AMERICAN EXCEPTIONALISM AT ITS FINEST: "SOFT ON CRIME" NOW A VOTE-WINNER IN THE WORLD'S LARGEST INCARCERATOR

by

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Anyone with even a remote interest in criminal justice was stunned by the "soft on crime" Republican Party advertisement at Super Bowl LIV in 2020, especially during a presidential election year. The United States of America has pursued an unrelenting, merciless "tough on crime" approach for half a century, resulting in it being the world's largest incarcerator by a massive margin. It was an unshakable political ideology that "tough on crime" was a vote winner. This resulted in incarceration levels increasing fourfold in four decades, with more than two million Americans ultimately behind bars. Legal and criminology scholars had argued intensely—seemingly in vain—for decades that mass incarceration was a flawed policy. They highlighted that it was extremely expensive, caused excessive gratuitous suffering, and did not reduce the incidence of crime. Despite this, lawmakers refused to budge from the populist, harsh approach to dealing with crime and offenders. However, in one of the most striking policy shifts in recent American history, lawmakers have radically changed their approach to dealing with crime. They are now promulgating policies that will result in the release of offenders from prison, rather than sending more of them there. Especially remarkable is that it was the conservative Republican federal government, led by then-President Donald Trump (an advocate for "tough on crime" policies), that was most active and effective in reducing prison numbers. Thus, the United States is now moving towards a period of decarceration. This process has accelerated in response to the COVID-19 pandemic; some prisoners, especially older inmates, have been released early because they are at a heightened risk of COVID-19 infection in

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the close confines of prison. Particularly notable is that the number of incarcerated African Americans (who are overrepresented in prisons) has significantly declined in recent years. This Article explores the catalysts for this social and political phenomenon, which highlight the collective ability of the American community to turn on a dime, shift tack, and embrace intelligent policy. The correction to American criminal justice policy and practice that we are now witnessing is compelling evidence that, while the democratic system in the United States does not always result in sound policy choices, those decisions can change profoundly with time. This Article also identifies challenges that the United States will face as it attempts to craft and implement a less punitive response to crime. Thus, the main purpose of this Article is to establish a roadmap for introducing normatively sound and empirically valid sentencing reforms that can ensure that the current momentum of reducing prison numbers is not reversed.

I. INTRODUCTION

For over 50 years, the United States federal government embraced a "tough on crime" political strategy.[1] Since President Richard Nixon declared the "War on Drugs" in 1971, both major political parties (Democrats and Republicans) have implemented an unabated policy of increasing penalty severity for crime.[2] This has resulted in America's prison population increasing fourfold in the four decades prior to 2012.[3] This is how the United States became, and remains, the world's largest incarcerator. America has nearly 25% of the world's prisoners, yet less than 5% of the world's population.[4] Moreover, the burden of imprisonment has been borne disproportionately by the most disadvantaged social groups.[5] In particular, African Americans are imprisoned at higher rates than any other section of the community.[6]

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[1] MICHAEL TONRY, SENTENCING MATTERS 134 (1996); NAT'L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 116–17 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

[2] *Id.* at 119–20; *see infra* Part II; Part IV.

[3] NAT'L RES. COUNCIL, *supra* note 1, at 33. It is widely accepted that the United States has a "serious over-punishment" and "mass incarceration" problem. Lynn Adelman, *What the Sentencing Commission Ought to Be Doing Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295, 295–96, 307–08 (2013). For general discussions on incarceration trends in the United States, see ANTHONY C. THOMPSON, RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS 9–15 (2008) (describing the unprecedented increase in incarceration in the 1980s and 1990s and the "particularly catastrophic impact on African American communities"); 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) (arguing that the "institutional shape of American prisons" results in individuals returning to prison post-release and discussing the emergence of mandatory minimum sentencing in the United States); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 27–33 (2011) (noting the "boom in incarceration" since the mid-1970s but also noting that the first decade of the 2000s saw "what could be the beginning of a trend to reduce reliance on incarceration"); Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 GA. ST. U. L. REV. 965, 965, 978 (2011) (comparing the growth in prisons during the 1990s to the real estate bubble of the 2000s, and noting political, social, and cultural forces that "have facilitated or fueled the penal excess"); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 153–64 (2011) (contrasting "coordinated market economies," such as Norway, with "liberal market economies," such as the United States, "the former relying far less on mass incarceration than does the latter"); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 426–36 (2013) (discussing the causes and effects of mass incarceration, and highlighting its disproportionate harms on disadvantage communities).

[4] Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES (Apr. 23, 2008), https://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html.

[5] Traum, *supra* note 3, at 431–36.

[6] *See infra* Part II; THOMPSON, *supra* note 3, at 9–10; Michael Tonry, *Crime and Human Rights: How Political Paranoia, Protestant Fundamentalism, and Constitutional Obsolescence Combined to Devastate Black America*, 46 CRIMINOLOGY 1, 21–23 (2008) (noting persistently

Criminologists and legal scholars have criticized the massive growth in prison numbers, arguing that higher prison populations do not make the community safer and that it is unethical to punish criminals in a manner that is disproportionate to the severity of their crimes.[7] For decades, these calls did not lead to any shifts in sentencing policy or practice. The "tough on crime" approach had become a permanent mainstay of political ideology: it was an apparent sure-fire way of attracting voters. Then something changed. This shift was almost imperceptible at first.

The seeds of change in criminal justice policy were planted over several years, but shifts that occurred initially were subtle, sporadic, and devoid of an overarching narrative. Consequently, these changes did not signal a considered and coherent shift in policy. Recently, however, striking evidence of a new direction in criminal justice policy has emerged, namely, a significant reduction in incarceration numbers. The number of prisoners has been diminishing gradually over the past decade. Incremental state-based reforms contributed to this trend, even though in most instances they were not expressly aimed at reducing prison numbers.[8] However, it was apparent that a movement to reduce incarceration was emerging when the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person ("First Step") Act, which specifically aimed to facilitate early release of prisoners, was introduced in 2018.[9] The development of this movement became even more apparent from the criminal justice campaign policies of the contenders for the Democratic Party's nomination for president in 2020.

The retreat from mass incarceration was spectacularly highlighted by a Republican Party advertisement at the 2020 Super Bowl. The advertisement focused on the early release of Alice Johnson in June 2018.[10] Johnson had served 21 years of a life sentence that she received for committing a drug offense in 1997.[11] The advertisement noted that, while other politicians merely talked about criminal justice reform, "President Trump got it done."[12] This was a reference to the First Step Act's

high racial disparities in incarceration disconnected from any increase or decrease in serious violent crime rates).

[7] *See infra* Part III; Part IV. *See generally* Richard Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005) (discussing disproportionate sentencing and different utilitarian standards of proportionality in sentencing).

[8] Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 363–65 (1997) (discussing Minnesota sentencing guidelines which are based on a theory of punishment that places upper and lower limits on sentencing severity).

[9] First Step Act, H.R. 5682, 115th Cong. (2018).

[10] Daniel Funke & Bill McCarthy, *Super Bowl Ad Watch: Trump on Criminal Justice Reform*, POLITIFACT (Feb. 2, 2020), https://www.politifact.com/article/2020/feb/03/super-bowl-ad-watch-trump-criminal-justice-reform/.

[11] *Id.*

[12] *Id.*

reduction of penalties for a large number of federal offenders and inmates.[13] As this demonstrates, a "soft on crime" policy is now seen as a vote winner.

Many aspects of the changing political approaches towards sentencing and incarceration are remarkable, including the fact that they have shifted despite the lack of community empathy for criminals. Also, it is surprising that the conservative Republican party—led by hardliner President Donald Trump—reduced prison numbers most systematically.[14]

A term such as "dramatic" can readily be overused, but it appropriately describes the change that has occurred in American sentencing policy. The "tough on crime" approach defined the bipartisan consensus on criminal justice policy for decades and attracted very little opposition. As a result, the United States reached an incarceration rate that was substantially greater than that of any other country on Earth. The recent shift towards decarceration has coincided with forceful criticism by academic scholars of the dominant criminal justice policies of the preceding 50 years, as well as a huge increase in exposure in popular media of the detrimental impact of mass incarceration. Both have resulted in a better-informed public that demands policy change. For those who endorse the concept of "American exceptionalism," the capacity of the American community to instigate policy change on behalf of its most politically underrepresented constituents may represent one of its finest examples.

The reduction in prison numbers is now accelerating in response to the COVID-19 pandemic currently sweeping through the United States.[15] As of July 6,

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[13] *Id.* Note that Johnson's sentence was commuted before the First Step Act was signed into law. *Id.*

[14] *See infra* Part V. President Trump initially adopted a tough on crime agenda. *See, e.g.*, Jenna Goff & Joan Greve, *Trump vs. Clinton: Criminal Justice Reform*, WASHINGTON WK. (Sept. 19, 2016), http://www.pbs.org/weta/washingtonweek/blog-post/trump-vs-clinton-criminal-justice-reform; Michelle Mark, *Here's What Hillary Clinton and Donald Trump Think About Criminal Justice*, BUS. INSIDER AUS. (Sept. 27, 2016), https://www.businessinsider.com.au/trump-and-clinton-on-issues-mass-incarceration-and-criminal-justice-2016-9.

[15] In December 2019, a pneumonia outbreak was reported in Wuhan, Hubei Province, China. On December 31, 2019, the outbreak was traced to a novel strain of COVID-19, and in February 2020 the International Committee on Taxonomy of Viruses (ICTV) named the virus "Severe Acute Respiratory Syndrome Coronavirus 2," or SARS-CoV-2. "Viruses are named based on their genetic structure to facilitate the development of diagnostic tests, vaccines, and medicines," while the "diseases that viruses cause are named to enable discussion on disease prevention, spread, transmissibility, severity, and treatment." *Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It*, WORLD HEALTH ORG., https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last visited May 26, 2021). On February 11th, 2020, the World Health Organization ("WHO"), the international group responsible for human disease preparedness and response, announced "COVID-19" as the name of this new disease. *See* WORLD HEALTH ORG., TIMELINE: WHO'S

2020 there were at least 535,236 COVID-19-related confirmed deaths and more than 11,619,000 confirmed COVID-19 cases across the world.[16] As of that date in the United States, there had been more than 131,100 confirmed deaths and more than 2,900,000 confirmed cases,[17] and an infection rate of about 870 per 100,000 residents.[18] The population of American prisons and jails is aging and the elderly are the most vulnerable to contracting COVID-19. Further, jails and prisons can be breeding grounds for contagious diseases because inmates live in close proximity to one another.[19] In March 2020, consultant and former executive director of the Colorado Department of Corrections, Rick Raemisch, described prisons as "bacteria factories," warning that the "devastation" wreaked by an outbreak of COVID-19 in the prison system would be "unbelievable."[20] As COVID-19 continues its destructive path through America's massive system of prisons and jails, officials and scholars have turned their attention to the pressing issue of whether prisoners should be released early, and, if so, why.[21] It is likely that the pandemic will result in the release of a great number of prisoners. Indeed, by April 23, 2020, there had been a reduction in the federal prison population in the preceding three weeks of approximately 1,100 inmates.[22]

The retreat from the "tough on crime" approach is a welcome policy shift. However, for the following reasons, it is uncertain whether the new policies will endure. First, the shift occurred abruptly. Second, it lacks an overarching doctrinal

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COVID-19 RESPONSE, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#event-0 (last visited May 26, 2021).

[16] *COVID-19 United States Cases by County*, JOHNS HOPKINS UNIV. CORONAVIRUS RESOURCE CTR., https://coronavirus.jhu.edu/map.html (last visited May 26, 2020).

