

CONTINUING PRINCIPLED SENTENCING REFORM AND WINDING BACK MASS INCARCERATION AGAINST THE BACKDROP OF AMERICA’S SURGE IN VIOLENT CRIME

Professor Mirko Bagaric,* Jennifer Svilar** and Brienna
Bagaric***

Five decades of an unremitting tough on crime policy resulted in the United States having the highest incarceration rate on earth. This approach was in the process of being systematically wound back in recent years. The mood for criminal justice reform was highlighted by the receptiveness of many people to what on their face seemed to be radical proposals, such as defunding the police and abolishing prisons. This resulted in a significant decline in the incarceration levels. The momentum towards proportionate and principled sentencing has stalled as a result of the massive increase in violent crime in the United States in the past two years. Calls to defund the police have been drowned out by calls to refund the police and impose harsher criminal penalties. This Article identifies the contours of an evidence-based sentencing system and proposes reforms that are achievable despite the heightened community concern about the increasing crime rate. The reforms will address entrenched discrimination in the sentencing system and include introducing the proportionate sanction, utilizing technology that accurately predicts recidivism, and implementing societal reforms (such as enhancing educational outcomes) that address the root cause of crime.

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* Dean of Law, Swinburne Law School, Melbourne

** Professor, J.D., University of Tennessee College of Law

*** Lecturer, Deakin University Law School, Melbourne

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INTRODUCTION

The criminal justice system is in a state of change—more so than at any point over the past half century. The tough on crime policy, which has dominated United States criminal justice policy for the past fifty years and has resulted in the United States becoming the world’s largest incarcerator,¹ has finally been exposed as a failed experiment. As a result of the police murder of George Floyd,² the mood for reform has been accelerated due to an increased intolerance for any form of institutional racism. It is simply quite no longer an option to maintain a system that imprisons African Americans at approximately four times the rate of White Americans.³

¹ See Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, ATLANTIC (Apr. 28, 2016), <https://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/> [https://perma.cc/J5Y3-DYKM].

² Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/> [https://perma.cc/3CYD-DCEG]; Elliot C. McLaughlin, *How George Floyd’s Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [https://perma.cc/2LZ4-BZMQ].

³ See *infra* Part II.

The key reason for the dramatic failure of criminal justice policy is that it was grounded on political opportunism and sloganism as opposed to being informed by evidence. Strikingly, the criminal justice system is one of the few societal institutions that has remained impervious to empirical learning and scientific and technological developments over the past fifty years. While disciplines such as medicine, engineering, communications, and marketing have changed dramatically during this time, the criminal justice process has largely remained in a technology and science-free time warp. In particular, the principal method of punishment (locking up offenders behind concrete walls) has remained unchanged.

Political imperatives have proven to be an insurmountable obstacle to the adoption of evidence-based developments in the criminal justice system. This is no longer the case. Never has the criminal justice climate been more ready for reform. This is highlighted by the receptiveness of many parts of the community to seemingly radical reform proposals, such as abolishing prisons⁴ and defunding police departments.⁵ While it is clear that the criminal justice system must change, there is no clarity or consensus regarding how it should change.

The criminal justice system has numerous phases, including investigation, arrest, trial, and conviction or acquittal, and then the imposition of sanctions against offenders. This last stage, sentencing, is arguably the most important aspect of the criminal justice system: The sanctions available against offenders target the most cherished and coveted individual interests, such as the right to liberty and, in extreme cases, the right to life.⁶ Moreover, mistakes at the sentencing stage of the process threaten to undermine the integrity of the entire criminal justice system. If, for example, murderers habitually received only small fines or shoplifters were sentenced to life imprisonment, this would seriously undermine the efficacy of the entire criminal justice process. This Article sets out the evidence-based changes that should be made to the sentencing system.

While there is considerable momentum and apparent receptivity for criminal justice reform, proposals need to be pragmatically orientated, otherwise they will be rejected for being too ambitious and unworkable. Or worse still, over-ambitious reforms could be implemented that will have a net negative impact on society. Thus, in reforming the sentencing system, it is important to balance pragmatism and theoretical purity. The key consideration in balancing these issues is not to lose sight of the main objective of sentencing (and indeed the criminal justice system), which is to protect the community against crime. Thus, it is cardinal that any proposed reforms do not undermine the communi-

⁴ See Mirko Bagaric et al., *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 73 (2018).

⁵ See e.g., Charlotte Alter, *Black Lives Matter Activists Want to End Police Violence. But They Disagree on How to Do It*, TIME (June 5, 2020, 3:54 PM), <https://time.com/5848318/black-lives-matter-activists-tactics> [https://perma.cc/ZKC6-XCE3].

⁶ See *infra* Parts I & III.

ty's sense of safety. It would be pragmatically untenable to advocate for reforms that will significantly reduce prison numbers in a climate in which the crime rate is increasing. This is an especially important observation given that in 2020, 2021, and the start of 2022 there has been a significant rise in the violent crime and homicide rate in the United States.⁷

As has been noted recently:

Four years ago, progressive prosecutors were in the sweet spot of Democratic politics. Aligned with the growing Black Lives Matter movement but pragmatic enough to draw establishment support, they racked up wins in cities across the country.

Today, a political backlash is brewing. With violent crime rates rising in some cities and elections looming, their attempts to roll back the tough-on-crime policies of the 1990s are increasingly under attack—from familiar critics on the right, but also from onetime allies within the Democratic Party.⁸

The other key pillar of the reforms involves identifying a coherent alternative to the tough on crime approach. Intellectually this is a complex task. While most jurists agree that America has punished offenders too heavily in recent decades, there is no accepted methodology that can be invoked to guide the development of appropriate penalties for criminal offenses.⁹ To this end, the only plausible theoretical construct is the principle of proportionality, which prescribes that the harshness of the punishment should match the seriousness of the crime.¹⁰ This principle is vague; arguably meaningless. However, in this Article, we suggest a methodology for giving it workable content. A key practical implication from this involves decriminalizing drug offenses.

In Part I of this Article, we will provide an overview of the current sentencing system and incarceration numbers and trends in the United States. This will be followed by an explanation of the current breadth and depth of the momentum for reform in Part II. In Part III, we will set out the nonnegotiable elements of any reform proposals. These include the need to ensure that changes do not result in an increase in violent crime, and they must eliminate, or at least substantially reduce, racial discrimination in the sentencing system. Reform proposals will be set out in Part IV of the Article and will include the need to: implement proportionate sanctions, decriminalize drug use, replace prison for nonviolent and nonsexual offenses with monitoring sanctions, and introduce

⁷ See *infra* Part III.

⁸ Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged.*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html> [<https://perma.cc/E7TP-RCAS>].

⁹ See, e.g., MICHAEL TONRY, SENTENCING MATTERS 134 (1996); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative To What?*, 89 MINN. L. REV. 571, 572–73 (2005); Cassia Spohn, *Twentieth-Century Sentencing Reform Movement*, 13 CRIMINOLOGY & PUB. POL'Y 535, 536 (2014); Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 503 (2014).

¹⁰ See *infra* Part IV.

societal reforms that address the root cause of crime. The key reforms will be summarized in the concluding remarks.

