



Testimony of Marc Mauer

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On Trends in Sentencing and Incarceration

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Commission on the Administration
of Justice**

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Thank you for the invitation to testify on trends in incarceration, deterrence, and public safety. I am Marc Mauer, Executive Director of The Sentencing Project, a national non-profit organization engaged in policy research on criminal justice issues. I have frequently been invited to testify before legislative committees in Congress and state legislatures, and am the author of a wide range of publications focusing on sentencing policy, incarceration, racial disparities, and the collateral consequences of a criminal conviction.

The national discussion about the scale of imprisonment and approaches to public safety has been shifting significantly in recent years. As a result of a number of factors – including the cost of incarceration, the rising number of drug offenders in prison, and the reentry movement – many states are now reconsidering the sentencing policies adopted in the “tough on crime” era of the 1980s and 1990s, and striving instead to be “smart on crime.”

In this testimony I will review trends in incarceration over the past several decades, assess the impact of incarceration on crime rates, and examine the evolving movement for reform. I will then conclude with recommendations for the Commission to consider regarding sentencing policy in Nevada.

CAUSES OF INCARCERATION GROWTH IN THE UNITED STATES, 1972–2014

As is well known, over the past four decades there has been an unprecedented expansion of corrections populations in the United States. The nationwide prison and jail population has grown from about 330,000 people in 1972 to 2.2 million today. Similar increases in probation and parole supervision have produced a total population of nearly seven million individuals under criminal justice supervision. The U.S. has now become the world leader in its rate of incarceration, locking up its residents at a rate 5-8 times that of other industrialized nations.

During the 1970s the growth in incarceration was influenced by the rise in crime that occurred from the mid-1960s through the mid-1970s, though it is difficult to quantify this precisely because crime reporting in that era was much less comprehensive than it is today. Since 1980, though, the rise in the prison population nationally has been due to *changes in policy, not changes in crime rates*.

The size of a prison system is essentially a function of two key decisions – how many people are sent to prison and how long they stay there. Since the 1980s, both the likelihood of imprisonment and the length of sentences have increased substantially due to a variety of policy changes enacted at both the state and federal levels. Most notably, law enforcement and sentencing policy changes have included a substantial expansion of drug law enforcement, the adoption of mandatory minimum penalties for many offenses, and restrictions on parole release and prison good time credits.

Changes in sentencing and release policies have been the drivers of the prison expansion. In a comprehensive analysis conducted for the National Research Council, researchers concluded that

from 1980 – 2010 the *entire* increase in the prison population was due to such changes, rather than crime rates.¹

SLOWING RATE OF GROWTH IN IMPRISONMENT

In the first decade of the 20th century, the rate of growth in imprisonment slowed considerably. Whereas the number of people in prison rose by 79% from 1990 to 2000, from 2000 to 2010 the prison population grew by only 17%. In both these periods the prison population growth in Nevada exceeded the national rate, rising by 89% from 1990 to 2000, and by 26% from 2000 to 2010.

Since 2010 the number of individuals held in prisons nationally has declined modestly each year, for a total decline of about 3%. Nevada's prison population has grown by 1.5% since 2010.

A number of states have achieved substantial reductions in their prison populations in recent years, with nine states experiencing double-digit declines in the past decade. The three states that led the nation in downsizing their prisons – California, New Jersey, and New York – have each reduced their prison populations by about 25%. An analysis conducted by The Sentencing Project found that while significantly reducing their prison populations, violent and property crimes in these states fell at rates similar to, and sometimes exceeding, the national crime drop.²

DECLINING IMPACT OF INCARCERATION ON CRIME

Imprisoning certain offenders clearly provides public safety benefits. Incapacitating a serial rapist who is terrorizing a neighborhood, for example, provides an immediate measure of relief to that community. But this is not the profile of the typical person sent to prison. For many offenders sentenced to prison, the impact on public safety is much more modest. Assessing these effects is a complex undertaking, but there is a growing consensus while incarceration has had an impact on crime, it is generally of a much smaller scale than commonly believed.

After its exhaustive review of research on the crime control effects of incarceration, the National Research Council concluded that:

On balance, panel data studies support the conclusion that the growth in incarceration rates reduced crime, but the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.³

Studies of the crime decline since the 1990s suggest that greater levels of imprisonment accounted for anywhere from 10-25% of the crime decline. While the upper bound, 25%, is hardly trivial, it also means that 75% of the decline was a function of factors other than incarceration. There is no definitive analysis of the contribution of those factors but they include changing policing strategies,

¹ National Research Council. Jeremy Travis, Bruce Western, and Steve Redburn, eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 2014, 47-55.

² Marc Maurer and Nazgol Ghandnoosh, *Fewer Prisoners, Less Crime: A Tale of Three States*, The Sentencing Project, 2014.

³ National Research Council, 155.

the waning of crack cocaine drug markets, neighborhood anti-crime initiatives, and reentry programming.

The finding of a relatively modest impact of incarceration on crime at first seems counterintuitive since one would imagine that placing an offender behind bars clearly eliminates that person's potential to commit crime in our communities. Several factors help to explain the declining impact of large-scale incarceration.

Many offenders sent to prison are “replaced” on the streets.

The “replacement” effect of incarceration refers to the reality that in many cases incarcerating an offender does not directly address the particular crime problem. This is because peers or competitors replace many offenders on the streets during their incarceration, causing imprisonment to have a negligible impact on crime. This is particularly true for drug offenders and certain juvenile crimes.

