

Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform

Mirko Bagaric

Daniel McCord

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>

 Part of the [Criminal Procedure Commons](#), and the [Criminology and Criminal Justice Commons](#)

Buffalo Law Review

VOLUME 67

APRIL 2019

NUMBER 2

Decarcerating America: The Opportunistic Overlap Between Theory and (Mainly State) Sentencing Practice as a Pathway to Meaningful Reform

MIRKO BAGARIC†

DANIEL MCCORD‡

ABSTRACT

Criminals engender no community sympathy and have no political capital. This is part of the reason that the United States has the highest prison population on earth, and by a considerable margin. Incarceration levels grew four-fold over the past forty years. Despite this, America is now experiencing an unprecedented phenomenon whereby many states are now simultaneously implementing measures to reduce prison numbers. The unusual aspect of this is that the response is neither coordinated nor consistent in its approach, but the movement is unmistakable. This ground up approach to reducing prison numbers suffers from the misgiving that it is an ineffective solution to a complex issue. While prison numbers are declining, it is at a glacial rate. Pursuant to current trends, it would take five decades to reach incarceration levels that are in keeping with historical levels in the United States, and which are in line with prison numbers in most other countries. The massive growth in prison numbers during the latter half of the twentieth century was a result of a coordinated tough on crime strategy, spawned by the War on Drugs and the implementation of harsh mandatory sanctions. The response to these policy failings must be equally coordinated and systematic in order to be effective.

† Professor of Law and Director of Criminal Justice and Sentencing Project, Swinburne University, Melbourne.

‡ J.D. Candidate 2020, Northwestern Law School.

This Article provides the theoretical and empirical framework that can be used by lawmakers to tap into the community appetite to reduce prison numbers to make changes that are efficient and normatively sound, and that will significantly accelerate the decarceration process. In broad terms, this Article proposes a bifurcated system of sentencing, whereby sexual and serious violent offenders are imprisoned while other offenders (such as those who commit property, immigration, and drug offenses) are dealt with by other forms of sanctions. The changes will especially benefit African Americans and Hispanics, given that they are incarcerated at disproportionately high levels. The empirical evidence also suggests that the proposed reforms will not result in an increased crime rate.

INTRODUCTION

The United States is the most punitive country on earth from the perspective of how it treats criminals.¹ Less than five percent of the world's population live in the United States, yet it has approximately twenty-five percent of the entire world's prison population.² The suffering caused by the massive prison population is exacerbated by the fact that the people who are most disproportionately affected by punitive sanctions are the most economically disadvantaged groups in the community, namely African Americans and

1. It is widely accepted that the United States has a "serious over-punishment" and "mass incarceration" problem. See ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 9–15 (2008); Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295–96, 307–08 (2013); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 27–28 (2011); Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96, 96–100 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 GA. ST. U. L. REV. 965, 970–78 (2012); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 153–64 (2011); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 426–36 (2013); Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, ATLANTIC (Apr. 28, 2016), <https://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/>.

2. Tim Lau, *Sentencing Reform Should Be a Top Post-Election Priority for Congress*, BRENNAN CTR. FOR JUST. (Nov. 7, 2018), <https://www.brennancenter.org/blog/sentencing-reform-should-be-one-of-congress-top-post-election-priorities>.

Hispanics.³

A striking paradox stems from the phenomenon that is mass incarceration. There is an avalanche of nearly uncontradicted research evidence by American scholars that demonstrates that mass incarceration does not produce any community benefits.⁴ To this end it has been observed that:

Mass incarceration is the most urgent civil rights issue of our time. America's stubborn commitment to the failed war on drugs, tough-on-crime policies, and lengthy prison sentences has resulted in the caging of a breathtaking number of black and brown people. These policies have not made us safer, and they have not addressed the underlying causes of crime, such as poverty, mental illness, a lack

3. See Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 LAW & INEQ. 1, 7–9 (2015) [hereinafter Bagaric, *Rich Offender, Poor Offender*]; Mirko Bagaric, *Three Things That a Baseline Study Shows Don't Cause Indigenous Over-Imprisonment; Three Things That Might but Shouldn't and Three Reforms that Will Reduce Indigenous Over-Imprisonment*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 103, 107 (2016) [hereinafter Bagaric, *Three Things*]. However, it should be noted that in recent years there has been a slight reduction in the extent to which African Americans are imprisoned compared to the rest of the community, but nevertheless their over-imprisonment rate is more than five to one. See Eli Hager, *A Mass Incarceration Mystery*, MARSHALL PROJECT (Dec. 15, 2017, 7:00 AM), <https://www.themarshallproject.org/2017/12/15/a-mass-incarceration-mystery>.

4. See, e.g., NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 116–17, 121–22 (Jeremy Travis et al. eds., 2014); MICHAEL TONRY, SENTENCING MATTERS 134 (1996) [hereinafter TONRY, SENTENCING MATTERS]; Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 89–95 (2005); Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40–54 (2006); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 627–34 (2005) [hereinafter Frase, *Excessive Prison Sentences*]; Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 415–22 (1997) [hereinafter Frase, *Sentencing Principles in Practice*]; Cassia Spohn, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 CRIMINOLOGY & PUB. POL'Y 535, 536–39 (2014); Michael Tonry, *Crime and Human Rights—How Political Paranoia, Protestant Fundamentalism, and Constitutional Obsolescence Combined to Devastate Black America: The American Society of Criminology 2007 Presidential Address*, 46 CRIMINOLOGY 1, 5–9 (2008) [hereinafter Tonry, *Crime and Human Rights*]; Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 504–07 (2014) [hereinafter Tonry, *Remodeling American Sentencing*].

of access to health care, and relatedly, substance abuse. Instead, these policies have ripped apart families and neighborhoods, leaving a blight on communities of color that will last for decades unless we immediately reverse course.⁵

Over the past five years, there has been a minor retreat from mass incarceration.⁶ This was spawned initially not as a result of effective lobbying by prisoners or their families, nor indeed for any policy related reasons; rather, the changes were prompted by pragmatism in its most basal form. Many states in America now spend more money on prisons than higher education.⁷ Disfigured spending realities of this nature could not be ignored perpetually. This led to a slow realization that mass incarceration was not sustainable. In recent years, disquiet about the incarceration levels has become more widespread. The huge financial burden arising from imprisoning more than two million people, and a growing awareness of the immense personal and social toll that incarceration has on offenders and their relatives, has catalyzed a growing movement calling for a reduction in the severity of many criminal sanctions and a corresponding reduction in the prison rate.

The telling aspect about this is that the impetus for change is coming from a diverse and extremely wide-ranging sector of the community. It is predictable that the families of offenders would agitate for reduced penalties and prison time, but the movement has gone far beyond this group to include law enforcement officials and even victims' groups.⁸ The recognition that the failings of mass incarceration must

5. Malcolm Jenkins & Austin Mack, *Vote Yes on 1: Why We Must Treat and Not Jail Addiction*, MEDIUM (Nov. 2, 2018), https://medium.com/@kristi_70932/vote-yes-on-1-why-we-must-treat-and-not-jail-addiction-90d6ed844e39; see also Carrie Pettus-Davis & Matthew W. Epperson, *From Mass Incarceration to Smart Decarceration*, (Am. Acad. of Soc. Work & Soc. Welfare, Working Paper No. 4, 2015), <https://aaswsw.org/wp-content/uploads/2015/03/From-Mass-Incarceration-to-Decarceration-3.24.15.pdf>.

6. See *infra* Part III.

7. See *infra* Part II.

8. See *infra* Part III.

be addressed is now so wide-spread that it is a high profile theme in the mainstream media.⁹ And unlike many social issues, there is no meaningful counter-argument—there are few people or groups who expressly or actively argue in favor of the current status quo or increasing prison numbers.

This has underpinned a wave of, albeit piecemeal, legislative changes in numerous parts of America. More than twenty-five American states have implemented or initiated reforms that are aimed at reducing prison numbers.¹⁰ While there is a pronounced momentum and appetite for meaningful and effective change to the criminal justice system, lacking is a sense of strategic purpose and research-based reforms that can consolidate the current reform movement and accelerate the path toward decarceration in a manner that will enhance community safety and reduce the expenditure of non-economically productive amenities in the form of prisons.

The United States rapidly moved toward a state of mass incarceration on the back of an increasing crime rate and the War on Drugs, which led to the adoption of wide-ranging harsh mandatory penalty regimes.¹¹ These changes commenced about four decades ago and resulted in a rapid increase in imprisonment numbers, rising more than four-fold in the forty years to 2012.¹² In the past five years, there has been a reduction in prison numbers in the order of five percent. This trend is the right direction but it is too slow. At this rate it would take nearly half a century for United States imprisonment numbers to reduce to something in line with international trends. The cause of the rapid increase in prison numbers was a systematic and purposeful (albeit misguided) policy. The solution must also be systematic. This

9. *See infra* Part III.

10. *See infra* Part III.

11. *See* NAT'L RESEARCH COUNCIL, *supra* note 4, at 119–20 (for announcement of mandatory sentences by President Richard Nixon in 1971).

12. *Id.* at 13.

Article provides that pathway.

The starting point for proposing principled sentencing reform that will meaningfully reduce prison numbers is to examine the recent changes which have already had some success in lowering incarceration levels. Most of these reforms have been successful to some extent because they have resulted in lower prison numbers, but the overall effect is small. However, an analysis of the reforms that have been introduced to reduce incarceration levels provides some valuable insights regarding the mechanisms that should be used to lower prison numbers. They are even more telling because the changes have been organic and largely not influenced by practices in other states. Despite this, important commonalities have emerged. Most of the reductions in prison numbers have occurred in relation to distinct categories of offenders: property and drug offenders. A natural consensus has emerged, which has resulted in a move to lowering penalties for offenders who do not present a material threat to the physical or sexual autonomy of individuals.

The convergence that emerges from these reforms coincides with earlier previous research findings, which suggest that imprisonment should be reserved for offenders who scare us as opposed to those who make us angry. We are now witnessing a loose, but distinct, harmony between pragmatism fueled by the economic imperative to reduce spending on prisons and abstract research regarding the types of offenders who should be incarcerated. The key to consolidating and accelerating the move to reducing prison numbers is to test the validity of this alignment, and if it holds to promulgate it in the form of effective law reform which significantly accelerates the decarceration trend in a manner that will enhance community safety, while greatly reducing expenditure on prisons—making more money available for productive social spending on activities such as health and education.

The next part of the Article examines the causes of mass

incarceration. This is followed in Part II by an explanation of the failures of mass incarceration. In Part III, we provide an overview of the current practices that have been put in place to reduce prison numbers. The theoretically most desirable manner in which to reduce prison numbers is discussed in Part IV. Part V explains the current overlap that exists regarding the theory and practice of decarceration and the manner in which this should be harmonized to achieve this objective. The reform proposals are summarized in the concluding remarks.

I. THE REALITY OF MASS INCARCERATION AND ITS CAUSES

A. *The Alarming Number of Incarcerated Americans*

The United States imprisons more of its people than any other country in the world, and by a staggering margin. Currently, there are more than 2.1 million Americans in prisons or local jails.¹³ This rate has more than doubled over the past 15 years.¹⁴ In recent years, incarceration levels have been declining but, as discussed further below, the decrease is minor.¹⁵ The imprisonment rate is 860 per 100,000 adults.¹⁶ The immense scale of the incarceration levels in the United States is illustrated by the fact that its imprisonment rate is approximately ten times that of several Scandinavian countries, including Sweden and Finland.¹⁷ Prison rates in

13. DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

14. Albert R. Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), <https://www.nytimes.com/2011/11/21/us/21iht-letter21.html>.

15. *See infra* Part III.

16. KAEBLE & GLAZE, *supra* note 13, at 12.

17. MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 10 (2014), http://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_TH_P_10CrimeFacts.pdf. Rates in the OECD range from 47 to 266 per 100,000 adults in adult populations. John Pfaff and James Forman argue that the key reason for the increase in incarceration numbers is stricter prosecution practices, where

the United States, however, are far from uniform. Some states, such as Maine, Massachusetts, Minnesota, and Vermont, have imprisonment numbers around 300 per 100,000 adult population.¹⁸ However, others are staggeringly high. Oklahoma and Louisiana have 1,079 and 1,052 prisoners per 100,000 adult population respectively.¹⁹

Mass incarceration is a relatively new phenomenon in the United States. Prison numbers have grown massively over the past four decades, resulting in a quadrupling of the prison population. This rise in prison numbers stemmed from increased penalties which were driven by an increasing crime rate in the 1970s and 1980s during the “War on Drugs,” which was declared by President Richard Nixon in the 1960s.²⁰ A notable feature of the increased sanctions was that they were often in the form of (harsh) mandatory minimum terms, which reduced the ability of judges to impose sentences that they felt were appropriate to the offender and the crime.

As Mark Fondarcaro et al. observe, “mass incarceration in America has been fueled by an increased likelihood that an individual will: A) be sent to prison, and B) be assigned to stay for a longer period of time, as prisons have risen as the predominant means of social control.”²¹ William Berry explains how the introduction of mandatory guidelines for courts led to this situation:

Prior to 1984, federal judges possessed discretion that was virtually

felonies are charged at a higher rate and in larger numbers. See JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017).

18. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

19. *Id.*

20. NAT'L RESEARCH COUNCIL, *supra* note 4, at 119–20.

21. Mark R. Fondarcaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 707 (2015).

“unfettered” in determining sentences, guided only by broad sentence ranges provided by federal criminal statutes. The Sentencing Reform Act of 1984 . . . moved the sentencing regime almost completely to the other extreme, implementing a system of mandatory guidelines that severely limited the discretion of the sentencing judge.²²

Those guidelines, which remain in force to different extents in all United States jurisdictions,²³ prescribed fixed or presumptive penalties,²⁴ with individual penalties calculated according to offenders’ criminal history scores²⁵ and the seriousness of their crimes. As Michael Tonry notes, the impact of prescribed penalties has been obvious:

Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), LWOP [life without parole] laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe “career criminal,” “dangerous offender,” and “sexual predator” laws. These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.²⁶

Federal District Judge Mark Bennett reinforces the

22. William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and its Progeny*, 40 CONN. L. REV. 631, 633 (2008).

23. They are also one of the key distinguishing aspects of the United States’ sentencing system compared to that of Australia (and most other sentencing systems in the world). See CONNIE DE LA VEGA ET AL., UNIV. OF S.F. SCH. OF LAW CENTER FOR LAW AND GLOB. JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 46–47 (2012), <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf> (noting that 137 of 168 surveyed countries had some form of minimum penalties but none were as wide-ranging or severe as in the United States); see also Tonry, *Remodeling American Sentencing*, *supra* note 4, at 516.

24. For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article.

25. See NAT’L RESEARCH COUNCIL, *supra* note 4, at 325.

26. Tonry, *Remodeling American Sentencing*, *supra* note 4, at 514 (citation omitted). For a list of jurisdictions in the United States which use guideline sentencing, see Robina Inst., *Sentencing Guidelines Resource Center*, U. MINN., <http://sentencing.umn.edu/> (last visited Apr. 26, 2019).

excessively punitive nature of the federal sentencing laws, describing eighty percent of the mandatory sentences that he imposes as unjust because they are too harsh.²⁷ This sentiment is supported by data from the United States Sentencing Commission that indicates that in the fiscal year 2016, the average length of a prison term for federal offenders convicted of a crime that carried a mandatory minimum penalty was 110 months, which was nearly four times more (twenty-eight months) than the average prison term for offenders who committed an offense that did not have a mandatory minimum.²⁸

It is important to note that the goal of reducing prison numbers that is advanced in this Article is not a goal in itself but rather a means to overcome two serious problems stemming from this phenomenon. The first problem is the exorbitant fiscal cost of incarceration. The second is the serious damage that incarceration inflicts on the families of offenders, and the incidental burden inflicted on offenders (which often exceeds the deprivation stemming from the loss of liberty). The need to ameliorate these is heightened by the fact that there is no countervailing benefit from mass incarceration. In particular, it does not make the community safer by reducing crime. We now discuss these three matters in greater detail, in that order.

27. Mallory Simon & Sara Sidner, *The Judge Who Says He's Part of the Gravest Injustice in America*, CNN POL. (June 3, 2017), <http://edition.cnn.com/2017/06/02/politics/mandatory-minimum-sentencing-sessions/index.html>.

28. U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf; see also URBAN INSTITUTE, A MATTER OF TIME:

THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA'S PRISONS, 7 (2017), http://apps.urban.org/features/long-prison-terms/a_matter_of_time_print_version.pdf (“[I]n nearly half the states we looked at, the average time served [by those in the top 10 percent of prison terms] increased by more than five years [between 2000 and 2014].”).

II. THE FAILURES OF MASS INCARCERATION

A. *The Massive Financial Burden of Mass Incarceration*

The costs of incarceration in America are, by any measure, prohibitive. The Prison Policy Initiative calculates that \$182 billion is spent annually purely on imprisoning offenders.²⁹ This sum does not factor in the social costs stemming from incarceration. Once these are included, it has been estimated that the total cost of incarceration is \$997 billion annually, which remarkably equates to nearly six percent of America's Gross Domestic Product.³⁰ This large expenditure on prisons necessarily means significantly less money that can be spent on productive social services, such as education and health.³¹ The National Research Council observes:

29. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

30. Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* (Concordance Inst. for Advancing Social Justice, Working Paper No. CI072016, July 2016), <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf>.

31. See MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. ON BUDGET & POLICY PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION (2014), <https://www.cbpp.org/sites/default/files/atoms/files/10-28-14sfp.pdf>; Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>.