[17] *Id.*

[18] *Tracking the Novel Coronavirus in the U.S.*, REUTERS, https://graphics.reuters.com/HEALTH-CORONAVIRUS-USA/0100B5K8423/index.html (last visited May 26, 2021).

[19] David Montgomery, *'Prisons Are Bacteria Factories'; Elderly Most at Risk*, PEW (Mar. 25, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/03/25/prisons-are-bacteria-factories-elderly-most-at-risk.

[20] *Id.*

[21] *See, e.g.*, Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. TIMES (Mar. 16, 2020), https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html; J.J. Prescott et al., *It's Time to Start Releasing Some Prisoners with Violent Records*, SLATE (Apr. 13, 2020), https://slate.com/news-and-politics/2020/04/combat-covid-release-prisoners-violent-cook.html; Margo Schlanger & Sonja Starr, *Four Things Every Prison System Must Do Today*, SLATE (Mar. 27, 2020), https://slate.com/news-andpolitics/2020/03/four-steps-prevent-coronavirus-prison-system-catastrophe.html; Peter Wagner & Emily Widra, *Five Ways the Criminal Justice System Could Slow the Pandemic*, PRISON POL'Y INITIATIVE (Mar. 27, 2020), https://www.prisonpolicy.org/blog/2020/03/27/.

[22] *According to BOP Reporting, Federal Prison Population Now Shrink About 1,000 Persons per Week*, SENT'G L. & POL'Y (Apr. 23, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/04/according-to-bop-reporting-federal-prison-population-now-shrinking-about-1000-persons-per-week.html.

foundation and, hence, it is feasible that the change is merely temporary. Third, it has not yet led to a dramatic reduction in the incarceration rate. Prison numbers have dropped by less than 10% since they peaked at over 2.3 million in 2008.[23] At this pace, it would take approximately 40 years for prison numbers to recede to the incarceration rate in 1971.[24]

The aim of this Article is to explain the context behind the dramatic shift in criminal justice policy regarding sentencing offenders, and then set out a doctrinal basis that could justify this change in order to increase the likelihood that it will endure. The current trajectory can be maintained in the future if the sentencing reforms that are made now are jurisprudentially and normatively sound.

Part II of this Article provides an overview of the current incarceration rate and contrasts it with trends over the past half-century. Notably, this analysis highlights that prison numbers dramatically increased in the four decades prior to 2007.[25] While there has been a slight reduction in incarceration numbers since that time, in relative terms, the United States remains the most punitive country on Earth, with incarceration levels still ten times higher than those of many developed countries.[26] Part III of the Article examines the reasons why mass incarceration is a flawed policy. In short, the policy imposes an unsustainable fiscal cost on the community and undue suffering on offenders and their families, and it does not lead to a meaningful reduction in the crime rate. Part IV discusses the social and political factors that fueled the "tough on crime" movement. It is important to understand the causes of mass incarceration in order to reduce the likelihood that they will continue to shape

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[23] John Gramlich, *America's Incarceration Rate Is at a Two-Decade Low*, PEW RES. (May 2, 2018), https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/. The Brennan Center for Justice analyzed developments in criminal justice in the first year of the Trump presidency and argued that during this period a harsher criminal justice system has evolved:

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

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

[24] Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. FOR JUST. (Aug. 6, 2019), https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem.

[25] Cole, *supra* note 3, at 28.

[26] Roy Walmsley, *World Prison Population List*, INST. FOR CRIM. POL'Y RES. (2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf.

sentencing policy and practice in the future.

Part V of the Article focuses on reforms that have been introduced throughout the United States in recent years that, cumulatively, have resulted in a slight decline in incarceration numbers. No overarching policy or approach has been adopted to drive down incarceration levels. Rather, the reforms that have been made have been incremental and far from uniform. Until recently, most of the changes that resulted in declining prison numbers were state based, although some states have seen increases in prison numbers recently. In 2019, major reforms were made at the federal level in an attempt to lower incarceration levels. While there is no coherency to these reforms, generally penalty reductions have not been applied to sexual or violent offenders. This Part also explores possible reasons for the dramatic shift in American sentencing policy.

Part VI sets out a sentencing policy that, if adopted, could make the current reform movement principled and durable. Our proposed reforms are summarized in the concluding remarks.[27] In short, we recommend imposing prison sentences only on serious sexual and violent offenders and developing alternative sanctions for other offenders.

II. THE UNITED STATES' INCARCERATION RATE

In the United States, incarcerated offenders are primarily held in two forms of detention: prisons and jails.[28] Prisons are long-term confinement institutions run by state or federal governments, which hold offenders with sentences that are typically longer than one year in duration, and include public and private prisons, boot camps, and treatment centers.[29] Jails are temporary detention facilities operated by a sheriff, police chief, or city or county administrator, and generally, they hold individuals awaiting trial or offenders sentenced to a term of one year or less.[30]

The most recent official report by the Department of Justice, Bureau of Justice Statistics relating to prison numbers was published in October 2020.[31] The report provides that the United States imprisonment rate for 2019 was 419 per 100,000 (1,430,805 prisoners in total), which was a decrease of 3% from 2018. This was the lowest incarceration rate since 1995, and since 2009 the imprisonment rate has

[27] These reforms are fully discussed in Mirko Bagaric et al., *Nothing Seemingly Works in Sentencing: Not Mandatory Penalties; Not Discretionary Penalties—But Science Has the Answer*, 53 IND. L. REV. 499, 526–43 (2020) [hereinafter Bagaric et al., *Nothing Seemingly Works in Sentencing*].

[28] DANIELLE KAEBLE & MARY COWHIG, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 1 (2018), https://www.bjs.gov/content/pub/pdf/cpus16.pdf.

[29] *Id.* at 5–6.

[30] *Id.* at 5.

[31] E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019 (2020), https://www.bjs.gov/content/pub/pdf/p19.pdf.

dropped 17% overall.[32] However, more than 200,000 of these inmates are serving life sentences.[33] There is no official jail population census report for the same period. The most recent official data relating to jail numbers relates to the midyear point of 2018.[34] At this time there were 738,400 jail inmates. In the 10 years from 2008 to 2018, the rate of confinement in jails reduced by 12%.[35]

Despite this, the United States still imprisons more people than any other nation,[36] and at a rate that is, remarkably, ten times higher than that of some other developed nations.[37]

Although there has been a 28% reduction in the incarceration rate of Black Americans between 2008 and 2018,[38] on average, Black Americans are still 5.1 times more likely to be incarcerated in state prisons and seven times more likely to be incarcerated in federal prisons than white Americans.[39] The ratio is only slightly better in relation to the jail population, where Black Americans are still incarcerated at approximately four times the rate of white individuals.[40]

The move towards mass incarceration commenced approximately 50 years ago when former President Nixon declared a "War on Drugs."[41] Sanctions were increased, and often took the form of harsh mandatory minimum prison terms, which compelled judges to impose more severe sentences than they might otherwise have.[42] Those guidelines, which remain in force to different extents in all United States

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[32] *Id.* at 1.

[33] *Id.* at 3, tbl.1; *No End in Sight: America's Enduring Reliance on Life Imprisonment*, SENT'G PROJECT (Feb. 17, 2021), https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/.

[34] ZHEN ZENG, U.S. DEP'T OF JUSTICE: BUREAU OF JUSTICE STATISTICS, JAIL INMATES IN 2018 (2020), https://www.bjs.gov/content/pub/pdf/ji18.pdf.

[35] *Id.*

[36] *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited May 26, 2021) (displaying United States' prison population as of 2018).

[37] *See generally* Walmsley, *supra* note 26 (providing statistics for prison populations by nation). Denmark, Sweden, Finland, Japan, and Iceland (and unexpectedly, several developing countries such as South Sudan, Tanzania, Syria, and Yemen) each have an imprisonment rate less than one-tenth that of the United States. *See id.*

[38] *U.S. Imprisonment Rate at its Lowest Since 1996*, DEP'T JUST. (Apr. 30, 2020), https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/ojp-news-04302020a.pdf.

[39] *See* William Sabol et al., *Trends in Correctional Control by Race and Sex*, COUNCIL ON CRIM. JUST. 1, 4 (Dec. 2019), https://cdn.ymaws.com/councilonj.org/resource/collection/4683B90A-08CF-493F-89ED-A0D7C4BF7551/Trends_in_Correctional_Control_-_FINAL.pdf.

[40] *Id.*

[41] NAT'L RES. COUNCIL, *supra* note 1, at 119–20.

[42] TONRY, *supra* note 1, at 135.

jurisdictions,[43] prescribe fixed or presumptive penalties,[44] with individual penalties calculated according to offenders' criminal history scores,[45] and the seriousness of their crimes. As Michael Tonry notes, these penalties have had a profound impact:

> Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), LWOP [(life without parole)] laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe "career criminal," "dangerous offender," and "sexual predator" laws. These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.[46]

This mass incarceration crisis has caused a number of wide-ranging problems that have incited a groundswell of opposition to the practice. The next Part discusses the nature and extent of these problems.

III. THE PROBLEMS INDUCED BY MASS INCARCERATION

A. Present Incarceration Levels Are Fiscally Exorbitant

Mass incarceration produces several major problems. The most obvious is the exorbitant and unsustainable cost to the public purse—$81 billion annually.[47] Between 1980 and 2010, the United States effectively tripled its spending on imprisonment.[48] Between 2010 and 2015, there was a minuscule drop in spending on

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[43] They are also one of the key distinguishing aspects between the United States sentencing system and that of Australia (and most other sentencing systems in the world). *See* CONNIE DE LA VEGA ET AL., 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 regarding first degree murder, none of the sampled countries' mandatory sentences were as severe as in the United States).

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

[45] *See* NAT'L RES. COUNCIL, *supra* note 1, at 325.

[46] Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 514 (2014) (internal citations omitted). For a list of jurisdictions in the United States that use guideline sentencing, see *Sentencing Guidelines Resource Center*, UNIV. MINN., http://sentencing.umn.edu/ (last visited May 26, 2021).

[47] Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration; Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

[48] MELISSA S. KEARNEY ET AL., HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 13 (2014), https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf. In real terms, spending has

incarceration of only 0.5% across 45 states.[49] Crucially, this expenditure diminishes the pool of government funds that are available for essential social services.[50] The National Research Council has noted:

> 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.[51]

Comparative spending on prisons and education in many American states is particularly alarming: over the past 20 years, growth in expenditures on incarceration has outpaced that of spending on higher education by a ratio of 6:1.[52] The Center of Budget and Policy Priorities reported that, in 2013, 11 states spent more on imprisoning offenders than on higher education.[53] Increases in correctional spending have also outpaced spending on primary and secondary education (which is much greater than higher education spending generally) by double the rate in 23

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increased from $77 yearly by each U.S. resident in 1980 to $260 in 2010. *Id.*

[49] *Trends in Prison Population and Spending: 2010–2015*, VERA INST., https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-population-and-spending (last visited May 26, 2021).

[50] For an analysis of why mass incarceration is flawed from a financial perspective, see Jason Furman & Douglas Holtz-Eakin, *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.

[51] NAT'L RES. COUNCIL, *supra* note 1, at 314 (citation omitted).

[52] *See* Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 23, 2012), http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america.