Of the tens of thousands of drug offenders sent to prison in recent decades, most were not the “kingpins” of the drug trade, but were rather in the lower- and middle-levels of a drug operation. When a street-corner seller is arrested and subsequently incarcerated this in effect creates a “job opportunity” for another seller to enter that market. As long as the demand for drugs exists in communities, there is a virtually endless supply of potential sellers available to fill these roles. Thus, incarceration in such cases carries with it a substantial cost to taxpayers, but produces at best a minimal impact on the drug trade.

The incapacitating effect on juvenile offenders is frequently modest as well, since many of their crimes are committed in groups. For example, a group of five teenagers may be engaged in stealing cars. If one member of the group is caught and incarcerated, the group is likely to just recruit another young person to their operation and continue their thefts.

We are well past the point of diminishing returns in regard to the crime-reducing impact of incarceration.

The crime control impact of enhanced incarceration is diminished also because of two features relating to policy decisions about who to send to prison and how long to keep them there. The first issue regards the types of offenders who are incarcerated and their frequency of offending. In jurisdictions with small prison populations it is likely that prison space will be reserved for offenders who present the greatest risk to public safety. But as prison systems expand, it becomes increasingly likely that successive offenders will be less frequent or serious offenders. For example, someone who commits a burglary once a month has a greater chance of being apprehended than someone who does so only once in their lives. A jurisdiction with a low incarceration rate would incarcerate the active offender; a jurisdiction with a high incarceration rate would also incarcerate the infrequent offender.

The other cause of diminishing returns is long-term incarceration. There are now increasing numbers of long-term prisoners throughout the United States. One of every nine individuals in prison is serving a life sentence, with nearly a third of this group sentenced to life without parole. An undetermined additional number are serving “virtual” life sentences of 40 years or more. While the vast majority of these long-term prisoners were convicted of a serious violent offense, in most cases they committed this crime at a young age. By the time they are 40 years of age or older, their risk of returning to crime declines substantially, while their health care costs become increasingly significant for corrections systems. Therefore each additional year of incarceration produces less incapacitating effect, but comes at a greater cost.

The deterrent effect of the criminal justice system is primarily a function of the certainty of punishment, not the severity of punishment.

While the criminal justice system as a whole exerts a deterrent impact on individuals, the effect of incarceration itself is quite modest. This is primarily because of the longstanding finding that deterrence is primarily a function of the *certainty* of punishment, not *severity*. That is, if we can increase the odds of apprehension, some potential offenders will refrain from committing a crime. But merely making already severe penalties even more so has little effect, in large part because most offenders either don’t believe they will be caught or are under the influence of drugs or alcohol while committing a crime, and so are not thinking about the consequences of their actions. In the words of the National Research Council, “... increasing already long sentences has no material deterrent effect.”

In recent years the policy initiative that has received the most scrutiny for its claimed deterrent effect is the California “three strikes and you’re out” policy. That policy, adopted in 1994, called for a sentence of 25 years to life upon conviction of a third felony following two prior convictions for “serious or violent” offenses. (In 2012, a ballot measure scaled back the scope of the statute so that the third felony now is also required to be serious or violent, in contrast to the original legislation under which any felony would qualify). The most sophisticated research on this policy finds that it has had either no impact or a modest one.⁴ And yet over 8,000 men and women in California are serving life sentences, and over 30,000 have had their sentences enhanced under this law.

IMPLICATIONS FOR SENTENCING AND INCARCERATION POLICY

The goals of sentencing are varied, and will depend on the individual circumstances of both the offender and the offense. In some cases, societal interest in punishing the offense may outweigh particular crime control objectives. But in general, policymakers will want to address the value of incarceration in contributing to public safety as a key objective, and weigh these benefits against alternative forms of public spending and investment that promote public safety.

The growing movement for evidence-based sentencing and corrections policy has been a welcome development, and holds the promise for a more effective use of state resources in promoting public

⁴ Ibid., 135.

safety. Policymakers seeking to control prison growth should explore sentencing options relating to prison admissions and length of stay in prison, including:

Prison admissions

- *Review admissions criteria for court diversion and alternative sentencing programs* – In recent decades court systems around the country have established a broad range of programs designed for community supervision of offenders. While many of these have provided effective supervision and services, they often have only a modest effect on reducing admissions to prison. This is largely a function of narrow program admissions criteria that screen out from consideration many persons who might be appropriate candidates for such options.
- *Incarceration of drug offenders generally produces few deterrent or incapacitation effects* – Given the limited impact of incarceration on the drug trade, this suggests that policymakers should focus more on the demand side of substance abuse policy through greater investments in prevention and treatment, both within and outside the criminal justice system. Such reforms would also help to reduce unwarranted racial disparity in the prison population.

Length of stay

- *Reconsider sentencing and parole policy for long-term prisoners* – Even as crime rates have been declining nationally and a number of states are experiencing declining prison populations, the growing proportion of long-term prisoners in most states threatens to thwart substantial reductions in the prisoner population. Policymakers should establish parole and clemency procedures that assess actual public safety risks of persons sentenced to lengthy prison terms.

CONCLUSION

The large-scale buildup of the prison population over the past four decades was a result of a variety of factors both within and outside the criminal justice system. Similarly, any attempt to reduce the scale of incarceration will require a multi-pronged approach. Given what we know about the costs and effectiveness of imprisonment, policymakers are now in a good position to assess the appropriate mix of prison and non-punitive approaches that will produce the best public safety outcomes.