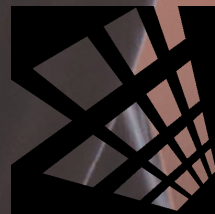




COUNTING
DOWN

**PATHS TO A 20-YEAR
MAXIMUM PRISON SENTENCE**



**THE
SENTENCING
PROJECT**



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The Sentencing Project advocates for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice.

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COUNTING DOWN: PATHS TO A 20-YEAR MAXIMUM PRISON SENTENCE

EXECUTIVE SUMMARY

As the United States marks 50 years of mass incarceration, dramatic change is necessary to ensure another 50 do not follow.¹ In no small part due to long sentences, the United States has one of the world's highest incarceration rates, with nearly two million people in prisons and jails.² The destabilizing force of mass incarceration deepens social and economic inequity – families lose not only a loved one, but income and childcare. By age 14, one in 14 children in the United States experience a parent leaving for jail or prison.³ Individuals returning to the community face profound barriers to employment and housing.⁴ Meantime the communities most impacted by crime – poor communities and communities of color – disproportionately bear the burden of incarceration's impacts. Long sentences affect young Black men disproportionately compared to every other race and age group.⁵ Twice as many Black children as white children have experienced parental incarceration.⁶ Mass incarceration entrenches cycles of harm, trauma, and disinvestment and consumes funds that might support investment in interventions that empower communities and create lasting safety.⁷

In the United States, over half of people in prison are serving a decade or longer and one in seven incarcerated people are serving a life sentence.⁸ To end mass incarceration, the United States must dramatically shorten sentences. Capping sentences for the most serious offenses at 20 years and shifting sentences for all other offenses proportionately downward, including by decriminalizing some acts, is a vital decarceration strategy to arrive at a system that values human dignity and prioritizes racial equity.

This report begins by examining the evidence in support of capping sentences at 20 years. Countries such as Germany and Norway illustrate that sentences can be far shorter without sacrificing public safety. A wealth of criminological evidence makes clear that unduly long sentences are unnecessary: people age out of crime, and

even the general threat of long term imprisonment is an ineffective deterrent.

The Sentencing Project recommends the following seven legislative reforms to cap sentences at 20 years and right-size the sentencing structure:

1. Abolish death and life without parole (LWOP) sentences, limiting maximum sentences to 20 years.⁹
2. Limit murder statutes to intentional killings, excluding offenses such as felony murder, and reduce homicide penalties.
3. Eliminate mandatory minimum sentences and reform sentencing guidelines to ensure that judges can use their discretion to consider mitigating circumstances.
4. Provide universal access to parole and ensure timely review.
5. Eliminate consecutive sentences and limit sentence enhancements, including repealing “truth-in-sentencing” and “habitual offender” laws.
6. Create an opportunity for judicial “second look” re-sentencing within a maximum of 10 years of imprisonment, regardless of an individual's offense.
7. Shift all sentences downward, including by de-felonizing many offenses and decriminalizing many misdemeanors.

Finally, this report offers ideas for how stakeholders can take steps toward shrinking sentences *today*. Prosecuting attorneys can use their discretion to limit sentences to 20 years when charging and plea bargaining, as well as engage in sentence review. Judges can impose lower sentences where possible. And communities can invest in interventions that prevent long sentences by keeping people from entering or reentering the criminal legal system altogether. Limiting maximum terms to 20 years need not be the end goal of criminal legal reform – 20 years is still an extraordinary length of time in prison – but it is an essential step toward a fair and proportionate justice system.

INTRODUCTION

As the United States marks 50 years since the era of mass incarceration began, it is a moral imperative to take a hard look at the mindset, laws, and policies that have created and sustained it.

Fifty years ago, the imprisonment rate stood at 93 imprisoned people per 100,000 residents in the general population.¹⁰ But as the United States started its sharp, upward climb over the following four decades, imprisonment rates eventually grew 700%. Though crime both increased and decreased over these decades, prison populations continued to grow until 2009. In the subsequent decade, the prison population declined at an annual rate of 1% – a pace that would require more than 50 years just to cut the prison population in half.¹¹ Ending mass incarceration will require investing heavily in effective alternatives to limit reliance on incarceration and decreasing the length of time people spend in prison.¹²

Laws and policies that lengthen prison sentences, enhance time-served requirements, and limit parole have combined to lengthen prison stays dramatically. In Georgia, for example, the typical sentence imposed for voluntary manslaughter in 1990 was just under 13 years

and those convicted were released, on average, after five years. By mid-2022, the typical sentence for the same crime was nearly 20 years and the average time served was just over 11 years.¹³ Time in prison for this crime *more than doubled* in about 20 years.

