three-strikes-and-you’re-out” laws, which automatically imposed lengthy prison sentences, up to and including life without parole, for those convicted of a third felony. Spurred in part by the federal 1994 “Crime Bill,” half the states passed three strikes laws between 1993 and 1995 alone.<sup>16</sup>

There is disagreement over whether the devastating racial inequalities caused by these policies were known and intentional, or inadvertent side effects. But it’s clear that our inheritance is an incarceration rate five times higher than in the mid-1970s, with vast racial disparities.<sup>17</sup>

## **Effect on Crime**

This history begs a central question. Did mass incarceration achieve its ostensible goal of reducing crime? After all, it would be difficult to suggest cutting the prison population if doing so would risk public safety.

Over the last four decades, crime plummeted dramatically. Today, the crime rate is half of what it was at its peak in 1991. Despite recent troubling headlines about rising murder rates in Baltimore

and Chicago, crime nationwide is at historic lows. Violent crime today is about where it was in 1970. Property crime is at 1967 levels.<sup>18</sup>

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.<sup>19</sup> Though this truth is counter-intuitive, it is real.

Studies from the Brookings Institute's Hamilton Project and the National Academy of Sciences corroborate findings from the Brennan Center and leading economists: "When the incarceration rate is high, the marginal crime reduction gains from further increases tend to be lower, because the offender on the margin between incarceration and an alternative sanction tends to be less serious. In other words, the crime fighting benefits of incarceration diminish with the scale of the prison population."<sup>20</sup> Although there is some relationship between increased incarceration and lower crime, at a certain point, locking up additional people is not an effective crime control method, especially when imprisoning one person costs \$31,000 a year.<sup>21</sup>

Another body of research shows that keeping people in prison for *longer* periods has similar diminishing returns.<sup>22</sup> For example, a 2007 National Bureau of Economic Research study found that prison stays longer than 20 months had "close to no effect" on reducing commission of certain crimes upon release.<sup>23</sup> Other studies show that prison often has a "criminogenic" effect, meaning that imprisonment can actually lead people to commit more crimes after release. Prisons provide little rehabilitative programming and often release individuals back to communities without proper support, leaving them vulnerable and likely to turn back to crime. This is one major reason more than half of released prisoners are back behind bars within three years.<sup>24</sup>

Recent reforms enacted by states show that mass incarceration and crime are not inextricably linked. Over the last decade, 27 states have reduced both imprisonment and crime together.<sup>25</sup> From 1999 to 2012, New Jersey and New York reduced their prison populations by about 30 percent, while crime fell faster than it did nationally. Texas decreased imprisonment and crime by more than 20 percent during the same period. California, in part because of a court order, cut its prison population by 27 percent, and violence in the state also fell more than the national average.<sup>26</sup>

It has become clear that it is unnecessary to warehouse so many prisoners for such long periods of time. Yet, last year, half of all offenders in federal prison were sentenced to more than 10 years.<sup>27</sup> And in the states, lengths of prison stays have increased by 33 percent from 1993 to 2009.<sup>28</sup>

The current sentencing regime was largely a knee-jerk reaction to crime, not grounded in any scientific rationale. While it may have seemed like a reasonable approach to protect the public, a comprehensive examination of the data proves it is ineffective at that task.<sup>29</sup> Worse yet, it is also inequitable, placing a disproportionate burden on communities of color.<sup>30</sup>

Today's public policy is dislocated from public reality. It is time to change our laws to reflect and serve our country's current public safety needs, rather than govern based on mistakes from the past.

## This Report's Purpose

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<sup>i</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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

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i This number represents the total prisoners in this report's dataset, which includes 94 percent of state and federal prisoners. The total U.S. prison population is 1.56 million. We were unable to secure detailed data from New Mexico and Vermont, and other sources did not cover every single state prisoner. For more information, see Appendix A: Methodology. We originally intended to include an analysis of jail inmates. Due to difficulty in obtaining detailed data on jail inmates, we were unable to complete that analysis and hope to do so in a subsequent report.

For the purpose of this report, we assumed that all current criminal laws remained in force. We only examined sentencing changes. An analysis of whether some crimes may be best treated as civil infractions or become legal conduct, thereby avoiding criminalization altogether, is a fruitful avenue for future research.

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

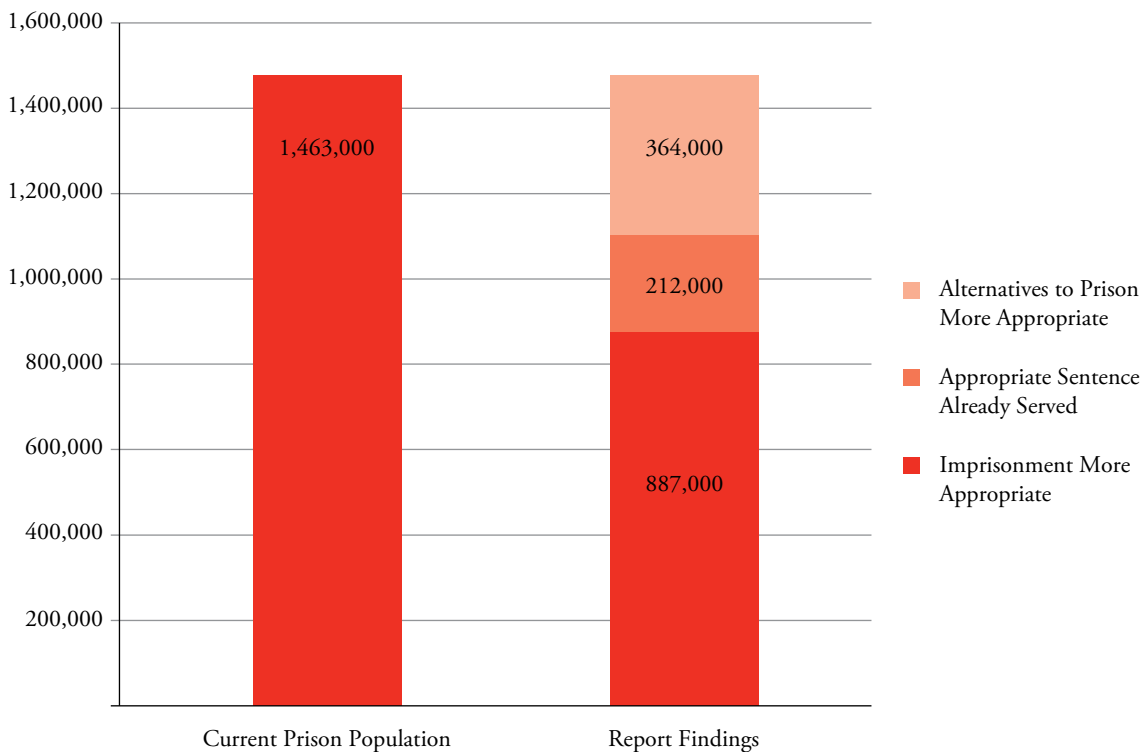
As depicted in Figure 1, this report finds the following:

- 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.<sup>33</sup>
- 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.<sup>34</sup>

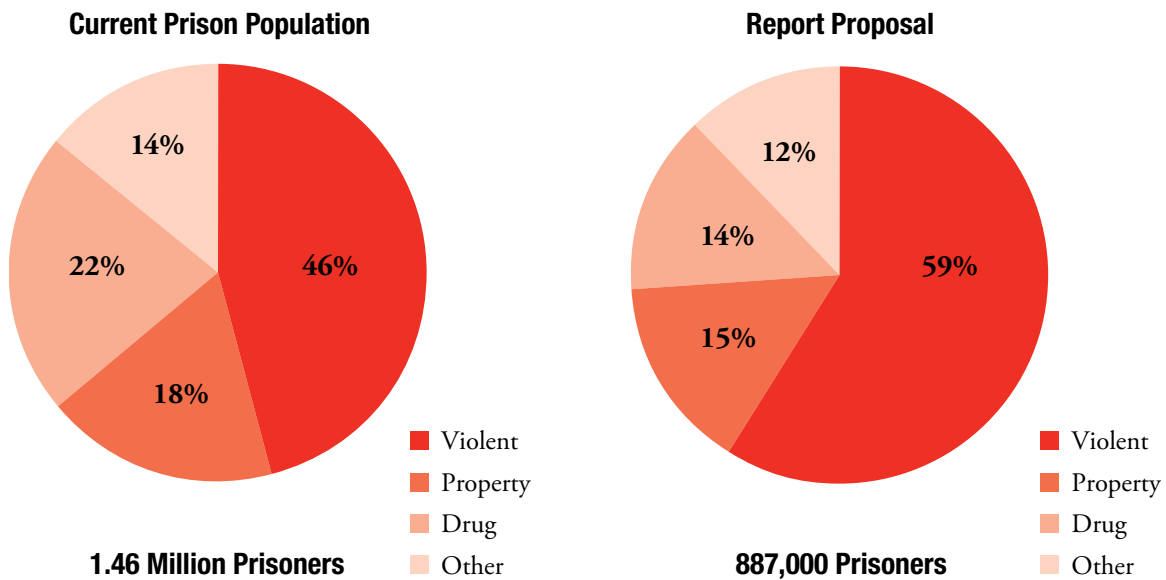
- An estimated 212,000 prisoners (14 percent of the total population) have already served sufficiently long prison terms and could likely be released within the next year with little risk to public safety. These prisoners are serving time for the more serious crimes that make up 58 percent of today’s 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.

**Figure 1: Best Estimate of Americans Unnecessarily Incarcerated**



Source: Brennan Center Analysis.<sup>36</sup>

**Figure 2: Current and Recommended Prison Population, by Crime Category**



Source: Brennan Center Analysis.<sup>37</sup>

## 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).<sup>ii</sup>

- **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.

ii This report separates crime into categories — drug, property, violent, other — consistent with the National Corrections Reporting System, so that this analysis can be compared to other national datasets. Some advocates have noted that the violent crime category may be overly broad, sweeping in crimes that do not actually include perpetrate violence. Ideally, these categories would better reflect the acts committed. See generally Justice Policy Inst., *Defining Violence: Reducing Incarceration by Rethinking America’s Approach to Violence* (2016), [http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi\\_definingviolence\\_final\\_report.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report.pdf).

- **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.

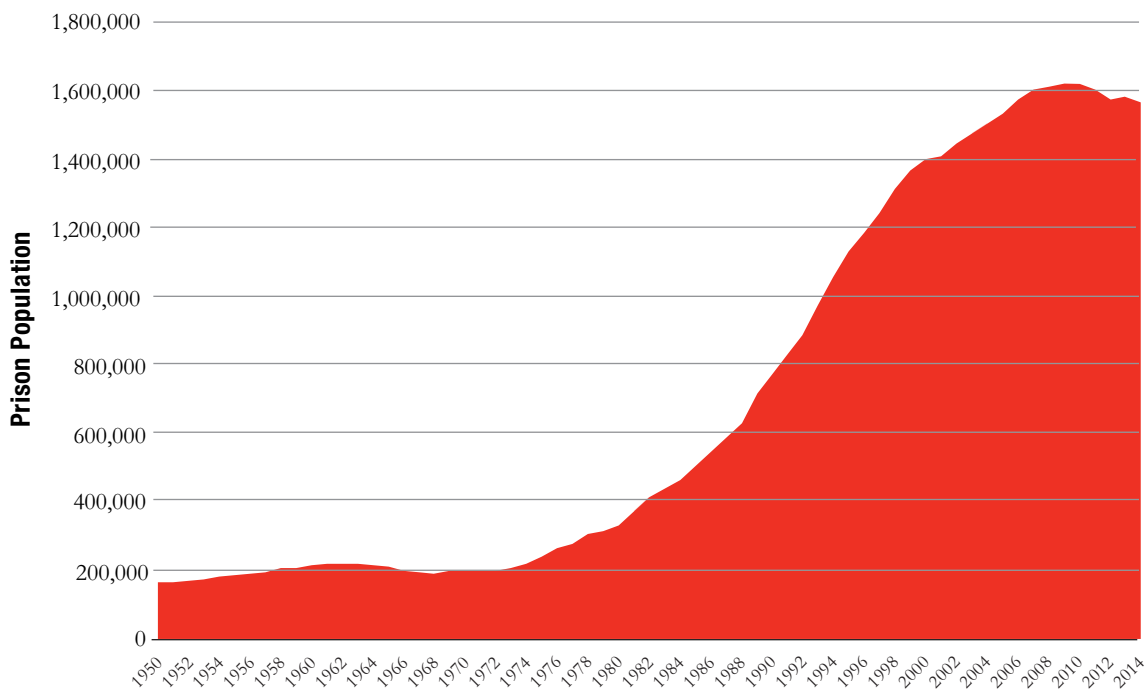
*Inimai Chettiar is the director of the Justice Program at the Brennan Center for Justice. She directed the research team conducting this report.*



## I. CURRENT PRISON POPULATION

From 1950 to 1972, the prison population grew by 18 percent, as shown in Figure 3. Then, from 1972 to 2009, it grew by 700 percent, reaching a peak of 1.6 million. This expansion was driven largely by overly punitive policies enacted beginning in the 1970s and continuing through the 1990s, such as higher new mandatory minimum sentencing laws, “truth-in-sentencing” laws, and “three-strike” laws that imposed automatic life terms on repeat offenders, and an expansion of criminal codes.<sup>38</sup> Since 2009, due to reforms enacted by state legislatures, the prison population has declined marginally, by 3 percent.<sup>39</sup>

**Figure 3: State and Federal Prison Population (1950-2014)**

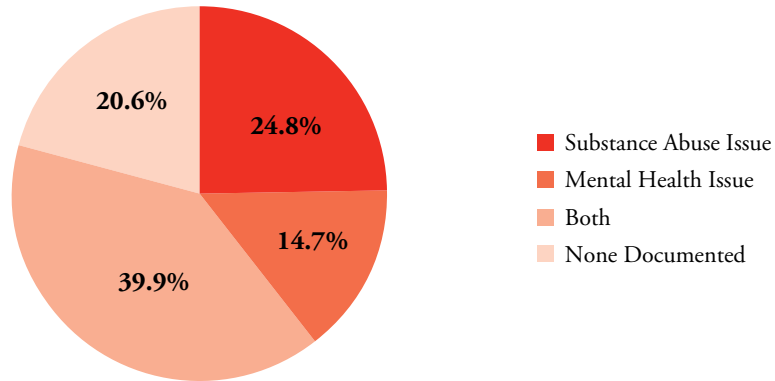


*Source: U.S. Bureau of Justice Statistics.<sup>40</sup> (The 2014 BJS population is slightly higher than the authors’ total prison population for the reasons explained in footnote i).*

There are more mentally ill people in the nation’s prisons than in its mental hospitals.<sup>41</sup> As shown in Figure 4, the authors’ estimate of recent data indicates that 79 percent of today’s prisoners suffer from either drug addiction or mental illness, and 40 percent suffer from both. As explained in the box “Prisons: The New Mental Hospitals,” prisons are ill-equipped to respond to these challenges, and usually simply warehouse sick people without treating them.<sup>42</sup>

Prisons also house significant numbers of juveniles and elderly people. Thirteen percent of prisoners are under the age of 24, and 10 percent are over the age of 55.<sup>43</sup> Research shows that human brains do not reach full maturity until the mid-twenties.<sup>44</sup> Research also indicates that prisoners over 50 are highly unlikely to commit another crime if released.<sup>45</sup>

**Figure 4: Substance Abuse & Mental Health Issues, State & Federal Prisoners (2014)**



*Source: Brennan Center estimate analyzing data from U.S. Bureau of Justice Statistics (2014).<sup>46</sup>*

## PRISONS: THE NEW MENTAL HOSPITALS

Pennsylvania Secretary of Corrections John Wetzel warns, “America is turning our correctional system into a mental health system nationally, and . . . that’s a poor policy.”<sup>47</sup> According to a recent report, “The number of individuals with serious mental illness in prisons and jails now exceeds the number in state psychiatric hospitals tenfold.”<sup>48</sup> Worse, when those who suffer from mental illness have completed their sentences, prison officials often release them with no services or medical care. People whose illnesses may have worsened while detained, and who may no longer have access to needed medications, confront a reentry process daunting for even those well-prepared.<sup>49</sup>

Historians and advocates have noted the sharp rise in mentally ill prisoners following “deinstitutionalization,” the shift away from inpatient mental health institutions to outpatient care in the 1960s, compounded by policies in the 1980s.<sup>50</sup> This shift left many former patients with no care at all, with many ending up homeless.<sup>51</sup> Between 1955 and 2012, the populations in state and county mental hospitals dropped from approximately 559,000 to 35,000. During that same period, the mentally ill population in jails and prisons expanded, reaching 356,268 people with severe mental illness. Today, about 15 percent of men and 30 percent of women in prisons and jails have a severe mental illness such as schizophrenia or major depression, compared to less than 5 percent of the general population.<sup>52</sup>

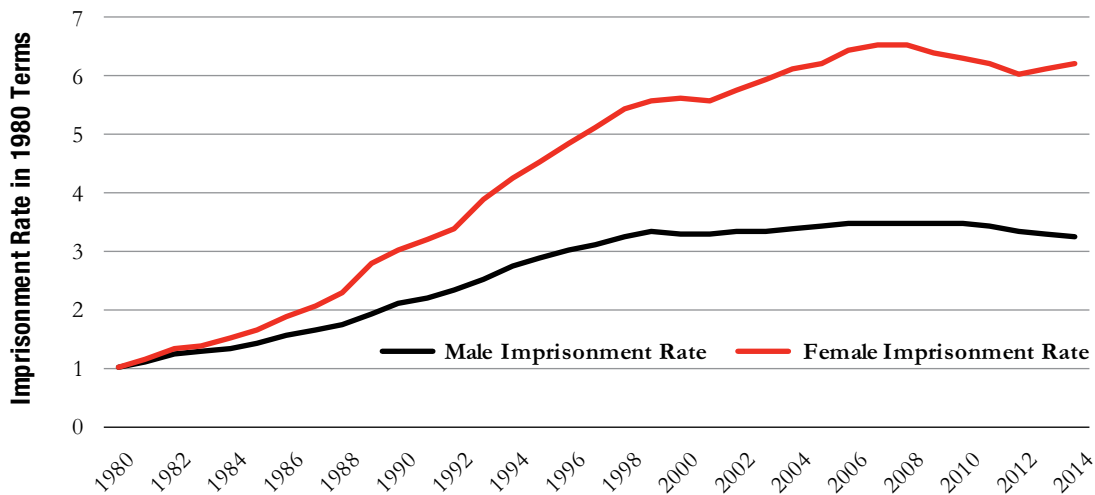
Along with the mentally ill, prisons have swept in thousands of people with drug addiction. Our prisons have become ill-equipped hospitals. Such illnesses are extremely difficult to treat in prison.<sup>53</sup> Prisons do not have the best tools to treat mentally ill people, and even the bare minimum treatment they receive in prison is more expensive and less effective than treatment in the community or in mental health institutions.<sup>54</sup>

The rise of mass incarceration has exacerbated the problem, not only taxing limited mental health treatment resources in prisons, but also exposing inmates with mental illness to traumatic prison conditions. Mentally ill prisoners face the challenges of overcrowding, poor medical care, isolation, violence, and sexual victimization. A recent study of the jail population showed that suicide has been the leading cause of death since 2000, causing 34 percent of all deaths in 2013.<sup>55</sup>

Our prisons have become warehouses for people whom we don’t know how to help. Proven alternative interventions, such as probation with intensive treatment, may yield better results for these individuals.

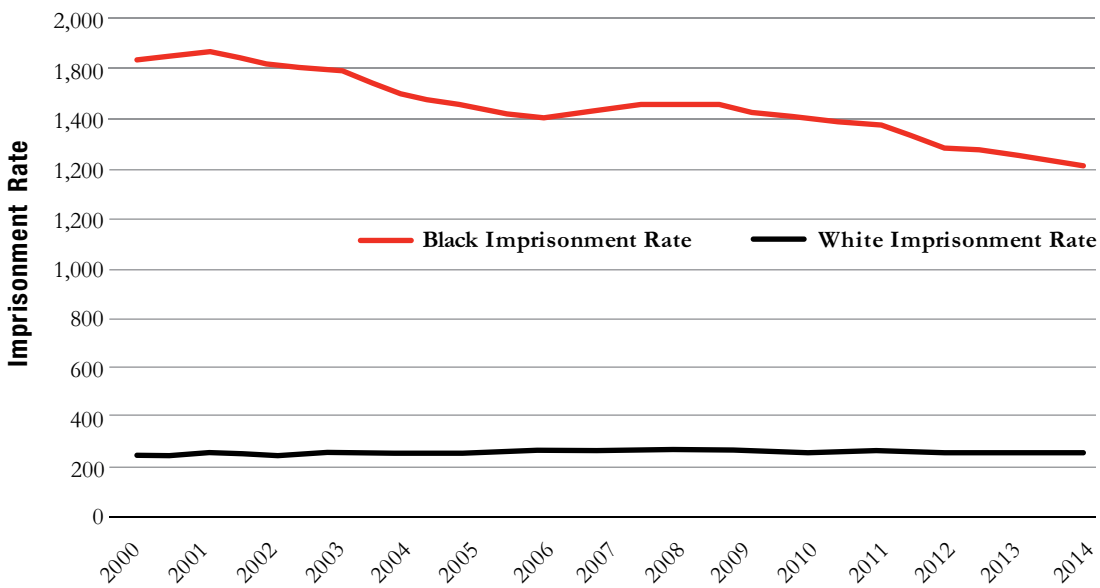
Two additional demographic trends are worth noting. First, the incarceration of women has accelerated compared to past decades. The female imprisonment rate is six times higher than it was in 1980, as shown in Figure 5. Second, the imprisonment rate of African-Americans is 5.5 times higher than that of white Americans. As shown in Figure 6, though disparities have decreased marginally (by 1.8 percent per year since 2000), it would take 100 years for the disparity to disappear at the current trend.

