

 The Fund for New Jersey

CROSSROADS NJ

POLICY CHOICES THAT DEFINE OUR FUTURE

CRIMINAL JUSTICE
REFORM

REDUCING
MASS INCARCERATION
WOULD BENEFIT
NEW JERSEY'S
COMMUNITIES



Reducing Mass Incarceration Would Benefit New Jersey's Communities

New Jersey has chosen to lock up people at a rate that does not make anyone safer, costs the state billions of dollars, and results in disproportionate burdens on many of our families and communities.

The scale of incarceration in the United States and in New Jersey is staggering. With only 5% of the world's inhabitants, the U.S. has the world's largest prison population, both in absolute numbers¹ (almost a quarter of the prisoners in the world) and as a percentage of the population.² And New Jersey has a higher incarceration rate than all but six nations.³ These data reflect policies that accept imprisonment alone as a goal of the criminal justice system. "Mass incarceration" is the term we now use to describe high rates of imprisonment, particularly among "young, African-American men living in neighborhoods of concentrated disadvantage."⁴ This paradigm does not work for anyone.

Transforming the criminal justice system in New Jersey into a fair and effective system will require rethinking everything from policing strategies upfront to release and rehabilitation at the end of the criminal justice pipeline, and making practical changes. The premise should be that incarceration is the last resort, not the first response. The money we spend to confine so many New Jerseyans could be used for public investment in other important areas that support human and economic growth, such as education, housing, and health.⁵

This report offers recommendations that embody sound public policy and are informed by a consensus that mass incarceration is not a reasonable or appropriate model for a system of criminal justice. Our recommendations will not address the collection of injustices that result in mass incarceration or redress all its consequences. But combined with retaining improvements already underway, specifically, New Jersey's landmark bail reform effort, the report recommends feasible and affordable policies that will put the state on a path toward a more equitable and effective criminal justice system.



Putting more people behind bars is not an effective law enforcement strategy.

Mass Incarceration in New Jersey Today

Although the number of people incarcerated in New Jersey has decreased since 1999 (when it peaked at five times the 1978 level), the total stands today at four times the 1978 number.⁶ Further, the population in our jails and prisons does not reflect the diversity of the population as a whole. And it is the racial disparities in our prison populations that are most disturbing. Nationally, African-Americans make up 13% of the population but 40% of those in prison.⁷ In New Jersey, the difference is even more striking: African-Americans make up only 14% of the population but comprise 54% of those in prison. That is, African-Americans are incarcerated in New Jersey at a rate more than 12 times that of Caucasians. This level of racial disparity is the highest in the nation.⁸ Even in the juvenile justice system, where the state has made progress in decreasing the number of children behind bars, large disparities remain. African-American youth are 24 times, and Latino youth are 5.4 times, more likely to be committed to a juvenile facility than are white youth.⁹

The causes of these disparities are many, among them policing practices, prosecutorial decision making, and sentencing bias. African-Americans are more likely to be arrested for breaking certain laws than are Caucasians. Consider marijuana possession: nationally, in 2010, 34% of Caucasians and 27% of African-Americans reported using marijuana during the previous year. But in New Jersey, African-Americans were 2.8 times more likely to be arrested for marijuana possession than whites, and in six counties (Hunterdon, Ocean, Monmouth, Warren, Salem, and Mercer) the arrest disparities were higher than the national average, which tells us that African-Americans are 3.7 times more likely to be arrested than Caucasians.¹⁰

Furthermore, putting more people behind bars is not an effective law enforcement strategy. Recent studies show that sending large numbers of people to prison or jail does not make us safer; rather, the rate of incarceration has a minimal impact on the commission of property crimes and essentially no impact on the commission of violent crimes.¹¹

Crime rates are lower in New Jersey and elsewhere, not because of incarceration rates, but because of aging populations (older people commit fewer crimes), increased graduation rates and employment, decreased alcohol consumption, and policing methods based on data used to identify crime patterns and target resources.¹² For example, situational crime prevention strategies (such as adding lighting, cleaning up graffiti, and razing abandoned buildings) produce “larger and longer-term crime prevention benefits” than arresting offenders or putting more police in crime hot spots.¹³ Perhaps most revealingly, in 2014 (the most recent year for which statistics are available), violent crime in New Jersey was at its lowest rate since 1969, and the overall crime rate was at its lowest point since 1963¹⁴—both before the “get tough on crime policies” were implemented.

Indeed, research demonstrates that the disproportionate number of people of color¹⁵ caught up in New Jersey’s criminal justice system stifles social and economic progress and destroys families and neighborhoods, resulting in an increase in crime. Those who are incarcerated—a preponderance of them young men of color—are often from economically poor urban areas where their absence affects the economic vitality, the mental and physical health, and the family stability of the entire community.¹⁶ Rutgers

professor Todd Clear hypothesizes that high rates of incarceration increase crime because “high rates of removal of parent-aged residents from poor communities set off a series of effects that destabilize the capacities of those communities to provide informal social control[s]” which limit delinquency.¹⁷ In other words, communities actually become less safe when incarceration rates are high.

And mass incarceration is expensive. New Jersey Department of Corrections spending more than quadrupled from 1985 to 2015, to \$1.07 billion from \$241.4 million.¹⁸ The high costs to taxpayers of a system that provides such minimal benefits are difficult to justify.