Reduced investment in education is also occurring at the more junior education level: "In recent years . . . states have cut education funding, in some cases by large amounts. At least 30 states are providing less general funding per student this year for K-12 schools than in state fiscal year 2008, before the Great Recession hit, after adjusting for inflation. In 14 states, the reduction exceeds 10 percent. The three states with the deepest funding cuts since the recession hit—Alabama, Arizona, and Oklahoma—are among the ten states with the highest incarceration rates." MITCHELL & LEACHMAN, *supra*, at 10; see also Beatrice Gitau, *The Hidden Costs of Funding Prisons Instead of Schools*, CHRISTIAN SCI. MONITOR (Oct. 3, 2015), <http://www.csmonitor.com/USA/Justice/2015/1003/The-hidden-costs-of-funding-prisons-instead-of-schools> (noting that eleven states spend more on prisons than universities: Michigan, Oregon, Arizona, Vermont, Colorado, Pennsylvania, New Hampshire, Delaware, Rhode Island, Massachusetts, and Connecticut).

Budgetary allocations for corrections have outpaced budget increases for nearly all other key government services (often by wide margins), including education, transportation, and public assistance Today, state spending on corrections is the third highest category of general fund expenditures in most states, ranked behind Medicaid and education. Corrections budgets have skyrocketed at a time when spending for other key social services and government programs has slowed or contracted.³²

Former President Barack Obama expressly noted that the excessive financial cost of incarceration is one that the United States can no longer continue to afford.³³ Sentiments of this nature have at least in part been responsible for causing law makers and some members of the community to reflect on the merits of mass incarceration.

Research shows that the availability of accurate information on the cost of punishment can influence decisions regarding how much punishment is appropriate.³⁴ There is a tendency among individuals in any scenario to unduly rely on information that is readily available to them immediately, often from memory, when making a decision. Sentencing policy often reflects this tendency, as lawmakers make the dual mistake of overvaluing unimportant information that they already know, while simultaneously undervaluing vital information that they have not sourced.³⁵ Another factor that often leads to poor policy development is the propensity to ignore risk when dealing with resources that one does not own. For policy-makers, the impacts of criminal justice laws will not affect them personally in most cases, so they tend to be less risk averse when setting punishment levels. An experiment conducted at Georgia

32. NAT'L RESEARCH COUNCIL, *supra* note 4, at 314 (citation and footnote omitted); *see also* KEARNEY ET AL., *supra* note 17, at 13.

33. Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 815 (2017).

34. Eyal Aharoni et al., *Justice at Any Cost? The Impact of Cost-Benefit Salience on Criminal Punishment Judgments*, 37 BEHAV. SCI. & L. 38, 38–39 (2018).

35. *See id.* at 39–41, 47, 51–52.

State University examined how each of these issues played into a person's assessment on appropriate criminal justice reform.³⁶

In the first part of the experiment, the participants were given information on the costs of various punishments, and then asked to choose the punishment for the scenario. The results showed that as the level of information provided to people increased, the severity of the punishment that was imposed reduced.³⁷ This suggests that people are responsive to the economic impact of their decisions when setting sentencing policy. This was reinforced by another finding that showed that people were only most greatly influenced by their choice of punishment if they were provided with concrete information regarding the precise cost of the sanction.³⁸ People act in their self-interest, so the public's increasing awareness of the costs of mass incarceration is one reason that likely underpins the slowly changing attitude toward mass incarceration.

Recognition of this fact as providing a basis for implementing measures to reduce prison numbers is supplemented by additional humanistic reasons that support the same outcome.

B. *The Human Toll of Mass Incarceration is Intolerable*

In addition to the unsustainable cost of imprisonment, there is another compelling reason to reduce prison numbers. This relates to the hidden burden that prison often inflicts on offenders and the intense hardship that incarceration often causes to the family members of offenders, and in particular their children and spouses.³⁹ Heightening the

36. *Id.* at 39–43.

37. *Id.* at 47.

38. *Id.* at 46–47, 51.

39. See Mirko Bagaric et al., *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663 (2017); Bagaric, *Rich Offender; Poor Offender*,

injustice of this predicament is that racial minorities, and particularly African American⁴⁰ and Latino communities,⁴¹ as well as white people from socially and economically-deprived backgrounds,⁴² are disproportionately over-represented amongst the prison population. One disturbing fact stemming from this is that forty-eight percent of offenders serving life prison terms are African American.⁴³

The key hardship that prison is meant to impose on offenders is the deprivation of liberty. However, the incidental burdens associated with or stemming from the conditions in prison are often so significant that they can make the net pain inflicted on prisoners near intolerable. The “harshness and inhumanity” of America’s prisons, as Adam Gopnik describes it,⁴⁴ inflict further, unnecessary suffering by also depriving inmates of access to goods and services,⁴⁵ and sexual relationships;⁴⁶ restricting their ability to pursue family relationships and reproduce;⁴⁷ and exposing

supra note 3, at 9–10.

40. Bagaric, *Rich Offender; Poor Offender*, *supra* note 3, at 7–9; *see also* Bagaric, *Three Things*, *supra* note 3. However, it should be noted that in recent years there has been a slight reduction in the extent to which African Americans are imprisoned compared to the rest of the community, but nevertheless their over-imprisonment rate is more than five to one. *See* Hager, *supra* note 3.

41. SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 6–7 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

42. *Id.*

43. ASHLEY NELLIS, SENTENCING PROJECT, STILL LIFE: AMERICA’S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 5 (2017), <http://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>. It has been suggested that many African Americans supported policies that resulted in mass incarceration. *See* FORMAN, *supra* note 17, at 9. For a critique of this, *see* Darren Lenard Hutchinson, *Who Locked Us Up? Examining the Social Meaning of Black Punitiveness*, 127 YALE L. J. 2388 (2018) (book review).

44. Gopnik, *supra* note 31.

45. GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 67–68 (1958).

46. *Id.* at 70–71; *see also* Robert Johnson & Hans Toch, *Introduction* to THE PAINS OF IMPRISONMENT 13, 13–20 (Robert Johnson & Hans Toch eds., 1982).

47. Bagaric et al., *supra* note 39, at 1699–700.

them to a greater risk of sexual and physical victimization than free Americans⁴⁸ (over 70,000 prisoners are raped in America annually).⁴⁹ Further, as a consequence of having been imprisoned, former inmates experience a reduction in their life expectancy,⁵⁰ ongoing problems in obtaining employment, and reduced earnings compared with people who have never been imprisoned.⁵¹

In addition to this, spouses of offenders are more likely to divorce their partners than other spouses,⁵² and mass incarceration has had a particularly devastating impact on the over five million American children who have at least one parent who has been imprisoned.⁵³ A report by David Murphey and P. Mae Cooper found that those children typically suffered from difficulties that afflicted other children to a far lesser extent, including a greater number of traumatic life events, emotional problems, and difficulties at school, as well as less engagement with school and less

48. *Id.* at 1702–03.

49. *Id.* at 1703 (citing *US: Federal Statistics Show Widespread Prison Rape*, HUM. RTS. WATCH (Dec. 15, 2017, 7:00 PM), <https://www.hrw.org/news/2007/12/15/us-federal-statistics-show-widespread-prison-rape>).

50. A study that examined the 15.5-year survival rate of 23,510 ex-prisoners in the U.S. State of Georgia found much higher mortality rates for ex-prisoners than for the rest of the population. There were 2,650 deaths in total, which was a forty-three percent higher mortality rate than normally expected (799 more ex-prisoners died than expected). The main causes for the increased mortality rates were: homicide, transportation accidents, accidental poisoning (which included drug overdoses) and suicide. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 482 (2011); see also NAT'L RESEARCH COUNCIL, *supra* note 4, at 220–26.

51. NAT'L RESEARCH COUNCIL, *supra* note 4, at 247. One study estimated the earnings reduction to be as high as forty percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 8, 13.

52. NAT'L RESEARCH COUNCIL, *supra* note 4, at 265.

53. DAVID MURPHEY & P. MAE COOPER, CHILD TRENDS, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN? 1–2 (2015), <https://childtrends-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>.

oversight from parents.⁵⁴ More fully, it has been observed in studies that the impact on children of incarcerated parents is profound. Amy Cyphert notes that:

Children with an incarcerated parent are more likely to face a range of health issues, from asthma and obesity to depression and anxiety. The data is especially striking for very young children (“[m]ore than 15 percent of children with parents in federal prison . . . are 4 or younger”) and for children whose mothers are incarcerated. For these children, we know that the disruption of parental attachment caused by parental incarceration can sharply increase rates of depression and anxiety and severely disrupt a child’s educational performance. Older children do not escape unscathed and still face serious negative impacts when a parent is incarcerated. For example, researchers have concluded that when parents are incarcerated during their children’s adolescence, this separation “interrupts key developmental tasks” during the time “when parent-child relations strongly influence issues of identity.”

Sadly, even if a parent is released from prison, these negative impacts are lasting and haunt children of incarcerated parents through their own adulthoods. Parental imprisonment has consistently been found “to be a strong risk factor for antisocial behavior, future offending . . . drug abuse, school failure, and unemployment.” Because these children are statistically more likely to grow up and be incarcerated themselves, the problem of parental incarceration is a cyclical one that perpetuates “intergenerational patterns of criminal behavior.”⁵⁵

A recent survey conducted by FWD.us (an organization that undertakes research into the impact of the United States criminal justice system), in partnership with Cornell University, highlights the detrimental impact of mass incarceration on the nation’s families.⁵⁶ Four thousand

54. *Id.*

55. Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 391–92 (2018) (footnotes omitted).

56. Christal Hayes, *This Isn’t Just Numbers—But Lives’: Half of Americans Have Family Members Who’ve Been Incarcerated*, USA TODAY (Dec. 6, 2018, 6:10 AM), <https://www.usatoday.com/story/news/politics/2018/12/06/half-americans->

individuals participated in the survey, a sample size which is representative of the United States' population. Among the notable findings is that fifty percent of adults in the United States has an immediate family member who is, or has been incarcerated.⁵⁷ For context, that is 113 million people who have such a family member.⁵⁸ Moreover, one in seven adults have a family member who has served more than one year in prison, and one in thirty-four have a relative who has served more than ten years behind bars.⁵⁹ The survey again noted the disproportionate burden of mass incarceration on the least well-off members of the community. Most notably, the findings established that sixty percent of both African Americans and native Americans have an immediate family member who has spent time behind bars.⁶⁰

C. The Crime Prevention Dividend of Mass Incarceration is Small

Given the heavy financial burden of mass incarceration and the significant amount of suffering that it inflicts on offenders and their families, only an immense countervailing advantage could justify it, but no such benefit is evident. While it might reasonably be expected that a massive increase in the number of people who are incarcerated would significantly reduce the crime rate, this potential justification for a high rate of imprisonment is unsubstantiated. In fact, many studies have demonstrated that mass incarceration has not meaningfully enhanced community safety. A recent Brennan Center report notes that “rigorous social science research based on decades of data shows that increased incarceration played an extremely

have-family-who-have-been-jailed-new-study-shows/2206521002/.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

limited role in the crime decline.”⁶¹

While, as noted below, there has been a small reduction in the incarceration level in the United States in recent years, recent studies do not suggest that has coincided with a meaningful increase in the crime rate. Violent crime increased slightly in the years 2015 and 2016, however this trend has changed.⁶² The most recent data from the Federal Bureau of Investigation (FBI) shows that there were reductions in both violent crimes and property crimes in the second half of 2017 when compared with the first half of 2016.⁶³ Most recently, in June 2018, former Attorney General Jeff Sessions noted that preliminary data for 2018 indicated that there was a 3.8% drop in violent crime and a 4.7% decline in the number of murders.⁶⁴ This is supported by the findings of a June 2018 Brennan Center report, which notes that in 2017,

[t]he overall crime rate in the 30 largest cities in 2017 declined slightly from the previous year, falling by 2.1 percent to remain at historic lows [and] [t]he violent crime rate declined as well, falling by 1 percent from 2016, essentially remaining stable. Violent crime

61. JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED 5 (2016), https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf. For further information, see the studies summarized in Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person That Committed The Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 384–409 (2014) [hereinafter Bagaric, *The Punishment Should Fit the Crime*].

62. Lauren-Brooke “L.B.” Eisen & Inimai M. Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators, Executive Summary*, BRENNAN CTR. FOR JUST. (Mar. 22, 2018), <https://www.brennancenter.org/publication/criminal-justice-election-agenda-candidates-activists-and-legislators#Exec%20summary>.

63. *Preliminary Semiannual Uniform Crime Report, January–June, 2017*, FBI, <https://ucr.fbi.gov/crime-in-the-u.s/2017/preliminary-report/home> (last visited Apr. 29, 2019).

64. Attorney General Jeff Sessions, Remarks to the Western Conservative Summit (June 8, 2018), in U.S. DEP’T JUST., <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-western-conservative-summit>.

remains near the bottom of the nation's 30-year downward trend.⁶⁵

This trend is not seen equally throughout the nation's largest cities. In Washington, D.C., the murder rate is actually expected to rise by as much as 34.9%, the highest increase in the nation.⁶⁶ In Austin, Texas where the homicide rate is relatively low, there is an expected increase of thirty percent.⁶⁷ In cities with higher numbers of homicide, the decline is expected to be significant. Chicago expects a 23.2% decrease, resulting in the lowest rate since 2015.⁶⁸ In general, violent crime in Chicago is expected to drop by 3.4%.⁶⁹ Other large cities are seeing similar trends. In New York City, the nation's largest metropolitan area, the overall crime rate is expected to decrease by 1.2%.⁷⁰ Interestingly, the murder rate is expected to go up 4.5%, possibly due in part to the very low homicide rate in New York currently.⁷¹ Los Angeles, the second largest city in the United States, will see overall crime drop by 3.8%.⁷² In Baltimore, a smaller city with a relatively high crime rate, this rate is projected to go down by as much as 17.5%.⁷³ The decreases and increases do not seem to be based on geography or size, but rather on the previous rates of crime and homicide. Overall, fourteen of the nation's thirty largest cities are projected to see their overall crime rates drop in 2018.⁷⁴ Data is not available for this in

65. AMES GRAWERT ET AL., BRENNAN CTR. FOR JUSTICE, CRIME IN 2017: FINAL ANALYSIS (2018), https://www.brennancenter.org/sites/default/files/analysis/Crime_in_2017_A_Final_Analysis.pdf.

66. AMES GRAWERT ET AL., CRIME AND MURDER IN 2018: A PRELIMINARY ANALYSIS 1 (2018), https://www.brennancenter.org/sites/default/files/publications/2018_09_CrimeAnalysisV6.pdf.

67. *Id.*

68. *Id.*

69. *Id.* at 3.

70. *Id.*

71. *Id.* at 4.

72. *Id.* at 3.

73. *Id.*

74. *Id.*

eleven of those cities, so it is unclear just how widespread this trend will be for 2018.⁷⁵ However, what is clear is that there is no evidence of even an arguable correlation between (slightly) declining prison numbers and increasing crime rates.

Thus, it is evident that there does not appear to a connection between reducing prison numbers and higher crime rates. In the next part of the Article, we now examine the current momentum and changes that have been made toward reducing prison numbers in America.

III. THE CURRENT MOVE TOWARDS DECARCERATION

A. *The Current Interest in Finding Solutions to the Mass Incarceration Crisis*

As noted above, the financial and humanistic problems stemming from the mass incarceration crisis have promoted awareness from many sectors of the community of the need to reduce prison numbers. The telling aspect of this movement is its breadth. It includes not only prisoners and their relatives, but also police, prosecutors, and victims. The need for decarceration is now a regular theme in the mainstream media. This has resulted in action at the political level, which has seen more than twenty states implement reforms aimed at lowering prison numbers.

We now provide an overview of the current mode for reform. This is followed by an examination of the legislative changes that have occurred in several states in an endeavor to reduce prison numbers.

B. *Recognition of Need for Reform*

The “tough on crime” approach that has been a mainstay of American politics and society more generally for much of the past forty years is no longer receiving unquestioned

75. *Id.*

support. Individuals and a diverse range of institutions and groups are advocating for a reduction in the severity of sanctions imposed for many types of offenses.

1. Scholarly reports and commentary

The errors of mass incarceration have been persuasively argued and well-documented by scholars in the academic literature.⁷⁶ The theoretical and empirical arguments against mass incarceration are so compelling that in fact no scholar has advanced an argument in favor of incarceration at the levels currently experienced in the United States.⁷⁷ In addition to scholarly papers, several well-researched and prominent reports have emphasized the urgent need to introduce sentencing measures that will lower the number of prisoners as well as violent crime. These reports are aimed at the dual audiences of the scholarly community, as well as the wider general community. For example, a February 2017 report by the Vera Institute for Criminal Justice, titled *Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration*, recommends taking a broader approach to the issue of violence, which involves ending “mass incarceration and keep[ing] communities safe while upholding fairness and human dignity” and “suggests that any policy or practice targeting violence should be survivor-centered, accountability-based, safety-driven, and racially equitable.”⁷⁸

76. See, e.g., TONRY, SENTENCING MATTERS, *supra* note 4; Alschuler, *supra* note 4, at 89–95; Berman & Bibas, *supra* note 4, at 40–54; Frase, *Excessive Prison Sentences*, *supra* note 4, at 627–34; Frase, *Sentencing Principles in Practice*, *supra* note 4, at 415–22; Spohn, *supra* note 4, at 536–39; Tonry, *Crime and Human Rights*, *supra* note 4.

77. For an argument in favor of tougher prison conditions, see Nicole Smith, *An Argument in Favor of Tougher Prisons in the United States*, ARTICLEMYRIAD (Jan. 15, 2012), <http://www.articlemyriad.com/argument-favor-tougher-prisons-united-states/>.

78. DANIELLE SERED, ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 8 (2017), <http://noebie.net/wp-content/uploads/accounting-for-violence.pdf>.