I. OVERVIEW OF UNITED STATES SENTENCING LAW AND INCARCERATION PRACTICE

A. *Sentencing Law and Practice*

Sentencing is the process through which courts impose sanctions on criminal offenders. The sentencing system has operated to make the United States the world's largest incarcerator—it imprisons more of its people than any other country.¹¹ The move towards mass incarceration started five decades ago, coinciding with President Nixon's "War on Drugs" and a move towards harsh mandatory sentencing penalties.¹² Michael Tonry observes that these penalties have had a significant impact on prison rates:

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.¹³

While each jurisdiction in the United States has its own sentencing systems,¹⁴ they have similar objectives of sentencing in the form of community protection, specific and general deterrence, retribution, and rehabilitation.¹⁵ The

¹¹ The only other country with a higher imprisonment rate than the United States is Seychelles. See ROY WALMSLEY, INST. FOR CRIM. POL'Y RES., WORLD PRISON POPULATION LIST 5–6 (12th ed. 2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wpl_12.pdf [<https://perma.cc/4T2E-NMJK>].

¹² NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70 (Jeremy Travis et al. eds., 2014).

¹³ Tonry, *supra* note 9, at 514. For a list of jurisdictions in the United States that use guideline sentencing, see *Sentencing Guidelines Resource Center: In-Depth Jurisdiction Profiles*, ROBIN INSTITUTE, <https://robininstitute.umn.edu/publications/sentencing-guidelines-resource-center-depth-jurisdiction-profiles> [<https://perma.cc/R47J-A43C>]. See also Alison Siegler, *End Mandatory Minimums*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums> [<https://perma.cc/CB44-6JJ8>].

¹⁴ Sentencing (and more generally, criminal law) in the United States is mainly the province of the states. See *United States v. Morrison*, 529 U.S. 598, 612–13 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

¹⁵ See U.S. SENTENCING COMM'N, UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (2021), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLM-Full.pdf> [<https://perma.cc/9ZTS-ET98>] [hereinafter U.S. SENTENCING COMM'N 2021].

most important of these aims is community protection.¹⁶ This aim underpins strict prescriptive sentencing laws that to some degree operate in every American jurisdiction.¹⁷

A good illustration of the operation of prescriptive sentencing laws is the Sentencing Commission (USSC) Guidelines Manual (Federal Sentencing Guidelines *or* Guidelines), which have significantly shaped sentencing systems.¹⁸ Moreover, the federal prison system itself is among the ten largest in the world.¹⁹

The Federal Sentencing Guidelines are similar to most prescribed sentencing systems in that the main considerations that determine penalty severity are offense seriousness and the offenders' criminal history.²⁰ There are also dozens of other considerations that can either mitigate or aggravate penalty severity.²¹ These are factored into the penalty in the form of "adjustments" and "departures."²² Thus, by way of example, remorse can decrease the penalty by up to three levels if it is accompanied by an early guilty plea.²³ Courts can also adjust the penalty on the basis of considerations that are not expressly stated in the Guidelines if they set out the reasons for doing so.²⁴ While the Guidelines are only advisory,²⁵ the guideline range is important in determining the sentence²⁶—with about half of all sentences being within the range.²⁷

¹⁶ See NAT'L RSCH. COUNCIL, *supra* note 12, at 322.

¹⁷ See *id.* at 325.

¹⁸ See U.S. SENTENCING COMM'N 2021, *supra* note 15.

¹⁹ Melissa Hamilton, *Sentencing Disparities*, 6 BRIT. J. AM. LEG. STUD. 177, 182 (2017).

²⁰ See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1110–11 (2008).

²¹ Amy Baron-Evans & Jennifer Niles Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines' Prohibitions and Restrictions on Mitigating Factors*, in LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION i, i–ii (Amy Baron-Evans & Paul Hofer eds., 2010), https://static1.squarespace.com/static/551cb031e4b00eb221747329/t/5883e40717bffc09e3a59ea1/1485038601489/Litigating_Mitigating_Factors.pdf [<https://perma.cc/6RBL-82S9>].

²² *Id.* at ii.

²³ U.S. SENTENCING COMM'N 2021, *supra* note 15, 377–78.

²⁴ *Id.* at 471.

²⁵ *United States v. Booker*, 543 U.S. 220, 222 (2005) (holding that aspects of the Guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial).

²⁶ Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); see also Baron-Evans & Coffin, *supra* note 21, at i–ii. For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, see WILLIAM W. BERRY III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 2471, 2471 (Julian V. Roberts ed., 2011); U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT: FISCAL YEAR 2014 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf [<https://perma.cc/Q4MX-K223>].

²⁷ See generally U.S. SENTENCING COMM'N, ANNUAL REPORT 2018 (2018), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report.pdf> [<https://perma.cc/WP9L-SN2G>].

B. Incarceration Numbers and Trends

1. Overall Incarceration Trends

At present, there are approximately two million incarcerated people in the United States.²⁸ Total incarceration numbers peaked at 2.29 million in 2007²⁹—following a fourfold increase in the four decades leading to this point.³⁰ Incarceration has dropped in recent years.³¹ Between 2006 and 2018, the rate fell by 17 percent.³² This decline continued in recent years; in part due to the COVID-19 pandemic.³³ Overall, incarceration levels in state and federal prisons and local jails dropped from 2.1 million in 2019 to 1.8 million in mid-2020.³⁴ State and federal prisons incarcerated about 1,311,100 people in mid-2020, and the population further declined, leveling out at about 1,249,300 in late 2020.³⁵ The incarceration level of local jails declined about 17 percent from mid-2019 to late 2020, with most of the decline occurring during the first part of the COVID-19 pandemic.³⁶ In population percentage terms, the rate of people behind bars at state and federal prisons and local jails dropped from 644 people per one hundred thousand residents to 551 people per one hundred thousand residents in the first half of 2020.³⁷

²⁸ *Incarceration Declined Only Slightly from Fall 2020 to Spring 2021 After an Unprecedented Drop in Incarceration in 2020*, VERA INST. (June 7, 2021), <https://www.vera.org/new-room/incarceration-declined-only-slightly-from-fall-2020-to-spring-2021-after-an-unprecedented-drop-in-incarceration-in-2020> [https://perma.cc/5Q48-9MFU].

²⁹ HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T. OF JUST., NCJ 224280, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2007 6 (2008).

³⁰ *State Reforms Reverse Decades of Incarceration Growth*, PEW CHARITABLE TRS. (Mar. 21, 2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/03/state-reforms-reverse-decades-of-incarceration-growth> [https://perma.cc/ZQ2W-5ZL9].

³¹ E. ANN CARSON, U.S. DEP'T OF JUST., NCJ 253516, PRISONERS IN 2018 1 (2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf> [https://perma.cc/PM69-FLVH]; see also John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RES. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [https://perma.cc/2VGT-72CV].

³² Gramlich, *supra* note 31.

