

BRENNAN CENTER  
FOR JUSTICE  
TWENTY YEARS

A FEDERAL AGENDA TO  
REDUCE MASS INCARCERATION

*Ames C. Grawert, Natasha Camhi, and Inimai Chettiar*

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## EXECUTIVE SUMMARY

This report sets forth an affirmative agenda to end mass incarceration and reform our criminal justice system. Bipartisan momentum has been growing for years. We must keep it going.

The United States has less than five percent of the world's population, but nearly one quarter of its prisoners.<sup>1</sup> Mass incarceration contributes significantly to the American poverty rate.<sup>2</sup> Conservatives, progressives, and law enforcement leaders now agree that the country must reduce its prison population, and that it can do so without jeopardizing public safety. In the last decade, 27 states have led the way, cutting crime and imprisonment together.<sup>3</sup>

Of course, because 87 percent of prisoners are housed in state facilities,<sup>4</sup> changes to state and local law are necessary. But history proves that decisions made in Washington affect the whole criminal justice system, for better or worse. Federal funding drives state policy, and helped create our current crisis of mass incarceration. And the federal government sets the national tone, which is critical to increasing public support and national momentum for change. Without a strong national movement, the bold reforms needed at the state and local level cannot emerge.

In a divisive political environment, it is tempting to assume that progress toward federal reform is impossible. But even today, the need to confront problems in the way we arrest, prosecute, and incarcerate remains a rare point of trans-partisan agreement. Republican and Democratic Congressional leaders alike acknowledge that unnecessarily long federal prison sentences continue to impede rehabilitation, driving recidivism and economic inequality. And according to a new poll from the Charles Koch Institute, 81 percent of Trump voters believe criminal justice reform is a “very important” or “somewhat important” issue. More than half know someone who is in or has been to prison.<sup>5</sup>

Even with broad public support, addressing the problems in our criminal justice system will not be easy. For the last eight years, the White House and Justice Department supported this important work. But Attorney General Jeff Sessions appears opposed to efforts to reduce unnecessarily harsh charging and sentencing. While President Donald Trump's own views remain unclear, key advisers such as Vice President Mike Pence, senior adviser Jared Kushner, and Gov. Chris Christie all support efforts to reduce imprisonment.

To help bridge that divide, this report offers solutions that would keep crime rates low and show support for law enforcement, while reducing mass incarceration. The strongest of these policies require congressional action. Others could be implemented by a sympathetic administration. Taken together, these policies form the core of a national agenda for federal leaders to make our country safer and fairer. They also serve as models for state and local action.

### Legislation

- **End the Federal Subsidization of Mass Incarceration:** Federal grants help shape criminal justice policy at the state and local levels. For decades, these grants have subsidized the growth of incarceration. For example, the 1994 Crime Bill offered states \$9 billion in funding to build more prisons. Today, \$8.4 billion in federal criminal justice grants flow from Washington annually, largely on autopilot, encouraging more arrests, prosecution, and incarceration. To bring accountability to this flow, Congress can pass a “Reverse Mass Incarceration Act” that would dedicate \$20 billion over 10 years to states that reduce both crime and incarceration. This would spur state and local action across the country.
- **End Federal Incarceration for Lower-Level Crimes:** Our criminal justice system relies heavily on prison, using it as the default punishment for most crimes. But research has shown that unnecessary incarceration is costly and ineffective at preventing recidivism and promoting rehabilitation. Early

estimates show that approximately 49 percent of the federal prison population is likely incarcerated without an adequate public safety reason. Congress can pass legislation to eliminate prison terms for lower-level offenses and shorten prison terms for other crimes. In doing so, it can safely, significantly cut the prison population, saving around \$28 billion over 10 years, enough to fund a Reverse Mass Incarceration Act.

- **Institute a Police Corps Program to Modernize Law Enforcement:** The country faces a national crisis in policing. Some believe that overly-zealous enforcement has reached a breaking point. Others believe police are not adequately funded or supported. All can agree that something needs to change. To advance a twenty-first century police force, Congress can allocate \$40 billion over five years to recruit new officers and train them in modern policing tactics focused on crime prevention, as well as techniques to reduce unnecessary arrests, uses of force, and incarceration.
- **Enact Sentencing Reform:** While lawmakers should aspire to the bold changes to federal sentencing described above, Congress can start with a milder first step: reintroducing and passing the Sentencing Reform and Corrections Act of 2015. This proposal would cautiously reduce prison sentences for some nonviolent crimes. A bipartisan group of senators, led by Chuck Grassley (R-Iowa) and Dick Durbin (D-Ill.), have already committed to reintroducing the bill this session. The White House has expressed cautious support.