A number of state and federal policymakers have begun to pursue reforms to stem prison growth, but thus far, most decarceration strategies have focused on people convicted of relatively low-level, nonviolent crimes. These efforts are worthwhile, but leave excessively long sentences largely untouched.¹⁴ It is virtually impossible to end mass incarceration without addressing long sentences, which are typically applied in response to violent crimes.¹⁵ The Sentencing Project recommends capping all prison sentences at 20 years to address the societal harms caused by mass incarceration while still protecting public safety.



THE CASE FOR 20 YEARS

A 20-year sentence cap would align the U.S. with many western democratic nations. In countries such as Norway and Germany, criminal sanctions balance accountability with proportionality while protecting human dignity. As a result, most periods of imprisonment do not exceed 20 years, and sentences for lesser offenses reflect this general cap.¹⁶ Prison time is dedicated to programming, therapy, self-improvement, and education to improve odds of remaining crime-free after release. It is well understood that this period should last no longer than 20 years, and typically takes far less time.

Evidence shows lengthy prison terms do not have a significant deterrent effect on crime,¹⁷ but they *do* divert resources from effective investments in public safety.¹⁸ This reasoning implies, then, that a 20-year sentence cap could promote public safety. Long sentences also exacerbate many of the pains of imprisonment, including accelerated declines in health for which people receive substandard health care.¹⁹

Criminal sentences that foreclose a meaningful likelihood of release are cruel and merciless. Most criminal careers are under 10 years²⁰ and as people age, they usually desist from crime. Even people who engage in chronic, repeat offending that begins in young adulthood usually desist by their late 30s.²¹ A 20-year sentence cap would mean ceasing to incarcerate many people who have aged out of crime.

Implementing a 20-year sentence cap would prioritize reforms that shift all sentences underneath this cap downward. The Bureau of Justice Statistics reports that over half the people in prison are serving a decade or longer.²² The Sentencing Project's research finds that one in seven incarcerated people is serving a life sentence.²³ A prospective and retrospective 20-year sentence cap would have an immediate and significant influence on prison

populations and give hope to those experiencing some of its greatest cruelties.

Lastly, a sentence cap of 20 years would advance racial justice. Though overrepresentation of Black and Latinx Americans and other people of color plagues the criminal legal system from beginning to end, the disparity grows more evident as sentence lengths increase.²⁴ In 2019, Black people represented 14% of the total U.S. population, 33% of the total prison population, and 46% of the prison population who had already served at least 10 years. One in five Black men in prison is serving a life sentence and two thirds of all people serving life are people of color.²⁵ Higher levels of engagement in violent crime explain only some of this disproportionality. As an abundance of scholarship demonstrates, racial and ethnic bias drives harsher sentencing outcomes because of race.²⁶

CHARTING A PATH TO 20 YEARS

Rolling back decades of increasingly punitive sentencing structures will be difficult, but all jurisdictions can begin to rein in the local drivers of extreme sentences. The following recommendations offer paths toward a 20-year sentencing cap. Legislative reform strategies should target the statutes and practices that drive extreme sentences while taking account of local political considerations.

1. Abolish death and life without parole sentences

The path to capping sentences at 20 years should begin with eliminating, prospectively and retroactively, the most extreme sentences: the death penalty and life without parole (LWOP). Those who are already serving such sentences should be allowed to appear before a judge to receive a new sentence, and the courts should no longer have the option to impose such sentences.

While the use of the death penalty continues to decline across the United States, death sentences remain legal in half of the country. As of November 2022, over 2,400 people were facing active death sentences.²⁷ Continued use of the death penalty has met significant international condemnation.²⁸

As of 2020, 55,945 people in the U.S. were serving LWOP sentences. All states except for Alaska currently permit LWOP sentences,²⁹ and U.S. courts thus far have not ruled LWOP unconstitutional wholesale. The United States' frequent use of LWOP distinguishes it from other western democracies. International human rights standards reject the use of LWOP, which is also increasingly referred to as "death by incarceration."³⁰ Though few countries have outlawed it outright, many have never adopted it and among those who have, its use is extremely rare.³¹ For example, the Canadian Supreme Court unanimous-

ly ruled that LWOP was cruel and therefore unconstitutional in 2022, eliminating its use both retroactively and prospectively.³²