The American Civil Liberties Union (ACLU) has also outlined methods for reducing mass incarceration in each of the fifty states. While the proposals are geared toward particular states, there are general trends among the reforms—ending pretrial detention, reducing mandatory minimum sentencing, and introducing more alternatives to prison time—that could result in lower incarceration rates and massive budgetary savings. The report breaks down each state’s numbers, and possible reductions, by the types of offenses that could be alternatively punished.⁷⁹ For example, Arizona could cut its incarceration figures by approximately 23,000 by simply reducing sentences to drug possession and distribution crimes, which account for nearly a third of the state’s prison population.⁸⁰ In North Carolina, reducing the time served and introducing alternative punishments for public order offenses—which include certain drug offenses, public intoxication, and prostitution, among others—could reduce the population by roughly 5,300 people.⁸¹

The report also accounts for the potential cost savings stemming from their recommendations. In a state like Arizona, the reduced number of drug-related prison sentences, along with other reforms, could lead to over \$1 billion in savings over the next six years.⁸² Oregon could see approximately \$500 million saved over that same timespan by reducing their count by only 6,895.⁸³

79. *ACLU Launches State-by-State Blueprints with Roadmaps for Cutting Incarceration by 50 Percent*, AM. CIV. LIBERTIES UNION (Sept. 5, 2018), <https://www.aclu.org/news/aclu-launches-state-state-blueprints-roadmaps-cutting-incarceration-50-percent>.

80. AM. CIVIL LIBERTIES UNION, *BLUEPRINT FOR SMART JUSTICE ARIZONA* 13, 15 (2018), <https://50stateblueprint.aclu.org/assets/reports/sj-blueprint-az.pdf> [hereinafter *ACLU, SMART JUSTICE ARIZONA*].

81. AM. CIVIL LIBERTIES UNION, *BLUEPRINT FOR SMART JUSTICE NORTH CAROLINA* 18 (2018), <https://50stateblueprint.aclu.org/assets/reports/sj-blueprint-nc.pdf>.

82. *ACLU, SMART JUSTICE ARIZONA*, *supra* note 80, at 15.

83. AM. CIVIL LIBERTIES UNION, *BLUEPRINT FOR SMART JUSTICE OREGON* 17

The ACLU's report also notes the considerable impact that mass incarceration has had on America's ever-present racial disparity. Florida's black population makes up for just sixteen percent of the state's total population, but they account for fifty percent of the state's incarcerated individuals.⁸⁴ In Massachusetts, a liberal state, Latino citizens account for a quarter of the incarcerated population—approximately twice their percentage of the state's population.⁸⁵ These numbers highlight the urgency of reducing mass incarceration for communities of color in states all across America.

Yet, arguments of this nature did not influence lawmakers for several reasons, including the perception by politicians that “tough on crime” is a popular message to voters.⁸⁶ Finally, the message that mass incarceration is an intolerable situation has started to resonate in the wider-community, largely because (as noted above) of the increasing awareness of the massive cost of mass incarceration.⁸⁷

2. Mainstream Media

The opposition to mass incarceration has now been picked up by many sectors of the mass media in recent years. Many articles in mainstream newspapers and magazines have criticized the overly punitive nature of the sentencing system. For instance, an article in *Rolling Stone* magazine condemned the imposition of mandatory sentences for nonviolent drug offenders because they cause suffering

(2018), <https://50stateblueprint.aclu.org/assets/reports/sj-blueprint-or.pdf>.

84. AM. CIVIL LIBERTIES UNION, BLUEPRINT FOR SMART JUSTICE FLORIDA 8 (2018), <https://50stateblueprint.aclu.org/assets/reports/sj-blueprint-fl.pdf>.

85. AM. CIVIL LIBERTIES UNION, BLUEPRINT FOR SMART JUSTICE MASSACHUSETTS 8–9 (2018), <https://50stateblueprint.aclu.org/assets/reports/sj-blueprint-ma.pdf>.

86. NAT'L RESEARCH COUNCIL, *supra* note 4, at 121–22.

87. *See supra* Section II.A.

without reducing recidivism.⁸⁸ *The New York Times* has published numerous pieces that highlight the excessive government expenditure on incarceration,⁸⁹ and endorse reduced sentences⁹⁰ (including those recommended in a proposal to soften federal sentencing laws).⁹¹ The *Huffington Post* reported on a 2016 document issued by the White House, titled *Economic Perspectives on Incarceration and the Criminal Justice System*, which highlighted that the prison population includes a disproportionate number of Hispanic and African American people and that offenders who serve long prison terms often reoffend.⁹² The document also considered options for lowering the crime rate.⁹³

These views are no longer fringe but have been echoed among top government officials and politicians. Eric Holder, President Obama's first Attorney General (and first African

88. Andrea Jones, *The Nation's Shame: The Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014, 4:33 PM), <http://www.rollingstone.com/politics/news/the-nations-shame-the-injustice-of-mandatory-minimums-20141007>.

89. Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/business/economy/in-the-us-punishment-comes-before-the-crimes.html>.

90. The Editorial Board, *Cutting Prison Sentences, and Costs*, N.Y. TIMES (Dec. 24, 2016), <http://www.nytimes.com/2016/12/24/opinion/sunday/cutting-prison-sentences-and-costs.html>; The Editorial Board, *Cut Sentences for Low-Level Drug Crimes*, N.Y. TIMES (Nov. 23, 2015), <http://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html>; Tina Rosenberg, Opinion, *Even in Texas, Mass Imprisonment Is Going Out of Style*, N.Y. TIMES (Feb. 14, 2017), https://www.nytimes.com/2017/02/14/opinion/even-in-texas-mass-imprisonment-is-going-out-of-style.html?_r=0; Steven Zeidman, Letter to the Editor, *End Mass Imprisonment*, N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/opinion/letters/prosecutors-clemency-parole.html>.

91. The Editorial Board, *Toward Saner, More Effective Prison Sentences*, N.Y. TIMES (Oct. 3, 2015), <http://www.nytimes.com/2015/10/04/opinion/sunday/toward-saner-more-effective-prison-sentences.html>.

92. Matt Ferner, *New Report Reveals Devastating Effects of Mass Incarceration on the U.S.*, HUFFINGTON POST (May 2, 2016, 7:34 PM), http://www.huffingtonpost.com.au/entry/effects-mass-incarceration_us_5727b6abe4b0b49df6ac0e00.

93. *Id.*

American Attorney General), stated in 2013 that “too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason. It’s clear, at a basic level, that 20th-century criminal justice solutions are not adequate to overcome our 21st-century challenges.”⁹⁴ After his time in office, Holder argued in *The New York Times* that the United States can reduce prison numbers without compromising community security.⁹⁵ Following that, there have been countless newspaper articles and even mainstream television documentaries forcefully advocating against mass incarceration.

Leading writers, actors, and filmmakers have also spoken on mass incarceration through their platforms. Shondra Rhimes, the widely popular creator of the hit television show *How to Get Away with Murder*, a drama centered on a law professor, highlighted the issue in an episode featuring the main character advocating for an inmate in front of the Supreme Court.⁹⁶ Another popular television show, *Madam Secretary*, features the main character running for president with a strong message against mass incarceration.⁹⁷

The narrative among various media outlets does not always take on the same form, but ultimately all argue for essentially the same end. For example, conservative journalists and politicians like to focus their messaging on

94. Eric Holder, Attorney General, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), in U.S. DEP’T JUST., <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

95. Eric H. Holder Jr., Opinion, *Eric Holder: We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016), <http://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html>.

96. Inimai M. Chettiar, ‘Entertainers Must Use Their Power and Public Visibility’ Toward Incarceration Reform, VARIETY (Dec. 1, 2018, 10:49 AM), <https://variety.com/2018/politics/features/inimai-chettiar-entertainers-must-use-power-incarceration-reform-1203071269/>.

97. *Id.*

recognizing the need to reduce costs and protect families.⁹⁸ On the opposite end of the spectrum, liberal voices highlight the issue through the viewpoint of historic racial oppression and its modern equivalency.⁹⁹ Whereas progressive journalists and activists in the Netflix documentary *13th* explain mass incarceration through the lens of modern slavery and its legal basis in the Thirteenth Amendment to the United States Constitution, Senator Mike Lee (one of the most conservative members of the United States Senate) wrote an opinion editorial urging a reduction in prison numbers that does not mention race, but instead focuses on the need to protect families from breaking up.¹⁰⁰ The messaging may be completely distinguishable, but the recognition of the need for reform transcends those differences.

Importantly, the need to rethink mass incarceration comes from both the liberal and conservative citizenry. While more liberal news outlets have traditionally supported this narrative, even conservative sources now promulgate the same message. Fox News, America's conservative news organization, ran the recent opinion editorial from Senator Lee where he calls for an end to the minimum-sentencing laws that underpin mass incarceration.¹⁰¹

3. Opinion Polls and Law Enforcement Leaders

Perhaps influenced by such media coverage, many recent surveys reveal strong public support for sentencing reform.

98. See Mike Lee, Opinion, *Sen. Mike Lee: A Conservative Case for Criminal Justice Reform*, FOX NEWS (Nov. 13, 2018), <https://www.foxnews.com/opinion/sen-mike-lee-a-conservative-case-for-criminal-justice-reform>.

99. See *13TH* (Kandoo Films 2016). For other another examination of mass incarceration through the lens of racial oppression, see *Vice: Raised in the System*, (HBO television broadcast Apr. 6, 2018), <https://www.hbo.com/vice/season-06/raised-in-the-system>; see also Brave New Films, *Sentencing Reform: Part 1—The Power of Fear*, YOUTUBE (Dec. 7, 2017), <https://www.youtube.com/watch?v=29Fotznf9lc>.

100. Compare *13TH*, *supra* note 99, with Lee, *supra* note 98.

101. Lee, *supra* note 98.

An ACLU survey conducted in late 2017 shows that seventy-one percent of respondents believe that the United States must reduce prison numbers.¹⁰² This was a bipartisan call for action, with “[e]ighty-seven percent of Democrats, 67 percent of independents, and 57 percent of Republicans” agreeing that America should reduce prison numbers.¹⁰³ The poll also showed that “[t]wo in three Americans would be more likely to vote for candidates who supported reducing the prison population and using the savings to reinvest in drug treatment and mental health programs, including 65 percent of President Trump voters.”¹⁰⁴

A more wide-ranging poll shows that three-quarters of Americans believe that the criminal justice system needs to be significantly improved, and eighty-seven percent of Americans agree that community money directed to imprisoning nonviolent offenders “should be shifted to alternatives such as electronic monitoring.”¹⁰⁵ Further, eighty-five percent of voters believe that the main objective of sentencing should be rehabilitation.¹⁰⁶ In a recent poll of supporters of President Trump, sixty-three percent of

102. Udi Ofer, *ACLU Poll Finds Americans Reject Trump’s Tough-on-Crime Approach*, AM. CIVIL LIBERTIES UNION (Nov. 16, 2017, 1:45 PM), <https://www.aclu.org/blog/mass-incarceration/smart-justice/aclu-poll-finds-americans-reject-trumps-tough-crime-approach>; see also REASON-RUPE, OCTOBER 2014 TOPLINE RESULTS 4 (2014), <http://reason.com/assets/db/14128084586864.pdf>. In one survey, even most victims of crime supported sentencing reforms which would lower prison numbers. Timothy Williams, *Trump Wants to Get Tough on Crime. Victims Don’t Agree.*, N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/crime-victims-poll-trump-agenda.html>.

103. Ofer, *supra* note 102.

104. *Id.*

105. Lydia Wheeler, *Poll: 3/4 of Americans Support Criminal Justice Reform*, HILL (Jan. 25, 2018, 11:54 AM), <http://thehill.com/regulation/370692-poll-3-4-of-americans-support-criminal-justice-reform>. This represents a vast change in polls over recent decades, which traditionally showed that the vast majority of Americans were in favor of tougher sentences. See Amelia Thomson-DeVeaux, *Jeff Sessions Is Trying To Take Criminal Justice Back To The 1990s*, FIVETHIRTYEIGHT (Feb. 7, 2018 2:45 PM), <https://fivethirtyeight.com/features/jeff-sessions-is-trying-to-take-criminal-justice-back-to-the-1990s/>.

106. Wheeler, *supra* note 105.

respondents agreed that judges should have greater capacity to impose sanctions other than imprisonment.¹⁰⁷ More widely it has been reported that:

Crime is no longer a wedge issue, and voters desire reform. A 2017 poll from the Charles Koch Institute reveals that 81 percent of Trump voters consider criminal justice reform important. Another, from Republican pollster Robert Blizzard, finds that 87 percent of Americans agree that nonviolent offenders should be sanctioned with alternatives to incarceration. And according to a 2017 ACLU poll, 71 percent of Americans support reducing the prison population—including 50 percent of Trump voters.¹⁰⁸

In a similar vein, a recent survey has demonstrated that a significant majority of the community support reforms which would allow nonviolent offenders to get more days off of their sentence for good behavior.¹⁰⁹ Eighty-two percent of Americans support allowing nonviolent offenders to finish their sentences through a type of confinement at home.¹¹⁰ They also supported increased access to halfway houses and other reentry programs.¹¹¹

It has been noted that criminal justice reform is one of the few issues that has wide-ranging support: “criminal justice reform presents an issue—perhaps the *only* issue

107. Vikrant P. Reddy, *The Conservative Base Wants Criminal-Justice Reform*, NAT'L REV. (May. 8, 2017, 8:00 AM), <http://www.nationalreview.com/article/447398/criminal-justice-reform-donald-trump-supporters-conservative-base-want-fresh>; see also Jasmine Heiss & Jack Norton, *United Toward Justice: Urban and Rural Communities Share Concerns about Incarceration, Fairness of the Justice System, and Public Spending Priorities*, VERA INST. JUST. (Apr. 19, 2018), <https://www.vera.org/blog/united-toward-justice-urban-and-rural-communities-share-concerns-about-incarceration-fairness-of-the-justice-system-and-public-spending-priorities>.

108. Eisen & Chettiar, *supra* note 62.

109. Jonathan Easley, *Poll Finds Broad Support for House-passed Prison Reform Bill*, HILL (Jul. 25, 2018, 4:45 PM), <https://thehill.com/homenews/house/398858-poll-finds-broad-support-for-house-passed-prison-reform-bill>; see also C.J. Ciaramella, *Poll Shows Wide Support for Criminal Justice Reform Bill in Congress*, REASON (Oct. 18, 2018, 11:30 AM), <https://reason.com/blog/2018/10/18/poll-shows-wide-support-for-criminal-jus>.

110. Ciaramella, *supra* note 109.

111. *Id.*

today—on which the left and the right can unite”¹¹² to reduce incarceration numbers and eliminate problems such as “ruthless mandatory penalties.”¹¹³

In October 2017, Law Enforcement Leaders to Reduce Crime and Incarceration, an alliance of more than 200 law enforcement officials including police chiefs and attorneys-general from all fifty states, agreed that reducing the incarceration rate could be done without leading to an increase in the crime rate.¹¹⁴ The group submitted an open letter to President Trump urging his White House to pivot from its stated “tough on crime” approach because the organization does not “believe that public safety is served by a return to tactics that punish without strong purpose.”¹¹⁵

It is important to not overstate the extent of the mood for change to lower levels of sentencing punitiveness. There are still some offenses that attract high levels of community commendation. For example, a recent survey conducted in September 2018 by the Foundation for Safeguarding Justice, a group loosely affiliated with federal prosecutors, found that seventy-four percent of Americans are opposed to any reductions in the severity of sentencing for “[d]rug trafficking

112. Erik Luna, *Is It Time for Criminologists to Step Outside the Ivory Tower?*, CRIME REPORT (Nov. 7, 2017), <https://thecrimereport.org/2017/11/07/is-it-time-for-criminologists-to-step-outside-the-ivory-tower/>.

113. *Id.*

114. Press Release, Law Enforcement Leaders, Police and Prosecutors Urge Trump and Sessions to Join Bipartisan Movement for Criminal Justice Reform (Oct. 18, 2017), <http://lawenforcementleaders.org/wp-content/uploads/2017/10/Crime-Summit-Press-Release.pdf> [hereinafter Law Enforcement Leaders, Police and Prosecutors Urge Trump]; see also Douglas A. Berman, *Notable New Group Advocating for Sentencing Reforms: Law Enforcement Leaders to Reduce Crime and Incarceration*, SENT’G L. & POL’Y (Oct. 21, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/notable-new-group-advocating-for-sentencing-reforms-law-enforcement-leaders-to-reduce-crime-and-inca.html; Press Release, Law Enforcement Leaders, 60+ Top Law Enforcement to Congress: White House Criminal Justice Efforts Not Sufficient to Reduce Crime (Apr. 23, 2018), <http://lawenforcementleaders.org/wp-content/uploads/2018/04/LEL-April-2018-SRCA-Letter-Press-Release.pdf>.

115. Law Enforcement Leaders, Police and Prosecutors Urge Trump, *supra* note 114.

of heroin, fentanyl, and similar drugs.”¹¹⁶ Half of all respondents believe that the Federal Government is not tough enough in its current approach to punishing drug traffickers.¹¹⁷ These numbers vary slightly among political parties, but the difference is negligible. It was noted that eighty-seven percent of Republican voters and seventy percent of Democratic voters opposed reducing penalties for drug offenders.¹¹⁸ Whites opposed the measure at the highest rate, with seventy-seven percent against it.¹¹⁹ Black and Hispanic Americans were slightly below, at seventy-one and sixty-four percent, respectively.¹²⁰ The difference of opinion by gender was almost negligible, as the percentages of each were nearly identical.¹²¹

Thus, there is a considerable (but not universal) public appetite for softer penalties—especially in relation to drug trafficking offenses. The general sentiment in favor of a less punitive approach to sentencing is now translating into political action in many parts of America.

