

BRINGING SENTENCING INTO THE 21ST CENTURY: CLOSING THE GAP BETWEEN PRACTICE AND KNOWLEDGE BY INTRODUCING EXPERTISE INTO SENTENCING LAW

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I. INTRODUCTION

Sentencing law is the area of law where the state acts in its most coercive and authoritative manner against its citizens. It is fundamentally broken. There is no tenable rationale that can justify the shocking reality that there are currently more than two million Americans in prisons and local jails.¹ The rate of incarceration in the United States is the highest on earth and by a considerable margin, even when compared to other developed countries, most of which imprison their citizens at more than four times the world average.² It is apparent from a consideration of

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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, 28-33 (2011); Sharon Dolovich, *Creating the Permanent Prisoner, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 96, 96-105 (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).

2. WHITE HOUSE COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM* 23 (2016), <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf>.

imprisonment and severity-weighted crime rates³ that between 1983 and 2013 the United States became 165% more punitive.⁴

The most pressing and important issue relating to sentencing law and practice is its continued disregard of expert knowledge and empirical evidence. Sentencing is the area of law where there is the greatest gap between practice and what knowledge tells us can be achieved.⁵ All other social institutions and areas of learning, such as medicine, engineering, and education, readily embrace and change their practices in response to new learning that demonstrates more efficient and effective ways of achieving desirable outcomes. In sentencing, however, the dominant practices and reforms made in the last four decades, which are responsible for the mass incarceration crisis, have been implemented despite voluminous, largely academic, literature exposing their problems.⁶ Empirical evidence highlights that key sentencing objectives that have been invoked to justify heavier penalties, such as marginal general deterrence and specific deterrence, are flawed, yet they remain central goals of American sentencing systems.⁷

In this Article, we examine the reasons for the gulf between sentencing knowledge and practice, and make recommendations regarding the measures that need to be undertaken to bridge that gap, so that lawmakers bring sentencing practice in line with current knowledge

3. See PEW CHARITABLE TRS., THE PUNISHMENT RATE: NEW METRIC EVALUATES PRISON USE RELATIVE TO REPORTED CRIME 2 (2016), http://www.pewtrusts.org/~media/assets/2016/03/the_punishment_rate.pdf (“The severity-weighted crime rate captures the frequency and seriousness of reported crime per 100,000 residents, as measured by the seven specific offenses for which reliable, national data are available and that the FBI classifies as Part I offenses: criminal homicide, rape, robbery, aggravated assault, burglary, larceny, theft, and motor vehicle theft.”).

4. *Id.*

5. See *infra* Part IV.

6. See, e.g., NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES 116-17, 121-22 (Jeremy Travis et al. eds., 2014); MICHAEL TONRY, SENTENCING MATTERS 134 (1996); 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*, 37 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*, 13 CRIMINOLOGY & PUB. POL’Y 535, 536-39 (2014). See generally 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 (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 (2014) [hereinafter Tonry, *Remodeling American Sentencing*].

7. See *infra* Part IV.

in this area and make it fairer and more efficient.⁸ This is a greatly under-researched area of law and policy, and, if our proposals are adopted, the incarceration rate will be substantially reduced, far less taxpayer dollars will be spent on prisons, and the community is likely to be safer.

We argue that a key reason for the mass incarceration crisis and, ultimately, the separation between sentencing knowledge and practice, is the historical preference in the United States for retributive justice.⁹ While criminologists have attributed this emphasis to the so-called “tough on crime” rhetoric and policies that dominated criminal justice policy in the 1960s,¹⁰ “tough on crime” policies are deeply rooted in political, social, and economic traditions that were entrenched in American society well before the 1960s and, in some cases, even the 1860s.¹¹ The diverse sources of these attitudes are explored in greater detail in Part VI of this Article.¹² We maintain that, despite this longstanding attraction to retributive justice and criminals’ lack of political capital, attitudes can change and it is possible for sentencing practice to be reformed in response to expert knowledge.

Indeed, particularly in the past two years, concern about mass incarceration in the United States has been growing and there has been wide-ranging public discussion about the need for solutions. The issue has moved from academic inquiry to mainstream attention. Indeed, in July 2015, Barack Obama became the first sitting U.S. President to visit a U.S. prison when he visited a medium-security prison in central Oklahoma.¹³ Following the visit, “[t]he president called for lowering—if not ending—mandatory minimum sentences for non-violent drug offenses, restoring the voting rights of ex-felons, revisiting hiring practices that require applicants to list criminal activity, and expanding job training programs so inmates are better prepared to reintegrate into

8. This builds on previous work undertaken by one of us. See Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349, 374-409 (2014); 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, 179-97 (2016); Mirko Bagaric et al., *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. (forthcoming 2017) (on file with authors).

9. See *infra* Part VI.A.

10. See *infra* Part VI.A.

11. See *infra* Part VI.A.2.

12. See *infra* Part VI.A.

13. Sabrina Siddiqui, ‘An Injustice System’: Obama’s Prison Tour Latest in Late-Term Reform Agenda, GUARDIAN (July 17, 2015, 6:43 PM), <http://www.theguardian.com/us-news/2015/jul/16/barack-obama-prison-tour-criminal-justice-race-reform>.

society.”¹⁴ Former President Obama also mentioned the need for sentencing reform in his 2015 State of the Union address.¹⁵

In 2016, 30,000 people, including police officials, attorneys, and prosecutors, signed a public letter to Democratic Party presidential nominee Hillary Clinton and (now) President Donald J. Trump urging a fundamental re-think of sentencing law with a view to reducing incarceration numbers.¹⁶ The letter states as follows:

We want dangerous offenders off our streets, and behind bars. We want to make sure the people in the communities we serve are protected. . . . However, we also know that our burgeoning prison population is creating a new public safety challenge . . . over-relying on incarceration does not deter crime. As prison budgets have continued to rise, funding for state and local law enforcement has been slashed, negatively impacting innovative work in the field including diversion programs . . . and smart policing tactics. With finite prison space, we believe prison should be used for the most dangerous offenders. . . .

[We urge you to] support policy changes that appropriately address the burgeoning prison population through thoughtful and sensible measures that protect public safety. These include modifications to sentencing laws that carefully filter out the truly dangerous individuals who belong in prison and out of our communities, while allowing lower level offenders a chance for redemption through alternative punishments that are proven to reduce recidivism and rehabilitate. Such measures allow law enforcement to more effectively protect and serve our country.¹⁷

The current focus on problems with the sentencing system provides a window in which the community and lawmakers may be receptive to evidence-based reforms to sentencing. To take advantage of this opportunity, it is necessary to research systematically and understand the existing barriers to implementing progressive reforms to the sentencing system. In so doing, this Article will help surmount these obstacles and fill an important gap in the literature relating to sentencing reform.

14. *Id.*

15. Inimai M. Chettiar & Abigail Finkelman, *If You Blinked, You Missed When Obama Made Criminal Justice Reform History*, BRENNAN CTR. FOR JUST. (Jan. 13, 2016), <https://www.brennancenter.org/analysis/if-you-blinked-you-missed-when-obama-made-criminal-justice-reform-history>.

16. Letter from David LaBahn, President, Assoc. of Prosecuting Att’ys et al., to Donald J. Trump, Donald J. Trump for President & Sec’y Hillary Clinton, Hillary for Am. (July 13, 2016), <http://lawenforcementleaders.org/wp-content/uploads/2016/07/Law-Enforcement-Letter.pdf>.

17. *Id.*

In the next Part of this Article, we provide an overview of American sentencing law and practice.¹⁸ This is followed in Part III by an examination of key failings of the sentencing system.¹⁹ Part IV demonstrates the existence of the gap between sentencing practice and knowledge.²⁰ In this Part, we provide an overview of the current state of learning about objectives that can be achieved through a state-based system of punishment. We demonstrate that the two primary sentencing goals, which have resulted in increased prison numbers, are flawed. Empirical data shows that the theory of (marginal) general deterrence²¹ is unsound, as harsher penalties do not deter individuals from committing crimes. Incapacitation²² (as a means of community protection) is also a misguided ideal for several reasons, including because there are no accurate methods for predicting which serious offenders are likely to reoffend. Specific deterrence, which is another, though less invoked, sentencing objective, is also misconceived. It is founded on the theory that harsh penalties will dissuade individual offenders from reoffending to avoid again being subjected to criminal punishment, but harsh penalties probably have the opposite effect and increase recidivism.²³ In this Part, we suggest that an evidence-based sentencing system would almost halve prison numbers. This outcome would be achieved by adopting a bifurcated system whereby prison sentences are reserved mainly for serious violent and sexual offenders, while more lenient sanctions are imposed on other offenders (such as those who commit fraud, property, immigration, and drug offenses).²⁴

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. This is the theory that there is a link between harsh penalties and lower crime. See *infra* Part IV.B.

22. This is often used interchangeably with the objective of community protection. See *infra* Part IV.B.

23. See *infra* Part IV.A.

24. Approximately half of the offenders in U.S. state and federal prisons are not detained for sexual or violent offenses. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248955, PRISONERS IN 2014, at 11, 16 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>. In 2013, there were 1,325,305 prisoners in U.S. state prisons. *Id.* at 30 tbl.4. The most serious offense categories for these prisoners were as follows: violent 704,800; property 255,600; drug 208,000; public order 146,300; and other 10,600. *Id.* There were 192,663 prisoners in U.S. federal prisons as of September 2014. *Id.* at 30 tbl.5. Their most serious offenses were as follows: violent 14,100; property 11,600; drug 96,500; public order 69,100; other 21,400. *Id.* Thus, less than half of the total inmates (forty-seven percent) in federal and state prisons are imprisoned for sexual and violent offenses. See *id.* at 30. In addition to this, there was an estimated 744,600 inmates in local jails. Press Release, Bureau of Justice Statistics, The Nation's Jails Held Fewer Inmates at Midyear 2014 Compared to Their Peak Count in 2008 (June 11, 2015), <http://www.bjs.gov/content/pub/press/jim14pr.cfm>. This data, however, is not as accurate. See *Data Collection: Annual Survey of Jails*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=261> (last visited Apr.

The fact that lawmakers continue to pursue demonstrably unattainable objectives indicates their unwillingness to allow sentencing policy decisions to be guided by experts in the field, but also scholars' and jurists' failure to promulgate their learning in an effective manner that shapes critical social and legal policy.

Part V highlights the current mainstream focus on sentencing law and appetite for fundamental reform of this area.²⁵ It provides some basis for confidence that lawmakers may finally be receptive to evidence-based suggestions regarding the development of sentencing law.

In Part VI, we discuss the reasons for the mass incarceration crisis, which have led to the resistance of sentencing law and practice to expert-based reforms.²⁶ We maintain that a major cause of the crisis is retributive attitudes to criminal justice in the United States, which are deeply entrenched in American politics, culture, and society, and have manifested most recently in the embrace of "tough on crime" policies. We demonstrate that such punitive attitudes have been generated and fueled by racism, the crime wave from about 1960 to 1980, economic instability over the past three decades, and the privatization of aspects of criminal justice policy and practice. In this Part of the Article, we offer solutions to overcome, or at least minimize, these barriers to expert-based sentencing reform.

We also argue that mass incarceration is attributable to a considerable knowledge gap regarding a core component of the sentencing system, namely, the proportionality principle. Proportionality, at least in theory, is universally endorsed as a bulwark of sentencing.²⁷ In its crudest form it is the intuitively appealing principle that the "punishment should fit the crime."²⁸ The principle is so alluring that it is normally endorsed without qualification. However, it suffers from a fundamental problem: it is devoid of clear criteria. While there is near universal agreement that the seriousness of the punishment should match the gravity of the crime, there is not even a remote consensus regarding how these two limbs should be calibrated. The principle is so nebulous that it can be used to justify a ten-month or a ten-year prison term for a drug trafficker or an inside trader. A principle that is so fluid is in fact no principle at all; it is a meaningless, abstract

10, 2017) ("Collects data from a nationally representative sample of local jails on jail inmate populations, jail capacity, and related information. The collection began in 1982 and has been conducted annually, except for years 1983, 1988, 1993, 1999, and 2005, during which a complete census of U.S. local jails was conducted.").

25. See *infra* Part V.

26. See *infra* Part VI.

27. See *infra* Part VI.B.

28. See *infra* Part VI.B.

aspiration. We contend that scholars' failure to formulate a coherent and persuasive theory of proportionality has made it easy, and even inevitable, for lawmakers to ignore sentencing knowledge in the design and promulgation of sentencing law and policy.²⁹ In this Part of the Article, we attempt to give content to the principle of proportionality.

Before proceeding to substantive matters, it is opportune to deal with an ostensible paradox in this Article. A key argument of this Article is that scholarly writing, essentially in the forms of academic articles and books, has been largely ineffective in influencing sentencing reform. Yet, in our view, it is still important to raise this for discussion in an Article that will reach principally an academic audience because, in order to remedy any problem, the first step is to identify and recognize it, and this scholarly audience has the knowledge and resources to adjust its methods so that it does influence the direction of sentencing law and practice.

II. OVERVIEW OF THE CURRENT SENTENCING SYSTEM

We commence our analysis by providing a brief overview of the sentencing framework in the United States. All state and federal jurisdictions have their own sentencing regimes.³⁰ Each system has distinctive features, but there are considerable similarities in the overarching objectives of sentencing throughout the United States. The main objectives of sentencing are community protection (also known as incapacitation),³¹ general deterrence,³² specific deterrence,³³ rehabilitation,³⁴ and retribution.³⁵ While the objectives are relatively uniform, they are not equal in weight, and community protection has been the dominant aim of sentencing in the United States for the past forty years.³⁶

29. See *infra* notes 402-09 and accompanying text.

30. Sentencing—and, more generally, criminal law—in the United States is mainly the province of states. See *United States v. Morrison*, 529 U.S. 598, 612-13 (2000).

31. Incapacitation is the theory that imprisoning offenders or curtailing their freedom by other means reduces the crime rate. See Bagaric, *supra* note 8, at 382-91.

32. General deterrence is the theory that there is a link between harsher penalties and lower crime. See *id.* at 377.

33. Specific deterrence is the theory that harsh penalties discourage recidivism in offenders who are subjected to these sanctions. See *id.* at 375.

34. Rehabilitation is the theory that crime can be reduced by treatment, which elicits positive attitudinal reform in offenders. See *id.* at 391.

35. Retribution is the theory that criminal offending should be met with a stern response. See *id.* at 394-95. These objectives are set out in U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2015).

36. NAT'L RESEARCH COUNCIL, *supra* note 6, at 7.

The goal of community protection has been most pointedly pursued through the enactment of prescriptive sentencing laws, which significantly limit judicial discretion³⁷ and often prescribe prison terms. Fixed minimum or presumptive penalties³⁸ now apply (to varying degrees) in all jurisdictions in the United States.³⁹ Prescribed penalties are often set out in sentencing grids, which normally use criminal history scores⁴⁰ and offense seriousness to calculate appropriate penalties. These grids are sometimes referred to as sentencing guidelines.⁴¹ The penalties prescribed by the guidelines have been criticized as being too harsh. Typical of this sentiment is the following observation by Michael Tonry:

Anyone who works in or has over time observed the American criminal justice system 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), life-without-possibility-of-parole laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by “career criminal,” “dangerous offender,” and “sexual predator” laws. These laws, because they required sentences of historically

37. *See id.* at 3. As noted by William W. Berry III:

Prior to 1984, federal judges possessed discretion that was virtually “unfettered” in determining sentences, guided only by broad sentence ranges provided by federal criminal statutes. The Sentencing Reform Act of 1984 (the “Act”) 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.

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).

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

39. 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, CTR. FOR LAW & GLOB. JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 46-47 (2012) (noting that 137 of 168 surveyed countries had some form of minimum penalties, but none were as wide-ranging or severe as those in the United States). However, as noted below, not all jurisdictions have comprehensive guideline systems.

40. This is based mainly on the number, seriousness, and age of the prior convictions. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2A2.3.

41. *See* Richard S. Frase & Kelly Lyn Mitchell, *What Are Sentencing Guidelines?*, UNIV. MINN. ROBINSON INST. CRIM. L. & CRIM. JUST., <http://sentencing.umn.edu/content/what-are-sentencing-guidelines> (last visited Apr. 10, 2017) (defining sentencing guidelines as rules that “(1) are currently in effect; (2) recommend sentences, for most types of crime or at least most felonies, that are deemed to be appropriate in typical cases of that type (i.e., cases that do not present aggravating or mitigating factors that might permit departure from the recommendation); (3) were developed initially or later endorsed by a legislatively-created sentencing commission (regardless of whether the rules are embodied in statutes, and even if the sentencing commission ceased to exist at some point after the guidelines went into effect); and that (4) judges are legally required to consider (even if the judge is then free to ignore the applicable recommendation), or that it appears judges are considering even if they are not required to”).

unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.⁴²

It has been contended that none of these policies, which have led to the increase in fixed penalties, emanated from a clear theoretical foundation, but rather stemmed from “back-of-an-envelope calculations and collective intuitive judgements.”⁴³ In a similar vein, Douglas Berman and Stephanos Bibas state that “[o]ver the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules.”⁴⁴

As we discuss further in Part VI of this Article, this transition has been caused, to a considerable degree, by the extensive involvement of non-judicial bodies in determining the nature and length of sentences.⁴⁵ These non-judicial bodies include legislatures, at both federal and state levels, and state electorates themselves, which determine policy directly through “proposition” ballots.⁴⁶ In addition, the direct election of judges and prosecutors (a distinguishing feature of the American judicial system) has contributed markedly to the exceptional severity and rigidity of sentencing in the United States.⁴⁷ Fear of electoral retribution among assembly members (who face the verdict of the electorate far more frequently and in more forms than legislators in most other nations) and among judicial officers has encouraged the adoption of a “tough on crime agenda” which has resulted in harsh and often compounding sentences.⁴⁸

As a consequence of these practices, more offenders have been sentenced to prison and to longer terms of imprisonment.⁴⁹ For example, a 2012 report by the Pew Center on the States found that the average

42. Tonry, *Remodeling American Sentencing*, *supra* note 6, at 514 (citations omitted).

43. Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in PREVIOUS CONVICTIONS AT SENTENCING 93 (Julian V. Roberts & Andrew von Hirsch eds., 2010); see Alschuler, *supra* note 6, at 92-95. For further criticism of the Guidelines, see Berman & Bibas, *supra* note 6, at 40-54; and Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 180-86 (2010).