**Figure 5: Imprisonment by Gender (1980-2014)**



Source: U.S. Bureau of Justice Statistics.<sup>56</sup>

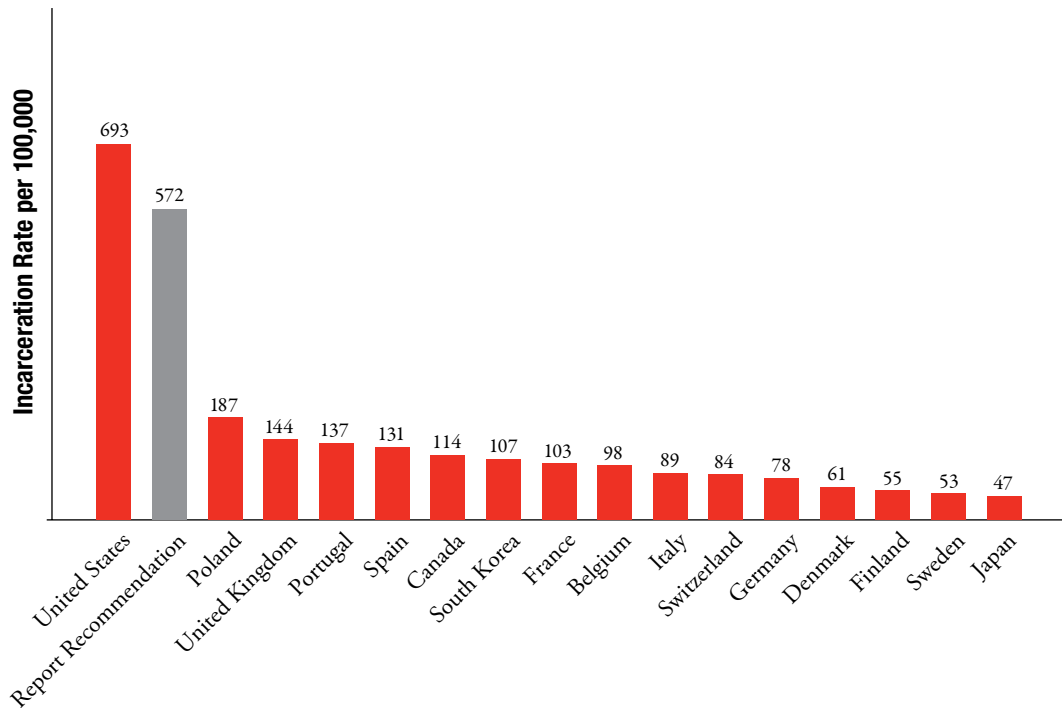
**Figure 6: Imprisonment by Race (2000-2014)**



Source: U.S. Bureau of Justice Statistics.<sup>57</sup>

And these booming incarceration rates have made the United States a distant outlier when compared to other democracies.

**Figure 7: Incarceration Rates for High Income Democracies (2016)**



Source: *World Prison Brief (2016) & Brennan Center Analysis*.<sup>58</sup>

As Figure 7 shows, the United States has an incarceration rate (prisoners plus jail inmates) nearly four times greater than Poland, the developed democracy with the second-highest rate. Even implementing the recommendations of this report (explained in Sections III and IV below) would leave the country's incarceration rate more than double the rate of the democracy with the second highest incarceration rate. This is not meant to imply that a rate of 572 prisoners per 100,000 people is an optimal rate of incarceration. Rather, it merely depicts what the country's incarceration rate would be after applying this report's recommendations.

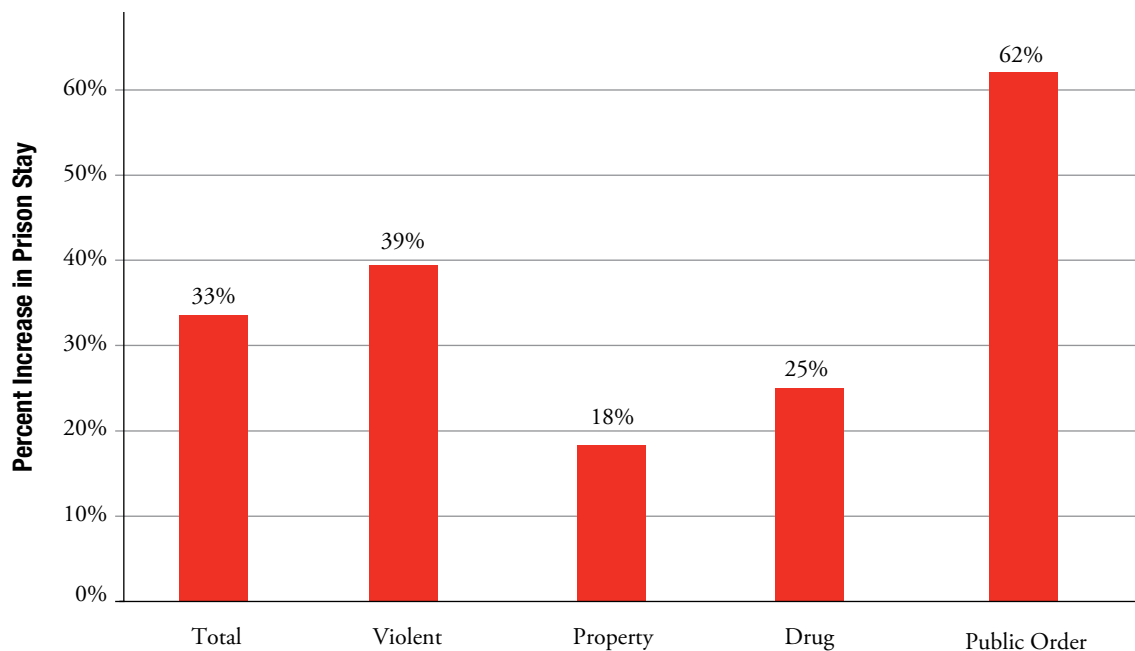


## II. TIME SERVED IN PRISON TODAY

As the number of people in prison has increased, so has the time they spend there. The 1990s and 2000s saw states of all demographic and political compositions pass laws aimed at keeping people in prison longer. These laws targeted both “front-end” policies, which increased the length of sentences handed down (such as higher statutory sentence ranges, mandatory minimums, and “three-strikes” laws), as well as “back-end” policies, which caused inmates to serve more time (such as requirements that inmates serve 85 percent of their sentence behind bars, life without parole sentences, limits on the ability to earn time toward early release, and restrictions on parole boards).<sup>59</sup>

As shown in Figure 8, between 1993 and 2009, the average prison stay for state inmates increased by 33 percent. While the increase in prison stays was most dramatic for violent and public order crimes, prison stays also increased 18 percent for property crimes and 25 percent for drug crimes from 1993 to 2009.<sup>60</sup> Following the same trend, the average stay for federal prisoners more than doubled from 1988 to 2012, rising from 1.5 to 3.1 years.<sup>61</sup>

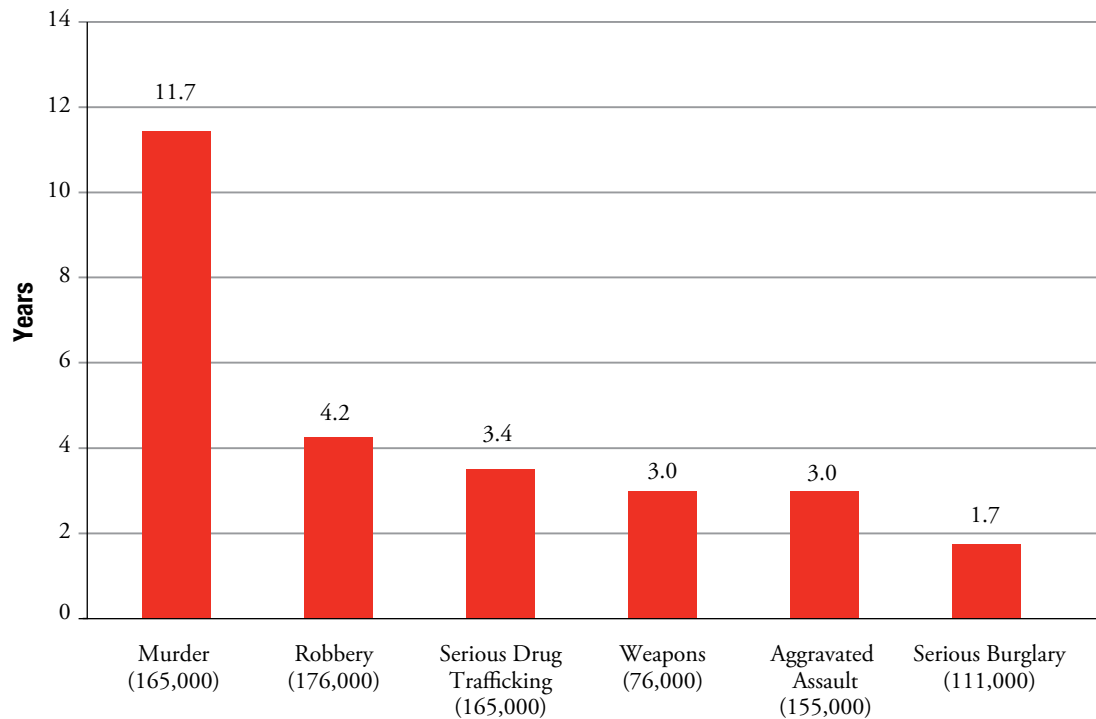
**Figure 8: Growth in Time Served By State Prisoners (1993-2009)**



*Source: National Corrections Reporting Program (The last comprehensive collection on lengths of stay was conducted in 2009).*<sup>62</sup>

Figure 9 provides a more detailed look, examining current average prison stays for six serious crimes that make up 58 percent of the prison population.<sup>63</sup> Notably, many of the laws and policies that increased time served are not based on evidence showing that longer stays behind bars enhanced public safety. Instead, they are the result of decades of severe sentencing laws, guidelines, and practices premised on a collective “guess” that more punishment and more prison would reduce crime.<sup>64</sup>

**Figure 9: Current Prison Stays for Major Crimes**



Source: Brennan Center Analysis.<sup>65</sup>

Driven by advances in social science, states are increasingly turning toward risk assessment tools to help decide how much time people should spend behind bars. These tools use data to predict whether an individual has a sufficiently low likelihood of committing an additional crime to justify a shorter sentence or an alternative to incarceration. They take into account various factors such as: criminal history, drug and alcohol abuse, employment history and education, connection to others with criminal histories, mental health, and financial well-being.

Some courts have implemented risk assessments to determine whether defendants should be held in jail or released while waiting for trial; similarly, some parole boards use them to decide which prisoners to release. States such as Kentucky and Virginia have implemented the former, while Arkansas and Nevada have implemented the latter. More recently, states are applying risk assessments to guide sentencing decisions.<sup>66</sup> The first state to incorporate such an instrument in sentencing was Virginia in 1994. By



2004, the state implemented risk assessments statewide, requesting judges to consider the results in individual sentencing decisions.<sup>67</sup> Courts in at least 20 states have begun to experiment with using risk assessments in some way during sentencing decisions.<sup>68</sup>

Some studies have shown these tools are effective at reducing incarceration while reducing the risk of releasing people who may go on to commit new crimes.<sup>69</sup> Other studies have shown that they produce unjust racial disparities.<sup>70</sup> Specifically, these tools rely on factors, such as educational and employment history, that are affected more by structural inequities disproportionately affecting racial and ethnic minorities instead of by individual factors. As these tools are implemented more widely, there will be more evidence of their results. Because these instruments do not change existing sentencing laws, which the authors believe are a root cause of overly long sentences, this report does not delve further into the use of risk assessment in sentencing.



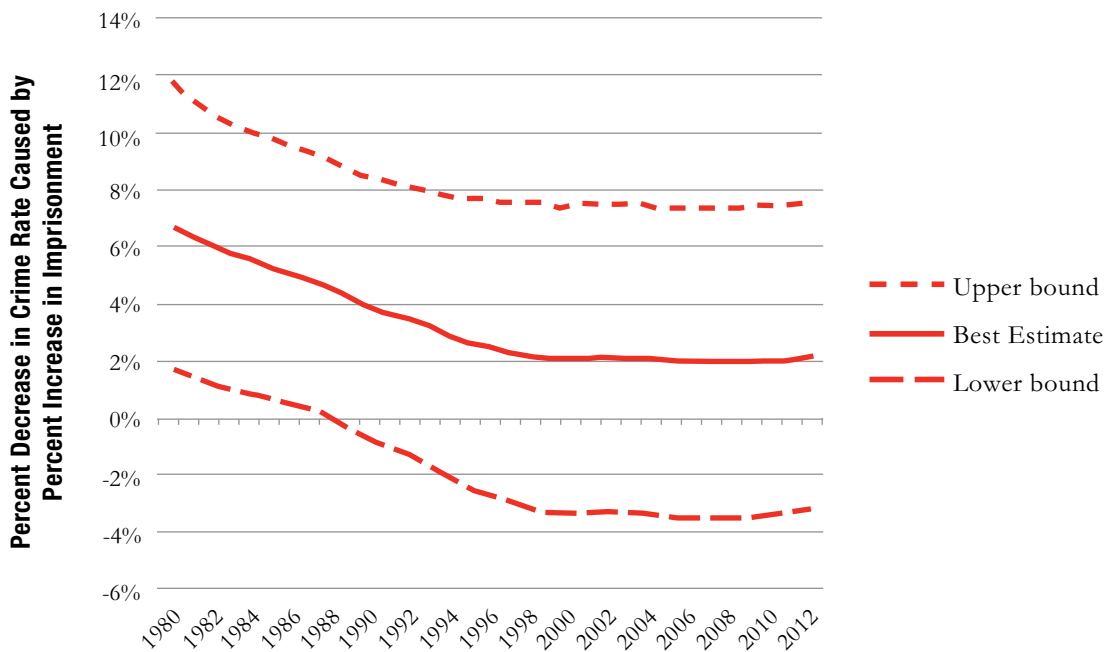
### III. ENDING PRISON FOR LOWER-LEVEL CRIMES

#### A. Research On Prison And Crime

The prison population exploded as crime rates began a dramatic decline. Today, the crime rate is half of what it was at its height in 1991. Violent crime has fallen by 51 percent since 1991, and property crime by 52 percent.<sup>71</sup>

One might conclude that the increase in incarceration at the same time as the crime decline indicates that one trend is responsible for the other. But studies now show that incarceration has long since passed the point where locking up additional prisoners would have a pronounced effect on reducing crime. As shown in Figure 10, starting in about 2000, increased imprisonment had a limited effect on the crime rate. The diminishing returns of incarceration are becoming more commonly accepted.<sup>72</sup>

**Figure 10: Increased Imprisonment's Effect on Crime (1980-2012)**



Source: *What Caused the Crime Decline?* (Brennan Center 2015, analyzing data through 2012).<sup>73</sup>

What may account for this counterproductive effect of incarceration?

One body of research shows that prison may make some people *more* likely to commit crimes after release. Criminologists call this the “criminogenic” effect of prison. It is particularly powerful on lower-level offenders. Once individuals enter prison, they are surrounded by other prisoners who have often committed more serious or violent offenses. While in prison, they are generally not provided rehabilitative

programming, treatment, or any job or educational training to ensure success upon release. They are also cut off from support networks and life and employment skills deteriorate.<sup>74</sup> As a result, after release prisoners often have trouble finding employment and reintegrating into society, often leading them to turn to crime.<sup>75</sup> It is therefore unsurprising that the national recidivism rate for former prisoners hovers around 50 percent — meaning that half are reincarcerated within three years of release.<sup>76</sup>

Studies on this effect abound. A September 2016 *New York Times* editorial, citing research published by the Laura and John Arnold Foundation, concluded that unnecessary time spent behind bars “harms defendants and may actually increase crime.”<sup>77</sup> A 2002 study of more than 1,000 felony offenders in Kansas City, Missouri, indicated that using prison instead of probation for lower-level drug offenders increased their likelihood of committing crimes upon release.<sup>78</sup> Similarly, a 2012 study of over 17,000 Florida inmates found that prison, when compared to probation, resulted in higher recidivism for drug and property criminals. Interestingly, it found that prison and probation were equally effective for *violent* offenders.<sup>79</sup> That same year, a study by criminologist William Bales of 79,000 prisoners found that those sentenced to prison were 10 percent more likely to reoffend than those put on “house arrest” with mandatory treatment.<sup>80</sup>

A second series of studies shows that alternatives to incarceration promote public safety more effectively than incarceration, especially for lower-level offenders. In 1986, the Rand Corporation found that those sentenced to probation were less likely to reoffend than those sentenced to prison. This difference was particularly pronounced for property offenders. A 1999 report by the Centre for Criminal Justice Studies showed that those who received probation or community service had lower recidivism rates than those who served prison sentences. Reviewing nearly 100 studies on drug treatment and recidivism, a 2006 study on violent and nonviolent offenders by the Washington State Institute of Public Policy concluded that, on average, treatment-oriented probation reduced recidivism by 12 percent, while in-prison treatment reduced recidivism by only 6 percent.<sup>81</sup>

Finally, other recent research shows no difference in the effect on recidivism reduction of incarceration compared to alternative sanctions. A 2002 Vera Institute of Justice study found that offenders in New York sentenced to alternatives to incarceration programs that provide counseling and treatment in lieu of incarceration “were no more likely to be convicted of new offenses over the three years than the comparison group of offenders who spent much more of that time incarcerated.”<sup>82</sup> A 2009 analysis by criminologists of 55 empirical studies concluded that prison either increased reoffending or did not affect it, compared to alternatives to prison.<sup>83</sup> A 2011 follow-up study reached a more definite conclusion: “With some confidence, we can conclude that, across all offenders, prisons do not have a specific deterrent effect. Custodial sentences [jail and prison] do not reduce recidivism more than noncustodial sanctions.”<sup>84</sup> A 2012 study in the *Journal of Quantitative Criminology* found no benefit to incarceration compared with noncustodial alternatives for violent and nonviolent offenders, declaring the result “quite consistent with an emerging body of work” showing “little persuasive evidence that incarceration reduces future criminality.”<sup>85</sup> It pointed to three studies conducted from 2007 to 2011 on thousands of offenders in Chicago and Washington, D.C.<sup>86</sup>

This evidence conclusively weighs in favor of expanding the use of alternatives to incarceration as a more effective crime reduction technique, especially for lower-level crimes.