There is reason to believe that efforts to eliminate LWOP will eventually succeed. In recent years its use has become increasingly curtailed for people who were under 18 at the time of their crime, which provides an opening for additional categories of individuals to challenge its application.³³ For example, the Washington Supreme Court ruled that LWOP is unconstitutional for young adults under 21 years old.³⁴ The Michigan Supreme Court held that mandatory life without parole for 18-year-olds violates the state's constitution.³⁵ Massachusetts courts are also currently assessing the constitutionality of mandatory LWOP sentences for individuals under 21.³⁶ Illinois passed similar legislation in 2019 that allowed those who committed crimes when they were younger than 21 to apply for parole after 10 years.³⁷

Some states that had eliminated parole-eligible life sentences are also beginning to contemplate reinstating them.³⁸ In 2021, following the advocacy of the Massachusetts Campaign to End Life Without Parole, lawmakers considered H1797, a bill that would have ended LWOP by making all individuals eligible for parole after 25 years of incarceration.³⁹ While that bill did not succeed, it offers an example of how states can begin to eliminate the most extreme sentences. Likewise, in 2022, the Maine legislature established a commission to examine reinstatement of parole, which was abolished in 1976.⁴⁰ If its recommendations result in a successful legislative proposal to reinstate parole, Maine will join the rest of the Northeast region in having this release mechanism.

2. Limit murder liability and lower homicide sentences

Homicide causes unique, irreparable harm, and in turn is typically punished with the longest prison sentences. Murder convictions are disproportionately responsible for 20-plus year sentences. In Illinois, for instance, more than two thirds of those serving sentences of 20 years or more, including those with life sentences, have been convicted of a homicide.⁴¹

Homicide statutes often criminalize a broad swath of conduct with widely varying degrees of culpability – from intentional, premeditated murder to “felony murder.” Felony murder laws treat people who were involved in a felony that resulted in a death as if they intentionally committed the resulting homicide. Such laws disproportionately affect people of color, young people, and women.⁴² This population includes people like Tevin Louis, who was convicted of felony murder when a police officer killed his friend Marquise Sampson after the teens committed a robbery, even though Louis was not present when Sampson was shot.⁴³ Felony murder laws do not decrease the likelihood of the commission of felony crimes nor deadly felony crimes.⁴⁴ Leading scholars in the field recommend their full abolition.⁴⁵ Reform is underway in some jurisdictions: in 2022, the District of Columbia, for example, passed a bill eliminating accomplice liability for felony murder.⁴⁶

Similarly, eliminating drug-induced homicide (DIH) laws would reduce sentences that exceed 20 years. DIH laws punish the act of providing someone with an illicit substance which unintentionally results in a fatal overdose as homicide. DIH laws were introduced in the 1980s and spread to 23 states, the District of Columbia, and the federal system.⁴⁷ In response to the overdose epidemic, some prosecutors have dramatically increased the rate of DIH prosecutions in their jurisdictions.⁴⁸ Research shows, however, that DIH laws fail to curb overdoses.⁴⁹ DIH laws also discourage people from calling for help in the case of an emergency – one study found that media reports of DIH prosecutions were associated with an increase in overdose deaths⁵⁰ and only four states offer immunity from DIH if a person calls 911 during an overdose.⁵¹ And DIH laws often criminalize bereaved loved

ones⁵² and disproportionately yield longer sentences for people of color.⁵³

Beyond limiting the reach of unintentional homicide liability, jurisdictions can also lower homicide sentences without endangering public safety. As discussed above, in countries such as Germany and Norway, periods of incarceration rarely exceed 20 years, including for homicide offenses. Research shows that, while very serious, committing homicide is typically an isolated offense. When individuals who commit homicides return to the community, their likelihood of committing another homicide is extremely low, typically 1-3%.⁵⁴ The majority of individuals convicted of homicide will never violently recidivate.⁵⁵ And individuals convicted of homicide have far lower rates of overall recidivism than individuals convicted of other crimes.⁵⁶ Jurisdictions can safely lower the maximum sentence for homicide to 20 years and reinvest savings earned from less imprisonment towards making communities safer, while still holding individuals accountable.