[53] MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. ON BUDGET & POLICY PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION 1, 10 (2014), https://www.cbpp.org/sites/default/files/atoms/files/10-28-14sfp.pdf. Reduced investment in education is also occurring at the more junior education level:

> In recent years . . . states have cut education funding, in some cases by large amounts. At least 30 states are providing less general funding per student this year for K-12 schools than in state fiscal year 2008, before the Great Recession hit, after adjusting for inflation. In 14 states, the reduction exceeds 10%. The three states with the deepest funding cuts since the recession hit—Alabama, Arizona, and Oklahoma—are among the ten states with the highest incarceration rates.

Id.; *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 11 states spend more on prisons than universities: Michigan, Oregon, Arizona, Vermont, Colorado, Pennsylvania, New Hampshire, Delaware, Rhode Island, Massachusetts, and Connecticut).

states over the same time period.[54] A 2016 study showed that each dollar spent on incarceration leads to $10 in social costs.[55] This means that the total financial cost of incarceration in the United States is over $1 trillion annually, which equates to nearly 6% of the United States' GDP.[56] In addition to the burgeoning and increasingly unsustainable fiscal cost of imprisonment, imprisonment inflicts gratuitous and profound suffering on offenders. It is to this problem that we now turn.

B. Conventional Incarceration Violates Inmates' Human Rights

Incarceration often inflicts enormous suffering on offenders. One of the authors of this Article has argued that the human rights violations caused by America's mass incarceration have created the nation's most urgent contemporary domestic human rights crisis.[57] This crisis is exacerbated by the fact that racial minorities and people from deprived social backgrounds are disproportionately represented in American prisons.[58]

While most commentators accept imprisonment as a form of retribution, inmates of American prisons generally experience far more punishment than deprivation of their liberty. The extent of this hardship is often overlooked in mainstream

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[54] *See Report: Increases in Spending on Corrections Far Outpace Education*, U.S. DEP'T EDUC. (July 7, 2016), https://www.ed.gov/news/press-releases/report-increases-spending-corrections-far-outpace-education.

[55] Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.*, at 3–4 (Concordance Inst. for Advancing Justice Research & Innovation Research, Working Paper No. CI072016), https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf.

[56] *Id.* at 4.

[57] *See* Mirko Bagaric et al., *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663, 1695–1702 (2017) [hereinafter Bagaric et al., *Principled Strategy*].

[58] Mirko Bagaric, *Three Things that a Baseline Study Shows Don't Cause Indigenous Over-Imprisonment; Three Things that Might but Shouldn't and Three Reforms that Will Reduce Indigenous Over-Imprisonment*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 103, 107 (2016); *see also* Mirko Bagaric, *Rich Offender; Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 L. & INEQ. 1, 7 (2015). 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. Nevertheless, their over-imprisonment rate is more than 5:1. *See* Sabol et al., *supra* note 39, at 4 ("[B]y 2016, the black-white disparity ratio for people in state prison stood at 5.1."); Keith Humphreys & Charles Lane, *Black Imprisonment Rates Are Down. It's Important to Know Why.*, WASH. POST (Apr. 30, 2019), https://perma.cc/FX5Y-MTQ8. The reasons that Black Americans are imprisoned at greater levels are discussed *infra* Part IV.

discourse. Inmates are prevented from participating in normal family and other relationships,[59] often denied basic goods and services,[60] and face sexual and physical abuse at significantly higher rates than the general population.[61] Inmates suffer physical and mental health problems at an alarming rate owing to a variety of features of the prison environment, including overcrowding and lack of access to food with nutritional value, physical exercise, privacy, and adequate ventilation.[62] Prisoners' mental health issues are often exacerbated in this setting, partially because they are denied access to health care they received before entering prison.[63] Further, it is estimated that 1,000 people die annually in American local jails.[64] Suicide rates are three to four times higher among prisoners compared with the general population, and 34% of those who die in jails in the United States have taken their own lives.[65]

Inmates experience further long-term hardship upon their release from prison, including diminished life expectancy,[66] an increased likelihood of unemployment,

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[59] GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 70–71 (Princeton Univ. Press 2007) (1958) (sexual relationships); ROBERT JOHNSON & HANS TOCH, THE PAINS OF IMPRISONMENT 17 (1982) (same); Bagaric et al., *Principled Strategy*, *supra* note 57, at 1695–1702 (procreating and other family life).

[60] SYKES, *supra* note 59, at 67–68.

[61] Bagaric et al., *Principled Strategy*, *supra*, note 57, at 1702. In 2007, a Bureau of Justice Statistics (BJS) report revealed that four years after passage of the Prison Rape Elimination Act (PREA), more than 70,000 prisoners were abused in American jails the previous year. Josephine Yurcaba, *Rape Behind Bars: Stopping the Cycle of Violence*, NATION SWELL (Sept. 28, 2018), https://nationswell.com/rape-in-prison/. In 2012, the Justice Department issued standards for reporting sexual assault under PREA. Alysia Santo, *Prison Rape Allegations Are on the Rise*, MARSHALL PROJECT (July 25, 2018), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise. Since these standards were released, assaults are being reported more, with the number increasing from 8,768 in 2011 to 24,661 in 2015. *Id.* After a prisoner survey in 2012, the BJS "estimated that more than 200,000 inmates are sexually abused in American detention facilities annually." *Id.*

[62] Emily Nagisa Keehn & J. Wesley Boyd, *How Mass Incarceration Harms U.S. Health, in 5 Charts*, CONVERSATION (Jan. 31, 2018), https://theconversation.com/how-mass-incarceration-harms-u-s-health-in-5-charts-90674.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] A study examined the 15.5-year survival rate of 23,510 ex-prisoners in the state of Georgia, finding much higher mortality rates for ex-prisoners than for the rest of the population. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 481–82 (2011). There were 2,650 deaths in total, which was a 43% higher mortality rate than normally expected (799 more ex-prisoners died than expected). *Id.* at 482–83. The main causes for the increased mortality rates included homicide, transportation accidents, and accidental poisoning (including drug overdoses). *Id.* at 484–85; *see also* NAT'L RES. COUNCIL, *supra* note 1, at 226–27.

and reduced income.[67] Psychologists and criminologists have found that incarceration "in a highly structured yet socially threatening environment" can in fact lead to changes in inmates' personalities, which assist inmates to manage the incarceration experience, but can be "counter-productive for their lives upon release."[68] Indeed, upon release, they may distrust others and have difficulties forming relationships and making decisions, which impedes their rehabilitation.[69] Solitary confinement is also commonly used; more than 60,000 people were held in solitary confinement in the United States as of fall 2017.[70] This causes extreme suffering for prisoners, as they are confined to cramped cells, socially isolated from others, and allowed only very brief periods of physical exercise outside their cells.[71]

Incarceration also causes a great deal of harm for lesbian, gay, bisexual, transgender, and queer ("LGBTQ") prisoners, who are particularly vulnerable in most prison settings. Not only are LGBTQ individuals more likely to come into contact with the criminal justice system than the general population,[72] but they face unique challenges once they are incarcerated. Members of this community are more often victims of physical, verbal, and sexual abuse, perpetrated by both guards and fellow prisoners.[73] Moreover, they are often housed in solitary confinement for long periods of time at higher rates than the general prison population—allegedly to guarantee their safety—which leads to them experiencing debilitating mental health

[67] NAT'L RES. COUNCIL, *supra* note 1, at 227, 247. One study estimated the earnings reduction to be as high as 40%. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 13 (2010).

[68] Christian Jarrett, *How Prison Changes People*, BBC (May 1, 2018), https://www.bbc.com/future/article/20180430-the-unexpected-ways-prison-time-changes-people.

[69] *Id.*

[70] Stephanie Wykstra, *The Case Against Solitary Confinement*, VOX (Apr. 17, 2019), https://www.vox.com/future-perfect/2019/4/17/18305109/solitary-confinement-prison-criminal-justice-reform.

[71] Jennifer Gonnerman, *Before the Law*, NEW YORKER (Sept. 29, 2014), http://www.newyorker.com/magazine/2014/10/06/before-the-law.

[72] A 2015 study of 28,000 transgender adults, for example, showed that 2% had been incarcerated in the past year, more than twice the rate of the general population at the time. *See LGBTQ People Behind Bars*, NAT'L CTR. FOR TRANSGENDER EQUALITY 5 (Oct. 2018), https://transequality.org/transpeoplebehindbars.

[73] *Id.* at 13.

issues.[74] Medical treatment is particularly inaccessible for transgender inmates.[75] Prisons typically lack medical experts who are qualified to treat gender dysphoria, resulting in detrimental mental health consequences for transgender prisoners.[76]

Imprisonment also harms people who have not committed crimes, most notably the relatives of inmates or those who are financially or emotionally dependent on prisoners.[77] A study published in 2019 reported that 45% of Americans have had an immediate relative imprisoned.[78] Incarceration thus causes immense, albeit unintended, suffering for many individuals.[79] While there are numerous forms of dependence,[80] the most established and deepest form derives from the bond between parent and child. Children's separation from their incarcerated parents has an extremely detrimental impact on them.[81] While this effect is profoundly damaging, it is also fairly common, as more than five million American children experience this separation from their imprisoned parents at some point in their lives.[82] In 2018, it

[74] *Id.* at 13–14. Most notably, transgender individuals are regularly housed according to their gender at birth, leading to horrific accounts of violence and abuse. *Id.* While data on solitary confinement of transgender individuals was not available, a BJS study found that lesbian, gay, and bisexual prisoners were put in restrictive housing at a rate of 28%, substantially higher than the 18% of the general population who had as well. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011–12, at 4 tbl.3, 5 (2015), https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf.

[75] *LGBTQ People Behind Bars*, *supra* note 72, at 14–15.

[76] *Id.*

[77] *See* Mirko Bagaric & Theo Alexander, *First-Time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing*, 78 ALB. L. REV. 397, 399, 438 (2015); *see also* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. JUST. J., May 2017, at 10, 11–13 (detailing the negative impact incarceration of parents can have on their children).

[78] *The Ripple Effects of Mass Incarceration*, PSYCHOL. TODAY (Mar. 13, 2019), https://www.psychologytoday.com/au/blog/evidence-based-living/201903/the-ripple-effects-mass-incarceration.

[79] *See* Bagaric & Alexander, *supra* note 77, at 439.

[80] Dependency occurs where one person's happiness would be affected significantly and adversely if the relationship between the two individuals was severed. For a discussion about the meaning of happiness, see Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 N.Z.U. L. REV. 411, 430–32 (2013) [hereinafter Bagaric, *Injecting Content*].

[81] *See generally* SARA WAKEFIELD & CHRISTOPHER WILDEMAN, HOW PARENTAL INCARCERATION HARMS CHILDREN AND WHAT TO DO ABOUT IT 2 (Nat'l Council on Family Relations, 2018), https://www.ncfr.org/sites/default/files/2018-01/How%20Parental%20Incarceration%20Harms%20Children%20NCFR%20Policy_Full%20Brief_Jan.%202018_0.pdf (capturing the impact of imprisonment on children).

[82] David Murphey & Mae Cooper, *Parents Behind Bars: What Happens to Their Children?*, CHILD TRENDS (Oct. 2015), https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf.

was estimated that 2.7 million American children had a parent who was in prison.[83] After factoring in other variables, such as income and race, the incarceration of a child's parent is associated with a higher chance of him or her experiencing difficulties during his or her most formative years. Children of incarcerated parents face more emotional difficulties, are less engaged in school, have more problems in school between the ages of 6 and 17, and suffer from other issues that stem from the lack of parental monitoring.[84] Further, incarcerating a parent greatly increases the likelihood that their children will also be incarcerated and experience physical and mental health problems later in their lives.[85]

C. The Rate of Recidivism of Former Prisoners Is High

As we discuss in more detail below,[86] imprisonment has its benefits: it imposes a considerable hardship on the guilty offender and protects the community. However, the benefit of community protection is overestimated in many cases. While imprisonment prevents the commission of further crimes while the offender is incarcerated, former prisoners have high recidivism rates.[87] More than half of those who are released from prison are rearrested within five years.[88] It has been noted

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[83] Keehn & Boyd, *supra* note 62.