³³ Linda So et al., *Dying Inside: The Hidden Crisis in America's Jails*, REUTERS (October 28, 2020, 12:00 PM) <https://www.reuters.com/investigates/special-report/usa-jails-release/> [https://perma.cc/JS8W-7Z3W]; John Yang & Mike Fitz, *Inmates Released to Home Confinement During Pandemic Fear 'Devastating' Reincarceration*, PBS (September 21, 2021, 6:35 P.M.), <https://www.pbs.org/newshour/show/inmates-released-to-home-confinement-during-pandemic-fear-devastating-reincarceration> [https://perma.cc/FS6X-63JQ].

³⁴ JACOB KANG-BROWN ET AL., VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN 2020 3 (2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf> [https://perma.cc/LTR2-ZWT4].

³⁵ *Id.* at 1 tbl.1.

³⁶ *Id.* at 8.

³⁷ *Id.* at 7.

While the prison rate has dropped, the decline has been slow, and the United States continues to house the most prisoners on earth as measured per capita.³⁸

2. *The Ongoing Problem of Race and Incarceration*

Racial discrimination is a particularly disturbing aspect of the sentencing system. The Bureau of Justice Statistics (BJS) provides annual statistics on incarceration levels, which are broken down according to race.³⁹ The 2018 report stated that the black incarceration rate was 3.2 times higher than the white incarceration rate, down from 4.9 times in 2008.⁴⁰ It was also noted that during this period the Latinx incarceration rates had declined significantly over the same timeframe.⁴¹ Despite the narrowing of the gap among races, racial minorities still continue to be incarcerated at alarming levels. As of March 2020, African Americans made up approximately 40 percent of the incarcerated population, yet they make up only about 13 percent of the total United States population.⁴² Even though there was a decline in the jail inmate population due to COVID-19, not all groups benefitted proportionately. For instance, in mid-2020, whites were jailed at a rate of 133 per one hundred thousand white US residents, and Hispanics were jailed at a rate of 134 per one hundred thousand Hispanic US residents.⁴³ But, African Americans were still jailed at a rate of 465 per one hundred thousand black US residents.⁴⁴

Racial disparities in fact worsened during the pandemic: even as the total jail population dropped, racial disparities increased.⁴⁵ By June 2020, black people were incarcerated at about 3.5 times the rate of white people, as compared

³⁸ *International Imprisonment Rates*, SENT'G ADVISORY COUNCIL, <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/international-imprisonment-rates> [https://perma.cc/9JZF-R87S]; see also ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 15 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/02/No-End-in-Sight-Americas-Enduring-Reliance-on-Life-Imprisonment.pdf> [https://perma.cc/DD7G-Z7D8] (“The United States holds an estimated 40% of the world’s life-sentenced population, including 83% of those serving LWOP [life without parole].”).

³⁹ KANG-BROWN ET AL., *supra* note 34, at 3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [https://perma.cc/3F4C-CUEX].

⁴³ TODD D. MINTON ET AL., U.S. DEP'T OF JUST., NCJ 255888, IMPACT OF COVID-19 ON THE LOCAL JAIL POPULATION, JANUARY-JUNE 2020 14 (2021), <https://www.bjs.gov/content/pub/pdf/icljppj20.pdf> [https://perma.cc/4CLS-7GD2].

⁴⁴ *Id.*

⁴⁵ Alexi Jones & Wendy Sawyer, *New Data on Jail Populations: The Good, the Bad, and the Ugly*, PRISON POL'Y INITIATIVE (Mar. 17, 2021), <https://www.prisonpolicy.org/blog/2021/03/17/jails/> [https://perma.cc/M7Y6-PFVL].

to 3.3 times the rate of white people in June 2019.⁴⁶ Moreover, “the number of white people in jails dropped by almost 28% while the number of Black people in jails fell by only 22%.”⁴⁷

Racial disparities, though clearly present throughout the entire criminal justice system, are even more pronounced in those serving life sentences.⁴⁸ For instance, one in every nine prisoners are serving a life sentence and two-thirds of these prisoners are people of color.⁴⁹ To dismantle the prison “buildup,” punishments should be reduced, and individuals should be evaluated for punishment based on their behaviors and “prospects for a crime-free life upon release.”⁵⁰ Part of this effort must be geared toward addressing problems with overly long prison terms, especially life sentences.

3. *The Prohibitive Financial Cost of Mass Incarceration*

The high incarceration rate not only disproportionately punishes offenders and discriminates against some groups but also causes a number of other societal problems. This first problem relates to the cost of incarceration. Local governments struggling to help their residents through the COVID-19 pandemic have looked for areas where they could cut costs, such as within the incarceration system. According to Pew Charitable Trusts:

[A] sustained commitment to safely cutting the number of people in jail could provide long-term financial benefits. The recent experience of reducing prison populations offers a glimpse of the potential cost savings: The 9% drop in the prison population from 2008 to 2018 virtually flattened corrections spending, which had averaged 5.4% annual growth from 1991 to 2007.⁵¹

At the end of 2017, local governments’ spending on jail and other corrections “had risen sixfold since 1977, with jail costs reaching \$25 billion.”⁵² Between 2007 and 2017, about “84 cents of every local government dollar spent on corrections” was spent on jails, and counties with jails spent about one of every seventeen dollars on jails in 2017.⁵³ It costs approximately \$34,000 annu-

⁴⁶ *Id.*; see also ZHEN ZENG & TODD D. MINTON, U.S. DEP’T OF JUST., NCJ 255608, JAIL INMATES IN 2019 1 (2021), <https://www.bjs.gov/content/pub/pdf/ji19.pdf> [<https://perma.cc/2RBE-JQKS>] (“At midyear 2019 . . . Blacks were incarcerated at a rate (600 per 100,000) more than three times the rate for whites (184 per 100,000).”).

⁴⁷ Jones & Sawyer, *supra* note 45.

⁴⁸ NELLIS, *supra* note 38 at 15.

⁴⁹ ASHLEY NELLIS, SENT’G PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 5, 8 (2013), <https://www.sentencingproject.org/app/uploads/2022/08/Life-Goes-On.pdf> [<https://perma.cc/2GTQ-FZPR>].

⁵⁰ NELLIS, *supra* note 38 at 5.

⁵¹ PEW CHARITABLE TRS., LOCAL SPENDING ON JAILS TOPS \$25 BILLION IN LATEST NATIONWIDE DATA 1 (2021), https://www.pewtrusts.org/-/media/assets/2021/01/pew_local_spending_on_jails_tops_25_billion.pdf [<https://perma.cc/F3V7-68Z7>].

⁵² *Id.* at 1–2 (“In 2017, local governments spent 521% more on corrections than they did in 1977.”).

⁵³ *Id.* at 2, 4.

ally per person to keep someone in jail,⁵⁴ and this detracts from the capacity of government to provide productive social services in the form of education and health.