Step-by-Step Reform Would Make New Jersey’s Criminal Justice System Equitable and Effective

As it grows increasingly clear that the federal government will not lead a reform effort,¹⁹ many states²⁰ already are considering—and implementing—programs designed to reduce their prison populations.²¹ From 2006 to 2014, New Jersey lowered its rate of incarceration by 24%, to 242 per 100,000 from 317 per 100,000.²² The lower rate was achieved by changing the administration of parole, using the sentencing flexibility offered by changes in the law²³ and by the drug courts for low-level drug offenders and, most recently, by redesigning practices related to bail and eliminating jail time for many people awaiting trial. Nonetheless, despite these reductions, the number of people filling our jails and prisons remains unacceptably high and fundamentally inequitable.

New Jersey must build on the gains it has made. Reform requires a comprehensive, system-wide approach from the beginning to the end of the criminal justice system. Accordingly, our recommendations track that process through the phases of arrest, bail, sentencing, post-sentencing, and reentry.

The Arrest Phase: Focusing Law Enforcement Resources on Public Safety

When the Legislature and the governor determine that certain behaviors are sufficiently problematic, they deem them criminal. Although law enforcement officers cannot choose which actions are criminal, they retain significant discretion to decide how to use the resources that are available to them. These decisions should be focused on assuring the safety of the public. Yet, New Jersey makes thousands of arrests each year for low-level offenses such as disorderly conduct (12,988 in 2015) and loitering (1,416)²⁴—nonviolent crimes categorized as disorderly persons offenses or petty disorderly persons offenses. No low-level offense produces more arrests than marijuana possession. In 2015, New Jersey law enforcement agencies arrested nearly 28,290 people for small-scale possession of marijuana.²⁵ Indeed, the enforcement of low-level offenses throughout New Jersey has resulted in aggressive stop-and-frisk practices and numbers-based policing strategies that lead to encounters between the police and the public that are not necessary for ensuring public safety. Moreover, while people rarely face long sentences for low-level offenses such as marijuana possession, arrests have other serious consequences. Criminal and civil sanctions can prohibit those arrested



Some behavioral disturbances, such as disorderly conduct, can be handled more effectively through referrals to social services rather than arrests and the ensuing involvement in the criminal justice system.

from securing employment, housing, or an education.²⁶ And, arrest for possession of even a small amount of marijuana can include up to six months in jail,²⁷ loss of a job²⁸ and driver's license,²⁹ and more than \$1,500 in fees and fines.³⁰

There is a better way: not every community problem merits police intervention. Some behavioral disturbances, such as disorderly conduct, can be handled more effectively through referrals to social services rather than arrests and the ensuing involvement in the criminal justice system.

RECOMMENDATION

Re-direct law enforcement priorities to those matters that truly affect public safety. To that end, legalize marijuana and review the efficacy of criminal statutes related to other low-level offenses. Recognize that social services are more appropriate interventions for some behavioral offenses.

PROTECTING IMMIGRANTS FROM DEPORTATION OVER MINOR OFFENSES

When people are arrested for low-level offenses they may come to the attention of federal immigration authorities that have in recent years increasingly relied on local law enforcement to gather and share information about arrestees. Since 2007, state, county, and local police officers in New Jersey have been required to inquire about the immigration status of anyone arrested and charged with an indictable offense or driving while intoxicated.³¹ That information is used by federal Immigration and Customs Enforcement (ICE) to place arrestees in detention and start deportation proceedings. It need not be that way.

New Jersey could join many municipalities and such states as California³² in strictly separating local law enforcement from federal immigration enforcement. Such separation is widely recognized as a useful tool in gaining the trust of immigrant communities, which in turn encourages crime victims and witnesses to come forward, and more effectively guards public safety.³³

RECOMMENDATION

Limit local law enforcement's interactions with Immigration and Customs Enforcement. Rescind and replace Attorney General Directive 2007-3, which requires police to inquire about arrestees' immigration status in certain circumstances.

COLLECTING RELIABLE AND CONSISTENT DATA

Reliable data can drive good decision making at all stages of the criminal justice process, including with regard to arrests. But not all police departments keep track

of arrests in ways that allow meaningful analysis. For example, some police departments fail to record ethnicity data in arrest records, specifically for Latinos. The City of Elizabeth, for example, does not record information that would allow the tracking of Latino arrests—despite having a population that is 60% Latino.³⁴ The failure to track this information likely results in the underreporting of disparate treatment of Latinos in the criminal justice system.

Other departments fail to maintain arrest data in formats that enable researchers to isolate arrests based on the crime charged.³⁵ The axiom that you cannot manage what you cannot measure is particularly true in policing. Effective data collection and retention practices assist police departments in determining resource allocation priorities, identifying public safety needs, and building a comprehensive picture of department-wide policing practices.

RECOMMENDATION

Require police departments to improve data collection and management, to enable systematic analysis of arrests and other data.

Departments must allow for easy access and retrieval of arrest, summonses, stop-and-frisk, and police-search information for analysis, for the benefit of both the police department and the public.