4. Political Action

a. Recent Political Races

The above sentiment has already had an effect on some political races from the 2018 election cycle. For example, in Dallas County, Texas, the two candidates for District Attorney found themselves vying to prove who would be more effective at curtailing police infractions and reducing prison numbers.¹²² This race comes in the wake of the killing of

116. Press Release, Safeguarding Justice, Poll: Three Out of Four Americans Oppose Sentencing Reforms That Lower Penalties for Drug Trafficking (Oct. 11, 2018), <https://safeguardingjustice.org/media-release>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. Farah Stockman, *How ‘End Mass Incarceration’ Became a Campaign*

Botham Jean, an unarmed black man who was murdered in his own apartment by a police officer who entered his apartment thinking it was her own.¹²³ Philadelphia, which had the highest incarceration rate among America's ten largest cities in 2015, recently elected a new District Attorney, Larry Krasner,¹²⁴ who in a piece for *The New Yorker* urged an end to mass incarceration through a number of different measures.¹²⁵

In Dallas, the candidate with a stronger message of reducing mass incarceration was elected.¹²⁶ The results indicate that the general public is supporting sentencing reform, regardless of party affiliation.¹²⁷ Whereas John Creuzot, the victor of the race in Dallas, is a Democrat running in a district with a relatively even split, Republican Locke Thompson won with his decarceration platform in extremely conservative Mississippi.¹²⁸

b. The Federal Jurisdiction

Since taking office, President Trump initially continued his harsh stance on criminal law adopted during his campaign and endorsed a “tough on crime” agenda.¹²⁹ The

Slogan for D.A. Candidates, N.Y. TIMES (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/us/texas-district-attorney-race-mass-incarceration.html>.

123. *Id.*

124. Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration>.

125. *Id.*

126. Kate Pastor, *Are Americans Finally Turning Away from 'Tough on Crime' Era?*, CRIME REPORT (Nov. 12, 2018), <https://thecrimereport.org/2018/11/12/are-americans-finally-turning-away-from-tough-on-crime-era/>.

127. *Id.* During the 2018 Dallas County District Attorney election, both candidates embraced criminal justice reform proposals. While the Republican incumbent instituted a program to help convicted felons erase their records under certain conditions, and declined to impose cash bail on low level marijuana-related offenses, her Democratic opponent went a step further, pledging to cut incarceration by 15–20 percent.

128. *Id.*

129. See Jenna Goff & Joan Greve, *Trump vs. Clinton: Criminal Justice*

Brennan Center for Justice analyzed developments in criminal justice in the first year of the Trump presidency, and argues that during this period a harsher criminal justice system has evolved:

All told, President Trump and Attorney General Jeff Sessions have already left a significant mark on the Justice Department. They have used short memoranda or subtle changes in enforcement strategy to quietly undo much of President Barack Obama's criminal justice reform legacy. In its place, they have built a more draconian vision of law enforcement, centered around immigration.¹³⁰

However, there is now a growing number of influential Republican politicians agitating for softer sentences.¹³¹ The Republican Party, America's conservative political wing, has had a recent change in their approach to sentencing and mass incarceration.¹³² The American political right has traditionally been synonymous with a "tough on crime" approach to criminal justice.¹³³ While this approach seemed to cohere with wide-ranging community sentiment in the 1960s, when violent crime was on the rise and whites were the overwhelming majority of voters, as noted above, it is

Reform, PBS: WASH. WEEK (Sept. 19, 2016), <http://www.pbs.org/weta/washingtonweek/blog-post/trump-vs-clinton-criminal-justice-reform>; Michelle Mark, *Here's What Hillary Clinton and Donald Trump Think About Criminal Justice*, BUS. INSIDER AUSTRALIA (Sept. 27, 2016, 6:08 AM), <https://www.businessinsider.com.au/trump-and-clinton-on-issues-mass-incarceration-and-criminal-justice-2016-9?r=US&IR=T>.

130. BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE ONE YEAR INTO THE TRUMP ADMINISTRATION 1 (2018), https://www.brennancenter.org/sites/default/files/publications/Criminal_Justice_One_Year_Into_the_Trump_Administration_0.pdf; see also Justin George, *Trump Justice, Year One: The Demolition Derby*, MARSHALL PROJECT (Jan. 17, 2018), <https://www.themarshallproject.org/2018/01/17/trump-justice-year-one-the-demolition-derby>.

131. Amanda Marcotte, *Can Republicans Get Sentencing Reform Past Trump and His Base?*, SALON (Oct. 12, 2017), <https://www.salon.com/2017/10/12/can-republicans-get-sentencing-reform-past-trump-and-his-base/>.

132. Lars Trautman, *Where the Right Went Wrong on Criminal Justice*, AM. CONSERVATIVE (Jul. 6, 2018, 12:01 AM), <http://www.theamericanconservative.com/articles/where-the-right-went-wrong-on-criminal-justice>.

133. *Id.*

now less popular.¹³⁴

The prohibitive cost of incarceration has forced fiscally conservative Republicans to rethink their approach.¹³⁵ Some of America's Republican strongholds, such as Texas, have already led the way on this issue, where reforms leading to lower incarceration rates have also brought down both crime and recidivism rates in the state as well.¹³⁶ By saving billions in taxpayer dollars in the process, this trend has caught the eye of Republicans nationwide. Texas has shown that criminal justice reform can satisfy the political right's desire for limited government and low spending while maintaining their desire to reduce the crime rate.

Fiscal responsibility is not the only factor underpinning the shift by the Republicans on crime and justice. The Republican Party appeals predominantly to white voters, which is reflected in their election results. In the 1960s, this constituted a substantial cohort of the American population. But the demography of America has changed significantly in recent decades. The fastest-growing minority, Hispanics, have gone from 6.5% of the population in 1980 to 17% today.¹³⁷ Likewise, the African American share of the total vote has risen to a level high enough to threaten the Republican Party's once tight grip in even the safest Southern states.

This is a considerable political problem for the Republicans, who typically receive significantly less votes from these blocs. The highest Hispanic vote-getter was George W. Bush in 2000, receiving roughly a third of those voters.¹³⁸ By contrast, Donald Trump received only twenty-

134. *Id.*

135. *Id.*

136. *See infra* notes 220–29 and accompanying text.

137. Trautman, *supra* note 132.

138. *Id.*

eight percent in 2016.¹³⁹ The African American numbers are even more fragile, with President Trump winning only eight percent of that vote.¹⁴⁰ As African American and Hispanic populations are growing, and they make up sixty percent of the prison population, Republicans have increasingly viewed criminal justice reform as a way to garner increased support from these groups.¹⁴¹

Most significantly, the Trump administration has recently expressed support for measures to reduce recidivism,¹⁴² including prioritizing “funding and support for Federal programs that have proven to help reduce State prison recidivism”¹⁴³ and introducing legislation that will “[p]romote evidence-based recidivism reduction programs.”¹⁴⁴ This sentiment has translated into meaningful legislative change with the passing of the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act, or FIRST STEP Act, which received overwhelming support from the Democrats and Republicans in Congress¹⁴⁵ in December 2018. The Act was praised by the U.S. Commission on Civil Rights, which notes

139. *Id.*

140. *Id.*

141. *Id.*

142. Alexander Bolton, *Trump Gives Thumbs Up to Prison Sentencing Reform Bill at Pivotal Meeting*, HILL (Aug. 3, 2018, 6:00 AM), <https://thehill.com/homenews/senate/400176-trump-gives-thumbs-up-to-prison-sentencing-reform-bill-at-pivotal-meeting>.

143. *President Donald J. Trump Supports Legislative Action to Reduce Recidivism in Our Prison System*, WHITE HOUSE (May 18, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-supports-legislative-action-reduce-recidivism-prison-system/?utm_source=ods&utm_medium=email&utm_campaign=1600d.

144. *Id.*; see also Molly Ball, *Jeff Sessions Is Winning for Donald Trump. If Only He Can Keep His Job*, TIME (Mar. 29, 2018), <http://time.com/5220086/jeff-sessions-is-winning-for-donald-trump-if-only-he-can-keep-his-job/>.

145. Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next>.

that:

The *Sentencing Reform and Corrections Act* contains necessary and important steps towards more equitable punishments in the federal system, advancing the fair administration of justice by better fitting punishment to crime. If enacted, it would help reduce the outsize US prison population without jeopardizing public safety.¹⁴⁶

Professor Berman describes the Act as the most significant piece of sentencing legislation in decades:

President Donald J. Trump officially signed the FIRST STEP Act into law today, and I am so very excited that a significant piece of sentencing and prison reform finally became law after years and years and years of talk and effort by so many. I wish the reform was even more significant, especially on the sentencing side, but something is better than nothing and but for a modest reform to crack sentencing terms, we really have had nothing positive coming from Congress on the sentencing side in more than 20+ years.¹⁴⁷

As alluded to above, the Act deals with prison reform more than sentencing changes, but has several aspects that will reduce the length of prison terms of some offenders, thereby reducing federal prison numbers. The Act is expected to apply to approximately thirty percent of federal prisoners.¹⁴⁸

146. Press Release, U.S. Comm'n on Civil Rights, U.S. Commission on Civil Rights Supports Sentencing Reform Legislation (Nov. 13, 2017), <http://www.usccr.gov/press/2017/11-13-statement.pdf>; see also Chuck Grassley, *Sen. Chuck Grassley: Sentencing Reform Bill Will Fight Crime*, FOX NEWS (Apr. 27, 2018), <http://www.foxnews.com/opinion/2018/04/27/sen-chuck-grassley-sentencing-reform-bill-will-fight-crime.html>. For an analysis of the likely impact of the Act, see U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY S. 1917, THE SENTENCING REFORM AND CORRECTIONS ACT OF 2017, (Mar. 19, 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/March_2018_Impact_Analysis_for_CBO.pdf.

147. Douglas A. Berman, *Prez Trump Signs Historic (Though Modest) FIRST STEP Act into Law. . .and Now Comes the Critical Work of Implementing It Well!!*, SENT'G L. & POL'Y (Dec. 21, 2018), https://sentencing.typepad.com/sentencing_law_and_policy/2018/12/prez-trump-signs-historic-though-modest-first-step-act-into-law-and-now-comes-the-critical-work-of-i.html.

148. Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change*, TIME (Dec. 20, 2018), <http://time.com/5483066/congress-passes-bipartisan-criminal-justice-refo>

The Act will make substantial reforms to mandatory minimum sentencing policy. First, it will give judges more discretion in handing down mandatory minimum sentences by expanding so-called “safety valves.”¹⁴⁹ These give judges important decision-making authority for certain offenses, most notably those involving nonviolent drug crimes.¹⁵⁰ It also shortens the amount of time for mandatory minimum drug crime sentencing overall.¹⁵¹ Second, the Act relaxes the “three strikes” rule, which subjected triple offenders to life sentences, by reducing the mandatory minimum amount from life to twenty-five years.¹⁵² While still a very high number, it is a substantial decrease from life. Finally, the Act takes the already-successful reforms from the Fair Sentencing Act of 2010, which reduced the disparity between sentences for crack and powder cocaine offenses, and applies it retroactively to those convicted before that law’s passage in 2010.¹⁵³ This will apply to some 3000 inmates and make an important impact on the racial disparity that plagues drug conviction rates.¹⁵⁴

The Act also makes important changes for inmates after they are convicted. “Good-time credits” are awarded to inmates for good behavior during their incarceration periods and reduces the length of their stay in prison.¹⁵⁵ While this was previously capped at forty-seven days per year of incarceration, inmates can now earn up to fifty-four days for every year of their sentence.¹⁵⁶ This change will also apply

rm-effort/.

149. German Lopez, *The First Step Act, Explained*, VOX (Feb. 5, 2019), <https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform>.

150. *Id.*

151. Grawert & Lau, *supra* note 145.

152. *Id.*

153. *Id.*

154. *Id.*

155. Lopez, *supra* note 149.

156. *Id.*

retroactively, affecting some 4,000 inmates.¹⁵⁷ It will vary widely based on the amount of time of an inmate's sentence, but will have the effect of facilitating the release of some offenders from the day the bill takes effect.¹⁵⁸ It also expands the ability to get these credits by providing inmates with more options to accumulate them.¹⁵⁹ Prison inmates would now receive credits for taking vocational training courses, among other educational offerings.¹⁶⁰ Not only does this shorten the length of time spent in prison, but it can also potentially reduce recidivism rates by allowing inmates to spend less time in prison and more time in halfway houses and community supervision.¹⁶¹

While this Act has the potential to achieve major reductions in the prison population, some commentators are skeptical regarding its likely efficacy. One controversial aspect of the Act is the way in which it uses algorithms to determine good behavior, and, in turn, early release and parole. The Act requires an algorithm to be constructed to determine the potential "risk" that inmates present to the community if they are released.¹⁶² The Act does not lay out this algorithm in detail yet, but instead directs the agencies to create such a method within 210 days from when the bill takes effect.¹⁶³ Critics argue that this is insufficient time to study the multitude of complex problems that make up the federal prison system and develop such a complex protocol.¹⁶⁴

Apart from the FIRST STEP Act, the most impactful

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Brandon L. Garrett, *The Prison Reform Bill's Implementation Will Be Tricky*, SLATE (Dec. 27, 2018, 9:00 AM), <https://slate.com/news-and-politics/2018/12/prison-reform-bill-success.html>.

164. *Id.*

measure at the federal level to reduce prison numbers recently was by former President Obama, who made clemency for minor drug offenses a theme in his final year in office, and granted over 1500 clemency approvals and pardons in his last months as president.¹⁶⁵ These efforts greatly exceeded clemency efforts undertaken by past presidents, but made little change in overall prison numbers. Obama's historic program "has affected less than one-tenth of one percent of the national prison and jail population."¹⁶⁶ The trend of granting clemencies seems to be continuing with President Trump, who in June 2018 indicated that he was considering up to 3000 offenders for possible clemency.¹⁶⁷

Clemency grants are now gaining momentum at the state level. Six former governors (Richard Celeste, Ohio; John Kitzhaber, Oregon; Martin O'Malley, Maryland; Bill Richardson, New Mexico; Pat Quinn, Illinois; Toney Anaya, New Mexico) have called on Jerry Brown, the incumbent governor of California, to follow in their footsteps and grant clemency to the 740 inmates currently on California's death row.¹⁶⁸ The former governors highlight the racial bias of the system, as well as the tendency to commit errors in the trying

165. See Gregory Korte, *Obama Grants 330 More Commutations, Bringing Total to a Record 1,715*, USA TODAY (Jan. 19, 2017, 4:09 PM), <http://www.usatoday.com/story/news/politics/2017/01/19/obama-grants-330-more-commutations-bringing-total-record-1715/96791186/>; The Editorial Board, *Mr. Obama, Pick Up Your Pardon Pen*, N.Y. TIMES (Jan. 16, 2017), <https://www.nytimes.com/2017/01/16/opinion/mr-obama-pick-up-your-pardon-pen.html?referer&r=1>. For an analysis of this, see Paul J. Larkin, Jr., "A Day Late and a Dollar Short"—*President Obama's Clemency Initiative 2014*, 16 GEO. J.L. & PUB. POL'Y 147 (2018).

166. N.Y.C. BAR, TASK FORCE ON MASS INCARCERATION, MASS INCARCERATION: WHERE DO WE GO FROM HERE? 1–3 (2017), http://documents.nycbar.org/files/mass_incarceration_where_do_we_go_from_here.pdf.

167. Doina Chiacu, *Muhammad Ali Family Lawyer to Trump: Thanks, But No Pardon Needed*, REUTERS (Jun. 8, 2018, 9:10 AM), <https://www.reuters.com/article/us-usa-trump-pardons/trump-considering-3000-pardons-including-boxer-muhammad-ali-idUSKCN1J41SR?feedType=RSS&feedName=newsOne>.

168. Richard Celeste et al., *Jerry Brown Has the Power to Save 740 Lives. He Should Use It.*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/opinion/jerry-brown-california-death-row.html>.

and punishing of defendants.¹⁶⁹ In their call to action, they emphasize the possibility of executing innocent citizens who have been falsely convicted. Of course, not each of the 740 inmates on death row were falsely convicted.¹⁷⁰ In fact, the majority of them were likely not wrongly convicted.¹⁷¹ But Governor Brown can spare them of the death penalty without releasing them from prison.¹⁷² The increasing use and calls for clemencies again highlights a changing mindset regarding the treatment of offenders.

While the FIRST STEP Act and federal clemencies will only impact a relatively small portion of the total prison population in the United States, even greater changes that are aimed to reduce mass incarceration are occurring at the state level.¹⁷³

c. State Reforms Which are Reducing Prison Numbers

There are, in fact, significant criminal justice reforms occurring in numerous states, which aim at lowering the punitiveness of the system.¹⁷⁴ Bill Keller observed that between 2010 and 2015, thirty-one states reduced their rate of imprisonment *and* the state crime rate.¹⁷⁵ In 2014 and 2015, forty-six states passed reform legislation with the intent of

creating or expanding opportunities to divert people away from the

169. *Id.*

170. *See id.*

171. *See id.*

172. *Id.*

173. *See infra* Section III.B.4.c.

174. For an overview of the Trump Administration's activities in this area in its first 100 days, see AMES GRAWERT & NATASHA CAMHI, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE IN PRESIDENT TRUMP'S FIRST 100 DAYS (2017), https://www.brennancenter.org/sites/default/files/publications/Criminal_Justice_in_President_Trumps_First_100_Days.pdf.