44. Berman & Bibas, *supra* note 6, at 40.

45. See *infra* Part VI.A.5.

46. See *infra* Part VI.A.5.

47. See *infra* Part VI.A.5.

48. See, e.g., NAT'L RESEARCH COUNCIL, *supra* note 6, at 123-24.

49. MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. ON BUDGET & POLICY PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION 5-6 (2014), <http://www.cbpp.org/sites/default/files/atoms/files/10-28-14sfp.pdf>; see also PEW CHARITABLE TRS., MORE PRISONERS, LESS PROBATION FOR FEDERAL OFFENDERS (2016), http://www.pewtrusts.org/~media/assets/2016/01/pspp_fs_moreprisonlessprobation_v1.pdf.

length of prison sentences has increased thirty-six percent since 1990.⁵⁰ A more recent report by the Sentencing Project notes that more than ten percent of prisoners in U.S. prisons are serving a life sentence.⁵¹ This is more than four times the rate in 1984 (despite crime rates declining during this period).⁵² Further, the number of prisoners serving a life sentence without the possibility of parole had increased by twenty-two percent between 2008 and 2013.⁵³

As discussed further below,⁵⁴ some of the increases to the severity of sanctions and the incarceration rate may have initially, at least partly, responded to increased rates of crime, but there has been a marked reduction in the crime rate in the last two decades.⁵⁵ It has been noted that, in recent years, violent crime has decreased nationally “by a standard measure of about forty percent,” and “in New York City by as much as eighty percent. By 2010, the crime rate in New York had seen its greatest decline since the Second World War; in 2002, there were fewer murders in Manhattan than there had been in any year since 1900.”⁵⁶

The crime rate continues to diminish, contrary to assertions by President Trump that America is becoming more dangerous.⁵⁷ Further, the most recent evidence regarding crime trends in states that have increased or decreased incarceration levels debunks the view that more prisoners leads to less crime. The Brennan Center for Justice, in its recent report entitled *Update: Changes in State Imprisonment Rates*, examined data from all fifty states on crime and imprisonment from 2006 to 2014.⁵⁸ The key findings are as follows:

50. See PEW CTR. ON THE STATES, *TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS* 13 tbl.1 (2012), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf.

51. See THE SENTENCING PROJECT, *LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA* 13 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

52. *Id.*

53. *Id.*

54. See *infra* Part IV.B.

55. The serious crime rate in the United States started dropping in the early 1990s. See D’Vera Cohn et al., *Gun Homicide Rate Down 49% Since 1993 Peak; Public Unaware*, PEW RES. CTR. (May 7, 2013), <http://www.pewsocialtrends.org/2013/05/07/gun-homicide-rate-down-49-since-1993-peak-public-unaware>.

56. Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>.

57. See Gabriel Dance & Tom Meagher, *Crime in Context: Violent Crime Is Up in Some Places, but Is It Really a Trend?*, MARSHALL PROJECT (Aug. 18, 2016, 2:20 PM), <https://www.themarshallproject.org/2016/08/18/crime-in-context#2Qv1Y1SZF>.

58. See LAUREN-BROOKE EISEN & JAMES CULLEN, BRENNAN CTR. FOR JUST., *UPDATE: CHANGES IN STATE IMPRISONMENT RATES 1* (2016), <https://www.brennancenter.org/sites/default/files/analysis/UpdateChangesinStateImprisonment.pdf>.

1. Many argue that increased incarceration is necessary to reduce crime. Yet the data shows the opposite. Over the last ten years, 27 states have decreased both crime and imprisonment. Not only is this trend possible, it's played out in the majority of states. Nationally, imprisonment and crime have fallen together, 7 percent and 23 percent respectively since 2006. Crime continued its downward trend while incarceration also decreased.
2. In recent years, states in the South have seen some of the largest decreases in imprisonment. Yet, they also remain the largest incarcerators in the country. Mississippi reduced imprisonment by 10 percent but still has the nation's 5th highest incarceration rate. Texas has reduced imprisonment by 15 percent yet still has the 7th highest imprisonment rate in the country.⁵⁹

While all American states have some form of prescribed penalties, not all have wide-ranging guideline sentencing systems. The Robina Institute notes that twenty U.S. jurisdictions currently have guideline sentencing systems.⁶⁰ The most extensively analyzed prescribed penalty laws are found in the *United States Sentencing Guidelines Manual* ("Guidelines").⁶¹ The Guidelines are important because of the large number of offenders sentenced under the federal system and the significant doctrinal influence they have exerted at the state level.⁶²

The United States Sentencing Commission notes that the Guidelines aim to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation."⁶³ The Guidelines state that "the [Sentencing Reform] Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system,"⁶⁴ and "[m]ost observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime."⁶⁵ The principle of

59. *Id.* (footnote omitted). *But see* Aamer Madhani, *Chicago Hits Grim Milestone of 700 Murders for 2016 and the Year's Not over*, USA TODAY (Dec. 1, 2016, 1:49 PM), <http://www.usatoday.com/story/news/2016/12/01/chicago-700-murders-2016/94732276> (reporting an increase in the number of murders in Chicago in 2016).

60. The jurisdictions are as follows: Federal (U.S. courts), Alabama, Alaska, Arkansas, Delaware, District of Columbia, Florida, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Washington. Frase & Mitchell, *supra* note 41.

61. U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2015).

62. *See* Berman & Bibas, *supra* note 6, at 40-42. There are more than 200,000 federal prisoners. *See* CARSON, *supra* note 24, at 2 tbl.1. Also, the broad structure of the Guidelines is similar to many other guideline systems in that the penalty range is not mandatory and permits departures in certain circumstances. Frase & Mitchell, *supra* note 41.

63. U.S. SENTENCING GUIDELINES MANUAL ch. 1 pt. A.

64. *Id.* at 2.

65. *Id.* at 4.

proportionality is pursued in the Guidelines “through a system that imposes appropriately different sentences for criminal conduct of differing severity.”⁶⁶ The sentencing ranges were not developed in abstract or against a purely theoretical model, but were influenced by an analysis of over 40,000 sentences that had been imposed.⁶⁷

Like most grid sentencing systems, the key considerations that determine the nature of a penalty under the Guidelines are the perceived severity of the offense and the criminal history of the offender.⁶⁸ Prior convictions can have a considerable impact on penalty, and in some cases lead to an approximate doubling of the sentence. For example, an offense at level 15⁶⁹ in the Guidelines carries a presumptive penalty for a first offender of imprisonment for 18 to 24 months,⁷⁰ which increases to 41 to 51 months for an offender with 13 or more criminal history points.⁷¹ For an offense at level 35, a first offender has a guideline penalty range of 168 to 210 months, which increases to 292 to 365 months for an offender with the highest criminal history score.⁷² Thus, an extensive criminal history can add 155 months (more than 12 years) to a jail term.⁷³

Following the U.S. Supreme Court decision of *United States v. Booker*,⁷⁴ the Guidelines are no longer mandatory but advisory.⁷⁵ While

66. *Id.* at 3.

67. *See id.* at 11 (“The Commission emphasizes that it drafted the initial guidelines with considerable caution. It examined the many hundreds of criminal statutes in the *United States Code*. It began with those that were the basis for a significant number of prosecutions and sought to place them in a rational order. It developed additional distinctions relevant to the application of these provisions and it applied sentencing ranges to each resulting category. In doing so, it relied on pre-guidelines sentencing practice as revealed by its own statistical analyses based on summary reports of some 40,000 convictions, a sample of 10,000 augmented presentence reports, the parole guidelines, and policy judgments.”).

68. *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1113-16 (2008).

69. U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A. The offense levels range from 1 (least serious) to 43 (most serious). *Id.*

70. *Id.*

71. *Id.* The criminal history score ranges from zero to thirteen or more (worst offending record). *Id.*

72. *Id.*

73. *Id.*

74. 543 U.S. 220 (2005). In *Booker*, the Supreme Court held that aspects of the Guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial. *See id.* at 258; *see also* *Pepper v. United States*, 562 U.S. 476, 481 (2011) (“[W]hen a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant’s postsentencing rehabilitation [that may] support a downward variance from the now-advisory Federal Sentencing Guidelines range.”); *Greenlaw v. United States*, 554 U.S. 237, 249-50 (2008); *Irizarry v. United States*, 553 U.S. 708, 715 (2008) (“[T]here is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a).”); *Gall v. United States*, 552 U.S. 38,

the Guidelines do remain an influential sentencing reference point, courts are beginning to deviate from them. Until recently, sentences within the Guidelines were still the norm.⁷⁶ In 2014, however, for the first time, federal courts imposed more sentences that were outside the Guidelines than sentences that were within them.⁷⁷ The margin is small (fifty-four to forty-six percent), but it does reflect a trend by the judiciary to adhere to the Guidelines less closely than in the past.⁷⁸

While criminal history score and offense severity are cardinal sentencing considerations, other matters also influence the penalty. Courts can depart from a guideline for a number of reasons. The most wide-ranging guideline is 18 U.S.C. § 3553, which states:

- (a) Factors to be Considered in Imposing a Sentence—The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this

41 (2007) (“[W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”); *Rita v. United States*, 551 U.S. 338, 350-51 (2007) (holding that federal appellate court may apply presumption of reasonableness to district court sentence that is within properly calculated Guidelines range).

75. Consequently, district courts are required to properly calculate and consider the Guidelines when sentencing, even in an advisory guideline system. *See* 18 U.S.C. § 3553(a)(4)–(5) (2012); *Gall*, 552 U.S. at 48 (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated Guidelines range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). *See Rita*, 551 U.S. at 350-51; *see also Gall*, 552 U.S. at 46-47 (“[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. . . . [A]ppellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines.”).

76. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); *see* AMY BARON-EVANS & JENNIFER NILES COFFIN, NO MORE MATH WITHOUT SUBTRACTION: DECONSTRUCTING THE GUIDELINES’ PROHIBITIONS AND RESTRICTIONS ON MITIGATING FACTORS 76-77 (2011), https://www.fd.org/docs/select-topics--sentencing/no_more_math_without_subtraction.pdf. For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, *see* William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 247 (Julian V. Roberts ed., 2011).

77. *See* U.S. SENTENCING COMM’N, FINAL QUARTERLY DATA REPORT, FISCAL YEAR 2014, at 1 tbl.1 (2014), http://www.usc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf.

78. *See id.*

subsection. The court, in determining the particular sentence to be imposed, shall consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed:
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner⁷⁹

The Guidelines set out over three dozen considerations that can affect the penalty⁸⁰ and several considerations that should not receive any weight.⁸¹ To determine the appropriate penalty, courts may factor in a number of mitigating and aggravating considerations, which are formulated as “adjustments” and “departures.”⁸²

Adjustments are considerations that increase or decrease penalty by a designated amount.⁸³ For example, a demonstration of remorse can result in a decrease of penalty by up to two levels and, if it is accompanied by an early guilty plea, it can decrease a penalty by three levels.⁸⁴ If a departure is applicable, courts can more readily impose a sentence outside the applicable Guidelines range.⁸⁵ Moreover, as noted above, pursuant to 18 U.S.C. § 3553, the Guidelines permit, in rare instances, considerations that are not set out in the Guidelines to justify departures from the range.⁸⁶ Thus, the range of aggravating and

79. For a discussion of the operation of this provision, see Berry III, *supra* note 76, at 247-49.

80. *Id.*

81. For a historical overview of the development of aggravating and mitigating considerations in the Guidelines, see BARON-EVANS & COFFIN, *supra* note 76, at 2-6.

82. See U.S. SENTENCING GUIDELINES MANUAL ch. 3, 5, pt. K (U.S. SENTENCING COMM’N 2015).

83. These are set out in chapter 3 of the Guidelines.

84. *Id.* § 3E1.1. However, the Guidelines also provide that the court cannot depart from a guideline range as a result of the following:

The defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court.

Id. § 5K2.0(d)(4).

85. See *id.* ch. 1, pt. A, at 6-7.

86. *Id.* § 5K2.0(a)(2)(B); see *Pepper v. United States*, 562 U.S. 476, 481 (2011); *Gall v.*

mitigating considerations set out in the Guidelines is not exhaustive. Where a court departs from the applicable range, it is required to state its reason for doing so.⁸⁷

This general approach to sentencing guidelines, whereby the guidelines strongly influence penalty and define, but do not prioritize the broad objectives of sentencing, is common.⁸⁸ Introducing expertise into sentencing law would not necessarily result in an abolition of sentencing guidelines, but it could lead to profound changes to the severity of most penalties set out in those guidelines.⁸⁹ These changes are detailed in Part VI of this Article.⁹⁰ We consider next, in greater detail, the problems stemming from current sentencing practice.

III. PROBLEMS WITH THE CURRENT SENTENCING SYSTEM: FINANCIALLY UNSUSTAINABLE AND UNDULY HARSH

Sentencing in the United States suffers from two main problems: the financial cost of prisons is unsustainable, and the hardship inflicted on prisoners is morally unjustifiable.⁹¹ These problems attest to the “divorces between sentencing policy and either evidence or normative theory.”⁹² Before analyzing the normative problem of mass incarceration, we set out in greater detail the nature and extent of the fiscal burden that the current prison situation has generated.

A. Current Incarceration Levels Are Financially Unsustainable

More than 2 million Americans are incarcerated in federal and state prisons and local jails.⁹³ This equates to an imprisonment rate of approximately 700 adults for every 100,000 people in the adult population.⁹⁴ This rate has increased more than four-fold over the past

United States, 552 U.S. 38, 46-53 (2007).

87. U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(e).

88. Frase & Mitchell, *supra* note 41.

89. See Bagaric & Gopalan, *supra* note 8, at 212-16, 227-35.

90. See *infra* Part VI.

91. See *infra* Part III.A–B.

92. Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 146 (2013).

93. The exact number of prisoners is 2,217,000. Inst. of Criminal Policy Research, *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited Apr. 10, 2017); see also E. ANN. CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 243920, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES, 1991–2012, at 1-6 (2013), <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf> (examining trends in prison admissions and releases). For a breakdown of the incarceration numbers, see Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2015*, PRISON POL’Y INITIATIVE (Dec. 8, 2015), <http://www.prisonpolicy.org/reports/pie2015.html>.

94. Inst. for Criminal Policy Research, *United States of America*, WORLD PRISON BRIEF,

forty years.⁹⁵ The United States now has the highest incarceration rate in the developed world,⁹⁶ and by a large margin. The imprisonment rate in most developed countries is five to ten times less than that of the United States,⁹⁷ and on average, that rate is six times the imprisonment rate of a typical nation in the Organisation for Economic Co-Operation and Development (“OECD”).⁹⁸

It is now widely accepted both domestically and internationally that the United States has a “serious over-punishment” and “mass incarceration” problem.⁹⁹ Vivien Stern, Secretary General of Penal Reform International, stated that “[a]mong mainstream politicians and commentators in Western Europe, it is a truism that the criminal justice system of the United States is an inexplicable deformity.”¹⁰⁰

The main tangible disadvantage of the high incarceration rate in the United States is the public cost of imprisoning so many offenders. The total cost of corrections in the United States is \$80 billion annually.¹⁰¹ Between 1980 and 2010, the per capita expenditure on corrections has more than tripled, even taking into account the growing population.¹⁰²

<http://www.prisonstudies.org/country/united-states-america> (last visited Apr. 10, 2017).

95. NAT’L RESEARCH COUNCIL, *supra* note 6, at 13.

96. *Criminal Justice Facts*, SENT’G PROJECT, <http://www.sentencingproject.org/criminal-justice-facts> (last visited Apr. 10, 2017); Nick Wing, *Here Are All of the Nations That Incarcerate More of Their Population Than the U.S.*, HUFFINGTON POST (Aug. 13, 2013, 8:21 AM), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html. Current incarceration rates are historically and comparatively unprecedented. The United States has the highest incarceration rates in the world, reaching extraordinary absolute levels in the most recent two decades. NAT’L RESEARCH COUNCIL, *supra* note 6, at 68.

97. See NAT’L RESEARCH COUNCIL, *supra* note 6, at 2.

98. MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, BROOKINGS, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES: POLICY MEMO 10 (2014). Rates in the OECD range from 47 to 266 per 100,000 adult population. *Id.*; see also Wing, *supra* note 96 (“At 716 per 100,000 people in 2013, according to the International Centre for Prison Studies, the U.S. tops every other nation in the world. Among OECD countries, the competition isn’t even close—Israel comes in second, at 223 per 100,000.”).

99. See, e.g., THOMPSON, *supra* note 1, at 9-15; Adelman, *supra* note 1, at 295-96, 306-07; Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 323 (2009); Harcourt, *supra* note 1, at 970-78; Taslitz, *supra* note 1, at 153-64. The problem is so acute that even a “Reverse Mass Incarceration Act” has been proposed. LAUREN-BROOKE EISEN & INIMAI M. CHETTIAR, BRENNAN CTR. FOR JUSTICE, THE REVERSE MASS INCARCERATION ACT 7-15 (2015), https://www.brennancenter.org/sites/default/files/publications/The_Reverse_Mass_Incarceration_Act%20.pdf; see U.S. JUSTICE ACTION NETWORK, REFORMING THE NATION’S CRIMINAL JUSTICE SYSTEM: THE IMPACT OF 2015 AND PROSPECTS FOR 2016, at 3-6 (2015), <http://www.justiceactionnetwork.org/wp-content/uploads/2015/12/Justice-Action-Network-Year-End-Report.pdf>.

100. Vivien Stern, *The International Impact of U.S. Policies*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 279, 280 (Marc Mauer & Meda Chesney-Lind eds., 2002).

101. KEARNEY ET AL., *supra* note 98, at 13.

102. *Id.*

In real terms, spending has increased from \$77 yearly by each U.S. resident in 1980 to \$260 in 2010.¹⁰³ The scale of the spending, even for the world's largest economy, is considerable and not readily sustainable. It is impinging on the American government's capacity to fund vital social services, including health and education.¹⁰⁴ A recent report by the Center of Budget and Policy Priorities illuminates that eleven American states spend more on prisons than on higher education.¹⁰⁵ Overall, American states' expenditure on incarceration in the past twenty years has risen six times more than the rate of expenditure on higher education.¹⁰⁶ The National Research Council observes:

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.¹⁰⁷

It is important to recognize that there are some regional variations in this spending. Professor Marie Gottschalk of the University of Pennsylvania, for example, has suggested that “[s]tates spend roughly two-to-three percent of their budgets on corrections.”¹⁰⁸ While

103. *Id.*

104. For an analysis on why mass incarceration is flawed from the financial perspective, see Jason Furman & Douglas Holtz-Eakin, Opinion, *Why Mass Incarceration Doesn't Pay*, N.Y. TIMES (Apr. 21, 2016), http://www.nytimes.com/2016/04/21/opinion/why-mass-incarceration-doesnt-pay.html?_r=0.