3. Eliminate mandatory minimums and reform sentencing guidelines

Mandatory minimums do not improve public safety.⁵⁷ They do, however, increase racial disparities,⁵⁸ incarceration rates,⁵⁹ and coercive plea bargains.⁶⁰ Public sentiment is growing against mandatory minimums,⁶¹ and there are bipartisan calls for their repeal.⁶² Judges often denounce the ways in which mandatory minimums constrain their discretion.⁶³ Among many other organizations, the Judicial Conference of the United States, the American Law Institute’s Model Penal Code, and the American Bar Association call for their elimination.⁶⁴

All 50 states currently retain many mandatory minimums,⁶⁵ although many state codes provide for a “safety valve” to allow judges to depart from the minimum in special circumstances.⁶⁶ Reforms to mandatory minimums have been modest, but in 2022, the District of Columbia Council took a significant step by passing a bill eliminating all mandatory minimums with the sole exception of those imposed for first degree murder.⁶⁷

The impact of mandatory minimums is particularly stark in the federal system. As of January 2022, 62% of individuals in federal prisons had been convicted of an offense carrying a mandatory minimum, although nearly a quarter were sentenced below that minimum because they qualified for relief.⁶⁸ Homicide convictions are rare in the federal system; instead, many of the most extreme sentences stem from drugs, firearms, and convictions for crimes of a sexual nature carrying mandatory minimums. In turn, more than half of people serving life sentences in federal prison have been convicted of a nonviolent drug crime.⁶⁹ Nearly three quarters of those convicted of crimes of a sexual nature were convicted of an offense carrying long mandatory minimums, and most remain subject to a mandatory minimum at sentencing, yielding an average sentence of over 21.5 years for those who did not receive relief.⁷⁰

The federal sentencing guidelines have also shaped long sentences, acting much like mandatory minimums in practice.⁷¹ Though advisory as of 2005 following *United States v. Booker*,⁷² the guidelines urge higher sentences than those typically imposed by judges and contribute to the high federal prison population.⁷³ The National Research Council, a nonpartisan body of crime policy experts and criminologists, wrote that the federal guidelines “greatly increased both the percentage of individuals receiving prison sentences and the length of sentences for many offenses.”⁷⁴

Many states have followed the federal model and adopted their own sentencing guidelines with the goal of limiting the extent to which a sentence can be reduced after sentencing.⁷⁵ While some of these state guidelines are mandatory, some are advisory, and the core rules that shape the guidelines vary significantly, all place limitations on judges’ discretion to sentence below the guidelines.⁷⁶ In particular, a common feature of state guidelines is that a prior record requires an increased sentence. Such rules can significantly contribute to increased incarceration, racial disparities, and extreme sentences with minimal public safety benefits.⁷⁷ To reduce those harms, both states and the federal system should eliminate mandatory minimums and reform sentencing guidelines to not only permit, but encourage lower sentences.

4. Expand access to timely parole review

In response to federal funding incentives included in the notorious 1994 Crime Bill, most states passed laws in the 1990s requiring individuals convicted of violent offenses to spend 85% to 100% of their sentence in prison.⁷⁸ So-called “truth-in-sentencing” laws have no public safety benefit. In fact, by denying individuals the opportunity to earn early release, they remove a common incentive for participation in rehabilitative programming.

Limitations on parole dramatically increase time served, and can play a crucial role in overall incarceration rates. For example, Louisiana’s extraordinarily high incarceration rate reflects, in part, the elimination of parole for life sentences. Today Louisiana imposes a mandatory LWOP sentence for both first and second degree murder, but Louisiana’s life sentences were not always so harsh. In 1926, Louisiana codified a term of 10.5 years to equal a life sentence, with the presumption that release would be earned through good behavior at this time. Early release mechanisms such as this were not uncommon – life sentences in other states often did not require more than 15 years in prison.⁷⁹ Following the 1973 U.S. Supreme Court death penalty moratorium,⁸⁰ Louisiana passed a law requiring life sentences for murder to carry a 20-year minimum before parole eligibility.⁸¹ Three years later, the legislature raised the minimum to 40 years. Finally in 1979, lawmakers abolished parole eligibility for anyone serving a life sentence.⁸² Louisiana’s incarceration rate is now the second highest in the nation.⁸³

Likewise, as Tennessee has increasingly embraced truth-in-sentencing provisions over the last 30 years, its incarceration rate has steadily climbed.⁸⁴ In 1995, Tennessee imposed an 85% time served requirement for several violent offenses in order to qualify for federal incentive funding under the 1994 Crime Bill.⁸⁵ The state legislature also increased the length of time required for parole eligibility for a life sentence from 25 years to 60 years.⁸⁶ Tennessee’s latest truth-in-sentencing law, passed in 2022, requires 100% time served for individuals convicted of several serious offenses and 85% for a broader array of crimes.⁸⁷ The Tennessee Department of Corrections projects that the ensuing increases in incarceration – which apply only to those convicted on or after

July 1, 2022—will cost \$80 million over the next 8 years.⁸⁸ Some individuals will serve three times as long as they would have had they been convicted under prior law.⁸⁹

The United States' experiment with limiting parole to improve public safety has failed: we now know that lengthening incarceration does not make communities safer.⁹⁰ Reinstating parole, however, is far from a panacea to decreasing incarceration; parole boards will also need significant reforms, such as requiring parole commissioners to focus on the current risk to the community, rather than the facts of the underlying offense, even if statutory barriers to parole are removed.⁹¹ A holistic reenvisioning of parole – from when individuals become eligible, to the standards employed by parole boards, to the length of parole, the conditions imposed, the services provided, and the grounds for revocation – is ultimately vital to decrease incarceration and improve public safety.