175. Bill Keller, *Nine Lessons About Criminal Justice Reform*, MARSHALL PROJECT (Jul. 19, 2017), <https://www.themarshallproject.org/2017/07/19/nine-lessons-about-criminal-justice-reform>.

criminal justice system; reducing prison populations by enacting sentencing reform, expanding opportunities for early release from prison, and reducing the number of people admitted to prison for violating the terms of their community supervision¹⁷⁶

The ten states with the largest reduction in prison numbers also enjoyed an average crime rate decrease of fourteen percent.¹⁷⁷ The so-called “red states”¹⁷⁸ have been especially active in implementing reforms which reduce incarceration numbers. Holly Harris and Andrew Howard noted this phenomenon:

First and foremost, it is conservatives in big red states like Texas, Georgia, and South Carolina who have led the way on justice reform

176. REBECCA SILBER ET AL., VERA INST. OF JUSTICE, JUSTICE IN REVIEW: NEW TRENDS IN STATE SENTENCING AND CORRECTIONS 2014–2015, at 3, 6–7 (2016), https://storage.googleapis.com/vera-web-assets/downloads/Publications/justice-in-review-new-trends-in-state-sentencing-and-corrections-2014-2015/legacy_downloads/state-sentencing-and-corrections-trends-2014-2015-updated.pdf. Wide-ranging reforms are occurring in Ohio and Michigan. See U.S. JUSTICE ACTION NETWORK, REFORMING THE NATION’S CRIMINAL JUSTICE SYSTEM: THE IMPACT OF 2015 AND PROSPECTS FOR 2016, at 10 (2015), <http://www.justiceactionnetwork.org/wp-content/uploads/2015/12/Justice-Action-Network-Year-End-Report.pdf>. Texas, like Ohio and Michigan, is engaging in wide ranging criminal justice reforms. See Adam Brandon et al., *Congress Should Follow the Red States’ Lead on Criminal-Justice Reform*, NAT’L REV. (May 2, 2016, 8:00 AM), <http://www.nationalreview.com/article/434783/criminal-justice-reform-conservatives-have-led-way>. For a summary of recent changes in some states to lower penalties for property, drunk driving, and other low-level offenses, see Sarah Breitenbach, *Prisons, Policing at Forefront of State Criminal Justice Action*, PEW CHARITABLE TRUSTS (Jun. 27, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/06/27/prisons-policing-at-forefront-of-state-criminal-justice-action>; see also NICOLE D. PORTER, SENTENCING PROJECT, STATE ADVANCES IN CRIMINAL JUSTICE REFORM, 2016 (2017), <http://www.sentencingproject.org/wp-content/uploads/2017/01/State-Advances-in-Criminal-Justice-Reform-2016-1.pdf>; TEX. HOUSE COMM. ON CORRECTIONS, INTERIM REPORT TO THE 85TH TEXAS LEGISLATURE (2016), http://www.house.state.tx.us/_media/pdf/committees/reports/84interim/Corrections-Committee-Interim-Report-2016.pdf; Adam Gelb & Jacob Denney, *National Prison Rate Continues to Decline Amid Sentencing, Re-entry Reforms*, PEW CHARITABLE TRUSTS (Jan. 16, 2018), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms>.

177. Keller, *supra* note 175.

178. States that traditionally support Republican candidates for President and skew conservative.

issues for a decade. These efforts yielded great success in safely reducing the prison population, saving significant taxpayer resources, and most importantly lowering crime and recidivism rates . . . Surveys in states that will have hotly-contested Senate races such as Florida, Illinois, North Carolina, Nevada, and Speaker Ryan's home state of Wisconsin show support for reform issues ranging from the 60s to high 80s. The smart political play is to embrace these reforms. Doing otherwise could backfire. Just ask Alaska's then-incumbent Senator Mark Begich. In the state's 2014 US Senate race, Begich attacked his Republican opponent, Dan Sullivan, alleging he was soft on crime. Sullivan emerged victorious over Begich and is currently serving as the junior senator from Alaska.¹⁷⁹

The Brennan Center has observed that “[i]n fact, 27 states have reduced both imprisonment and crime in the last decade.”¹⁸⁰ Both large and small, liberal and conservative, and coastal and inland states have taken up significant legislative reforms to curb their prison populations.

Connecticut was an early mover in passing legislation that aimed to lower prison numbers. In 2007, Connecticut found itself with a record high prison population of nearly 20,000 individuals; as of 2016, the number was just under 15,000.¹⁸¹ Connecticut achieved these reductions through

179. Holly Harris & Andrew Howard, *Ryan's Victory Trumps Justice Reform Opponents*, HILL (Aug. 15, 2016, 4:51 PM), <http://thehill.com/blogs/pundits-blog/crime/291500-ryans-victory-trumps-justice-reform-opponents>; see also Grover Norquist, *Conservatives for Criminal Justice Reform*, WALL ST. J. (Sept. 26, 2017, 6:12 PM), <https://www.wsj.com/articles/conservatives-for-criminal-justice-reform-1506463970?mod=e2two>. Oklahoma has also recently passed legislation aimed to reduce prison numbers. Barbara Hoberock, *Criminal Justice Reform Bills Signed into Law by Oklahoma Governor*, TULSA WORLD (Apr. 28, 2016), http://www.tulsaworld.com/news/capitol_report/criminal-justice-reform-bills-signed-into-law-by-oklahoma-governor/article_842d52ae-4512-5311-899c-665f31f2e90b.html. The developments in Georgia are discussed in Greg Bluestein, *Nathan Deal Aims to Cut 'Extraordinarily High' Number of Georgia Offenders on Probation*, AJC.COM (Apr. 29, 2016), <https://www.ajc.com/blog/politics/nathan-deal-aims-cut-extraordinarily-high-number-georgia-offenders-probation/Q8WwM1Ssny7oIOPT68TVvN/>.

180. Eisen & Chettiar, *supra* note 62.

181. DENNIS SCHRANTZ ET AL., SENTENCING PROJECT, DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS 7 (2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/>.

major legislative changes. A simple yet effective reform came through so-called “Raise the Age” legislation, which changed the age at which individuals can be charged as adults from sixteen years to eighteen years of age.¹⁸² This has led to a seventy-seven percent decrease in the incarceration rate for individuals below the age of eighteen, which has ultimately lowered the total rate.¹⁸³ This has also had ramifications for young adults, with detention of individuals under age twenty-five going down by sixty percent.¹⁸⁴ For communities of color, this has created a modest reduction in the disproportionate incarceration rates they face due to the disparity of detentions by race in the impacted age group.¹⁸⁵

Other significant changes included eliminating mandatory minimum sentencing and reclassifying nonviolent drug possession crimes as misdemeanors.¹⁸⁶ In conjunction with the legislation concerning age, these reforms have effected a twenty-seven percent decrease in the new prison commitment rate through 2016.¹⁸⁷ Reforms dealing with reduction in newly incarcerated individuals has received popular support in the state, as they are seen as ways to both reduce crime and save money.¹⁸⁸

Michigan is a state known for its extreme approach to crime in the 1970s during the War on Drugs, but has seen similar trends through its own reforms.¹⁸⁹ In 2003, then-Governor Jennifer Granholm created the Michigan Prisoner Reentry Initiative to target the number of parole approvals for certain offenders.¹⁹⁰ Prior to 2003, the parole approval

182. *Id.* at 13.

183. *Id.*

184. *Id.*

185. *Id.* at 14.

186. *Id.* at 11.

187. *Id.* at 9.

188. *Id.* at 14–15.

189. *Id.* at 17.

190. *Id.* at 18.

rate had fallen below fifty percent for three consecutive years, while the amount of time served per prisoner averaged 140% of the minimum sentence.¹⁹¹

Since then, the parole approval rate has risen to seventy-two percent in 2016.¹⁹² One way the reform accomplished this was through an increase in the number of parole board members.¹⁹³ This allowed more prisoners to be considered at a faster rate, meaning that people who already served their minimum sentence for a nonviolent crime could be paroled without adding more time to their incarceration.¹⁹⁴ The process of analyzing a potential parolee's risk moved to the front-end of the incarceration period, so that those who had reached the end of their sentence could be assessed more efficiently and released more quickly.¹⁹⁵ The reform also placed restrictions on how much a prisoner could be denied parole based on their risk assessment scores and amount of time served.¹⁹⁶ The changes resulted in the prison population decreasing by about twenty percent from 2006–2016.¹⁹⁷

The Michigan electorate has received these reforms less positively than that of Connecticut.¹⁹⁸ But this does not necessarily stem from a belief that lesser sentences and more parole is bad for the community. Instead, much of the pushback relates to the closing of prisons in certain communities where the economy is dependent on the local prison.¹⁹⁹ Prisons are a source of employment in places that do not otherwise have a robust labor market. With prison

191. *Id.* at 20.

192. *Id.* at 19.

193. *Id.*

194. *Id.* at 20.

195. *Id.*

196. *Id.*

197. *Id.* at 22.

198. *See id.* at 23.

199. *Id.*

closures came some job layoffs.²⁰⁰ The program has sought to avoid closing down too many prisons in one area, in order to reduce the effects of layoffs in any particular economic region.²⁰¹ Nevertheless, it is uncertain how the public feels about the principles of the program that touches on the issues of mass incarceration, even though they have clearly pushed back on the economic consequences to certain local economies.²⁰²

After individuals are released from incarceration, their chances of returning to prison have traditionally been high. In Mississippi, House Bill 585, which was passed in 2014, sought to ameliorate the rate of offender prison re-entry.²⁰³ One way it did this was by altering the consequences of certain forms of reoffending.²⁰⁴ For example, if an individual violates the terms of their parole, they are mandated to go to “violation centers” instead of prison until the third violation occurs.²⁰⁵ At that point, the parole board still has the option to decide if they will go to prison or a center.²⁰⁶ Moreover, the range of possible sanctions were increased, allowing the parole board to consider new alternatives to prison time for violations.²⁰⁷

The same legislative package from 2014 also strengthened the ability of parole boards to consider and release inmates. For nonviolent and other low-level offenses, the legislation created a presumption of parole, meaning that many prisoners would be paroled without a hearing, absent circumstances that created a risk of parole.²⁰⁸ This specific

200. *See id.*

201. *See id.*

202. *Id.*

203. *Id.* at 28.

204. *Id.* at 29.

205. *Id.* at 29–30.

206. *Id.* at 30.

207. *Id.*

208. *Id.* at 29.

provision is still in the process of being implemented, so its effect is yet unknown.²⁰⁹ Those who had sentences that precluded the possibility of parole received retroactive consideration through the reform bill, and are now eligible to go before a parole board.²¹⁰ The effects of this are still unknown, but logically should result in a further reduction of prison numbers.

Mississippi has seen its incarceration population decline by eighteen percent—approximately 4,000 individuals—from 2008–2016.²¹¹ In 2014, the discretionary parole rate doubled, while the rate of new prison commitments was at one of its three lowest annual rates since 2008.²¹² This has even caused a modest improvement in the racial disparity of Mississippi’s prison population, with the decline in prison numbers leading to a twenty-two percent reduction in the African American prisoner population, compared to just three percent of white inmates.²¹³

The public has generally supported these reforms, but there has been resistance to further changes by some sections of the community. The state’s law enforcement community has opposed addressing more sentencing and release reform options that promise to further reduce the prison population.²¹⁴ Moreover, despite bipartisan consensus and public support, the Department of Corrections, which handles the entirety of the state’s criminal justice system, has been underfunded for several years. This has made implementing crucial reforms, such as the presumption of parole, more difficult and time-consuming.²¹⁵ Nevertheless, Mississippi’s reforms have had a positive overall effect.

209. *See id.*

210. *Id.*

211. *Id.* at 25.

212. *Id.*

213. *Id.* at 30.

214. *Id.*

215. *Id.*

Another red state, Louisiana, passed a package of reform legislation in 2017 that is expected to reduce the state's prison population by a tenth over the next decade.²¹⁶ It expects to do this through more lenient sentencing, a reduction in mandatory minimums, and re-investing the savings that will result from lower incarceration into rehabilitation and mental health programs.²¹⁷

Louisiana is a red state with a Democratic Governor, a rare combination. But they have found common ground to pass meaningful sentencing reform in circumstances when other similar states with more cohesive government control have failed. For example, Oklahoma surpassed Louisiana to become the highest incarcerator, but recently failed to enact similar reforms in its own state despite having one-party control over the entire State Government.²¹⁸ In Louisiana, the political right helped usher in the legislation. Religious groups in the state also supported the legislation, which in turn persuaded the politicians (many of whom are religious) on both sides of the state's aisle to follow suit.²¹⁹ This bipartisanship is a notable indication of the strong support for reform in the state.

The largest conservative state, and the second-largest state overall, Texas, has seen major declines in its incarceration and recidivism rates through a number of reforms.²²⁰ Texas has always had a reputation for being one of the toughest states when it came to criminal punishment, but in 2005 the Republican leadership made a drastic change

216. *Louisiana's Criminal Justice Reforms Will Reduce its Prison Population*, ECONOMIST (July 6, 2017), <https://www.economist.com/democracy-in-america/2017/07/06/louisianas-criminal-justice-reforms-will-reduce-its-prison-population>.

217. *Id.*

218. *Id.*

219. *Id.*

220. Alan Greenblatt, *Law-and-Order Texas Takes on Criminal Justice Reform*, AM. CONSERVATIVE (Jul. 12, 2018, 12:01 AM), <https://www.theamericanconservative.com/articles/law-and-order-texas-takes-on-criminal-justice-reform/>.

in policy by putting a moratorium on the construction of new prisons in the state.²²¹ Before that point, Texas had been opening new prisons at a rate that exceeded other states.²²² But when the state's Department of Criminal Justice asked for a budget increase of \$523 million to build new prisons, state representative Jerry Madden and state senator John Whitmore convinced their colleagues to give the department half of that amount—\$241 million—to invest in mental health services, drug addiction treatment, and rehabilitation generally.²²³

This budgetary reallocation by the legislature has had huge ramifications for the state's criminal justice system. For prisoners awaiting drug treatment, which was required to complete their sentence, the waiting list shrunk by two thirds, or about 1000 prisoners.²²⁴ Therefore, those individuals were able to be released back into the community in lieu of spending several months in prison despite having already completed the rest of their sentence. The savings per prisoner are estimated to be \$35,000 per year.²²⁵

Overall, the state's prison population growth slowed to its lowest rate since the passing of the legislation.²²⁶ Recidivism rates have also significantly fallen. Whereas half of the individuals on parole in 2005 went back to prison on new charges, a mere sixteen percent did so in 2015.²²⁷ In addition to the hundreds of millions it saved on investing in rehabilitation instead of new facilities, Texas expects to save \$3 billion from its closure of four prisons since 2010, and plans to close four more.²²⁸ Fortunately for the nation, Texas'

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *See id.*

228. *Id.*

influence over other conservative states has inspired criminal justice reform legislation in some other right-leaning states in America's South.²²⁹

On the opposite end of the political spectrum, California has enacted bold reforms and seen some of the most considerable prisoner reductions in the country. The nation's most populous state has seen an overall drop in its prison population of roughly 55,000 since 2006.²³⁰ That is a decrease from 702 to 515 out of every 100,000 people statewide.²³¹ Some of this was spurred by mass overcrowding of its prisons.²³² California's prison system was designed to accommodate a maximum of 79,858 individuals, but in 2006 the population peaked at around 170,000 inmates.²³³ This created conditions so intolerable that the Supreme Court of the United States, in a historic move, ruled that the state system violated the Constitution's prohibition on cruel and unusual punishment.²³⁴

California has enacted several reforms since the Supreme Court's decision in 2011. One of the earliest moves came through the "Public Safety Realignment" legislation that same year.²³⁵ The legislation was controversial among the public and experts alike, as it shifted the burden of housing offenders who were nonviolent, nonsexual, and non-serious to the local jails, rather than the state prisons.²³⁶ Typically, local jails serve as temporary and pre-trial detention centers, whereas state prisons house convicted

229. *Id.*

230. See Bradley J. Bartos & Charis E. Kubrin, *Can We Downsize Our Prisons and Jails Without Compromising Public Safety?*, 17 CRIMINOLOGY & PUB. POL'Y 693, 694 (2018).

231. *Id.*

232. *Id.* at 695–96.

233. *Id.* at 695.

234. *Id.* at 696 (citing *Brown v. Plata*, 563 U.S. 493 (2011)).

235. *Id.*

236. *Id.*

individuals during their sentences. However, despite the uncertainty of this experiment, California saw a sharp and permanent decrease in its state prison population, although it is uncertain whether or not this was simply because the numbers were now reflected in local jails.²³⁷

California did not reach its judicial target of a 33,000-inmate reduction through that reform alone, but it did so a few years later.²³⁸ A key reform that helped get the state there was Proposition 47 (known as “Prop 47”), which mandated that certain drug and property offenses be charged as misdemeanors, rather than felonies.²³⁹ These included nonviolent property crimes where the value of the stolen property was less than \$950 and certain felony drug possession crimes.²⁴⁰

Since the enactment of Prop 47 in 2014, the prison population has been reduced by approximately 13,000.²⁴¹ Four mechanisms led to this decrease: an immediate decline of arrests and warrants for crimes applicable to Prop 47; a corresponding decline in the number of convictions for those same crimes; an increased rate of pre-trial release; and a drop in the average stay of sentenced offenders.²⁴²

Prop 47 has some of the familiar features seen in other state reforms, but its unique component is its emphasis on crime prevention. Many of the other reforms target existing prisoners and people with prior convictions. In addition to the above measures, Prop 47 involves investing heavily in preventing school dropouts, providing victims’ services, and treating drug abuse to target the root causes of criminal

237. *Id.* at 696 n.1.

238. *Id.* at 697.

239. *Id.*

240. *Id.*

241. *Id.* at 694.

242. *Id.* at 697.

behavior.²⁴³

The reception to Prop 47 in California has been mixed. Proponents boast that the dramatic reductions in the prison population are a credit to the effectiveness of the legislation.²⁴⁴ But critics argue that the crime rate has increased as a result.²⁴⁵ In its largest cities, that rate went up by eleven percent in the first six months of 2015.²⁴⁶ Moreover, the three major cities with the largest property crime increases were all located in California in 2015.²⁴⁷

Researchers on this issue warn that conclusions based on that data are premature.²⁴⁸ The full impact of criminal reform bills can take many years, even if there is data available immediately. Even proponents of the reform must be cautious, as there is simply not enough data to determine the relationship between crime rates and Prop 47. While prison population numbers have clearly decreased as a direct result of Prop 47's provisions, the indirect effect on California's crime rates may not be discernible for some time.

It is important to not over-emphasize the momentum towards decarceration. Many sectors of the community are still opposed to reducing penalty severity—at least for some offenses. For example, in November 2018, voters in Ohio overwhelmingly rejected (by a margin of 63.4% to 36.6%) a proposed constitutional change that was aimed at reducing sentences for a range of drug offenses and, in the process,

243. *Id.*

244. *Id.* at 698.