105. MITCHELL & LEACHMAN, *supra* note 49, at 1. Reduced investment in education is also occurring at the more junior education level. *See id.* at 10 (“In recent years, though, 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%. The 3 states with the deepest funding cuts since the recession hit—Alabama, Arizona, and Oklahoma—are among the ten states with the highest incarceration rates.” (footnote omitted)); *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: Arizona, Colorado, Connecticut, Delaware, Massachusetts, Michigan, New Hampshire, Oregon, Pennsylvania, Rhode Island, and Vermont).

106. *See* Gopnik, *supra* note 56.

107. NAT'L RESEARCH COUNCIL, *supra* note 6, at 314 (citation and footnote omitted); *see also* KEARNEY ET AL., *supra* note 98, at 13.

108. BETTINA MUENSTER & JENNIFER TRONE, WHY IS AMERICA SO PUNITIVE? A REPORT ON THE DELIBERATIONS OF THE INTERDISCIPLINARY ROUNDTABLE ON PUNITIVENESS IN AMERICA 23 (2016), http://www.jjay.cuny.edu/sites/default/files/news/Punitiveness_in_America_Report_March2016.pdf.

Gottschalk acknowledges that “costs have been rising, second only to Medicaid,” she cautions that such expenditure remains “a drop in the bucket,” and that, for this reason, fiscal justifications for changing sentencing policies are less important than socio-political and moral arguments for doing so.¹⁰⁹ By contrast, however, Ruth Wilson Gilmore has observed that between 1984 and 2007 the State of California built 23 major new prisons, at a cost of \$280 to \$350 million each (it had built just 12 prisons between 1852 and 1964).¹¹⁰ In the 25 years to 2007, California’s outlay on its prison system had grown from “2 percent of the general fund in 1982 to nearly 8 percent today,” and the Department of Corrections had become the state’s largest public agency, employing around 54,000 staff.¹¹¹

B. *Violation of Human Rights Through Imprisonment*

In addition to the financial problems associated with mass incarceration, there is a strong moral imperative for reforming America’s sentencing system. Emerging evidence indicates that the burden and suffering inflicted by imprisonment—the imposition of which has been driven in recent decades by the retributive ideal—is far greater than has previously been understood; in fact, the hardship caused by many sentences often exceeds the severity of the crimes for which they were imposed.¹¹² Indeed, one of the authors has suggested that mass incarceration in the United States has perpetrated human rights violations of an order that make it the most pressing domestic human rights crisis of our time.¹¹³ A disproportionate number of the victims of those human rights abuses are from racial minorities, especially African American¹¹⁴ and Latino communities,¹¹⁵ as well as white people from

109. *Id.*

110. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 7 (2007).

111. *Id.* at 8, 10.

112. Bagaric et al., *supra* note 8 (manuscript at 13-18).

113. *See id.* (manuscript at 23-24).

114. *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.* (forthcoming 2016) (manuscript at 31-33) (on file with author) [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* Keith Humphreys, *Black Incarceration Hasn’t Been This Low in a Generation*, *WASH. POST* (Aug. 16, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/08/16/black-incarceration-hasnt-been-this-low-in-a-generation>. The reasons that

socially and economically deprived backgrounds,¹¹⁶ due to those groups' over-representation in American prisons.

The intention of imprisonment is to punish offenders by depriving them of their liberty. However, the incidental burdens suffered by American prisoners can far exceed this deprivation and, cumulatively, constitute an even greater hardship for them. Adam Gopnik notes that America is famous "for the harshness and inhumanity of its prisons."¹¹⁷ It has been observed that the "pains" of imprisonment involve the deprivation of access to goods and services;¹¹⁸ the deprivation of sexual relationships;¹¹⁹ a limitation on the right to participate in family relationships and the ability to procreate;¹²⁰ and a higher risk of sexual and physical victimization than the free population¹²¹ (each year, more than 70,000 prisoners are raped in America).¹²² The widespread use of solitary confinement in particular, not only for hardened and convicted criminals, but even for teenagers held on remand, causes extreme suffering. Solitary confinement has been described by wardens as a "clean version of hell," placing prisoners in "conditions [that] literally drive people crazy . . . in deeply disturbing ways that would shock anyone with a conscience."¹²³ Indeed, there is "growing consensus in the United States that solitary confinement is indeed so damaging it truly should be a last resort or even banned."¹²⁴

Gopnik notes that every day "at least fifty thousand men . . . wake in solitary confinement, often in 'supermax' prisons or prison wings, in which men are locked in small cells, where they see no one, cannot freely read and write, and are allowed out just once a day for an hour's solo 'exercise.'"¹²⁵ A report in 2013 found that nearly twenty-seven percent of adolescent inmates in one American prison were being held in solitary confinement.¹²⁶ In the notorious prison Rikers Island (abutting

black Americans are imprisoned at greater levels are discussed in Part VI.A.1.

115. See NAT'L RESEARCH COUNCIL, *supra* note 6, at 34, 121-22.

116. See *id.* at 127-28.

117. Gopnik, *supra* note 56.

118. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 67-70* (1958).

119. *Id.* at 70-71; see Robert Johnson & Hans Toch, *Introduction* to *THE PAINS OF IMPRISONMENT* 13, 17-20 (Robert Johnson & Hans Toch eds., 1982).

120. Bagaric et al., *supra* note 8 (manuscript at 46).

121. See *id.* (manuscript at 33).

122. See *id.* (manuscript at 31).

123. MUENSTER & TRONE, *supra* note 108, at 20.

124. *Id.*

125. Gopnik, *supra* note 56.

126. See Jennifer Gonnerman, *Before the Law*, *NEW YORKER* (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>.

New York City), the total number of solitary beds increased by more than sixty percent between 2007 and mid-2013.¹²⁷ One Bronx teenager, Kalief Browder, spent more than three years in Rikers between 2010 and 2013, including the last six months in solitary, without ever being tried.¹²⁸ While in prison, Browder was beaten by guards, deprived of food, and deprived of resources with which to continue his education.¹²⁹ The solitary cells were not air-conditioned and, whenever Browder left solitary to bathe or exercise, he was handcuffed and strip-searched. Even when Browder slept in regular quarters, he was obliged to nap with his head resting to the side of his bed on top of a plastic bucket containing his belongings and extra food to keep them safe.¹³⁰

Studies have identified that following their release, prisoners and their relatives can suffer significantly as a consequence of their incarceration. Former inmates may have reduced life expectancy,¹³¹ long-term difficulties in securing employment, and lower rates of earning over their lifetime than those who have not been imprisoned.¹³² They may have higher rates of divorce,¹³³ and their incarceration could have harmful financial, social, and health implications for their family members.¹³⁴

IV. THE FAILURE OF CURRENT SENTENCING PRACTICES TO ACHIEVE THEIR KEY OBJECTIVES

The enormous fiscal burden and breach of fundamental human rights wrought by the current sentencing system are especially outrageous—almost to the point of being logically incomprehensible—in light of persuasive and extensive empirical evidence and expert analyses confirming that the key objectives used to justify it are, for the

127. *Id.*

128. *See id.*

129. *See id.*

130. *Id.*

131. A study that examined the 15.5 year survival rate of 23,510 ex-prisoners in the State of Georgia found much higher mortality rates for ex-prisoners than for the rest of the population. *See* 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). There were 2650 deaths in total, which was a forty-three percent higher mortality rate than normally expected (799 more ex-prisoners died than expected). *Id.* The main causes for the increased mortality rates were homicide, transportation accidents, accidental poisoning (which included drug overdoses), and suicide. *Id.* at 484; *see* NAT'L RESEARCH COUNCIL, *supra* note 6, at 221-26.

132. *See* NAT'L RESEARCH COUNCIL, *supra* note 6, 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.

133. *See* NAT'L RESEARCH COUNCIL, *supra* note 6, at 5.

134. *Id.* at 270.

most part, fundamentally flawed. Specifically, it has been established that incarceration does not meaningfully achieve sentencing aims that are most influential at present, namely, community protection through incapacitation and, to a lesser extent, specific deterrence and marginal general deterrence.¹³⁵ These goals should therefore neither guide judges' sentencing practices nor lead them to impose harsh sanctions. The only exception to this position is that incapacitation may be a justifiable objective of sentencing practices in circumstances where offenders have committed serious crimes and have previous convictions for similar offenses.¹³⁶ There is an enormous amount of literature examining and evaluating each of the key sentencing objectives that have been used to justify harsher penalties.¹³⁷ We now summarize the major findings of that work.

A. Imprisonment Does Not Achieve Specific Deterrence

The aim of specific deterrence is to reduce crime by deterring individual offenders from reoffending.¹³⁸ 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.¹³⁹ 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 higher.¹⁴⁰ These findings derived from a review of six

135. See *infra* Part IV.A–B.

136. See *infra* Part IV.C.

137. For 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*]; and 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 & Alexander, *The Fallacy That Is Incapacitation*].

138. Bagaric & Alexander, *The Capacity of Criminal Sanctions*, *supra* note 137, at 159.

139. See *id.*

140. Daniel S. Nagin et al., *Imprisonment & Reoffending*, 38 CRIME & JUST. 115, 155 (2009); see DONALD RITCHIE, SENTENCING ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE 15 (2011), <https://www.sentencingcouncil.vic.gov.au/sites/default/>

experimental studies in which custodial and non-custodial sentences were randomly assigned;¹⁴¹ eleven studies of matched pairs (each pair comprised two offenders who committed the same crimes, but only one of whom was incarcerated);¹⁴² thirty-one studies that were regression-based (mathematical modeling was used to determine the impact of potentially relevant factors);¹⁴³ and seven studies of circumstances that were not contrived by researchers.¹⁴⁴ Other studies have found that longer terms of imprisonment do not reduce the likelihood of reoffending,¹⁴⁵ and non-custodial sentences are associated with lower rates of recidivism than custodial sentences.¹⁴⁶

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 probability that they will reoffend.¹⁴⁷ 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.¹⁴⁸

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).

141. Nagin et al., *supra* note 140, at 144-45.

142. *Id.* at 145-53.

143. *Id.* at 154-55.

144. *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 reduced by 1.24% for each month of their remaining sentences, those who had served longer sentences initially were more likely to reoffend. *Id.*

145. 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).

146. SENTENCING ADVISORY COUNCIL, REOFFENDING FOLLOWING SENTENCING IN THE MAGISTRATES' COURT OF VICTORIA, at xi (2013).

147. WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 2, at 39.

148. *Id.*

*B. Imprisonment Does Not, Due to Its Severity, Achieve
General Deterrence*

Just as imprisonment does not achieve specific deterrence, so, too, it does not, by reason of its severity, lead to general deterrence, a goal to which judges frequently refer to justify their imposition of harsh penalties. 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.¹⁴⁹ Nevertheless, research shows that the notion of “marginal general deterrence,” which postulates that, the harsher a sanction, the greater its deterrent effect, is flawed.¹⁵⁰

In the past thirty years, the number of serious crimes committed in the United States has decreased.¹⁵¹ While there was also an increase in imprisonment of offenders during this period, it is not clear that the crime rate diminished owing to the marginal deterrent effect of this harsh sanction.¹⁵² The reduction in commission of offenses was more likely to have been attributable to an expansion in police numbers and thus greater probability (both perceived and actual) of detection of crime¹⁵³ (which accords with the absolute deterrence theory), as well as other socio-political and economic factors,¹⁵⁴ and the fact that more offenders were incapacitated and thus prevented from the commission of offenses. Notably, at the same time in Canada, the rates of crimes committed and imprisonment both diminished.¹⁵⁵

149. See RITCHIE, *supra* note 140, at 7; FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 14 (1973).

150. See RITCHIE, *supra* note 140, at 12.

151. JANET L. LAURITSEN & MARIBETH L. REZEY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 241656, TECHNICAL REPORT: MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 4 (2003), <http://www.bjs.gov/content/pub/pdf/mpcncvs.pdf>.

152. 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).

153. 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. PERSP. 163, 177 (2004) (estimating the increase in police numbers to be about fourteen percent). 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); and Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 799 (2010).

154. See, e.g., Levitt, *supra* note 153, 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/michael Ellison>.

155. Paternoster, *supra* note 153, at 803.

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 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 sentences is modest at best.¹⁵⁶

Other studies have found that even the prospect of capital punishment does not affect homicide rates.¹⁵⁷ 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.

C. 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. Behind this goal is the assumption that imprisonment protects the community by disabling the incarcerated from committing offenses while in prison. Yet, it is only legitimate to imprison offenders on the basis of this aim if those individuals would definitely commit crimes if they were not

156. NAT'L RESEARCH COUNCIL, *supra* note 6, at 139.

157. See, e.g., RICHARD HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 211-12 (2d 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 Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL'Y RES. 201, 220 (2009); John J. Donohue III, *Assessing the Relative Benefits of Incarceration: The Overall Change over the Previous Decades 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).

incarcerated,¹⁵⁸ and those offenses would have been sufficiently serious to warrant the expense of imprisonment.

Two sentencing practices are inspired by the objective of incapacitation. The first is “selective incapacitation,” which involves imposing prison sentences if risk assessments, based on the nature of the crime committed or the individual offender, indicate that it is highly probable that particular offenders will engage in further crimes.¹⁵⁹ The second is “general incapacitation,” which involves sentencing those who have committed crimes to imprisonment because, as a cohort, they are more likely to reoffend, rather than because it is predicted that individual offenders are more likely to offend again than others.¹⁶⁰ Selective incapacitation is unjustifiable because available analytical tools cannot accurately predict future offending.¹⁶¹ The overall effectiveness of general incapacitation is limited because, while it can reduce the crime rate, that rate diminishes to a lesser extent as more people are imprisoned, and it is mostly successful in relation to minor offenders, who are more likely to reoffend than serious offenders, but whose incarceration is unjustified because of the relative triviality of their offenses. General incapacitation is only a legitimate goal of imprisonment for the small number of serious offenders who have prior convictions for similar offenses, because their crimes are particularly damaging and they are more likely to reoffend.

Most research into predictors of individuals likelihood of future offending have focused on forecasting reoffending by those who have committed serious violent and sexual offenses.¹⁶² In the 1990s, a comprehensive analysis of predictive techniques that were then available found that those tools “tend to invite overestimation of the amount of incapacitation to be expected from marginal increments in imprisonment.”¹⁶³ Despite the development since that time of advanced actuarial tools, structured professional judgment, and criminogenic risk assessment methods that deploy a range of variables, no techniques have

158. See Kevin Bennardo, *Incarceration's Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. 1, 11 (2014) (noting that some incapacitative models assume that prison is not part of society, so crimes committed in prison are not taken into account in assessing the incapacitating effect of imprisonment); see also Colin Murray, *To Punish, Deter and Incapacitate: Incarceration and Radicalisation*, in UK PRISONS AFTER 9/11, PRISONS, TERRORISM AND EXTREMISM: CRITICAL ISSUES IN MANAGEMENT, RADICALISATION AND REFORM 17 (Andrew Silke ed., 2013) (noting that, for incapacitation to reduce the crime rate, it is vital that inmates do not corrupt other prisoners).

159. Bagaric & Alexander, *The Fallacy That Is Incapacitation*, *supra* note 137, at 103.

160. *Id.* at 107.

161. *Id.* at 103.

162. See *id.* at 104-07 (discussing research predicting which serious offenders will reoffend).

163. FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 86 (1995).

yet been proven capable of accurately forecasting individuals' future danger to the community.¹⁶⁴ All of the tools rely on prior criminal history, which has been found to be an unreliable indicator of the likelihood of reoffending.¹⁶⁵

To some extent, general incapacitation can be effective in reducing crime because it results in less people who may commit offenses being at large in the community. Research suggests that increases to the rate of imprisonment in the United States have lowered the incidence of crime.¹⁶⁶ Between 1993 and 2010, the imprisonment rate rose from 1.365 million to 2.27 million prisoners,¹⁶⁷ while the level of violent victimization rates decreased by seventy-six percent and the decline in total household property crime victimization was sixty-four percent.¹⁶⁸ Recent studies have nonetheless exposed that the extent to which incarceration reduces the crime rate diminishes as greater numbers of people are imprisoned. A report from the Executive Office of the

164. See BERNADETTE MCSHERRY & PATRICK KEYZER, *SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE* (2009); ADRIAN RAINE, *ANATOMY OF VIOLENCE: THE BIOLOGICAL ROOTS OF CRIME* 7-8 (2013); Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SEC. RES. 317, 322-23 (2011); Christopher Slobogin, *Legal Limitations on the Scope of Preventive Detention*, in *DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE* 37, 38 (Bernadette McSherry & Patrick Keyzer eds., 2011). The LSI-R assessment model, which is used in New South Wales, has fifty-four variables. See NEW SOUTH WALES SENTENCING COUNCIL, *HIGH-RISK VIOLENT OFFENDERS: SENTENCING AND POST-CUSTODY MANAGEMENT OPTIONS* § 2.86, at 23-24 (2012), http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf.

165. For a summary of the literature, see MICHAEL E. EZELL & LAWRENCE E. COHEN, *DESISTING FROM CRIME: CONTINUITY AND CHANGE IN LONG-TERM CRIME PATTERNS OF SERIOUS CHRONIC OFFENDERS* 53-100 (2005); Kathleen Auerhahn, *Conceptual and Methodological Issues in the Prediction of Dangerous Behavior*, 5 CRIMINOLOGY & PUB. POL'Y 771, 772-76 (2006); Michael E. Ezell, *The Effect of Criminal History Variables on the Process of Desistance in Adulthood Among Serious Youthful Offenders*, 23 J. CONTEMP. CRIM. JUST. 28, 29-31 (2007); and Lila Kazemian, *Assessing the Impact of a Recidivist Sentencing Premium on Crime and Recidivism Rates*, in *PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES* 227, 228-42 (Julian V. Roberts & Andrew von Hirsch eds., 2010).

166. See William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 97, 97 (Alfred Blumstein & Joel Wallman eds., 2000) (“[C]rime levels appear to have (at last) responded [to the rates of imprisonment], dropping to their lowest level in years.”); William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419, 485 (2000).

