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A Blueprint to End Mass Incarceration

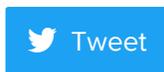
A Brennan Center report argues that releasing the “unnecessarily incarcerated” could reduce U.S. prison populations by almost 40 percent.



Stephen Lam / Reuters

MATT FORD

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Much of the debate surrounding mass incarceration is centered on its statistics: The United States has 5 percent of the world's population and 25 percent of its prisoners; American prisons hold more inmates than Soviet gulags at their peak; a greater proportion of black Americans are imprisoned than black South Africans under apartheid. Now there's a new figure worth remembering: 39 percent.

That's the percentage of people in U.S. prisons who are "unnecessarily incarcerated," a [new Brennan Center study](#) claimed last week. The report, which took three years to complete, studied criminal codes, criminal-justice research, and prison populations throughout the country to determine how many prisoners are incarcerated without a justifiable public-safety rationale. It concludes that 576,000 inmates currently locked up for crimes ranging from mail fraud to simple burglary could be swiftly released without endangering their fellow Americans.

Many of those Americans view incarceration as a largely punitive tool. But the report instead focuses on whether or not prison sentences reduce crime or enhance public safety. To that end, it outlines a series of alternatives that state legislatures and Congress could adopt, ranging from electronic monitoring to community service. The report also recommends redirecting the estimated \$18.1 billion in annual savings from reduced prison costs into reentry programs and community policing, although it doesn't otherwise focus on the impact of releasing half a million prisoners back into society.

It's a bold, novel proposal to change the American criminal-justice system, and one sure to draw its share of supporters and critics alike. I spoke with Inimai Chettiar, director of the Brennan Center's Justice Program, and Lauren-Brooke Eisen, the program's senior counsel, about their report's implications. Our conversation has been edited for style and clarity.

Matt Ford: One of the things that struck me about your report is a move away from the common focus on low-level nonviolent drug offenders and instead focusing on a much broader category of inmates. What led to that shift?

Inimai Chettiar: We wanted to step back and take a very data-driven look at who's in prison and why, so we did not want to rule out any subsets of prisoners off the bat. It seems from our perspective that two of the main reasons that people are in prison and why we have mass incarceration are one, there are too many low-level offenders who should not be in prison at all, and two, that even those people who might warrant prison, they're being sent to prison for way too long.

Ford: We hear a lot of folks on sentencing reform, but what this report actually advocates is just eliminating prison entirely for a certain set of offenses. How did you come to the decision to select these specific offenses, as opposed to more serious crimes? What was the balancing act?

Chettiar: So we actually came up with what we thought were factors that we could look at and [Lauren-Brooke Eisen] can get into them a little bit more. We looked at the full dataset of prisoners, so about 1.47 million prisoners, and we looked at each crime in terms of seriousness, victim impact, intent, and recidivism—all factors very much focused on public safety—and then made a recommendation based in research. A lot of research shows that if you put lower-level offenders in prison, it actually often increases the recidivism rate and can sometimes be counter-productive or not productive at all.

Ford: So for what kinds of crimes would imprisonment be eliminated? Are we talking about jaywalking, are we talking about mail fraud, or something more serious?

Lauren-Brooke Eisen: What we did is we looked at who should not be in prison at all, and that's what you're talking about right now, and those are more of the lower-level offenders: drug possession, minor larceny, minor property crimes, minor fraud and forgery, simple assault, minor trafficking of marijuana, even lesser burglary, and other minor drug offenses.

And then additionally we also looked at length of stays. A lot of the research we looked at indicated that prison may be justified in certain situations, especially for some more violent and egregious crimes. Our report looks at reducing the length of stay for some of the more serious crimes such as robbery, murder, aggravated assault, serious burglary, and that's how we get to our 39 percent unnecessarily incarcerated number.

Ford: And that's out of a U.S. prison population of about 1.5 to 2 million? What kind of practical efforts would this take to implement?

Chettiar: Just to answer your first question, it's actually out of a prison population of 1.5 million. What makes up the difference between the 1.5 million and the 2.2 million are the people in jail. We initially wanted to include jails in our report, but due to problems gathering jail data—it's very sparse and very hard to get—we ended up not including that. It's 39 percent of 1.47 million, because we couldn't get data from two states, so effectively it's about 40 percent of 1.5 million.