The Bail Phase: Implementing Pretrial Justice Reform

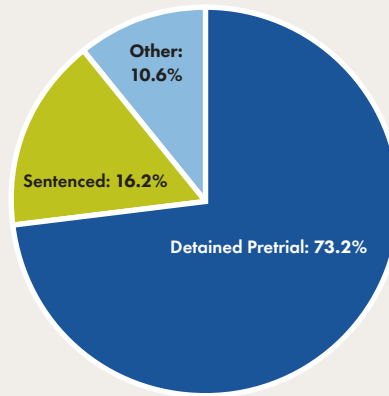
For years, decisions about whether people charged with crimes would be released from jail pending trial were based on a defendant's financial resources. Judges set bail—an amount of money, which, if posted, allows defendants to be released—designed to ensure that defendants appeared in court. This process resulted in people with low financial resources being punished in two ways. First, when defendants and their families were able to scrape together the money, often thousands of dollars, required to post bail, they typically would not get the money back even if the defendant appeared in court as required.³⁶ Although some people could post bail directly with a court and receive their money back at the end of the case, most people were forced to use commercial bail bond companies that kept any money paid regardless of the outcome of the case.³⁷ Second, people who were unable to post bail would languish in jail for months, or even years. Confronted with the option of either staying in jail or pleading guilty and getting out of jail, many people opted for the latter, even if they were innocent.³⁸

A 2013 study concluded that, on a single day, more than 5,000 people—38% of the 13,000 in custody at the time—were in New Jersey's county jails because of inadequate financial resources. And 33% of those detainees (more than 1,600 people, 12% of the entire jail population) could have secured release for \$2,500 or less. The average length of stay in jail pending trial was about 10 months, which generated significant and unnecessary costs for the state.³⁹ The report also showed the disparate impact on minorities: 71% of people in New Jersey jails were Black or Latino.

The devastating effects of incarceration, even for a few days,⁴⁰ on individuals, families, and communities have been well documented. Even if not tried and convicted, jailed people suffer consequences of incarceration and risk losing their jobs, falling behind on household bills, and even losing custody of their children.⁴¹

The 2013 study spurred action, first by the state Judiciary⁴² and later the Legislature. In 2014, New Jersey passed historic legislation designed to tie pretrial detention to the danger the defendant would pose to the community, rather than to whether the person had enough money to make bail. In other words, the new statute was designed to move from a resource-based system to a risk-based system. That change was critically needed because New Jersey's jails were filled with people who presented a low risk of committing subsequent crimes and were eligible to be released while awaiting trial except that they lacked the money to post bail.⁴³

**Before Reform:
Most People
Incarcerated in
New Jersey Were
Awaiting Trial**



Data are from 2012, before current reforms were adopted

Source: Luminosity and Drug Policy Alliance⁴⁴

The reform law took effect January 1, 2017, two months after voters approved a related state constitutional amendment.⁴⁵

If properly implemented, pretrial justice reform can dramatically reduce the population of New Jersey's county jails.⁴⁶ Indeed, the reform already shows great promise. New Jersey's pretrial jail population declined by more than 20% in the first six months of 2017.⁴⁷

Although pretrial justice reform is in place, it is still subject to attack, including by those with a financial stake in the old, unfair system. The next governor must protect and strengthen the state's historic reforms.

LIMITING PREVENTIVE DETENTION

Under a risk-based system of pretrial release, when a court determines that a defendant's release pending trial would pose an unacceptable threat to public safety, the court is authorized, after conducting a hearing, to detain that person. Though



When a person is forced to stay in jail because of perceptions arising from an unproved charge rather than proof that he or she poses a future danger, we have a serious challenge to the presumption of innocence.

preventive detention, as it is known, is constitutionally permissible,⁴⁸ it puts a strain on the presumption of innocence. State law responds to this concern by permitting preventive detention only when a court finds that no set of conditions can adequately protect the public, prevent obstruction of justice, and ensure the defendant's presence at court hearings.⁴⁹ In determining whether detention is proper, there is a presumption against detention in all cases except when the defendant is charged with murder or another crime carrying a maximum penalty of life imprisonment.⁵⁰

In 2016, opponents of bail reform suggested that lawmakers expand the category of cases for which preventive detention would be presumed, to include all crimes of violence.⁵¹ Although some elected officials and law enforcement personnel agreed,⁵² doing so would make detaining people far easier and more common and, thus, would undermine the aims of reform.

Where a defendant is actually a danger, a prosecutor should be able to make a showing relying on the specific facts of the case or history of the defendant, rather than the nature of the charge. When a person is forced to stay in jail because of perceptions arising from an unproved charge rather than proof that he or she poses a future danger, we have a serious challenge to the presumption of innocence. In rare cases, detention may be necessary, but New Jersey should not make it easier for prosecutors to utilize this exceptional remedy.

RECOMMENDATION

Resist efforts to expand categories of cases where courts presume detention.

Detention should be permitted only where the trial court finds detention is necessary to achieve the purposes of the pretrial justice reform law. Efforts to increase incidences of detention must rest on rigorous data collection and analysis.

Do not reintroduce money bail as the primary mechanism for pretrial release.

Money bail will not reduce the number of pretrial detainees, make the system fairer, or save money. Although opponents of bail reform point to the cost associated with screening defendants and running pretrial services,⁵³ the costs are more than offset by the savings—and increased fairness—associated with reduced pretrial jail populations.⁵⁴

Update New Jersey's speedy-trial framework so that no defendant waits in jail for two years or more to have his or her case heard.