5. Restrict consecutive sentences and limit sentence enhancements

In 2013, 21-year-old Atdom Mikels Patsalis was charged with committing a string of 22 burglaries over a three-month period.⁹² Most of the burglaries involved breaking into sheds or garages, no one was physically harmed, and the total value of stolen goods was under \$5,000. Patsalis was convicted and sentenced for each crime individually, not collectively. The sentences for each offense ranged from 15 years to 3 years and 9 months. Given his prior record, the court elected to impose those sentences consecutively instead of concurrently, sentencing him to a total of 298 years in prison – a punishment on par with aggravated murder. He challenged his sentence on the grounds that it was a cruel and unusual punishment. Although the appellate court's decision was split, the majority ruled that he did not receive a “grossly disproportionate” sentence.⁹³ Although Patsalis's sentence is a particularly egregious example, consecutive sentencing – requiring individuals to serve multiple terms of imprisonment one after the other for multiple offenses committed at the same time – is common and has contributed to the build-up of excessive sentences.

Canada's model suggests an alternative. Canadian judges could not impose consecutive sentences at all until 2011, and now can only impose them in murder cases.⁹⁴ Jurisdictions in the U.S. should likewise consider limiting consecutive sentences to the most serious cases, legislating a presumption that even in such circumstances sentences will be concurrent unless substantial justice dictates otherwise, and capping total sentences at 20 years.

Sentencing enhancements, provisions within the criminal code or sentencing guidelines that impose increased sentences based on certain conditions, can similarly inflate prison time. Sentencing enhancements often stack additional mandatory minimums on top of an existing sentence based on the possession or use of a weapon, alleged gang affiliation, or prior criminal history.⁹⁵ “Habitual offender” laws, for example, increase sentences based on prior criminal conduct. Louisiana's criminal code illustrates this approach by permitting sentences to be increased from 20 years to LWOP upon a fourth felony conviction, even if the offense does not include violence.⁹⁶

Sentence enhancements based on one's previous convictions, however long ago, entrench racial disparities given the disparities at every stage of the criminal legal process from arrest to sentencing.⁹⁷ Among those serving LWOP in Mississippi, 74% of those sentenced under the state's habitual offender law between 1986 and 2018 are Black.⁹⁸ Analysis of LWOP sentencing data over the same period in North Carolina reveals similar disproportionality: 81% of those sentenced to LWOP using the state's habitual offender statute are Black.

“Three strikes” laws often serve as the most severe form of habitual offender statute – mandating a life with parole or LWOP sentence for a third offense, not necessarily violent in nature. Three strikes laws gained popularity in the mid-1990s, with 23 states and the federal government passing such laws.⁹⁹ Judges have criticized such statutes for restraining discretion and producing overly long prison sentences, noting that they also disparately impact people of color and dramatically increase incarceration.¹⁰⁰ And despite the prevalence of three strikes laws, their public safety benefit is negligible: 10 years af-

ter their enactment, crime rates in states with strike laws fared no better than those without.¹⁰¹ Given the limited value of such enhancements, and their tremendous human cost, jurisdictions should explore other less carceral avenues to decrease recidivism and improve public safety.

6. Give everyone a second look

Extending relief to all those serving sentences over 20 years will require more than piecemeal statutory reform. The American Bar Association recommends that jurisdictions implement universal second look policies that allow all individuals to go before a judge once again after 10 years to assess the appropriateness of the original sentence, given their rehabilitation and risk to the community.¹⁰²

Some jurisdictions are already exploring second look laws. In 2022, U.S. Senator Cory Booker and Representative Karen Bass reintroduced the Second Look Act, a bill which would offer all individuals incarcerated for federal crimes a second look after 10 years.¹⁰³ The District of Columbia created a second look mechanism in 2019 for individuals who committed crimes while under age 18, allowing them to petition the court for resentencing after 15 years, then expanded the provision by raising the age limit to 25.¹⁰⁴ The D.C. Council then passed a bill expanding that provision to allow any person, regardless of their age at the time of the offense, to petition the court for review of their sentence after 20 years.¹⁰⁵ Some jurisdictions are also creating second look mechanisms for narrower categories of offenses. For example, New York's Domestic Violence Survivor Justice Act (2019) created sentencing reductions and resentencing opportunities for qualified survivors of domestic violence.¹⁰⁶ Regardless of their form, second look laws that give second chances to people serving long sentences are fiscally prudent, offer hope to families and incarcerated people, and are an invaluable tool for decarceration.¹⁰⁷

