

TRANSFORMING THE SYSTEM



ENCOURAGE

Equitable Sentencing

People convicted of crimes should receive fair sentences. These sentences should reflect the severity of the crime and be administered in a fair manner. Nonetheless, the explosion of the American prison population is largely due to sentences that are disproportionate to the severity of crimes. Prisons and jails are filled by many people who pose no threat to their communities.²⁶⁸ Laws that impose mandatory minimums contribute to mass incarceration.

Like other parts of the criminal justice system, there are severe racial disparities in how sentences are handed down. African American defendants are more likely to receive severe sentences than whites convicted of the same crime.²⁶⁹ It is critical to actively work against racial bias through implicit bias trainings, regularly reviewing data on biases in the sentencing process, and the inclusion of judicial bench cards that are intended to reduce bias during sentencing.

Creating equitable sentencing practices

There must be a concerted effort to promote equitable sentencing practices that reflect the severity of crime and ensure that prison is not overused as a punishment. Sentencing laws should ensure that there is individualization, which allows sentences that take into account the circumstances of an offense; humanity that focuses on sentences that respect the dignity of the individual and the impact of sentences on families and communities; parsimony, which allows for sentences that are no more severe than necessary; proportionality, which requires that sentences be proportioned to the severity of the offense; and regularity, which allows sentences be guides by “consistently applied standards or guidelines.”²⁷⁰

268 See Roberts, *supra* note 2.

269 Marc Mauer, “Racial impact statements as a means of reducing unwarranted sentencing disparities,” 5 *Ohio St. J. Crim. L.* 19 (2007).

270 Michael Tonry, “Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration,” 13 *Criminology & Public Policy* 503 (2014).

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Congress, and state and local legislatures should:

- ▶ Repeal “truth-in-sentencing” laws, which limit access to parole and decreases in the amount of time that a person convicted of an offense serves;²⁷¹
- ▶ Restore judicial discretion and review in sentencing determinations so that judges may consider the circumstances surrounding criminal conduct;²⁷²
- ▶ Eliminate cocaine and crack sentence differences;
- ▶ Prohibit the imposition of fines or jail time for alleged failure to appear, which seek to punish rather than ensure appearance in court, to ensure that individuals are not being incarcerated for missing a court date;²⁷³
- ▶ Shorten sentence lengths across the board;²⁷⁴
- ▶ Adopt a stated goal of reducing incarceration in half by 2030 to encourage smarter sentences;²⁷⁵
- ▶ Eliminate mandatory minimums;²⁷⁶
- ▶ Repeal drug free school zone laws and habitual offender laws;²⁷⁷
- ▶ Provide training programs for judges on implicit bias;
- ▶ Educate judges on their role in reducing mass incarceration;
- ▶ Replace incarceration with community service and/or probation for less serious offenses;

271 See Coke, *supra* note 4, at 30.

272 Because of concerns about the improper use of discretion, it is critical that judges also engage in conscious steps to reduce racial bias through implicit bias trainings, reflecting on data for sentences, and the use of judicial bench cards to reduce the impact of racial bias in the exercise of discretion. See *The Sentencing Project, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (2016): Discretion is an important component of the criminal justice system and is necessary for efficient system flow. It is neither desirable nor possible to eliminate discretion throughout the criminal justice system; professional judgment is a core component of making day-to-day operations manageable. Nevertheless, individual discretion can lead to racial injustices. *These can be safeguarded if discretion is well-informed and monitored.* What is needed is an introspective look at the substance of discretion and to find ways to either curb inappropriate use, such as through the development of standards, or to use discretion affirmatively to reduce racial disparity.

Discretion may aid in reducing the severity of sentences across the board, it may also result in racial disparities. To address the issue of disparities, this Report recommends that judges undergo implicit bias trainings and rely upon bench cards that help to mitigate against racial bias. At any rate, judges should have discretion to reduce overly harsh sentences, but there must be measures in place to ensure that they are not being biased in this process.