Eisen: And then in terms of the recommendations, we suggest very concrete policy proposals and sentencing changes, such as eliminating prison for lower-level crimes entirely barring exceptional circumstances and reducing sentence minimums and maximums that are currently on the books. We suggest in the report that legislators consider a 25 percent cut at the starting point for the six major crimes, the ones I just listed, that

make up the bulk of the nation's prison population. We also suggest retroactively applying these suggested reforms, and then additionally we have some complementary recommendations looking at prosecutors and the role they can play in reducing mass incarceration, that they should be using their discretion and seek alternatives to incarceration or shorter sentences that are in line with the recommendations in our report.

Chettiar: And one of the things that I think is unique about our recommendations. There's been a lot of people who have rightfully recommended that people in the criminal-justice system start using their discretion to reduce charges, to send people to alternatives. But we think it's really important that these start with mandates from the law so that things are made more uniform. To really, really see the bold changes needed on incarceration, we think there really need to be actual changes to laws.

Ford: So in that sense, it almost sounds like less of a change of mindset in terms of how the criminal-justice system operates—you're not going back to the old days of pure discretion, as we've seen some people advocate. You're still keeping intact some sentencing guidelines, but you're giving leeway, am I misinterpreting that?

Chettiar: That's right, so what we're saying is we don't think the solution is to return to so much discretion. We think that that could exacerbate disparities. We think that that could also continue to fuel mass incarceration because it's so dependent on individuals. We think the entire system needs to be reset, and it needs to be reset primarily through one principle, which is that the punishment should fit the crime. And that all the sentences to crime should be proportional to what the offense actually was, and that's not the case in our current prison population. And there absolutely are exceptions. So what we're recommending are that

these are what we're calling default sentences, so as a default, a person committing a lower-level crime should not be going to prison, except in exceptional circumstances. So a judge can look at if a person has a violent criminal history, or if a person has a mental-health or drug issue, so then they can depart up or down, depending on that.

Eisen: And to build on what Inimai just said, she mentioned proportionality and I think that's a really important part of this report. When we look at lengths of stay, many of them are just far disproportionate considering their crime that was actually committed, and I think that's a huge part of this report is just restoring some sense of proportionality and fairness to our justice system.

Ford: If I could go back real quickly to the idea of default sentences, which I think is a fascinating concept in terms of a paradigm shift: If I'm a legislator and I'm seeing a proposal to do away with prison for a variety of crimes, my natural reaction would be, "What do we replace that with?"

Chettiar: Research has shown that for lower-level crimes, alternatives like treatment, probation, community service, electronic monitoring, and fines that are calibrated to ability to pay are far more effective if the goal is public safety and reducing recidivism. And so those are what we are suggesting replace prison for this category of crimes, unless there's some extenuating circumstance that you would want to send the person to prison.

Ford: Is there any precedent for this sort of change to a criminal-justice system? We've seen all these experiments in states, I'm wondering if something like this has already been attempted.

Eisen: Absolutely, a lot of states have done similar things. One that comes to mind is South Carolina, and the reason I bring up South Carolina is

because the state has had remarkable success. They have reduced their crime and incarceration rates so much so that they've closed two prisons, and I believe on top of that they've also closed a wing of another prison, so two-and-a-half prisons. What they did is they eliminated mandatory minimums for some drug possession crimes, but more significantly, they also authorized most lower-level offenders to take advantage of all of those things Inimai just mentioned in the community, such as electronic monitoring, probation, community service, fees and fines, instead of going to prison. They dramatically reduced their prison population, and they've had incredibly safe communities ever since. I think South Carolina is a great example of a state that has made some significant changes in this vein.

Additionally, other states have done similar things. Texas has reduced its prison population and used alternatives to incarceration instead of sending so many drug offenders to prison. Other states like Kentucky has presumptive probation for low-level drug crimes so in a state like Kentucky, a judge is not even authorized to send someone to prison barring exceptional circumstances for certain crimes.

Ford: You mentioned something interesting about South Carolina being able to reduce both crime and incarceration. The common belief is that putting people in prison reduces crime, but it seems to me you're decoupling those two ?

Eisen: South Carolina is such a great example because they also reduced their recidivism rate. They have less people being returned to jail and prison while this great experiment was happening. And there's so much research indicating that incarceration can be more criminogenic and cause recidivism rates to go up, and a lot of that research is in our report.

Ford: So that seems like an interesting paradigm shift in and of itself: the idea that, rather than prison can be used to reduce crime, prison can actually increase crime.

Chettiar: Our report refers to two bodies of research that show two very similar things. One is that incarceration has diminishing returns on crime, so meaning that perhaps the first few people you incarcerate helps reduce crime, but as you incarcerate more and more people and more and more don't need to be there, you get a reduced effect on crime, so it draws on that. And the second body of research it draws on is the idea that lengths of stay in prison exhibit similar diminishing returns. So that if you're in prison for one year, or two years, or three years, you actually get the same amount of recidivism reduction as if you're in prison for ten or twenty years.

