

# The Sentencing Project

## Criminal Justice Issues and Prisoners' Rights

<https://www.sentencingproject.org/publications/a-proposal-to-reduce-time-served-in-federal-prison/>

## Public Facing Advocacy Writing

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As promising as these changes may be, we are a long way from solving our national problem of mass incarceration. The dramatic rise in incarceration during the 1980s and 1990s coinciding with the launch of the modern War on Drugs produced an overall prison population that remains unprecedented in world history. At the federal level, the growth in the incarceration rate has been even greater and more sustained than in the states. Addressing these problems will require far more than tinkering with sentencing policy for nonviolent drug offenders or revamping prison programming. To achieve a reasonable level of incarceration, we will need to substantially reduce both the number of people admitted to prison and the length of their sentences.

This testimony addresses the second of these two crucial factors: length of sentence. Excessively punitive sentences have contributed substantially to the nations scale of incarceration. They have been counterproductive for public safety objectives and have come at great cost.

Therefore, federal sentencing structures should establish an upper limit of no more than 20 years in prison, except for exceptional circumstances. Doing so would reduce the federal prison population considerably, would avert unnecessary costs for excessive incarceration, and would allow for a more appropriate balance of public safety investments. In addition, because sentencing structures are proportional, such a shift would likely reduce excessive sentences even at lower levels of offense severity, and could also serve as a model for state sentencing structures.

In 1980, about 22,000 individuals were incarcerated in the federal prison system. By 2014, the federal prison population had climbed to nearly 220,000. The result is a federal prison system that today is operating at 40% over capacity.<sup>1)</sup>[First Public Hearing of the Colson Task Force](#), 2015(statement of Charles Samuels, Dir. of U.S. Bureau of Prisons).

As the Urban Institute has documented, the federal prison population is driven by the combination of two factors: volume of admissions and length of time served.<sup>2)</sup>Nancy La Vigne and Julie Samuels, [The Growth & Increasing Cost of the Federal Prison System: Drivers and Potential Solutions](#), Urban Institute (2012).Of these two factors, sentence length, particularly for federal drug offenses, has been the major contributor to federal prison growth in recent years. According to a study by the Urban Institute, between 1998 and 2010, an increase in time served was by far the leading determinant of growth in the federal prison population, accounting for over half of the increase during that time.<sup>3)</sup>Kamala Mallik-Kane, Barbara Parthasarathy, and William Adams, [Examining Growth in the Federal Prison Population, 1998 to 2010](#), Urban Institute (2012).

Addressing excessive incarceration will require reforms that address both the front end and the back end of the federal sentencing regime. However, for reasons both political and practical, strategies that address the length of prison terms after a sentence has been imposed are limited in their ability to produce large and sustained reductions in prison populations.<sup>4)</sup>Todd Clear, *The Iron Law of Prison Populations*, in [To Build a Better Criminal Justice System](#), Marc Mauer and Kate Epstein, eds. (2012).No other policy shift would have the impact of reducing lengthy prison sentences.

Sentencing policies in the United States are much more punitive than in other modern democracies. This can be seen most dramatically at the extreme end of the sentencing spectrum. The United States is virtually the only industrialized nation that employs the death penalty, with over 3,000 people on death row.<sup>5)</sup>Death Penalty Information Center, [Section on Death Row Inmates by State](#)(last visited Mar. 2, 2015).Moreover, the nations use of life sentences has expanded exponentially in recent decades, with nearly 160,000 people sentenced to life in prison, or one of every nine people in prison.<sup>6)</sup>Ashley Nellis, [Life Goes On: The Historic Rise of Life Sentences in America](#), The Sentencing Project (2013).Of this group, almost 50,000 are serving life without parole sentences. Such whole-life sentences are exceedingly rare in other countries. For example, in the United Kingdom, only 49 individuals are serving life sentences with no opportunity for release.<sup>7)</sup>Ashley Nellis, [Life Goes On: The Historic Rise of Life Sentences in America](#), The Sentencing Project

(2013).

In the federal criminal code, many statutes authorize life imprisonment, for offenses ranging from drug trafficking to racketeering to crimes involving firearms. At least 45 federal statutes require a life sentence as the mandatory minimum penalty.<sup>8)</sup> See U.S. Sent. Commn, [Mandatory Minimum Penalties in the Federal Criminal Justice System](#) (2011). According to the United States Sentencing Commission, 42% of individuals who received a federal life sentence in 2013 had been sentenced under the terms of a mandatory minimum penalty.<sup>9)</sup> U.S. Sent. Commn, [Life Sentences in the Federal System](#) (2015). Given the breadth by which severe sentences are imposed, sentencing scholar Michael Tonry notes that modern laws flatly defy conventional notions of proportionality.<sup>10)</sup> Michael Tonry, [Remodeling American Incarceration: A Ten Step Blueprint for Moving Past Mass Incarceration](#), 13 *Criminology and Public Policy* 503, 515 (2014).