273 Ibid. at 15.

274 Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, Marshall Project (Mar. 4, 2015, 7:15 AM) <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent#.K3YcRSP8E>.

275 Leadership Development Executive Summary, JustLeadershipUSA, https://www.justleadershipusa.org/wp-content/uploads/2015/01/JLUSA_Leadership_Development.pdf (accessed 7 July 2016).

276 Ibid.

277 Ibid.

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- ▶ Provide a review process for incarcerated individuals who are over the age of 55 and who have served five years of sentences that are in excess of 10 years to be released from prison;²⁷⁸
- ▶ Make all incarcerated individuals who are serving fixed sentences of five years and higher or an indeterminate term, who have served five years of their sentences, to be eligible for release;
- ▶ Allow all incarcerated individuals who are 35 years of age and older and who are serving fixed sentences of three years and higher or an indeterminate term, who have served three years of their sentences, to be eligible for release;²⁷⁹ and
- ▶ Considering that there is considerable research on the discriminatory impact of the death penalty, abolish the death penalty while lowering sentences as whole.²⁸⁰ However, sentences that result in life without the possibility of parole should not be used a substitute for the death penalty.²⁸¹

The **United States Sentencing Commission** should revise the Sentencing Guidelines to allow for alternatives to incarceration, especially for individuals who been convicted of less serious crimes.²⁸²

Federal and state judges should:

- ▶ Place individuals in contempt of court for civil fees or fines only where the court has determined that the individual has the financial means to pay the fees or fines.
- ▶ Take “the welfare of the family of the accused...into account, with particular attention to the best interests of the child.”²⁸³

278 Office of the Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (2015) (recommending the expansion of the Bureau of Prisons compassionate release program, which allows for the release of elderly individuals who are incarcerated).

279 Michael Tonry, “Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration,” 13 *Criminology & Public Policy* 503 (2014).

280 See, e.g., Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (2015).

281 David R. Dow, “Life Without Parole Is a Terrible Idea: Examining the California SAFE Act,” *Daily Beast* (Apr. 12, 2012), <http://www.thedailybeast.com/articles/2012/04/27/life-without-parole-is-a-terrible-idea.html>.

282 Charles Colson Task Force on Federal Corrections, *supra* note 235.

283 UN African Descent, *supra* note 77.

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Restoring transparency and accountability in sentencing

Transparency and accountability are cornerstones of effective justice administration. To ensure that sentencing practices are fair, we must demand that sentencing data is maintained and inequities are immediately addressed.

State governments, judicial ethics organizations, Congress, and state and local legislatures should:

- ▶ Provide details on judicial sentencing determinations, disaggregated by race, religion, sex, gender, gender identity/expression, age, housing status, sexual orientation, HIV status, ethnicity, sexuality, immigration status, national origin, and religious affiliation;
- ▶ Provide regular and routine training programs for judges on implicit bias;²⁸⁴
- ▶ Assess the impact of political fundraising and corporate contributions on sentencing to reduce their impact;²⁸⁵
- ▶ Educate judges on their role in reducing mass incarceration and provide them with bench cards, which provide judges with short questions and guidelines to consider before judicial proceeding to encourage them to reduce their biases during proceedings.²⁸⁶

284 Ibid.

285 See Coke, *supra* note 4, at 30. In most states, incarcerated people are not counted for the decennial census in the communities where they resided prior to incarceration. Rather, they are counted in the communities where they are imprisoned. Because incarcerated people cannot vote in most states, using these counts to draw state and county legislative districts enhances the weight of a vote cast by people who live near prisons at the expense of urban communities. Several states have enacted legislation to reverse this practice and, thereby assure that assorted census-based tax revenues are allotted to the home communities of incarcerated people instead of those where they are incarcerated. Ending the practice of prison-based gerrymandering will change the balance of power in many states from rural to urban, more accurately reflecting the states' populations, and provide opportunities for the successful passage of reforms that positively affect urban communities and communities of color.

286 Ibid. at 40.

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For more information on sentencing reform, check out:

The **Sentencing Project**, which advocates for a “fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.”