7. Shift all sentences downward

When sentences for the most serious offenses are capped at 20 years, the sentences for lesser offenses must be recalibrated as well. The severity of extreme sentences exerts an upward pull on sentences lower down the scale. Even 10 years in prison is often far longer than public safety concerns justify. Most criminal careers typically end within approximately 10 years and recidivism rates fall measurably after about a decade of imprisonment.¹⁰⁸ Yet, more than half of people in U.S. prisons have been incarcerated for over 10 years.¹⁰⁹ Lowering that figure prospectively through statutory reforms and retroactively via “second look” mechanisms, parole, and commutations should accompany 20-year sentencing cap reforms.

Here, efforts to address sentencing for nonviolent crimes also come into play. Jurisdictions can begin to lower sentences by de-felonizing many offenses and decriminalizing non-public safety misdemeanors – including all simple possession of controlled substances. The increase in the felony charging rate per arrest over the last 30 years has been a key contributor to the rise of mass incarceration.¹¹⁰ California, Connecticut, Oklahoma, and Utah have reclassified all drug possession from a felony to a misdemeanor, with positive outcomes.¹¹¹ California's Proposition 47 raised the minimum felony threshold for various property crimes and reduced prison spending by \$68 million in the first year alone¹¹² without increases in reoffending.¹¹³ Similarly, some jurisdictions have explored non-prosecution for a wide array of misdemeanors associated with poverty. In Boston, research found that such non-prosecution reduced recidivism – a reflection of the criminogenic impact of even low-level criminal legal involvement.¹¹⁴ Moving low level offenses out of the criminal legal system altogether has the potential to not only decrease jail populations, but make communities safer. A number of studies have shown that community supervision produces better public safety outcomes than short terms of imprisonment.¹¹⁵ Jurisdictions should also implement checks on prosecutorial discretion such as interventions that improve prosecutorial transparency in plea bargaining, disincentivize overcharging, and protect the adversarial process.¹¹⁶

Addressing exceptional cases

While the vast majority of individuals, regardless of conviction offense, will age out of criminal behavior,¹¹⁷ a small percentage of persons may still present a risk to public safety at the conclusion of 20 years in prison. This small percentage of cases may include individuals with a history of chronic and serial violent recidivism and individuals who commit mass killings.¹¹⁸ To address such cases other countries use preventative detention, a legal mechanism to prevent future offending by individuals perceived to be a high reoffense risk. The specifics differ by country. For example, Canada uses an indeterminate sentence with a review process, while Belgium, France, and Germany extend incapacitation using either determinate or indeterminate sentencing. In these countries, preventative detention is typically part of the original criminal sentencing which extends the period of confinement beyond the original sentence length.¹¹⁹

In the U.S., preventative detention, a civil court process, is used in the form of civil commitment for crimes of a sexual nature, which allows for the indefinite confinement of persons beyond the term of their court-ordered sentence. Published estimates indicate the U.S. confines at least 6,300 individuals using civil commitment.¹²⁰ Those who are detained are rarely released or die while confined, living in prison-like conditions, which equates the facilities that hold them to “shadow prisons,” a prison under another guise.¹²¹ Expanding the use of this form of preventative detention in the U.S. is not recommended because of the current lack of criminal due process safeguards and high probability of *de facto* lifetime confinement without legitimate opportunities for relief. The deep flaws in its current use underline the need to explore alternative solutions to civil detention in order to promote public safety, rehabilitation and fair treatment. Given the history of mass incarceration in the U.S., whatever structure is implemented to address this potential small group of outliers must guard against recreating the harms of extreme sentencing.

Were the U.S. to implement a system of preventative detention for this small outlier population, the following principles should shape its structure to avoid a replication of current extreme sentencing while maintaining

appropriate safeguards for public safety. The principles are far from an exhaustive set of guidelines for preventative detention, rather they represent a potential set of limits to restrict its abuse.