167. See TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 156241, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993*, at iii (1995), <http://www.bjs.gov/content/pub/pdf/cpop93bk.pdf> (conveying the 1.365 million figure as including inmates in local jails (456,000) and state and federal prisons (909,000)); see also LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236319, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010*, at 3 (2011), <http://www.bjs.gov/content/pub/pdf/cpus10.pdf> (conveying the 2.27 million figure as the sum of inmates in local jails (749,000) and state and federal prisons (1,518,000)).

168. See LAURITSEN & REZEY, *supra* note 151, at 1.

President of the United States, titled *Economic Perspectives on Incarceration and the Criminal Justice System*, notes:

Criminal sanctions have the capacity to reduce crime through deterrence and incapacitation; however, marginal increases in incarceration may have small and declining benefits. Despite a large expansion in the prison population over the last several decades, a large body of research has generally found that the aggregate impact of incarceration on crime is modest and that it declines as the prison population grows. Researchers who study crime and incarceration believe that the true impact of incarceration on crime reduction is small, with a 10 percent increase in incarceration decreasing crime by just 2 percent or less.¹⁶⁹

Similarly, in 2014, after surveying data regarding the impact of incapacitation policy in the United States in recent decades, the National Research Council concluded:

Many studies have attempted to estimate the combined incapacitation and deterrence effects of incarceration on crime using panel data at the state level from the 1970s to the 1990s and 2000s. Most studies estimate the crime-reducing effect of incarceration to be small and some report that the size of the effect diminishes with the scale of incarceration. . . . On balance, panel data studies support the conclusion that the growth in incarceration rates reduced crime, but the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.¹⁷⁰

Any effectiveness of general incapacitation in reducing the crime rate is mainly achieved in relation to minor offenders because, as a cohort, they are proven to be especially likely to reoffend.¹⁷¹ Nevertheless, the cost of imprisoning such offenders is difficult to justify given the minimal impact of their crimes on the community.¹⁷² Some

169. WHITE HOUSE COUNCIL OF ECON. ADVISORS, *supra* note 2, at 36 (footnotes omitted).

170. NAT'L RESEARCH COUNCIL, *supra* note 6, at 155.

171. See JESSICA ZHANG & ANDREW WEBSTER, AUSTRAL. BUREAU OF STATISTICS, AN ANALYSIS OF REPEAT IMPRISONMENT TRENDS IN AUSTRALIA USING PRISONER CENSUS DATA FROM 1994 TO 2007, at 30 (2010), [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/\\$File/1351055031_aug%202010.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf); see also 93 DON WEATHERBURN ET AL., N.S.W. BUREAU OF CRIME STATISTICS & RESEARCH, CRIME & JUSTICE BULLETIN, HOW MUCH CRIME DOES PRISON STOP?: THE INCAPACITATION EFFECT OF PRISON ON BURGLARY app. at 12 (2006), <http://www.bocsar.nsw.gov.au/Documents/CJB/cjb93.pdf>; Ben Vollaard, *Preventing Crime Through Selective Incapacitation*, 123 ECON. J. 262, 278-83 (2012).

172. It is nonetheless extremely challenging to undertake an accurate cost-benefit analysis of imprisonment given the large number of speculative figures involved. See, e.g., David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 915-16 (2013).

Australian research, for instance, establishes not only that imprisoning large numbers of offenders can lower the crime rate due to their probability of reoffending, but also that the expense of relying on incarceration to reduce that rate is disproportionately high. A 2006 study measured the impact of imprisonment on the rate of burglaries and concluded:

[A]t least so far as burglary is concerned, prison does seem to be an effective crime control tool. Our best estimate of the incapacitation effect of prison on burglary (based on the assumption that burglars commit an average of 38 burglaries per year when free) is 26 per cent . . . [which] is equivalent to preventing over 44,700 burglaries per annum.¹⁷³

The report also noted, however, as follows:

[A] doubling of the sentence length for burglary would cost an additional \$26 million per annum but would only reduce the annual number of burglaries by about eight percentage points. A doubling of the proportion of convicted burglars would produce a larger effect (about 12 percentage points) but only if those who are the subject of our new penal policy offend as frequently as those who are currently being imprisoned. Given what we know about the frequency of offending amongst burglars who do not currently receive a prison sentence, this seems highly unlikely.¹⁷⁴

General incapacitation is nonetheless a justifiable objective of imprisonment in relation to the small cohort of offenders who commit serious offenses and have previous convictions for similar crimes.¹⁷⁵ While most serious offenders do not reoffend (and hence individuals' previous criminal behavior is an imprecise determinant of whether they will reoffend), individuals with prior convictions for serious offenses, particularly sexual and violent crimes, commit such crimes at a much greater frequency than the rest of the criminal population.¹⁷⁶ These offenses also cause the most harm. It is for this reason, as Part V discusses further below, that we recommend a bifurcated system of sentencing, which would see imprisonment reserved mainly for serious sexual and violent offenders.¹⁷⁷

173. WEATHERBURN ET AL., *supra* note 171, at 8.

174. *Id.* at 9.

175. See, e.g., Vollaard, *supra* note 171, at 278-83.

176. 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, 410 (2014).

177. For recent discussion regarding the nature of violent offenses, see generally JUSTICE POLICY INST., *DEFINING VIOLENCE: REDUCING INCARCERATION BY RETHINKING AMERICA'S*

V. THE CURRENT OPPORTUNITY FOR EXPERT-BASED SENTENCING REFORM

For decades, erudite, respected scholars in the United States have highlighted flaws in the sentencing objectives, and mandatory penalty regimes, which have driven many of the judicial and legislative responses to offenders and led to the present crisis of mass incarceration.¹⁷⁸ While their work has to now seemingly fallen on deaf ears, there is finally hope that the gulf between sentencing knowledge and practice will be narrowed, and a more rational and principled sentencing system will be implemented. A broad and influential cross section of American society has vociferously endorsed the need for change, some reforms have already been made, and there is support in the general community for diminishing harsh sanctions.

Several politicians at the highest levels have spearheaded the calls to lower the rate of incarceration and length of prison terms. In 2013, while still in office, then-U.S. Attorney General Eric Holder observed, “[T]oo 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.”¹⁷⁹ He is now expressly calling for lower incarceration levels and noting that this will not make America less safe.¹⁸⁰ In 2015, then Deputy Attorney General Sally Quillian Yates made similar comments and emphasized that at present there is substantial support, regardless of political affiliation, for change:

These days, there’s a lot of talk about criminal justice reform. We are at a unique moment in our history, where a bipartisan consensus is emerging around the critical need to improve our current system. About a month ago, a coalition of Republican and Democratic senators unveiled a bill—called the sentencing reform and corrections act—to address proportionality in sentencing, particularly for lower level, non-

APPROACH TO VIOLENCE (2016), http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report.pdf.

178. See, e.g., NAT’L RESEARCH COUNCIL, *supra* note 6, at 116-17, 121-22; TONRY, *supra* note 6, at 134; Alschuler, *supra* note 6, at 89-95; Berman & Bibas, *supra* note 6, at 40-54; Frase, *Excessive Prison Sentences*, *supra* note 6, at 627-34; Frase, *Sentencing Principles in Practice*, *supra* note 6, at 415-22; Spohn, *supra* note 6, at 536-39. See generally Tonry, *Crime and Human Rights*, *supra* note 6; Tonry, *Remodeling American Sentencing*, *supra* note 6.

179. Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

180. 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-holder-mandatory-minimum-sentences-full-of-errors.html>.

violent drug offenders. In short, we need to make sure that the punishment fits the crime.¹⁸¹

The bipartisan support for sentencing reform was manifest in the 2016 presidential campaign. Former Democratic Party candidate Bernie Sanders promised that, if elected President, “at the end of [his] first term, we [would] not have more people in jail than any other country,”¹⁸² while Hillary Clinton has also called for concrete changes to “end the era of mass incarceration.”¹⁸³ Members of the Republican Party have similarly proposed softening sentencing laws.¹⁸⁴ The *New York Times* noted:

The last time a Clinton and a Bush ran for president, the country was awash in crime and the two parties were competing to show who could be tougher on murderers, rapists and drug dealers. Sentences were lengthened and new prisons sprouted up across the country.

But more than two decades later, declared and presumed candidates for president are competing over how to reverse what they see as the policy excesses of the 1990s and the mass incarceration that has followed. Democrats and Republicans alike are putting forth ideas to reduce the prison population and rethink a system that has locked up a generation of young men, particularly African-Americans.¹⁸⁵

For the first time in living memory, as Holly Harris and Andrew Howard highlight, politicians are recognizing and demonstrating that “tough on crime” is not innately politically popular:

First and foremost, it is conservatives in big red states like Texas, Georgia, and South Carolina who have led the way on justice reform issues for a decade. These efforts yielded great success in safely reducing the prison population, saving significant taxpayer resources,

181. Sally Quillian Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, Remarks on Criminal Justice Reform at Columbia Law School (Oct. 29, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-criminal-justice-reform>; see Ken Cuccinelli, Opinion, *Criminal Justice Reform: Conservative States Have a Record of Success. So Why Ignore It?*, FOX NEWS (Nov. 5, 2015), <http://www.foxnews.com/opinion/2015/11/05/critics-federal-criminal-justice-reform-ignore-decade-long-success-in-conservative-states.html>.

182. German Lopez, *Bernie Sanders Just Set an Impossibly Ambitious Goal to Reverse Mass Incarceration*, VOX (Feb. 11, 2016, 9:55 PM), <http://www.vox.com/2016/2/8/10937468/bernie-sanders-mass-incarceration> (quoting Bernie Sanders at a New Hampshire rally).

183. *Our Criminal Justice System Is Out of Balance*, HILLARY FOR AM., <https://www.hillaryclinton.com/issues/criminal-justice-reform> (last visited Apr. 10, 2017).

184. See Evan Halper, *Clinton’s Call for Easing Harsh Sentencing Laws Is Echoed by Republican Rivals*, L.A. TIMES (Apr. 29, 2015, 6:48 PM), <http://www.latimes.com/nation/politics/la-pn-clinton-prison-reform-20150429-story.html>.

185. Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), http://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html?_r=0.

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 U.S. 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.¹⁸⁶

There have been some recent noteworthy changes to sentencing practices that are intended to reduce the number of people who are imprisoned. In 2014, the U.S. Sentencing Commission voted to lower the sentencing guideline level for most federal drug trafficking offenses.¹⁸⁷ A report by the Vera Institute of Justice found that forty-six American states passed legislation in 2014 and 2015 that, in response to relevant empirical evidence, was

creating or expanding opportunities to divert people away from the 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 supervision.¹⁸⁸

Several states have reduced prison terms for property and drug offenses.¹⁸⁹ Notably, in 2014, California voters approved California Proposition 47, Reduced Penalties for Some Crimes Initiative,¹⁹⁰ which

186. 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>.

187. News Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences (Apr. 10, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf.

188. REBECCA SILBER ET AL., VERA INST. OF JUSTICE, *JUSTICE IN REVIEW: NEW TRENDS IN STATE SENTENCING AND CORRECTIONS 2014–2015*, at 3 (2016); *see id.* at 7. Wide-ranging reforms are occurring in Ohio and Michigan. *See* U.S. JUSTICE ACTION NETWORK, *supra* note 99, at 10. Similar reforms are occurring in Texas. *See* Adam Brandon et al., *Congress Should Follow the Red States' Lead on Criminal-Justice Reform*, NAT'L REV. (May 2, 2016), <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 offenders, *see* Sarah Breitenbach, *Prisons, Policing at Forefront of State Criminal Justice Action*, PEW CHARITABLE TRS. (June 27, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/06/27/prisons-policing-at-forefront-of-state-criminal-justice-action>.

189. REBECCA SILBER ET AL., *supra* note 188, at 23-25.

190. This law brings about the following key changes: it “[r]equires misdemeanor sentence instead of felony for certain drug possession offenses” and “for the following crimes when amount involved is \$950 or less: petty theft, receiving stolen property, and forging/writing bad checks”; it

relaxed California's mandatory penalty regime by reducing some non-violent offenses from felonies to misdemeanors.¹⁹¹ Further, the Federal Sentencing Reform and Corrections Act of 2015¹⁹² aims to lower mandatory minimum penalties for a large number of non-violent offenses.¹⁹³ While it appears that Congress may not pass this bill,¹⁹⁴ the facts that it received bipartisan support and, if enacted, would considerably reduce federal prison numbers reflect the current appetite for change. A key aspect of the above reforms is that, although they are significant, they are piecemeal and not grounded in an overarching jurisprudential or empirical foundation. The proposals in this Article seek to achieve wide-ranging, principled, and sustainable evidence-based reform.

Mainstream media has also exposed social injustices and fiscal problems induced by mass incarceration. In 2014, *Rolling Stone* magazine published a piece criticizing the lengthy sentences meted out to "tens of thousands" of non-violent drug offenders in the face of "lawyers, scholars and judges" repeated denunciation of "mandatory drug sentencing as oppressive and ineffective."¹⁹⁵ The following year, HBO screened a documentary, *Fixing the System*, that reinforced the urgent need to reduce the rate of imprisonment.¹⁹⁶ The *New York Times*

"[a]llows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder, or child molestation or is registered sex offender"; and it "[r]equires resentencing for persons serving felony sentences for these offenses unless court finds unreasonable public safety risk." CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 34 (Nov. 4, 2014), <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf>.

191. The law was passed with a majority of fifty-nine percent of voters in favor. Kristina Davis, *Calif Cuts Penalties for Small Drug Crimes*, SAN DIEGO UNION-TRIB. (Nov. 4, 2014, 8:04 PM), <http://www.sandiegouniontribune.com/news/2014/nov/04/prop-47-misdemeanor-law-vote-election-drug>; see also *San Francisco Called a Model for Ending Mass Incarceration*, CRIME REP. (Dec. 1, 2015), <http://www.thecrimereport.org/news/articles/2015-12-san-francisco-called-a-model-for-ending-mass-incarce>. For an overview of the impact of the reform, see Rob Kuznia, *An Unprecedented Experiment in Mass Forgiveness*, WASH. POST (Feb. 8, 2016), https://www.washingtonpost.com/national/an-unprecedented-experiment-in-mass-forgiveness/2016/02/08/45899f9c-a059-11e5-a3c5-c77f2cc5a43c_story.html.

192. S. 2123, 114th Cong. (2015).

193. For a summary of the key aspects of this legislation, see *With SRCA Now "Officially" Dead . . . Send Your "Thanks" to (Failings of) Prez Obama and Bipartisan Bungling*, SENT'G L. & POL'Y (July 1, 2016), http://sentencing.typepad.com/sentencing_law_and_policy/2016/07/with-srca-now-officially-dead-send-your-thanks-to-failings-of-prez-obama-and-bipartisan-bungling.html.

194. *Id.*; see also Seung Min Kim & Burgess Everett, *Time Running Out for Major Criminal Justice Bill*, POLITICO (Apr. 20, 2016, 6:06 PM), <http://www.politico.com/story/2016/04/senate-justice-crime-bill-222225>.

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

196. See Gregory Korte, *Obama Launches Criminal Justice Tour: 'Something I'll Keep Fighting for,'* USA TODAY (Oct. 17, 2015, 7:25 PM), <http://www.usatoday.com/story/news/>

has published articles highlighting that the American government's investment in prisons exceeds its spending on food stamps,¹⁹⁷ advocating for reduced sentences,¹⁹⁸ and discussing the proposed new federal sentencing laws that would lower sentences for some non-violent offenses.¹⁹⁹ In *The Atlantic*, Alex Lichtenstein opined that mass incarceration is a means of managing those who most require help and conferring advantages on those who least need them:

Mass incarceration is not just (or even mainly) a response to crime, but rather a perverse form of social spending that uses state power to address a host of social problems at the back end, from poverty to drug addiction to misbehavior in school. These are problems that voters, taxpayers, and politicians—especially white voters, taxpayers, and politicians—seem unwilling to address in any other way. And even as this spending exacts a toll on those it targets, it confers economic benefits on others, creating employment in white rural areas, an enormous government-sponsored market in prison supplies, and cheap labor for businesses. This is what the historian Mike Davis once called “carceral keynesianism.”²⁰⁰

Police officials, prosecutors, and attorneys general have pleaded for reductions in rates of incarceration, too. In 2015, Law Enforcement Leaders to Reduce Crime and Incarceration, which comprised 130 of these personnel from all the states, issued a press release quoting its Co-Chair, Garry McCarthy, Superintendent of the Chicago Police Department:

As the public servants working every day to keep our citizens safe, we can say from experience that we can bring down both incarceration and crime together. . . . Good crime control policy does not involve arresting and imprisoning masses of people. It involves arresting and imprisoning the right people. Arresting and imprisoning low-level

politics/2015/10/17/obama-criminal-justice-reform-tour-charleston-heroin/74090902; Watch *VICE's Historic Conversation with President Obama*, VICE (Sept. 20, 2015, 10:31 PM), <http://www.vice.com/read/fixing-the-system-prisons-obama-shane-smith-hbo>.

197. 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?_r=0.

198. The Editorial Board, Editorial, *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>.

199. The Editorial Board, Editorial, *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?_r=0.

200. Alex Lichtenstein, *Mass Incarceration Has Become the New Welfare*, ATLANTIC (Sept. 16, 2015), <http://www.theatlantic.com/politics/archive/2015/09/mass-incarceration-has-become-the-new-welfare/404422>.

offenders prevents us from focusing resources on violent crime. While some may find it counterintuitive, we know that we can reduce crime and reduce unnecessary arrests and incarceration at the same time.²⁰¹

Community attitudes to criminal sanctions for offenders are also changing. In a 2013 poll, seventy-one percent of American respondents supported the abolition of mandatory minimum sentences for non-violent drug offenses, while seventy-seven percent of respondents endorsed the same proposal in 2014.²⁰² Even most victims of crime now seem to support more lenient sentences. A recent article in the *Washington Post* reports:

A first-of-its-kind national survey finds that victims of crime say they want to see shorter prison sentences, less spending on prisons and a greater focus on the rehabilitation of criminals. The survey . . . polled the attitudes and beliefs of more 800 crime victims pooled from a nationally representative sample of over 3,000 respondents. . . . “Perhaps to the surprise of some, the National Survey on Victims’ Views found that the overwhelming majority of crime victims believe that the criminal justice system relies too heavily on incarceration, and strongly prefer investments in treatment and prevention to more spending on prisons and jails.”²⁰³

Thus, there is now considerable momentum for sentencing reform. This Article proposes measures to capitalize on the apparent receptiveness to change, with a view to being a further catalyst for wide-ranging evidence-based reform.²⁰⁴

201. *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.