4. *The Untold but Massive Human Cost of Mass Incarceration*

Prison not only imposes a considerable fiscal burden on the community, but it also punishes the families of offenders. Imprisonment leads to “widespread consequences for community health, some of which extend beyond people who are and have been incarcerated and their immediate networks.”⁵⁵ For instance, in neighborhoods where there are high rates of imprisonment, there is also a higher risk for residents to develop “major depressive disorder, generalised anxiety disorder, dyslipidemia, and metabolic syndrome.”⁵⁶ Additionally, “a retrospective longitudinal analysis stratified by the cause of death” showed that “[i]n larger, predominantly non-rural counties . . . a 1 per 1000 increase in the county jail incarceration rate was associated with increases in mortality caused by all causes of death of interest⁵⁷ in the subsequent year.”⁵⁸ Moreover, that these effects are felt at the community level “might contribute to and worsen existing racialised and class-based disparities.”⁵⁹ In fact, “[r]acialised disparities are a central feature of the public health consequences of mass incarceration.”⁶⁰ And as incarceration rates go up, more individuals’ health will be affected, which may further affect the nation’s overall mortality rate.⁶¹

The COVID-19 pandemic poses a unique, serious risk to individuals behind bars, as there is no real way for inmates to practice social distancing. For example, in 2021, nearly 150,000 incarcerated mothers were expected to spend

⁵⁴ *Id.* at 5 (noting this amount increased about 17 percent from 2007).

⁵⁵ Sandhya Kajeepeta et al., *Association Between County Jail Incarceration and Cause-Specific County Mortality in the USA, 1987-2017: A Retrospective, Longitudinal Study*, 6 LANCET e240, e240 (2021), [https://www.thelancet.com/pdfs/journals/lanpub/PIIS2468-2667\(20\)30283-8.pdf](https://www.thelancet.com/pdfs/journals/lanpub/PIIS2468-2667(20)30283-8.pdf) [<https://perma.cc/ZRT6-D24R>].

⁵⁶ *Id.* (citing Mark L. Hatzenbuehler et al., *The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods*, 105 AM. J. PUB. HEALTH 138, 138–43 (2015) and Matthew L. Topel et al., *High Neighborhood Incarceration Rate Is Associated with Cardiometabolic Disease in Non-incarcerated Black Individuals*, 28 ANN EPIDEMIOL 489, 489–92 (2018)).

⁵⁷ *See id.* at e240 (testing for nine common causes of death, “cerebrovascular disease, chronic lower respiratory disease, diabetes, heart disease, infectious disease, malignant neoplasm, substance abuse, suicide, and unintentional injury”).

⁵⁸ *Id.* at e245.

⁵⁹ *Id.* at e241, e245–46 (identifying three pathways underlying their observations about how increased incarceration and county mortality are connected, “(1) the direct pathogenic effects of jail incarceration, (2) the racialised psychosocial pathway, and (3) the racialised material or economic pathway”).

⁶⁰ *Id.* at e245.

⁶¹ *Id.*

Mother’s Day away from their children because of this risk.⁶² Nearly 60 percent of women in US prisons are mothers, and of the more than two million women who are jailed yearly in the United States, 80 percent are mothers.⁶³ Additionally, it is estimated that fifty-eight thousand people are pregnant when they go into local prisons or jails annually.⁶⁴ Leaving their children in another person’s care is not the only difficulty these women face: they also face “[a]ggravation of mental health problems, a greater risk of suicide, and a much higher likelihood of ending up homeless or deprived of essential financial benefits.”⁶⁵ As if this were not bad enough, these women also face difficulties after release: “[f]ormerly incarcerated women experience extremely high rates of food insecurity . . . [a]nd . . . the 1.9 million women released from prisons and jails every year have high rates of poverty, unemployment, and homelessness.”⁶⁶ Incarceration does not affect only those serving the sentence—it continues to affect entire families long after the sentence is served.⁶⁷

Thus, the US sentencing system has resulted in the most punitive criminal justice regime on earth. The gratuitous suffering it inflicts goes beyond the pain inflicted on offenders to the financial impost of the broader community and suffering inflicted on the family of offenders. Finally, however, there is an appetite for change.

II. MOMENTUM FOR CHANGE

A. *Shift in Societal Mood*

Scholars have for decades argued that overly-punitive criminal sanctions are undesirable⁶⁸ because such sanctions are normatively flawed and lacking in empirical justification.⁶⁹ However, being “tough on crime” has proven to be politically popular, and this ethos has continued to define criminal justice policy and practice.

But then something happened. Communities started to understand that spending billions on failed criminal justice policies is wasteful. It also hurts

⁶² Wanda Bertram & Wendy Sawyer, *Prisons and Jails Will Separate Millions of Mothers from Their Children in 2021*, PRISON POL’Y INITIATIVE (May 5, 2021), <https://www.prisonpolicy.org/blog/2021/05/05/mothers-day-2021/> [https://perma.cc/MH22-CGH3].

⁶³ *Id.*

⁶⁴ *See id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ *See, e.g.*, TONRY, *supra* note 9, at 134; Frase, *supra* note 9, at 572; NAT’L RSCH. COUNCIL, *supra* note 12, at 116–17, 121–22; Spohn, *supra* note 9, at 536; Tonry, *supra* note 9, at 503–04.

⁶⁹ *See* Marc Levin, *Build a Bridge, Not a Wall, Between Administrations on Justice Reform*, THE HILL (Feb. 1, 2021, 11:00 AM), <https://thehill.com/opinion/criminal-justice/536732-build-a-bridge-not-a-wall-between-administrations-on-justice-reform> [https://perma.cc/5M32-N5F2].

people, especially the families of offenders. The need for reform has been sharpened by a growing rejection of racism in the criminal justice system. As mainstream discourse picked up this narrative, the conversation around mass incarceration has evolved quickly and loudly. Thus, a broader societal spotlight has been shone on the criminal justice system.

In recent years, numerous commentaries and depictions in the mainstream media have criticized the punitive excess of the sentencing system. *Rolling Stone* magazine, for example, condemned the imposition of mandatory sentences for nonviolent drug offenders because they cause suffering without reducing recidivism.⁷⁰ *The New York Times* has published numerous pieces that highlight the excessive government expenditure on incarceration⁷¹ and endorse softer sentences.⁷² Shonda Rhimes, the creator of the popular television show *How to Get Away with Murder*, a drama centered on a law professor, highlighted the issue of mass incarceration in an episode featuring the main character advocating for an inmate in front of the Supreme Court.⁷³ Popular television show, *Orange is the New Black*, also highlighted the plight of inmates.⁷⁴ Rapper Kendrick Lamar, performed a song at the Grammys in 2016 dressed in a prison uniform in a prison setting, which again brought national attention to the issue of mass incarceration.⁷⁵

⁷⁰ See generally Andrea Jones, *The Nation's Shame: The Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014), <https://www.rollingstone.com/politics/politics-news/the-nations-shame-the-injustice-of-mandatory-minimums-46729/> [<https://perma.cc/T7A9-ZMFP>].

⁷¹ Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/business/economy/in-the-us-punishment-comes-before-the-crimes.html> [<https://perma.cc/ET47-5NH8>].

⁷² 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> [<https://perma.cc/BS93-VHFW>]; 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> [<https://perma.cc/VQD3-CQ8P>]; 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> [<https://perma.cc/8AEG-3H9K>]; Steven Zeidman, *End Mass Imprisonment*, N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/opinion/letters/prosecutors-clemency-parole.html> [<https://perma.cc/4PJY-Z2W6>].

⁷³ Inimai M. Chettiar, *Entertainers Must Use Their Power and Public Visibility Toward Incarceration Reform*, VARIETY (Dec. 1, 2018, 10:49 AM), <https://variety.com/2018/politics/features/inimai-chettiar-entertainers-must-use-power-incarceration-reform-1203071269/> [<https://perma.cc/ABW9-QDUC>].