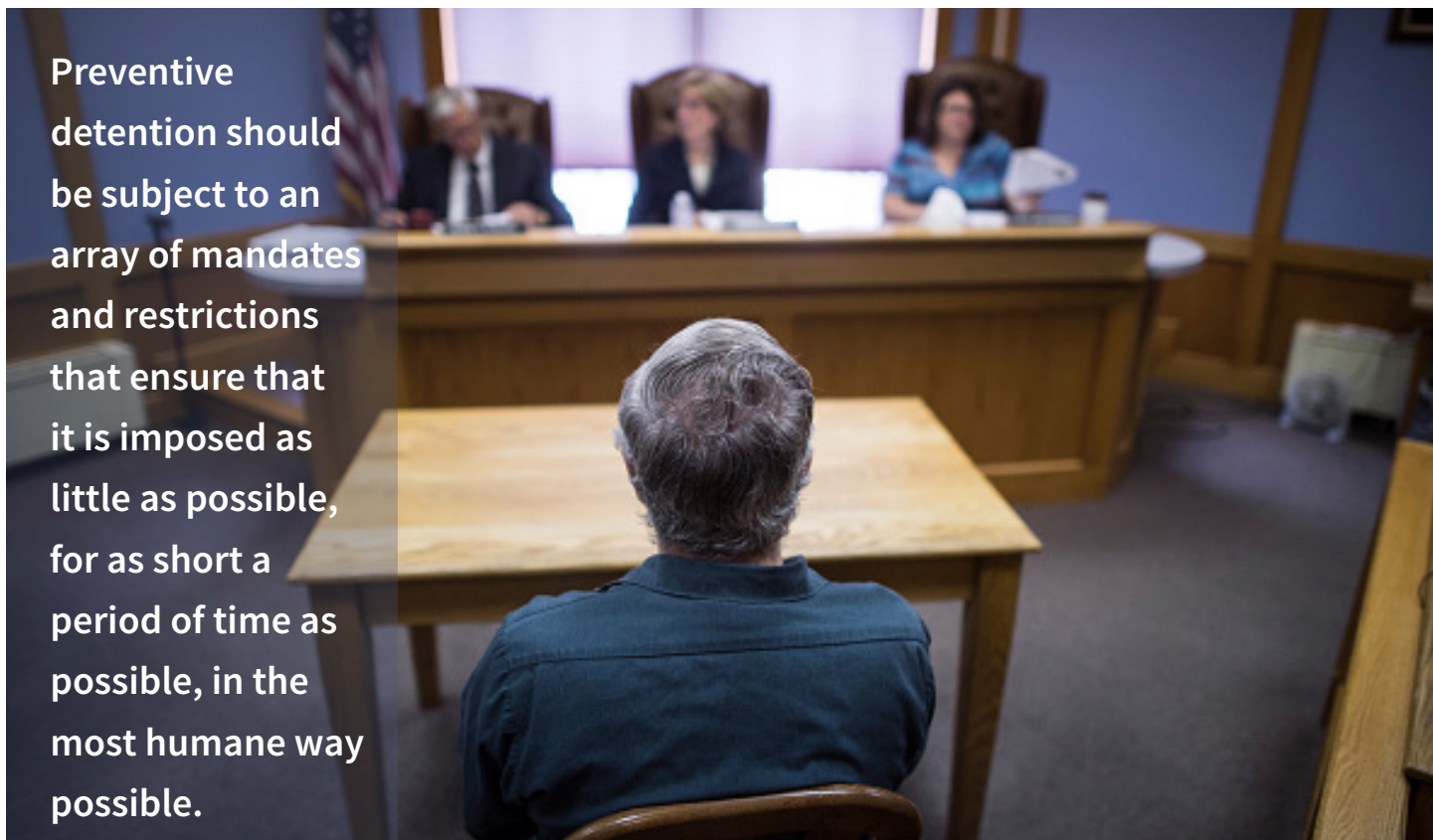
- Preventative detention at the end of a 20 year sentence should be statutorily limited to the most extreme offenses *in combination* with a current high or very high violent recidivism risk score. Recidivism risk scores should be derived from scientifically-validated risk assessment tools. Such tools should account for dynamic factors (e.g., participation in rehabilitation), not solely static factors (e.g., criminal history).¹²² In practice, the majority of serious offenses are unlikely to fulfill both of these criteria. Even those classified as “high risk” will rarely be high risk forever.¹²³ Desistance is the norm.
- All individuals statutorily eligible for preventative detention should receive an initial adversarial hearing as they approach the end of their 20 year sentence to assess whether they pose a continuing immediate danger to public safety and yearly hearings thereafter to assess the appropriateness of continuing preventative detention.
- The correctional agency should be mandated to provide intensive rehabilitative treatment and programming for individuals with statutorily eligible offenses from the time of their original sentencing to reduce their risk of being assessed as posing a high risk of violent recidivism at the end of their 20 year sentence. Compliance with that mandate should be assessed through regular independent oversight.
- All individuals, regardless of their offense or evaluated risk, should be subject to a presumption of release at their detention hearings – the burden to prove that an individual poses a high risk of violent recidivism and a continuing immediate danger to the community should fall on the prosecution or fact finder.
- At all detention hearings, individuals should retain their full due process rights – including the right to legal counsel and the right to cross-examination.