## EFFECTIVE ALTERNATIVES TO INCARCERATION

Not incarcerating people convicted of lower-level crimes does not mean they escape consequences. Alternative sanctions exist that are cost-effective and better reduce recidivism. Notably, 75 percent of crime victims prefer to hold offenders accountable through alternatives beyond incarceration.<sup>87</sup>

- **Probation:** Individuals are supervised by probation officers while continuing work or school. The supervision aims to prevent probationers from engaging in criminal activity. Probation conditions may include: anger management counseling, drug or alcohol treatment, drug tests, or regular check-ins with an officer. Studies show that supervision reduces recidivism by as much as 34 percent, at an average cost of \$3.42 per day, less than one-twentieth of the average cost of a day in prison (\$79).<sup>88</sup>
- **Electronic Monitoring:** Electronic devices, usually placed on the ankle, allow law enforcement to track offenders' whereabouts, ensuring compliance with location restrictions. Electronic monitors have increased in the last decade from 50,000 to 125,000 active devices.<sup>89</sup> Some studies found that more research is needed to determine how well the technology ensures returns to court, and others have contended that monitors can interfere with day-to-day functioning of individuals.<sup>90</sup> However, electronic monitoring is far less expensive than incarceration and can reduce rearrest rates by as much as 25 percent.<sup>91</sup>
- **Treatment:** This includes drug or alcohol abuse treatment, mental health treatment, and other rehabilitative programs. Treatment costs less than incarceration and reduces recidivism by addressing the core problem (the illness) instead of the symptom (the crime). A 2013 Vera Report showed that mental health treatment is less expensive and more effective than incarceration.<sup>92</sup> Successful drug treatment programs include Drug Treatment Alternatives to Prison ("DTAP") in New York, New York, Law Enforcement Assisted Diversion in Seattle, Washington, and Vermont's Cognitive Self-Change Program, reducing rearrests by between 21 and 58 percent compared to prison.<sup>93</sup> Although treatment programs require upfront costs, they offer long-term savings from averted incarceration.
- **Community Service:** This includes required work that improves the community, such as cleaning a park, stocking a food bank, or working with a youth group. By connecting offenders to their community, service may also be rehabilitative.
- **Fines and Restitution:** Fines go to the government, whereas restitution compensates victims. Of course, payments must be calibrated to a defendant's income and ability to pay.<sup>94</sup> Restitution may be especially appropriate for property crimes. In some countries, like Germany, where 79 percent of people who commit crimes are sanctioned with fines assessed according to ability to pay, fines are used as stand-alone sanctions and the country has a low crime rate.<sup>95</sup>

## B. Analysis

To determine whether incarceration is an effective sanction for specific crimes, this report weighed four factors: seriousness of the crime, victim impact, intent, and likelihood of recidivism (defined as reimprisonment for a new crime within three years). These factors reflect a social science and popular consensus on why we incarcerate — to deliver punishment, promote public safety, and rehabilitate. They also lean heavily in favor of protecting public safety. (See Appendix A: Methodology for more explanation of the rationale for these factors.)

Using data on 1.46 million inmates from 48 state prisons and all federal prisons, the authors analyzed why inmates were behind bars, and for how long.<sup>96</sup> The authors applied the four-factor framework in a comprehensive, crime-by-crime analysis of the 370 crimes for which all prisoners were convicted.

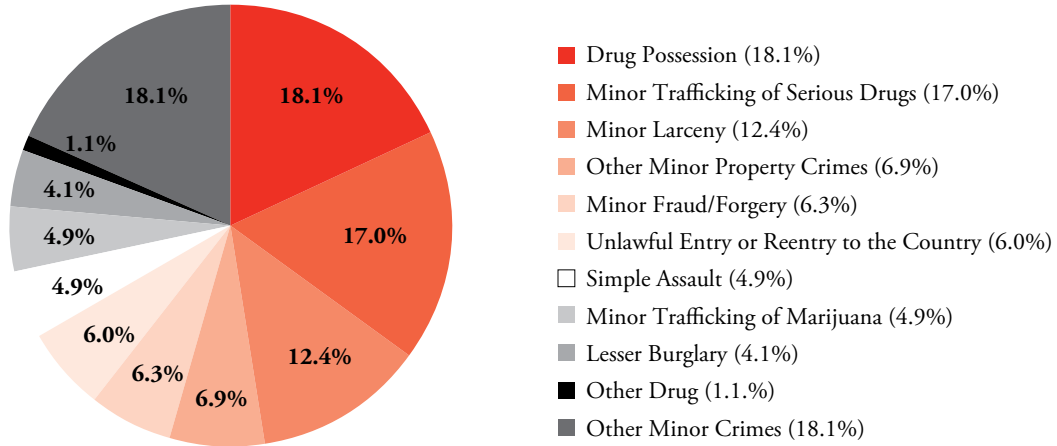
A detailed summary of this report’s recommendations can be found in Table 1. These recommendations are conservative. When the circumstances are ambiguous, they err on the side of protecting public safety. For a large subset of crimes, the report concludes that prison is likely not the most effective intervention. In these cases, public safety may be equally served by using an alternative to incarceration. These categories of crimes include those that do not result in serious harm to a victim or substantial destruction of property; where malicious intent may not have been present; and/or where prison may not serve as the most effective penalty to reduce recidivism.

Figure 11 depicts the lower-level crimes for which the authors’ analysis finds an alternative to incarceration to be the more effective sanction:

- Approximately 25 percent of the national prisoner population (364,000 prisoners) would benefit from alternatives to prison based on the four-factor analysis. (See Table 1 for more explanation and Section III. C for examples.)
- Ninety-five percent of these crimes are non-violent. The only crime included that is categorized as “violent” is simple assault, which typically involves only a verbal threat against another person. If bodily contact is involved, a higher crime, such as aggravated assault, can be charged.
- The category of “other minor crimes” comprises a number of lower-level offenses, including gambling, offenses against decency, and traffic infractions. These crimes are not violent and usually involve little to no direct harm to others. If an offender perpetrates violence during these crimes, they become more serious crimes that can merit incarceration.

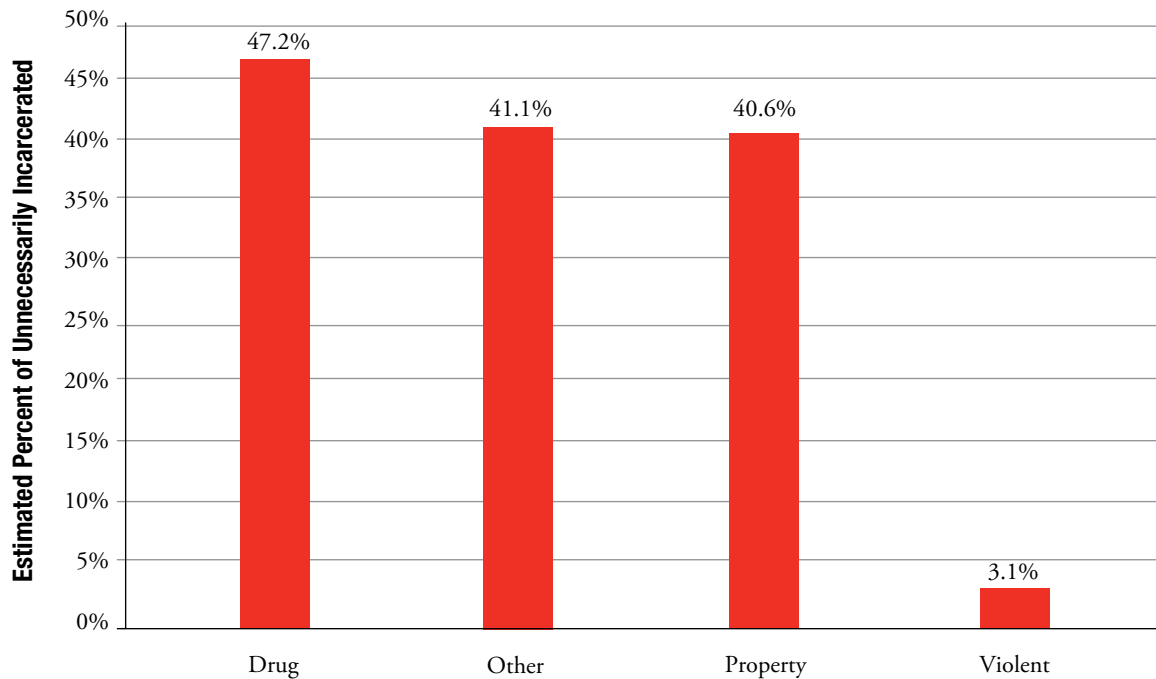
**Figure 11: Lower-Level Crimes Likely Warranting Alternatives to Prison**

Crime Category	Number of Prisoners Today	Percent of Total for Alternatives
Drug Possession	66,000	18.1%
Minor Trafficking of Serious Drugs	62,000	17.0%
Minor Larceny	45,000	12.4%
Other Minor Property Crimes	25,000	6.9%
Minor Fraud/Forgery	23,000	6.3%
Unlawful Entry and Reentry to the Country	22,000	6.0%
Simple Assault	18,000	4.9%
Minor Trafficking of Marijuana	18,000	4.9%
Lesser Burglary	15,000	4.1%
Other Minor Drug Offenses	4,000	1.1%
Other Minor Crimes (i.e. gambling, prostitution, first DUI offense)	66,000	18.1%
<b>TOTAL</b>	<b>364,000</b>	<b>100%</b>



Source: Brennan Center Analysis.<sup>97</sup>

**Figure 12: Estimated Percentage of Americans Unnecessarily Incarcerated, by Crime Type**



Source: Brennan Center Analysis.<sup>98</sup>

Figure 12 depicts the percent of prisoners that the authors found were incarcerated without a compelling public safety reason according to the four-factor analysis. This includes almost half of drug offenders and 40 percent of those convicted of property or other crimes.

### **C. Examples**

These findings emerged from a careful examination of each category of crime. A summary of the authors' analysis can be found in Table 1 and is further explained in the Methodology. Examples are provided below.

#### **1. Trafficking of Serious Drugs (227,000 prisoners, 15.5 percent of national prison population)**

In the original data collected by the authors, eight crime categories, including trafficking of serious drugs, had broad definitions that encompassed prisoners convicted of serious activities that likely merit incarceration and those convicted of less serious versions where alternative forms of punishment are likely more appropriate.<sup>99</sup> For these crime categories, the authors first used the four factors to determine what conduct constituted a “serious” and a “minor” definition of the crime. They then used more detailed data from a representative sample of states to estimate how many prisoners nationwide fell into each definition. The analysis for serious trafficking and minor trafficking is below.



*Serious Trafficking of Serious Drugs (165,000 prisoners, 72.7 percent of drug trafficking prisoners, 11.3 percent of all prisoners)<sup>100</sup>*

In these crimes, individuals play a managerial or high-level role in producing, importing, selling, or otherwise supplying illegal substances drugs — other than marijuana. These include cocaine, heroin, and methamphetamine.

- **Seriousness:** Those with higher-level roles do more to facilitate the spread of harmful drugs, and are more likely to use violence or fraud to further their organization.
- **Victim Impact:** Serious trafficking often entails physical violence, threats, or fraud, in addition to facilitating harmful drug use.
- **Intent:** These crimes generally require knowing or intentional action.
- **Recidivism:** The recidivism rate of prisoners released after serving time for drug trafficking is moderate relative to other crimes. According to data from the U.S. Bureau of Justice Statistics (BJS), nearly 25 percent were reimprisoned for a new crime within three years.<sup>101</sup>

All four factors point to incarceration as the recommended default sanction for serious trafficking.

*Minor Trafficking of Serious Drugs (62,000 prisoners, 27.3 percent of drug trafficking prisoners, 4.2 percent of all prisoners)*

In these crimes, offenders play a low-level role in trafficking, such as couriers, drug “mules,” or street dealers selling small quantities.

- **Seriousness:** Those with low-level roles contribute little to the operation and are replaceable. They are usually motivated to commit the crime due to poverty or drug addiction.
- **Victim Impact:** Individuals play a smaller role with regard to harmful drug use than serious drug traffickers.
- **Intent:** These crimes generally require knowing or intentional action.
- **Recidivism:** The recidivism rate is moderate relative to other crimes. Nearly 25 percent were reimprisoned for a new crime within three years.<sup>102</sup>

Two of the four factors for minor trafficking indicate the public safety threat presented is low and that a sanction other than incarceration may be an appropriate default. While the recidivism rate is moderate, many of these offenders are impoverished or suffering from addiction, which is more appropriately handled through social services and treatment.

## **2. Robbery (176,000 prisoners, 12.0 percent of national prison population)**

Robbery is defined as theft of property by force or intimidation, in the presence of the victim.

- **Seriousness:** This is a serious crime, entailing use of force or intimidation to subdue a victim and take his or her property.

- Victim Impact: This crime can result in both physical and psychological trauma to victims.
- Intent: Intent is required to commit this crime.
- Recidivism: Recidivism data from BJS indicates that 25 percent of these offenders were reimprisoned for a new crime within three years.<sup>103</sup>

While not all robberies entail physical harm, the trauma and potential for physical harm or death may merit incarceration. Because the authors chose to err on the side of public safety even when circumstances are questionable, this report recommends incarceration as the default sanction.

### **3. Murder (165,000 prisoners, 11.3 percent of national prison population)**

Murder is the intentional killing of another person, or killing of a person during a felony.

- Seriousness: Murder is the most serious crime.
- Victim Impact: It not only irrevocably ends the lives of victims, it causes trauma and suffering for the friends and family of the person killed.
- Intent: Murder is planned or intentional, or committed in the course of a planned or intentional felony crime. (A killing committed under sufficient provocation, or resulting from recklessness, is defined as manslaughter.)
- Recidivism: The recidivism rate is relatively low. 11 percent of those released after a murder conviction were reimprisoned for a new crime within three years.<sup>104</sup>

Three of the four factors point to incarceration as the recommended sanction. While the recidivism rate is relatively low, the gravity of this crime merits incarceration as a default.

### **4. Burglary (126,000 prisoners, 8.6 percent of national prison population)**

Burglary is entering a residence or occupied structure without permission, with intent to commit *any* crime inside. The crime committed inside could be completed or merely intended, including possibly arson, damage, loitering, or property theft. (Notably, if violence is committed or intended, the crime would escalate to attempted assault or use of deadly force).

Burglary is one of the eight categories that lumped together serious conduct along with other less serious conduct. The median victim loss amount for this crime is \$280.<sup>105</sup> Of course, some burglaries result in more, and others in less loss. The authors split this category into their own definitions of “serious burglary” and “lesser burglary” as discussed below.

*Serious Burglary (111,000 prisoners, 88.1 percent of burglary prisoners, 7.6 percent of all prisoners)*

Serious burglary is defined as a burglary that involves either: a deadly weapon, intent to commit a serious or violent felony, or entering a home or non-residential structure when occupants are present.

- **Seriousness:** These burglaries involve a violation of the home or other safe space such as an office, regardless of whether a resident is present or not. They may involve a weapon. Due to the sanctity of the home in common law and in society, the crime is considered serious.
- **Victim Impact:** People feel a particularly acute fear of having their homes violated and their families threatened. These burglaries may cause trauma as well as significant property loss.
- **Intent:** The crime requires, at the very least, an intention to inflict property damage upon others.
- **Recidivism:** Recidivism data from BJS indicates that 31 percent of burglary offenders were reimprisoned for another crime within three years.<sup>106</sup>

Although many would argue that if no violence was perpetrated incarceration is not appropriate, the authors erred on the side of public safety even in equivocal circumstances. Given the societal value placed on the sanctity of the home, they recommend incarceration as the default sanction.

*Lesser Burglary (15,000 prisoners, 11.9 percent of burglary prisoners, 1 percent of all prisoners)*

“Lesser burglaries” are burglaries of abandoned or unoccupied structures when occupants are not present.

- **Seriousness:** These burglaries occur on abandoned or unoccupied structures, but may result in property loss or damage. They do not involve homes, residential buildings, or office buildings.
- **Victim Impact:** These crimes do not involve contact with people directly, and therefore may cause less trauma.
- **Intent:** Intent to inflict property damage on others is required.
- **Recidivism:** Recidivism data from BJS indicates that 31 percent of burglary offenders were reimprisoned for another crime within three years.<sup>107</sup>

Three of the four factors indicate the public safety threat these prisoners present is low and that a default sanction other than incarceration may be appropriate. While the recidivism rate is relatively high, rehabilitation may be more likely achieved with an alternative sanction given the potential criminogenic effect of prison for these types of lower-level crimes.

## **5. Drug Possession (66,000 prisoners, 4.5 percent of national prison population)**

Drug possession involves having one or more specifically enumerated controlled substances, such as cocaine, heroin, methamphetamine, or marijuana.

- **Seriousness:** These are low-level crimes committed by people who often suffer from substance abuse problems. They generally possess these illegal drugs for their own personal use not for sale. Any sale or distribution (or intent to do so) escalates to a different crime captured under the drug trafficking category.
- **Victim Impact:** The primary harm is self-inflicted. However, purchase of an illegal substance provides at least marginal support for a criminal enterprise. Offenders also sometimes commit violence or other crimes while under the influence, or commit property crimes to support their drug purchases. But if these additional crimes are committed, they can be charged as separate crimes.
- **Intent:** The intent is usually to possess the drugs for personal use, not to harm another.

- **Recidivism:** Recidivism data from BJS indicates that 24 percent were imprisoned for another crime within three years.<sup>108</sup>

Three of the four factors indicate the public safety threat these prisoners present is low and that an alternative to incarceration may be appropriate. While the recidivism rate is moderate, a review of many studies on drug treatment and recidivism concluded that on average, treatment reduced recidivism more than prison.<sup>109</sup> For these reasons, the authors recommend a default sanction of alternatives to incarceration, such as treatment or probation.

## DEPARTING FROM RECOMMENDED SANCTIONS

This report recommends that laws set default sentences for crimes of either imprisonment or alternatives to incarceration, as detailed in Table 1. This is one way to restore proportionality to sentencing while ensuring that those who commit similar offenses are treated similarly. But these defaults are not absolute. Judges should retain discretion to make upward or downward departures in special circumstances such as:

- **Mental Illness, Drug Addiction, or Other Vulnerability:** When an offender suffers from mental illness, substance addiction, or history of victimization, an alternative sanction may be merited. In these cases, a defendant is more likely to be rehabilitated, refrain from recidivating, and become productive in society if offered treatment or another intervention instead of imprisonment. If the offender is a child or an elderly person, a departure may also be warranted.
- **Pleading Down:** Where an initial charge is for a more serious crime, but a defendant admits to, or pleads, to a lesser crime and it is clear that the defendant committed the underlying conduct, an upward departure may be appropriate.
- **Criminal History:** When a defendant has committed the same or other crimes in the past, imprisonment may be merited even for a lower-level crime.
- **Aggravating Circumstances:** Where specific circumstances, such as possession of gun or particularly egregious behavior, make a crime more serious than is evident from the crime itself, an upward departure may be warranted.
- **Remorse:** A remorseful defendant, who may be less likely to commit another crime and more receptive to rehabilitation, may merit a lesser sanction.