⁷⁴ See Orli Matlow, *7 Ways 'Orange is the New Black' Has Changed Society Since the Season 1 Premiere*, 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> [<https://perma.cc/SZ9P-YHA6>].

⁷⁵ Kia Makarechi, *Watch Kendrick Lamar Escape Handcuffs in 2016 Grammys Performance*, VANITY FAIR (Feb. 15, 2016), <https://www.vanityfair.com/hollywood/2016/02/kendrick-lamar-2016-grammys-performance> [<https://perma.cc/9DZM-MEAX>].

There is now growing recognition that incarceration numbers are too high.⁷⁶ Two-thirds of American voters surveyed in 2019 were of the view that incarceration levels were too high, with 68 percent of Republicans and 80 percent of Democrats supporting significant criminal justice reforms.⁷⁷ This bipartisan support has coincided with leaders from both major political parties looking for alternatives to incarceration.⁷⁸ *Gallup* has asked about the public's perception of the criminal justice system in the United States five times since 1992.⁷⁹ "[T]here has been a steady decrease in the percentage saying the system is not tough enough," with 83 percent giving this answer in 1992 and 41 percent giving this answer in 2020.⁸⁰ As of 2020, 21 percent say the system is "too tough," and about 35 percent think the system is "about right."⁸¹ Views vary across political parties and races. For instance, 58 percent of Republicans and Republican-leaning independents believe the system is not tough enough, but only 25 percent of Democrats and Democrat-leaning independents hold the same belief.⁸² Additionally, "[m]ore White Americans than Non-White Americans say the justice system is not tough enough (45% compared vs. 31%, respectively)."⁸³ *Gallup* also polled Americans on ways to lower the nation's crime rates, and 63 percent of Americans would prefer to spend money on addressing social and economic problems (e.g., homelessness, mental health, drug addiction) compared to 34 percent who would prefer to spend money on strengthening law enforcement.⁸⁴ Both white and non-white adults favor addressing systemic problems, but "[w]hite adults are less likely than non-[w]hite adults to prioritize this approach."⁸⁵ Even with these changes, many Americans still believe the system is not tough enough,⁸⁶ and hence it is important that any

⁷⁶ See generally 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 (2020) (outlining the momentum for change in sentencing law); see also Alex Busansky & Eli Lehrer, *Voters Are Driving Justice Reform*, THE HILL (Apr. 3, 2019, 6:00 PM), <https://thehill.com/opinion/criminal-justice/437174-voters-are-driving-justice-reform> [<https://perma.cc/6KZE-GXES>].

⁷⁷ Busansky & Lehrer, *supra* note 76.

⁷⁸ *Id.*; see also Van Jones & Louis Reed, *The One Issue that Could Bring Democrats and Republicans Together*, CNN (Mar. 9, 2021, 6:22 PM), <https://edition.cnn.com/2021/03/09/opinions/bipartisanship-criminal-justice-reform-jones-reed/index.html> [<https://perma.cc/3NE3-VD4N>].

⁷⁹ See generally Megan Brenan, *Fewer Americans Call for Tougher Criminal Justice System*, GALLUP (Nov. 16, 2020), <https://news.gallup.com/poll/324164/fewer-americans-call-tougher-criminal-justice-system.aspx> [<https://perma.cc/V7T6-DRQV>].

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

proposed reforms to the criminal justice system are measured and evidence-based.

B. Key Themes Relating to Sentencing Reform

A key aim of sentencing reform is to eliminate mandatory sentencing.⁸⁷ This is a major shift for the Democratic Party, which historically played a significant role in the move toward 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. . . .

. . . .

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.⁸⁸

The Democratic Party has shifted markedly from its tough on crime ideology.⁸⁹ This stance is a direct repudiation of the Democratic Party's former push for mandatory minimum sentencing.⁹⁰ For instance, Vice President Kamala Harris, promised to “[e]nd mandatory minimums on [the] federal level and incentivize states to do the same.”⁹¹ During the 2020 election campaign, President Joe Biden stated he would “eliminate mandatory minimums,” “work for the passage of legislation to repeal mandatory minimums at the federal level,”

⁸⁷ See generally Caitlin Oprysko, *Mandatory Minimum Sentencing Reform*, POLITICO (Dec. 19, 2019), <https://www.politico.com/2020-election/candidates-views-on-the-issues/criminal-justice-reform/mandatory-minimum-sentences-reform/> [<https://perma.cc/M8PZ-S678>] (capturing views of some Democratic politicians on mandatory minimum sentencing reforms).

⁸⁸ Marie Gottschalk, *The Democrats' Shameful Legacy on Crime*, NEW REPUBLIC (Sept. 11, 2019), <https://newrepublic.com/article/154631/democrats-shameful-legacy-crime> [<https://perma.cc/4S9G-5USB>].

⁸⁹ For more information on various Democratic presidential 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, 3:08 PM), <https://time.com/5615053/2020-democrats-criminal-justice-reform/> [<https://perma.cc/HYJ3-RQXP>].

⁹⁰ See Katie Park & Jamiles Lartey, *2020: The Democrats on Criminal Justice*, MARSHALL PROJECT (Oct. 10, 2019), <https://www.themarshallproject.org/2019/10/10/2020-the-democrats-on-criminal-justice> [<https://perma.cc/ME7H-4ZSL>].

⁹¹ 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, 1:29 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/09/senator-kamala-harris-releases-her-plan-to-fundamentally-transform-our-criminal-justice-system.html [<https://perma.cc/9UUG-CCLK>].

and “give states incentives to repeal their mandatory minimums.”⁹² He added that he would:

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 earned credit programs, and take other steps to reduce incarceration rates without impacting public safety.⁹³

President Biden has also indicated that he would encourage states both to invest in programs that prevent and reduce incarceration and to decriminalize some offenses, and he has confirmed his support for removal of incarceration as a sanction for drug use alone.⁹⁴

Even prior to the election of Joe Biden, significant sentencing reform had commenced. The most significant recent sentencing reform at the federal level is the FIRST STEP (an acronym for the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person) Act, which commenced in December 2018.⁹⁵ The more prominent aspects of the Act are that it retrospectively reduces penalties for some nonviolent offenses (especially drug offenses) and provides for the early release of certain offenders (those over sixty years of age) who are at low risk of reoffending.⁹⁶ One year after its commencement, more than seven thousand offenders had either been released from prison early or received shorter sentences than would have otherwise been the case without the FIRST STEP Act.⁹⁷ Unfortunately, implementation of aspects of the FIRST STEP Act has stalled more recently due to staff shortages and other resource constraints.⁹⁸

⁹² 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, 12:58 PM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/07/former-veep-joe-biden-releases-extended-plan-for-strengthening-americas-commitment-to-justice.html [<https://perma.cc/9AYE-84FB>].

⁹³ *Id.*

⁹⁴ Politico Staff, *Biden vs. Trump: Who’s the Actual Criminal Justice Reformer?*, POLITICO MAG. (Apr. 23, 2020, 5:00 AM), <https://www.politico.com/interactives/2020/justice-reform-biden-trump-candidate-policy-positions/> [<https://perma.cc/9EBX-BRNM>].