For the first time, the pretrial reform law provided New Jersey with a statutory speedy-trial framework. Defendants who are detained are guaranteed an opportunity to go to trial within a specified period.⁵⁵ This is a welcome change, as New Jersey had long been among a minority of states in which time limits were not explicitly set by either law or court rule.⁵⁶ But the periods set forth in the New Jersey statute are still too long. Defendants may have to wait in jail for longer than two years for a trial, even in relatively simple cases.⁵⁷

AVOIDING RACIAL DISCRIMINATION IN THE PRETRIAL JUSTICE SETTING

The pretrial justice reform statutes require that the assessment tool used to predict risk “not be discriminatory based on race, ethnicity, gender, or socio-economic status.”⁵⁸ But many experts have warned that, if not properly validated or used, risk assessment tools could further the racial disparities in the criminal justice system.⁵⁹ Even when properly used, those tools often rely on arrest and conviction data that, in turn, are based on our current system—in which people of color are disproportionately targeted for arrest and prosecution. The result is a continuing cycle of inequality.⁶⁰

The racial impact of pretrial justice reform requires ongoing evaluation to ensure the changes have no racially discriminatory effect and that, indeed, they reduce the discrimination that pervades the justice system.

RECOMMENDATION

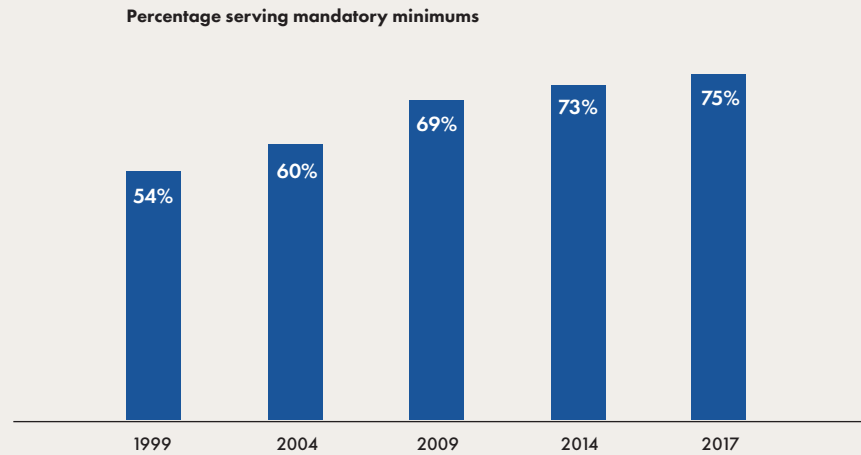
Rectify serious racial disparities in the criminal justice system through efforts to calibrate the pretrial justice risk assessment.

All risk-assessment tools contain value judgments. Is the tool more concerned with failure to appear or new criminal activity? Does the tool treat all new criminal activity the same, or is it more concerned with certain crimes? New Jersey’s tool should be designed to reduce rather than exacerbate racial disparities and should be evaluated regularly to achieve that purpose. One way to accomplish this is by giving less weight to inputs (marijuana possession arrests, for example) known to involve significant racial disparity.

The Sentencing Phase: Adjusting Prison Terms

Two sentencing policies have contributed most to the growing number of people incarcerated in New Jersey over the past four decades: longer sentences and severe mandatory minimum sentences.⁶¹ Not only do we have more people in prison, but they are also confined for longer periods of time. In 1982, 11% of New Jersey’s 7,990 prisoners were serving mandatory minimum terms.⁶² Today, 74% of New Jersey’s 20,489 prisoners—more than 15,000 people—are serving mandatory minimum sentences.⁶³

**Mandatory Minimums
Account for 3 of 4
New Jersey Sentences**



Source: State of New Jersey Department of Corrections⁶⁴

CURBING USE OF MANDATORY MINIMUM SENTENCES

Under mandatory minimum sentencing, judges lack discretion to reduce the time to be served below a specified minimum period.⁶⁵ Further, prisoners serving mandatory minimum sentences are ineligible for parole, or credit for work or good behavior, during the minimum term.⁶⁶

Although mandatory minimums suggest a tough-on-crime stance, they are often criticized as both ineffective at reducing crime and too expensive, increasing mass incarceration without a benefit to society.⁶⁷ As leading sentencing scholar Michael Tonry has explained: “The evidence is clear that mandatory penalties have either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away.”⁶⁸

Opposition to mandatory minimum sentencing is not limited to academics and political liberals. Many jurists and conservative commentators have criticized mandatory sentencing requirements. For example, U.S. Supreme Court Justice Anthony Kennedy has said: “I’m against mandatory sentences. They take away judicial discretion...”⁶⁹ Justice Stephen Breyer has written: “In 1994 Congress enacted a ‘safety-valve’ permitting relief from mandatory minimums for certain nonviolent, first-time drug offenders. This, in my view, is a small, tentative step in the right direction. A more complete solution would be to abolish mandatory minimums altogether.”⁷⁰ Grover Norquist, president of the advocacy group Americans for Tax Reform, has testified that “[t]he benefits, if any, of mandatory minimum sentences do not justify this burden to taxpayers.”⁷¹

Recognizing the need to address the rising financial cost of incarceration, over the past decade several states have eased many of their mandatory sentencing laws. Michigan, in 2003, repealed almost all mandatory minimums for drug offenses. After the repeal, during the period from 2006 to 2010, the state’s prison population fell 15%, spending on prisons declined by \$148 million, and both violent and property crime rates declined. Rhode Island, in 2009, repealed all mandatory minimum sentencing laws for drug offenses. Since then, its prison population has declined by 12% and the state’s crime rate

is down by several percentage points. And South Carolina, in 2010, eliminated mandatory minimum sentences for first convictions for simple drug possession.⁷²