**Table 1: Findings and Recommendations, State and Federal Prisoners**

Crime Category	# of Prisoners	% of Total	Alternatives Recommended	Prison Recommended	Average Years Served Now	Recommended Years Served	Explanation
<b>VIOLENT</b>							
Robbery	176,000	12.0%	No	Yes	4.2	3.1	Theft by force or intimidation, in the presence of the victim. Can result in severe physical and psychological trauma. Incarceration is the recommended default sanction, but the authors believe time served can be safely reduced; an approximate 25 percent cut should be considered.
Murder	165,000	11.3%	No	Yes	11.7	8.8	The intentional killing of another, or killing a person during a felony. Incarceration is recommended, but the authors believe time served can be safely reduced; an approximate 25 percent cut should be considered.
Aggravated Assault	155,000	10.6%	No	Yes	3.0	2.3	Knowingly or extremely recklessly causing serious injury to another. Because it causes severe physical injury, incarceration is the recommended default sanction, but the authors believe time served can be safely reduced; an approximate 25 percent cut should be considered. <sup>110</sup>
Rape	50,000	3.4%	No	Yes	7.4	N/A**	Sexual intercourse forced on a non-consenting victim. Because it causes severe physical and psychological trauma, incarceration is recommended.
Manslaughter	47,000	3.2%	No	Yes	5.6	N/A**	Unplanned killing. Incarceration is recommended.
Lewd Act with a Child	26,000	1.8%	No	Yes	3.6	N/A**	Unlawful sexual act committed with a child. Because this results in physical and psychological trauma to children, incarceration is recommended.
Simple Assault	18,000	1.2%	Yes	No	1.4	N/A	Knowingly or recklessly causing minor injury to another, or causing fear of injury. Because injuries are often minor, and the rate of reoffending is low, alternatives such as community service or probation are the recommended default sanction.
Serious Statutory Rape	3,000*	0.2%*	No	Yes	3.3	N/A**	Defined as sex with someone much younger or where consent is ambiguous. Because this entails an abuse of power and likely psychological harm, incarceration is recommended.
Other Statutory Rape	3,000*	0.2%*	Yes	No	3.3	N/A	Defined as sex with someone younger but close in age with clear consent. This could include a high school senior having intercourse with another senior or a junior, with clear consent. Alternatives such as counseling or probation are the recommended default sanction, especially if both parties are young adults.
Other Serious Violent Crimes	29,000	2.0%	No	Yes	N/A	N/A**	Examples include: assault on police, child abuse, and kidnapping. Because these crimes may cause severe physical and psychological trauma or may impede law enforcement's work, incarceration is the recommended default sanction.
<b>Total Violent</b>	<b>672,000</b>	<b>45.9%</b>	<b>3.1%</b>	<b>96.9%</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>

Crime Category	# of Prisoners	% of Total	Alternatives Recommended	Prison Recommended	Average Years Served Now	Recommended Years Served	Explanation
<b>PROPERTY</b>							
Serious Burglary	111,000*	7.6%*	No	Yes	1.7*	1.3	Defined as entering a residence or occupied structure without permission, with intent to commit a crime inside, involving a deadly weapon or intent to commit a serious or violent felony – regardless of whether occupants are present. Given the sanctity of the home reflected in American law and culture, incarceration is recommended as the default sanction. The authors believe time served can be safely reduced; an approximate 25 percent cut should be considered.
Minor Larceny	45,000*	3.1%*	Yes	No	1.1*	N/A	Taking another's property worth less than \$10,000 without consent. Because it results only in property loss, alternatives such as fines, restitution, and community service are the recommended default sanction.
Minor Fraud or Forgery	23,000*	1.6%*	Yes	No	1.1*	N/A	A knowing misrepresentation causing financial or material loss less than \$10,000. Because it results only in property loss, alternatives such as fines, restitution, and community service are the recommended default sanction.
Serious Fraud or Forgery	19,000*	1.3%*	No	Yes	1.1*	N/A**	Defined as a knowing misrepresentation causing financial or material loss of \$10,000 or more. This includes "white collar" crimes like securities fraud, money laundering, or tax fraud. Because fraud of such significant sums (20 percent of average annual household income) may substantially diminish a victim's wealth and cause mental anguish, incarceration is the recommended default sanction.
Serious Larceny	19,000*	1.3%*	No	Yes	1.2*	N/A**	Defined as theft of \$10,000 or more. Because larceny of over \$10,000 (20 percent of average annual household income) may substantially diminish a victim's wealth and cause mental anguish, incarceration is the recommended default sanction.
Lesser Burglary	15,000*	1.0%*	Yes	No	1.7*	N/A	Defined as entering an abandoned structure with intent to commit <i>any</i> crime inside. The crime committed could be completed or merely intended. Because these burglaries are less likely to result in a physical altercation and do not involve occupants, alternatives such as probation, restitution, or community service are the recommended default sanction.
Arson	6,000	0.4%	No	Yes	2.6	N/A**	Setting a fire to purposely destroy another's property. Because arson causes severe property damage, and can cause severe injury or death, incarceration is the recommended default sanction.
Other Serious Property Crimes	3,000	0.2%	No	Yes	N/A	N/A**	Examples include blackmail and embezzlement. Because these crimes diminish victims' wealth, cause mental anguish, or threaten the integrity of political and economic institutions, incarceration is the recommended default sanction.
Other Minor Property	25,000	1.7%	Yes	No	N/A	N/A	Examples include receiving stolen property and trespassing. Because these crimes result only in minor property loss, alternatives such as fines, restitution, and community service are the recommended default sanction.
<b>Total Property</b>	<b>266,000</b>	<b>18.2%</b>	<b>40.6%</b>	<b>59.4%</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>

Crime Category	# of Prisoners	% of Total	Alternatives Recommended	Prison Recommended	Average Years Served Now	Recommended Years Served	Explanation
<b>DRUG</b>							
Serious Trafficking of Serious Drugs	165,000*	11.3%*	No	Yes	3.4*	2.6	Defined as having a managerial or high-level role in producing, importing, selling, or supplying illegal substances other than marijuana (e.g. cocaine, heroin, and methamphetamine). These offenders contribute more to the distribution of harmful substances, and are more likely to commit violence to further the organization's interest. Incarceration is the recommended default sanction, but the authors believe time served can be safely reduced; an approximate 25 percent cut should be considered.
Drug Possession	66,000	4.5%	Yes	No	1.1	N/A	Because many users suffer from addiction or mental health problems, and this crime generally inflicts harm primarily on the offender, alternatives such as treatment or probation are the recommended default sanction.
Minor Trafficking of Serious Drugs	62,000*	4.2%*	Yes	No	3.4*	N/A	Defined as lower-level roles in trafficking, such as street dealers of small amounts or acting as a courier. Because these offenders do less to facilitate the spread of harmful drugs, and are often motivated by addiction or poverty, alternatives such as probation, treatment, or fines are the recommended default sanction.
Minor Trafficking of Marijuana	18,000*	1.2%*	Yes	No	1.3*	N/A	Defined as lower-level roles in selling marijuana, such as street deals of small amounts or acting as a courier. Research shows that marijuana is less harmful than other more serious drugs, and popular sentiment has moved toward favoring legalizing it. <sup>111</sup> Given these two factors, alternatives such as probation, treatment, or fines are the recommended default sanction.
Serious Trafficking of Marijuana	3,000*	0.2%*	No	Yes	1.3*	N/A**	Defined as having a managerial or high-level role in producing, importing, selling, or supplying marijuana. Because these offenders facilitate widespread drug trade for their own financial gain, and may have motive to commit fraud and violence, incarceration is the recommended default sanction.
Other Minor Drug Offenses	4,000	0.3%	Yes	No	N/A	N/A	Includes crimes such as possessing drug paraphernalia. Because they do not involve large scale trafficking, alternatives such as probation, fines, or treatment are the recommended default sanction.
<b>Total Drug</b>	<b>318,000</b>	<b>21.7%</b>	<b>47.2%</b>	<b>52.8%</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>

Crime Category	# of Prisoners	% of Total	Alternatives Recommended	Prison Recommended	Average Years Served Now	Recommended Years Served	Explanation
OTHER							
Non-Violent Weapon Offenses	76,000	5.2%	No	Yes	3.0	2.3	Includes weapons possession, negligent discharge, and other weapons uses that are not directed at a person or aimed at hurting a person. Use of a deadly weapon is a separate crime category. These crimes facilitate violence by expanding access to and hindering effective regulation of deadly weapons. Incarceration is recommended, but the authors believe time served can be safely reduced; an approximate 25 percent cut should be considered.
DUI — Multiple	27,000*	1.8%*	No	Yes	1.0*	N/A**	“Driving under the influence” involves driving a vehicle while beyond the legally permitted level of intoxication with one or more prior conviction for the same. DUI offenses pose a risk of severe injury or death to motorists or pedestrians. Because multiple DUI offenses involve intentional or extremely reckless disregard for the safety of others, incarceration is the recommended default sanction.
Unlawful Entry and Reentry to the Country	22,000*	1.5%*	Yes	No	1.8*	N/A	In most cases there has been no additional crime committed (if there is, it can be charged as a separate crime). This crime generally automatically results in the sanction of deportation under existing immigration law, making incarceration in federal prison unnecessary. <sup>iii</sup>
Immigration Smuggling	1,000*	0.1%*	No	Yes	1.8*	N/A**	Facilitation of illegal immigration of others. Because it facilitates widespread violation of the law, places people at risk of death or injury, and is associated with fraud, violence, or smuggling of sex workers, incarceration is recommended.
Other Serious Crimes	18,000	1.2%	No	Yes	N/A	N/A	Examples include escape from custody, racketeering, and bribery. Because these crimes not only cause physical or psychological harm, but impede the orderly functioning of prisons and other important institutions, incarceration is the recommended default sanction.
Other Minor Crimes	63,000	4.3%	Yes	No	N/A	N/A	Examples include prostitution, gambling, obscenity, traffic offenses, and first time DUIs. <sup>112</sup> These crimes involve behavior deemed immoral but may not necessarily cause physical injury to others; others involve risk of minor injury to others. Alternatives such as community service or fines are the recommended default sanction.
Total Other	<b>207,000</b>	<b>14.1%</b>	<b>41.1%</b>	<b>58.9%</b>	<b>N/A</b>	<b>N/A</b>	<b>N/A</b>
<b>Total Prisoners (authors dataset)</b>	<b>1,463,000</b>	<b>100%</b>	<b>24.9%</b>	<b>75.1%</b>	<b>N/A</b>	<b>N/A</b>	<b>By reducing prison stays for the six crimes noted above, an additional 14.5 percent of inmates (212,000 people) could be safely released.</b>

\* Estimates.<sup>113</sup> \*\* As explained in Section IV, the authors did not conduct a prison stay analysis for these crimes; however, they believe these stays could likely be safely reduced.

Source: Brennan Center Analysis.<sup>114</sup>

iii This report takes no position on immigration policy. This is merely meant to note that undocumented people already convicted of immigration felonies will be placed in the immigration system if not incarcerated.



## IV. REDUCING TIME SERVED FOR OTHER CRIMES

The recommendations in Section III would reduce the nation's prison population from 1.46 million to about 1.1 million. This section turns to a thoughtful approach to reduce sentence lengths for offenders whose crimes may still warrant prison.

### A. Research On Lengths Of Stay & Recidivism

In Section III, this report analyzed existing research that showed that increasing incarceration has diminishing returns on crime reduction. The same can be said of the relationship between the length of time spent in prison and crime.

One body of research demonstrates that longer sentences do not reduce recidivism more than shorter sentences. For example, a 2013 paper by economist David Abrams reviewed a range of studies examining the effects of sentencing and parole in three cities (Chicago, Las Vegas, and Washington, D.C.), and two states (California and Georgia). He concluded that “these studies seem to find fairly consistent evidence of specific deterrence for low sentence ranges, but not for longer ones.”<sup>115</sup> An analysis of over 440,000 prisoners by psychologist Paul Gendreau in 2002 also found significant diminishing returns. Further, he concluded that after 12 months, prison stays caused higher recidivism.<sup>116</sup>

A similar case study was conducted in 2007 by economist Ilyana Kuziemko for the National Bureau of Economic Research (“NBER”).<sup>117</sup> That analysis focused on 80,000 prisoners in Georgia. She chose this locale because the state's inmate population was representative of national prison population demographics, including percentage of violent and non-violent offenders and labor-market conditions upon release from prison. She also found conditions ripe for a natural experiment on sentence lengths. The Georgia Board of Parole assigned inmates “scores” that determined parole eligibility based on risk of recidivism – the lower the score, the higher the presumed risk of reoffending upon release. Scores were based on age, past record, and other factors believed to correlate with recidivism. However, release decisions were made based on which risk “tier” an inmate's score placed him in: a score of nine might place an inmate in the medium-risk tier, but a score of eight would correspond to high risk. This allowed Kuziemko to test the effect of prison on inmates who received similar risk scores, but were treated differently.<sup>118</sup> She was then able to assess whether lengths of time spent in prison resulted in different rates of recidivism. She chose to assess the recidivism risks of those imprisoned for less than 20 months (1.7 years) versus those imprisoned for longer. She found that for prisoners serving less than 20 months, an extra month behind bars moderately reduced reoffending. However, she found “an extra month ha[d] close to no effect on those serving more” than 20 months. Kuziemko concluded that her results strongly suggest that longer prison terms have diminishing returns to sentence lengths beyond 20 months.<sup>119</sup>

Other studies indicate that as individuals get older, they tend to commit fewer crimes, providing more evidence that longer sentences may not be as effective as assumed. Long sentences often hold people in prison after they “age out of crime.” In 1999, economist Steven Levitt found that people between the ages of 15 and 24 were most likely to commit crimes.<sup>120</sup> Similarly, sociologists Charles Tittle, David

Ward, and Harold Grasmick demonstrated in 2003 that 18 to 24 year olds were more likely to commit crimes than those who were older.<sup>121</sup> A study by sociologist Robert Sampson conducted that same year showed almost the exact same result in a longitudinal study, finding people over the age of 55 are 10 times less likely to commit crimes than those aged 23, even for individuals who had committed crimes earlier on in life.<sup>122</sup> Despite this evidence, the proportion of elderly prisoners tripled from 1993 to 2009.<sup>123</sup> This is a direct result of the lengthy sentences of the past four decades.

A second body of research finds little to no relationship between lengths of stay and recidivism. In its most recent multi-state study on recidivism published in 2002, the Justice Department examined data from 15 states reporting lengths of stays and recidivism rates from prisoners released. It found that recidivism rates did not differ significantly among those released after serving 6 months or less compared to those serving sentences all the way up to 30 months in prison.<sup>124</sup> A 2009 analysis by criminologists Daniel Nagin, Francis Cullen, and Cheryl Jonson reviewed 19 major studies and found that some research indicated that longer stays slightly decreased reoffending, while other research found that longer stays slightly increased reoffending.<sup>125</sup> A study that same year of juveniles convicted of serious crimes in Philadelphia, Pa., and Phoenix, Ariz., found that longer stays — increasing from three to 13 months — did not decrease future rearrest rates.<sup>126</sup> A 2010 evaluation by political scientist Donald Green and law professor Daniel Winik analyzed drug offenders in Washington, D.C., who were sentenced by more strict judges versus more lenient ones. They also did not find a relationship between longer incarceration and recidivism. In fact, they found that an extra month of imprisonment raised recidivism rates by about 1 percent, but this result was not statistically significant.<sup>127</sup>

Further, a third group of studies indicates that the longer one stays in prison, the *more* likely he or she is to reoffend upon release. In 2016, criminologist Jason Rydberg examined incarceration length's impact on recidivism rates in four states — Michigan, Missouri, New York, and Utah. He found that longer length of stays between caused higher recidivism rates especially for some public order and property crimes.<sup>128</sup> University of Michigan economist Michael Mueller-Smith also recently studied the effect of prison stays on recidivism rates in Harris County, Tex. He found that each additional year that a prisoner served time behind bars made them 4 to 7 percent more likely to reoffend within three-months after release. Further, he noted that this “should be of particular concern since it rapidly reverses any cost savings from crime prevented.”<sup>129</sup>

Similarly, studies indicate that long prison sentences have little or no impact on reducing the criminal behavior of the public at large. This theory, what criminologists call “general deterrence,” argues that humans are rational beings who consider the punishment for their behavior before acting. Studies, however, find this theory does not hold true, as most people consider immediate circumstances and emotions instead of longer term legal consequences when acting or reacting. A seminal study by the National Academy of Sciences in 2014 conducted a comprehensive analysis of more than a dozen leading studies on general deterrence, and concluded that “the evidence on the deterrent effect of sentence length suggests that the relationship between crime rate and sentence length” has “diminishing deterrent returns” at best.<sup>130</sup> Other studies find similar results. For example, in a 2002 study in Kentucky and North Carolina, economist David Anderson interviewed males imprisoned for felonies about their prior knowledge of the penalties they would face. He found that only 22 percent knew beforehand

what the punishment would be for their crime while more than half did not know or even consider the punishment. When it came to deadly crimes, 55 percent of the men responded that they did not think about the punishment at all.<sup>131</sup> In 2003, economists Steven Raphael and Jens Ludwig evaluated the effect of a policy implemented in 1997 in Richmond, Va., that increased prison sentences for gun crimes by prosecuting them as federal crimes. They found no deterrent effect associated with the sentence increases.<sup>132</sup> In 2009, economists David Lee and Justin McCrary examined young people in Florida about to reach their 18th birthday. Since the likelihood of receiving longer prison sentences increases when individuals turn 18, theoretically fewer people should be willing to commit crimes just after turning 18 compared to a month before. Lee and McCrary found a very small effect that was not statistically significant, concluding that deterrence effects were minor or nonexistent.<sup>133</sup>

Finally, much research shows that certainty of punishment — as opposed to severity — more effectively reduces future criminal activity. In recent years, researchers have focused on evidence that “swift and certain” punishment using non-prison alternatives to respond to violations of probation conditions are more effective than waiting for multiple violations and then revoking the probationer to prison. The theory is that the threat of immediate punishment deters criminal conduct more than the threat of more severe punishment occurring at some point in the future. Though this research was conducted on probationers, it supports the notion that severity of punishment on its own does not drive crime reduction.<sup>134</sup>

In sum, social science evidence indicates that in the worst case scenario, longer lengths of stay produce higher recidivism rates, while the best case scenario points to diminishing returns of incarceration on public safety. It also provides compelling evidence of the possibility that there is no relationship at all between long lengths of stay and recidivism rates. After decades of using long prison stays as a response to crime, these studies strongly encourage a need to rethink this approach.

## **B. Options For Reducing Prison Stays**

The authors attempted to search for a way to bring sentence lengths into line with current research and to make them more proportional to the crime committed. The authors recognize that their approach below may seem arbitrary. However, they believe that their research-driven approach will result in more effective sentences than the current arbitrary and overly punitive sentencing regime. They hope their recommendation will serve as a starting point for sentence reductions, and not a call for uniform application.

To provide a starting point, the authors tested different options. They considered options of cutting prison stays by 10 percent, 25 percent, and 50 percent, which they labeled as cautious, moderate, and assertive, respectively.

They tested these options on the six major crimes that make up 58 percent of the national prison population: aggravated assault, murder, nonviolent weapons crimes, robbery, serious burglary, and serious drug trafficking.<sup>135</sup> The authors chose these six crimes because they make up a significant portion of the prison population, and because their lengths of stays increased significantly between 1993 and 2009.<sup>136</sup>

Table 2 depicts the effects of these reductions on the prison population, and Table 3 shows the cost savings for each option:

- **Cautious:** A 10 percent reduction would shave off an average of about six months for these prisoners. This modest step would reduce the prison population by 85,000 (5.8 percent of the current prison population) and save \$2.7 billion per year.
- **Moderate:** A 25 percent reduction would cut the prison population by 212,000 (14.5 percent of the current prison population), saving almost \$6.6 billion annually and reducing sentences on average by about 15 months. It would save \$66 billion over 10 years.
- **Assertive:** Leading criminal justice advocacy groups such as the ACLU, Beyond the Dream, #Cut50, Ella Baker Center, #FreeAmerica, and JustLeadershipUSA support cutting the national prison population in half.<sup>137</sup> A similar approach could be applied to sentence lengths. It would reduce the prison population by 424,000 (28.9 percent) and cut sentence lengths by one year and four months, on average. It may risk short-term increases in recidivism, but the amount saved would be staggering — \$13.3 billion annually and \$133 billion over 10 years.

**Table 2: Proposed Reductions in Prison Stays for Major Crimes**

Crime Category	Current Prisoners	Percent of Total Prison Population	Current Average Prison Stay (Years)	10% Reduction	25% Reduction	50% Reduction
Robbery	176,000	12.0%	4.2	3.8	3.2	2.1
Serious Drug Trafficking	165,000	11.3%	3.4*	3.1	2.6	1.7
Murder	165,000	11.3%	11.7	10.6	8.8	5.9
Aggravated Assault	155,000	10.6%	3	2.7	2.3	1.5
Serious Burglary	111,000	7.6%	1.7*	1.5	1.3	0.9
Nonviolent Weapons Offenses	76,000	5.2%	3	2.7	2.3	1.5

\*Estimates.<sup>138</sup> Source: Brennan Center Analysis.<sup>139</sup>

**Table 3: Annual Cost Savings from Reduced Prison Stays**

Crime Category	10% Reduction	25% Reduction	50% Reduction
Robbery	\$550 million	\$1.38 billion	\$2.75 billion
Serious Drug Trafficking	\$520 million	\$1.29 billion	\$2.58 billion
Murder	\$520 million	\$1.29 billion	\$2.58 billion
Aggravated Assault	\$490 million	\$1.21 billion	\$2.43 billion
Serious Burglary	\$350 million	\$870 million	\$1.74 billion
Nonviolent Weapons Offenses	\$240 million	\$590 million	\$1.19 billion
<b>Total</b>	<b>\$2.7 billion</b>	<b>\$6.6 billion</b>	<b>\$13.3 billion</b>

Source: Brennan Center Analysis.<sup>140</sup>

Though it is difficult to categorically determine precise optimal sentence lengths, the authors attempted to find a way to safely roll back sentences to more proportional lengths.

To see which of these options seemed most effective, the authors applied their four-factor analysis to these six crimes, with an increased emphasis on recidivism due to the heightened public safety concern invoked by these more serious crimes. This analysis led to an average sentence reduction of 26.6 percent. To shed light on the authors’ analysis, two examples are illustrative:

- Murder:** The average current prison stay for federal and state murder is 11.7 years.<sup>141</sup> These offenders also serve an average of roughly 1 to 3 years of *additional* incarceration in county jails before their prison stays. In Broward County, Florida, those charged with murder served an average of 2.8 years in jail before they were transferred to prison.<sup>142</sup> This crime is one of the most serious offenses, which weighs in favor of a long prison sentence. Murder is an intentional crime where the victim impact is lethal and produces life-altering trauma for family members, which also weighs toward a long sentence. However, the recidivism rate is lower than average — 11 percent of those convicted of murder are reimprisoned for a new crime within three years of release.<sup>143</sup> Because the NBER study specifically found that sentences less than 20 months did help bring down recidivism rates, the authors caution against reducing prison stays to less than 20 months for the most serious violent crimes. However, given that there are diminishing returns to long prison stays generally, the authors recommend that prison stays for murder should be reduced somewhat. A 25 percent cut would result in a reduction of three years, leaving an 8.8 year sentence — which still keeps inmates behind bars for almost a decade.
- Serious Burglary:** On average, offenders spend 1.7 years in prison, along with an additional roughly 3 to 5 months in county jail. In Broward County, those charged with burglary served an average of 1.1 years in jail before being transferred to prison.<sup>144</sup> Burglary involves serious property damage and alarm to residents. It is intentional, and the victim impact varies from extensive property damage to emotional trauma, although it does not involve violence. (If

any physical harm to a victim is involved, the crime would escalate to assault, for example.) The recidivism rate is below average, 31 percent of all burglary offenders were reimprisoned for a new crime within three years of release.<sup>145</sup> Given that there are diminishing returns to long prison stays generally and that this crime is not violent, this report recommends considering cuts in stays. A 25 percent cut would result in a four-month reduction, leaving a 1.3 year sentence.