[84] Murphey & Cooper, *supra* note 82, at 2, 7.

[85] For example, in Texas, children of incarcerated parents are five times more likely than other children to commit crimes; incredibly, 70% of them become incarcerated at some point. *See Incarcerated—Children of Parents in Prison Impacted*, TEX. DEP'T CRIM. JUST. (July 2008), http://www.tdcj.state.tx.us/gokids/gokids_articles_children_impacted.html; Keehn & Boyd, *supra* note 62.

[86] *See infra* Part V.

[87] A study of prisoners released in 2005 found that 55.4% were arrested for, and convicted of, a new crime within five years of release. MATTHEW R. DUROSE, ALEXIA D. COOPER, & HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, 14 (2014).

[88] NATHAN JAMES, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY AND RECIDIVISM 9 (2015). The most common reason that prisoners are not released is simply that they were sentenced to life imprisonment. In 2012, 160,000 inmates were serving a life sentence, and of these, approximately 49,000 were sentenced to life without the possibility of parole. ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013). In 2013, approximately 4,500 inmates died in state or local prisons and jails due to natural causes, illness or disease, suicide, or violence. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013—STATISTICAL TABLES 1 (Aug. 2015), https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf [hereinafter U.S. DEP'T OF JUSTICE, MORTALITY IN LOCAL JAILS AND STATE PRISONS]. For the report on the number of deaths in federal prisons (of which there were 444), see U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MORTALITY IN STATE PRISONS, 2001–2014—STATISTICAL TABLES PRESS RELEASE 1 (Dec. 2016), https://www.bjs.gov/content/pub/pdf/msp0114st.pdf [hereinafter U.S. DEP'T OF JUSTICE, MORTALITY IN STATE PRISONS]. A small number are also executed. In fact, 2016 had the smallest number of executions

that:

> If any other institutions in America were as unsuccessful in achieving their ostensible purpose as our prisons are, we would shut them down tomorrow. Two-thirds of prisoners reoffend within three years of leaving prison, often with a more serious and violent offense. More than 90 percent of prisoners return to the community within a few years (otherwise our prisons would be even more overcrowded than they already are). That is why it is vitally important how we treat them while they are incarcerated.[89]

Not only do conventional prisons fail to reduce the threat posed to the community by offenders upon their release, but the hardships imposed on individuals in these facilities increase their risk of recidivism.[90] A 2016 U.S. Sentencing Commission report tracked 25,431 federal prisoners following their release from prison in 2005,[91] and found that over the succeeding eight-year period, almost half (49.3%) were re-arrested.[92]

The rate of recidivism of offenders released from state prisons is also very high. A study of offenders released from state prisons in 30 states in 2005 found that 83% were re-arrested at least once during the nine years following their release.[93] The figure was 90.1% for offenders who were 24 or younger at the date of release.[94]

D. High Prison Numbers Do Not Reduce the Crime Rate

While the financial and human costs of imprisonment are extremely high, the benefits of incarcerating over two million Americans are marginal. The increasing consensus among researchers is that mass incarceration has not meaningfully enhanced community safety. A 2016 Brennan Center report notes that "rigorous social science research based on decades of data shows that increased incarceration played

(20) in the modern era (i.e., since 1973 when some states commenced re-enacting death penalty statutes). *See* DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2016: YEAR END REPORT 1–2 (2016), http://deathpenaltyinfo.org/documents/2016YrEnd.pdf.

[89] James Gilligan, *Punishment Fails. Rehabilitation Works.*, N.Y. TIMES (Dec. 19, 2012), http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works.

[90] *See* M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. ECON. REV. 1 (2007).

[91] U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 3 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

[92] *Id.* at 5.

[93] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 6 (2018), https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf.

[94] *Id.*

an extremely limited role in the crime decline."[95] The report continues:

> Recent reforms enacted by states show that mass incarceration and crime are not inextricably linked. Over the last decade, 27 states have reduced both imprisonment and crime together. From 1999 to 2012, New Jersey and New York reduced their prison populations by about 30 percent, while crime fell faster than it did nationally. Texas decreased imprisonment and crime by more than 20 percent during the same period. California, in part because of a court order, cut its prison population by 27 percent, and violence in the state also fell more than the national average.[96]

Recent declines in incarceration have not resulted in increased crime rates. Data from the first half of 2019 from the Federal Bureau of Investigation (FBI) shows that overall crime rates fell since the first half of 2018 throughout cities and rural communities of different sizes despite the decarceration measures being taken in many jurisdictions nationwide.[97]

However, it is pertinent to note recently there has been an unprecedented spike in the homicide rate in the United States. In 2020, homicides in 34 cities rose by 30%.[98] The cause of this is unclear.[99] It has been postulated that:

> Perhaps the 2020 homicide spike is a blip, a fleeting artifact of the toxic mix of pandemic stress, economic hardship and protest outrage. Once the COVID-19 lockdowns and social distancing mandates end, the face-to-face outreach that characterizes the most successful anti-violence programs can resume, and the bloodshed hopefully will ebb.[100]

Irrespective of the cause of the homicide increase, it is clear that in order for the move towards lower incarceration levels to continue to gain momentum the rate of serious crime must not rise.[101]

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[95] JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 5 (2016), https://www.brennancenter.org/sites/default/files/2019-08/Report_Unnecessarily_Incarcerated_0.pdf; *see also* 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, 383–88 (2014) (summarizing studies on the issue).

[96] AUSTIN ET AL., *supra* note 95, at 5.

[97] *See* FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, 2019 JANUARY–JUNE PRELIMINARY SEMIANNUAL UNIFORM CRIME REPORT CRIME IN THE UNITED STATES TABLE 1, https://ucr.fbi.gov/crime-in-the-u.s/2019/preliminary-report/tables/table-1/table-1.xls (last visited May 26, 2021).

[98] Adam Gelb, *America's Surge in Violence: Why We Must Reduce Violent Crime for Prison Reform to Work*, USA TODAY (Mar. 9, 2021), https://www.usatoday.com/story/opinion/2021/03/09/why-reducing-violence-essential-prison-reform-work-column/4626310001/.

[99] *Id.*

[100] *Id.*

[101] *Id.*

An individual is prevented from reoffending while imprisoned, but this does not justify the current, extremely high level of incarceration across the United States. It is clear that increased incarceration does not generally correlate with lowered crime rates. A key reason for this appears to be that offenders' experience of incarceration does not result in their rehabilitation and can in fact increase their risk of reoffending.

IV. CAUSES OF THE CURRENT PROBLEMS AND SOLUTIONS TO OVERCOME, OR AT LEAST DILUTE, THEM

In this Part, we discuss the major social and political factors that have led to the mass incarceration crisis in the United States.[102] It is critical to explore and understand these matters, so that their impact can be minimized in the future to reduce incarceration numbers.

A. Punitive Attitudes Towards Criminal Justice in the United States

A leading cause of the growth in prison numbers in the United States has been the adoption and persistence of deeply punitive attitudes towards criminal justice. We briefly consider some social, economic, philosophical and policy reasons for this.

1. Racial Prejudice

Racial prejudice has been a key driver of—and, many argue, the primary impetus for—punitive criminal justice policies in the United States.[103] Although criminal and sentencing laws do not explicitly discriminate against individuals from racial minorities, they are applied disproportionately against them, and especially against Blacks. The "Interdisciplinary Roundtable on Punitiveness in America" found that racial prejudice and its infiltration into the criminal justice system has not changed significantly since the twentieth century.[104] Likewise, Khalil Gibran Muhammad, Director of the Schomburg Center for Research in Black Culture at the New York Public Library, observes that notions of racial difference underpin conceptions of the causes of criminality.[105] Due to the assumption that "[B]lack people are trapped by inherent or learned pathologies," it is understood that they

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[102] These reasons are explored more fully in Mirko Bagaric et al., *Bringing Sentencing into the 21st Century: Closing the Gap Between Practice and Knowledge by Introducing Expertise into Sentencing Law*, 45 HOFSTRA L. REV. 785, 819–29 (2017).

[103] NAT'L RES. COUNCIL, *supra* note 1, at 122–23.

[104] BETTINA MUENSTER & JENNIFER TRONE, WHY IS AMERICA SO PUNITIVE? A REPORT ON THE DELIBERATIONS OF THE INTERDISCIPLINARY ROUNDTABLE ON PUNITIVENESS IN AMERICA 26 (2016), http://www.jjay.cuny.edu/sites/default/files/news/Punitiveness_in_America_Report_March2016.pdf.

[105] *Id.* at 14–15.

should be "subject to heightened law enforcement and more punitive punishment."[106]

Police detect more offenses, and particularly minor ones, committed by individuals from racial minorities than by white people.[107] In part, this is because they more closely patrol poor areas where more people of color live.[108] A direct consequence of this close monitoring of disadvantaged neighborhoods is higher arrest rates of people from minorities for various offenses than of people from wealthier and whiter sections of the populace. Research has found that police are much more likely to arrest people from racial minorities than white individuals, and particularly for drug offenses, even though they commit the same or a lower number of such crimes.[109] Other powers appear to have been developed to police racial minorities, and especially African Americans. This is exemplified by the racially biased use of "stop and frisk" laws that empower police to detain and search people.[110]

Once arrested, individuals from racial minorities are more likely to be prosecuted than white suspects, even if they have similar previous criminal histories.[111]

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[106] *Id.* at 15.

[107] K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 290–91, 293 (2014); Research Working Group & Task Force on Race and the Criminal Justice System, *Preliminary Report on Race and Washington's Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 636–38 (2012).

[108] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 30 (1998) [hereinafter Davis, *Prosecution and Race*]; Howell, *supra* note 107, at 297–98; 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 (1992) (quoting THOMAS M. UHLMAN, RACIAL JUSTICE: BLACK JUDGES AND DEFENDANTS IN AN URBAN TRIAL COURT 13 (1979)); Kim Farbota, *Black Crime Rates: What Happens when Numbers Aren't Neutral*, HUFFINGTON POST (Sept. 2, 2015), http://www.huffingtonpost.com/kim-farbota/black-crime-rates-your-st_b_8078586.html.

[109] HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 1, 4–6, 9 (2009), https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states; Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 707, 709 (1999) (citing MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 9–10 (1995)); Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 107, at 642 (citing Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 475 (2011)).

[110] Issa Kohler-Hausmann & Jamie Fellner, *A Red Herring: Marijuana Arrestees Do Not Become Violent Felons*, HUM. RTS. WATCH 2, 11 (Nov. 2012), https://www.hrw.org/report/2012/11/23/red-herring/marijuana-arrestees-do-not-become-violent-felons.