Ford: From that, it sounds like you're suggesting this could increase public safety?

Eisen: Absolutely. We have a lot of this research in our report that keeping these close ties with the community and providing programs that focus on mental-health treatment, substance-abuse treatment are much more effective in many ways than sending someone to prison, where we all know there's very little rehabilitation happening in prison. There's very little programming. And in fact the good programming has lines and waiting lists. When we look at reducing recidivism, first of all, it's much cheaper to keep someone supervised in the community in one of these programs and more importantly than that, it's much more effective in a lot of cases.

Ford: So it seems like a step away from the idea that incarceration can be rehabilitative?

Chettiar: I would say in some circumstances, incarceration may be the most effective sanction, but incarceration in and of itself is not rehabilitative. You would need programs in prison, you would need treatment in prison, you need recidivism reduction programs in prison, and so incarceration on its own does not serve the purpose of rehabilitation.

Eisen: And it can be more criminogenic in a lot of cases. There's a lot of research indicating that, especially for lower-level offenders, prison can be seen as a crime school, because you might be in a cell sitting with someone who's committed multiple crimes or might be more violent than you, and without the support services in prison, you might emerge with more anti-social attitudes and more proclivity to commit crime.

Ford: Part of the question with mass incarceration is always the timeframe in which it can be reduced. How long would it take for us to see a serious decline in the prison population if these proposals were to be enacted?

Eisen: In our report, we note that 212,000 prisoners could be released within the year because they've already served what we consider to be an appropriate length of stay. Additionally, we suggest in our report that this could happen retroactively, and so we think we could do this in a few years.

Chettiar: I think that what's going to take longer is actually getting the laws changed, and I think once that happens, the proposals could take effect quickly. And this is what we've seen in the states as well, where within a couple of years they've been able to reduce the prison population while state crime continued to stay low.

Eisen: And in the mean time you'd have a whole group of people who wouldn't ever go to prison and then at the same time you'd have people being released.

Ford: So it'd be a combination of straight-off reduction by release, and then attrition?

Eisen: Exactly.

Ford: Do you think there's a political will to support something like this?

Chettiar: I think the political will is getting there. As we've seen over the last couple of years, there's more of an awakening among politicians from both sides of the aisle, law enforcement, researchers, advocates, that we must end mass incarceration. A lot of the proposals that have been enacted have been incremental and so what we are pushing for is bolder change, and I think the momentum is going in that direction.

Eisen: Additionally, there are grave fiscal consequences for being the world's number-one incarcerator, and the Republicans and conservatives have played a large role in the leading the way towards some of the reforms in the states. We're hopeful that some of this focus on reducing cost will also be hugely helpful in moving this reform forward.

Ford: Building off that, say that I'm Donald Trump, and it's my first year in office, and I get a bill that comes across my desk that contains many if not all of the proposals you suggest. How would you convince me this would be the best thing for the country?

Chettiar: What I would say is the efforts to reduce the prison population through legislation over the last 10 years have been largely championed by Republicans, and many Republicans have made a principled argument

that reducing imprisonment is a conservative cause based on the values of rehabilitation, wanting to give people second chances, wanting the government not to have a wasteful and ineffective program, and an idea that wants to advance public safety. So I would hope Republicans would be urging Donald Trump to come to see criminal-justice reform as a conservative issue that he should champion.

Ford: That's such an interesting shift from what we already think of it as—maybe bipartisan, but it's usually framed as a left-leaning issue.

Chettiar: I would say it's definitely a progressive issue, but Democrats have been slower to join the effort. Even though progressive advocates and activists have been arguing for this for decades, the first part of the political elite that really joined into this, in addition to African American leaders, were Republican leaders, and only after Republican leaders joined it did Democratic leadership start speaking out about it. So it's definitely a very interesting and unique political dynamic.



ABOUT THE AUTHOR

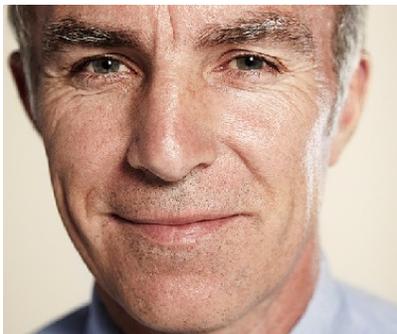


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