⁹⁵ For a discussion of other notable bipartisan criminal justice reforms, including the FIRST STEP Act, see Levin, *supra* note 69.

⁹⁶ Memorandum from R. L. Rhodes, Acting Assistant Dir. of Reentry Servs. Div. on Elderly Offender Program (First Step Act) (Mar. 15, 2019); Press Release, U.S. Dep’t of Just., Justice Department Announces New Rule Implementing Federal Time Credits Program Established by the First Step Act (Jan. 13, 2022).

⁹⁷ U.S. SENT’G COMM’N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 4 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf [<https://perma.cc/K2H8-XSWK>].

⁹⁸ Erik Ortiz, *Staffing Shortages and Deficient Training Leave First Step Act Floundering, Federal Prison Employees Say*, NBC NEWS (July 28, 2022, 3:46 PM), <https://www.nbcnews.com/news/us-news/staffing-shortages-deficient-training-leave-first-step-act-floundering-rcna40210> [<https://perma.cc/SE77-PA8S>].

To complement the FIRST STEP Act,⁹⁹ Senator Mike Lee (R-Utah) has cosponsored the Smarter Sentencing Act (SSA), which also has bipartisan support and is “designed to bring judicial discretion and flexibility to non-violent drug charge sentencing.”¹⁰⁰ The impetus for the SSA is that there is a large contingent of prisoners serving mandatory sentences for drug-related offenses,¹⁰¹ which has “increase[ed] the taxpayer burden by more than 2,000%.”¹⁰² As noted earlier, mandatory minimums have contributed to “the explosion of the U.S. prison population, often leading to sentences that are unfair, fiscally irresponsible, and a threat to public safety.”¹⁰³ Not only will the SSA save taxpayers about \$3 billion over ten years, it will provide judges with the “flexibility and discretion they need to impose stiff sentences on the most serious drug lords and cartel bosses, while enabling nonviolent offenders to return more quickly to their families and communities.”¹⁰⁴

In Washington, for example, some prosecutors are pushing the state to rethink its three-strikes law, which was approved by voters in 1993 but is not appropriate based on “an evolving standard of decency.”¹⁰⁵ Although changes have been made to the law,¹⁰⁶ such changes do not go far enough. The state has been slow to revisit the law, whereas twenty-nine states had eased mandatory penalties as of 2014.¹⁰⁷ Even though the Washington legislature passed a law allowing prosecutors to request resentencing in which the “original sentence ‘no longer advances the interests of justice,’” prosecutors disagree on whether the law applies to three-strikes cases.¹⁰⁸

⁹⁹ Press Release, Senator Mike Lee, Sen. Lee Cosponsors the Smarter Sentencing Act (Mar. 26, 2021), <https://www.lee.senate.gov/public/index.cfm/press-releases> [<https://perma.cc/HF-T9-6YGS>] (“Several important reforms from the *Smarter Sentencing Act* were included in the landmark First Step Act, which was enacted into law in 2018.”).

¹⁰⁰ *Id.* (“The bill is sponsored by Senator Dick Durbin (D-Ill.) and cosponsored by 11 of their colleagues.”). The SSA was first introduced in 2013.

¹⁰¹ *See, e.g.*, U.S. SENT’G COMM’N, UNITED STATES SENTENCING COMMISSION QUARTERLY DATA REPORT: FISCAL YEAR 2021–1ST QUARTER 1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/US_SC_Quarter_Report_1st_FY21.pdf [<https://perma.cc/LAC8-KUYR>] (showing for the first quarter 2021, 32.1% of all federal offenders committed drug crimes).

¹⁰² Press Release, Senator Mike Lee, *supra* note 99.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Nina Shapiro & Manuel Villa, *New Laws Lead Some Washington Prosecutors to Rethink Three-Strike Life Sentences*, SEATTLE TIMES (Jan. 3, 2021, 6:00 AM), <https://www.seattletimes.com/seattle-news/new-laws-lead-some-washington-prosecutors-to-rethink-three-strike-life-sentences/> [<https://perma.cc/2AYW-YC28>].

¹⁰⁶ *See, e.g., id.* (discussing the state legislature’s decision to remove second-degree robbery from the strike list).

¹⁰⁷ *Id.* (citing VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES 8 (2014), https://www.vera.org/downloads/publications/mandatory-sentences-policy-report-summary-v3_2022-03-15-183821_ouzi.pdf [<https://perma.cc/88LX-DWR3>]).

¹⁰⁸ *Id.*

C. Ambitious Calls for Changes to the Wider Criminal Justice System

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 that reduces penalty severity, invokes a more strategic approach to criminal justice,¹⁰⁹ and is evidence-based.¹¹⁰ During his first speech to a joint session of Congress, President Biden voiced his support for policing reform and the passage of the George Floyd Justice in Policing Act.¹¹¹ Such legislation “would ban chokeholds, prohibit racial and religious profiling, establish a national database to track police misconduct and bar certain no-knock warrants” and even had bipartisan support, including that of Representative Troy E. Nehls (R-Tex.), who voted to overturn the results of Biden’s election as President.¹¹² President Biden vowed to pass the Act after former Minneapolis police officer Derek Chauvin was convicted of murder, saying, “We have all seen the knee of injustice on the neck of Black America.”¹¹³

President Biden also has pushed for boldness in reform by issuing executive orders to advance racial equity, end for-profit federal prisons, and change the way facts and data are used in federal policymaking.¹¹⁴ President Biden is not the only one pushing for better use of data to improve the criminal justice system. Arnold Ventures hosted an expert roundtable in April 2021 focusing on such efforts.¹¹⁵ According to the experts, “a precondition of effective reform is the foundational data that can guide, fine tune, and measure the success of reforms.”¹¹⁶ As part of this effort, the current data systems, operated by the BJS must be improved, and “the federal government should invest in a regular series of community-level surveys that can measure victimization, fear of crime, and public trust in the operations of the justice system.”¹¹⁷ Specifically, the ex-

¹⁰⁹ See, e.g., Rachel Barkow & Mark Osler, *14 Steps Biden’s DOJ Can Take Now to Reform America’s Criminal Legal System*, APPEAL (Mar. 15, 2021), <https://theappeal.org/the-lab/white-paper/14-steps-bidens-doj-can-take-now-to-reform-americas-criminal-legal-system/> [https://perma.cc/J3ZZ-ULUL].

¹¹⁰ Jon Gould & Pamela Metzger, *Evidence-Based Paths Toward Criminal Justice Reform*, THE HILL (Feb. 26, 2021, 3:31 PM), <https://thehill.com/opinion/criminal-justice/540478-evidence-based-paths-toward-criminal-justice-reform> [https://perma.cc/W4QQ-HAPZ].

¹¹¹ Timothy Bella, *GOP Lawmaker Who Voted to Overturn Biden’s Election Win Wants to Help Him on Criminal Justice Reform*, WASH. POST (Apr. 29, 2021, 12:29 PM), <https://www.washingtonpost.com/politics/2021/04/29/biden-speech-troy-nehls-trump/> [https://perma.cc/9PPB-YK4V].