The authors also looked to two additional points of reference. First, as mentioned above, while cutting sentence lengths by 50 percent may appear to many as a radical step, a powerful national coalition is calling for a similar approach.

Second, prominent criminologists and other experts have called for a return to the shorter prison stays that existed before the prison population exploded. They argue that the low crime rates of the 1970s indicate that crime can remain low, even with shorter prison stays. Todd Clear, criminologist and former Rutgers University Dean of the School of Criminal Justice, and James Austin, co-author of this report, argued in a 2009 paper, “An in-depth examination of sentence lengths and time served is called for, it might begin with the presumption that terms be cut back to what they were circa 1975 when the imprisonment binge began.”<sup>146</sup> Others have implied that even returning to the sentencing regime of the early 1990s, before the imposition of truth-in-sentencing and mandatory minimums policies and the narrowing of parole eligibility, would make a significant impact in reducing prison populations.<sup>147</sup> To return to the length of stay in 1990, today’s average prison stays would need to be cut by almost 40 percent.<sup>148</sup>

A 25 percent cut in sentence lengths for these six crimes seems more modest in comparison.

Based on the four-factor analysis, as well as these additional reference points, the authors conclude that a 25 percent cut *on average* for these six crimes seems moderate and should serve as a starting point for consideration. This recommendation — which would shave about 15 months from prison sentences for these crimes — ensures that sanctions for serious crimes involve significant prison time, are at levels that deter recidivism while protecting public safety, and achieve significant savings.<sup>149</sup> There are, of course, myriad different methods to project more proportional lengths of stay.

**Table 4: Current Prison Population, by Recommendation**

Category	Number of Prisoners
Alternatives to Prison Appropriate — Lower Level Crimes	364,000
Prison Appropriate and Recommended Term Already Served — Six Major Crimes	212,000
Prison Appropriate and Recommended Term Not Yet Served — Six Major Crimes	636,000
Prison Appropriate and Length of Stay Analysis Can Be Applied — Other Crimes	251,000
<b>Total Prison Population</b>	<b>1,463,000</b>

Source: Brennan Center Analysis.<sup>150</sup>

As shown in Table 4, if this recommendation were retroactively applied to prisoners currently serving time for these six crimes, 212,000 inmates would have already served their reduced sentences and could be released within the next year. Under this hypothetical, another 636,000 current prisoners would continue to serve time until they reached the recommended length of stay.

Further, given today's lengthy sentences, the authors believe a similar analysis can be applied to determine a safe but shorter length of stay for the remaining 17.2 percent of the national prison population (251,000 prisoners) for which the authors recommend imprisonment as the default sanction. Some of these crimes may warrant more or less than a 25 percent cut depending on the crime.

Of course, appropriate recidivism reduction, job training, education, and reentry programs should be implemented before releasing any prisoners to ensure proper reintegration into society without increasing recidivism.

## V. RECOMMENDATIONS & COST SAVINGS

### A. Recommendations

Whether viewed through a lens of justice, fairness, public safety, or cost, the U.S. prison system unnecessarily warehouses hundreds of thousands of people. This report calls for the following changes to sentencing *laws* as opposed to guidelines or practices, which can too easily be reversed.

- **Eliminate Prison for Lower-Level Crimes Barring Exceptional Circumstances:** State legislatures and Congress should amend sentencing laws to mandate alternatives to prison as the default penalty for lower-level crimes. These offenses include: drug possession, lesser burglary, minor drug trafficking, minor fraud and forgery, minor theft, simple assault, and other crimes such as prostitution and public disorder. Alternatives include: community service; drug, alcohol, and mental health treatment; electronic monitoring; fines calibrated to ability to pay; and probation. In exceptional circumstances, such as repeated past criminal activity, judges should have discretion to depart from the defaults.
- **Reduce Maximum and Minimum Sentences Set by Law:** Lawmakers should consider reducing sentence maximums and minimums defined in criminal statutes and sentencing guidelines. A 25 percent cut can be considered as a starting point for the six major crimes that make up 58 percent of the prison population: aggravated assault, murder, nonviolent weapons offenses, robbery, serious burglary, and serious drug trafficking.<sup>151</sup> Sentencing ranges for other crimes that warrant prison should similarly be reviewed and likely recalibrated based on research showing diminishing returns to sentence lengths.
- **Retroactively Apply Reforms if Safe:** Lawmakers should allow current inmates to petition judges for retroactive application of these reforms. Judges can apply an analysis similar to the four-factor test in this report and grant petitions if risks to public safety are minimal.
- **Additional Recommendations:**
  - o Prosecutors should use their discretion to seek alternatives to incarceration or shorter prison stays in line with this report's recommendations.
  - o Lawmakers should seek to repeal "three-strikes" and "truth-in-sentencing" laws, which arbitrarily increase time-served, and expand parole eligibility.
  - o Lawmakers should reinvest savings from imprisonment reduction into policies proven to reduce incarceration and crime, including: alternatives to incarceration (especially drug and mental health treatment), community policing, and reentry programs. Although treatment programs require upfront costs, they offer long-term cost efficiencies through savings from averted incarceration. Attention should also be paid to the more than 500,000 Americans employed in the nation's prisons, for whom downsizing may mean a loss of livelihoods. These experienced workers could be retrained to work in alternative to prison programs.



## SENTENCING REFORM SUCCESS IN STATES

Several states have started changing their sentencing laws in the direction recommended by this report. Below are some examples.

- **Florida:** In 2009, Florida eliminated prison sentences for some low-level, nonviolent felonies, such as lower-level theft and insurance fraud. These individuals may now be sentenced to probation or community supervision with requirements that they participate in community service, educational classes, training programs, or other recidivism reduction programs.<sup>152</sup> By 2012, Florida was able to shut down 11 correctional facilities due to this and other reforms.<sup>153</sup> From 2009 to 2014, the state's imprisonment rate fell 9 percent while violent and property crime fell by more than 10 percent.<sup>154</sup>
- **Mississippi:** In 2008, the state repealed its truth-in-sentencing law for offenses involving possession of a "small quantity of drugs," reducing the time-served requirement to 25 percent of the original sentence.<sup>155</sup> After this and other reforms, the state's rate of incarceration fell by 17 percent between 2008 and 2014, while violent crime fell by nearly 10 percent.
- **South Carolina:** In 2010, the state eliminated mandatory minimums for drug possession, and expanded the use of probation instead of prison for drug possession.<sup>156</sup> Between 2010 and 2014, South Carolina saw its imprisonment rate fall by 13 percent along with a 17 percent decline in violent crime and an 11 percent decline in property crime.
- **Texas:** In 2007, state legislators increased the availability of drug addiction and mental health treatment instead of prison for lower-level offenders including nonviolent drug offenses.<sup>157</sup> In 2011, the Texas legislature passed a bill allowing drug offenders to reduce their prison sentence lengths by completing educational programs.<sup>158</sup> From 2011 to 2014, the state reduced crime by 14 percent with an accompanying 8 percent reduction in the incarceration rate.<sup>159</sup>

## B. Cost Savings

Ending prison as the default punishment for lower-level crimes would reduce the current prison population by 364,000 people. Reducing time served for the six major crimes by 25 percent would allow an additional 212,000 prisoners to be released within the next year. These two recommendations, taken together, would shrink today's prison population of 1.46 million people by almost 580,000, and would also curtail the major drivers of mass incarceration going forward.

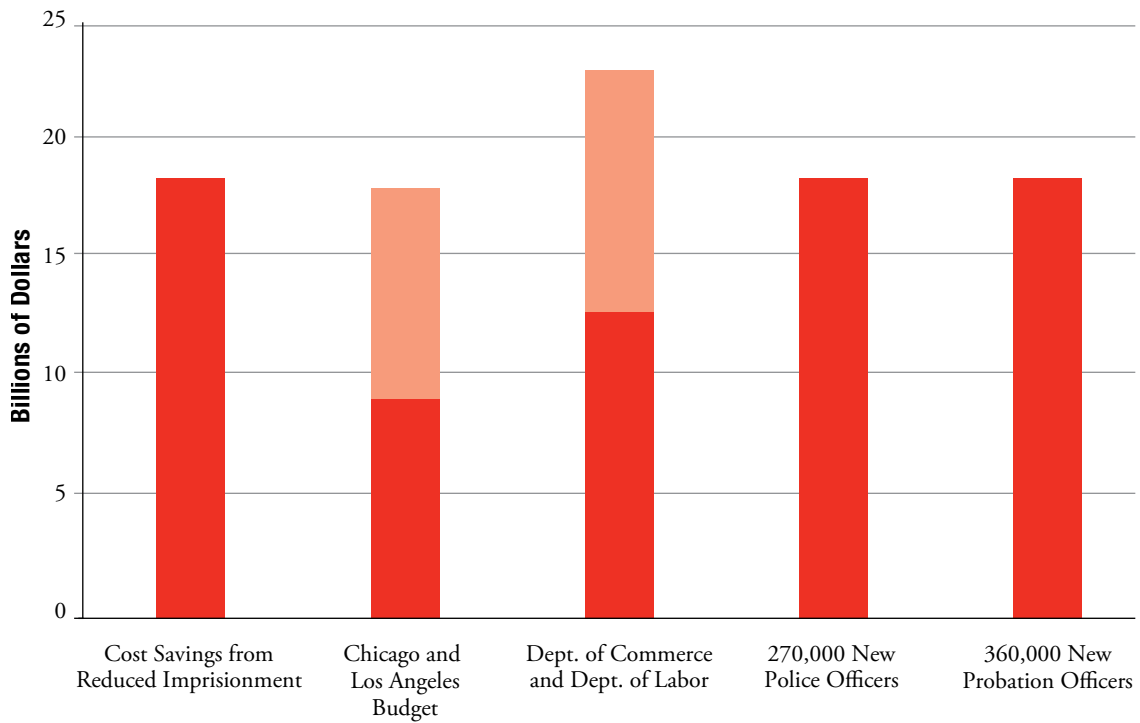
The average cost to house an inmate is about \$31,000 per year. Therefore, these two recommendations would yield \$18.1 billion in savings annually and \$181 billion over 10 years, assuming the number of people convicted of such crimes remained constant.<sup>160</sup>

Figure 13 depicts some of these analogues. This savings is the equivalent of:

- Hiring and training 270,000 new police officers.<sup>161</sup>
- Employing 360,000 probation officers.<sup>162</sup>
- Hiring 327,000 new teachers.<sup>163</sup>
- Sending two million young people to college.<sup>164</sup>
- The annual budgets of Los Angeles and Chicago, combined.<sup>165</sup>
- Nearly the combined budgets of the U.S. Departments of Commerce and Labor.<sup>166</sup>
- The annual budget of NASA.<sup>167</sup>
- The annual budget of Connecticut.<sup>168</sup>

All these dollars could be saved with little effect on public safety.

**Figure 13: Cost Savings from Reduced Imprisonment**



Source: Brennan Center Analysis of Agency Budgets (2016).<sup>169</sup>

## CONCLUSION

America's experiment in mass incarceration has failed. Not only does using prison as a knee-jerk reaction to crime devastate families and communities, but many of today's overly punitive prison sentences produce little public safety benefits. Many people in prison today are serving sentences for lower-level crimes, for which an alternative sanction would prove more just, equitable, less costly, and more effective at reducing recidivism. Additionally, many prisoners could serve less time in prison with similar public safety results.

This report's findings and recommendations are intended to offer the country one practical and effective approach to end mass incarceration while preserving the public safety gains of the last two decades. The authors hope that it serves as a catalyst for discussion for much needed change to criminal punishment in the United States.

## APPENDIX A: METHODOLOGY

### I. DATA SOURCES

The authors began research for this report in 2013, at which time 2012 data on state and federal prisoners was the most recent available. Notably, Dr. Austin and his co-investigators relied on data obtained from the National Corrections Reporting Program, a restricted source that cannot be distributed to outside parties.<sup>170</sup> Therefore the dataset for this report cannot be shared.

The authors initially intended to include jail data, but due to difficulty securing representative jail samples, they ultimately could not include jail populations in this report. They hope to conduct a similar analysis on jails in the future, if data allows.

Ultimately, the authors analyzed state inmate data from 48 states plus federal prisons, totaling 1.46 million prisoners, representing 94 percent of the national prisoner population.

#### A. State Prison Data

This report includes data from 48 states:

- **National Corrections Reporting Program (NCRP) Data:** The NCRP, run by the Justice Department, collects data every year on individual prisoners in state prisons. In 2012, 47 states reported some data to the NCRP.<sup>171</sup> But only 42 of those states reported data containing information on prison populations and lengths of prison stay, sorted by crime (into 370 crime categories) — the format needed for this report. Notably, NCRP data does not capture information about every single inmate in state prison so some individuals are missing from the dataset.
- **Individual State Data:** The authors secured data on 2012 prison populations directly from six additional states: Arizona, Arkansas, Connecticut, Hawaii, Louisiana, and Virginia.<sup>172</sup>
- **Missing Data:** The only states unable to fulfill any part of the request were New Mexico and Vermont. New Mexico organizes its data by criminal offense, but not individual offense, therefore over-counting all incarcerated people convicted of multiple offenses. Vermont's Department of Corrections does not organize its data by criminal offense. Therefore data from these states could not be inputted into the authors' dataset. Prisoners in New Mexico and Vermont make up just 0.5 percent of the total, national prison population, and around 0.7 percent of the state prison population.<sup>173</sup>

#### B. Federal Prison Data

Data on federal prisoners were collected from the Federal Justice Statistics Program (FJSP), which describes criminal cases in the federal justice system from arrests through corrections. It lists 33 federal

crime categories. Data in the FJSP is collected from the U.S. Marshals Service, Drug Enforcement Administration, Executive Office for U.S. Attorneys, Administrative Office of the U.S. Courts, U.S. Sentencing Commission, and the Federal Bureau of Prisons.<sup>174</sup> The data on length of prison stays details the mean time served for prisoners released in 2012, sorted by crime category.

The FJSP differs from the NCRP data in two main ways. First, the FJSP data uses slightly different crime categories than the NCRP. Second, the FJSP year runs from October 1st to September 30th, while the NCRP year runs from January 1st to December 31st.

### **C. Rounding**

Because prison populations fluctuate, the authors rounded all statistics on the number of prisoners. Totals listed in this report are the sums of the unrounded figures, rounded to the nearest thousand or single percent.

### **D. Definitions**

Some sources did not include definitions of crimes. In those circumstances, the authors relied on definitions from the American Law Institute's Model Penal Code, Black's Law Dictionary, and other leading casebooks on modern criminal law.<sup>175</sup>

## **II. ANALYSIS TO IDENTIFY LOWER-LEVEL CRIMES**

To determine the appropriate default sanction, whether incarceration or an alternative, the authors devised a four-part test. They then applied the test to each crime category in their dataset.

### **A. Crime Categories**

The NCRP dataset contained 160 crime categories. Individual states reported between 16 and 57 crime categories each. The FJSP reported 33 crime categories. Added together, the authors analyzed 370 crime categories.

For presentation purposes, the authors grouped these categories into the larger categories (listed in Table 1) when they entailed the same or similar conduct. For example, the overarching category of serious larceny includes grand larceny, attempted larceny, and conspiracy to commit larceny from the NCRP data, crimes labeled "theft" from individual state data, and crimes labeled larceny from the federal data.

Notably, this report uses the labels drug, property, violent, and other consistent with the NCRP and FJSP, so that this analysis can be compared to other national datasets and studies. The violent crime category in these sources may be overly broad, sweeping in crimes that do not actually include perpetrated violence.<sup>176</sup> Ideally, these categories would be more reflective of the acts committed.

## **B. Four-Factor Analysis**

The authors devised a four-factor analysis that relies heavily on public safety and applied it to each of the 370 crime categories. Their analysis weighed the following factors: seriousness of crime, victim impact, state of mind, and likelihood of recidivism. These factors were chosen based on a comprehensive review of scholarly and popular consensus on why we incarcerate — to promote public safety and deliver deserved punishment. Each of the first three factors speaks to both of these rationales. The final factor, recidivism, focuses solely on public safety.

Some crimes, such as attempted murder, are serious but may not physically injure victims, while others, like some regulatory offenses, are serious and potentially harmful, but lack culpable intent. Consideration of all four factors allowed the authors to determine when incarceration adequately reflected a concern for the maintenance of public safety, and when it unnecessarily burdened individuals, budgets, and communities with little public safety benefit.

While these factors were generally weighed equally, on occasion one or more factors predominated. For example, attempted murder had an exceptionally low recidivism rate, and by definition the victim was not killed. However, because it required intent to commit the most serious, irreversible crime, the first and third factors were given greater weight, leading to a recommendation of incarceration as the default sanction.

The authors labeled crimes as “lower-level” when the analysis led to a conclusion that the crime did not merit incarceration as the default sanction. Among these lower-level offenses were crimes that did not result in serious harm to a victim or substantial destruction of property, for which malicious intent may not have been present, and/or for which prison was not effective at reducing recidivism.

These recommendations are meant to instill default guidelines into sentencing laws, not provide absolute sanctions. As noted in the report, these defaults should be adjusted up or down depending on individual circumstances of each case and offender.

Further description of the four factors is below.

### **1. Seriousness**

This factor reflects the intuitive idea that a crime that causes, or has the potential to cause, great harm to victims and to society may merit more severe means of prevention and incapacitation. The broad metric of “seriousness” ensures consideration of both real and potential harm, and both tangible and intangible harm. For example, an attempted murder in which the victim does not know of the attempt may not harm the victim, although it has great potential to do so. Moreover, a mugging may not cause serious bodily or material harm, but it can cause fear, mental anguish, and property loss.<sup>177</sup>

This factor takes into consideration the retribution theory of punishment (by relying on the argument that a more serious crime deserves a more serious punishment) while using proportionality to cabin its effect (to ensure that sentences are not more severe than necessary).

## **2. Victim Impact**

This factor reflects the idea that actual, as opposed to potential harm, deserves special consideration. Bodily harm is the most common distinction in popular discussion of crime, differentiated by violent and non-violent harm. The special significance of bodily harm is both intuitive and deeply rooted in American law. Criminal law in every state reserves the most serious punishments for infliction of bodily harm.<sup>178</sup>

Today, criminologists and the public also recognize the significance of psychological harm.<sup>179</sup> Some crimes that involve no physical contact at all, such as burglary of someone's unoccupied home, may still cause significant fear and mental anguish.

## **3. State of Mind**

A culpable mental state, also called “mens rea” or intent, is a core tenet of criminal liability in American law. The Model Penal Code, produced by the American Law Institute, forms the basis of many state criminal codes and requires that all crimes have some mental state element — at a minimum negligence (carelessness, or a lack of “reasonable care”), but usually requiring knowledge or intent.<sup>180</sup> This means that the individual must know they are committing the criminal act or have the will or desire to commit the act to be held guilty of that crime. The idea that mental state affects culpability is reflected in the different categories of killing in almost every jurisdiction. All states have determined that a planned murder deserves a more severe punishment than a negligent killing, although the harm to the victim may be the same.<sup>181</sup>

## **4. Recidivism**

Concern for reducing recidivism reflects part of the public safety rationale for incarceration — the idea being that a sanction for a crime will deter the individual from future criminal conduct, often called “specific deterrence,” thereby making society safer. (The other public safety rationale is incapacitation — meaning that as long as the offender is kept out of society and in prison, they won't have the opportunity to commit another crime.) It is important to consider recidivism because over 95 percent of today's prisoners will be released at some point in the future.<sup>182</sup> Recidivism is most commonly defined as the rearrest, reconviction, or reincarceration of a former offender within a specific time frame.<sup>183</sup> Recidivism also encompasses the idea of rehabilitation, as lower recidivism rates should ideally reflect more rehabilitative programs that deter future crime. It also takes into account the theory of incapacitation (the idea that a prisoner will not commit crimes while he or she is in prison) as part of its analysis of public safety impact.