Because sentencing systems are proportional, extreme penalties exert an upward pressure on offenses at all levels of severity. According to the American Law Institute, the most severe penalty in a criminal sentencing scheme serves as an anchor point, defining the scale of the penalties beneath it.<sup>11)</sup> American Law Institute, [Model Penal Code Sentencing, Tentative Draft No. 2](#) (2011). Arguably, the entire scale of authorized sanctions has some tendency to be stretched upward, or compressed downward, depending on where the absolute maximum is located.<sup>12)</sup> American Law Institute, [Model Penal Code Sentencing, Tentative Draft No. 2](#) (2011).

As law professor Jonathan Simon has written, extreme sentences particularly life sentences have had an inflationary effect on the entire structure of punishment and the overall scale of criminal penalties.<sup>13)</sup> Jonathan Simon, [How Should We Punish Murder?](#), 94 Marq. L. Rev. 1241, 1249 (2010-11). The high price for murder (i.e. often death or a life sentence) eases the way for harsher sentences for all manner of less serious offenses such as burglary, larceny, and drug selling.<sup>14)</sup> Jonathan Simon, [How Should We Punish Murder?](#), 94 Marq. L. Rev. 1241, 1249 (2010-11). Indeed, during the 1980s and 1990s, as the average time served for murder increased by 238%, trends in time served for many other crime types also showed growth.<sup>15)</sup> Jeremy Travis and Bruce Western, [The Growth of Incarceration in the United States: Exploring Causes and Consequences](#) (2014), at 53. It follows that if the most extreme punishments are less severe, punishments for less serious offenses will be less severe as well. Doing so would place the United States closer to the sentencing severity range of comparable nations since the United States generally imposes longer sentences on persons sentenced to incarceration than other industrialized nations.<sup>16)</sup> James P. Lynch and William Alex Pridemore, Crime in International Perspective, in *Crime and Public Policy*, James Q. Wilson and Joan Petersilia, eds., (2011), at 34.

These issues are particularly prevalent in the federal system, due to the combination of the presumption of incarceration in the sentencing guidelines structure, the use of mandatory penalties for many drug and gun offenses, the 85% truth in sentencing requirement, and the imposition of life prison terms, even for nonviolent offenses. Each of these features pushes the length of federal prison terms higher.

For a number of reasons, sentences of more than 20 years are largely counterproductive and are extremely costly.

Therefore, federal sentencing structures should generally employ an upper limit of no more than 20 years in prison, except for exceptional circumstances. This upper limit incorporating appropriate exceptions could come about through a variety of mechanisms.

First, Congress could act to reduce statutory penalties of greater than 20 years. Second, short of abolishing mandatory minimum penalties, which drive long federal sentences while undermining justice, fairness, and effectiveness, Congress could prohibit the practice of stacking such penalties to achieve sentences exceeding 20 years. The stacking of mandatory minimum penalties is the means by which an individual can be sentenced to 55 years of imprisonment for possessing firearms in connection with selling small amounts of marijuana.<sup>21)</sup> See [Letter in support of commutation petition of Weldon Angelos](#), 2013.

Next, Congress could enact legislation prohibiting any federal sentence longer than 20 years unless a court has determined that the individual presents an undue risk to public safety. Congress could establish a mechanism for making this determination, with appropriate safeguards to ensure due process. For example, in the event that a public safety exception is found to require a sentence longer than 20 years, the defendant could have an opportunity to present evidence and arguments regarding mitigating factors.

In addition, the United States Sentencing Commission could restructure its sentencing guidelines to create systems that encompass within them a maximum sentence of 20 years for any offense, regardless of the formal maximum statutory limit. All lesser penalties could be reduced to ensure that penalties in the guidelines are proportional.

Finally, all of these measures could be applied retroactively to individuals serving federal sentences. In lieu of retroactive application, the President could exercise the executive clemency power, commuting any federal sentence in excess of 20 years.

Such a structure is not as radical as one might think. In many democratic nations, sentences of greater than 20 years are quite rare. For example, in Norway, the maximum sentence for any offense is 21 years, with the possibility of civil commitment for public safety reasons following that. Nations such as Germany, France, and Italy have found life sentences to be unconstitutional.<sup>22)</sup> See Catherine Appleton and Brent Grover, *The Pros and Cons of Life Without Parole*, 47 *Brit. J. Criminology* (2007).

The notion that punishment should be no greater than necessary to achieve a legitimate public purpose has been one of the central conceptions of justice shared by Western nations since the Enlightenment. But in recent decades, the concept of parsimony in punishment has been lost. Rather than treating our criminal justice system as an institution whose purpose is to ensure social norms, it has become a system of punishment operating grossly disproportionately and with little regard for promoting effective public safety strategies or individual liberties.

It is time to recalibrate our system of punishment, and there is nowhere better to start than with the federal sentencing regime. By employing an upper limit of no more than 20 years in prison, except for exceptional circumstances, we could establish a new anchor point for proportional sentencing. Such an evidence-based approach would mitigate the counterproductive effects of lengthy sentencing, help control costs, and bring the United States more in line with other industrialized nations. Setting such an upper limit in the federal

system could serve as a model for state consideration as well, and therefore contribute to a serious reconsideration of sentencing policy nationally.

Footnotes[+]

People in prison is serving a life sentence

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