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ ARNOLD VENTURES, CAMPAIGN FOR CRIMINAL JUSTICE DATA MODERNIZATION 2 (2021), <https://craftmediabucket.s3.amazonaws.com/uploads/AV-CJ-Data-Report-v7-1.pdf> [https://perma.cc/CK5D-H5RK].

¹¹⁵ *Id.* at 4 (“The recommendations reflect input from over 50 criminologists, statisticians, technologists, and justice practitioners.”).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

perts recommended, inter alia, that the Biden Administration “create a National Commission on Criminal Justice Data Modernization to envision timely accurate collection, validation, curation and dissemination of crime and victimization data along with data on the operations of the criminal justice system.”¹¹⁸ Additionally, data transparency should be a priority to increase accountability and public trust in the system, and federal agencies should lead the way in this endeavor, while models should also be created at the state level.¹¹⁹ Accountability and trust would also improve if the Department of Justice (DOJ) published crime data more frequently and linked criminal justice data sources to provide more insight into the system.¹²⁰

It has also been proposed that the Biden Administration focus on reform in three other discrete areas: “prosecutorial charging discretion, participatory defense efforts and the needs of small, tribal and rural, or STAR, communities.”¹²¹ Specifically when it comes to prosecutors, over-policing often occurs, leading to “crushing caseloads that force prosecutors to work too quickly and with too little information as they make their charging decisions.”¹²² To relieve this problem, specialized charging units should be created and staffed by experienced prosecutors “who are afforded the time and resources to make prompt and accurate charging decisions.”¹²³ Federal funding can help make this happen and ensure that charging decisions are evidence-based, accurate, fair, and timely.¹²⁴

Similar problems are seen on the defense side: most criminal defendants “are represented by public defenders or assigned counsel” who are overloaded and underfunded.¹²⁵ Efforts to increase funding and reduce caseloads have thus far been unsuccessful, but a new approach focusing on participatory defense may help.¹²⁶ Participatory defense is “a community-organizing model for defendants, their families and communities” that empowers families and communities to work with assigned attorneys and “advocate for their loved ones.”¹²⁷

Additionally, there is significant disparity between urban or suburban areas and STAR (small, tribal, and rural) communities. Federal datasets generally focus on larger urban communities, but “[i]t is essential that policymakers turn their attention to STAR communities, collecting data about the size, scale and cost of these small, tribal and rural criminal justice systems.”¹²⁸ This is made

¹¹⁸ *Id.* at 5.

¹¹⁹ *Id.* at 9–11.

¹²⁰ *See id.* at 13, 17–18.

¹²¹ Gould & Metzger, *supra* note 110.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

more difficult by the fact that “STAR communities are legal deserts with few, if any, experienced, criminal lawyers on either side of the aisle,” but Biden’s Administration could fix this by creating a federal initiative offering “educational grants, loan forgiveness and other incentives to law students who commit to a STAR criminal legal practice.”¹²⁹ Like with other reform efforts, there needs to be state and local government cooperation, but the federal government can lead the way in initiating reform.¹³⁰

Wide-ranging and systematic reforms have been proposed to the sentencing system. Such reforms include: addressing COVID-19 outbreaks in prisons and jails by reducing prison populations and sentences for low-risk prisoners, ending mandatory minimum and life sentences, decriminalizing drug use, providing more policing oversight and accountability, and expanding incarceration alternatives and community programs.¹³¹

D. Speculation Regarding Likely Implementation of Genuine Wide-Ranging Reform

Despite the strong impetus for criminal justice reform, many question whether reform efforts will happen. Even though President Biden signed an executive order under which the DOJ will not renew contracts with private prison companies, it is “a prime example of largely symbolic but practically useless reform.”¹³² Critics note that it is a tiny step that “does not get to the heart of what really needs to change” because nobody “will be released or serve less time” based on the order.¹³³ Other changes will undoubtedly need to be made, and policy changes that are geared toward remedying “structural issues . . . would have the biggest impact in reducing prison populations and remedying disproportionate punishments and discriminatory policies.”¹³⁴

Founder of Dream Corps, Van Jones, for example, has suggested that President Biden and his team will not have to “break new ground on this issue,” but rather can “build upon a bipartisan movement that began” under Presidents Barack Obama and Donald Trump.¹³⁵ To build on previous progress, it has been suggested that President Biden can take a number of concrete measures—none of which have thus far occurred. First, he can increase funding for the First Step Act “by allocating more money to the kinds of educational and job training programs prescribed in the First Step Act.”¹³⁶ There is high demand for

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Sarah Martinson, *Top 5 Criminal Justice Reforms Advocates Want Under Biden*, LAW360 (Jan. 10, 2021, 8:02 PM), <https://www.law360.com/articles/1337194/top-5-criminal-justice-reforms-advocates-want-under-biden> [<https://perma.cc/X5Q8-2FXE>].

¹³² *See, e.g.*, Barkow & Osler, *supra* note 109.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Jones & Reed, *supra* note 78.

¹³⁶ *Id.*

these programs, and access to such programs was made more difficult by the COVID-19 pandemic.¹³⁷ Second, President Biden can fix federal supervision systems, that have led to “years or even decades of invasive monitoring and additional time behind bars” for some.¹³⁸ Third, President Biden can put his support behind existing bipartisan legislative efforts, such as the Safer Detention Act,¹³⁹ Smarter Pretrial Detention for Drug Charges Act,¹⁴⁰ and the Driving for Opportunity Act,¹⁴¹ and reintroduce legislation like the Smarter Sentencing Act¹⁴² and the Community First Pretrial Reform and Jail Decarceration Act.¹⁴³

The time has come for genuine reform. If this opportunity is not grasped now, at best only token changes will occur. To this end, President Biden has already been criticized for his inaction on criminal justice reform, as he made little progress in enacting such reforms during his first one hundred days in office.¹⁴⁴ For example, President Biden made a campaign promise to end mandatory minimum sentencing for federal drug offenses, but since being elected, his administration “supported renewing a policy that subjects individuals to mandatory minimum sentences for having trace amounts of fentanyl in their systems.”¹⁴⁵ As noted earlier, Biden’s order eliminating the use of private federal prisons, while an important step, has limited impact because it phases out the contracts between federal prisons and private prison companies, rather than immediately ending them.¹⁴⁶ Additionally, it does not end mass incarceration.¹⁴⁷ Even though President Biden did not take much action in reforming the criminal justice system during his first one hundred days, his efforts were not “inconsequential,” and advocates like Professor Andrew Sidman believe that Pres-

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* (discussing the bill introduced by Sen. Dick Durbin (D-Ill.) and Sen. Chuck Grassley (R-Iowa) that expands compassionate release for elderly and those considered the most medically vulnerable).

¹⁴⁰ *Id.* (discussing the bill introduced by Sens. Durbin, Lee, and Chris Coons (D-De.) that would eliminate the practice of judges detaining individuals with drug charges before trial and requiring cash bail).

¹⁴¹ *Id.* (discussing the bill introduced by Sens. Coons and Roger Wicker (R-Miss.) that would put an end to the practice in more than 30 states of punishing individuals with unpaid debt by suspending their licenses).