New Jersey is not among the states that have taken steps to reduce mandatory sentences. Of the more than 100 changes that New Jersey made to its sentencing scheme from 1979 to 2007, 39 involved new or harsher mandatory minimum sentences and none eliminated or reduced such sentences.⁷³ In the years since 2007, the Legislature reduced a mandatory minimum penalty only once and raised mandatory minimums several times.⁷⁴ Today mandatory minimum sentences exist in New Jersey for murder⁷⁵ and other crimes of violence,⁷⁶ offenses involving firearms⁷⁷ and drugs,⁷⁸ and official misconduct,⁷⁹ among other crimes.⁸⁰

RECOMMENDATION

Eliminate mandatory minimum sentences in New Jersey.

Judges should be allowed to impose harsh sentences when appropriate, but should also have the discretion to avoid unnecessarily long incarceration.

We should eliminate mandatory minimums for nonviolent offenses without further delay. We should move quickly to review sentencing guidelines to end mandatory minimums as appropriate across the system.

RECALIBRATING BASE SENTENCES TO REFLECT THE LOSS OF PAROLE AND EARLY RELEASE CREDITS UNDER CURRENT LAW

A most important consideration for those affected by the criminal justice system—defendants and victims alike—is the actual amount of time a defendant will serve, taking into account credits, parole, and other opportunities for early release.⁸¹

In the 1990s, when the federal government provided incentive grants for prison construction to states that passed laws requiring certain serious violent offenders to serve at least 85% of their sentences prior to release,⁸² New Jersey responded by passing the No Early Release Act (NERA)⁸³ and actual prison terms lengthened considerably. Take, for example, someone charged with an armed robbery and given a 10-year sentence. Previously, the term served before parole eligibility had been three years and four months. After NERA, the term served before parole eligibility was reset at eight years and six months, more than doubling the previous requirement. Despite significant increases in required time served, New Jersey has never adjusted the base terms for most offenses. Indeed, whenever New Jersey has changed base terms by altering the degree of the crime associated with certain behavior, the degree has been raised and the base terms have increased.⁸⁴



Without sufficient information about the realities of sentencing practices, the public and policymakers cannot make reasonable decisions about reform.

RECOMMENDATION

Adjust criminal sentences to reduce the base term for criminal sentences for which early release is prohibited.

ESTABLISHING A SENTENCING REFORM COMMISSION

In 2004, recognizing that new criminal offenses had been added to the code and that penalties for many existing offenses had been increased, the Legislature decided to re-examine whether the sentences for these offenses were fair and proportionate. The result was a Commission to Review Criminal Sentencing.⁸⁵

That commission operated until 2009, when it was replaced by a Criminal Sentencing and Disposition Commission.⁸⁶ The new commission's objective was to thoroughly review criminal sentencing and consider recommendations for revisions with a goal toward "a rational, just and proportionate sentencing scheme that achieves to the greatest extent possible public safety, offender accountability, crime reduction and prevention, and offender rehabilitation while promoting the efficient use of the State's resources." The commission was also tasked with considering issues of disparity in the criminal justice process, including sentencing and racial and ethnic disparities.⁸⁷

The Criminal Sentencing and Disposition Commission has never met, and no members have been appointed.⁸⁸ Without sufficient information about the realities of sentencing practices, the public and policymakers cannot make reasonable decisions about reform.

RECOMMENDATION

Appoint members to the Criminal Sentencing and Disposition Commission so that it can fulfill its statutory duty to examine New Jersey's sentencing scheme.

Set up a comprehensive system for reporting detailed information on sentences served and the resulting financial costs.

The Department of Corrections should be required to publish data on sentences served, broken down by offense, county, race, ethnicity, gender, and age. Data regarding the cost of incarceration and alternatives to incarceration also should be made readily available.

Ensure that some members of the Criminal Sentencing and Disposition Commission have expertise in immigration law. The Commission should reconsider the classification of certain crimes in order to eliminate immigration consequences, *i.e.*, deportation.

Any examination of sentencing in New Jersey must also include consideration of the ways in which criminal law interacts with federal immigration law to create anomalous and undesirable results. Immigration law is particularly unforgiving. Criminal convictions—even for minor state crimes—often trigger automatic deportation. For example, being convicted of a non-serious New Jersey crime, such as shoplifting in the fourth degree, could get a green card holder deported simply because the charge carries a possible sentence of more than one year.

The Post-Sentencing Phase: Release Reform

New Jersey, like all states, has mechanisms in place to reduce, as appropriate, the amount of time prisoners actually spend in prison. These mechanisms are aimed at ensuring that offenders serve time in prison that is proportionate to their crimes and not so excessive as to be unjust punishment, result in greater risk of recidivism, and cause greater hardships to affected families.

Credits, parole, and pardons can all help address mass incarceration. Although each of these tools has been available in New Jersey for decades, in recent years, the use of parole release, in particular, has decreased significantly. New Jersey must reverse course: opportunities for early release should be both improved and expanded in order to further reduce the period of incarceration for eligible prisoners.