245. In 2015, just after the implementation of Prop 47, California's violent crime rate rose by 8.4 percent. *Id.*

246. *Id.*

247. San Francisco, Long Beach, and Los Angeles experienced the three highest increases in property crime in the nation in 2015. See Matt Levin, *California Crime on the Rise*, CALMATTERS (Mar. 23, 2016), <http://www.calmatters.org/articles/charticle-californias-crime-on-the-rise/>.

248. Bartos & Kubrin, *supra* note 230, at 699 (citing MAGNUS LOFSTROM ET AL., PUB. POLICY INST. OF CAL., CALIFORNIA'S HISTORIC CORRECTIONS REFORMS (2016)).

reduce prison numbers.²⁴⁹

5. Current Decarceration Measures are Too Modest

The above steps to reduce the prison population are significant but have been erratic and lacking a central ideological drive.²⁵⁰ Even with the limited federal reforms and the more comprehensive state movement, little difference has been made in total American prison numbers. The efforts to roll back “tough on crime” agendas from previous decades have led to minor reductions. The years 2011 and 2012 saw a slight decrease in total prison numbers (approximately two percent).²⁵¹ This trend was reversed the following year,²⁵² only to dip again in 2014,²⁵³ 2015, and marginally in 2016.²⁵⁴ These changes are negligible and lack the expanse and focus that any impactful solution would require.²⁵⁵

249. Laura Hancock, *Ohio Voters Defeat Issue 1 on Drug Crimes*, CLEVELAND (Nov. 6, 2018), <https://www.cleveland.com/open/2018/11/ohio-voters-defeat-issue-1-on-drug-crimes.html>.

250. CARRIE PETTUS-DAVIS ET AL., CTR. FOR SOC. DEV., *GUIDEPOSTS FOR THE ERA OF SMART DECARCERATION: FOR SMART DECARCERATION STRATEGIES FOR PRACTITIONERS, ADVOCATES, REFORMERS, AND RESEARCHERS* 12 (2017), https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/a/1278/files/2017/05/Guideposts_akg-1g5n70f.pdf.

251. Matthew Friedman, *Just Facts: The U.S. Prison Population Is Down (A Little)*, BRENNAN CTR. FOR JUST. (Oct. 29, 2015), <http://www.brennancenter.org/blog/us-prison-population-down-little>.

252. *Id.*

253. In 2014, there was a slight decrease in federal and state prison numbers but this was partially offset by an increase in local jail numbers. *See Id.* State and federal prison numbers decreased by 15,400 people from December 31, 2013 to December 31, 2014. *Id.* However, county and city jail numbers increased by 13,384 inmates from mid-year 2013 to mid-year 2014. *Id.* While these time periods are not aligned, they are indicative of a larger trend. The increasing jail numbers are eclipsing the progress made by decreasing prison numbers.

254. The number of prisoners fell by 51,300, from 2,173,800 to 2,136,600 (i.e., a drop of about 2.5%). KAEBLE & GLAZE, *supra* note 13, at 1.

255. There are no official statistics for prison numbers at year-end 2017, but it is estimated that there was a reduction of approximately one percent (i.e. 19,400 people) from the previous year. *See* Oliver Hinds et al., *People in Prison 2017*, VERA INST. JUST. (May 2018), <https://www.vera.org/publications/people-in-prison->

According to a study by the Vera Institute in June 2018, at the current pace of the prison population decline, it would take 149 years for United States incarceration rates to reach the levels they were at 1970 (i.e., before the mass incarceration era).²⁵⁶ The report also notes that there is no general move toward lower prison numbers:

At the same time, while aggregated national prison population data indicates slow decline, it cannot be the sole indicator used to measure the progress made in the nation's recent efforts to reduce incarceration. Prison populations are slow to change after the implementation of most policy or practice changes, and thus provide an inadequate metric by which to measure and adjust the immediate impact of reforms—or regressive legislation. Furthermore, a reliance on aggregate prison data fails to acknowledge or measure the tremendous variation in incarceration trends from state to state and within states, and ignores a significant locus of incarceration: local jails—county- or municipally-run facilities that primarily hold people arrested but not yet convicted of a crime. For example, while much of the country is locking fewer people in jails and prisons, Kentucky is doing the opposite. If jails and prisons continue to grow in Kentucky as they have since 2000, everyone in the state will be incarcerated in 113 years.²⁵⁷

The disappointing pace of decline in mass incarceration might also be explained by the so-called “bifurcation hypothesis.” According to a recent paper published in the October 2018 volume of *Law & Policy*, the rate of decline has been slowed by the passing of laws that enhance sentences for violent crimes and nonviolent crimes.²⁵⁸ All but a handful of states have passed such laws since 2007, although these incarcerative laws are far fewer than the decarcerative laws passed during the same period in the same states. Despite

2017.

256. JACOB KANG-BROWN ET AL., VERA INST. OF JUSTICE, THE NEW DYNAMICS OF MASS INCARCERATION 5 (2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-new-dynamics-of-mass-incarceration/legacy_downloads/the-new-dynamics-of-mass-incarceration-report.pdf.

257. *Id.* at 6.

258. See Katherine Beckett, et al., *US Criminal Justice Policy and Practice in the Twenty-First Century: Toward the End of Mass Incarceration?*, 40 LAW & POLY 321 (2018).

being outnumbered by decarcerative measures by a ratio of three to one, incarcerative laws have a noticeable effect on the prison population.²⁵⁹ Recent decarcerative measures almost exclusively target nonviolent crimes, effecting relatively short sentences and preventing new prison admissions. Incarcerative measures enhance both violent and nonviolent criminal sentences, enhancing already-heavy sentences while also dulling the effects of reduced sentences for nonviolent offenses. On the back-end, the trend is almost identical. Whereas not one of the 175 decarcerative laws passed to increase the rate of parole and other release methods targeted violent and serious offenders, the thirty-seven incarcerative laws passed for the opposite purpose are spread throughout all types of crimes.²⁶⁰

Another impact on the rate of decline came through the disparity between dropping crime and arrest rates for property crimes. While the rate of change in violent crimes and arrests were nearly identical from 2007 to 2014, the rate of property crimes dropped fourteen percentage points more than the rate of arrests for suspected property crimes.²⁶¹ Nevertheless, this impact is likely less potent than that of bifurcation, as arrests for drug and public order offenses have dropped by approximately twenty percent each.²⁶² There is no data on the actual crime rates for these types of low-level offenses yet, so it is not entirely certain how the changing arrest-to-crime ratio will impact the rate of decarceration.

Similarly, the change in admission-to-arrest ratio indicates that despite decarcerative reforms, the likelihood of being admitted to prison for a wide variety of arrests has gone up. For violent crimes, this ratio has gone up 19.3%, resulting in an estimated 21,853 admissions that would not

259. *See id.* at 338.

260. *Id.* at 333.

261. *Id.* at 334.

262. *Id.*

have occurred if the rate had remained constant in 2014.²⁶³ For public order crimes, that rate is 38.7%, leading to an estimated additional 22,486 admissions.²⁶⁴ Drug offenses, which are universally targeted by decarcerative measures in every state, are still 6.3% more likely to result in an admission following an arrest.²⁶⁵ While the rate of new prison admissions has still decreased from 2007–2014, it is estimated that that decrease could have been nearly three times as large absent the higher admission-to-arrest ratio.²⁶⁶

Thus, the past four decades in the United States have witnessed a tough on crime agenda, but this is slowly wilting against the backdrop of an unsustainable public budget and growing realization that tougher penalties do not equate to enhanced community safety. The rate of decarceration, however, is painstakingly slow and a systematic approach is necessary to accelerate this process. We now discuss the approach that is most desirable.

IV. A PRINCIPLED APPROACH TO DECARCERATION

A. *The Failure of Current Sentencing Practices to Achieve Their Key Objectives*

In order to make the case for decarceration, it is not sufficient to establish that prison is expensive and damages prisoners and their relatives. Harsh penalties are traditionally justified by resorting to a number of sentencing objectives, in the form of specific deterrence, general deterrence, and incapacitation. In order to firm up the argument for reducing the severity of sentences, it is also necessary to establish that either these objectives are not sound or that they do not justify prison numbers commensurate with present numbers. To this end, by way of

263. *Id.* at 335.

264. *Id.*

265. *Id.*

266. *Id.* at 336.

overview, it has been established that incapacitation does not meaningfully enhance community safety, and specific deterrence and marginal general deterrence are empirically flawed sentencing aims.²⁶⁷ There is an enormous amount of literature examining and evaluating each of the key sentencing objectives that have been used to justify harsher penalties.²⁶⁸ We now summarize the major findings in relation to the efficacy of these sentencing objectives.

B. *Imprisonment Does Not Achieve Specific Deterrence*

The aim of specific deterrence is to reduce crime by deterring individual offenders from re-offending.²⁶⁹ It is premised on the belief that inflicting hardship on individuals for their offenses will demonstrate that crime does not pay and dissuade them from engaging in similar conduct in the future to avoid experiencing such consequences again.²⁷⁰ While the theory seems logical, research suggests that the imposition of harsh sanctions does not have this effect.

A comprehensive analysis of studies of specific deterrence, conducted by Daniel S. Nagin, Francis T. Cullen, and Cheryl L. Jonson, exposed that the rate of recidivism of offenders who are imprisoned is not necessarily lower than those who receive non-custodial penalties, and may in fact be

267. See *infra* Section IV.B–C.

268. For a detailed discussion of the empirical evidence regarding the efficacy of state-imposed criminal sanctions to achieve the goals of incapacitation, general deterrence, and specific deterrence, see Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work—and What It Means for Sentencing*, 35 CRIM. L.J. 269, 273–77 (2011); Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159, 163–65 (2012) [hereinafter Bagaric & Alexander, *The Capacity of Criminal Sanctions*]; Mirko Bagaric & Theo Alexander, *The Fallacy That is Incapacitation: An Argument for Limiting Imprisonment Only to Sex and Violent Offenders*, 2 J. COMMONWEALTH CRIM. L. 95, 99–103 (2012) [hereinafter Bagaric, *The Fallacy That is Incapacitation*].

269. Bagaric & Alexander, *The Capacity of Criminal Sanctions*, *supra* note 268, at 159.

270. See *id.*

higher.²⁷¹ These findings derived from a review of six experimental studies in which custodial and non-custodial sentences were randomly assigned;²⁷² eleven studies of matched pairs (each pair comprised of two offenders who committed the same crimes, but only one of whom was incarcerated);²⁷³ thirty-one studies that were regression-based (mathematical modeling was used to determine the impact of potentially relevant factors);²⁷⁴ and seven studies of circumstances that were not contrived by researchers.²⁷⁵ Other studies have found that longer terms of imprisonment do not reduce the likelihood of reoffending,²⁷⁶ and non-custodial sentences are associated with lower rates of recidivism than custodial sentences.²⁷⁷

A report of the Executive Office of the United States President published in 2016 reviewed research that suggests that imprisoning individuals can even increase the

271. Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 155 (2009); see also DONALD RITCHIE, SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE 15 (2011), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Does%20Imprisonment%20Deter%20A%20Review%20of%20the%20Evidence.pdf>; DON WEATHERBURN ET AL., AUSTL. INST. OF CRIMINOLOGY, THE SPECIFIC DETERRENT EFFECT OF CUSTODIAL PENALTIES ON JUVENILE REOFFENDING 2–3 (2009).

272. Nagin et al., *supra* note 271, at 144–45.

273. *Id.* at 145–53.

274. *Id.* at 154–55.

275. *Id.* at 155. In the final category was a study of more than 20,000 prisoners in Italy who, in 2006, were released early in their sentences and advised that if they reoffended within five years, they would be imprisoned for their remaining sentences and receive further sentences in response to their new offenses. *Id.* While the prisoners' reoffending decreased by 1.24% for each month of their remaining sentences, those who had served longer sentences initially were more likely to reoffend. *Id.*

276. See Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357, 358–59 (2010).

277. SENTENCING ADVISORY COUNCIL, REOFFENDING FOLLOWING SENTENCING IN THE MAGISTRATES' COURT OF VICTORIA, at xi (2013), <https://www.sentencingcouncil.vic.gov.au/publications/reoffending-following-sentencing-magistrates-court>.

probability that they will reoffend.²⁷⁸ It observes as follows:

[A] growing body of work has found that incarceration increases recidivism. . . . For instance, one recent study that uses highly detailed data from Texas . . . finds that although initial incarceration prevents crime through incapacitation, each additional sentence year causes an increase in future offending that eventually outweighs the incapacitation benefit. Each additional sentence year leads to a 4 to 7 percentage point increase in recidivism after release.²⁷⁹

Accordingly, it is not feasible to justify harsh sentences on the rationale that they will reduce the rate of re-offending by offenders.

C. (*Marginal*) General Deterrence Does Not Work

The other form of deterrence theory that has been advanced to underpin severe penalties is general deterrence. This focuses on the effect of criminal sanctions on the general community (and in particular, potential offenders), as opposed to individual offenders. Empirical evidence suggests there is some validity to the theory of “absolute general deterrence,” which proposes that the mere existence of criminal sanctions, regardless of their severity, discourages people from committing offenses for fear of the consequences.²⁸⁰ Nevertheless, research shows that the notion of “marginal general deterrence,” which postulates that the harsher a sanction, the greater its deterrent effect, is flawed.²⁸¹

In the past thirty years, the number of serious crimes committed in the United States has decreased.²⁸² While

278. WHITE HOUSE COUNCIL OF ECON. ADVISORS, EXECUTIVE OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 39 (2016).

279. *Id.*

280. See RITCHIE, *supra* note 271, at 7; FRANKLIN E. ZIMRING & GORDON J. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 14 (1973).

281. See RITCHIE, *supra* note 271, at 12.

282. JANET L. LAURITSEN & MARIBETH L. REZEY, BUREAU OF JUSTICE STATISTICS,

there was also an increase in imprisonment of offenders during this period, a causal nexus between these events has not been established.²⁸³ The reduction in commission of offenses was more likely to have been attributable to an expansion in police numbers and thus the greater probability (both perceived and actual) of detection of crime²⁸⁴—which accords with the absolute deterrence theory—as well as other socio-political and economic factors,²⁸⁵ and the fact that more offenders were incapacitated and thus prevented from committing offenses. Notably, at the same time in Canada, the rates of crimes committed and number of police officers per capita both diminished.²⁸⁶

Having analyzed studies of the connection between harsh criminal sanctions (other than capital punishment) and the crime rate, a 2014 report of the National Research Council of the National Academies noted:

Ludwig and Raphael (2003) find no deterrent effect of enhanced sentences for gun crimes; Lee and McCrary (2009) and Hjalmarsson (2009) find no evidence that the more severe penalties that attend moving from the juvenile to the adult justice system deter offending; and Helland and Tabarrok (2007) find only a small deterrent effect of the third strike of California's three strikes law. As a consequence, the deterrent return to increasing already long

TECHNICAL REPORT: MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 4 (2013), <http://www.bjs.gov/content/pub/pdf/mpencvs.pdf>.

283. See Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U. S.F. L. REV. 585, 593–94 (2009).

284. See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPECTIVES 163, 177 (2004) (estimating the increase in police numbers to have been about fourteen percent in the 1990s). For further discussion, see John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA* 207, 248 (Alfred Blumstein & Joel Wallman eds., 2000); Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 799 (2010).

285. See, e.g., Levitt, *supra* note 284, at 182–83; Michael Ellison, *Abortion Cuts Crime Says Study*, *GUARDIAN* (Aug. 9, 1999, 8:47 PM), <http://www.theguardian.com/world/1999/aug/10/michaelellison>.

286. Paternoster, *supra* note 284, at 799.

sentences is modest at best.²⁸⁷

Other studies have found that even the prospect of capital punishment does not affect homicide rates.²⁸⁸ Such research confirms that, while the existence of sanctions that would-be offenders wish to avoid can be important to reducing crime, the imposition of especially harsh sentences is not. Accordingly, the weight of research evidence does not support the proposition that harsh sentences will reduce the incidence of crime in the community.

D. Imprisonment for Incapacitation is Only Justified for Some Serious Offenders With Prior Convictions for Similar Offenses

The sentencing objective most commonly cited to justify the imposition of harsh sentences is incapacitation. Ostensibly, incapacitation is a sure method for protecting the community because while offenders are in prison, they cannot commit offenses in the community. The success of incapacitation cannot be measured solely by the height of the prison wall.²⁸⁹ Incapacitation is only effective if the offender would have re-offended during the term of the prison

287. NAT'L RESEARCH COUNCIL, *supra* note 4, at 139.

288. *See, e.g.*, RICHARD HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 211–12 (2d rev. & updated ed. 1996); NIGEL WALKER, *SENTENCING IN A RATIONAL SOCIETY* 60–61, 191 (1969); Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 313, 328 (2005); John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 129 (1994); Dieter Dölling et al., *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. ON CRIM. POL'Y & RES. 201, 220 (2009); John J. Donohue III, *Assessing the Relative Benefits of Incarceration: Overall Changes and the Benefits on the Margin*, in *DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM*, 269, 269–72 (Steven Raphael & Michael A. Stoll eds., 2009); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 145 (2003).

289. For a more in-depth treatment of this argument, see Mirko Bagaric & Sandeep Gopalan, *Saving the United States From Lurching To Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 St. Louis U. L.J. 169, 184–97 (2016).

sentence. Further, incapacitation has an admittedly crude cost-benefit aspect. It is self-defeating to imprison offenders in order to prevent them from committing minor or trivial offenses, whose cost clearly exceeds the damage from their crimes.²⁹⁰

There are no established models for determining with a high degree of accuracy offenders who will re-offend.²⁹¹ To the extent that sound predictions can be made about re-offending, this is in relation to relatively minor (especially property) offenses.²⁹² However, the cost of imprisoning these offenders normally outweighs the seriousness of the offense.²⁹³ In addition, as adverted to above, research has demonstrated that incarceration might have “criminogenic” effects.²⁹⁴ Lower level offenders interact with more serious criminals in prison and tend to commit graver crimes upon release. To be sure, there are complex reasons for this phenomenon including socialization into a criminal culture, diminishment of lawful employment opportunities upon

290. As noted in Part IV of this Article, this is no accepted method for calibrating the cost of crime and hence this criterion should only be relevant if the nature of the crime is manifestly minor.