## Executive Action

- **Redirect Federal Grants Away from Mass Incarceration:** Since many of the harmful incentives in federal criminal justice grants are written into law, truly ending the federal subsidization of mass incarceration will take congressional action, as laid out above. But the Justice Department can take the first step, by changing performance measures for grants to reward states that use federal funds to reduce both crime and incarceration.
- **Institute New Goals for Federal Prosecutors:** The Justice Department should ensure that scarce federal criminal justice resources are focused on the most serious crimes, and evaluate U.S. Attorneys nationally based on their ability to decrease both crime and incarceration.
- **Commute Sentences to Retroactively Apply the Fair Sentencing Act:** In 2010, Republicans and Democrats joined together to pass legislation to reduce the disparity between crack and powder cocaine crimes as the drugs are scientifically equivalent. But more than 4,000 federal prisoners remain incarcerated under outdated drug laws. Future presidents can bring justice to these prisoners by identifying clemency petitions meeting certain criteria, fast-tracking them for review, and granting clemency.

# I. LEGISLATION

## 1. End the Federal Subsidization of Mass Incarceration

For decades, the federal government has encouraged states to increase arrests, prosecutions, and imprisonment.

For example, the Violent Crime Control and Law Enforcement Act of 1994 (“1994 Crime Bill”) gave \$9 billion to states that passed laws to increase prison stays. By 1999, 24 states had done just that.<sup>6</sup> While that grant has expired, a preliminary estimate from 2016 found that Washington sends approximately \$8.4 billion annually to states.<sup>7</sup> These funds operate largely on autopilot, under the outdated notion that arrest and prison are the best way to reduce crime. One example is the Edward Byrne Memorial Justice Assistance Grant Program (“Byrne JAG”), which appropriates around \$330 million each year using outdated performance measures that encourage draconian law enforcement practices.<sup>8</sup>

Aside from minor adjustments to Byrne JAG, the Obama administration did little to modernize these critical funding streams.<sup>9</sup> To fully reverse course, Congress can pass a bill to unwind these incentives — a “Reverse Mass Incarceration Act” — that ensures federal dollars are sent only to states that reduce both crime and incarceration.<sup>10</sup>

Such an act would set aside incentive funds, perhaps \$20 billion over ten years, to reward states that: (1) reduce their prison population by seven percent over three years; and (2) reduce or hold stable crime rates. Why seven percent? This threshold is slightly greater than the average annual reduction in states already cutting their imprisonment rate, making it an achievable, ambitious goal. Optimally, this initiative would be funded by combining and redirecting all current federal criminal justice grants, ensuring that all federal dollars point toward the same goals. Or, it could be funded through new dollars. It could be introduced as a stand-alone act, an amendment to a current bill, or part of a budget bill.

If states compete for funding, as they have in the past, the Reverse Mass Incarceration Act could achieve a 20 percent reduction in the national imprisonment rate over 10 years. States would be free to approach the goals however they see fit, building on local expertise rather than federal mandate.

This proposal represents the single most powerful step the federal government can take to reduce mass incarceration. And it could draw bipartisan support. Conservative and liberal groups alike — from the R Street Institute and Texas Public Policy Foundation to the NAACP and Drug Policy Alliance — support tying federal grants to measurable reductions in crime and incarceration.<sup>11</sup> The NAACP heralded the Reverse Mass Incarceration Act as a break with “old paradigms” of crime and punishment, and one that would “spur nationwide change to end mass incarceration.”<sup>12</sup> The Justice Action Network’s conservative executive director, Holly Harris, recently wrote that using “federal incentives for states that safely decrease their prison populations” would be a powerful way to “hold government accountable,” and “a stark reversal of legislation signed into law by President Bill Clinton in 1994, which did just the opposite.”<sup>13</sup>



## 2. End Federal Incarceration for Lower-Level Crimes

Incarceration is too often the punishment of first resort. Over the past 30 years, Congress has passed more than 100 new laws imposing mandatory minimum sentences,<sup>14</sup> and the federal prison population grew by nearly a factor of 7.<sup>15</sup> Between 1980 and 2013, federal spending on prisons grew by more than 500 percent, expanding from 14 to 23 percent of the Justice Department’s budget.<sup>16</sup> Yet a comparatively small percentage of federal prisoners are sentenced for a violent crime.<sup>17</sup>

Prison can be a powerful crime-fighting tool. But research now conclusively shows that longer prison stays have sharply diminishing returns on reducing crime.<sup>18</sup> Prolonged unnecessary incarceration may even *increase* recidivism.<sup>19</sup> Congress can take steps to return reason and proportionality to federal sentencing. Specifically, it can pass legislation to eliminate imprisonment for lower-level federal offenses, such as minor marijuana trafficking and immigration crimes.

What would a safe, thorough reevaluation of our prison policies look like?