[111] Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 107, at 647 (citing ROBERT D. CRUTCHFIELD ET AL., WASH. STATE MINORITY & JUSTICE COMM'N, RACIAL AND ETHNIC DISPARITIES IN THE PROSECUTION OF FELONY CASES IN KING COUNTY 4 (1995), http://www.courts.wa.gov/committee/pdf/November%201995%20Report.pdf (demonstrating that prosecutors charged white and Black defendants differently in

Various reasons have been posited for the apparent inclination of prosecutors to exercise their considerable discretion in this manner,[112] including that they are susceptible to the influence of unconscious bias that people of color are dangerous.[113] In addition, because people of color are more likely than white people to have criminal records, owing to the higher rate at which police monitor and arrest them, prosecutors can more easily substantiate charges against them at trial.[114] Hence, studies find that people from racial minorities also have higher rates of conviction and receive harsher sentences than white people.[115] For instance, Black Americans are imprisoned at a rate six times that of white Americans.[116] Moreover, their terms of incarceration are longer than those of white offenders, accounting for their commission of the same offenses and their similar histories of prior convictions.[117] Notably, research reveals that Black offenders who harm white people receive harsher sanctions than white offenders who harm Black people.[118]

Washington state)).

[112] Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 205–06 (2008) [hereinafter Davis, *Racial Fairness*]; Howell, *supra* note 107, at 299; Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 643, 645–49 (2002); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 796–97 (2012).

[113] Davis, *Racial Fairness*, *supra* note 112, at 34–35; Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 429 (2013); Howell, *supra* note 107, at 303; *see* Davis, *Prosecution and Race*, *supra* note 108, at 203, 206; Research Working Group & Task Force on Race and the Criminal Justice System, *supra* note 107, at 666, 667.

[114] Davis, *Prosecution and Race*, *supra* note 108, at 36–37.

[115] Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, *in* CONTINUING THE STRUGGLE FOR JUSTICE: 100 YEARS OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY 193–94 (Nat'l Council on Crime and Delinquency et al. eds., 2007).

[116] HEATHER C. WEST ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2009 (2010), http://bjs.gov/content/pub/pdf/p09.pdf; *see* BROMLEY PRISON FACTFILE, PRISON REFORM TRUST 34 (Nov. 2012), http://www.prisonreformtrust.org.uk/Portals/0/Documents/FactfileJune2012.pdf (noting that Black "prisoners account for the largest minority of ethnic prisoners" in the United Kingdom); *see also* HUMAN RIGHTS WATCH, *supra* note 109, at 16 (analyzing prison admission data for 2003 revealing that relative to population, Blacks are 10.1 times more likely than whites to be imprisoned for drug offenses).

[117] William Rhodes et al., *Federal Sentencing Disparity: 2005–2012*, at 9, 53, 59 (Bureau of Justice Statistics, Working Paper No. NCJ 248768, 2015), https://www.bjs.gov/content/pub/pdf/fsd0512.pdf. This report also systematically documents previous studies in the United States that support the conclusion that subconscious bias causes racial disparity in sentencing. U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2, 6, 8, 16 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

[118] Siegfried L. Sporer & Jane Goodman-Delahunty, *Disparities in Sentencing Decisions*, *in* SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME 390 (2009).

2. The Crime Wave Between 1960 and 1980

Another major cause of Americans' punitive attitudes towards criminal justice that led to increases to prison numbers and the present incarceration crisis was the crime wave in the United States between 1960 and 1980, and the government's response to it.[119] According to the National Research Council, the increase to national crime rates from 1961, in addition to "certain features of the social, political, and institutional context," encouraged "politicians, policy makers, and other public figures" to support criminal justice measures that "entailed embracing harsher policies rather than emphasizing other remedies"; that approach, in turn, heightened "public fears of crime even after crime rates had ceased to increase."[120]

President Lyndon Johnson's "Great Society" policy program greatly enlarged policing powers and resources.[121] The Office of Law Enforcement Assistance was established under the Law Enforcement Assistance Act, which was passed by Congress in 1965.[122] The Omnibus Crime Control and Safe Streets Act, passed in 1968, authorized "federal grants to police for equipment, training, and pilot programs and also greater federal investments in rehabilitation, crime prevention, and alternatives to incarceration."[123] Nevertheless, these advances were undermined by state government discretion over the disbursement of federal money, and by "provisions on wiretapping, confessions, and use of eyewitnesses that curtailed the procedural protections that had been extended by [recent] Supreme Court decisions."[124]

As noted above, in 1971, President Nixon announced a "War on Drugs," which further increased incarceration rates. The introduction and increased severity of federal and state anti-drug legislation ensured that, by 1997, close to 20% of state prisoners and two-thirds of federal prisoners were incarcerated for these crimes.[125] Since then, the rate of imprisonment at the state level for drug crimes has not changed and the proportion of federal prisoners incarcerated for such offenses has reduced only marginally to 50%.[126]

The passage of punitive criminal justice laws did not abate from the 1980s onwards, though the crime wave had ceased. The 1994 federal Violent Crime Control and Law Enforcement Act, which supplanted the Omnibus Crime Control and

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[119] Gopnik, *supra* note 52.

[120] NAT'L RES. COUNCIL, *supra* note 1, at 111.

[121] Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), https://time.com/3746059/war-on-crime-history/.

[122] NAT'L RES. COUNCIL, *supra* note 1, at 110.

[123] *Id.* at 110.

[124] *Id.* at 111.

[125] *Id.* at 120.

[126] *Id.*

Safe Streets Act, provided financial incentives for states to expand police departments, pass tough-on-crime sentencing laws, and build prisons.[127] Pursuant to this legislation, states "curtailed or even abolished parole, established mandatory minimum sentences, and passed 'three strikes'-type laws that required especially stiff penalties for repeat offenders."[128]

Bipartisan endorsement of strong criminal justice measures during and beyond the crime wave period was driven by racial prejudice. The Republican Party's electoral platform at national and state levels focused on harsh criminal justice strategies to attract significant numbers of white voters by implicitly reflecting their assumptions that people of color were responsible for the high crime rate.[129] Although the Democratic Party retained some policies aimed at reducing punishments, it remained sensitive to Republican charges that it was "soft on crime."[130] White Democratic voters also supported harsh criminal justice measures; while supportive of civil rights in the abstract, some Democratic "liberals" remained so concerned about African Americans' supposed disposition to crime that they rejected true racial integration at a community level.[131]

3. Origins of the "Tough on Crime" Agenda in the 1940s to 1960s

The "tough on crime" policies associated with the crime boom of the 1960s were modelled on and had the same flaws and limitations as the "liberal" and Democratic criminal justice reforms that followed the Second World War. Both were thoroughly and traditionally "Progressive" in their rationales, implementation and effects. Their proponents tended to assume that procedural fairness was the key to producing just outcomes, so reforms in both periods were technocratic.[132] They aimed to professionalize and standardize the administration of justice, particularly by enlarging federal power in the operation of justice systems at state and local levels.[133] And, in keeping with the Progressive reform tradition, they did not aim to change any structures of property or social power in American society.[134] Thus, the reforms of the post-war and Great Society periods were both undermined by prem-

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[127] MUENSTER & TRONE, *supra* note 104, at 13.

[128] *Id.*

[129] NAT'L RES. COUNCIL, *supra* note 1, at 108, 113, 115–16.

[130] On partisanship in the Cold War, see NICK FISCHER, SPIDER WEB: THE BIRTH OF AMERICAN ANTICOMMUNISM 261–262 (2016); NAT'L RES. COUNCIL, *supra* note 1, at 115.

[131] FISCHER, *supra* note 130, at 261–62; NAT'L RES. COUNCIL, *supra* note 1, at 115.

[132] NAT'L RES. COUNCIL, *supra* note 1, at 108.

[133] *Id.* at 107–08.

[134] *See* SHELTON STROMQUIST, REINVENTING "THE PEOPLE": THE PROGRESSIVE MOVEMENT, THE CLASS PROBLEM, AND THE ORIGINS OF MODERN LIBERALISM 9 (2006) (noting that the Progressive moment's "vision of the people, although universal in its claims, was in fact more limited and culturally bounded").

ises about the racial origins and associations of crime. The importance of these premises was, in general, overlooked by reformers who failed to grasp that standardized procedures, however fairly applied, do not in themselves ensure the equitable application of criminal justice.

The enlargement of the federal government's criminal justice powers after the Second World War was intended to introduce "uniformity, neutrality, and proceduralism in law enforcement and sentencing," to redress the perception of individuals from racial minorities that the system was unfair and discriminatory.[135] Yet the equation of federal authority with objective application of the law was deeply problematic. It failed to account for the influence of racism in federal agencies that had vested interests in manipulating crime data to justify increasing their budgets and attribute ballooning crime rates in discreet offense categories to racial minorities.[136] Two agencies with critical roles in national criminal justice policy and enforcement were the FBI and the Federal Narcotics Bureau (FNB).[137] Both were led for long periods by virulent racists. For more than 40 years (c. 1930–72), J. Edgar Hoover's FBI was the major source of national crime figures.[138] Its Uniform Crime Reports were found by the National Research Council to have accepted skewed data supplied by local police departments to show increases in crime categories that would encourage greater government funding and identify rising crime amongst Blacks.[139] Likewise, Harry Anslinger at the FNB boosted his bureau's powers by encouraging the general public to identify the consumption of marijuana and heroin with racial minorities, and to regard this consumption as a criminal justice rather than a health issue.[140] Anslinger thereby encouraged support for the introduction of severe sanctions for such crimes, leading to increased incarceration of people of color.[141]

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[135] NAT'L RES. COUNCIL, *supra* note 1, at 108.

[136] *Id.* at 106.

[137] *History*, FBI, https://fas.org/irp/agency/doj/fbi/fbi_hist.htm (last visited May 26, 2021); John F. Galliher et al., *Lindesmith v. Anslinger: An Early Government Victory in the Failed War on Drugs*, 88 J. CRIM. L. & CRIMINOLOGY 661, 664–65 (1998).

[138] NAT'L RES. COUNCIL, *supra* note 1, at 114; *Uniform Crime Reporting (UCR) Program*, FBI, https://www.fbi.gov/services/cjis/ucr (last visited May 26, 2021); *J. Edgar Hoover, May 10, 1924–May 2, 1972*, FBI, https://www.fbi.gov/history/directors/j-edgar-hoover (last visited May 26, 2021).

[139] NAT'L RES. COUNCIL, *supra* note 1, at 114.

[140] JOHANN HARI, CHASING THE SCREAM: THE FIRST AND LAST DAYS OF THE WAR ON DRUGS 7–41 (2015).

[141] *Id.*; Laura Smith, *How A Racist Hate-Monger Masterminded America's War on Drugs*, TIMELINE (Feb. 27, 2018), https://timeline.com/harry-anslinger-racist-war-on-drugs-prison-industrial-complex-fb5cbc281189.

B. The Privatization of Criminal Justice

The persistence of punitive criminal justice policies and the growth of America's prison population have also been attributable to the efforts of those who draw political and economic benefits from the many privately-run prisons and corrections services in the United States.[142]

The privatization of prisons is a hallmark of neo-liberal, free-market economic policy because it entails outsourcing government functions on the grounds that this will minimize the burden on taxpayers, reduce government intrusion into social policy, and produce greater economic efficiencies.[143] Yijia Jing observes that, in privatizing prisons, "the state simultaneously enhances its overall punishing capacity but reduces its role in the direct administration of punishment."[144]

Prison privatization expanded exponentially from the mid-1980s in the United States, building on private firms' previous provision of health care and food services for state prisons.[145] In each year between 1986 and 2000, around 17 new American private prisons commenced operation.[146] In 1996, American private prisons accounted for 92% of the 50,000-inmate rated capacity of private prisons in the world, and in 2003, 5.7% of American state inmates were imprisoned in private prisons.[147] California epitomized this trend: it built 23 new prisons between 1984 to 2007.[148] In 2019, private prisons in America incarcerated approximately 116,000 inmates.[149] While this is a 16% reduction from the peak level in 2012, the private prison population continues to grow relative to the total prison population.[150] Since 2000, the private prison population has grown 32%; by contrast the overall increase in the prison population is 3%.[151]

By making hefty donations and offering private sector jobs to legislators, companies that operate private prisons and their associated services have influenced the

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[142] NAT'L RES. COUNCIL, *supra* note 1, at 126.