291. Hence, the theory of selective incapacitation is flawed. See BERNADETTE MCSHERRY & PATRICK KEYZER, *SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE* 104 (2009) [hereinafter MCSHERRY & KEYZER, *SEX OFFENDERS*]; Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SECURITY RES. 317, 323–24 (2011). See generally Bernadette McSherry & Patrick Keyzer, “Dangerous” People: An Overview, in *DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE* 3 (Bernadette McSherry & Patrick Keyzer eds., 2011) [hereinafter McSherry & Keyzer, “Dangerous” People]. Most recently it has been suggested that habitual criminals and serious offenders have a different brain anatomy compared to other people. Neuroimaging of the brain showed that such offenders have less brain activity in certain areas of the brain, including the ventromedial prefrontal cortex and the dorsolateral prefrontal cortex, which are associated with self-awareness, learning from past experiences, and emotions. See ADRIAN RAINE, *THE ANATOMY OF VIOLENCE: THE BIOLOGICAL ROOTS OF CRIME* (2013).

292. Bagaric, *The Fallacy That is Incapacitation*, *supra* note 268, at 106–07.

293. *Id.* at 107.

294. Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, 6 CRIMINOLOGY & PUB. POL’Y 589, 593 (2007).

conviction, deterioration of relationships, and negative mental well-being.²⁹⁵

It is essentially for these two reasons that the benefits of incapacitation appear to have been minor. The United States National Academy of Sciences notes:

The increase in incarceration [in the United States over the past four decades] may have caused a decrease in crime, but the magnitude of the reduction is highly uncertain and the results of most studies suggest it was unlikely to have been large.²⁹⁶

A recent report by the Brennan Center based upon an analysis of state imprisonment data between 1980 and 2013 concluded that

[i]ncarceration has been declining in effectiveness as a crime control tactic since before 1980. Since 2000, the effect on the crime rate of increasing incarceration . . . has been essentially zero. Increased incarceration accounted for approximately 6 percent of the reduction in property crime in the 1990s (this could vary statistically from 0 to 12 percent), and accounted for *less than 1 percent* of the decline in property crime this century. Increased incarceration has had little effect on the drop in violent crime in the past 24 years. In fact, large states such as California, Michigan, New Jersey, New York, and Texas have all reduced their prison populations while crime has continued to fall.²⁹⁷

The Brennan Center report elaborates that the ineffectiveness of incarceration as a crime fighting tool might be owed to the fact that a large percentage of the increase in incarceration numbers relates to the imprisonment of large numbers of drug and other nonviolent offenders.²⁹⁸ The

295. CHRISTY VISHER ET AL., URBAN INST., LIFE AFTER PRISON: TRACKING THE EXPERIENCES OF MALE PRISONERS RETURNING TO CHICAGO, CLEVELAND, AND HOUSTON 4–5 (2010), https://www.urban.org/research/publication/life-after-prison-tracking-experiences-male-prisoners-returning-chicago-cleveland-and-houston/view/full_report.

296. NAT'L RESEARCH COUNCIL, *supra* note 4, at 4.

297. OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 4 (2015), https://www.brennancenter.org/sites/default/files/analysis/Crime_rate_report_web.pdf.

298. *Id.* at 25.

Sentencing Project noted that “[w]hile incarceration is one factor affecting crime rates, its impact is more modest than many proponents suggest, and is increasingly subject to diminishing returns.”²⁹⁹

While serious sexual and violent offenders do not reoffend at manifestly high rates, it transpires that individuals with previous convictions for serious offenses³⁰⁰ commit crime at a greater frequency than the rest of the criminal population. Further, offenders with prior convictions for serious sexual and violent offenses re-offend more frequently than first-time offenders.³⁰¹ Thus, to the extent that incapacitation can be effective, there is some theoretical basis for imposing harsher penalties on recidivist serious offenders. To this end, it seems that while incapacitation does not justify additional prison time for minor offenders, it can support a recidivist loading in the order of twenty to fifty percent for serious sexual and violent offenders.³⁰²

Thus, it follows that the goal of incapacitation does not justify imprisoning large numbers of offenders. It is only a justifiable rationale in relation to repeat sexual and violent offenders.

E. *Proportionality*

While the objectives of general deterrence, specific

299. RYAN S. KING, ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 8 (2005), http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf.

300. See *infra* regarding the principle of proportionality (arguing serious offenses are confined to sexual and assault offenses).

301. See Bagaric, *The Punishment Should Fit the Crime*, *supra* note 61, at 410. Beyond this, there is no basis for more accurately predicting future serious offending. See MCSHERRY & KEYZER, SEX OFFENDERS, *supra* note 291, at 23–24; Black, *supra* note 291, at 317; McSherry & Keyzer, “Dangerous” People, *supra* note 291, at 4–5.

302. See Bagaric, *The Punishment Should Fit the Crime*, *supra* note 61, at 408–11 (arguing that this is consistent with the rate of re-offending of these offenders).

deterrence, and incapacitation provide potential reasons that can justify the imposition of punishment, as we have seen, it is only absolute general deterrence that justifies the infliction of punishment, and in relation to recidivist sexual and violent offenders, incapacitation also serves as a subsidiary justification. However, these rationales do not provide guidance on how much punishment should be inflicted on offenders. In determining how much to punish, the key guiding principle is proportionality. This is the principle that the hardship imposed on offenders should be commensurate with the seriousness of the crime.

Proportionality is widely endorsed and embraced. It is a requirement of the sentencing regimes of ten states in the United States.³⁰³ Proportionality is also a core principle that informs (though it does not strongly influence) the *Federal Sentencing Guidelines*.³⁰⁴ In addition to this, a survey of state sentencing law by Thomas Sullivan and Richard Frase shows that at least nine states have constitutional provisions relating to the prohibition of excessive penalties or treatment (an endorsement of proportionality),³⁰⁵ and that twenty-two states have constitutional clauses which prohibit cruel and unusual penalties, including eight states with a proportionate-penalty clause.³⁰⁶ Despite this, it has been contended that proportionality is a vacuous concept: it exists in the abstract only, devoid of even the sparsest of content.

The most obscure and problematic aspect of proportionality is that there is no stable and clear manner in which the hardship of the punishment can be matched to the

303. E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 154 (2008); *see also* Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington, and West Virginia).

304. *See* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, Policy Statement (U.S. SENTENCING COMM'N 2018).

305. SULLIVAN & FRASE, *supra* note 303, at 154–55.

306. *Id.* at 154.

severity of the crime. Jesper Ryberg, in the course of his rigorous and probing analysis of the proportionality principle, observes that one of the key criticisms of proportionality is that it “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”³⁰⁷ He further notes that to give content to the theory, it is necessary to rank crimes, rank punishments, and anchor the scales.³⁰⁸

The vagaries associated with proportionality are so pronounced that it is verging on doctrinal and intellectual fiction to suggest that an objective answer can be given to common sentencing dilemmas, such as how many years imprisonment is equivalent to the pain felt by an assault victim, whether a robber should be dealt with by way of imprisonment or fine, or the appropriate sanction for a drug trafficker. There is no demonstrable violation of proportionality if a mugger, robber, or drug trafficker is sentenced to either six to ten months or six to ten years imprisonment. The fact that the principle can be so flexible suggests that it is no principle at all, but rather a doctrinal expedient—a sophistry invoked by courts (and legislatures) as a means of justifying their intuitive sentencing impulses. The unstable and illusory nature of proportionality is, in our view, one of the reasons that the Supreme Court has consistently declined to invalidate crushing prison terms, even for relatively minor offenses. As noted by Richard Frase:

As is well known, the Court has been very reluctant to invalidate lengthy prison terms on Eighth Amendment grounds. Only one prisoner, in *Solem v. Helm*, has won such a claim in modern times. And in recent years the Court has upheld sentences of shocking severity—life without parole for a first-time offender charged with cocaine possession (admittedly, involving a very large quantity),

307. JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION* 184 (2004).

308. *Id.* at 185.

and a mandatory minimum prison term of twenty-five years to life for the crime of shoplifting several golf clubs.³⁰⁹

Despite infirmities with proportionality theories, such difficulties should not give rise to the inference that it is not doctrinally feasible to shore up the proportionality principle and inject it with concrete meaning. To do so requires a fundamental re-assessment of the principle. The starting point is to identify its constituent features. Broken down to its core elements, proportionality has two limbs: the seriousness of the crime and the harshness of the sanction. Further, the principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

While the complexity associated with operationalizing the principle has been noted by numerous scholars, one of us has argued elsewhere that there is one criterion that should be used to measure offense severity and the hardship of a sanction: individual well-being.³¹⁰ The type and degree of punishment imposed on offenders should cause them to have their well-being set back by an amount equal to that which the crime set back the well-being of the victim.

The main difficulty to this approach relates to mapping and calculating the notion of well-being.³¹¹ There is admittedly a degree of approximation involved in such an assessment. However, the level of accuracy in making such

309. See Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 57 (2008) [hereinafter Frase, *Limiting Excessive Prison Sentences*].

310. See Mirko Bagaric, *Injecting Content into the Mirage That is Proportionality in Sentencing*, 25 N.Z. U. L. REV. 411 (2013). The approach has some similarity with the majority opinion of Justice Powell in *Solem v. Helm*, who stated that the seriousness of the offense is determined by harm caused and the defendant's degree of culpability. 463 U.S. 277, 293–94 (1983); see also Frase, *Limiting Excessive Prison Sentences*, *supra* note 309, at 58. However, lacking in this analysis is the criteria by which harm is to be determined.

311. This argument is explored in greater depth elsewhere. See Bagaric et al., *supra* note 39 at 1715–18.

view to providing insight into calculations of offense seriousness or sanction severity, two tentative conclusions can be made regarding the relevance of the studies to the concept of proportionality.

First, property offenses—which deprive victims of wealth as opposed to diminishing their personal security—are over-rated in terms of their seriousness. Wealth has a far smaller impact on personal happiness than a range of other factors,³¹⁶ and hence, the criminal justice system should view these offenses less seriously. The main situation where property offenses make a significant adverse impact on victims is where they result in the victim living in a state of poverty. The second conclusion that follows from the above analysis is that offenses that imperil a person's sense of security, or otherwise negatively affect a person's health and capacity to lead a free and autonomous life, should be punished severely.

These conclusions are supported by studies that assess the impact of different forms of crime on victims. The available data suggests that victims of violent crime and sexual crime have their well-being more significantly set back than for other types of crime.³¹⁷ For example, one study showed that victims of violent crime, sexual crime in particular, have difficulty being involved in intimate relationships,³¹⁸ higher divorce rates,³¹⁹ diminished parenting skills (although this finding was not universal),³²⁰ lower levels of success in the employment setting,³²¹ and

316. *Money Can't Buy Happiness*, AM. PSYCHOL. ASS'N (Jun. 14, 2011), <http://www.apa.org/news/press/releases/2011/06/buy-happiness.aspx>.

317. Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189 (2010).

318. *Id.* at 190–91.

319. *Id.* at 191.

320. *Id.* at 190.

321. *Id.* at 191; *see also* MIKE DIXON ET AL., INST. FOR PUB. POLICY RESEARCH, CRIMESHARE: THE UNEQUAL IMPACT OF CRIME26 (2006), http://www.ippr.org/files/images/media/files/publication/2011/05/crimeshare_1500.pdf?noredirect=1.

much higher levels of unemployment.³²² Victims of property crimes likewise suffer reduced levels of well-being but at generally less pronounced rates than victims of sexual and violent crime.³²³

The other side of the proportionality equation—measuring punishment severity—is less contentious. Ryberg contends that this is because of the underlying belief that the “answer is pretty straightforward” as imprisonment is clearly the harshest disposition.³²⁴ As Ryberg notes, the answer would seem to rest on the “negative impact on the well-being of the punished.”³²⁵ To this end, it is clear that imprisonment is the harshest commonly applied sanction because, as previously discussed, it has a severe impact on the well-being of offenders.³²⁶

The final problem regarding proportionality is how to match the severity of the punishment with the seriousness of the offense. In light of the above discussion, this is, theoretically, relatively straightforward. The type and degree of punishment imposed on offenders should set their well-being back in an amount equal to that which the crime set back the well-being of the victim.³²⁷

The above approach assesses both the hardship of

322. Hanson et al., *supra* note 317, at 191.

323. See Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT'L REV. VICTIMOLOGY 141, 155–56 (1998).

324. RYBERG, *supra* note 307, at 102.

325. *Id.* at 102–03.

326. See *supra* Part II.

327. This is in keeping with the approach of some other theorists. Von Hirsch asserts that an interests analysis, similar to the living standard analysis he adopts for gauging crime seriousness, should be used to estimate the severity of penalties. Andrew Von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 34–35 (1991). Ashworth states that proportionality at the outer limits “excludes punishments which impose far greater hardships on the offender than does the crime on victims and society in general.” ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 97 (2d ed. 1995).

punishment and the severity of crime as they relate to well-being. This enables at least a crude match to be made, which stems from a number of premises. First, the crimes which have the most serious adverse consequences for victims are assault and sexual offenses. Secondly, the adverse effects of imprisonment seem to have been greatly undervalued. In light of this, a logical starting point is that, generally, imprisonment should be imposed only for sexual and violent offenses and most prison terms should be reduced compared to those currently imposed.³²⁸ Of course, this says nothing about the appropriate length of imprisonment for certain categories of sexual and violent offenses. However, it follows from the above that prison terms for most of these offenses should be reduced from existing norms given that current sentencing practices do not pay sufficient regard to the harshness of imprisonment.³²⁹

V. PRAGMATISM MEETS REALITY

The above discussion and analysis establish a number of important propositions and matters which can be used to put in place a clear and effective pathway for ameliorating mass incarceration. The first important fact to emerge is that the incarceration numbers in the United States are undesirable. This is not because they are massively out of keeping with and much higher than historical levels and current rates in other countries. Rather, incarceration rates are problematic because of the extraordinary financial burden they impose on the taxpayers and hidden humanistic burden they inflict on offenders and their relatives, which is shouldered disproportionately by the most socially and economically disadvantaged groups in the community. Moreover, there is no countervailing community benefit associated with mass

328. We suggest that most offenses should be dealt with in a manner which does not involve a term of imprisonment and that imprisonment should be mainly reserved for serious sexual and violent offenses.

329. See Bagaric et al., *supra* note 39.

incarceration. In particular, high prison rates do not correlate with a perceptible decrease in the crime rate.

The above discussion has also demonstrated that there is now a considerable degree of support for lowering prison numbers. The most effective manner in which to achieve this is by reduction in the severity of sanctions for a range of crimes. This momentum has already resulted in a slight decrease in prison numbers, mainly as a result of reforms in a number of American states. These reforms are, however, not coordinated, tend to be ad hoc, and provide no effective remedy for meaningfully reducing prison numbers in the foreseeable future.

Coherent and strategic sentencing reforms are needed to reduce prison numbers in a timely manner. These should be based on research findings regarding the appropriate objectives of sentencing and the empirical data regarding the connection between sanctions and crimes, and a fulcrum around which penalty levels should be based is the principle of proportionality. This analysis suggests that prison should be reserved for offenders who commit serious violent and sexual offenses.³³⁰ Offenders who commit other types of

330. The United States Sentencing Commission recently put out a preliminary version of its proposed amendments to major sentencing laws for 2019. *See generally* Proposed Amendments to the Sentencing Guidelines, 83 Fed. Reg. 65,400 (Dec. 20, 2018). The proposal includes suggestions for: USSG § 1B1.10, which deals with sentencing range guidelines; § 4B1.1-2, which deals with guidelines for punishing career offenders; and various technical and miscellaneous provisions throughout criminal sentencing laws.

The proposed amendments to career offender laws would touch primarily on violent crimes. *See id.* at 65,409. The judicial system currently uses a categorical or modified categorical approach to determine if a crime is a crime of violence, meaning that there are criteria that must be present in order to determine that a crime is violent. One proposed change would do away with this approach, allowing judges wide discretion in what they utilize to make the determination. *Id.* Another major proposal would affect the meaning of “robbery,” which is any theft that involves violence. One option would be to add a definition of “robbery” to the guideline for determining if an offender is a career offender. *Id.* at 65,411. Another would state that “robbery” in the enumerated offenses clause (which lists offenses that qualify a person as a career offender) is to be defined as it is in 18 U.S.C. § 1951. *Id.* Both would have a major impact on sentencing career

criminal offenses, such as property, fraud, immigration and drug offenses should be dealt with by other forms of sanctions. This would drastically reduce the crime rate given that about forty percent of offenders in American prisons are incarcerated for offenses not involving violence or sexual offending. This approach will not increase the crime rate. This bifurcated sentencing approach is not likely to be met with considerable community opposition given that it is sexual and violent offenses, which cause the most harm to victims.

For decades, scholars have been suggesting that penalty levels should be lower and that this type of approach should be adopted by lawmakers. The recommendations have not been acted upon, presumably because of the concern by politicians that tough on crime is a popular strategy, and the corollary that imposing softer penalties will lose votes. These concerns were understandable given the lack of empathy that seems to exist for criminals. However, the level of community awareness regarding the profound problems associated with mass incarceration is now relatively high. This is demonstrated in a compelling manner by the recent changes that have been made in numerous states that have led to the lowering of criminal sentences. Many of these were expressly approved by voters, often in what are regarded as more conservative red states. While these changes have not been uniform, there is a broad pattern that has emerged. The penalty reductions that have been enacted apply to offenders who have not committed violent or sexual offenses. These reforms have not come on the back of extensive scholarly analysis regarding the ideal approach to sentencing reform. They seem to be the product of the collective common sense of politicians and community groups. This is one situation in which common sense and research-based reforms brilliantly align. It is a fortuity that should not be missed by lawmakers. They are now in the rare situation where theoretically sound

offenders, as the task of defining “robbery” has typically been left to the courts.

but politically controversial reforms have been road tested and approved by the community. This provides them with the strongest possible reasons to implement wide-ranging, generational reforms to the criminal justice system.