In December 2016, a Brennan Center analysis gave one perspective, estimating that 39 percent of the national prison population could be safely sanctioned with alternatives to incarceration, such as community service, electronic monitoring, probation, or treatment, or benefit from shorter sentences.<sup>20</sup>

A forthcoming Brennan Center report applies this methodology to federal prisons. Early estimates suggest that somewhere around 49 percent of the federal prison population is behind bars without a justifiable public safety basis. Some of these prisoners — many of whom are serving time for low-level drug possession or sale, immigration offenses, or regulatory crimes — could be safely sentenced to an alternative to incarceration. Others could safely have their prison sentences reduced. Together, this totals around 90,000 prisoners, or half of the total federal prison population,<sup>21</sup> who could have their time in prison shortened, or cut altogether, without negatively affecting public safety.<sup>22</sup>

Implementing these changes to the federal prison system would result in savings of \$2.8 billion annually, or \$28 billion over 10 years, more than enough to fund the Reverse Mass Incarceration Act proposed above. Reducing sentences for these offenses would also reserve scarce Justice Department resources for the prosecution and imprisonment of the most serious offenders.<sup>23</sup>

Reducing unnecessary incarceration is a goal that activists on the left and right both share. The week after President Trump’s election, the heads of several prominent conservative groups — Americans for Tax Reform, the Faith and Freedom Coalition, FreedomWorks, and Right on Crime — wrote to the president-elect to ask him to support sentencing reform. “Just as we recognize those who pose a danger to society must be behind bars,” they wrote, “for many others such as addicts and those with mental illnesses public safety can best be advanced through treatment-based approaches.”<sup>24</sup> And states have shown that this approach can work: in Florida, Mississippi, South Carolina, and Texas, diverting low-level offenders to drug treatment programs has reduced both crime and incarceration.<sup>25</sup> The federal government can follow their example.

### 3. Institute a Police Corps Program to Modernize Law Enforcement

Republicans and Democrats both acknowledge the need to improve policing. Progressives focus on the strained relationship between police officers and communities of color — the legacy of tragedies in Baltimore, Ferguson, Dallas, and other cities. Conservatives highlight the need to support state and local law enforcement, especially when the number of sworn police officers has declined by around 10 percent nationally since 2010.<sup>26</sup>

These concerns both speak to a need to reform law enforcement, starting with financial support for better policing. The federal government traditionally supported policing at state and local levels through grant programs and other initiatives. Between 1994 and 2001, the Community Oriented Policing Services program (“COPS”) provided \$7.3 billion to hire and train 100,000 officers, which contributed to the dramatic drop in crime since the 1990s.<sup>27</sup> The final 2017 appropriations bill continues to fund this program.<sup>28</sup> However, COPS has been criticized for failing to ensure that hired officers actually practiced community policing techniques, which engages officers to build trust with citizens.

One powerful way to modernize law enforcement nationwide is to provide federal backing for hiring a new generation of local police officers specifically trained in the latest crime prevention techniques that also result in fewer unnecessary arrests, use of force, and incarceration.

Following the model of other successful programs such as Teach for America and Job Corps, the federal government could launch a “Police Corps” program designed to replenish the police force with new officers trained in modern techniques — 20,000 officers each year for five years, totaling \$40 billion.<sup>29</sup> These officers would be trained to carry out a 21st century policing mission, including focusing on preventing and reducing crime, while also reducing unnecessary arrests and use of force. They would learn “evidence-based” and community policing practices, while representing diverse cultural and racial backgrounds. For example, officers would be trained in to identify individuals with mental health or drug addiction needs and divert them into rehabilitative services or treatment instead of jail. Officers could also be trained in de-escalation techniques, and in how to recognize and combat unconscious bias. The program could select cities to receive officers through a competitive application process, and periodically review their effectiveness.

This program could attract widespread support from police chiefs and officers, many of whom embrace what one group, Law Enforcement Leaders to Reduce Crime and Incarceration, described as the need for “resources to mend community relationships, and in so doing, further reduce crime and enhance public safety.”<sup>30</sup> In its legislative agenda for the 114th Congress, the International Association of Chiefs of Police specifically called for funds to incentivize careers in law enforcement.<sup>31</sup> Other law enforcement organizations, such as the National Association of Police Organizations, have also sought increased police funding.<sup>32</sup> It could also attract support from activists and civil rights groups calling for widespread police reform.

Building a new Police Corps would transform the practices and culture of law enforcement from the inside, while helping secure stronger ties between police and communities and more effectively focusing resources on crime reduction. It would also enlist law enforcement officers as part of the drive for criminal justice reform. The program could help overcome rhetoric that falsely pits law enforcement against reformers and communities, and mark a strong first step toward uniting police and citizens around shared interests.