[143] YIJIA JING, PRISON PRIVATIZATION: A STUDY OF THE CAUSES AND MAGNITUDE xviii–xix (2010); Robert Nelson, *Big House Inc.*, PHX. NEW TIMES (Apr. 3, 2003), http://www.phoenixnewtimes.com/news/big-house-inc-6433263.

[144] JING, *supra* note 143, at xviii–xix.

[145] *Id.* at xvi–ii.

[146] *Id.* at xvi.

[147] *Id.* at xvi, n.2.

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

[149] *Private Prisons in the United States*, SENT'G PROJECT (Mar. 3, 2021), https://www.sentencingproject.org/wp-content/uploads/2021/03/Private-Prisons-in-the-United-States.pdf.

[150] *Id.*

[151] *Id.*

passage of legislation to support their businesses.[152] Congress created the Prison Industries Enhancement Certification Program (PIE) in 1979 "to encourage states and . . . local government to establish employment opportunities for prisoners that approximate private sector work opportunities."[153] In order to ensure that inmates of private prisons could produce goods for the businesses of their owners, the American Legislative Exchange Council lobbied for the passage of the federal Prison Industries Act (PIA), which led to many states expanding their PIE.[154] In its original incarnation, the PIE permitted inmates to be employed at "prevailing" wage rates and deductions from their pay for "room and board" needed to be "reasonable and . . . used to defray the cost of inmate incarceration."[155] Yet, under the PIA, the money that was removed from prisoners' wages to offset incarceration costs was funneled into a "private sector prison industry expansion account," which was used to build new facilities and pay for other companies to contribute to the provision of private sector programs and their implementation.[156]

The imposition of more and longer prison terms serves the interests of the owners and operators of private prisons and has bred corruption. Florida's Correctional Services Corporation (CSC), which is the largest private prison provider in the United States, was "holding inmates past their release dates so the company could collect more per diem dollars from the state."[157] The Florida Department of Juvenile Justice reported in 1998 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."[158] The high rate of prison escapes from private prisons is notable because the operators benefit from such escapes, as the terms of prison sentences of escaped inmates are increased.[159] From 1995 to 2000, on average, 1 of 489 prisoners escaped from private prisons across the United States, whereas 1 of 14,601 inmates escaped from public prisons in California.[160]

C. Jurisprudential Neglect to Articulate the Content of the Proportionality Principle

Another key cause of the mass incarceration crisis is the failure of legislatures,

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[152] 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/.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Nelson, *supra* note 143.

[158] *Id.*

[159] *Id.*

[160] *Id.*

courts, and scholars to clearly articulate the content of the principle of proportionality and factors that are relevant to its application. This principle requires that the harshness of the penalty that is imposed matches the seriousness of the offense. If it was properly applied, this principle could result in lower prison numbers because it would reduce the number of harsh sentences that are imposed. Yet no systematic, doctrinally sound methodology for ensuring that the principle is applied properly has been developed and, indeed, some argue that its current formulation is so vague as to be meaningless.[161] Currently, therefore, harsh sanctions can be imposed in an untrammeled manner.

Proportionality is, in fact, a sentencing consideration in several American states at present. Ten states' sentencing regimes include proportionality as a requirement.[162] Constitutional provisions in nine states prohibit the imposition of excessive penalties or treatment.[163] In addition, 22 states have constitutional clauses that proscribe the imposition of cruel and unusual penalties, and eight of those include a proportionate-penalty clause.[164] Nevertheless, the sentences that are imposed within and between those states for similar offenses vary. The reason for this is that the proportionality principle has not been invested with any content and a methodology for comparing the "gravity of harms," and thus ensuring that punishments fit their crimes, has not yet been developed.[165] As Jesper Ryberg observes, some have argued that the principle of proportionality "presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment."[166] The failure to define the factors that are relevant to the application of the

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[161] *See* JESPER RYBERG, THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION 93 (2004) (arguing that "proportionalists are still far from having provided an adequate comparison or scaling of crimes in gravity," and that "the theoretical ground for judgements on seriousness [of crimes] is, to a wide extent, missing").

[162] Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 242, 250 (2012).

[163] F. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 154 (2009).

[164] *Id.*

[165] *Id.* at 154–57 (explaining that 49 state constitutions include varying language regarding proportionality and that "[c]ases that construe these state provisions are as varied as the provisions themselves and do not always track differences in constitutional text"). The Supreme Court has held that proportionality is a component of the Eighth Amendment, however, it only applies to stamp out 'grossly disproportionately' sentences, and hence, has proved to be feeble protection. Ewing v. California, 538 U.S. 11, 20, 30–31 (2003). In *Ewing*, the court even upheld a 25-year sentence for the theft of golf clubs worth less than $1,200. *Id.* at 18, 30–31. In this case, Justice Scalia noted that proportionality was an incoherent concept. *Id.* at 31; *see* Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 3 (1991).

[166] RYBERG, *supra* note 161, at 184. For discussion regarding the obscure proportionality jurisprudence by the Supreme Court, see Perry L. Moriearty, *Implementing Proportionality*, 50

proportionality principle has meant that the severity of penalties and prison numbers have not been reduced.

D. Overview of Solutions to Overcoming or Diluting the Influence of the Causes of Mass Incarceration in the United States

As noted above, understanding the major causes of the mass incarceration crisis in the United States is vital to ensure that they can be redressed, so the current trend is reversed. It is important to expose the influence of racial prejudice on American attitudes towards criminal justice and on criminal justice policies. This requires an acknowledgment that the inflated incarceration rate is less attributable to the crime rate than it is to discrimination against racial minorities. The crime rate during the period from 1960 to 1980 was a major reason for increased punitive attitudes towards criminal justice and the growth in prison numbers. Yet those attitudes and increased incarceration have persisted, despite the fact that crime rates have diminished. Consequently, there is far less justification for harsh sentencing laws today and their continuation can largely be explained by enduring racial discrimination.

The two decades prior to the crime wave show that the development of procedural regularity and fairness cannot alone guarantee the equitable application of criminal justice policy. Further, the lack of criminal justice policy reform in the decades following the cessation of the crime wave reinforces how important it is to address the causes of punitive criminal justice attitudes and, in particular, the racial prejudice that has for so long underlain them. Part VI more fully discusses the measures that should be implemented to reduce incarceration levels in a sustained and principled manner. Prior to this, we set out the catalyst that currently exists for genuine sentencing and penal reform.

V. THE CURRENT IMPETUS FOR LOWERING INCARCERATION NUMBERS

For decades, the United States' political norm demanded tougher and tougher criminal sanctions, which resulted in it having the highest incarceration rate in the world by a wide margin.[167] Change requires political sympathy, which has traditionally not been directed at those who commit crimes. Nevertheless, somehow, a shift in the opposite direction has taken only a few years to become the new political consensus. While there are myriad reasons for this, some of which remain unclear, the long history of scholarship highlighting the problems of mass incarceration laid the foundation for eventual policy change. As mainstream discourse picked up this narrative, the conversation around mass incarceration has evolved quickly and loudly.

U.C. DAVIS L. REV. 961, 967, 986 (2017).

[167] WORLD PRISON BRIEF, *supra* note 36.

Many articles in mainstream newspapers and magazines have criticized the overly punitive nature of the sentencing system. For instance, an article in *Rolling Stone* magazine condemned the imposition of mandatory sentences for nonviolent drug offenders because they cause suffering without reducing recidivism.[168] *The New York Times* has published numerous pieces that highlight the excessive government expenditure on incarceration,[169] and endorse reduced sentences,[170] including those recommended in a proposal to soften federal sentencing laws.[171] The *Huffington Post* reported on a 2016 document issued by the White House titled, *Economic Perspectives on Incarceration and the Criminal Justice System*, which highlighted that the prison population includes a disproportionate number of Hispanic and Black people and that offenders who serve long prison terms often reoffend.[172] That document also considered options for lowering the crime rate.[173]

For the first time in modern history, powerful and influential public officials are promulgating these same views. Eric Holder, President Barack Obama's first Attorney General (AG), and the first Black AG, stated in 2013 that "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason. It's clear, at a basic level, that twentieth-century criminal justice solutions are not adequate to overcome our twenty-first-century challenges."[174] After his time in office, Holder argued in *The New York Times* that the United States

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[168] 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.

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

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

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

[172] Matt Ferner, *New Report Details Devastating Effects of Mass Incarceration on the U.S.*, HUFFINGTON POST (May 3, 2016), http://www.huffingtonpost.com.au/entry/effects-mass-incarceration_us_5727b6abe4b0b49df6ac0e00.

[173] *Id.*

[174] Eric Holder, Attorney General, 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/iso/opa/ag/speeches/2013/ag-speech-130812.html.

can reduce prison numbers without compromising community security.[175] Since then, the frequency of critical public discussion about mass incarceration from journalists, documentary filmmakers, and other mainstream commentators has grown exponentially.

Leading writers, actors, and filmmakers have conveyed their views on mass incarceration through various media. Shonda Rhimes, the creator of the popular television show "How to Get Away with Murder," a drama centered on a law professor, highlighted this issue in an episode featuring the main character advocating for an inmate in front of the Supreme Court.[176] Another popular television series, "Madam Secretary," portrays its main character running for president with a strong message against mass incarceration.[177] Television shows that have focused solely on issues affecting people caught up in mass incarceration, such as "Orange is the New Black," have become cultural staples, especially among younger viewers.[178]

Rappers and hip-hop artists have a long history of speaking out against the criminal justice system, and have accordingly been some of the most powerful voices among celebrities who oppose mass incarceration.[179] One recent high-profile example of this is that of Kendrick Lamar, a hugely successful rapper, who performed a song at the Grammys dressed in a prison uniform and surrounded by other "prisoners" on a set designed to look like a prison cell block.[180] These artists distinguish themselves through their efforts to be actively involved in change by using their platforms to speak out.

While there seems to be a consensus on the need to bring an end to mass incarceration, the appropriate means for doing so remains a subject of debate. The conservative political right uses familiar themes, such as fiscal responsibility and protecting the traditional family structure, as justifications for reducing prison rates.[181]

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

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

[177] *Id.*

[178] Orli Matlow, *How Has 'OITNB' Changed Society?*, BUSTLE (June 11, 2015), https://www.bustle.com/articles/89491-7-ways-orange-is-the-new-black-has-changed-society-since-the-season-1-premiere.

[179] Sheldon Pearce, *How Hip-Hop is Fighting for Prison Reform*, PITCHFORK (Nov. 13, 2017), https://pitchfork.com/thepitch/how-hip-hop-is-fighting-for-prison-reform/.

[180] Spencer Kornhaber, *Deconstructing Kendrick Lamar's Grammys Performance*, ATLANTIC (Feb. 16, 2016), https://www.theatlantic.com/entertainment/archive/2016/02/kendrick-lamars-new-song-grammys-performance-review/462939/.

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

On the opposite end of the spectrum, liberal and progressive voices highlight the issue of historic racial oppression, declaring mass incarceration to be a modern form of slavery.[182] There is not much overlap in the rhetoric of the major political parties beyond the broad goal of decarceration. This is reflected in an editorial written by Senator Mike Lee, one of the most conservative members of the United States Senate, in which he urged a reduction in prison numbers without mentioning racial issues at all.[183] Nevertheless, general recognition of the need for reform possibly transcends such differences.