In this report, the authors use reincarceration within three years as the standard for recidivism as this report's recommendations focus on incarceration.<sup>184</sup>

When determining recidivism rates for the 370 crime categories, the authors relied on data and research from four seminal federal government studies on nationwide recidivism: one of state prisoners released in 1983 (published in 1990); one of state prisoners released in 1994 (published in 2002); one of state prisoners released in 2005 (published in 2014); and one of federal prisoners released in 2005 (published



in 2016).<sup>185</sup> Generally, these studies examined rearrest, reconviction, and reimprisonment rates for released prisoners over three and five years.

In conducting the recidivism analysis for the vast majority of crimes, the authors relied on the 2002 study of offenders released in 1994 because it was the most recent available analysis providing recidivism data specifically broken down by the crime for which the released person served time.<sup>186</sup> The more recent studies examined recidivism rates for crimes combined into the overall categories of violent, property, drug, and other. The authors compared the overall recidivism rates reported by each study and found a high level of consistency over a period of more than 20 years for rearrest, reconviction, and reimprisonment within these overall categories. Given this long-term consistency, the authors believe it was prudent to use the 1994 data, although a more recent source broken down by specific crime would have been preferable.

## 5. Other Factors

There are myriad factors that one could consider when determining sentences. The authors examined some additional factors and ultimately decided not to include or to implicitly include them in their analysis for the reasons below.

- **Incapacitation:** Incapacitation focuses on the value of preventing individuals who have committed crimes from committing additional crimes by removing them from society through imprisonment.<sup>187</sup> This theory could be used to lock up individuals for the longest period of time possible — on the rationale that the longer someone is removed from society, the longer their capacity for committing crimes remains zero. The authors believe there should be a limiting principle to this theory because otherwise it could be used to justify unnecessarily long punishment, which has produced our current regime of an overreliance on incarceration. For this reason, the authors considered incapacitation in two ways. First, as part of the public safety impact consideration under the recidivism factor. Second, this report suggests that incapacitation should be proportional to the crime committed, linked to seriousness of the crime and victim impact. If one has committed a more serious crime, there is a rationale to incapacitate that individual for a longer period of time (compared to a lower-level offender).
- **General deterrence:** This theory hinges on the idea that the threat of incarceration for long periods prevents future crimes by deterring individuals from committing crimes by instilling a fear of punishment. Two underlying assumptions call into question the veracity of this concept. First, general deterrence depends on an individual's knowledge of criminal penalties. Second, it requires the individual to instantaneously weigh their potential criminal behavior against those penalties when acting or reacting in often volatile and emotional situations.<sup>188</sup> As explained in Section IV of this report, a large body of research indicates that general deterrence is not effective at preventing crime. Therefore the authors did not include this in their four-factor analysis. They believe that their factor considering the individual offender's recidivism post-prison captures the majority of the relevant public safety effects of sentences.

- **Retribution:** This theory of punishment focuses on the moral wrong committed by the offender. It is punishment inflicted primarily as vengeance for a wrong or criminal act. It does not consider the positive or negative effects of punishment on the individual or society, but is grounded in the idea that punishment is deserved regardless of its future effects.<sup>189</sup> This theory is, for example, codified in the Old Testament, which calls for “an eye for an eye, a tooth for a tooth, and a life for a life.”<sup>190</sup> The authors incorporated retribution in their analysis in two ways. First, they did so through their seriousness factor. This factor takes into consideration the retribution theory of punishment (by relying on the argument that a more serious crime deserves a more serious punishment) while using proportionality to cabin its effect (to ensure that sentences are not more severe than necessary). Second, the impact on victims and offender’s intent both include aspects of the morality of the offense.
- **Individual Liberty and Effects on Individuals and Communities:** One reason to reduce excessive sentences is to prevent the unnecessary deprivation of individual liberty and other collateral consequences to individuals and their families.<sup>191</sup> With this in mind, in making their decisions, the authors implicitly weighed their four factors alongside an individual’s right not to be deprived of liberty without justification and the country’s and communities’ interest in reducing over-incarceration.

### C. Estimates For Crimes With Broad Definitions

Eight NCRP crime categories describe conduct that varied widely in gravity, from less serious to more serious types. These crimes are: burglary, driving under the influence, embezzlement, fraud and forgery, grand larceny, statutory rape, trafficking of marijuana, and trafficking of serious drugs (substances other than marijuana). The NCRP does not provide detailed data on the specifics of crimes committed under these categories.

In order to appropriately apply the four-factor analysis, the authors first devised a definition for lower-level conduct compared to more serious conduct for each of these eight categories, and split them into a “minor” and “serious” versions, respectively. They then estimated how much of the national prison population fell into each category by using representative data from individual states that broke down their prison populations into more detailed crime categories. These states include: Arizona, Arkansas, California, Connecticut, Florida, Kentucky, and Louisiana. Through this analysis, they were able to devise the estimates of the national prison population incarcerated for each degree of offense. Estimates produced using this analysis are noted with an asterisk in Table 1.

The analysis for two offenses — burglary and trafficking of serious drugs — is shown in Section III of this report as examples.

### **III. ANALYSIS FOR REDUCTIONS IN PRISON STAYS**

#### **A. Calculating Current Average Prison Stay**

The NCRP contains average prison stays for 42 states. The federal data from the FJSP reports sentence lengths, but not length of prison stay. Most of the data collected from individual states did not include prison stay lengths. Therefore, the authors relied on the NCRP for prison stay lengths as it provided the needed detail on sentence lengths and was nationally representative.

The authors combined length of stay data for individual crimes to create an average length of stay for the larger crime categories in Table 1. The authors weighted these averages by population, adjusting for the number of people in each crime category, to ensure accurate representation.

For the eight crimes with broad definitions noted above, the average length of stay in Table 1 represents the length of stay for the broad category since data for the more specific categories created by the authors was not available.

#### **B. Options For Recommended Reductions**

Because it is difficult to ascertain an exact, ideal sentence length for a crime, the authors picked three benchmark options to test percentage cuts (10, 25, and 50 percent) to sentence lengths in order to provide policymakers with different options to consider as starting points.

Instead of testing the benchmark options on all 370 crime categories, the authors opted to test them on the six crimes that comprised 58 percent of the national prison population — aggravated assault, murder, nonviolent weapons crimes, robbery, serious burglary, and serious drug trafficking — and comprised 75 percent of the prison population for which the authors recommended incarceration as the default sanction.<sup>192</sup>

The authors then sought to determine which of these options would most appropriately bring prison stay lengths to be more proportional to the crimes committed, while still protecting public safety. They applied the four-factor analysis used in Section III, with an increased emphasis on recidivism due to the heightened public safety concern for these more serious crimes. The four-factor analysis led, on average, to a 26.6 percent sentence reduction.

The authors concluded that a 25 percent reduction in length of stay closely resembled their calculated average reduction and could be achieved without producing harm to public safety.

The authors recognize that this methodology can be viewed as somewhat arbitrary. The purpose of this analysis is not to put forth absolute sentence lengths. Instead, it is to put forth options for policymakers to consider, starting with one the authors believe is moderate and effective.

The authors believe a similar analysis should be applied to the remaining 17 percent of the national prison population (251,000 prisoners) for whom the authors recommend incarceration as the default sanction to determine whether current sentence lengths are appropriate or could be safely cut. This could further reduce the prison population.

### **C. Estimating Effect Of Prison Stay Reductions On The Prison Population**

The authors then estimated the impact of these prison stay reduction recommendations on the current prison population to determine how many prisoners convicted of the six crimes have already served the recommended prison terms.

To estimate this number, the authors used a model that relies on a “steady state” assumption. Under this assumption, the same number of people would be admitted and released each year for the same crimes so that the prison population stays flat. For example, the number of people in prison for drug trafficking, robbery, and theft would stay constant with the same length of stay year after year. In reality, incremental changes each year cause admissions, releases, and lengths of stay to vary. But for the purposes of estimating the number of prisoners that can be released, the authors assumed that the prison population equaled the average prison stay multiplied by the admissions per year. This is a common assumption employed when making such estimates.

To estimate admissions, the authors divided the current prison population by length of stay for the six crimes. The authors multiplied this admissions estimate by the new recommended lengths of stay for each of the six crimes to estimate the reduced prison population.

## **IV. METHODOLOGICAL LIMITATIONS**

Limitations include:

- This report’s analysis is the authors’ best attempt at creating a more evidence-based sentencing scheme. They recognize that modifications and alternate approaches could be made to improve these recommendations, and they encourage such research and proposals.
- This report makes recommendations for *default* sanctions. They do not take into consideration individual factors. For that reason, these defaults should be adjusted up or down according to individualized factors, as listed in the report. The authors believe that an equitable system of sentencing should treat like offenders alike. For that reason, they erred on the side of recommendations based on offenses while giving judges the discretion to depart.
- There are many factors that one could consider when devising sentencing laws. The authors chose to focus on the factors they believe were the most relevant to public safety and most in line with social science research on punishment. Of course, others could select different factors, arriving at different conclusions.

- The authors relied on 2012 data because that was the most recent data available when the authors began their research. The prison population has changed slightly since then; for this reason, the authors rounded and approximated data on prisoners. Despite any fluctuations, the overarching findings and recommendations continue to be valid.
- The authors' dataset is confidential and cannot be shared as it includes NCRP data, which is restricted from general dissemination and cannot be distributed to outside parties.
- The authors estimated the number of prisoners for the eight overly broad crime categories based on data from sample states, rather than an exact accounting of the number of people incarcerated for each version. This could slightly skew the data; however, the overarching recommendations continue to be valid.
- This report relies primarily on recidivism data from the 1994 study referenced above, because it was the most recently available data that provided a breakdown by specific crime. Consistency in recidivism data over time suggests that the data remains accurate. However, a more recent source of data may change the recommendations slightly.
- The authors recognize that their methodology to cut lengths of stays can be viewed as somewhat arbitrary. The purpose of this analysis is not to put forth absolute sentence lengths. Instead, it is to put forth options for policymakers to consider, starting with one that the authors believe is modest and effective for the six major crimes that make up a substantial percentage of the prison population.
- The authors recognize that the 50 states and the federal government each have their own unique criminal and sentencing laws and enforcement policies. However, for presentation purposes and to tally the number of people incarcerated with limited public safety rationale, they presented a national level analysis in this report. This presentation minimizes individual differences between these jurisdictions. However, the authors' data set preserves these differences.
- The data in this report does not indicate whether the incarceration term is a result of a plea bargain or a conviction after trial. However, around 95 percent of criminal convictions in this country result from plea bargains.<sup>193</sup> This is significant for two reasons. First, the prosecution might have been very likely to win the case, but in the interest of the victim or efficiency, may have wanted to avoid a full trial and negotiated a lesser charge with a less serious prison sentence. Or alternatively, the defendant may have felt pressure to agree to a plea deal to a lesser crime even if not guilty because of the threat of mandatory minimums sentences attached to the charges a defendant may face after conviction at trial. Because the authors searched for a more fair and proportional method for sentence lengths, they made their recommendations based on the actual offense for which the offender was convicted, while providing judges the discretion to depart in such cases.



## ENDNOTES

- 1 See U.S. CENSUS BUREAU, QUICK FACTS, UNITED STATES, <https://www.census.gov/quickfacts/table/PST045215/00>; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 15 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.
- 2 See Michelle Ye Hee Lee, *Does The United States Really Have 5 Percent Of The World's Population And One Quarter Of The World's Prisoners?*, WASH. POST, Apr. 30, 2015, <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners> (finding that the United States contains 4.4% of the global population, and 22% of global prisoners); see also ROY WALMSLEY, WORLD PRISON BRIEF, WORLD PRISON POPULATION LIST 5, 14 (11th ed. 2015), [http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition.pdf) (placing the United States prison population at 2,217,000, or 21.4% of the global prison population of 10,357,134) and U.S. CENSUS BUREAU, U.S. WORLD & POPULATION CLOCK, <https://www.census.gov/popclock/world> (stating that, as of mid-2016, the United States contained approximately 4.4% of the world's population).
- 3 See DANIELLE KAEBLE ET AL., BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES 2014 2 tbl.1 (2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>; WORLD PRISON BRIEF, HIGHEST TO LOWEST – PRISON POPULATION TOTAL, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total/trackback?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total/trackback?field_region_taxonomy_tid=All).
- 4 See WORLD PRISON BRIEF, HIGHEST TO LOWEST – PRISON POPULATION TOTAL, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total/trackback?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total/trackback?field_region_taxonomy_tid=All) (ranking countries by incarceration rate).
- 5 The imprisonment rate includes only prison. The incarceration rate includes jail and prison. See CHET BOWIE, BUREAU OF JUSTICE STATISTICS, PRISONERS 1925-1981 2 tbl.1 (1982), <http://www.bjs.gov/content/pub/pdf/p2581.pdf> and BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS ANALYSIS TOOL (CSAT) – PRISONERS, <http://www.bjs.gov/index.cfm?ty=nps> (follow “Quick Tables” hyperlink).
- 6 See CHET BOWIE, BUREAU OF JUSTICE STATISTICS, PRISONERS 1925-1981 2 tbl.1 (1982), <http://www.bjs.gov/content/pub/pdf/p2581.pdf> and BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS ANALYSIS TOOL (CSAT) – PRISONERS, <http://www.bjs.gov/index.cfm?ty=nps> (follow “Quick Tables” hyperlink).
- 7 The incarceration rate leveled off in 2008, and then began to decline. See BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS ANALYSIS TOOL (CSAT) – PRISONERS, <http://www.bjs.gov/index.cfm?ty=nps> (follow “Quick Tables” hyperlink). The average annual decline between 2008 and 2014 was about 1.15%. See *id.* If that trend continued, the incarceration rate would fall below 200 by 2089.
- 8 See Barry Goldwater, Goldwater’s 1964 Acceptance Speech (Jul. 16, 1964), in WASH. POST, <http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm>.
- 9 See *1968: Nixon vs. Humphrey vs. Wallace*, MUSEUM OF THE MOVING IMAGE: THE LIVING ROOM CANDIDATE (2012), <http://www.livingroomcandidate.org/commercials/1968> (follow “The First Civil Right” hyperlink in the “Republican” row; under “Click on thumbnail to view video”).
- 10 See UNITED STATES DEP’T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING STATISTICS, STATE-BY-STATE AND NATIONAL CRIME ESTIMATES BY YEAR(S), <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (providing crime statistics from 1960 to 2013).
- 11 See BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE U.S.: 1973-79 TRENDS 43 tbl.17 (1981), <http://www.bjs.gov/content/pub/pdf/cvus7379.pdf> (data for 1979).
- 12 See JIM PARSONS ET AL., VERA INST. OF JUSTICE, END OF AN ERA: THE IMPACT OF DRUG LAW REFORM IN NEW YORK CITY 5 (2015), <http://www.vera.org/sites/default/files/resources/downloads/drug-law-reform-new-york-city-summary-01.pdf> (laying out the history of the Rockefeller drug laws).

- 13 See PAULA M. DITTON & JAMES WILSON, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS 2 tbls.1, 3 (1999), <http://bjs.gov/content/pub/pdf/tssp.pdf>.
- 14 28 U.S.C. § 991.
- 15 See, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (1986).
- 16 See Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103d Cong. (1994) (enacted); NAT’L CONF. OF STATE LEGISLATURES, PRINCIPLES OF EFFECTIVE STATE SENTENCING AND CORRECTIONS POLICY (2011), <http://www.ncsl.org/research/civil-and-criminal-justice/principles-of-sentencing-and-corrections-policy.aspx> (see “mandatory minimum sentences”). (This bill is commonly known as the “Crime Bill.”)
- 17 See BUREAU OF JUSTICE STATISTICS, PRISONERS 1925-1981 2 tbl.1 (1982), <http://www.bjs.gov/content/pub/pdf/p2581.pdf> (providing data through 1978) see also BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS ANALYSIS TOOL (CSAT) – PRISONERS, <http://www.bjs.gov/index.cfm?ty=nps> (follow “Quick Tables” hyperlink; then follow “1978-2014” hyperlink under “Prisoners under the jurisdiction of state or federal correctional authorities, December 31, 1978-2014” to download data table).
- 18 See UNITED STATES DEP’T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING STATISTICS, STATE-BY-STATE AND NATIONAL CRIME ESTIMATES BY YEAR(S), <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (providing crime statistics from 1960 to 2013) and UNITED STATES DEP’T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING STATISTICS, CRIME IN THE UNITED STATES, 2015 (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/home> (providing data through 2015). For this calculation, the overall crime rate is the sum of the property and violent crime rates.
- 19 See OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE (2015), <https://www.brennancenter.org/publication/what-caused-crime-decline> (including a detailed review of other existing research on the topic).
- 20 See NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 138 (JEREMY TRAVIS, BRUCE WESTERN, & STEVE REDBURN EDs., 2014); STEVEN RAPHAEL & MICHAEL STOLL, THE HAMILTON PROJECT, A NEW APPROACH TO REDUCING INCARCERATION WHILE MAINTAINING LOW RATES OF CRIME 9 (2014), <http://brook.gs/1E6xzG1>; OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE (2015), <https://www.brennancenter.org/publication/what-caused-crime-decline> (including a detailed review of other existing research on the topic).
- 21 See CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 (2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>.
- 22 See Section IV.
- 23 Ilyana Kuziemko, *Going off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime* 21 (Nat’l Bureau of Econ Research, Working Paper No. 13380, 2007), <http://www.nber.org/papers/w13380>.
- 24 See MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 1 (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> (providing recidivism rates for those who are returned to prison with or without a new prison sentence).
- 25 See LAUREN-BROOKE EISEN & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, UPDATE: CHANGE IN STATE IMPRISONMENT RATES 1 (2016), <https://www.brennancenter.org/sites/default/files/analysis/UpdateChangesinStateImprisonment.pdf>.



- 26 For imprisonment rates, see BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS ANALYSIS TOOL (CSAT) – PRISONERS, <http://www.bjs.gov/index.cfm?ty=nps> (follow “Quick Tables” hyperlink). For crime rates, see UNITED STATES DEP’T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING STATISTICS REPORTS, STATE-BY-STATE AND NATIONAL CRIME ESTIMATES BY YEAR(S), <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> (providing crime statistics from 1960 to 2013). For the Supreme Court case affecting California imprisonment rates, see *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).
- 27 U.S. SENTENCING COMM’N, QUICK FACTS: FEDERAL OFFENDERS IN PRISON – JANUARY 2015 2 (2015), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts\\_BOB.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick-Facts_BOB.pdf).
- 28 THOMAS P. BONCZAR ET AL., BUREAU OF JUSTICE STATISTICS, NAT’L CORRECTIONS REPORTING PROGRAM: SENTENCE LENGTH OF STATE PRISONERS, BY OFFENSE, ADMISSION TYPE, SEX, AND RACE (2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2056> (follow the “1993” and “2009” hyperlinks to download data tables for 1993 and 2009; then compare mean time served in prison in Table 9 (“NCRP9309.csv” and “ncrp0909.csv” for 1993 and 2009, respectively)).
- 29 See MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 I (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> (describing high rates of recidivism, around 50%, for former prisoners).
- 30 See generally JESSICA EAGLIN & DANYELLE SOLOMON, BRENNAN CTR. FOR JUSTICE, REDUCING RACIAL AND ETHNIC DISPARITIES IN JAILS (2013), <https://www.brennancenter.org/publication/reducing-racial-and-ethnic-disparities-jails-recommendations-local-practice>.
- 31 See Abe Cho, *Lowering Sentences for Illegal Immigrants: Why Judges Should Have Discretion to Vary from the Guidelines Based on Fast-Track Sentencing Disparities*, 43 SSRN ELECTRONIC J. 4 (2009), [https://www.researchgate.net/publication/228294416\\_Lowering\\_Sentences\\_for\\_Illegal\\_Immigrants\\_Why\\_Judges\\_Should\\_Have\\_Discretion\\_to\\_Vary\\_from\\_the\\_Guidelines\\_Based\\_on\\_Fast-Track\\_Sentencing\\_Disparities](https://www.researchgate.net/publication/228294416_Lowering_Sentences_for_Illegal_Immigrants_Why_Judges_Should_Have_Discretion_to_Vary_from_the_Guidelines_Based_on_Fast-Track_Sentencing_Disparities); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentences* (Yale Law School Faculty Scholarship Series, Paper No. 2050, 1992), [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3083&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3083&context=fss_papers); William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENT’G REP. 339 (1991), [http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2183&context=faculty\\_scholarship](http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2183&context=faculty_scholarship).
- 32 See CHARLES W. OSTROM ET AL., NAT’L INST. OF JUSTICE, JUDGES & DISCRIMINATION: ASSESSING THE THEORY & PRACTICE OF CRIMINAL SENTENCING (2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/204024.pdf>; David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J. LAW & ECON. 285 (2001), [https://www.researchgate.net/publication/24101050\\_Racial\\_Ethnic\\_and\\_Gender\\_Disparities\\_in\\_Sentencing\\_Evidence\\_from\\_the\\_US\\_Federal\\_Courts](https://www.researchgate.net/publication/24101050_Racial_Ethnic_and_Gender_Disparities_in_Sentencing_Evidence_from_the_US_Federal_Courts); Mirko Bagaric, *Consistency and Fairness in Sentencing*, 2 CAL. CRIM. L. REV. 1 (2000), <http://scholarship.law.berkeley.edu/bjcl/vol2/iss1/1>; Abigail Payne, *Does Inter-Judge Disparity Really Matter? An Analysis of the Effects of Sentencing Reforms in Three Federal District Courts*, 17 INT’L REV. OF LAW & ECON. 337 (1997) (suggesting that the disparities resulting from judicial discretion may be better than the increase to incarceration caused by determinate sentencing).
- 33 See Section V.
- 34 See Table 1.
- 35 See analysis in Section I.
- 36 This report’s findings and analysis, as explained in greater detail in Appendix A: Methodology, build on data describing the number of prisoners incarcerated nationwide, and the average lengths of prison stays. For data on federal prisoners, see MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2012 – STATISTICAL TABLES 37 tbl.7.9, 39 tbl.7.11 (2015), <http://www.bjs.gov/content/pub/pdf/fjs12st.pdf> (listing, respectively, the number of persons incarcerated in the federal system by offense, and the mean time served by offense).