#### 4. Enact Sentencing Reform

The creation of new federal mandatory minimum sentences is one significant reason the average federal prison stay more than doubled between 1988 and 2012.<sup>33</sup> Federal law imposes sweeping mandatory minimums for a wide range of crimes, spanning from the illegal use of food stamps to murder.<sup>34</sup> Several states, such as Connecticut, South Carolina, and Ohio, have already proven that reducing mandatory minimums works.<sup>35</sup> These states and others have enacted reforms and seen crime and prison rates fall together.<sup>36</sup>

Ending imprisonment for lower-level offenses, as described on page 4, is the type of bold sentencing reform the country truly needs. As a milder first step, lawmakers from both parties could come together to reintroduce and pass the Sentencing Reform and Corrections Act (SRCA), introduced in 2015 by Sens. Chuck Grassley (R-Iowa) and Dick Durbin (D-Ill.) and supported by House Speaker Paul Ryan (R-Wis.).<sup>37</sup> This bipartisan bill would have recalibrated federal sentencing policies by reducing some non-violent mandatory minimum sentences and giving judges discretion to depart from mandatory minimums in other cases.<sup>38</sup>

The bill did not pass last year, due to opposition from a small group of extreme Republicans — specifically, then-Senators Sessions and Tom Cotton (R-Ark.). Sessions called the SRCA a “criminal leniency bill,”<sup>39</sup> and in October 2015 gave an impassioned speech against the bill, implying it would invite a new crime wave. “Now is not the time to move too fast to further reduce penalties without careful thought,” he said. “Before we rush to judgment about undoing Federal sentencing laws, we must consider the results of what has already happened — how much reduction we have already seen.”<sup>40</sup>

Even so, there is reason to believe the bill could pass in this Congress, or in future sessions. The SRCA is supported by advocates on the left and the right, from the American Civil Liberties Union, NAACP, and Center for American Progress, to the Faith and Freedom Coalition, Right on Crime, and U.S. Justice Action Network. Major law enforcement groups also backed the bill, including the International Association of Chiefs of Police, Law Enforcement Leaders to Reduce Crime and Incarceration, Major Cities Chiefs Association, Major County Sheriffs Association, and National District Attorneys Association.<sup>41</sup>

Sens. Grassley and Durbin have committed to reintroducing the bill this year. And last month, the Trump administration dispatched key advisor Jared Kushner, who supports criminal justice reform, to meet with senators about the bill.<sup>42</sup> Some have even hypothesized that Sessions’ appointment to the Justice Department could make the bill easier to pass, as he can no longer block it in the Senate.

Though the current administration’s position on the bill is unknown, there remains a future for sentencing reform in Congress, given its overwhelming trans-partisan support.

## II. EXECUTIVE ACTION

### 1. Redirect Federal Grants Away From Mass Incarceration

The Reverse Mass Incarceration Act, described above, would redirect federal funds to incentivize smart crime policy at the state and local level, cutting both crime and incarceration. A less ambitious, but still significant, version of this reform could be achieved through executive action to recalibrate the existing \$8.4 billion in annual federal criminal justice grants.<sup>43</sup>

While the president cannot create a new grant program or override conditions put in place by Congress, he or she can take the first step by issuing an executive order directing federal agencies to hold grant recipients more accountable to the modern criminal justice goals of both reducing crime and prison overuse. Though the Trump administration may not be amenable to such a change, future presidents may be.

Agencies that administer these grants — largely the Justice Department but also the Departments of Transportation, Labor, and others — often hold vast discretion over federal grant programs that provide criminal justice dollars to states and localities. The orders could require these agencies to submit plans outlining how to recast their grants to hold recipients accountable to meeting the goals of reducing crime and incarceration.

For some grants, such as the Department of Justice’s Tribal Governments Program, agencies can ensure that dollars do not flow to states that do not achieve these goals. For others, such as the High Intensity Drug Trafficking Areas program, agencies can set aside part of the grant’s annual amount to reward states that do meet them. And for formula grants, such as Byrne JAG, the Justice Department can simply change performance measures to send clear signals to states on the expected outcomes of the dollars, steering grantees away from outdated drug-war measures.<sup>44</sup>

These crucial changes can bring accountability to the federal grant process. It is a policy that conservatives and liberals alike support.<sup>45</sup> As explained above, the R Street Institute, Texas Public Policy Foundation, NAACP, ACLU, and Drug Policy Alliance all support executive action to redirect grants to support reducing crime and incarceration.

## PRESERVING RECENT PROGRESS TOWARD A FAIRER JUSTICE SYSTEM

In 2014, the federal prison population declined for the first time in decades. By 2016, the number of people in federal prison had fallen substantially.<sup>46</sup>

What caused this halting progress? One contributor may have been a series of Obama-era policies aimed at refocusing Justice Department resources toward violent crime, and away from low-level drug offenses. Unfortunately, some of these initiatives have already ended Attorney General Jeff Sessions. Others may soon follow them. Any agenda to reverse mass incarceration must begin with a commitment to preserving, reinstating, or expanding these crucial programs.<sup>47</sup>