EXPANDING AVAILABILITY OF GOOD-TIME CREDITS

In New Jersey, prisoners earn credits against their sentence for good behavior. The allotment of credits varies with how much time a person has served. The average number of days taken off annually from a sentence for prisoners serving sentences of 10 or fewer years is 103.⁸⁹

New Jersey also offers credit for program participation. Prisoners can earn time off their sentences by attending substance-abuse counseling, taking educational courses, or avoiding serious disciplinary infractions.⁹⁰ However, more inmates want to be in educational, vocational, and therapeutic programs than can be accommodated, with the result that many people do not have the opportunity to earn these credits.⁹¹

Also, other states are far more generous in providing credits. Seven states offer some classes of inmates one day's credit or more for each day in a particular program. Prisoners in those states—Alabama, Illinois, Louisiana, Oklahoma, Texas, and West Virginia, plus DWI offenders in North Carolina—can cut their sentences in half if they are not serving mandatory minimums.⁹²

RECOMMENDATION

Expand the availability of programs through which prisoners can earn credits toward release, and increase the commutation credits available to state prisoners.

Increasing the availability of educational, vocational, and therapeutic programs serves a dual purpose by providing credits toward reduced sentences and better equipping offenders to re-enter society.⁹³

INCREASING PAROLE TRANSPARENCY

The standard for granting parole is straightforward and appropriate: release is available unless evidence shows a prisoner “has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole.”⁹⁴ Despite this clear standard, New Jersey has seen a sharp decline in grants of parole in recent years. From 2002 to 2008, the number of people released from prison every year on parole averaged 7,747. Yet in 2015, only 3,011 people were paroled. Putting aside the decrease in the number of parole-eligible prisoners, the overall number of people coming up for parole has decreased and fewer of those who reach the hearing stage are granted parole. For example, in 2000 there were 16,620 hearings and 49.8% were granted parole whereas in 2015 there were 8,749 hearings and only 34.4% were granted parole.⁹⁵

In sum, analyzing decisions to grant or deny releases is difficult because New Jersey’s parole system is cloaked in secrecy.⁹⁶

RECOMMENDATION

Make data about parole decisions public.

Published data should be broken down by crime of conviction, race, gender, age, length of sentence, and county of commitment. Personal information should be removed as required by law.

Making data available will increase understanding of the parole determination decisions and will improve accountability within the system.

PROVIDING CREDITS FOR PRETRIAL DETENTION

To promote equal treatment of defendants who are released before their trial and those who are detained, New Jersey allows for the provision of jail credits.⁹⁷ County jail credits reflect the acknowledgment that a defendant who is detained pretrial suffers in comparison with someone who is released.⁹⁸ Even with jail credits, defendants who are detained pretrial are at a disadvantage. Because neither commutation credits nor work credits are available to those detained before conviction,⁹⁹ those defendants who are at liberty before trial stand to serve significantly less time if they are convicted than those who have been detained.

An example is illustrative. Defendant One is at liberty while awaiting trial. He receives a five-year sentence with no period of parole ineligibility. Defendant Two is in jail for one year before he receives the same five-year sentence. He receives 365 days of jail credits in an effort to put him in the same position as Defendant One. But because Defendant One is eligible to receive commutation and work credits for his entire sentence, he ultimately will serve 28 fewer days than Defendant Two.¹⁰⁰ The system fails to place detained defendants on an equal footing with those who are released.



The benefits of eliminating mandatory minimums, reducing the severity of custodial sentences, and allowing prisoners to earn sentence reductions through commutation and jail-time credits will be substantially undermined if former prisoners are unable to reintegrate into society.

RECOMMENDATION

Provide work and commutation credits to pretrial detainees.

The Reentry Process: Reducing Return to Prison

Fourteen years ago, an Urban Institute report (supported by The Fund for New Jersey) painted a bleak picture of available assistance for ex-offenders as they sought to reenter society after incarceration.¹⁰¹ In the last decade, New Jersey has taken significant steps to create more opportunities for formerly incarcerated people through the passage of legislation hailed as a “model for the rest of the nation.”¹⁰² Also, we have seen the creation of nonprofit organizations dedicated to helping ex-offenders.¹⁰³

Yet, the benefits of eliminating mandatory minimums, reducing the severity of custodial sentences, and allowing prisoners to earn sentence reductions through commutation and jail-time credits will be substantially undermined if former prisoners are unable to reintegrate into society. After offenders are released from incarceration, they need to secure stable housing, a job, and health care to fully transition back to their families and into their communities. The collateral consequences of many criminal convictions in New Jersey work against those goals, leaving ex-inmates with few options and funneling many of them back into New Jersey’s prisons and jails.

MINIMIZING THE COLLATERAL CONSEQUENCES OF A CONVICTION

Former prisoners face daunting barriers to successful re-entry. In searching for stable and affordable housing, they must contend not only with the high costs faced by all New Jerseyans who struggle to make ends meet, but also with municipal housing authorities that may impose eligibility restrictions based on criminal history,¹⁰⁴ and private landlords who may demand background checks and disqualify those applicants involved with the criminal justice system.¹⁰⁵ When it comes to employment, former prisoners, particularly those convicted of drug crimes and other offenses under the category of “moral turpitude,” are barred by law from many positions, from public employees¹⁰⁶ to firefighters¹⁰⁷ to insurance adjusters.¹⁰⁸ Many former prisoners must also deal with a lengthy driver’s license suspension that serves as a restriction on their ability to find and maintain employment.¹⁰⁹

These consequences only add to the difficulties former prisoners experience in obtaining substance-abuse treatment, education or vocational training, and even cash assistance under certain public benefits programs.¹¹⁰

RECOMMENDATION

Reduce barriers that former prisoners face, by, among other things, providing transitional housing, eliminating unnecessary employment restrictions and driver’s license suspensions, and funding health care, educational and vocational programs, and providing other resources.