202. REASON-RUPE, PUBLIC OPINION SURVEY: OCTOBER 2014 TOPLINE RESULTS 4 (2014), <http://reason.com/assets/db/14128084586864.pdf>.

203. Christopher Ingraham, *Even Violent Crime Victims Say Our Prisons Are Making Crime Worse*, WASH. POST (Aug. 5, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/08/05/even-violent-crime-victims-say-our-prisons-are-making-crime-worse> (quoting ALL. FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 13 (2016), <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>).

204. It should be noted that all of the momentum is towards less incarceration. Senator Tom Cotton has recently stated that the United States is suffering from “under-incarceration.” See Nick Gass, *Sen. Tom Cotton: U.S. Has ‘Under-Incarceration Problem,’* POLITICO (May 19, 2016, 2:16 PM), <http://www.politico.com/story/2016/05/tom-cotton-under-incarceration-223371>. However, this view is not common place.

VI. CAUSES OF THE CURRENT PROBLEMS AND SOLUTIONS TO OVERCOMING—OR AT LEAST DILUTING—THEM

While there is some momentum for real sentencing change, in order for this to be implemented in a coherent, sustainable, and effective manner, it is necessary to understand more fully the reasons for the current failings of the sentencing system. This inquiry will help us understand how to negate or at least dilute the impact of those influences, so that evidence-based sentencing reform can be introduced to make the system fairer and more efficient.²⁰⁵

A. Punitive Attitudes to Criminal Justice

A major reason for the mass incarceration crisis is the distinctively punitive attitude that American society has evinced for decades and even hundreds of years towards criminal justice. This attitude has its origins in diverse and interrelated social, institutional, and economic causes, and its strength is easier to understand in the context of a broad, if necessarily précised, explanation of the long and complex history of criminal justice philosophy and policy in the United States.²⁰⁶ To ensure that evidence-based reform of the sentencing system can take place, it is critical both to appreciate the bases of the attitude and to minimize their impact.

1. Race and Criminal Justice

The single most important determinant of punitive attitudes to criminal justice in the United States is race. The National Research Council of the National Academies has stated that “public opinion about crime and punishment”²⁰⁷ in America “is highly racialized.”²⁰⁸ It has also stated that racial prejudice is strongly “associated with increased support for punitive penal policies.”²⁰⁹ The Interdisciplinary Roundtable on Punitiveness in America has similarly reported that racial prejudice, contrary to expectations, has not fundamentally changed since the twentieth century and that jurors (and by implication, judicial officials) are still “more likely to remember information about aggressive behavior by black defendants and to remember information about mitigating factors when the defendant is white.”²¹⁰

205. See *infra* Part VI.A–B.

206. See *infra* Part VI.A.1–5.

207. NAT’L RESEARCH COUNCIL, *supra* note 6, at 123.

208. *Id.*

209. *Id.* at 122.

210. MUESTER & TRONE, *supra* note 108, at 26.

More important, race has played, and continues to play, a vital role not just in the application of problematic criminal justice policies but especially in their development. And it is here that history, in the form of long-held fears and antipathies, intersects with the criminal justice system, often with devastating effects.

In simple terms, the intersection of racial prejudice and criminal justice means that racial minorities, especially African Americans, are subjected in far greater numbers to controversial policies such as “stop and frisk” laws, which empower police to detain citizens arbitrarily and subject them to a personal search.²¹¹ Further, these laws are actually developed (however consciously) for policing such minorities. And this logic applies not just to relatively recent laws like “stop and frisk,” but also to a raft of measures stretching back to the nineteenth century. As Khalil Gibran Muhammad, Director of the Schomburg Center for Research in Black Culture at the New York Public Library, notes, throughout American history demographers and criminal justice advocates have built the concept of racial differences into their understanding of the causes of criminal behavior.²¹² Thus, whether it has been based on “colonial witness testimony, antebellum newspaper accounts, or more recently, modern uniform crime reports,”²¹³ criminal justice has consistently developed in ways that assume that “black people are trapped by inherent or learned pathologies,”²¹⁴ and must therefore be “subject to heightened law enforcement and more punitive punishment.”²¹⁵

In addition, it is important to recall that race has long obstructed and even wholly prevented criminal justice authorities from accepting the rehabilitative purposes of prison. As Gottschalk has observed, “the association in the South of crime and race made it impossible to embrace rehabilitation, the *raison d'être* for the penitentiary.”²¹⁶ Thus, across many states in the re-unified Union, white majorities used lynching as a preferred method for controlling African Americans’ movements and ambitions. And just as more than eighty percent of lynchings between 1889 and 1918 occurred in the Deep South, so, too, have more than eighty percent of the almost 1400 judicial executions that have taken

211. ISSA KOHLER-HAUSMANN & JAMIE FELLNER, HUMAN RIGHTS WATCH, A RED HERRING: MARIJUANA ARRESTEES DO NOT BECOME VIOLENT FELONS (2012), <https://www.hrw.org/report/2012/11/23/red-herring/marijuana-arrestees-do-not-become-violent-felons>.

212. *Id.* at 14-15.

213. *Id.*

214. *Id.* at 15.

215. *Id.*

216. NAT’L RESEARCH COUNCIL, *supra* note 6, at 125.

place in the United States since 1976.²¹⁷ Thus, we must take seriously the arguments of scholars like Gibran Muhammad, who contend that the contemporary criminal justice system has by design allowed “elected officials and the public [to perpetuate] racism in America while [ostensibly] consigning stereotypical racist figures to the past.”²¹⁸

According to this line of reasoning, we should not be surprised at the explosion in prisoner numbers in America. For scholars such as Robert Perkinson, author of *Texas Tough: The Rise of America’s Prison Empire*, it is inarguable that America’s criminal justice system has always enforced white supremacy.²¹⁹ And the rapid, exponential growth in incarceration rates from the 1960s was a response not just to rising crime rates, but also to problems posed by the Great Migration of African Americans to Pacific and Northern industrial centers, as well as the civil rights movement.²²⁰ The threat of racial integration, across the entire United States, stimulated the reimposition of “Jim Crow” through mass imprisonment.²²¹ Thus, even in the ostensibly more “liberal” Pacific and Northern states, the prison population comprises predominantly of young, undereducated black men, who “pass quickly from a period of police harassment into a period of ‘formal control’ (i.e., actual imprisonment),”²²² where they become “doomed for life to a system of ‘invisible control’ . . . [p]revented from voting, legally discriminated against for the rest of their lives,” and cycling repeatedly “back through the prison system.”²²³ Thus, the criminal justice system performs the racial separation for which it has precisely been designed.²²⁴

It is important to note that sentencing and criminal laws are racially neutral on their face; no criminal laws expressly target or discriminate against racial minorities. Nevertheless, the criminal laws, and especially the sentencing system, operate unfairly against some racial minorities because of the manner in which they are enforced and applied. There are a number of ways in which the law disproportionality targets racial minorities and in particular, African Americans.

Law enforcement agencies in many American states police urban, densely-populated, and largely black neighborhoods more rigorously

217. MUENSTER & TRONE, *supra* note 108, at 16.

218. *Id.*

219. Gopnik, *supra* note 56.

220. NAT’L RESEARCH COUNCIL, *supra* note 6, at 109-10, 112.

221. Gopnik, *supra* note 56.

222. *Id.*

223. *Id.*

224. *Id.*

than areas mostly inhabited by white, wealthier people.²²⁵ Consequently, police detect more crimes, especially minor offenses, committed by racial minorities than by white people.²²⁶ The rate of commission of offenses in urban communities can be high due to poverty. Researchers have found that poor people are more likely to commit crimes than those who are affluent,²²⁷ and African Americans are the most socially and economically disadvantaged social group in the United States. The African American population is almost three times poorer than white Americans (twenty-eight percent compared to ten percent).²²⁸ White Americans are employed at virtually double the rate of African

225. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 30 (1998); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 *GEO. J. LEGAL ETHICS* 285, 286, 290-91, 296-99 (2014); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 *COLUM. J. L. & SOC. PROBS.* 601, 602 n.5 (1992) (quoting THOMAS M. UHLMAN, *RACIAL JUSTICE* 13 (1979)); Kim Farbota, *Black Crime Rates: What Happens When Numbers Aren't Neutral*, *HUFFINGTON POST* (Sept. 2, 2015, 3:28 PM), http://www.huffingtonpost.com/kim-farbota/black-crime-rates-your-st_b_8078586.html.

226. Howell, *supra* note 225, at 286, 290-91, 296-99; Task Force on Race & the Criminal Justice Sys., *Preliminary Report on Race and Washington's Criminal Justice System*, 35 *SEATTLE U. L. REV.* 623, 636, 642-44 (2012).

227. See, e.g., Stuart P. Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2010 *U. CHI. LEGAL F.* 43, 47-48, 59-69 (arguing that punishment should depend on poverty, subject to variables like type of crime committed); Harry J. Holzer et al., *The Economic Costs of Childhood Poverty in the United States*, 14 *J. CHILD. & POVERTY* 41, 48-50, 52 (2008) (“[C]hildhood poverty imposes costs on American society . . . [of] about \$500 billion per year.”); Don Weatherburn & Bronwyn Lind, *What Mediates the Macro-Level Effects of Economic and Social Stress on Crime?*, 39 *AUSTL. & N.Z. J. CRIMINOLOGY* 384, 393-94 (2006) (noting that parental neglect has a stronger connection with crime than poverty, however, there is a strong link between poverty and parental neglect). For a discussion of the link between poverty and homicide, see William Alex Pridemore, *Poverty Matters: A Reassessment of the Inequality–Homicide Relationship in Cross-National Studies*, 51 *BRIT. J. CRIMINOLOGY* 739, 752-53, 762-64 (2011); and Paul B. Stretesky et al., *Space Matters: An Analysis of Poverty, Poverty Clustering, and Violent Crime*, 21 *JUST. Q.* 817, 829, 830 tbl.1, 832, 836-37 (2004). For a general discussion of the link between poverty and violent crime, see Avelardo Valdez et al., *Aggressive Crime, Alcohol and Drug Use, and Concentrated Poverty in 24 U.S. Urban Areas*, 33 *AM. J. DRUG & ALCOHOL ABUSE* 595, 600, 602 (2007); and see also N.S.W. DEP’T OF JUV. JUST., 2003 N.S.W. YOUNG PEOPLE IN CUSTODY HEALTH SURVEY: KEY FINDINGS REPORT 12-13 tbls.1, 2, 3 & 4 (2003) (discussing the results of a survey into the background, health, and risk behavior of young Australians in custody); Morgan Kelly, *Inequality and Crime*, 82 *REV. ECON. & STATS.* 530, 530-33 (2000) (discussing the relation between various types of crime and inequality); and Robert E. Larzelere & Gerald R. Patterson, *Parental Management: Mediator of the Effect of Socioeconomic Status on Early Delinquency*, 28 *CRIMINOLOGY* 301, 312, 314-18 (1990) (finding that the effect of socioeconomic status on delinquency was not significant after controlling parental monitoring and discipline).

228. Brad Plumer, *These Ten Charts Show the Black-White Economic Gap Hasn't Budged in 50 Years*, *WASH. POST: WONKBLOG* (Aug. 28, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/08/28/these-seven-charts-show-the-black-white-economic-gap-hasnt-budged-in-50-years/?utm_term=.c7442d280b40 (summarizing data from official government sources).

Americans,²²⁹ and the median household income of African Americans is \$32,068 compared with \$54,620 for white Americans.²³⁰ Eighty percent of white Americans compared with about sixty-two percent of African Americans complete high school,²³¹ and the rate of imprisonment of African Americans who have not completed high school is rising.²³² Statistics compiled in 2008 show that over two-thirds of African American males who had not completed high school would serve a term of imprisonment during their lives and those under the age of thirty-five were less likely to be employed than imprisoned.²³³

While the link between poverty and crime is complex and somewhat obscure, it is possible to identify reasons why, given their circumstances, poor people may be more inclined to commit crimes than their wealthier counterparts.²³⁴ Social and economic deprivation—and inequalities experienced by poor people due to racism, lack of resources and opportunities,²³⁵ substandard education, and, in some cases, violent neighborhoods and single-parent families²³⁶—may induce feelings of frustration, rebellion, and aggression that impel them to commit crimes.²³⁷ Parents may unwittingly foster their children's aberrant behavior if they are unable to curb it or neglect their children owing to their poor circumstances.²³⁸ Further, poor people can lack the freedom, employment, opportunity, and power that more affluent individuals risk losing from committing crimes.

229. *Id.* (noting that 12.6% of African Americans are unemployed compared to 6.6% of white Americans).

230. *Id.*

231. Christopher B. Swanson & Sterling C. Lloyd, *Graduation Rate Approaching Milestone*, 32 EDUC. WK. 22, 22 (2013).

232. Western & Pettit, *supra* note 132, at 10 fig.1 (noting that the rate of incarceration of African American men who have dropped out of high school in the United States has surged from ten percent in 1980 to thirty-seven percent in 2008).

233. *Id.* at 12, 16.

234. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 863-75 (2008); *see also* Bagaric, *Rich Offender, Poor Offender*, *supra* note 114, at 10-13 (stating reasons for the link between crime and poverty).

235. *See* Judith R. Blau & Peter M. Blau, *The Cost of Inequality: Metropolitan Structure and Violent Crime*, 47 AM. SOC. REV. 114, 115-17 (1982); Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 499-502, 508-10 (2013).

236. Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 24, 28-33 (1985); *see also* Haney, *supra* note 234, at 865-66.

237. Blau & Blau, *supra* note 235, at 119 (explaining that substantial wealth disparities mean that "there are great riches within view but not within reach of many people destined to live in poverty . . . [causing] resentment, frustration, hopelessness and alienation" among the poor).

238. *See* Julie L. Crouch & Joel S. Milner, *Effects of Child Neglect on Children*, 20 CRIM. JUST. & BEHAV. 49, 51 (1993); Delgado, *supra* note 236, at 27-28, 33.

As alluded to above, racial minority groups are also disproportionality targeted by sections of the criminal justice system. A 2011 review of data from multiple studies found that police are more inclined to arrest suspects from racial minorities than white suspects.²³⁹ This disparity in arrests is especially apparent in relation to drug offenses, with more black people arrested than white people despite their comparable or even lower rate of commission of such crimes.²⁴⁰ Between 1980 and 2007, across America, black people were arrested on drug charges at rates between 2.8 to 5.5 times higher than white people relative to their respective populations.²⁴¹ Empirical evidence exposes in particular that, although white Americans use marijuana at the same or even higher rates than black people, African Americans and Latinos are more likely to be arrested for marijuana possession than whites.²⁴² Various factors may explain these disproportionate arrests. In addition to the more intense policing of black neighborhoods than of predominantly white areas, and consequent discovery of more crimes committed by people from racial minorities than by whites, implicit racial bias can affect police decisions about whom to arrest.²⁴³ For instance, research has shown that, even if they have not committed offenses, people from racial minorities disproportionately exhibit the nonverbal cues that police officers often rely on to identify suspects.²⁴⁴

239. Task Force on Race & the Criminal Justice Sys., *supra* note 226, at 642 (quoting Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 475, 480, 490 (2011)).

240. Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 708-09 & n.16 (1999) (citing MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 9-10 (1995)).

241. *Decades of Disparity: Drug Arrests and Race in the United States*, HUM. RTS. WATCH (Mar. 2, 2009), <https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states>.

242. AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 19-21 (2013), https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-re11.pdf (finding that, as of 2013, on average, black people are 3.73 times more likely to be arrested for marijuana possession than white people, although they use marijuana at similar rates throughout America); see Howell, *supra* note 225, at 297, 321 & n.198, 322-24; KOHLER-HAUSMANN & FELLNER, *supra* note 211 (noting that the rates of marijuana use in New York City do not differ significantly, but white people have slightly higher rates than non-Hispanic blacks); Davis, *supra* note 225, at 30; Task Force on Race & the Criminal Justice Sys., *supra* note 226, at 651-52 (explaining that in Seattle the rate of arrests of black people for selling serious drugs other than marijuana is 21 times higher than the rate of arrests of white people for the same offense, despite the fact that several sources indicate that most sellers and users of serious drugs in Seattle are white).

243. Task Force on Race & the Criminal Justice Sys., *supra* note 226, at 666 (“The racial component of a given case may influence judgments of character and guilt, expectations of recidivism, and decisions to arrest and charge.”).

244. *Id.* at 667; see also Robin S. Engel & Richard Johnson, *Toward a Better Understanding of Racial and Ethnic Disparities in Search and Seizure Rates*, 34 J. CRIM. JUST. 605, 610-12 (2006).

Studies have also found that prosecutors are more likely to file and proceed with charges against black suspects than white suspects, even when their criminal records are identical.²⁴⁵ Although police officers are responsible for arresting more black people than white people, prosecutors have substantial, largely unregulated, and unreviewable discretion about whether to charge those arrested with crimes, and if so, how many crimes to charge, and which offenses to charge.²⁴⁶ Prosecutors may decide to charge the many minor offenses for which black people are arrested because they wish to avoid offending the police officers with whom they must work,²⁴⁷ and they lack the time and resources to analyze relevant evidence.²⁴⁸ Importantly, while prosecutors cite race-neutral factors as reasons for their decisions, implicit racial bias and racial stereotypes may also heavily influence their exercise of discretion to prosecute black people in relation to minor and more serious offenses, rather than to dismiss such cases.²⁴⁹ Research demonstrates that many Americans unconsciously assume that African Americans are dangerous, and associate them with criminality.²⁵⁰ Prosecutors may therefore be more inclined to charge African American suspects with violent offenses.²⁵¹ Prosecutors might also, without realizing it, deem offenses to be more serious and decide to proceed with charges if the suspect is black and the victim is white than vice versa.²⁵² Moreover, it is easier for prosecutors to substantiate charges at trial if suspects have criminal records and, due to the high policing and rate of arrests of black people, they are more likely to have prior convictions than white people.²⁵³

245. Task Force on Race & the Criminal Justice Sys., *supra* note 226, at 647; *see also* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806-08 (2012) (quoting Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587, 591-92, 599, 601, 603-06, 609 (1985) (demonstrating that prosecutors in Florida charged white and black defendants differently in homicide cases)).