- **Reinstitute and Expand the “Smart on Crime” Initiative:** In 2013, Attorney General Eric Holder implemented the Smart on Crime initiative, which, among other things, directed federal prosecutors to refrain from charging some lower-level drug cases in a way that would trigger draconian mandatory minimum penalties.<sup>48</sup> Perhaps due to this initiative, the number of drug offenders given a mandatory minimum sentence in 2016 was the lowest since 1993.<sup>49</sup> Then-Senator Sessions disagreed with this order, saying it amounted to “direct[ing] prosecutors not to follow the law.”<sup>50</sup> Last week, he issued a new charging directive requiring prosecutors to seek the maximum punishment in every case, effectively reversing Holder’s order.<sup>51</sup> Sessions’ new policy is likely to increase penalties for even minor offenses, and future presidential administrations could revise or repeal it.
- **Respect State Marijuana Laws:** Nearly 30 states and Washington, D.C., have decriminalized marijuana in some form,<sup>52</sup> but possessing even small amounts of it remains a federal crime.<sup>53</sup> In 2013, the Justice Department attempted to resolve this conflict by issuing a directive that federal prosecutors refrain from prosecuting marijuana use if the behavior complies with state law and does not implicate other federal issues.<sup>54</sup> Sessions believes marijuana is a dangerous drug,<sup>55</sup> and said in remarks to reporters in March 2017 that he “may have some different ideas” about marijuana policy.<sup>56</sup> What could those ideas be? For one, he could repeal the 2013 directive and begin aggressively prosecuting marijuana crimes. This would likely lead to the incarceration of more people on minor drug offenses, exacerbating already high incarceration rates. Some Republicans, including Rep. Tom McClintock (R-Calif.), have expressed hope that Sessions will understand and respect states’ rights to determine their own marijuana policy.<sup>57</sup>
- **Restore Oversight of Local Police:** The Justice Department has historically used federal law to investigate and correct “pattern[s] and practice[s]” of police misconduct.<sup>58</sup> Over the last 8 years, for example, the Department investigated more than 20 police agencies across the country, and was overseeing “consent decrees” — negotiated settlements overseen by a federal court — with 15.<sup>59</sup> Sessions brought an abrupt end to this practice this year. “It is not the responsibility of the federal government to manage non-federal law enforcement agencies,” he wrote in a March memo.<sup>60</sup> While the Trump administration is unlikely to resume active investigations of police misconduct, future presidents should direct the Justice Department to resume this vital task and commit to working with police departments to address crisis scenarios.
- **End Over-Reliance on Private Prisons:** In August 2016, then-Deputy Attorney General Sally Yates directed the federal Bureau of Prisons to phase out the use of private prisons, citing

effectiveness and safety concerns.<sup>61</sup> Sessions rescinded that directive in February, saying it “impaired the Bureau’s ability to meet the future needs of the federal correctional system.”<sup>62</sup> Future administrations could consider reinstating the 2016 order in light of the well-documented safety and effectiveness concerns raised by private correctional facilities.<sup>63</sup>

- **Let Local Police Focus on Violent Crime:** Trump directed his Department of Homeland Security Secretary in January to work with local police to aggressively enforce local immigration law.<sup>64</sup> But this strategy may actually undermine law enforcement officers’ vital work to reduce violent crime. “When you create a shadow population . . . that fears any interaction” with police, said Charlie Beck, Chief of the Los Angeles Police Department, “then you create a whole population of victims, because they become prey for human predators who extort them or abuse them because they know they won’t contact police.”<sup>65</sup> Focusing on immigration is a priority for the Trump administration, and unlikely to change. But future presidents should allow local police to focus on what they believe are the greatest threats to their communities, instead of spending their limited resources on minor immigration offenses.

## 2. Institute New Goals for Federal Prosecutors

Prosecutors hold an incredible amount of power in our judicial system. They decide how and when defendants should be charged with a crime, recommend sentences, and control the course of plea bargaining — a process that decides 97 percent of federal criminal cases.<sup>66</sup> Prosecutors, and the sentencing laws they enforce, have contributed to the trend of mass incarceration.

Prosecutors can also help reverse this trend. In 2013, Attorney General Eric Holder announced the Justice Department’s Smart on Crime Initiative, which aimed to fight recidivism, deter crime, and reduce unnecessary imprisonment. Smart on Crime called on prosecutors to prioritize the enforcement of violent crimes, and revised charging policies to recommend that lower-level offenders not be charged with crimes carrying a mandatory minimum sentence.<sup>67</sup> Some federal prosecutors have also begun to work with their constituents to develop crime prevention strategies tailored to the community’s needs.<sup>68</sup>

Sessions has reversed Holder’s order,<sup>69</sup> drawing criticism from conservatives and progressives alike.<sup>70</sup> Similar groups have also spoken out about the need to reduce harsh prosecutorial practices. Since 2015, for example, the American Conservative Union’s Conservative Political Action Conference (“CPAC”) has featured a panel called “Prosecutors Gone Wild.”<sup>71</sup> The inaugural panel highlighted the problem of prosecutorial misconduct,<sup>72</sup> and this year’s event discussed over-criminalization.<sup>73</sup> “If [they] want to put criminal justice reforms into effect,” agrees Peter Wagner, executive director of the Prison Policy Institute, state and local leaders “need to look at how prosecutors use and abuse their discretion.”<sup>74</sup> Recent scholarship has also examined how prosecutors’ charging priorities have driven trends in prison admissions.<sup>75</sup>

Though local prosecutors must act to rectify most of this problem, the federal government can also bring change. To start, the Justice Department should implement new priorities for federal prosecutors that focus on reducing crime and unnecessary imprisonment. It could implement these new priorities in two ways.