Data on prison populations and average lengths of stay for 42 states were collected from the National Corrections Reporting Program. This dataset is confidential, and the authors obtained access under a restricted use agreement. Accordingly, this data cannot be shared publicly. See NAT'L ARCHIVE OF CRIM. J. DATA, NATIONAL CORRECTIONS REPORTING PROGRAM RESOURCE GUIDE, <https://www.icpsr.umich.edu/icpsrweb/content/NACJD/guides/ncrp.html>.

Data from 4 other states were collected directly from government sources. See VA. DEP'T OF CORRECTIONS, STATE RESPONSIBLE OFFENDER POPULATION TRENDS FY2008 – FY2012 (2013), [https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends\\_fy08-fy12.pdf](https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy08-fy12.pdf); Email from Mike Dolny, Research Unit, Arizona Dep't of Corrections, to the authors (Jul. 8, 2015) (on file with the authors); Email from Mary Lansing, Associate Research Analyst, Ct. Dep't of Corrections, to the authors (Jan. 21, 2106) (on file with the authors); Email from George R. King, Ph.D., Research Statistician, Hawaii Dep't of Pub. Safety, to the authors (Jul. 8 2015) (on file with the authors).

The authors also collected data from Arkansas and Louisiana, but were unable to obtain data on prisoners and lengths of stay from Vermont and New Mexico. However, Vermont and New Mexico prisoners combined make less than 1 percent of the national prison population, making this report's data substantially complete. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 3 tbl. 2 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

This summary is hereinafter referred to below as the "Authors' Analysis." More information can be found in Appendix A: Methodology.

- 37 For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 38 See generally NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014).
- 39 See LAUREN-BROOKE EISEN & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, THE REVERSE MASS INCARCERATION ACT 10 (2015), <https://www.brennancenter.org/publication/reverse-mass-incarceration-act> (summarizing and detailing BJS statistics).
- 40 See BUREAU OF JUSTICE STATISTICS, PRISONERS 1925-1981 2 tbl.1 (1982), <http://www.bjs.gov/content/pub/pdf/p2581.pdf> (providing data through 1978) and BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS ANALYSIS TOOL (CSAT) – PRISONERS, <http://www.bjs.gov/index.cfm?ty=nps> (follow "Quick Tables" hyperlink; then follow "1978-2014" hyperlink under "Prisoners under the jurisdiction of state or federal correctional authorities, December 31, 1978-2014" to download data table).
- 41 Stephanie Mencimer, *There are 10 Times More Mentally Ill People Behind Bars Than in State Hospitals*, MOTHER JONES, Apr. 8, 2014, <http://www.motherjones.com/mojo/2014/04/record-numbers-mentally-ill-prisons-and-jails>.
- 42 See DAVID CLOUD, VERA INSTITUTE OF JUSTICE, ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION 10 (2014), <http://vera.org/pubs/public-health-mass-incarceration> (citing JENNIFER C. KARBERG & DORRIS J. JAMES, BUREAU OF JUSTICE STATISTICS, SUBSTANCE DEPENDENCE, ABUSE, AND TREATMENT OF JAIL INMATES (2002); Seena Fazel et al., *Substance Abuse and Dependence in Prisoners: a Systematic Review*, 101 ADDICTION 181, 181-189 (2006); Bridget F. Grant et al., *Prevalence and Co-occurrence of Substance Use Disorders and Independent Mood and Anxiety Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Conditions*, 61 ARCHIVES OF GENERAL PSYCHIATRY 807, 807-816 (2004)).
- 43 E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, AGING OF THE STATE PRISON POPULATION, 1993-2013 1-2 (2016), <http://www.bjs.gov/content/pub/pdf/aspp9313.pdf>.
- 44 MIT YOUNG ADULT DEVELOPMENT PROJECT, BRAIN CHANGES (2008), <http://hrweb.mit.edu/worklife/youngadult/brain.html>.

- 45 Medical expenses also make these inmates far more expensive than younger inmates. See KIDEUK KIM & BRYCE PETERSON, URBAN INST., AGING BEHIND BARS: TRENDS AND IMPLICATIONS OF GRAYING PRISONERS IN THE FEDERAL PRISON SYSTEM 4-6 (2014), [http://www.urban.org/research/publication/aging-behind-bars-trends-and-implications-graying-prisoners-federal-prison-system/view/full\\_report](http://www.urban.org/research/publication/aging-behind-bars-trends-and-implications-graying-prisoners-federal-prison-system/view/full_report).
- 46 The authors calculated these estimates by taking the percentage of the state and federal prison populations experiencing mental health and substance dependence issues from 2006 (the last year for which data was available), assuming those ratios have remained unchanged, and applying those percentages to the 2014 state and federal prison populations. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 5 tbl.3 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>; DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 5 tbl.5 (2006), <http://www.bjs.gov/content/pub/pdf/mhppji.pdf>.
- 47 Rich Lord, *Pennsylvania Prison System Develops Separate Housing For Mentally Ill Inmates*, PITTSBURGH POST-GAZETTE, Jan. 6, 2015, <http://www.post-gazette.com/news/state/2015/01/06/Pennsylvania-prison-system-develops-separate-housing-for-mentally-ill-inmates/stories/201501060042>
- 48 E. FULLER TORREY, M.D. ET AL., TREATMENT ADVOCACY CTR. & NAT'L SHERIFF'S ASS'N, THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6 (2014). <http://www.tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf>.
- 49 See generally KIDEUK KIM, URBAN INST., THE PROCESSING & TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM (2015), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf>; see also RAM SUBRAMANIAN & ALISON SHAMES, VERA INST. OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 11-13 (2013), <http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf> (noting the number of jail inmates with mental health problems, and the damage done to them by incarceration).
- 50 E. FULLER TORREY, AMERICAN PSYCHOSIS: HOW THE FEDERAL GOVERNMENT DESTROYED THE MENTAL ILLNESS TREATMENT SYSTEM 88 (Oxford Univ. Press ed., 2014).
- 51 See, e.g., DARRELL STEINBERG ET AL., STANFORD LAW SCHOOL THREE STRIKES PROJECT, WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTHCARE FACILITIES? 5-6 (2015), [http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slpublic/Report\\_v12.pdf](http://law.stanford.edu/wp-content/uploads/sites/default/files/child-page/632655/doc/slpublic/Report_v12.pdf) (describing this process in California); TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 101 (2014), <http://www.tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf>.
- 52 TREATMENT ADVOCACY CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6, 101 (2014) <http://www.tacreports.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf>; DAVID CLOUD, VERA INST. OF JUSTICE, ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION 7 (2014), <http://vera.org/pubs/public-health-mass-incarceration>.
- 53 See Figure 4.
- 54 DAVID CLOUD, VERA INST. OF JUSTICE, ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION 12-14 (2014), <http://vera.org/pubs/public-health-mass-incarceration>.
- 55 MARGARET NOONAN ET AL., BUREAU OF JUSTICE STATISTICS, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000-2013 – STATISTICAL TABLES 1 (2015), <http://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf>.
- 56 See BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS ANALYSIS TOOL (CSAT) – PRISONERS, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=nps> (follow “Quick Tables” hyperlink).
- 57 PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 27 appx. tbl.14 (2011) <http://www.bjs.gov/content/pub/pdf/p10.pdf>; E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 8 tbl.8 (2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf>; E. ANN

CARSON & DANIELLA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS & RELEASES, 1991-2012 25 tbl.18 (2013), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 9 tbl.8 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 15 tbl.10 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

- 58 An “incarceration rate” includes both prison and jail inmates. For the imprisonment rate under this report’s proposal, see Table 1. The authors then added in the current jail population to calculate the overall incarceration rate under the report’s proposal. For the current incarceration rates of the United States and other countries, *see* World Prison Brief, Highest to Lowest – Prison Population Total, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total/trackback?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total/trackback?field_region_taxonomy_tid=All) (listing most recent estimates of the incarceration rate in each country). This source is routinely updated with new information; rates in this figure were drawn from the site as it appeared in September 2016. The incarceration rate for the United Kingdom is the weighted average of England & Wales, Northern Ireland, and Scotland.
- 59 *See generally* EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL OF ECONOMIC ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION & THE CRIMINAL JUSTICE SYSTEM 15-20 (2016), [https://www.whitehouse.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf) (finding that rate of convictions, sentencing options, and length-of-stay increases all contributed to the growth of mass incarceration); PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS (2012), [http://www.pewtrusts.org/-/media/assets/2012/06/6/time\\_served\\_report.pdf](http://www.pewtrusts.org/-/media/assets/2012/06/6/time_served_report.pdf) (analyzing the growth in prison stays at state levels).
- 60 “Length of stay” is commonly used to describe the amount of time a person actually spends in prison, which often differs from the person’s sentence length because low-risk inmates can frequently earn release before serving their full sentences. For the data underlying this analysis, see Figure 8.
- 61 PEW CTR. ON THE STATES, PRISON TIME SURGES FOR FEDERAL INMATES I (2015), [http://www.pewtrusts.org/-/media/assets/2015/11/prison\\_time\\_surges\\_for\\_federal\\_inmates.pdf](http://www.pewtrusts.org/-/media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf).
- 62 THOMAS P. BONCZAR ET AL., BUREAU OF JUSTICE STATISTICS, NAT’L CORRECTIONS REPORTING PROGRAM: SENTENCE LENGTH OF STATE PRISONERS, BY OFFENSE, ADMISSION TYPE, SEX, AND RACE (2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2056> (follow the “1993” and “2009” hyperlinks to download data tables for 1993 and 2009; then compare mean times served in prison by offense according to Table 9 (“NCRP9309.csv” and “ncrp0909.csv” for 1993 and 2009, respectively)).
- 63 For a description of the data sources underlying this report’s analysis, see endnote above describing Authors’ Analysis.
- 64 *See* Hon. Jed S. Rakoff, *Mass Incarceration: the Silence of the Judges*, N.Y. REV. OF BOOKS (May 21, 2015), <http://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges> (“[T]he supposition on which our mass incarceration is premised — namely, that it materially reduces crime — is, at best, a hunch. Yet the price we pay for acting on this hunch is enormous.”).
- 65 For a description of the data sources underlying this report’s analysis, see endnote above describing Authors’ Analysis.
- 66 Sarah Desmarais & Jay Singh, *Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States: An Empirical Guide*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (2013), <https://csgjusticecenter.org/wp-content/uploads/2014/07/Risk-Instruments-Guide.pdf>.
- 67 Mark H. Bergstrom & Richard Kern, *A View from the Field: Practitioners’ Response to Actuarial Sentencing: An “Unsettled” Proposition*, CRIMINOLOGY PUB. POL’Y (forthcoming 2011).
- 68 Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STANFORD L.J. 803, 809 (2014).

- 69 PEW Ctr. on the States, Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders 1 (2011), [http://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes\\_assets/2011/pewriskassessmentbriefpdf.pdf](http://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2011/pewriskassessmentbriefpdf.pdf).
- 70 James T. McCafferty, *Unjust Disparities? The Impact of Race on Juvenile Risk Assessment Outcomes*, 25 CRIMINAL JUSTICE POLICY REVIEW, (2016); <http://cjp.sagepub.com/content/early/2016/02/25/0887403416634163.abstract>.
- 71 See UNITED STATES DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING STATISTICS, STATE-BY-STATE AND NATIONAL CRIME ESTIMATES BY YEAR(S), <http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (providing crime statistics from 1960 to 2013) and UNITED STATES DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING STATISTICS, CRIME IN THE UNITED STATES, 2015 (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/home> (providing data through 2015). For this calculation, the overall crime rate is the sum of the property and violent crime rates.
- 72 See, e.g., STEVEN RAPHAEL & MICHAEL STOLL, THE HAMILTON PROJECT, A NEW APPROACH TO REDUCING INCARCERATION WHILE MAINTAINING LOW RATES OF CRIME 9-12 (2005), [http://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/v5\\_THP\\_RaphaelStoll\\_DiscPaper.pdf](http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v5_THP_RaphaelStoll_DiscPaper.pdf).
- 73 OLIVER ROEDER ET AL., WHAT CAUSED THE CRIME DECLINE?, BRENNAN CTR. FOR JUSTICE 23 (2015), <https://www.brennancenter.org/publication/what-caused-crime-decline>.
- 74 See, e.g., JOAN PETERSILIA & SUSAN TURNER, RAND CORP., PRISON VERSUS PROBATION IN CALIFORNIA: IMPLICATIONS FOR CRIME AND OFFENDER RECIDIVISM vii-viii (1986), <https://www.rand.org/content/dam/rand/pubs/reports/2007/R3323.pdf> (noting that prison markedly increased recidivism for persons convicted of property crimes); Gerald Gaes, *Unintended Consequences: Experimental Evidence for the Criminogenic Effect of Prison Security Level Placement on Post-Release Recidivism*, 5 J. EXPERIMENTAL CRIMINOLOGY 139 (2009), <http://link.springer.com/article/10.1007/s11292-009-9070-z>; Daniel S. Nagin & G. Matthew Snodgrass, *The Effect of Incarceration on Re-Offending: Evidence from a Natural Experiment in Pennsylvania*, 29 J. QUANTITATIVE CRIMINOLOGY 601, 642 (2012).
- 75 See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003), [http://scholar.harvard.edu/files/pager/files/pager\\_ajs.pdf](http://scholar.harvard.edu/files/pager/files/pager_ajs.pdf); BRUCE WESTERN & BECKY PETTIT, PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY (2010), [http://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes\\_assets/2010/collateralcosts1pdf.pdf](http://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf).
- 76 See MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 I fig.1 (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>; PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.
- 77 See Editorial Board, *A Formula to Make Bail More Fair*, N.Y. TIMES, Sept. 16, 2016, [http://www.nytimes.com/2016/09/17/opinion/a-formula-to-make-bail-more-fair.html?\\_r=1](http://www.nytimes.com/2016/09/17/opinion/a-formula-to-make-bail-more-fair.html?_r=1).
- 78 Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 347 fig.1 (2002).
- 79 See Daniel Mears et al., *Gender Differences in the Effects of Prison on Recidivism*, 40 J. CRIM. JUST. 370 (2012).
- 80 William D. Bales & Alex R. Piquero, *Assessing the Impact of Imprisonment on Recidivism*, 8 J. EXPERIMENTAL CRIMINOLOGY 71, 76 n.4, 96 & tbl. 9 (2012).
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- produced slight increases in recidivism.”); WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT 3 (2006), <http://www.wsipp.wa.gov/ReportFile/924>.
- 82 Rachel Porter et al., *Balancing Punishment and Treatment: Alternatives to Incarceration in New York City*, 24 FED. SENT’G REP. 26, 26-29 (2011) (republishing 2002 Vera Institute investigation).
- 83 See Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 178 (2009).
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- 86 Daniel S. Nagin & G. Matthew Snodgrass, *The Effect of Incarceration on Re-Offending: Evidence from a Natural Experiment in Pennsylvania*, 29 J. QUANTITATIVE CRIMINOLOGY 601, 607 (2012), <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1407&context=heinzworks> (citing Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357-387 (2010); Danton Berube & Donald P. Green, *The Effects of Sentencing on Recidivism: Results from a Natural Experiment* (2007) (unpublished paper) (on file with Yale University); Charles E. Loeffler, *Estimating the Effects of Imprisonment on the Life-Course* (2011) (unpublished Ph.D. dissertation, Harvard University)).
- 87 ALLIANCE FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 20 (2016), <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.
- 88 For information on recidivism, see JOAN PETERSILIA & SUSAN TURNER, RAND CORP., PRISON VERSUS PROBATION IN CALIFORNIA: IMPLICATIONS FOR CRIME AND OFFENDER RECIDIVISM vii-viii (1986), <https://www.rand.org/content/dam/rand/pubs/reports/2007/R3323.pdf> (finding the percent of probationers incarcerated within two-years of release to be 34 percent lower than the percent of prisoners incarcerated in the same time period); PAUL GENDREAU ET AL., PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM (1999) (“The results were as follows: [relative to shorter sentences and alternative sanctions] prison produced slight increases in recidivism”). For information on cost, see PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 13 (2009), [http://www.pewtrusts.org/-/media/assets/2009/03/02/pspp\\_1in31\\_report\\_final\\_web\\_32609.pdf](http://www.pewtrusts.org/-/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf); Joan Petersilia, *Probation in the United States*, CRIME AND JUST. 149, 186 (1997) (“[I]n programs where offenders received *both* surveillance (e.g. drug tests) and participated in relevant treatment, recidivism was reduced 20-30 percent.”).
- 89 See PEW Ctr. on the States, Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders 1 (2011), [http://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes\\_assets/2011/pewriskassessmentbriefpdf.pdf](http://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2011/pewriskassessmentbriefpdf.pdf).
- 90 See PEW Charitable Trusts, Use of Electronic Offender-Tracking Devices Expands Sharply 1 (2016), [http://www.pewtrusts.org/-/media/assets/2016/10/use\\_of\\_electronic\\_offender\\_tracking\\_devices\\_expands\\_sharply.pdf](http://www.pewtrusts.org/-/media/assets/2016/10/use_of_electronic_offender_tracking_devices_expands_sharply.pdf); James Kilgore, E-Carceration: The Problematic World of Being On an Electric Monitor, Alternet, Oct. 20, 2016 <http://www.alternet.org/human-rights/electronic-monitoring-restrictive-and-wrong>.
- 91 See JOHN K. ROMAN ET AL., DISTRICT OF COLUMBIA CRIME POLICY INST., THE COSTS AND BENEFITS OF ELECTRONIC MONITORING FOR WASHINGTON, D.C. 6 (2012) (analyzing seven evaluations of electronic monitoring and finding that those under monitoring had an average rearrest rate 23.5 percent lower than standard probationers and parolees), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412678-The-Costs-and-Benefits-of-Electronic-Monitoring-for-Washington-D-C-.PDF>.