An Interagency Reentry Council, reporting to the governor, should be established to ensure maximum effectiveness of reentry initiatives.

EXTENDING EXPUNGEMENT TO MORE NEW JERSEYANS

Expungement makes the records of criminal convictions inaccessible for most purposes, mitigating the consequences of involvement with the criminal justice system.¹¹¹ Several provisions of New Jersey’s expungement statute, however, unduly restrict eligible ex-offenders. For example, many first- and second-degree nonviolent drug convictions cannot be expunged,¹¹² and the waiting periods that apply (10 years for a crime, and five years for a disorderly persons offense¹¹³) are so long—longer than those in other states¹¹⁴—that the benefits are often illusory. In addition to shortening waiting periods, common-sense reforms would include simplifying the process to reduce the time and expense involved in applying for expungement¹¹⁵ and making the expungement of non-conviction records, such as dismissals, automatic under most circumstances.¹¹⁶

RECOMMENDATION

Make expungement more widely available in New Jersey by permitting multiple nonviolent first- and second-degree drug offenses to be expunged, reducing the lengthy waiting periods before expungement can be requested, and enacting provisions that enable longtime non-recidivists to “wipe the slate clean” by expunging their entire criminal records.

AVOIDING DEPORTATION

Criminal convictions, even for minor state crimes, trigger automatic deportation. Prior convictions also can bar otherwise qualified green card holders from becoming U.S. citizens.

RECOMMENDATION

The governor should create an advisory board to recommend cases for his or her consideration in granting pardons to people facing serious immigration consequences due to their criminal records.

Previous governors in Maryland and New York have made frequent use of their pardon power to vacate old or minor criminal convictions for lawfully residing immigrants¹¹⁷ and, recently, the governor in New York used his pardon power to give a longtime resident the chance to re-open his deportation case. An advisory board would serve law enforcement objectives while minimizing the unintended harsh consequences of minor criminal convictions. The board, in appropriate cases, could enable more lawfully residing immigrants to remain with their families and remove potential obstacles to pursuing citizenship.

RESTORING THE RIGHT TO VOTE

States vary in the extent to which they deny criminal offenders one of American citizens' most basic rights. The spectrum goes from two states that let prisoners vote by absentee ballot to 12 that deny the right to vote even to offenders who have fulfilled all their obligations to the criminal justice system.¹¹⁸ New Jersey is among the more restrictive: no one in prison, on parole, or on probation can vote.

In a state where African Americans make up such a disproportionately large share of the incarcerated, denial of voting rights has broad implications.

African Americans Count for Half of All New Jerseyans Who Are Barred From Voting

	INCARCERATED	PAROLE	PROBATION	TOTAL	% OF VOTING AGE POPULATION
All People	21,360	14,831	58,123	94,315	1.36
African Americans	12,761	6,466	28,243	47,470	5.28

Source: The Sentencing Project¹¹⁹

More than 5% of the African American population of voting age is barred from voting in New Jersey: African Americans count for half of all state residents disenfranchised. The percentage of those barred in New York and Pennsylvania, by comparison, is less than 50% of those barred in New Jersey.

RECOMMENDATION

New Jersey should not deny criminal offenders the right to vote.

The state should join Maine and Vermont in allowing prisoners as well as people on parole or probation to vote. Allowing prisoners to vote would put New Jersey in the vanguard of reform and would constitute a major step toward reducing racial inequity in the criminal justice system.

Conclusion

In recent decades New Jersey has chosen a criminal justice framework that does not make the state's residents safer and is rife with racial disparities. The system we have chosen costs the state billions of dollars and sharply diminishes the economic prospects of families and communities disproportionately affected by mass incarceration. The irony is that we are paying those billions of dollars for a system that wreaks havoc on individuals, families, and communities.

A better, more rational balance must be struck.