Perhaps due, at least in part, to the mainstream media's focus on reducing incarceration levels, there is now widespread recognition that incarceration numbers are unacceptably high.[184] Two-thirds of American voters surveyed in 2019 believed that incarceration levels were too high, with 68% of Republicans, 78% of Independents, and 80% of Democrats supporting significant reforms.[185] This bipartisan support has encouraged leaders from both major political parties to look for alternatives to incarceration.[186]

A key theme—particularly among liberals—is a call to abolish mandatory sentencing.[187] This is a major shift for the party that originally played a large role in encouraging mass incarceration. In a commentary titled "The Democrats' Shameful Legacy on Crime," Marie Gottschalk notes:

> For decades, a growing number of Democrats had been trying to reposition themselves as the party of law enforcement and to lure white voters away from the GOP . . . .

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reform; Tina Rosenberg, *On One Issue, Americans Are United. Too Many Are Behind Bars.*, N.Y. TIMES (Oct. 30, 2019), https://www.nytimes.com/2019/10/30/opinion/on-one-issue-americans-are-united-too-many-are-behind-bars.html.

[182] *See* 13TH (Kandoo Films 2016). For other examinations of mass incarceration through the lens of racial oppression, see *Vice: Raised in the System*, HBO (Apr. 6, 2018), https://www.hbo.com/vice/season-06/raised-in-the-system; *see also Sentencing Reform: A Limited Series* (Brave New Films 2017), https://www.thenation.com/article/its-time-to-end-mass-incarceration/.

[183] Lee, *supra* note 181.

[184] The momentum for change is further outlined in Mirko Bagaric et al., *Sentencing Developments in the United States in 2019: Shifting from the 'Tough on Crime' Mantra to (Seriously) Contemplating the Abolition of Prisons*, 44 CRIM. L.J. 54, 56–57 (2020) [hereinafter Bagaric et al., *Sentencing Developments*]; *see also* Alex Busansky & Eli Lehrer, *Voters Are Driving Justice Reform*, HILL (Apr. 3, 2019, 6:00 PM), https://thehill.com/opinion/criminal-justice/437174-voters-are-driving-justice-reform.

[185] *See* Busansky & Lehrer, *supra* note 184.

[186] *See id.*

[187] *See generally* Caitlin Oprysko, *Mandatory Minimum Sentences Reform*, POLITICO (Dec. 19, 2019), https://www.politico.com/2020-election/candidates-views-on-the-issues/criminal-justice-reform/mandatory-minimum-sentences-reform/ (capturing views of some Democratic politicians on mandatory minimum sentencing reforms).

. . .

> The $30 billion law [known as the 1994 Crime Bill], passed 25 years ago this month, was the capstone of their efforts . . . . [I]ts main thrust was a vast array of punitive measures . . . . The crime bill did not significantly lower crime rates; it did, however, help transform the United States into the world's warden, incarcerating more of its residents than any other country.[188]

The Democratic Party of 2020 looked markedly different from its past incarnation, with the majority of the recently concluded primary candidates running on promises to lower incarceration.[189] This stance is a direct repudiation of this party's former push for mandatory minimum sentencing.[190] For instance, then Senator Kamala Harris, a former district attorney known for being "tough on crime," promised to end mandatory minimums at the federal level and incentivize states to do the same.[191] Likewise, Senator Bernie Sanders asserted that he would "stop excessive sentencing with the goal of cutting the incarcerated population in half" and end mandatory sentencing minimums.[192]

Then former Vice President Joe Biden took the same position as then Senator Harris, stating that he would eliminate mandatory minimums, work for the passage of legislation to repeal mandatory minimums at the federal level, and give states incentives to repeal their mandatory minimums.[193] He has also promised to:

> Create a new $20 billion competitive grant program to spur states to shift from incarceration to prevention . . . . In order to receive this funding, states will have to eliminate mandatory minimums for non-violent crimes, institute

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[188] Marie Gottschalk, *The Democrats' Shameful Legacy on Crime*, NEW REPUBLIC (Sept. 11, 2019), https://newrepublic.com/article/154631/democrats-shameful-legacy-crime.

[189] For more information on various candidates' stances on criminal justice and the potential for lowering incarceration rates, see Josiah Bates, *Criminal Justice Reform Is Proving a Tricky Subject for Many of These 2020 Democrats*, TIME (July 2, 2019, 3:08PM), https://time.com/5615053/2020-democrats-criminal-justice-reform/.

[190] *See* Katie Park & Jamiles Lartey, *2020: The Democrats on Criminal Justice*, MARSHALL PROJECT (Apr. 8, 2020, 8:00PM), https://www.themarshallproject.org/2019/10/10/2020-the-democrats-on-criminal-justice.

[191] Douglas A. Berman, *Senator Kamala Harris Releases Her Plan "to Fundamentally Transform Our Criminal Justice System*," SENT'G L. & POL'Y BLOG (Sept. 9, 2019, 1:29PM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/09/senator-kamala-harris-releases-her-plan-to-fundamentally-transform-our-criminal-justice-system.html.

[192] Douglas A. Berman, *Senator Bernie Sanders Releases Criminal Justice Reform Plan Under Banner "Justice and Safety for All,"* SENT'G L. & POL'Y BLOG (Aug. 18, 2019, 6:32PM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/08/senator-bernie-sanders-releases-criminal-justice-reform-plan-under-banner-justice-and-safety-for-all.html.

[193] Douglas A. Berman, *Former Veep Joe Biden Releases Extended "Plan for Strengthening America's Commitment to Justice,"* SENT'G L. & POL'Y BLOG (July 23, 2019, 10:12PM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/07/former-veep-joe-biden-releases-extended-plan-for-strengthening-americas-commitment-to-justice.html.

> earned credit programs, and take other steps to reduce incarceration rates without impacting public safety.[194]

Biden also indicated that he would encourage states both to invest in programs that prevent and reduce incarceration and to decriminalize some offenses and confirmed his support for removal of incarceration as a sanction for drug use alone.[195] There are even some overlaps between criminal justice reforms endorsed by Biden and Trump, in addition to lessening the application of mandatory minimum sentencing laws, such as to commute certain offenders' sentences.[196]

The impetus for change is reflected by increasingly ambitious calls for fundamental reform of not only the sentencing system, but more widely the criminal justice system in a manner which reduces penalty severity, invokes a more strategic approach to criminal justice,[197] and is evidence-based.[198] Some states are engaging in sentencing reform through a range of approaches, with varying degrees of success, but the trend is not uniform across the nation.[199]

Former President Trump's campaign initially communicated a "tough on crime" attitude that was consistent with past criminal justice policies.[200] Nevertheless, there have been comparatively more extensive and systematic reforms in the federal jurisdiction designed to reduce the incarceration rate under his administration than in the preceding 50 years.[201] And in fact under his administration the federal prison population reduced by nearly 20%—a reduction of approximately 38,000 inmates.[202] The fact that many of these reforms apply retrospectively has

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[194] *Id.*

[195] Politico Staff, *Biden vs. Trump: Who's the Actual Criminal Justice Reformer?*, POLITICO MAG. (Apr. 23, 2020, 5:00 PM), https://www.politico.com/interactives/2020/justice-reform-biden-trump-candidate-policy-positions/.

[196] *Id.*

[197] See recently, for example, Rachel Barkow & Mark Osler, *14 Steps Biden's DOJ Can Take Now to Reform America's Criminal Legal System*, APPEAL: THE LAB (Mar. 15, 2021), https://theappeal.org/the-lab/white-paper/14-steps-bidens-doj-can-take-now-to-reform-americas-criminal-legal-system/.

[198] Jon Gould & Pamela Metzger, *Evidence-Based Paths Toward Criminal Justice Reform*, HILL (Feb. 26, 2021), https://thehill.com/opinion/criminal-justice/540478-evidence-based-paths-toward-criminal-justice-reform.

[199] For an analysis of different states' approaches, see Bagaric et al., *Nothing Seemingly Works in Sentencing*, *supra* note 27, at 518–22.

[200] German Lopez, *Donald Trump Wants to Bring Back the "Tough on Crime" Policies that Helped Cause Mass Incarceration*, VOX (Sept. 21, 2016), https://www.vox.com/2016/5/25/11737264/donald-trump-criminal-justice-republican-president.

[201] Alan Neuhauser, *DOJ Touts 10-Year Drop in Incarceration Rates*, U.S. NEWS (Apr. 25, 2019), https://www.usnews.com/news/national-news/articles/2019-04-25/doj-touts-10-year-drop-in-incarceration-rates.

[202] *With a New Attorney General Now in Place, Should We Expect to See Any Changes in the Federal Prison Population?*, (Mar. 14, 2021), https://sentencing.typepad.com/sentencing_

had a particularly significant impact on the large number of nonviolent offenders who were convicted under an unduly harsh sentencing regime.

The most significant recent sentencing reform at the federal level is the FIRST STEP Act, which took effect in December 2018.[203] The more prominent aspects of the Act are that it retrospectively reduces penalties for some non-violent offences (especially drug offences) and provides for the early release of certain elderly offenders who are at low risk of reoffending.[204]

The risk of reoffending is evaluated with the assistance of a recently developed risk and needs assessments instrument called the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) program, which has a number of key design and operational elements.[205] It utilizes an algorithm which incorporates static integers but also involves a dynamic individualized assessment, which evaluates offenders' risks and needs by reference to factors that are susceptible to change, including their conduct while incarcerated.[206] The tool contains 15 factors in total (11 of which are dynamic and the remaining are static).[207] The algorithm is also designed to be racially and ethnically neutral,[208] and to assess offenders' criminogenic features in order to develop measures to lessen their risks of reoffending.[209] One year

law_and_policy/2021/03/with-a-new-attorney-general-now-in-place-should-we-expect-to-see-any-changes-in-the-federal-prison-p.html.

[203] For a discussion of other notable bipartisan criminal justice reforms, see Marc Levin, *Build a Bridge, Not a Wall, Between Administrations on Justice Reform*, HILL (Feb. 1, 2021), https://thehill.com/opinion/criminal-justice/536732-build-a-bridge-not-a-wall-between-administrations-on-justice-reform.

[204] Press Release, Office of the White House, President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer (Dec. 21, 2018), https://www.legistorm.com/stormfeed/view_rss/1414680/organization/69295/title/president-donald-j-trump-secures-landmark-legislation-to-make-our-federal-justice-system-fairer-and-our-communities-safer.html; Ames Grawert, *What Is the First Step Act—And What's Happening With It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it; Alan Ellis, Mark H. Allenbaugh, & Nellie Torres Klein, *INSIGHT: First Step Act of 2018—Early Release for Elderly Inmates*, BLOOMBERG L. (May 2, 2019 1:01AM), https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-first-step-act-of-2018-early-release-for-elderly-inmates.

[205] OFFICE OF THE ATT'Y GEN., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM (2019), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf.

[206] *Id.* at 46.

[207] OFFICE OF THE ATT'Y GEN., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM–UPDATE 10–11 (2020), https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf. Dynamic factors include infraction convictions during current incarceration, number of programs completed, and education score. Static factors include age at time of assessment and criminal history score.

[208] *Id.* at 8–9.