First, future attorneys general can reinstate and expand Holder’s charging directive. Second, the Justice Department could adopt a new method for periodically measuring and evaluating how U.S. Attorneys, their offices, and their prosecutors achieve progress toward performance goals — such as reducing crime and reducing incarceration.<sup>76</sup>

Progress toward these goals could be determined using “success measures” — concrete data points that quantify progress. The goal of reducing crime could be measured by examining the annual change in a district’s violent crime rate; the percent change in violent and serious cases on the office docket; or the percentage of prisoners charged with, convicted of, or sentenced to incarceration for a new crime within three years of release. The goal of reducing incarceration could be measured by examining the percentage of defendants sentenced to incarceration, or the change in federal prison population attributable to that district. These measures could be modified when determining line prosecutors’ contributions.

These benchmarks could be incorporated into the Justice Department’s periodic evaluations of U.S. Attorney Offices through the Evaluation and Review Staff (EARS) program. Currently, these reviews focus on caseload management and strategic planning, but could be reworked to focus on measures that direct offices toward reducing crime and incarceration. U.S. Attorneys’ offices could also measure progress toward benchmarks in each individual prosecutor’s Performance Work Plans (PWP), to make sure line prosecutors are working toward office goals. Lastly, these benchmarks could be considered when making decisions about bonuses and promotions. These metrics would create incentives that focus each office and its staff on specific goals, and encourage individual prosecutors to shift practices to achieve them.<sup>77</sup> Implementing these changes would bring the best practices of private sector management into federal prosecution.

A Brennan Center fiscal analysis estimates that this reform could cut the federal prison population enough to save the government nearly \$12 billion over 10 years — and as much as \$20 billion if applied more robustly.<sup>78</sup>

### 3. Commute Sentences to Retroactively Apply the Fair Sentencing Act

Approximately half of federal prisoners are serving sentences for drug crimes.<sup>79</sup> Many were sentenced under outdated mandatory minimum penalties now considered unjust and unnecessary. Worse, those laws punished drug crimes involving crack cocaine more severely than crimes involving powder cocaine, creating unjustifiably long prison sentences that disproportionately affected African-American men.

In 2010, Congress passed the Fair Sentencing Act (FSA), which reduced the sentencing disparity between crack and powder cocaine. The FSA passed the Senate by unanimous consent, signifying broad bipartisan support.<sup>80</sup> Then-Senator Sessions even championed the Act.<sup>81</sup> However, it did not apply to prisoners already serving time under the older laws, and federal courts have chosen not to make the FSA retroactive.<sup>82</sup> According to the most recently available data from the U.S. Sentencing Commission, between 4,000 and 4,900 individuals would receive reduced sentences if the FSA were applied retroactively today.<sup>83</sup>

Article II of the Constitution grants the president the power to pardon and commute federal prison sentences, broadly referred to as the “clemency” power.<sup>84</sup> In 2014, the Obama administration announced an initiative to encourage clemency petitions. In response, advocacy organizations formed “Clemency Project 2014” to help prisoners request relief. Chronic understaffing left the initiative struggling to keep up with demand.<sup>85</sup> But it did achieve some results. During his eight years in office, President Obama granted more than 1,700 commutation requests, more than every other president over the last half-century combined.<sup>86</sup>

It is unlikely that President Trump will continue this work. While Sessions supported the Fair Sentencing Act as a Senator, he vocally opposed the Obama administration’s efforts to extend it through clemency.<sup>87</sup>

Future presidents, however, could develop a plan to issue categorical commutations rapidly. That could start with an executive order directing the Justice Department to identify the thousands of people left behind by the FSA. The Justice Department could proactively seek out federal prisoners who would be eligible for relief if the FSA were fully retroactive, encourage them to file petitions, and expedite their review. It could then review these petitions with a presumption that, barring exceptional circumstances, all prisoners fitting these criteria will receive a commutation reducing their sentence to a length consistent with the new law. This proposal may seem too revolutionary to ever win broad acceptance. But the idea of categorical clemency is not new to the federal system, and future presidents can learn from past successes.<sup>88</sup>

Such a step would complete the progress begun by the FSA, save more than \$100 million, and immediately bring relief to prisoners detained on unjust, outdated laws.<sup>89</sup>



### III. ADDITIONAL IDEAS

Future federal leaders can also advance criminal justice reform through the smaller, positive steps outlined below. Many of these measures could also be championed by a future president.