Endnotes

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- ² [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?” Washington Post, April 30, 2015.](#)
- ³ [Peter Wagner and Alison Walsh, “States of Incarceration: The Global Context 2016,” Prison Policy Initiative, June 16, 2016.](#) (New Jersey has a lower incarceration rate than only the United States, Turkmenistan, El Salvador, Cuba, Thailand, and the Russian Federation.)
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- ⁵ [Christian Henrichson and Ruth Delaney “The Price of Prisons: What Incarceration Costs Taxpayers,” Vera Institute of Justice, January 2012.](#) (Estimating the total cost to taxpayers of prisons at \$1.4 billion annually.)
- ⁶ [Sentencing Project: State-by-State Data.](#) (In 2015, there were 20,489 people in New Jersey prisons.)
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- ⁹ [“Unbalanced Juvenile Justice,” The W. Haywood Burns Institute for Juvenile Justice Fairness & Equity.](#) (New Jersey’s incarceration rate for youth of color is more than ten times higher than for white youth, making it the state with the second highest disparity in the nation.)
- ¹⁰ [American Civil Liberties Union, “The War on Marijuana in Black and White,” June 2013, p 21, 165.](#)
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- ¹⁶ [Todd Clear, "The Effects of High Imprisonment Rates on Communities," Crime and Justice Volume 37 No 1 p 97-132, 2008.](#)
- ¹⁷ Ibid, p 118.
- ¹⁸ New Jersey State Budget FY1987, showing [Department of Corrections actual spending in FY1985](#) and New Jersey State Budget FY 2017, showing [Department of Corrections actual spending in FY2015, D-61.](#)
- ¹⁹ [Jon Schuppe, "With Trump in White House, Criminal Justice Reformers Will Look Elsewhere," NBC News, November 10, 2016.](#)
- ²⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."
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- ²⁷ *N.J.S.A. 2C:43-8.*
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- ³⁵ Ibid.
- ³⁶ [Color of Change and American Civil Liberties Union, "Selling Off Our Freedom," May 2017, p 2.](#)
- ³⁷ N.J.S.A. 2A:162-12 (2013) (Limiting methods of posting bail in cases with bail restrictions.)
- ³⁸ [New Jersey Judiciary Court System, "Report of the Joint Committee on Criminal Justice," March 2014, p 69.](#)
- ³⁹ [Marie VanNostrand, "New Jersey Jail Population Analysis," Provided by Luminosity in Partnership with the Drug Policy Alliance, March 2013, p 14.](#)
- ⁴⁰ [3 Days Count, "Commonsense Pretrial," 2017.](#)
- ⁴¹ [Vera Institute of Justice, "The Human Toll of Jail Project: More on Incarceration's Impact on Kids and Families."](#)
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- ⁴³ VanNostrand, *supra*, note 39.
- ⁴⁴ [Marie VanNostrand, "New Jersey Jail Population Analysis," Provided by Luminosity in Partnership with the Drug Policy Alliance, March 2013.](#)
- ⁴⁵ N.J.S.A. 2A:162-15 *et. seq.*
- ⁴⁶ There is also reason to believe that reducing the pretrial detention population might have an impact on the post-trial incarceration rate. New Jersey's dramatic success with the Juvenile Detention Alternatives Initiative (JDAI) can serve as a model: in counties in which JDAI was active the average daily population of the detention centers (the juvenile equivalent of jails) fell from 813.5 in 2003 to 368 in 2011, a reduction of 54.8%. At the same time, the number of children in residential placement (the juvenile equivalent of being sentenced to prison) in New Jersey decreased from 960 to 615, a reduction of 35%. Simply put, the fewer kids who appeared before a sentencing judge already in custody, the fewer kids who ultimately wound up with custodial sentences. There are many reasons to doubt that the tremendous success associated with reforming juvenile detention could result in corresponding achievement in the context of adult pretrial reform. But some reduction in the prison population is nevertheless possible. [State of New Jersey, Office of the Attorney General, Juvenile Justice Commission, "New Jersey Juvenile Detention Alternatives Initiative \(JDAI\) Annual Data Report," February 2013.](#)
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- ⁶⁷ [Eric Holder, Remarks at the Annual Meeting of the American Bar Association's House of Delegates, San Francisco, August 12, 2013.](#)
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- ⁷⁶ N.J.S.A. 2C:43-7.2 (Proving that defendants serve at least 85% of any sentence imposed for a crime of violence).
- ⁷⁷ N.J.S.A. 2C:43-6c (Providing for a minimum term of 42 months).
- ⁷⁸ N.J.S.A. 2C:35-3 (25 years to life for a conviction as a leader of a narcotics network); N.J.S.A. 2C:35-4 (One-third to one-half of the sentence imposed for maintaining a drug production facility); N.J.S.A. 2C:35-6 (One-third to one-half of the sentence imposed or five years, whichever is greater, for employing a juvenile); N.J.S.A. 2C:35-5 (One-third to one-half of the sentence imposed for first-degree possession with intent to distribute).
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¹⁰³ See, e.g., [New Jersey Reentry Corporation; Volunteer Lawyers for Justice](#)

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¹⁰⁷ N.J.S.A. 40A:14-9.

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¹¹³ N.J.S.A. 2C:52-2(a), 52-3(b).

¹¹⁴ *Ark. Code* §§ 16-90-1405, 1406 (5 years for a felony, 60 days for a misdemeanor); *Ky. Rev. Stat.* §§ 431.073(2), 431.078(2) (5 years for felonies and misdemeanors); *Minn. Stat.* § 609A.02 (5 years for a felony, 2 years for a misdemeanor).

¹¹⁵ An individual seeking an expungement must, often without an attorney, consult the relevant code provisions to determine if he is eligible, *N.J.S.A. 2C:52-2 to 52-6*; gather information related to his or her conviction, which will often require consulting court records, *N.J.S.A. 2C:52-7*; prepare a petition with the required information, file it, and pay the filing fee of \$75, *N.J.S.A. 2C:52-29*; serve up to ten different law enforcement agencies with a copy of the petition and other materials within five days of filing, *N.J.S.A. 2C:52-10*; attend a hearing on the petition, *N.J.S.A. 2C:52-9*; and, if the petition is granted, serve it on any law enforcement agencies that may possess records to be expunged. [New Jersey Courts: "How to Expunge Your Criminal and/or Juvenile Record," November 2012.](#) (34-page official publication containing a guide to expungement process and sample forms.)

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¹¹⁹ *Ibid.*