[209] *Id.* at 23. For some preliminary insights into the efficacy of this tool, see Amy Cyphert,

after its commencement, more than 140 offenders had either been released from prison early or received shorter sentences than would have otherwise been the case pursuant to the First Step Act.[210]

Accordingly, there have been a number of changes made to the sentencing system in order to reduce prison numbers.[211] These changes have only slightly reduced incarceration rates. However, there is now an unequivocal impetus among state and federal lawmakers towards reducing penalties for many criminal offenses in order to lower incarceration rates. This change in policy direction from the recent past is striking.

The move towards less punitive criminal justice measures has coincided with the mainstream media persistently highlighting the flaws of mass incarceration. This discourse represents the only relevant feature of American life that appears to have changed in recent years. Hence, a shift in community sentiment has helped to instigate a new orientation in criminal justice policy. This change has been occurring slowly, but the fact that it has begun illustrates the workings of the democratic process: the collective will of the people is capable of encouraging lawmakers to adopt evidence-based policies. It is imperative that this momentum is not lost. To ensure that it is maintained, sentencing reform must be evidence-based and effective.

VI. THE PROPOSED MANNER IN WHICH TO MAKE DECARCERATION SUSTAINABLE AND ACCELERATE SENTENCING REFORM

From the above analysis, it is apparent that a promising trend towards reducing incarceration numbers is emerging. However, three factors suggest that it is by no means certain that this pattern will continue. First, as we have discussed, the shift in criminal justice policy towards a "soft on crime" approach occurred quite abruptly. Second, this change has lacked an overarching doctrinal foundation, and, hence, it is feasible that it is merely transient. Third, the reduction in prison numbers has not been extensive. The best manner in which to consolidate this move towards decarceration is to put in place evidence-based and normatively sound reforms that reduce the rate of incarceration and its detrimental consequences, while ensuring that the crime rate does not rise. We now explain our proposal for the

Reprogramming Recidivism: The First Step Act and Algorithmic Prediction of Risk, 51 SETON HALL L. REV. 331, 334–35 (2020).

[210] U.S. SENTENCING COMM'N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf#page=13.

[211] Mirko Bagaric et al., *Mitigating America's Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1, 20–22 (2018) [hereinafter Bagaric et al. *Mitigating America's Mass Incarceration Crisis*].

features of such a sentencing system.[212]

There are three key elements that are essential to reforming the sentencing system. The first is appropriately matching the penalty to the crime. This will ensure that excessively heavy (and for that matter overly-lenient) sanctions are not imposed. This can be achieved by implementing the principle of proportionality. This principle has, as we have seen, already been endorsed as a component of the sentencing system. However, it is has failed to curb mass incarceration because it has been swamped by the tough on crime agenda and at the theoretical and structural level the principle has not been defined with sufficient rigor to firmly designate appropriate penalty ranges. While scholars and jurists have not firmly resolved how to precisely match the seriousness of the harm with the harshness of a criminal sanction, it is possible to provide guidance regarding the broad parameters of the principle.[213]

It has been established that the crimes which cause the most immediate and long-term damage to victims are sexual and violent offenses.[214] The harshest sanction is incarceration (with the obvious exception of the death penalty, which is rarely invoked)[215] and hence it logically makes sense that this should be reserved for serious violent and sexual offences. While this is a crude calibration, it would result in a considerable reduction in incarceration numbers given that 40% of current prisoners are serving a sentence for other types of offences.[216]

This raises for consideration the appropriate length of prison terms for sexual and violent offenders and the manner in which other offenders should be dealt with and takes us to the two remaining key structural aspects of a reformist sentencing system, both of which involve incorporating the greater use of technology into the process. The second key proposal involves obtaining a better understanding of the offenders who present a genuine risk to the community. This is a cardinal consideration given that community protection is the main objective of sentencing,[217] and most offenders—more than 90%—will at some point be released from prison.[218]

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[212] These reforms are set out in greater detail in Bagaric et al., *Nothing Seemingly Works in Sentencing*, *supra* note 27, at 526–43.

[213] *Id.* at 527.

[214] *Id.* at 528–29; Bagaric et al., *Mitigating America's Mass Incarceration Crisis*, *supra* note 211, at 36.

[215] *See* DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2021), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (finding an overall decrease in executions since 1999).

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

[217] *Cf.* Bagaric et al., *Nothing Seemingly Works in Sentencing*, *supra* note 27, at 530–31.

[218] NATHAN JAMES, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY AND RECIDIVISM (2015), https://fas.org/sgp/crs/misc/RL34287.pdf.

Traditionally, predictions of offender recidivism have been in the form of unstructured assessments by judges, which typically take into account considerations such as the nature of the current offense and an offender's prior criminal history. These assessments are often inaccurate and hence in relation to some parts of the criminal justice system, such as parole determinations, there has been an increased use of risk and needs assessment tools.[219] These instruments use a large number of variables, some of which are static (such as prior criminal history) and others which are dynamic (such as educational courses which have been completed) to determine the likelihood that an offender will commit offenses in the future. The PATTERN instrument discussed in the context of the First Step Act above is one example of such an instrument. These tools are now starting to get some currency in the sentencing process,[220] but need considerable additional refinement and testing to enhance their accuracy and reliability. In addition to improving accuracy, the integers which are used by these instruments are all deliberately set and can be controlled to ensure that they do not incorporate considerations which discriminate against minority groups.[221] It is accepted that no instrument will be fool proof in terms of predicting offender recidivism, however, given the importance of these decisions, it is important to make them as precise as possible. Offenders who are wrongly evaluated as being of low risk can cause incalculable damage to future victims. Conversely, a false assessment that an offender is at high risk of reoffending can lead to a longer prison term which equates to gratuitous unnecessary hardship to the offender. Risk and needs assessment tools should play an important role in determining the appropriate penalty for all sexual and violent offenders. Their penalty should be mainly guided by the principle of proportionality; however, a penalty loading should be attached where the risk and needs assessment indicates that an offender has a meaningful risk of recidivism.

The last main structural change that needs to be made to the sentencing system is the development of a new sanction which can be used as alternative to prison (for offenders who have not committed serious sexual or violent offences) which will reduce reoffending, while imposing a significant hardship on offenders. The key feature of this sanction is the use of modern monitoring and sensor technology which can be used to physically confine the movements of offenders to precise locations, while monitoring their actions in live time to greatly diminish the prospect of offending. The sanction would build on the design features of home detention orders which use GPS tracking, and which are already used in many parts of the

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[219] *Cf. id.*

[220] Bagaric et al., *Nothing Seemingly Works in Sentencing*, *supra* note 27, at 522–24.

[221] Cyphert, *supra* note 209, at 544; *see also* Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, MD. L. REV. (forthcoming 2021) (manuscript at 8–9) (on file with authors).

United States.[222]

Technology has already been developed which can monitor the movements of people and other moving objects and is in use in a number of contexts including detecting if a patient falls in hospital and in directing driverless cars. Tamper-proof sensor equipment and visual recording equipment could be attached to the body of offenders to monitor their movement. This would supplement GPS technology which monitors the location of offenders.[223] The equipment would detect if offenders engaged in suspicious movement (such as if they picked up an implement or applied force to another person) and this would trigger a camera which would film and record the event. A corrections officer would also be automatically notified of the incident and put in place appropriate interventions immediately, such as directly communicating with offender to desist from his or her current actions or directing police to where the offender is situated.

This sanction would have significant advantages beyond merely reducing the harm that an offender would cause if his or her actions were not monitored. Empirical data shows that the greatest deterrent to crime is not the severity of the possible punishment but the belief by offenders that if they commit a crime that they will be detected.[224] Thus, the mere imposition of this sanction would greatly reduce the incidence of reoffending. Moreover, this sanction aids law enforcement because when offenders who are undergoing the monitoring sanction do offend, the sensor equipment will provide cogent evidence regarding their involvement in the offense.[225]

The sanction can be operationalized in a number of different ways so that it is tailored to match the severity of the crime. Not only can the length of the monitoring obviously vary (for example from six months to ten years) but the area of confinement can also be controlled. Thus, for example, offenders who have committed relatively minor offences (such as property offenses) could be permitted to move within say ten miles of their home, while more serious offenders would be required to not stray from their work and home locations.

This sanction could be used as an alternative to probation, especially for offenders who have not committed sexual or violent offenses. As noted above, this would result in a reduction in prison numbers in the order of 40%. This number would even be greater if the sanction is extended to offenders who have committed less serious sexual and violent offenses, but who are assessed as low risk of reoffending by a risk and needs assessment tool.

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222 *See also* Bagaric et al., *Nothing Seemingly Works in Sentencing*, *supra* note 27, at 542.

223 *Id.*

224 *Id.*

225 *Id.*

VII. CONCLUSION

In recent years, community and political views have changed markedly regarding the best approach to "deal" with criminal offenders. After half a century of implementing punitive criminal justice policies and practices, which have resulted in the United States having the highest incarceration rate in the world,[226] a very different policy orientation is gaining traction. While the seeds of this shift had been planted for several years, it was not initially apparent that a new policy direction was taking shape because changes that were made were subtle and sporadic, and lacked an overarching narrative. Now, however, we have clear evidence of widespread support for a new direction in criminal justice policy, which aims to reduce the incarceration rate.[227] Moves to lower prison numbers have been developing for the past decade and were, at first, evident in incremental state-based reforms, though they were not expressly focused on this goal.

The emergence of a movement that sought to lower incarceration rates became more evident with the passage of the FIRST STEP Act, which specifically sought to facilitate the early release of prisoners.[228] The arrival of this movement was also heralded by the criminal justice campaign policies of the contenders for the Democratic nomination for the presidential election in 2020. Any doubt that the "tough on crime" rhetoric was no longer driving criminal justice policy vanished with the Republican Party's advertisement at the 2020 Super Bowl, which promoted the virtues of a more lenient approach to law and order.[229] Mass incarceration reflected a major failure of sentencing and penal policy. The correction to this that we are now witnessing is compelling evidence that the democratic system in the United States does not always result in sound policy choices, but, in time, policy choices can change radically.

The move towards imposing less punitive sentences and lowering prison rates is desirable, particularly given the fiscal cost of incarceration and the suffering that it inflicts on offenders and their families.[230] In order for the current momentum in favor of softer sentencing practices to translate into meaningful reductions in prison numbers, it is necessary to enact laws that will introduce evidence-based, normatively-sound sentencing reforms. If any evidence emerges that suggests that the current momentum to reduce incarceration rates is inappropriate, such as an inflation of the crime rate, this could lead to a rapid stalling or reversal of the new policy direction.

To prevent this from occurring, it is vital that three key sentencing reforms are

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[226] WORLD PRISON BRIEF, *supra* note 36.

[227] Bagaric et al., *Sentencing Developments*, *supra* note 184.

[228] Grawert, *supra* note 204.

[229] Funke & McCarthy, *supra* note 10.

[230] *Supra* Part III.

made. First, the major principle that we argue should inform penalty severity is proportionality, and therefore sanctions should be principally calibrated to achieve a match between the harm caused by the crime and the deprivation imposed on the offender. Second, it is necessary to greater utilize and improve the accuracy of risk and needs assessment tools in order that courts can make more informed decisions regarding the likelihood that offenders will reoffend. This is vital if courts are to more effectively achieve the objective of community protection. Finally, technological advances should be utilized to develop sanctions which can more efficiently protect the community, while imposing proportionate hardship on offenders. This can be achieved by using sensor technology to monitor the movements and actions of offenders while they are in designated geographical areas of the community.

The current political climate is finally receptive to evidence-based sentencing reforms. It is important that reforms of this nature are implemented, otherwise the opportunity to create a more just, transparent, and cost-effective sentencing system may be lost in the foreseeable future.