246. *See* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 205-06 (2007); Howell, *supra* note 225, at 298-99, 305-06; Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L., Fall 2002, at 643, 645-49; Smith & Levinson, *supra* note 245, at 805, 810.

247. Howell, *supra* note 225, at 312 & n.157.

248. *Id.* at 313.

249. *See* Davis, *supra* note 246, at 206; *see also* Davis, *supra* note 225, at 34-38; Kristin N. Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 429 (2013); Smith & Levinson, *supra* note 245, at 806-13.

250. Smith & Levinson, *supra* note 245, at 798; Task Force on Race & the Criminal Justice Sys., *supra* note 226, at 665-66.

251. Smith & Levinson, *supra* note 245, at 808.

252. *See* Davis, *supra* note 225, at 35; Davis, *supra* note 246, at 207.

253. Davis, *supra* note 225, at 36-37.

Having been arrested and charged, due to racial discrimination, people from racial minorities are more likely to be convicted and receive harsher sanctions than white people for the same offenses.²⁵⁴ African Americans are imprisoned at more than six times the rate at which white Americans are imprisoned.²⁵⁵ Moreover, according to a particularly wide-ranging study that surveyed over 59,000 offenders who received sentences, black defendants are twenty-two percent more likely to receive longer prison terms than white offenders who have committed the same crimes and have identical criminal histories.²⁵⁶ Likewise, a study undertaken for the U.S. Bureau of Justice Statistics and the U.S. Department of Justice Working Group on Racial Disparity found that, in the federal jurisdiction between 2005 and 2012, judges imposed prison sentences on black men that were approximately five to ten percent longer than those imposed on white offenders for similar offenses.²⁵⁷ During that period, courts had considerable discretion regarding sentencing because, as noted above, in 2005, the U.S. Supreme Court held in *United States v. Booker* that the Guidelines were advisory rather than mandatory.²⁵⁸ While the report for this study notes that it is “difficult to attribute racial disparity to skin color alone,”²⁵⁹ it also comments:

We are concerned that racial disparity has increased over time since *Booker*. Perhaps judges, who feel increasingly emancipated from their guidelines restrictions, are improving justice administration by incorporating relevant but previously ignored factors into their

254. Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, in CONTINUING THE STRUGGLE FOR JUSTICE: 100 YEARS OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY 193, 193-96 (Barry Krisberg et al. eds., 2007).

255. HEATHER C. WEST ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 231675, BULLETIN: PRISONERS IN 2009, at 9 (2010), <http://bjs.gov/content/pub/pdf/p09.pdf>; see PRISON REFORM TR., BROMLEY BRIEFINGS PRISON FACTFILE 35 (2012), <http://www.thebromleytrust.org.uk/Indehibit/files/BromleyBriefingsJune2012.pdf> (stating that in the United Kingdom the number of racial minorities in prison is greater than in the United States); see also HUM. RTS. WATCH, *supra* note 241 (“Human Rights Watch’s analysis of prison admission data for 2003 revealed that relative to population, blacks are 10.1 times more likely than whites to be imprisoned for drug offenses.”).

256. Ronald S. Everett & Roger Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189, 195-96, 199-200, 207 (2002); see also David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUDS. 347, 351-52, 356 (2012).

257. William Rhodes et al., *Federal Sentencing Disparity: 2005–2012*, at 51-54, 56 (Bureau of Justice Statistics, Working Paper Series No.2015:01, 2015). This report also systematically documents previous studies done in the United States that support the conclusion that subconscious bias causes racial disparity in sentencing. *Id.* at 7-15.

258. *United States v. Booker*, 543 U.S. 220, 245-46 (2005); see *supra* notes 74-75 and accompanying text.

259. See Rhodes et al., *supra* note 257, at 67.

sentencing calculus, even if this improvement disadvantages black males as a class. But in a society that sees intentional and unintentional racial bias in many areas of social and economic activity, these trends are a warning sign. It is further distressing that judges disagree about the relative sentences for white and black males because those disagreements cannot be so easily explained by sentencing-relevant factors that vary systematically between black and white males. . . . We take the random effect as strong evidence of disparity in the imposition of sentences for white and black males.²⁶⁰

Other studies have also found that heavier penalties have been imposed on black offenders who harmed white victims than on offenders who harmed black victims, which the authors concluded was attributable to the notion that because “the judges were also White . . . their in-group or worldview was more threatened by criminal conduct against persons from their in-group.”²⁶¹

To reduce the impact of the punitive attitude to criminal justice, and therefore make it more likely that evidence-based reform of the sentencing system can occur, it is vital to acknowledge and then attempt to thwart the racist aspects of its operation. While it is beyond the scope of this Article to discuss economic and social measures that would improve many African Americans’ low socio-economic status, some immediate concrete reforms can be implemented to ameliorate the disproportionate punitive burden that the sentencing system imposes on racial minorities, which would make some progress towards greater social and economic equality in the United States. These recommendations, if adopted, will not eliminate all of the unfair burdens experienced by African American offenders.²⁶² Nevertheless, they would

260. *Id.* at 68. Recently it has been suggested that predictive tools used to assess future criminality are biased against black Americans. Julia Angwin et al., *Machine Bias: There’s Software Used Across the Country to Predict Future Criminals. And It’s Biased Against Blacks*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>; see also Joe Palazzolo, *Wisconsin Supreme Court to Rule on Predictive Algorithms Used in Sentencing*, WALL ST. J. (June 5, 2016, 5:30 AM), <http://www.wsj.com/articles/wisconsin-supreme-court-to-rule-on-predictive-algorithms-used-in-sentencing-1465119008> (stating that the legality of the use of algorithms to predict the likelihood of criminal conduct is being challenged in Wisconsin).

261. Siegfried L. Sporer & Jane Goodman-Delahunty, *Disparities in Sentencing Decisions*, in SOCIAL PSYCHOLOGY OF PUNISHMENT ON CRIME 379, 390 (Margit E. Oswald et al. eds., 2009). Further, African Americans and Latinos are over-represented in solitary confinement when compared to the general prison population. Juleyka Lantigua-Williams, *The Link Between Race and Solitary Confinement*, ATLANTIC (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/race-solitary-confinement/509456>.

262. For an example in the context of indigenous Australian communities, see LAW COUNCIL OF AUSTRALIA, INQUIRY INTO ABORIGINAL AND TORRES STRAIT ISLANDER EXPERIENCES OF LAW ENFORCEMENT AND JUSTICE SERVICES 5-7, 11, 16 (2015), <https://www.lawcouncil.asn>.

decrease the suffering experienced by African Americans as a consequence of sentencing, and could act as a catalyst for the implementation of other changes to the criminal justice system that would further reduce this burden.

To overcome the disproportionate punitive burden that the sentencing system has inflicted on African American offenders, a number of changes are necessary. The first is obvious: the community needs to be encouraged to accept the reality that racial prejudice underpins many of the harsh penalties that are now a feature of sentencing law in the United States. This will lead to a more critical assessment of such provisions.

One of the authors has previously argued that there are two other essential reforms that are necessary to redress the additional suffering experienced by African Americans as compared to white people in the current sentencing system.²⁶³ First, African Americans should receive a discounted penalty in the order of twenty-five percent when they are sentenced for all offenses except serious sexual and violent offenses. The often devastating effects of serious sexual and violent offenses on the lives of victims,²⁶⁴ plus the fact that all people (no matter how poor) are aware of the heinous nature of such crimes, militates against a sentencing discount for these types of offenses. The calculus is differently weighted regarding other forms of offenses, such as drug and property offenses. Once the suffering associated with violent and sexual injuries is removed from the equation, the stricture and pain of poverty is paramount and should be reflected in a twenty-five percent sentencing reduction for African American offenders who commit such crimes.

Further, there should be a considerable reduction in the aggravating effect of prior convictions. Prior convictions can often result in a massive increase in penalty, even more than a decade in prison. There is no jurisprudential or normative justification for this approach. Poor African American offenders are disproportionately affected by this unfair sentencing enhancement because they have more prior convictions, and

au/lawcouncil/images/2994_-S_-_submission_atsi_experience_of_law_enforcement_and_justice_services.pdf (discussing the problems associated with the over-policing of Indigenous communities and inadequate legal and interpreter services); and see also JUST REINVEST N.S.W., SUBMISSION TO INQUIRY INTO ACCESS TO LEGAL ASSISTANCE SERVICES 3, 6-7 (2015), <http://www.aph.gov.au/documentstore.ashx?id=cb97b4c9-d6e8-46a2-9be0-89f9bab6565b&subId=350666>; and Wayne Martin, CJ, WA Sup. Ct., Address at the University of Western Australia Conference: Law Summer School (2015), http://www.supremecourt.wa.gov.au/_files/speeches_indigenous_incarceration_rates.pdf.

263. Bagaric, *Rich Offender, Poor Offender*, *supra* note 114, at 29-44; see Bagaric, *Three Things*, *supra* note 114 (manuscript at 33-41).

264. Bagaric, *Rich Offender, Poor Offender*, *supra* note 114, at 37-39.

hence, it is a clear case of indirect discrimination. They would benefit most from the abolition of a recidivist loading or at least a significant reduction in the weight that is placed on prior criminality in the sentencing calculus. To that end, as noted above, the recidivist loading should be abolished in relation to all sexual and violent offenders, where a much reduced enhancement should apply, in the order of twenty percent to fifty percent. This would considerably reduce the rate and duration of prison terms imposed on poor African Americans.

In addition to these recommendations, greater attention needs to be paid to the unfair policing and prosecution practices that target African Americans disproportionately, and sentencing judges, prosecutors, and law enforcement officials should undergo subconscious bias training.

2. The Crime Wave Between 1960 and 1980

While race remains a singularly important determinant of American punitive attitudes to criminal justice, the long-term effects of the crime wave between 1960 and 1980 have also greatly influenced them. As Gopnik has stated, “the real background to the prison boom . . . [was] the crime wave that preceded and overlapped it.”²⁶⁵ Recognizing that “the big-city crime wave of the sixties and seventies”²⁶⁶ may now appear “like mere bogeyman history”²⁶⁷ to “those too young to recall”²⁶⁸ it, he has also asserted, “for those whose entire childhood and adolescence were set against it,”²⁶⁹ this escalation in violent crime was “the crucial trauma in recent American life and explains much else that happened in the same period.”²⁷⁰

National crime rates began to increase significantly in 1961 and continued to rise until 1981.²⁷¹ While panic about other episodes of rising (real or perceived) criminal activity had previously marked American society and politics, these prior concerns had not created such sustained concern or lasting and comprehensive legal consequences. As the National Research Council has noted, a complex range of factors contributed to the singular effect that crime had on criminal justice policy from the 1960s onwards.²⁷² As the Council puts it, “[c]ertain features of the social, political, and institutional context”²⁷³ of the 1960s

265. Gopnik, *supra* note 56.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. NAT'L RESEARCH COUNCIL, *supra* note 6, at 111.

272. *Id.* at 104-06, 109-11, 113-15, 118-28.

273. *Id.* at 111.

led “politicians, policy makers, and other public figures”²⁷⁴ to respond to crime in ways that “entailed embracing harsher policies rather than emphasizing other remedies,”²⁷⁵ and that inflamed “public fears of crime even after crime rates had ceased to increase.”²⁷⁶

The responses to rising crime rates that developed during this period were crucial to the creation of current rates of incarceration. Although President Lyndon Johnson’s “Great Society” policy program waged “war on poverty” and concentrated, to some extent, on the “root causes” of crime, it resulted not so much in greater investment in education, health, welfare, and other essential services as in greatly enlarged policing powers and resources.²⁷⁷ In 1965, Congress passed the Law Enforcement Assistance Act.²⁷⁸ This Act, which established the Office of Law Enforcement Assistance, began an era of unprecedented federal government involvement in law enforcement.²⁷⁹ Soon after, the findings of the President’s Commission on Law Enforcement and the Administration of Justice led Congress to pass the Omnibus Crime Control and Safe Streets Act (“Safe Streets Act”) in 1968.²⁸⁰ The “liberal” features of this Act, including “federal grants to police for equipment, training, and pilot programs and also greater federal investments in rehabilitation, crime prevention, and alternatives to incarceration,” were all but cancelled by measures giving state governments great discretion in the disbursement of federal money, as well as “provisions on wiretapping, confessions, and use of eyewitnesses that curtailed the procedural protections that had been extended by [recent] Supreme Court decisions.”²⁸¹

America’s so-called “war on drugs,” announced by President Richard Nixon in 1971, also contributed greatly to incarceration rates.²⁸² Federal and state anti-drug laws enacted or revised in this period resulted in unprecedented imprisonment rates for the use and possession of prohibited substances. By 1997, around one-fifth of all state inmates and almost two-thirds of federal prisoners were imprisoned for drug

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 109-10.

278. Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197, 79 Stat. 828 (repealed 1968); see NAT’L RESEARCH COUNCIL, *supra* note 6, at 110.

279. NAT’L RESEARCH COUNCIL, *supra* note 6, at 110.

280. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197 (codified as amended in scattered sections of 47 U.S.C.); see NAT’L RESEARCH COUNCIL, *supra* note 6, at 110.

281. NAT’L RESEARCH COUNCIL, *supra* note 6, at 110-11.

282. *Id.* at 119-20.

offenses.²⁸³ Subsequently, the proportion of state prisoners imprisoned for drug offenses has remained at this level, while the proportion of federal prisoners has slightly dropped to a still extraordinary (by international standards) fifty percent.²⁸⁴

Punitive anti-drug laws were just one form of punitive state criminal justice laws that were promulgated in the 1980s. Also, the Safe Streets Act was amended by the Violent Crime Control and Law Enforcement Act of 1994,²⁸⁵ which has been described as the “largest single piece of criminal justice legislation in history” and has “provided financial incentives for states to expand police departments, pass tough-on-crime sentencing laws, and build prisons.”²⁸⁶ State legislatures enacted “so-called truth-in-sentencing reforms designed to ensure that offenders spent more of their sentence behind bars.”²⁸⁷ Simultaneously, “[s]tates also curtailed or even abolished parole, established mandatory minimum sentences, and passed three strikes-type laws that required especially stiff penalties for repeat offenders.”²⁸⁸

The Safe Streets Act and some anti-drug legislation coincided with the growth in violent crime rates.²⁸⁹ Yet, subsequent legislation did not, including the Violent Crime Control and Law Enforcement Act.²⁹⁰ By this time, however, American lawmakers were operating in a political environment, forged in the 1960s, where “the law-and-order issue became a persistent tripwire stretching across national and local politics [that] politicians and policy makers increasingly chose to trigger . . . as they sought support for more punitive policies and for expansion of the institutions and resources needed to make good on promises to ‘get tough.’”²⁹¹ And the disjunction between crime rates after 1980 and the ever-harsher responses to them did not represent a break with more justifiable responses in the 1960s and 1970s. For, even then, “tough on crime” laws, the National Research Council argues, were the result of “political choices not determined by the direction in which the crime rate was moving” but rather by a generation of political “candidates and office-holders” who exploited a “lack of political consensus” on the

283. *Id.* at 120.

284. *Id.*

285. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1807 (codified as amended in scattered sections of the U.S.C.).

286. MUENSTER & TRONE, *supra* note 108, at 13.

287. *Id.*

288. *Id.*

289. NAT’L RESEARCH COUNCIL, *supra* note 6, at 110-12.

290. See Erik Eckholm, *Prison Rate Was Rising Years Before 1994 Law*, N.Y. TIMES, Apr. 11, 2016, at A9.

291. NAT’L RESEARCH COUNCIL, *supra* note 6, at 108.

causes of and effective remedies to the increase in violent crime, and the public alarm that this lack of consensus caused.²⁹²

The elevation and sustenance of crime as a political issue was contingent on perennial, substantial features of American politics and society. One was partisanship. The Republican Party rebuilt its electoral popularity on its “tough on crime” credentials, particularly in the South, which had essentially been a Democratic protectorate since the Civil War.²⁹³ Barry Goldwater’s presidential campaign of 1964 had “sought white electoral support through explicit and implicit race-based appeals and denunciations of the civil rights movement” that were expressed as harsh criminal justice measures.²⁹⁴ As Southern and Northern Democrats fought over how to respond to the civil rights movement, Republicans developed “political strategies that used the crime issue to appeal to white racial anxieties.”²⁹⁵ Their “Southern” strategy advanced Goldwater’s ostensibly unsuccessful strategy and saw them make “racially coded appeals to woo southern and working-class white voters.”²⁹⁶ As top Nixon aide Harold Robbins Haldeman later explained, while Nixon and his heirs believed “the *whole* problem [was] really the blacks,” with respect to crime, they also learned it was crucial “to devise a system that recognizes this while not appearing to.”²⁹⁷

There was considerable precedent in recent and more antique American history for such partisanship. The Red Scare of the 1940s and 1950s was, in significant part, a political beat-up exploited by a Republican leadership furious in 1948 with having lost a fifth consecutive presidential election.²⁹⁸ Charges leveled by Republicans against the Truman Administration for being “soft on communism” were echoed twenty years later in Republican claims that Democratic policies of easing punishments constituted misguided social welfare policy that was “soft on crime.”²⁹⁹

Yet these charges only stuck, and had electoral appeal, because Democrats and their constituency also rejected the prospect of true racial integration at a community and street level. As the National Research Council states, the “social, political, and economic pressures that [both]

292. *Id.* at 111.

293. *Id.* at 104, 112, 119-20.

294. *Id.* at 108.

295. *Id.* at 113, 115.

296. *Id.* at 115.

297. *Id.* at 116 (quoting H. R. HALDEMAN, *THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE* 53 (1994)).

298. NICK FISCHER, *SPIDER WEB: THE BIRTH OF AMERICAN ANTICOMMUNISM 200-03* (2016) (discussing partisanship during the Cold War).

299. NAT’L RESEARCH COUNCIL, *supra* note 6, at 114-15.

northern and southern whites felt from the Second Great Migration”³⁰⁰ of African Americans from the South to northern and Pacific industrial centers led the Johnson Administration to emphasize the enhancement of “law enforcement and professionalizing the police” at the expense of strengthened “investments in cities and social programs to mitigate the stresses and strains of the Great Migration.”³⁰¹ While “many urban white voters” were prepared to support “national pro-civil rights candidates,” they were “personally concerned over and often opposed to residential integration at the local level.”³⁰² So, in short, age-old concepts of “racial” unity created the common platform for a bipartisan consensus on the need for strong responses to the crime rates that coincided with a period of great social change.