#### Legislation

- **Support Public Defenders:** Make federal grants to states for public defender’s offices contingent on reforms that reduce the incarceration of lower-level offenders, such as forgiving quality-of-life arrest warrants or reclassifying petty misdemeanors as civil infractions. These incentives would divert police resources toward fighting serious crime, and ease the burden on over-worked, under-funded public defenders. It would also reduce local jail populations with minimal public safety impact.<sup>90</sup>
- **Allow Judicial Certificates of Rehabilitation:** Returning citizens often face serious challenges finding a stable job capable of providing a living wage.<sup>91</sup> To address this challenge, one federal judge issued a “certificate of rehabilitation” in 2016 to a defendant who had left prison 12 years prior, but “struggled considerably as a result of her conviction.” Last August, the Second Circuit reversed that decision, citing a lack of jurisdiction.<sup>92</sup> While courts debate whether and how federal judges can help former offenders reintegrate, Congress can pass a law proactively granting courts the authority to issue such “certificates of rehabilitation” or, better yet, seal the criminal records of people who have long-since paid their debt to society.
- **Eliminate Barriers to Public Benefits:** Repeal federal laws that allow states to limit former inmates’ access to public benefits, such as Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act, which restricts access to Temporary Assistance for Needy Families benefits. Many states have already “opted out” of Section 115.<sup>93</sup> Repealing it outright would allow former offenders to access the social safety net, and other vital benefits, while searching for employment and housing post-release.
- **Continue Funding the Second Chance Act:** Since 2008, the Second Chance Act has supported programs to help people who have been to prison return to, and reintegrate with, their communities.<sup>94</sup> Congress should continue funding this vital work.

#### Executive Action

- **Challenge Unjust Bail Practices:** President Obama’s Justice Department filed briefs in support of lawsuits against counties whose pretrial release policies, such as cash bail, resulted in “unnecessary incarceration.”<sup>95</sup> Similar lawsuits continue to succeed with federal support.<sup>96</sup> But the Justice Department has a powerful voice, and lends credibility and urgency to local advocates’ efforts. Future attorneys general could partner directly with these groups, and work with them to identify and file civil rights lawsuits against cities or counties whose bail practices unfairly burden the poor.
- **Reclassify Marijuana:** Future presidents can review marijuana’s place on the federal schedule of controlled substances, which describes how strictly a drug is regulated. Working with the Justice Department, he or she can reclassify it to a lower level, such as Schedule II. This would not affect the penalties for marijuana use. However, it would open up avenues for medical research.<sup>97</sup> Attempts to reschedule marijuana have failed as recently as 2016, but presidential involvement could help.<sup>98</sup> With many states legalizing marijuana for medical use, and growing support among conservatives, progressives, and law enforcement to reduce punishment for drug crimes, this would mark a good first step.

- **End Solitary Confinement:** A future president can issue an executive order eliminating solitary confinement in federal prisons except in exceptional circumstances. Solitary confinement increases recidivism upon release, and creates or exacerbates mental health issues.<sup>99</sup> Ending this practice would build on prior Justice Department decisions to limit the use of solitary confinement for juveniles and inmates with mental illnesses,<sup>100</sup> and put an end to an outdated practice with little correctional benefit.<sup>101</sup>
- **Recommend Model Police Practices:** Ask the Justice Department to develop national policing guidelines on the use of force, crisis management, and de-escalation techniques.<sup>102</sup>
- **Expand “Ban the Box” Initiatives:** Expand the 2016 Office of Personnel Management rule that “bans the box” on federal government applications to include executive branch contractors.<sup>103</sup> This will further expand employment opportunities for former offenders, reducing recidivism in the process and spurring more states to follow suit.

## CONCLUSION

Americans look to Washington to solve real problems facing the country. All too often, partisanship gets in the way — or opens the easy path of criticizing, rather than the hard work of finding answers. This report offers proposals for Republicans and Democrats to advance a common agenda to reduce over-incarceration, while keeping the country safe.

## ENDNOTES

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<sup>1</sup> 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/> (noting that the most recent data has the United States containing 4.4% of the global population, and 22% of global prisoners).

<sup>2</sup> See Robert DeFine & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, 59 CRIME & DELINQUENCY 562, 581 (2013) (indicating that had incarceration not exploded to current levels, the poverty rate would have declined by 2.8 percentage points, rather than by 0.3).

<sup>3</sup> See LAUREN-BROOKE EISEN & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, UPDATE: CHANGES IN STATE IMPRISONMENT (2016), <https://www.brennancenter.org/analysis/update-changes-state-imprisonment-rates/>.

<sup>4</sup> See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2015 5 tbl.2 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

<sup>5</sup> Vikrant Reddy, *The Conservative Base Wants Criminal Justice Reform*, NATIONAL REVIEW ONLINE, May 8, 2017, <http://www.nationalreview.com/article/447398/criminal-justice-reform-donald-trump-supporters-conservative-base-want-fresh>, citing CHARLES KOCH INST., *New Poll Suggests Surprising Support for Criminal Justice Reforms Among Trump Voters* (Apr. 26, 2017), <https://www.charleskochinstitute.org/news/new-poll-suggests-surprising-support-criminal-justice-reforms-among-trump-voters/>.