- 92 See David Cloud & Chelsea Davis, The Vera Inst. for Justice, Treatment Alternatives to Incarceration for People with Mental Health Needs in the Criminal Justice System: The Cost-Savings Implications (2013), <http://archive.vera.org/sites/default/files/resources/downloads/treatment-alternatives-to-incarceration.pdf>.
- 93 An evaluation by the National Center on Addiction and Substance Abuse found that participation in the DTAP program reduced rearrest rates by 26 percent. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., CROSSING THE BRIDGE: AN EVALUATION OF THE DRUG TREATMENT ALTERNATIVE-TO-PRISON (DTAP) PROGRAM 6 (2003). An independent evaluation of Seattle's Law Enforcement Assisted Diversion found that participants had a 58 percent lower chance of arrest than a control group. SUSAN E. COLLINS ET AL., UNIV. OF WASH. LEAD EVALUATION TEAM, LEAD PROGRAM EVALUATION: RECIDIVISM REPORT 3 (2015), [http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD\\_EVALUATION\\_4-7-15.pdf?token=xTmZUgmkb4HTY3bnogXuOI8Uows%3D](http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf?token=xTmZUgmkb4HTY3bnogXuOI8Uows%3D). Vermont's cognitive self-change program, targeting violent offenders with treatment in and out of prison, reduced the rate of new criminal charges by 21 percent relative to a comparison group. Kris R. Henning & B. Christopher Frueh, *Cognitive-Behavioral Treatment of Incarcerated Offenders: An Evaluation of the Vermont Department of Corrections' Cognitive Self-Change Program*, 23 CRIM. J. & BEHAVIOR 522, 534 (1996).
- 94 See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 7-10 (2010).
- 95 See RAM SUBRAMANIAN & ALISON SHAMES, VERA INST. OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 8-9 (2013), <http://www.vera.org/sites/default/files/resources/downloads/european-american-prison-report-v3.pdf> (describing the role of fines in the German justice system); UNITED NATIONS OFFICE ON DRUGS & CRIME, GLOBAL STUDY ON HOMICIDE (2013), <http://www.unodc.org/gsh/en/data.html> (from the landing page, select "Homicide counts and rates, time series 2000-2012") (showing a German 2011 homicide rate of 0.8 per 100,000, compared to 4.7 in the United States). Homicide rates are a valid comparison because the definition of the crime is unlikely to vary internationally.
- 96 Data from New Mexico and Vermont were not included in this report's analysis. For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 97 For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 98 For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 99 The other such crimes included driving under the influence, drug trafficking non-marijuana, drug trafficking marijuana, fraud and forgery, grand larceny, and statutory rape.
- 100 For references in this section to the number of prisoners incarcerated for a specific offense, see Table 1. For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 101 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. While BJS has collected recidivism data more recently, the more recent data is not broken down as narrowly by crime as the 1994 data, and is thus not as useful in this report's crime by crime analysis. Additionally, the more recent data is only for rearrest, not for reimprisonment. This and subsequent balancing tests use data from Table 9 of the 1994 report, stating the percentage of people who returned to prison within three years of release. Comparing the 1994 data to more recent data sets not broken down by crime shows a high degree of consistency over time.
- 102 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. While BJS has collected recidivism data more recently, the more recent data is not broken down as narrowly by crime as the 1994

data, and is thus not as useful in this report's crime by crime analysis. Additionally, the more recent data is only for rearrest, not for reimprisonment. This and subsequent balancing tests use data from Table 9 of the 1994 report, stating the percentage of people who returned to prison within three years of release. Comparing the 1994 data to more recent data sets not broken down by crime shows a high degree of consistency over time.

- 103 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. While BJS has collected recidivism data more recently, the more recent data is not broken down as narrowly by crime as the 1994 data, and is thus not as useful in this report's crime by crime analysis. Additionally, the more recent data is only for rearrest, not for reimprisonment. This and subsequent balancing tests use data from Table 9 of the 1994 report, stating the percentage of people who returned to prison within three years of release. Comparing the 1994 data to more recent data sets not broken down by crime shows a high degree of consistency over time.
- 104 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. While BJS has collected recidivism data more recently, the more recent data is not broken down as narrowly by crime as the 1994 data, and is thus not as useful in this report's crime by crime analysis. Additionally, the more recent data is only for rearrest, not for reimprisonment. This and subsequent balancing tests use data from Table 9 of the 1994 report, stating the percentage of people who returned to prison within three years of release. Comparing the 1994 data to more recent data sets not broken down by crime shows a high degree of consistency over time.
- 105 NAT'L ARCHIVE OF CRIM. J. DATA, NATIONAL CORRECTIONS REPORTING PROGRAM RESOURCE GUIDE, (2002) <https://www.icpsr.umich.edu/icpsrweb/content/NACJD/guides/ncrp.html>. The report lists the cost to victim as \$280 dollars which would be \$375 dollars in today's terms according to the Bureau of Labor Statistics tool at <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=280&year1=2002&year2=2016>.
- 106 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. While BJS has collected recidivism data more recently, the more recent data is not broken down as narrowly by crime as the 1994 data, and is thus not as useful in this report's crime by crime analysis. Additionally, the more recent data is only for rearrest, not for reimprisonment. This and subsequent balancing tests use data from Table 9 of the 1994 report, stating the percentage of people who returned to prison within three years of release. Comparing the 1994 data to more recent data sets not broken down by crime shows a high degree of consistency over time.
- 107 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. While BJS has collected recidivism data more recently, the more recent data is not broken down as narrowly by crime as the 1994 data, and is thus not as useful in this report's crime by crime analysis. Additionally, the more recent data is only for rearrest, not for reimprisonment. This and subsequent balancing tests use data from Table 9 of the 1994 report, stating the percentage of people who returned to prison within three years of release. Comparing the 1994 data to more recent data sets not broken down by crime shows a high degree of consistency over time.
- 108 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. While BJS has collected recidivism data more recently, the more recent data is not broken down as narrowly by crime as the 1994 data, and is thus not as useful in this report's crime by crime analysis. Additionally, the more recent data is only for rearrest, not for reimprisonment. This and subsequent balancing tests use data from Table 9 of the 1994 report, stating the percentage of people who returned to prison within three years of release. Comparing the 1994 data to more recent data sets not broken down by crime shows a high degree of consistency over time.



- 109 See, e.g., WASH. STATE INST. FOR PUB. POLICY, EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT 3 (2006), <http://www.wsipp.wa.gov/ReportFile/924>.
- 110 This category also includes some crimes of a sexual nature.
- 111 Christopher Ingraham, *Americans Are More Bullish Than Ever on Legal Weed*, WASH. POST, Oct. 26, 2016, <https://www.washingtonpost.com/news/wonk/wp/2016/10/26/americans-are-more-bullish-than-ever-on-legal-weed/> (citing recent polling data indicating that 64 percent of Americans support making marijuana legal).
- 112 The estimated total number of first time DUI offenders in prison nationally is 290. Due to rounding, this number rounded to zero and is therefore not included in the total numbers.
- 113 For most crimes, the authors' analysis yielded a straightforward recommendation for whether incarceration or an alternative was most appropriate. However, in the authors' dataset, eight crimes — including burglary, driving under the influence, drug trafficking, embezzlement, fraud and forgery, larceny, and statutory rape — had broad definitions that encompass both serious versions (more appropriately punished by incarceration) and less serious versions (more appropriately punished by alternatives to incarceration). For these eight crimes, the authors first used the four factors to determine what conduct constituted “serious” and “minor” versions of the crime, and then used more detailed data from a representative sample of states to estimate how many prisoners nationwide fell into each category. For more details, see Appendix A: Methodology.
- 114 This table summarizes all of the report's recommendations. For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 115 David Abrams, *The Prisoner's Dilemma: A Cost Benefit Approach to Incarceration*, 98 IOWA L.J. 907, 936 (2013).
- 116 PAUL GENDREAU ET AL., THE EFFECT OF PRISON SENTENCES & INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS & INDIVIDUAL DIFFERENCES (2002), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs/index-eng.aspx>.
- 117 Ilyana Kuziemko, *Going off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime* 21 (Nat'l Bureau of Econ Research, Working Paper No. 13380, 2007), <http://www.nber.org/papers/w13380>.
- 118 *Id.* at 19-22.
- 119 *Id.* at 20-22 & n.28 (calling for further study of this effect). A modified version of this working paper was published in 2013. See Ilyana Kuziemko, *How Should Inmates Be Released From Prison? An Assessment of Parole Versus Fixed Sentence Regimes*, 128 Q.J. ECON. 371 (2013).
- 120 See Steven D. Levitt, *The Limited Role of Changing Age Structure in Explaining Aggregate Crime Rates*, 37 CRIMINOLOGY 581, 592 (1999).
- 121 See Charles R. Tittle et al., *Gender, Age, and Crime/Deviance: A Challenge to Self-Control Theory*, 40 J. RESEARCH IN CRIME AND DELINQUENCY 426, 443 (2003).
- 122 Robert J. Sampson, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to the Age of 70*, 41 AMERICAN SOCIETY OF CRIMINOLOGY, 301, 312 (2003).
- 123 Bureau of Justice Statistics, *Aging of the State Prison Population (1993-2009)* 1, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5602>.
- 124 PATRICK LANGAN & DAVID LEVIN, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 1994 II* (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.
- 125 Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUSTICE 115, 169-175 (2009).
- 126 Thomas A. Loughran et al., *Estimating a Dose-Response Relationship Between Length of Stay and Recidivism in Serious Juvenile Offenders*, 47 CRIMINOLOGY 699, 723-26 (2009).

- 127 Donald Green & Daniel Winik, *Using Random Judge Assignment to Estimate the Effects of Incarceration and Probation on Recidivism*, 48 CRIMINOLOGY 357, 374 tbl.5, 380-81 (2010).
- 128 See Jason Rydberg & Kyleigh Clark, *Variation in the Incarceration Length Recidivism Dose-Response Relationship*, 125 Journal of Criminal Justice (2016), [https://www.academia.edu/27391540/Variation\\_in\\_the\\_Incarceration\\_Length-Recidivism\\_Dose-Response\\_Relationship](https://www.academia.edu/27391540/Variation_in_the_Incarceration_Length-Recidivism_Dose-Response_Relationship).
- 129 Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* 25 (2015) (working paper), <http://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>.
- 130 Jeremy Travis et al., Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 139, 154 (2014). See also, Daniel S. Nagin, *Deterrence in the Twenty-first Century: A Review of the Evidence*, 42 Crime and Justice: Crime and Justice in America 1975-2025 199, 231 (2013).
- 131 David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 AMER. L. & ECON. REV. 295 (2002), <http://aler.oxfordjournals.org/content/4/2/295.short>.
- 132 Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile, in Evaluating Gun Policy: Effects on Crime and Violence* 252 (2003), [http://home.uchicago.edu/ludwigj/papers/Exile\\_chapter\\_2003.pdf](http://home.uchicago.edu/ludwigj/papers/Exile_chapter_2003.pdf).
- 133 David Lee. Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence*, PRINCETON UNIVERSITY, July 2009, [http://eml.berkeley.edu/~jmccrary/lee\\_and\\_mccrary2009.pdf](http://eml.berkeley.edu/~jmccrary/lee_and_mccrary2009.pdf)
- 134 See, e.g., ANGELA HAWKEN & MARK KLEIMAN, *MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE* 64 tbl.A2 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> (finding lower new arrest and revocations rates for participants in the Hawaii Opportunity Probation with Enforcement program compared to other probationers).
- 135 For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 136 For data showing the increase in average length of stay for these offenses, see BUREAU OF JUSTICE STATISTICS, NAT'L CORRECTIONS REPORTING PROGRAM: SENTENCE LENGTH OF STATE PRISONERS, BY OFFENSE, ADMISSION TYPE, SEX, AND RACE (2011), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2056> (follow the "1993" and "2009" hyperlinks to download data tables for 1993 and 2009; then compare mean time served in prison in Table 9 ("NCRP9309.csv" and "ncrp0909.csv" for 1993 and 2009, respectively)).
- 137 See *Let's Cut Our Prison Population in Half*, ACLU, <https://action.aclu.org/secure/end-mass-incarceration;WhatWeDo,#CUT50>, <http://www.cut50.org/mission> (scroll down to "About Us"); *Ella Baker Center on the Move*, ELLA BAKER CTR. FOR HUMAN RIGHTS (Dec. 12, 2012), <http://ellabakercenter.org/blog/2012/12/ella-baker-center-on-the-move>; *The #FreeAmerica Pledge*, #FREEAMERICA, <http://letsfreeamerica.com/pledge>; *About Us*, JUSTLEADERSHIPUSA, <https://www.justleadershipusa.org/about-us> (scroll down to "Mission Statement").
- 138 For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 139 For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 140 To calculate savings, the authors multiplied the average cost of one year of imprisonment (\$31,286), as calculated in CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 9 (2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>, by the number of people who would not be incarcerated if the proposed reductions were fully implemented. The authors would prefer to base calculations on long-term marginal costs of incarceration, but these costs were difficult to identify, due to a lack of data.

- 141 For average lengths of stay discussed in this section, see Table 1.
- 142 James F. Austin, Evaluation of Broward Jail Population: Current Trends and Recommended Options (Oct. 2016) (unpublished manuscript) (on file with authors). The national estimate is a rough estimate by lead author James Austin based on working directly with 100 jails and 47 state prison systems to help reduce their populations.
- 143 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.
- 144 James F. Austin, Evaluation of Broward Jail Population: Current Trends and Recommended Options (Oct. 2016) (unpublished manuscript) (on file with authors). The national estimate is a rough estimate by lead author James Austin based on working directly with 100 jails and 47 state prison systems to help reduce their populations.
- 145 PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 8 tbl.9 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.
- 146 JAMES AUSTIN ET AL., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 19 (THE JFA INST. 2009); see also James Austin & Todd R. Clear, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 311 (2009).
- 147 See e.g., CTR. ON BUDGET AND POLICY PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION (2014) (recommending that policymakers repeal truth-in-sentencing requirements and mandatory minimum sentences), <http://www.cbpp.org/research/changing-priorities-state-criminal-justice-reforms-and-investments-in-education>; JEREMY TRAVIS, BRUCE WESTERN, AND STEVE REDBURN, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (2014) (suggesting states modify truth-in-sentencing laws, scale back “three strike enhancements,” relax mandatory minimum sentencing laws, expand good time credit to increase parole eligibility, prevent reimprisonment for parole violations, and retroactively apply sentencing guidelines changes).
- 148 Erica Goode, *Average Prison Stay Grew 36 Percent in Two Decades*, N.Y. TIMES, June 6, 2012, at A12, [http://www.nytimes.com/2012/06/06/us/average-prison-stay-grew-36-percent-in-two-decades.html?\\_r=1](http://www.nytimes.com/2012/06/06/us/average-prison-stay-grew-36-percent-in-two-decades.html?_r=1).
- 149 The 15-month estimate represents the weighted average of sentence reductions described in Table 2.
- 150 For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 151 For a description of the data sources underlying this report's analysis, see endnote above describing Authors' Analysis.
- 152 See S.B. 1722, 1st Reg. Sess. (Fla. 2009), [http://laws.flrules.org/files/Ch\\_2009-063.pdf](http://laws.flrules.org/files/Ch_2009-063.pdf).
- 153 Press Release, Florida Dep't of Corrections, Florida Department of Corrections to Close Prisons, Work Camps (Jan. 12, 2012), <http://www.dc.state.fl.us/secretary/press/2012/01-12PrisonClosings.html>.
- 154 For crime rates through 2012 reported in this section, see UNITED STATES DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING STATISTICS, STATE-BY-STATE AND NATIONAL CRIME ESTIMATES BY YEAR(S) (1985-2012), <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm>. For 2014 crime rates, see UNITED STATES DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2014 tbl.5 (2015), <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-5>. Rates of incarceration are for sentenced prisoners under state control. See WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 30 appx. tbl.10 (2009), <http://www.bjs.gov/content/pub/pdf/p08.pdf>; HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 24, appx. tbl.9 (2010), <http://www.bjs.gov/content/pub/pdf/p09.pdf>; PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 22 appx. tbl.9 (2011) <http://www.bjs.gov/content/pub/pdf/p10.pdf>; E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE

- STATISTICS, PRISONERS IN 2011 8 tbl.6 (2012), <http://www.bjs.gov/content/pub/pdf/p11.pdf>; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 8 tbl.6 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.
- 155 S.B. 2136, Reg. Sess. (Miss. 2008), <http://billstatus.ls.state.ms.us/documents/2008/html/SB/2100-2199/SB2136CS.htm>.
- 156 ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 36 (2011), <https://www.aclu.org/files/assets/smartreformispossible.pdf>.
- 157 MARC LEVIN, TEX. PUB. POL'Y FOUND., ADULT CORRECTIONS REFORM: LOWER CRIME, LOWER COSTS 1 (2011), <http://www.rightoncrime.com/wp-content/uploads/2011/09/Texas-Model-Adult.pdf>.
- 158 H.B. 1205, 82d Leg. (Tex. 2011); H.B. 2649, 82d Leg. (Tex. 2011); *see also* LAUREN-BROOKE EISEN & JULIENE JAMES, VERA INST. OF JUSTICE, REALLOCATING JUSTICE RESOURCES: A REVIEW OF 2011 STATE SENTENCING TRENDS 26 (2012) <http://archive.vera.org/sites/default/files/resources/downloads/reallocating-justice-resources.pdf> (surveying Texas house bills on earned credit programs).
- 159 BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICAL ANALYSIS TOOL (CSAT) – PRISONERS, <http://www.bjs.gov/index.cfm?ty=nps>.
- 160 To calculate savings, the authors multiplied the average cost of one year of imprisonment (\$31,286), as calculated in CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012), <http://www.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>, by the number of people who would not be incarcerated if the proposed reductions were fully implemented. The authors would prefer to base calculations on long-term marginal costs of incarceration, but these costs were difficult to identify, due to a lack of data.
- 161 Using BJS data on the average starting salary (\$40,500) and training cost (\$16,000) for police officers, and adjusting for inflation, the authors found that the savings could cover the training and salaries for 368,000 new officers for ten years. This number is not adjusted to include salary increases or additional training. *See* BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, LOCAL POLICE DEPARTMENTS, 2007 6 (2010), <http://www.bjs.gov/content/pub/pdf/lpd07.pdf>; BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2006 5 (2009), <http://www.bjs.gov/content/pub/pdf/slleta06.pdf>; BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX INFLATION CALCULATOR, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm).
- 162 The number of probation officers who could be employed is calculated using the median salary for probation officers, as reported by BLS in 2015 (\$49,360), adjusted for inflation. *See* BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2016-17 EDITION, PROBATION OFFICERS AND CORRECTIONAL TREATMENT SPECIALISTS, <http://www.bls.gov/ooh/community-and-social-service/probation-officers-and-correctional-treatment-specialists.htm>; BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX INFLATION CALCULATOR, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm).
- 163 Using data from the National Center for Educations Statistics on the average starting salary (\$55,418) for high school teachers and elementary school teachers the authors found that the savings could cover the salaries for 327,000 new teachers. All figures are in 2012 dollars. This number is not adjusted to include salary increases, healthcare or additional training. *See* NATIONAL CENTER FOR EDUCATIONS STATISTICS, ESTIMATED AVERAGE SALARY OF TEACHERS IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS, tbl. 211.50, (2014) [https://nces.ed.gov/programs/digest/d14/tables/dt14\\_211.50.asp](https://nces.ed.gov/programs/digest/d14/tables/dt14_211.50.asp)
- 164 According to the College Board, the average in-state public college tuition is \$9,410 per year. *Average Published Undergraduate Sector, 2015-2016*, THE COLLEGE BOARD, <https://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2015-16>.
- 165 The 2015 budget of Los Angeles was \$8.58 billion. CITY OF LOS ANGELES, BUDGET SUMMARY, FY 2015-16 2 (2016), <http://cao.lacity.org/budget/summary/2015-16BudgetSummaryBooklet.pdf>. The 2015 budget

- of Chicago was \$9.32 billion. CITY OF CHICAGO, 2016 BUDGET OVERVIEW 21 (2016), [http://www.cityofchicago.org/content/dam/city/depts/obm/supp\\_info/2016Budget/2016BudgetOverviewCoC.pdf](http://www.cityofchicago.org/content/dam/city/depts/obm/supp_info/2016Budget/2016BudgetOverviewCoC.pdf).
- 166 The requested budget for the Department of Labor for FY 2017 is \$12.8 billion. DEP'T OF LABOR, FY 2017 DEPARTMENT OF LABOR IN BRIEF 7 (2016), [https://www.dol.gov/sites/default/files/documents/general/budget/FY2017BIB\\_0.pdf](https://www.dol.gov/sites/default/files/documents/general/budget/FY2017BIB_0.pdf). The President's budget allotted \$9.75 billion for the Department of Commerce for FY 2017. DEP'T OF COMMERCE, FACT SHEET: FY 2017 U.S. DEPARTMENT OF COMMERCE BUDGET (2016), <https://www.commerce.gov/news/fact-sheets/2016/02/fact-sheet-fy-2017-us-department-commerce-budget>.
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- 172 See VA. DEP'T OF CORRECTIONS, STATE RESPONSIBLE OFFENDER POPULATION TRENDS FY2008 – FY2012 (2013), [https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends\\_fy08-fy12.pdf](https://vadoc.virginia.gov/about/facts/research/new-statsum/offenderpopulationtrends_fy08-fy12.pdf); Email from Mike Dolny, Research Unit, Arizona Dep't of Corrections, to the authors (Jul. 8, 2015) (on file with the authors); Email from Mary Lansing, Associate Research Analyst, Ct. Dep't of Corrections, to the authors (Jan. 21, 2106) (on file with the authors); Email from George R. King, Ph.D., Research Statistician, Hawaii Dep't of Pub. Safety, to the authors (Jul. 8 2015) (on file with the authors).
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- 176 See generally JUSTICE POLICY INST., DEFINING VIOLENCE: REDUCING INCARCERATION BY RETHINKING AMERICA'S APPROACH TO VIOLENCE (2016), [http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi\\_definingviolence\\_final\\_report.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report.pdf).
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- 188 MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 9 (Alan Sheridan trans., Vintage Books, 2d ed. 1995) (1977).
- 189 Richard S. Frase, *A More Perfect System: Twenty-Five Years of Guidelines Sentencing Reform Purposes*, 58 (STAN. L. REV.) 67, 73 (2005) (emphasis added).
- 190 Deuteronomy 19:21.
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