Again, this race-based response to such change was not unprecedented. The National Research Council contrasts the “tough on crime” policy unity of the major parties since 1965 with the response of progressives in the early twentieth century to “white criminality in urban areas,” which they argued was “rooted primarily in the strains of industrial capitalism and urban life.”³⁰³ Thus, the Council argues that “policy makers, legislators, and social activists in the Progressive era sought to ameliorate those strains by pressing for greater public and private investments in education, social services, social programs, and public infrastructure in urban areas with high concentrations of European immigrants.”³⁰⁴ Yet this analysis entirely ignores the substantial conservative backlash to immigration that culminated in the passage of the Immigration Act of 1924, which revolutionized immigration policy, instituting for the first time restrictive “national origins” quotas for arbitrarily defined ethnic groups that white-washed immigration for the next forty years.³⁰⁵ In times of great political and social stress, race has proven to be a perennial and preponderant basis for public policy.³⁰⁶

While the crime wave in the period from 1960 to 1980 has been a significant cause of punitive attitudes to criminal justice, crime rates are no longer high, so there is no need to address this factor to tackle the current incarceration crisis. Nevertheless, in highlighting that current

300. *Id.* at 109.

301. *Id.* at 109-10.

302. *Id.* at 115.

303. *Id.* at 113.

304. *Id.*

305. See FISCHER, *supra* note 299, at 114-15, 117-18, 121-23.

306. See *id.* at 113-27 (discussing the history of the Immigration Act of 1924).

crime rates are low, this history helps justify the introduction of more moderate sentencing laws today.

3. The Progressive Roots of the “Tough on Crime” Agenda

The influence of race is crucial to understanding why the “liberal” and Democratic criminal justice reforms that followed the Second World War in no way challenged fundamental premises about the racial origins and associations of crime. This would prove decisive in the rise of “tough on crime” policies associated with the crime boom of the 1960s. Liberal criminal justice reforms of the period, typically emanating from northern and urban areas, were thoroughly and traditionally “progressive” in their rationales, implementation, and effects. In simple terms, the reforms of the 1940s to 1960s were technocratic, seeking to professionalize and standardize the administration of justice. In equally simple terms, its proponents tended to assume that procedural fairness was the key to producing just outcomes.

Beginning in the 1940s, liberal reformers strove to enlarge the federal government’s role in criminal justice.³⁰⁷ The Truman Administration prioritized “uniformity, neutrality, and proceduralism in law enforcement and sentencing,” to improve criminal justice outcomes, particularly for defendants from minority groups.³⁰⁸ Together with the legal profession and the U.S. Supreme Court led by Chief Justice Earl Warren, the federal government focused on eliminating “discretion and arbitrary power,” which were particularly associated with southern states and local authorities.³⁰⁹ The Warren Court handed down a series of judgments “expanding the procedural rights of suspects, defendants and prisoners,” and the American Legal Institute devised the *Model Penal Code* to guide sentencing policy.³¹⁰ Reformers hoped that these “greater procedural protections” would make the “criminal justice system more legitimate in the eyes of minority groups,” and thereby “eliminate a main source of protests and political discontent” among social groups “that did not view the system as fair and legitimate.”³¹¹

The equation of federal authority with objective application of the law, however, was itself problematic. The major source of national crime figures, from 1930 until 1973, for example, was the Federal Bureau of Investigation’s Uniform Crime Reports (“UCR”).³¹² Initially

307. NAT’L RESEARCH COUNCIL, *supra* note 6, at 107-08.

308. *Id.* at 108.

309. *Id.*

310. *Id.*

311. *Id.* at 107-08.

312. *Id.* at 114; *see also* ATHAN G. THEOHARIS, *THE FBI AND AMERICAN DEMOCRACY: A*

gathered to buttress the Bureau's image and enlarge its influence, the reports were infused with the biases of its dictatorial and virulently racist boss, J. Edgar Hoover.³¹³ Thus, as the National Research Council diplomatically states, "[i]t does appear that the UCR data exaggerated the extent and duration of the crime increase [of the 1960s] for certain offense categories,"³¹⁴ which were readily associated with racial minorities. Further, the data were not even produced so much as doctored by the Federal Bureau of Investigation.³¹⁵ The data underpinning the UCR was actually submitted by local police departments, and then "often systematically skewed in recording and reporting, due in part to incentives to record more crime in order to receive more government funding to combat crime."³¹⁶

The perversion of criminal justice policy by ambitious bureaucrats looking to expand the size and power of their agencies was widespread. Another empire-building official, Harry Anslinger, who was the head of the Federal Bureau of Narcotics ("FBN") (a forerunner of the current Drug Enforcement Administration) from 1930 to 1962, saw in marijuana and heroin an opportunity to redirect federal government efforts to prohibit the consumption of substances associated with racial minorities.³¹⁷ With the great alcohol prohibition experiment ending ignominiously, Anslinger elevated the threat in the public mind of illicit substances that were carefully associated with Mexicans, Chinese, and African Americans.³¹⁸ Thus, over several decades, Anslinger not only built up a formidable agency, but he also influenced drug policy away from therapeutic, health-based approaches toward heavy criminal penalties for people involved, no matter how innocuously, in the drug trade. The great bulk of people criminalized by drug addiction were, of course, racial minorities.³¹⁹ Whereas the great jazz singer Billie Holiday was literally harassed to death by the FBN, white stars such as Judy Garland were given a sympathetic hearing, and shielded from professional and social consequences of their addiction.³²⁰ By the time then-President Nixon declared his "war on drugs," largely to deflect

BRIEF CRITICAL HISTORY 35-36 (2004).

313. See FISCHER, *supra* note 299, at 226; NAT'L RESEARCH COUNCIL, *supra* note 6, at 114.

314. NAT'L RESEARCH COUNCIL, *supra* note 6, at 114.

315. *Id.* at 112, 114 & nn.10-11.

316. *Id.* at 114. For how Hoover's racism perverted Bureau operations see FISCHER, *supra* note 299, at 70, 226, 248.

317. JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS 10-11, 15-19, 26-28 (2015).

318. *Id.* at 14-17.

319. See *id.* at 15-17, 26-27.

320. *Id.* at 18, 22-26, 28-32.

attention from the disastrous course of the Vietnam War, the racist application of criminal drug policy, which has channeled millions of prisoners into American prisons, had been established for nearly fifty years.³²¹

Mid-century criminal justice reformers were prevented from detecting problems inherent in equating federal authority and standardized procedure with fundamental justice by the legacy of the Progressive tradition in American social policy. Arising in the last years of the nineteenth century, the Progressive movement comprised an informal and loose coalition of reform causes led by middle-class and professional white citizens (from northern European backgrounds). Although these reformers “admitted there was much wrong with America,” they still “saw little that could not be mended using governmental authority and scientific efficiency.”³²² As they saw it, they were working to rebirth a “managed republic in which men of talent and training guided the affairs of a prosperous people.”³²³ Progressives shunned any notion that any action by citizens or government “should alter the fundamental structures of social power and property” in America. Progressives tended to regard “[n]ew immigrants and African Americans . . . as dependent peoples [that] merited charitable attention [and] even concerted education,” but who were essentially “incapable of constructive group activity on their own behalf.”³²⁴

According to historian Shelton Stromquist, “[p]rogressivism figured into the reform equations of succeeding decades in ambiguous ways,” including a “propensity of reformers to look to the state and dispassionate experts for the solutions to social problems.”³²⁵ President Johnson’s “war on poverty” was the last gasp of the Progressive tradition, and the criminal justice initiatives of the Johnson and Eisenhower Administrations can profitably be seen as examples of the Progressive reluctance to examine and change the deeper power structures and social beliefs that can frustrate the capacity of even the most enlightened processes and administrators to deliver fundamental justice to society’s less fortunate.³²⁶ Although liberals in the 1950s and

321. Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, ATLANTIC (Mar. 26, 2012), <http://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319>.

322. John L. Thomas, *The Progressive Impulse*, in THE GREAT REPUBLIC: A HISTORY OF THE AMERICAN PEOPLE 596 (3d ed. 1985).

323. *Id.* at 598.

324. See SHELTON STROMQUIST, REINVENTING “THE PEOPLE”: THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM 9 (2006).

325. *Id.* at 10.

326. NAT’L RESEARCH COUNCIL, *supra* note 6, at 109-10.

1960s reasoned that their criminal justice reforms “would yield racial fairness and thus reduce political unrest and crime among minority groups,”³²⁷ they did not appreciate the extent to which the application of their measures might founder on the rock of entrenched racial attitudes.

In order to dilute the impact of the Progressive reform tradition on sentencing law, it is important to understand that while procedural regularity and fairness *are* important (indeed they are central premises underlying many of the reforms proposed in this Article), fairly applied procedures alone are insufficient to ensure the efficient and just application of criminal justice policy. The root causes of punitive attitudes also must be addressed. This is in part why evidence that violent crime rates have been falling to historic lows has not resulted in substantial reform to criminal justice policy. In order for sentencing to evolve into a fairer and more efficient practice, the focus must move from the implementation of procedural structures to an approach where these procedures reflect acute understanding of the key factors that influence crime, as well as policy objectives that can properly be achieved through a system of state-based punishment.

4. Economic Crisis and Criminal Justice Policy

The rise in violent crime and imprisonment rates from the 1960s accompanied major structural changes in the U.S. economy that were extremely damaging to the economic and social prospects of the classes of people who would come to inhabit America’s grossly overpopulated prisons in disproportionate numbers: namely undereducated manual laborers from the working classes, many of whom hailed from minority ethnic groups.

“The years 1967–68 . . . marked the end of a long run-up in annual increases in profit” and signaled “the close of the golden age” of American capitalism.³²⁸ America’s manufacturing sector increasingly began to lose markets to cheaper foreign labor and the financial sector became the new command center of the U.S. economy.³²⁹ Labor unions were now unable to protect their members’ benefits, conditions, and wages, and laborers found that they increasingly had no role and no government structures to protect them.³³⁰

Prisons, as Ruth Wilson Gilmore notes, “are partial geographical solutions to political economic crises.”³³¹ Crises create environments

327. *Id.* at 110.

328. GILMORE, *supra* note 110, at 25.

329. Perry Anderson, *Homeland*, *NEW LEFT REV.*, May/June 2013, at 5, 8-10.

330. *Id.* at 7-11.

331. GILMORE, *supra* note 110, at 26.

where instability “can be fixed only through radical measures, which include developing new relationships and new or renovated institutions out of what already exists.”³³² And the economic and social crisis striking the United States at “the end of the golden age of American capitalism provides a [vital] key” to understanding the origins of contemporary criminal justice policy.³³³

As the National Research Council notes, “the decline of organized labor and the contraction of well-paying manufacturing and other jobs in urban areas for low-skilled workers” created “pockets of severe and spatially concentrated poverty” where “contact with the criminal justice system and incarceration rates climbed to extraordinary levels.”³³⁴ Whatever progress African Americans and others made through the civil rights movement was undermined by “the decline of urban manufacturing,” which “undermined economic opportunities for those with no more than a high school education,” resulting in “growing racial gaps in earnings and employment that extended from the mid-1970s to the end of the 1980s.”³³⁵

When Martin Luther King, Jr., was assassinated, he and his colleagues regarded the struggle for greater economic rights for America’s poorest citizens as their next great challenge.³³⁶ King’s death, however, led to “the eclipse of the ‘poor peoples’ campaign in 1968,” and thereafter, the “explicit vocabulary of class receded” from view in “the lexicon of liberal reform as the twentieth century wound down.”³³⁷

Meanwhile, socially conservative politicians heightened their rhetorical and policy emphasis on being “tough on crime.” As Gilmore shows, California serves as a meaningful case study for the development of national trends.³³⁸ Among the politicians encouraging harsh criminal justice policies, few were more significant than Nixon and Reagan. Both were in office in the late 1960s, with Nixon as President and Reagan as Governor of California. Then, during Reagan’s tenure as President, from 1981 to 1989, he continued to greatly influence national criminal justice policy. Although California’s economy grew in the post-war era to become the fifth or sixth-largest economy in the world, its poverty rankings also rose dramatically, from thirtieth in 1980 to fourteenth in

332. *Id.*

333. *Id.*

334. NAT’L RESEARCH COUNCIL, *supra* note 6, at 127.

335. *Id.* at 127-28.

336. *Id.* at 127.

337. STROMQUIST, *supra* note 324, at 203.

338. See generally GILMORE, *supra* note 110 (discussing the national impact of California’s economic and social expansion).

2001.³³⁹ Much of this inequality resulted from the evaporation of jobs for the children of those African Americans who had migrated into wartime industries and whose children from the 1960s onward could not find equally well remunerated jobs.³⁴⁰ When the Summer of Love saw “thousands of flower children [flock] to San Francisco to repudiate the establishment, California lined up its *anti-antiracist* coercive forces behind the vanguard Panther Gun Bill,” targeting the radical black political and activist collective, the Black Panthers, just as “the rate of profit began its spectacular decline” and as California entered a deep, nationally significant recession.³⁴¹ Hence, as California’s economy and political structures were reconfigured, “power blocs rising from the Sunbelt,” including those fronted by Nixon and Reagan, “began to propose ‘law and order’ as the appropriate response to domestic insecurity, whatever its root causes.”³⁴²

Thus, we can see that from the 1960s onwards, governments in the United States have followed a reactive path of investing in punitive criminal justice rather than more productive forms of social expenditure, such as education, training, and broad economic restructuring. With the United States enduring prolonged recession or flat growth for much of the last ten years, and with disenchantment with economic policies of the last thirty-five years at record levels, the time is ripe for fresh discussion about the role of criminal justice systems in an economic context. Such a context should encourage greater recognition that expenditure on imprisonment is profoundly unproductive and unjust, and that it diverts precious public resources away from productive services such as health, education, and training.

5. The Privatization of Criminal Justice Policy

The sharp end of the connection between the criminal justice system and misguided economic policy set out above is the massive scale of the privatization of the corrections sector. The United States houses by far the majority of the world’s privately-run prisons and associated corrections services.³⁴³ And while the profit motive may not have been an initial impetus for the development of “tough on crime” policies, these policies “over time . . . created new economic interests

339. *Id.* at 30.

340. *Id.* at 38-39.

341. *Id.* at 39-40.

342. *Id.* at 40.

343. NAT’L RESEARCH COUNCIL, *supra* note 6, at 126.

and new political configurations,”³⁴⁴ which have both fueled and capitalized on punitive attitudes to criminal justice.

Journalist Robert Nelson has described prison privatization policy as the “brain child of free-market economists.”³⁴⁵ It is quintessential neo-liberal economic policy: the outsourcing of previous government monopolies justified by claims of economic efficiency and reduced taxpayer burden.³⁴⁶ Further, as Yijia Jing puts it, prison privatization, perhaps uniquely, “reconciles the conflict between the expansive role of government in social control under social conservatism and the minimal, non-intrusive role of the state across policy areas under neo-liberalism.”³⁴⁷ Privatized prisons ensure that “the state simultaneously enhances its overall punishing capacity but reduces its role in the direct administration of punishment.”³⁴⁸

The extent of new economic and political configurations created by prison privatization in the United States over the last thirty or so years has prompted critics of privatization to decry the existence of a “prison industrial complex.”³⁴⁹ The principal players in this complex—major corporations that run the prisons and associated services—have written the laws that create their business since the 1980s, with the aid of legislators to whom they have given generous donations and private sector jobs.³⁵⁰ While prisoners have produced goods for over a hundred years, prisoners were for many years barred from working for private entities in order to protect private companies from unfair competition.³⁵¹ This situation has since changed markedly due to lobbying by the American Legislative Exchange Council (“ALEC”), which wrote and sponsored the Federal Prison Industries Act (“PIA”) to greatly expand the Prison Industries Enhancement Certification Program (“PIE”).³⁵²

The PIE was created by Congress in 1979 “to encourage states and . . . local government to establish employment opportunities for prisoners that approximate private sector work opportunities.”³⁵³ Until the mid-1990s, few states participated in the program. Then, under the

344. *Id.*

345. Robert Nelson, *Big House Inc.*, PHX. NEW TIMES (Apr. 3, 2003, 4:00 AM), <http://www.phoenixnewtimes.com/news/big-house-inc-6433263>.

346. Anderson, *supra* note 329, at 9-11.

347. YIJIA JING, *PRISON PRIVATIZATION: A STUDY OF THE CAUSES AND MAGNITUDE*, at xviii (2010).

348. *Id.* at xviii-xix.

349. Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, NATION (Aug. 1, 2011), <https://www.thenation.com/article/hidden-history-alec-and-prison-labor>.

350. *See id.*

351. *Id.*

352. *Id.*

353. *Id.*

influence of ALEC, which had already been instrumental in the introduction of mandatory minimum sentences for drug offenders and “three strikes” laws, dozens of states began to introduce “truth in sentencing” acts, and greatly expand their PIEs.³⁵⁴ Key legislators backing this expansion included Texas State Representative and ALEC member Ray Allen, who “crafted the Texas Prison Industries Act” to expand the PIE in Texas.³⁵⁵ Allen eventually rose to become Chair of the Texas House Corrections Committee and simultaneously was Chair of ALEC’s Criminal Justice Task Force (later the Public Safety and Elections Task Force).³⁵⁶ Allen resigned from the legislature in 2006, while being investigated for unethical lobbying and became a lobbyist for Geo Group, formerly Wackenhut Corrections, one of the two largest private prison firms in the United States.³⁵⁷

According to Jing, lobbyists gave birth to the idea of prison privatization in the mid-1980s.³⁵⁸ This represented an extension of service contracting in state prisons (for health care and food services) that private firms had already been meeting. Between 1986 and 2000, “an average of [seventeen] new private prisons entered the marketplace annually.”³⁵⁹ By 1996, more than 50,000 prisoners worldwide were held in private prisons and the United States “accounted for 92% of it.”³⁶⁰ By 2003, 5.7% of state prisoners in the United States were held in private prisons.³⁶¹ In just one state, California, 23 major new prisons were built between 1984 and 2007 at a cost of \$280 to \$350 million each.³⁶² California had built only 12 prisons between 1852 and 1964.³⁶³ Interestingly, private prisons are also an Anglophone phenomenon. In 2002, only Australia, the United Kingdom, South Africa, Canada, and New Zealand had private prisons.³⁶⁴ The Anglosphere has also formed the heart of the neo-liberal consensus.