<sup>6</sup> Compare PAULA M. DITTON ET AL., BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS, 2 (1999), <http://bjs.gov/content/pub/pdf/tssp.pdf> (showing that as of January 1999, 29 states had laws meeting the federal truth-in-sentencing requirement) with U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, TRUTH IN SENTENCING: AVAILABILITY OF FEDERAL GRANTS INFLUENCED LAWS IN SOME STATES, GAO-GGD-98-42, 6 (Feb. 1998), <http://www.gao.gov/assets/230/225212.pdf> (detailing the date of passage of truth-in-sentencing laws in states that received federal grants in fiscal year 1997, and showing that these laws predated the 1994 Crime Bill in five cases).

<sup>7</sup> BRENNAN CTR. FOR JUSTICE, FEDERAL CRIMINAL JUSTICE GRANTS (unpublished 2016). The authors are currently updating this report for future publication.

<sup>8</sup> See Consolidated Appropriations Act, Pub. L. No. 115-131 (2017), <https://www.congress.gov/bill/115th-congress/house-bill/244> (according to Brennan Center analysis, Byrne JAG funding totals \$334.6 million once earmarks are subtracted, and all Justice Department grants, together, add up to \$2.3 billion).

<sup>9</sup> Inimai M. Chettiar & Lauren-Brooke Eisen, BRENNAN CTR. FOR JUSTICE, *Justice Department Takes Steps to Reform Grant Program Incentives* (Nov. 18, 2014), <https://www.brennancenter.org/blog/justice-department-takes-steps-reform-grant-program-incentives>.

<sup>10</sup> For more information on this legislative proposal, see LAUREN-BROOKE EISEN & INIMAI M. CHETTIAR, BRENNAN CTR. FOR JUSTICE, THE REVERSE MASS INCARCERATION ACT (2015), <https://www.brennancenter.org/publication/reverse-mass-incarceration-act>. For background on federal grants, see INIMAI M. CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION (2013), <https://www.brennancenter.org/publication/reforming-funding-reduce-mass-incarceration>.

<sup>11</sup> See, e.g., Letter from Brennan Center for Justice et al. to Attorney General Eric Holder (Dec. 19, 2013), <https://www.brennancenter.org/sites/default/files/publications/Letter%20of%20Support.pdf>; Letter from Mark A. Levin, Director, Center for Effective Justice, Texas Public Policy Institute, to Denise O'Donnell, Director, Bureau of Justice Assistance (Dec. 20, 2013), <https://www.brennancenter.org/sites/default/files/publications/Marc%20Levin%20Letter%20of%20Support.pdf>; Letter from Eli Lehrer, President, R Street Institute, to Attorney General Eric Holder (Jan. 28, 2014), <https://www.brennancenter.org/sites/default/files/publications/Eli%20Lehrer%20Letter.pdf>.

<sup>12</sup> Hilary O. Shelton & Inimai Chettiar, *Want to Shrink Prisons? Stop Subsidizing Them*, WASH. POST, Nov. 1, 2016, [https://www.washingtonpost.com/news/in-theory/wp/2016/11/01/want-to-shrink-prisons-stop-subsidizing-them/?utm\\_term=.39772f3d74a1](https://www.washingtonpost.com/news/in-theory/wp/2016/11/01/want-to-shrink-prisons-stop-subsidizing-them/?utm_term=.39772f3d74a1).

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<sup>88</sup> President Ford issued executive orders establishing a Clemency Board to review particular convictions for draft evasion during the Vietnam War, and allowed individuals who were affected by particular statutes between certain dates to apply for conditional amnesty by a particular date. See generally Mark William Osler, *The Ford Approach and Real Fairness for Crack Convicts*, 23 FED. SENT'G REP. 228 (2011). For more on this proposal, see MICHAEL WALDMAN & INIMAI M. CHETTIAR, BRENNAN CTR. FOR JUSTICE, 15 EXECUTIVE ACTIONS 19 (2014), <https://www.brennancenter.org/publication/15-executive-actions>.

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incarceration. Assuming that 4,900 offenders would be eligible for relief, the government could potentially save approximately \$150,037,265 per year.

<sup>90</sup> In 2014, states maintained databases with over 7.8 million outstanding arrest warrants, the vast majority of which were for minor offenses. Additionally, there is reason to believe that this is an underestimate. *See Utah v. Strieff*, 126 S. Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting). Since outstanding arrest warrants for petty crimes can increase workloads for police and public defenders by causing people to become unnecessarily caught up in the criminal justice system, local authorities have already undertaken steps to reduce the number of outstanding arrest warrants. *See* Doreen St. Félix, *Amnesty in Brooklyn*, NEW YORKER, July 27, 2015, <http://www.newyorker.com/news/news-desk/amnesty-in-brooklyn>; John Eligon & Mitch Smith, *Ferguson Announces Amnesty on Warrants*, N.Y. TIMES, Aug. 24, 2015, <http://www.nytimes.com/2015/08/25/us/ferguson-announces-an-amnesty-on-warrants.html>.

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