This reform is supported by recent observations relating to what has termed the “uneven incarceration” burden in the United States. One issue that makes the United States unique is that it has both a functioning criminal justice system and high violent crime rate. Its counterparts in Western Europe and Japan have high-functioning criminal justice systems, but very low violent crime rates. While the United States had a homicide rate of 5.4 per 100,000 people in 2017, Germany had a rate of just 1.18 per 100,000 in 2016.³³¹ On the other hand, in countries such as Brazil, where the criminal justice system deals with overt corruption, the homicide rate is 29.5 per 100,000.³³²

As noted above, there seems to be a small to negligible link between mass incarceration and violent crime. This is further supported by a more wide-ranging analysis of crime and punishment. Germany’s incarceration rate was just 76 per 100,000 people in 2016, while the United States had a rate of 670 per 100,000 that same year.³³³ Brazil is in the middle, with 324 per 100,000 people.³³⁴ Charles Lane argues that uneven incarceration is one of the sources of America’s criminal justice woes.³³⁵ While the United States heavily incarcerates people for property and drug-related offenses, there are areas in the country that fail to adequately punish

331. Charles Lane, *Mass Incarceration Isn't Always the Issue. Uneven Incarceration Is.*, WASH. POST (Oct. 22, 2018), https://www.washingtonpost.com/opinions/mass-incarceration-isnt-always-the-issue-uneven-incarceration-is/2018/10/22/7920d058-d613-11e8-aeb7-ddcad4a0a54e_story.html?utm_term=.cd78e7bc84fd.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

violent crimes.³³⁶ For example, in places like Chicago and Baltimore, police often do not solve homicide crimes in low-income neighborhoods where gangs are prevalent and police-community relations are almost non-existent.³³⁷ These same areas experience some of the highest levels of homicide in the nation, which possibly contributes to the disparity in the incarceration and homicide rates that America faces.³³⁸

Therefore, America's uneven approach to criminal justice could be the cause of both its overly high incarceration and high homicide rates. While approximately forty percent of prisoners are serving time for violent crimes,³³⁹ the fact that some communities are passed over by law enforcement in the wake of violent crimes shows that they receive both an over- and under-enforcement of the law. They are disproportionately arrested and imprisoned for nonviolent and non-serious offenses, but are ignored as victims of serious crimes. This perpetuates the current problem, where the criminal justice system sometimes fails its duty of keeping communities safe, while over-emphasizing punishment for nonviolent offenses.³⁴⁰

To illustrate the manner in which a strategically-developed sentencing system would operate, we set out below current penalty levels and the presumptive penalty levels that should apply to a number of common offenses. We then stipulate the considerations that would lead to a penalty increase or decrease.³⁴¹ We contextualize the proposed penalty ranges by comparing them to the current penalties for each offense as prescribed by the *Federal Sentencing*

336. *Id.*

337. *See id.*

338. *See id.*

339. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

340. *See supra* Section IV.E (discussing the principle of proportionality).

341. The analysis and table are adopted from Bagaric & Gopalan, *supra* note 289, at 238–40.

Guidelines. By way of overview, all of the proposed penalties are significantly less severe than the current Federal Guideline penalty ranges.

TABLE 1. Guideline Penalty Ranges

Offense	Current Penalty Level (corresponding term of imprisonment)	Proposed Penalty Level (corresponding term of imprisonment)
Theft	6 (0–18 months' imprisonment)	0 ³⁴²
Theft more than \$15,000	10 (6–30 months' imprisonment)	1 (0–6 months' imprisonment) ³⁴³
Insider trading	10 (6–30 months' imprisonment)	1 (0–6 months' imprisonment) ³⁴⁴
Trafficking small quantities of drugs (e.g. less than 50 grams cocaine)	12 (10–37 months' imprisonment)	1 (0–6 months' imprisonment) ³⁴⁵
Burglary of a residence	17 (24–63 months' imprisonment)	1 (0–6 months' imprisonment) ³⁴⁶
Robbery (without the use of a weapon)	20 (33–87 months' imprisonment)	2 (1 years' imprisonment) ³⁴⁷
Robbery with a	23–27	3

342. *Cf.* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, ch. 5, pt. A Sentencing Table (U.S. SENTENCING COMM'N 2018) (contrasting this as a level six offense, which carries a penalty range of zero to eighteen months' imprisonment).

343. *Cf. id.* (contrasting this as a level ten offense, which carries a penalty range of six to thirty months' imprisonment).

344. *Cf. id.* § 2B1.4, ch. 5, pt. A Sentencing Table (contrasting this as a level eight to fourteen offense, which carries a penalty range of zero to forty-six months' imprisonment).

345. *Cf. id.* § 2D1.1(c), ch. 5, pt. A Sentencing Table (contrasting this as a level twelve offense, which carries a penalty range of ten to thirty-seven months' imprisonment).

346. *Cf. id.* § 2B2.1(a)(1), ch. 5, pt. A Sentencing Table (contrasting this as a level seventeen offense, which carries a penalty range of twenty-four to sixty-three months' imprisonment).

347. *Cf. id.* § 2B3.1, ch. 5, pt. A Sentencing Table (contrasting this as a level twenty offense, which carries a penalty range of thirty-three to eighty-seven

weapon	(46–162 months’ imprisonment)	(2 years’ imprisonment) ³⁴⁸
Aggravated assault	14–24 (15–125 months’ imprisonment)	6 (5 years’ imprisonment) ³⁴⁹
Trafficking large quantities of drugs (e.g. more than 450kg of cocaine)	38 (235 months’ imprisonment to life imprisonment)	6 (5 years’ imprisonment) ³⁵⁰
Kidnapping with ransom demand	32–38 (121 months’ imprisonment to life imprisonment)	8 (7 years’ imprisonment) ³⁵¹
Criminal sexual abuse (i.e. rape)	30–38 (97 months’ imprisonment to life imprisonment)	11 (10 years’ imprisonment) ³⁵²
First degree murder	43 (life imprisonment)	21 (20 years’ imprisonment) ³⁵³

The above suggestions for penalties are only presumptive, rather than mandatory, because there are a number of considerations that should be able to increase or decrease a penalty, which are respectively referred to as aggravating and mitigating considerations. They are valid

months’ imprisonment).

348. *Cf. id.* (contrasting this as a level twenty-three to twenty-seven offense, which carries a penalty range of 46–162 months’ imprisonment).

349. *Cf. id.* § 2A2.2, ch. 5, pt. A Sentencing Table (contrasting this as a level fourteen to twenty-four offense, which carries a penalty range of 15–125 months’ imprisonment).

350. *Cf. id.* § 2D1.1(c), ch.5 pt. A Sentencing Table (contrasting this as a level thirty-eight offense, which carries a penalty range of 235 months’ imprisonment to life imprisonment).

351. *Cf. id.* § 2A4.1, ch. 5, pt. A Sentencing Table (contrasting this as a level thirty-two to thirty-eight offense, which carries a penalty range of 121 months’ imprisonment to life imprisonment).

352. *Cf. id.* § 2A3.1, ch. 5, pt. A Sentencing Table (contrasting this as a level thirty to thirty-eight offense, which carries a penalty range ninety-seven months’ imprisonment to life imprisonment).

353. *Cf. id.* at § 2A1.1, ch. 5, pt. A Sentencing Table (contrasting this as a level forty-three offense, which carries a penalty of life imprisonment).

sentencing considerations because they logically, normatively, or empirically relate to justifiable sentencing objectives, which are typically community protection (incapacitation) or to the principle of proportionality, or they derive from an established criminal defense. The tables below set out our recommendations for the aggravating and mitigating considerations that should be recognized, the maximum weight that should be accorded to them, and the justification for taking them into account in the sentencing calculus.³⁵⁴

TABLE 2. Aggravating factors

Consideration	Maximum Weight	Rationale
Prior criminal record for serious sexual and violent offenses	50%	Incapacitation
High degree of involvement in crime	10%	Proportionality (culpability)
High degree of planning	10%	Proportionality (culpability)
High level of harm	10%	Proportionality (harm to victim)

354. These are derived from Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When It Comes to Punishing Criminals*, 62 BUFF. L. REV. 1159 (2014).

TABLE 3. Mitigating Considerations

Consideration	Maximum weight	Rationale
Severe impact from punishment (e.g., harsh prison conditions)	50%	Proportionality (harm to offender)
Plea of guilty	25%	Reduce delay and cost of criminal justice system
Assisting authorities	25%	Reduce crime
Socio-economic deprivation—only for nonsexual and non-violent offenses	25%	Proportionality (culpability)
Restitution of property	25%	Proportionality (harm to victim)
No prior convictions	25%	Incapacitation
Harm to dependents of the offender	20%	Innocent should not suffer
Incidental punishment	20%	Proportionality (harm to offender)
Spontaneous offending	10%	Proportionality (culpability)
Self-defense	10%	Failed criminal defense (coherency of the criminal law)
Necessity	10%	Failed criminal defense (coherency of the criminal law)
Duress or coercion	10%	Failed criminal defense (coherency of the criminal law)
Mental illness	10%	Failed criminal defense (coherency of the criminal law)

The above penalty adjustments set out the maximum discount or increase that should be permitted when the relevant consideration is applicable. In order to make mapping apposite to computerization, it is necessary to select a binary figure and it is a logical solution to pick the mid-point, which is half of each of the figures set out above.

That of course leaves the issue of how to deal with

nonviolent and nonsexual offenders. The current main alternative to prison is probation, which is a court-imposed order mandating correctional supervision in the community and is normally imposed as an alternative to incarceration.³⁵⁵ Offenders who are placed on probation are normally subjected to a number of restrictions. The most important condition is not to commit any further offenses.³⁵⁶ Other requirements typically include geographical restrictions (for example, constraints on where an offender can reside and travel) and behavioral restrictions, including a prohibition against offending, and consuming drugs and alcohol.³⁵⁷ These orders are monitored by a corrections officer. The monitoring is not pervasive. Generally, it consists of pre-organized meetings with a corrections officer.³⁵⁸ The default position is that offenders who are not subjected to prison terms should be placed on probation. However, probation has a number of problems regarding its efficacy as a sanction. These are so significant that they should encourage law makers to propose an alternative substitute sanction to prison. Criminal justice reform is a complex issue and hence the alternative sanction should only be implemented once the core reforms have been implemented, stabilized, and garnered general community support. However, for the sake of completeness, we provide an overview of the workings of the replacement sanction to incarceration.

The key problem with monitoring offenders on probation is that the supervision is only intermittent and hence there is ample opportunity for offenders to violate the conditions of

355. See KAEBLE & GLAZE, *supra* note 13.

356. See, e.g., 28 U.S.C. § 994(a)(3) (2012); 18 U.S.C. §§ 3563(a), 3583(d) (2012).

357. See, e.g., 18 U.S.C. §§ 3563(b), 3583(d) (2012).

358. See *generally* COLUMBIA UNIV. JUSTICE LAB, TOO BIG TO SUCCEED: THE IMPACT OF THE GROWTH OF COMMUNITY CORRECTIONS AND WHAT SHOULD BE DONE ABOUT IT (2018), https://justicelab.columbia.edu/sites/default/files/content/Too_Big_to_Succeed_Report_FINAL.pdf.

their orders. Not surprisingly, reoffending rates are high.³⁵⁹ Another problem with probation is its expense. It costs between \$1,000 to over \$4,000 annually³⁶⁰ to monitor each offender who is on probation.

To overcome these problems, one of us has suggested that probation should be replaced by a technological variant of the sanction, which involves live-time monitoring of the location and actions of offenders.³⁶¹ The broad thrust of the proposed new sanction is that the location of the offender will be ascertainable at every point in time. This will be achieved by the use of GPS tracking, which is already used for many offenders in the United States—at present, approximately 130,000 inmates are subject to electronic monitoring.³⁶² These tracking devices are typically fitted into ankle bracelets and charged by a twenty-four-hour battery. Monitors consist of a hard-plastic shell containing a GPS chip and a fiber-optic cable, and are affixed to the offender's ankle with a rubber strap.³⁶³ Any attempt to tamper with or remove the bracelet will result in a notification sent to the local enforcement authorities monitoring the device.³⁶⁴

In addition to this, sensors based on technology used in driverless cars could be used detect human movement in live-

359. Mirko Bagaric et al., *Introducing Disruptive Technology to Criminal Sanctions: Punishment By Computer Monitoring to Enhance Sentencing Fairness and Efficiency*, 84 BROOK. L. REV. (forthcoming 2019).

360. *Id.*

361. *Id.*

362. This has grown from 53,000 in 2005. PEW CHARITABLE TRUSTS, USE OF ELECTRONIC OFFENDER-TRACKING DEVICES EXPANDS SHARPLY 3 (2016), https://www.pewtrusts.org/-/media/assets/2016/10/use_of_electronic_offender_tracking_devices_expands_sharply.pdf.

363. See Mark Morri, *New Electronic Anklets a Tougher Collar for Prisoners*, DAILY TELEGRAPH (Dec. 11, 2014, 6:41 PM), <http://www.dailytelegraph.com.au/news/nsw/new-electronic-anklets-a-tougher-collar-for-prisoners/news-story/c2e00e5356bbf7a8e7596d4285df4971>; Rob Walker, *Contemplating the Criminal Justice Tool's Role in the Rehabilitation Process Amid the Wearable Tech Boom*, GOOD (Jan. 5, 2016), <https://www.good.is/features/issue-35-ankle-monitors>.

364. See Morri, *supra* note 363; Walker, *supra* note 363.

time and if suspicious activity occurs (such as movements consistent with the application of force or picking up a weapon). When such activity occurs, a camera can automatically be activated which will enable a corrections officer to gain a more accurate assessment of the relevant event. Furthermore, the data from the sensor would be stored and always available for evidential purposes.³⁶⁵

Thus, lawmakers find themselves in the rare but privileged position where there is a coincidence between implementing the normatively and empirically sound sentencing policies, and those which are almost certain to be socially and politically appealing to the wider community. The license to implement such reforms provides an ideal opportunity for definitive and effective criminal justice reform to occur. It is an opportunity that must be harnessed—there is certainly no excuse for failure to enact the reforms.

CONCLUSION

The mass incarceration crisis has caused immense suffering in America. Most obviously, it has resulted in a fiscal burden on governments that is now no longer readily sustainable and that diminishes the capacity of governments to fully deliver productive social services, including in the areas of education and health. Less evidently, but perhaps even more troubling, is the immense personal toll stemming from the imprisonment of more than two million Americans. Studies show that incarceration has severe incidental negative consequences on inmates, which go far beyond the deprivation of liberty. These include the increased risk of physical and sexual trauma, reduced life expectancy, and greatly reduced income producing capacity. The suffering of prison extends to the relatives of offenders and is felt most acutely by the children of offenders, who are far more likely

365. For a fuller discussion of the proposed sanction, see Bagaric, et al., *supra* note 359.

to develop psychological problems, live in poverty, and themselves ultimately be incarcerated at some point in their lives. Thus, imprisonment has significant unintended consequences, and when these are multiplied in the context of more than two million Americans, it is not surprising that mass incarceration has been labelled the greatest human rights crisis of our time.

There has been a discernible shift in the mindset of many Americans toward the tough on crime approach that spawned mass incarceration. This has been sparked by reports in the mass media that have highlighted the problems associated with exceedingly high prison numbers. It has also led to some action at the legislative level, which has seen a reduction in the penalties for some offenses and lowering of prison numbers. These changes are positive but they are far too insignificant in terms of what is needed to reduce incarceration numbers to acceptable levels. At the current rate of decline in prison numbers, it would take approximately fifty years for incarceration rates to reduce to levels in keeping with historical levels.

Thus, there is a need for active and systematic legislative change to lower prison numbers. In proposing and implementing these reforms, it is important that they do not have unintended negative consequences, especially in the form of increasing crime. In this Article, we have demonstrated that higher penalties do not deter potential offenders, nor do they discourage individual offenders from re-offending. Thus, the goals of general deterrence and specific deterrence cannot justify severe penalties. The goal of incapacitation is effective in relation to serious violent and sexual offenders, and can justify relatively harsh sentences for this cohort of criminals. However, it does not justify severe terms for other types of offenders, such as property and drug offenders, given that the financial cost of incarcerating these offenders normally outweighs the damage caused by these offenses. Moreover, the principle of proportionality only mandates prison terms for sexual and

violent offenders.

The other point of reference in proposing effective sentencing change is that it must be acceptable to the community, otherwise there will be no political will to instigate the reform. In this context, there is considerable learning to be gained from piecemeal reforms that have occurred in a number of American states, which have seen sentences for certain offenses being lowered and a consequent reduction in prison numbers. Although these reforms have not been consistent or uniform in their approach, a pattern that has emerged is that sentences have been reduced for certain categories of crimes, most commonly drug and property offenses. These reforms have often been implemented on the back of express voter approval and some have been in place for several years, allowing empirical information to be gained regarding their efficacy.

These reforms have been met with a high degree of approval and have been broadly effective in achieving their goal of reducing prison numbers, while not resulting in an increase in crime. As it transpires, the reforms are broadly in keeping with research-based findings about the steps that are necessary to improve the United States sentencing system. It is a rare case of bottom-up reform aligning closely with scholarly research.

The point has been reached, however, where the reforms need to be promulgated and implemented in a far more wide-ranging and systematic manner. There is no logical or pragmatic impediment to this occurring. Lawmakers need to significantly recalibrate penalty levels for most offense types, and implement the overarching framework that sex offenders and violent offenders should normally be sentenced to prison (although generally for shorter periods than is presently the situation) while imposing lesser forms of sanctions on other offenders. Drug, property, and immigration offenders should only be imprisoned in relation to the most serious forms of these offenses. These changes would quickly reduce prison numbers, save the community

billions of dollars, and make the criminal justice system more normatively sound without risking an increase in the crime rate.