- At such hearings, the court should require the government to provide a detailed plan for rehabilitation, with the ongoing goal of returning the individual to the community.
- Preventative detention should incorporate multiple levels of custody, for example correctional facilities where individuals can leave during the day to work and visit loved ones,¹²⁴ electronic monitoring, intensive supervised release,¹²⁵ or placement in a reentry court. The court should be required to impose the least restrictive form of custody necessary to protect public safety.
- Similarly, individuals should not be detained in facilities resembling current U.S. prisons. Conditions of detention should not be punitive, rather they should be as unrestrictive as possible while protecting public safety. For example, facilities should embrace the correctional principle of “normalization”

as modeled in some German, Dutch, and Norwegian prisons, where daily life within the prison resembles daily life in the community as much as practically possible.¹²⁶

- Robust and wraparound reentry supports and services should be available to all individuals, but especially those statutorily eligible for preventative detention.

In short, preventive detention should be subject to an array of mandates and restrictions that ensure that it is imposed as little as possible, for as short a period of time as possible, in the most humane way possible. It is unwise both morally and fiscally to incarcerate individuals indefinitely on the basis of unlawful acts they might commit in the future. This negates human capacity for change as well as our fundamental rights to due process of law. Desistance is the norm and occurs far sooner than current sentencing structures acknowledge.



Preventive detention should be subject to an array of mandates and restrictions that ensure that it is imposed as little as possible, for as short a period of time as possible, in the most humane way possible.

MOVING TOWARD A 20-YEAR CAP WITH EXISTING TOOLS

The road to capping sentences at 20 years will be incremental, but meaningful change can begin immediately.

Even without legislative reform, judges can take steps to move sentences toward a 20-year maximum. When legally permitted, courts can make more extensive use of downward departures from mandatory minimum sentences or the lower end of sentencing ranges. Likewise, absent statutory bars, judges can impose concurrent rather than consecutive sentences.

Prosecutors have even greater power to move toward a 20-year sentencing cap, as they have wide latitude over charging, plea bargaining, and sentence recommendations. The overwhelming majority of convictions are achieved through plea bargains. Therefore prosecutors have the ability to radically decrease extreme sentences in the absence of legislative reform. They can adopt a policy of charging offenses proportionately and holistically – not merely pursuing the highest charge provable beyond a reasonable doubt – and avoiding, if possible, charges that trigger mandatory minimums. They can also decline to seek sentencing enhancements based on prior criminal history and alleged gang affiliation. They can even adopt a 20-year sentence cap for their offices, by committing to cap plea offers and sentence recommendations at 20 years.

Prosecutors can also tackle extreme sentences retroactively. Using already existing resentencing processes or newly passed laws, some prosecutors have integrated “prosecutor-initiated resentencing” within their offices, often through sentence review units.¹²⁷ Prosecutor-initiated resentencing empowers prosecutors to review and correct unjustly lengthy sentences, outside the narrow confines of innocence or conviction integrity review. And at minimum, prosecutors can make supporting parole the default, rather than the exception. While legislative reform to cap sentences at 20 years will be a lengthy process, elected prosecutors can begin the process immediately and, by opening their doors to researchers, help strengthen the body of evidence regarding the public safety impact of reducing sentences.

Finally, communities can invest in interventions that prevent extreme sentences by preventing crime and recidivism. Ranging from improving public lighting in crime hotspots, to youth employment programs, to credible messengers who intervene with the young men most at risk for gun violence, an abundance of effective evidence-based responses to violent crime are available.¹²⁸ Evidence-based reentry services can also decrease recidivism.¹²⁹

CONCLUSION

Capping all sentences at 20 years is a challenging but feasible policy goal, as demonstrated by its success in other countries and a project worthy of advocates' and policymakers' attention. The path to a 20-year cap will be different in every jurisdiction, but all steps offer vital hope to people serving lengthy sentences and their loved ones. Of course, obtaining a proportional, fair system of justice will take more than just shortening sentences, but it is integral to a wholesale reimagining of public safety that focuses on healthy and empowered communities, transforming prisons, investing in evidence-based prevention, and pursuing restorative alternatives to the carceral system.



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