Under the aegis of ALEC, the PIE has also been transformed into a virtual slave labor system. The PIE initially authorized the employment of inmate labor under various conditions, including the payment of

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. JING, *supra* note 347, at 24, 64.

359. *Id.* at xvi.

360. *Id.* at xvi n.2.

361. *Id.* at xvi.

362. GILMORE, *supra* note 110, at 7.

363. *Id.*

364. JING, *supra* note 347, at 11.

inmates at “prevailing wage rate.”³⁶⁵ Further, “room and board deductions” from prisoners’ pay were required to be “reasonable and . . . used to defray the cost of inmate incarceration.”³⁶⁶ The PIA, however, changed these conditions by creating a “‘private sector prison industry expansion account’ to absorb such deductions,” and making legal the use of such money for the construction of work facilities, the recruitment of corporations to participate in private sector program provision, and the payment of the costs of implementing these programs.³⁶⁷ “Thus, money that was taken from inmate wages to offset the costs of incarceration” was redirected to fund the expansion of the private prison industry.³⁶⁸ In some states, notably Florida, a PIE loophole was exploited to imply that rules applying to the use of prison labor were inapplicable to prisoner-manufactured goods that were not shipped interstate.³⁶⁹ This permitted third-party companies to establish addresses in states where prisoners made goods, and buy those goods to then sell them locally or interstate.³⁷⁰ Such activity was made possible, in part, by the transfer of oversight of PIE from the Department of Justice to “a private trade organization that happened to be represented by [Ray] Allen’s lobbying firm, Service House, Inc.”³⁷¹

The effects of these practices are widespread and devastating. In the broader economy, prison labor undercuts the viability of corporations that do not use it. In Florida, where there were forty-one prison industries in 2011, large prison contractors ran small printing operations out of business.³⁷² Other states replaced public sector workers with prison labor. When he was the Republican Governor of Wisconsin, Scott Walker permitted the use of prisoners in public sector jobs where inmates performed landscaping, painting, and maintenance work.³⁷³ These prisoners were not paid but instead given reduced sentences.³⁷⁴ Identical practices occurred in Virginia, Ohio, New Jersey, Florida, and Georgia, states with Republican assembly majorities and governors.³⁷⁵

365. Elk & Sloan, *supra* note 349.

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

These politicians effectively revived hard labor with time off for good behavior as legal punishment in their states.³⁷⁶

Prison privatization has also given rise to profiteering, reduced safety for guards and inmates, the payment of “sub-poverty wages for employees and political scandals.”³⁷⁷ In Florida, Correctional Services Corporation (“CSC”), the largest private prison provider in America, has been linked to “a litany of guard abuse and inmate escapes,” but was also “holding inmates past their release dates so the company could collect more per diem dollars from the state.”³⁷⁸ Private prisons on average:

- Operate only one percent cheaper than publicly owned prisons, but only because they pay atrocious wages to staff.
- Record forty-nine percent more assaults on staff and sixty-six percent higher inmate-on-inmate assaults.
- Record an employee turnover rate of fifty-three percent per annum compared with sixteen percent in public prisons (private prisons completely turn over their staff every two years).
- Record one escape per 489 inmates compared with one per 14,601 inmates in public prisons.
- Offer guards thirty-five percent less pre-service training hours.³⁷⁹

Private prisons ceased reporting salary information in 2000, when beginning employees on average were paid 23.4% less than public employees, and employees at the top of the salary scale were paid 39.4% less.³⁸⁰ Private prisons are also scandalously insecure. Prisoners escape from private facilities far more often and in greater numbers. Manhunts of dangerous felons were reckoned to cost communities about \$10,000 per day in police expenses in the mid-2000s.³⁸¹ Dangerous felons in CSC care escaped and killed people, and four convicted felons escaped from a CSC facility in Youngstown, Ohio, because the medium-security facility was holding more than 100 maximum-security prisoners.³⁸² Private companies actually benefit from prison escapes because when escapees are caught they are given longer sentences. The costs for communities also mount because, unlike in public prisons, guards in private facilities are not protected from litigation under state and federal law, which means that the costs of lawsuits are passed on to government.³⁸³ One

376. *Id.*

377. Nelson, *supra* note 345.

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

Florida juvenile court judge compared CSC's Pahokee Youth Department Center with a "Third World country that is controlled by . . . some type of evil power."³⁸⁴ In 1998, the Florida Department of Juvenile Justice reported that "CSC had kept 10 juveniles 'beyond their release dates for the sole purpose of making more money'" and that "CSC officials had issued a memorandum telling staff to hold teenagers so they would be counted on the quarterly head count that determines how much education and juvenile-justice money the company receives from the state."³⁸⁵ In 2001, the State of Maryland forced CSC to repay \$600,000 for failure to deliver contracted services after state officials auditing the Victor Cullen Center "found chronic understaffing, a failing education system, inadequate mental-health services and far too many incidences of staff abuses of inmates."³⁸⁶

With such atrocious service and safety records, the tide has finally begun to turn against privatized prisons. The Department of Justice announced in August 2016 that it would either not renew the contracts for private prison operators when they expire or would "substantially reduce the contracts' scope," with a view ultimately to ending the federal use of privately operated prisons.³⁸⁷

While such announcements represent an important change in policy, sustained advocacy targeting America's fifty state governments will be required to end the use of private prisons. The private prison industry has vast resources, strong financial ties to myriad serving legislators, and has been described as a "nimble political [actor]" in the process of "repositioning [itself] to provide private probation, parole, electronic monitoring, drug testing, counseling and other mandated services."³⁸⁸ The industry undoubtedly will rail against sentencing changes that would markedly reduce the number of Americans sentenced to prison. Nevertheless, any such protests must ultimately be ignored as special pleading.

B. Failure to Articulate the Content of the Proportionality Principle

In addition to the social and economic factors that generated and fueled the "tough on crime" agenda, which has led to the current mass incarceration crisis, a jurisprudential failing has allowed harsh sentences

384. *Id.*

385. *Id.*

386. *Id.*

387. Matt Zapotosky & Chico Harlan, *Justice Department Says It Will End Use of Private Prisons*, WASH. POST (Aug. 18, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons/?utm_term=.8526e7f76d83.

388. MUESTER & TRONE, *supra* note 108, at 31.

to be implemented in an untrammelled fashion. Properly applied, the principle of proportionality could lead to a reduction in the imposition of harsh sentences and the incarceration rate. Unfortunately, however, the failure of legislators, judges, and scholars to clearly articulate the content of the principle and factors that are relevant to it—according to some, its current formulation is so vague as to be meaningless³⁸⁹—is another cause of current problems with the sentencing system.

While proportionality is ostensibly a sentencing consideration in several American states, there is little convergence in sentences within and between those jurisdictions because the principle is devoid of content at present.³⁹⁰ Proportionality is a requirement of ten states' sentencing regimes,³⁹¹ at least nine states have constitutional provisions that prohibit excessive penalties or treatment,³⁹² and twenty-two states have constitutional clauses that disallow cruel and unusual penalties—and eight of those have a proportionate-penalty clause.³⁹³ Nevertheless, a clear method of matching punishments to crimes has not yet been established. As Andrew von Hirsch and Nils Jareborg observe, “virtually no legal doctrines have been developed on how the gravity of harms can be compared.”³⁹⁴ Jesper Ryberg similarly notes that proportionality “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”³⁹⁵

Even in countries such as Australia, where the proportionality principle is a core aspect of sentencing law in all jurisdictions, courts' purported application of it has failed to reduce the severity of sanctions or the incarceration rate because there has been no attempt to exhaustively define factors that are relevant to it. The High Court of

389. JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION* 59-94 (2004).

390. *Id.* The Supreme Court has held that proportionality is a component of the Eighth Amendment, however, it only applies to stamp out “grossly disproportionate” sentences and, hence, has proved to be feeble protection. *See Ewing v. California*, 538 U.S. 11, 21, 28, 30-31 (2003) (quoting *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)) (upholding a twenty-five years to life in prison sentence for shoplifting three golf clubs worth less than \$1000). Moreover, Justice Scalia noted that proportionality was a difficult concept. *Id.* at 31-32 (Scalia, J., concurring).

391. Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 242 n.2, 250 (2012).

392. E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* 154 (2009).

393. *Id.*

394. Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 3 (1991).

395. RYBERG, *supra* note 389, at 184. For a discussion regarding the obscure proportionality jurisprudence by the Supreme Court, see Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIS L. REV. 961, 972-85, 1006-07, 1013, 1019, 1022, 1024-26 (2017).

Australia observed in *Veen v The Queen (No. 1)*³⁹⁶ and *Veen v The Queen (No. 2)*³⁹⁷ that proportionality is the principal aim of sentencing and its primacy cannot be displaced even by the goal of community protection.³⁹⁸ The High Court further stated in *Hoare v. The Queen*³⁹⁹ that “a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.”⁴⁰⁰ If this principle had been applied appropriately, the rate of incarceration would have dropped. Yet, it has in fact tripled in Australia in the last three decades.⁴⁰¹

For application of the proportionality principle to mitigate the mass incarceration crisis, it is critical that legislatures and courts establish a systematic, doctrinally sound means of ensuring that the harshness of the sanction matches the seriousness of the offense. The method proposed in this Article is to impose a sanction that adversely affects the interests of the offender to the same extent as the crime adversely affected his or her victim’s interests.⁴⁰² Recent attempts to identify and measure factors that contribute to human well-being, as well as studies of the impact of different crimes on victims, can be deployed to assess the harm inflicted by offenses and match sanctions to crimes proportionally.

Lawmakers could, for instance, refer to the “Better Life Index,” developed by the OECD,⁴⁰³ in addition to research on the effects of

396. (1979) 143 CLR 458 (Austl.).

397. (1988) 164 CLR 465 (Austl.).

398. See, e.g., (1988) 164 CLR 465 (Austl.); (1979) 143 CLR 458, 467 (Austl.); *Lovelock v. The Queen* (1978) 20 ALR 1, 5-6 (Austl.).

399. (1989) 167 CLR 348 (Austl.).

400. *Id.*

401. See Adam Graycar, *Crime in the Twentieth Century Australia*, in YEAR BOOK AUSTRALIA 477, 485-88 (2001), [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/7B268DE64F791420CA2569DF00012F05/\\$File/13010_2001.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/7B268DE64F791420CA2569DF00012F05/$File/13010_2001.pdf); Press Release, Austl. Bureau of Statistics, Australian Prisoner Numbers Reach 30,000 for the First Time (Dec. 5, 2013), <http://www.abs.gov.au>.

402. Mirko Bagaric, *Injecting Content into the Mirage That Is Proportionality in Sentencing*, 25 N.Z. U. L. REV. 411, 438 (2013). The proposed method bears some similarity to approaches of other theorists, in particular, the notion of an “empirical desert.” See Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1104-08 (2011) (discussing the principle’s criteria). For further discussion on using an interests analysis to estimate the severity of crimes, which is similar to a living standard analysis for gauging crime seriousness, see von Hirsch, *supra* note 394, at 7-16; and see also ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 97 (2d ed. 1995) (recommending 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”).

403. *Creating Your Better Life Index*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/#/111111111111> (last visited Apr. 10, 2017).

particular crimes on victims, to determine sanctions that are proportionate to different offenses. The Better Life Index includes the following criteria for assessing individuals' quality of life, ordered from most to least important: life satisfaction, health, education, work-life balance, environment, jobs, safety, housing, community, income, and civic engagement.⁴⁰⁴ It also nominates the key interests that are vital to attaining life satisfaction as being rights to life, physical integrity, liberty, and property.⁴⁰⁵ This index is consistent with studies that have found that property offenses, in depriving victims of wealth, do not significantly affect their happiness (unless they render the victim impecunious),⁴⁰⁶ whereas violent assaults and sexual offenses, which can infringe individuals' sense of security, affect their health, and impede their capacity to live freely and autonomously, exact a far greater toll on their victims' well-being.⁴⁰⁷

Once the effect of an offense on a victim has been assessed, it is relatively straightforward to determine a sanction that has an equivalent impact on an offender's well-being by inflicting a similar degree of suffering or inconvenience on him or her.⁴⁰⁸ Of the available sanctions (with the exception of capital punishment), imprisonment has the most severe impact on offenders' well-being, though its effects are commonly underrated.⁴⁰⁹ Applying the proportionality principle, prison terms would therefore be reserved for the most serious violent and sexual crimes, which would result in a near halving of prison numbers.⁴¹⁰

404. *Id.* These measures are designed to be more informative than economic statistics. *See id.*

405. *Id.* These measures are consistent with various studies of human well-being. *See* Michael Argyle et al., *Happiness as a Function of Personality and Social Encounters*, in *RECENT ADVANCES IN SOCIAL PSYCHOLOGY: AN INTERNATIONAL PERSPECTIVE* 189, 193-94 (Joseph P. Forgas & J. Michael Innes eds., 1989) (discussing the different components of happiness); *see also* TIM KASSER, *THE HIGH PRICE OF MATERIALISM* 5-9, 64-66, 88-92 (2002); DAVID G. MYERS, *THE PURSUIT OF HAPPINESS* (1992); MARTIN E. P. SELIGMAN, *AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT* 10-12, 14, 49-50, 55-56, 58, 116-18, 128-29 (2002); Martin E. P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 *AM. PSYCHOLOGIST* 5, 9-12 (2000). For a summary of the results of these studies see Mirko Bagaric & James McConvill, *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, 10 *DEAKIN L. REV.* 1, 8-20 (2005).

406. *AM. PSYCHOLOGICAL ASS'N*, *Money Can't Buy Happiness: Individualism a Stronger Predictor of Well-Being Than Wealth, Says New Study* (June 14, 2011), <http://www.apa.org/news/press/releases/2011/06/buy-happiness.aspx>.

407. *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, 155-58 (1998); Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 10 *J. TRAUMATIC STRESS* 189, 190-93 (2010).

408. *See* RYBERG, *supra* note 389, at 102-03; ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* ch. 9 (2005).

409. *See* Bagaric & Gopalan, *supra* note 8, at 185, 204, 216.

410. *See id.* at 189, 216, 228, 235.

Thus, in our view, there is a sound doctrinal basis for injecting content into the proportionality principle to the extent that it can be used to define tightly the parameters of an appropriate sanction. Moreover, this would result in a diminution in sanction severity for most offenses. A universally or widely accepted definition of proportionality would provide a strong shield to draconian penalties. The intuitive appeal of the principle would make it difficult to argue in favor of sentences that were demonstrably, disproportionately harsh.⁴¹¹ However, proportionalism cannot serve as a vehicle for reforming sentencing practice until there is widespread and pragmatic endorsement of such an approach.

VII. CONCLUSION

Expert analyses and empirical research regarding sentencing have focused on the content of sentencing law and exposed various flaws of the sentencing system.⁴¹² They have identified that its key current failings derive from lawmakers' pursuit of objectives that are largely unattainable, including incapacitation, marginal general deterrence, and specific deterrence, which has resulted in the imposition of harsh sanctions.⁴¹³ Another significant problem has been lawmakers' failure to distinguish between offenses that significantly harm victims, namely, serious violent and sexual crimes, and less damaging crimes, such as property and drug offenses, and to reflect those differences in the penalties set for crimes.

Notwithstanding this knowledge, fundamental flaws in the sentencing system remain. This Article examines reasons why sentencing law is so resistant to evidence-based reform, and has proposed changes to address these issues and realize a fairer and more efficient sentencing system.⁴¹⁴

This Article argues that the gap between sentencing knowledge and practice and the consequent mass incarceration crisis is attributable particularly to the "tough on crime" agenda, which has thrived unabated given the lack of public empathy or concern for criminals. Such punitive attitudes to criminal justice have been fueled by racism against minority groups, especially African Americans, as well as the crime wave from about 1960 to 1980, considerable economic instability in the past three decades, and the privatization of aspects of criminal justice policy and

411. See Bagaric, *supra* note 402, at 414-15, 417-18.

412. See *supra* Parts II, IV.

413. See *supra* Parts III.B, IV.A-B.

414. See *supra* Part VI.

practice and, in particular, the establishment of private prisons.⁴¹⁵ The vacuous nature of the proportionality principle has also led to failings in the current sentencing system and the imposition of unduly severe sanctions. In theory, this principle could profoundly influence the type and severity of sanctions, but its lack of content has deprived scholars of an important counter-argument to the imposition of increasingly harsh penalties over the past few decades.

There is, however, now some prospect of meaningful sentencing reform owing to a growing awareness in American society that the prison population is so large that it is becoming too expensive to accommodate.⁴¹⁶ To take advantage of current receptiveness to change and effect evidence-based sentencing reform, this Article maintains that it is vital to take a multi-pronged, systematic, and strategic approach. This will involve not only highlighting deficiencies in sentencing law and practice, but also injecting content into the proportionality principle and understanding and overcoming, or at least diluting, the bases and impact of punitive attitudes to criminal justice.⁴¹⁷

To this end, we suggest that the impact of race on sentencing must be accepted and immediate measures implemented to reduce the disproportionate penal burden imposed on African Americans. Such measures include introducing a sentencing discount for African American offenders, reducing the emphasis on prior convictions, and changing policing and prosecution practices that disproportionately target African Americans.⁴¹⁸ In addition, it is critical to acknowledge that the crime rate has dropped dramatically in the last thirty years and that bringing more individuals within the scope of the criminal justice system and increasing prison numbers will impede the long-term economic and social flourishing of the United States. Further, it will be necessary to discourage the use of private prisons and undermine the power of this industry.⁴¹⁹ At the heart of all of these reforms lies the recognition that reforms in the Progressive tradition will not produce the required changes to criminal justice policies and practices. They will not address the determinative role of racial prejudice or bias in criminal justice. Nor will they address the economic, political, and especially the moral problems created by privatization of prison operations.

Pursuing these recommendations will, however, make possible and more effective evidence-based reforms to the sentencing system,

415. *See supra* Part VI.A.

416. *See supra* Part III.A.

417. *See supra* Part VI.B.

418. *See supra* Part VI.A.1.

419. *See supra* Part VI.A.5.

including those discussed in this Article, such as the introduction of a bifurcated system whereby only serious violent and sexual offenders are imprisoned.⁴²⁰ These reforms will considerably reduce the incarceration rate without diminishing community safety and save the community billions of dollars.

420. *See supra* Parts IV.C, VI.A.1, VI.B.