¹⁴² *Id.* (discussing the bill introduced by Sens. Durbin and Lee that would reduce mandatory minimums for drug crimes).

¹⁴³ *Id.* (discussing the bill introduced by Reps. David Trone (D-Md.) and Kelly Armstrong (R-N.D.) that is “designed to strengthen communities, reduce jail populations, and improve community safety through grants to community-based organizations and local governments”).

¹⁴⁴ Sarah Martinson, *Biden Falls Short on Criminal Justice Reform in First 100 Days*, LAW360 (May 2, 2021, 8:02 PM), <https://www.law360.com/articles/1372323/biden-falls-short-on-criminal-justice-reform-in-first-100-days> [<https://perma.cc/GUA3-VF2Q>].

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

ident Biden will get around to such reforms while in office.¹⁴⁸ Furthermore, other efforts taken by President Biden—such as managing COVID-19—“are crucial for crime prevention.”¹⁴⁹ President Biden also appointed civil rights attorney Vanita Gupta to be US Associate Attorney General for the DOJ and US Attorney General Merrick Garland, both of whom are familiar with injustices in the criminal justice system.¹⁵⁰

The opportunity for genuine reform of the sentencing system cannot be lost. In order for it to be grasped, a delicate balance between what is theoretically optimal and what is pragmatically palatable is required. Both considerations are complex, but for different reasons.

As is discussed in Part III below, there is a wealth of empirical data at the broad theoretical level to guide the sentencing objectives that should be pursued. However, the undertaking is complex because little consideration has been given to the nature of criminal sanctions or to rethinking what is possible given the vast advances in science and technology in recent decades. The pragmatism part of the equation is perhaps even more delicate because there is no formula for this aspect of the problem. It depends largely on a degree of speculation regarding the collective thinking of the community in terms of what baseline considerations are non-negotiable in relation to the criminal justice system. The only way to logically approach this is to refer to the ultimate aim of criminal law and ensure this is not impaired. To this end, it comes down to reducing harmful acts and any measure that involves potentially meaningfully increasing crime rates cannot be tolerated. This observation is especially important given that, as discussed more fully below, the murder and violent crime rate in the United States increased sharply in 2020.¹⁵¹

III. IRREDUCIBLE OBSTACLES TO REFORM

A. *No Increase in Crime Rate—Community Protection Is Cardinal*

As noted above, there is considerable momentum to make significant change to the criminal justice system. While there is no convergence of opinion regarding the exact changes that should occur, it is almost universally accepted that the outcome of the changes must result in a lower incarceration rate. This is of course a very easy outcome to achieve and could, for example, be achieved by simply halving the average prison terms that are currently imposed or by releasing all prisoners who have completed at least half of their prison term. Simplistic reforms of this nature are untenable, however, because they are

¹⁴⁸ *Id.* (quoting Professor Sidman, chair of the political science department at John Jay College of Criminal Justice).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ John Gramlich, *What We Know About the Increase in U.S. Murders in 2020*, PEW RES. CTR. (Oct. 27, 2021), <https://www.pewresearch.org/fact-tank/2021/10/27/what-we-know-about-the-increase-in-u-s-murders-in-2020/> [https://perma.cc/2PT7-YPA7].

likely to have undesirable side effects, such as increasing the crime rate. Thus, there is also a need to make acute decisions regarding offense types which should attract lower penalties.

For any durable reform, it is important to be cognizant of insurmountable obstacles and problems. Identification of these obstacles requires understanding the fundamental objectives of relevant institutions. Criminal law aims to achieve a number of objectives, but ultimately it is concerned with identifying the most harmful acts with a view toward (1) preventing or discouraging these acts,¹⁵² and (2) punishing offenders when these acts occur. Sentencing has a pivotal role in relation to both of these aims.¹⁵³

A key aim of sentencing is to discourage offenders by setting harsh sanctions for criminal behavior, thereby aiming to deter people from committing such acts for fear of being subjected to criminal sanctions.¹⁵⁴ This is known as the theory of general deterrence.¹⁵⁵ It also aims to prevent crime by incarcerating offenders who commit serious offenses, thereby physically preventing them from damaging the community during their term of incarceration. It is in this manner that community protection obtains its strongest expression. The amount of punishment that is meted out to offenders is guided not only by considerations of general deterrence and community protection but also by proportionality, which is the principle that the punishment should fit the crime.¹⁵⁶

The desirability and efficacy of sentencing to achieve these considerations is examined more closely below. However, at the outset, it is important to note that the most important goal of the criminal justice and sentencing system is community protection.¹⁵⁷ This entails that any reform that would have the effect of increasing criminal behavior, especially serious crime, would be manifestly untenable. Thus, in an environment where crime is increasing, it is important to implement measured and sensible reforms that, at the minimum, will not carry a demonstrable risk of increasing crime. This is especially the case given current crime trends.

Crime has declined for the most part in recent decades. The Federal Bureau of Investigation (FBI) reports that violent crime declined by 49 percent between 1993 and 2019, and property crime dropped even further—by 55 percent—during the same period.¹⁵⁸ The pattern has changed recently. Major cities

¹⁵² Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169, 184 (2016).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 184, 188.

¹⁵⁶ *Id.* at 190–91.

¹⁵⁷ Mirko Bagaric et al., *Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse*, 30 STAN. L. & POL'Y R. 1, 5 (2019).

¹⁵⁸ John Gramlich, *What the Data Says (and Doesn't Say) About Crime in the United States*, PEW RES. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/> [https://perma.cc/R4WS-67C8].

experienced a 33 percent increase in homicides in 2020 and the increase continued in the first quarter of 2021.¹⁵⁹ Sixty three “of the 66 largest police jurisdictions saw increases in at least one category of violent crimes in 2020, which include homicide, rape, robbery, and aggravated assault.”¹⁶⁰ In the first half of 2022, it has been reported that in twenty-nine major cities, homicides dropped by 2 percent compared to the same period in 2021, but they are still 39 percent higher than for the same period in 2019.¹⁶¹ It has been suggested that the increase in homicides is attributable to a number of factors including economic collapse, social anxiety due to the pandemic, depolicing in large cities, shifts in police resources, and release of defendants before trial or before sentences were fully served based on the high risk of COVID-19 in jails.¹⁶²

Prior to 2020, “the largest recorded one-year rise in murders in U.S. history was a 12.7 percent increase in 1968.”¹⁶³ Of course, there is more than one reason for the spike in 2020, and according to Thomas Abt, Director of the National Commission on COVID-19 and Criminal Justice, “it wasn’t just the pandemic, or police violence, or more guns, it was all of these things happening simultaneously and perhaps more.”¹⁶⁴ Murder rates had risen before lockdowns were ordered, and although it is possible that murder rates continued to increase because police were diverting their resources to respond to the protests that occurred in 2020, no “connection between the number of Black Lives Matter protests and the change in murder in big cities” existed.¹⁶⁵ It has also been noted that, “[c]hanges in how the public perceives the legitimacy of policing—caused in part by the highly publicized killings of George Floyd, Breonna Taylor, and others—may have driven violence up.”¹⁶⁶ Murder rates continued to increase in the fall of 2020, probably due to pandemic fatigue, as well as “the worsening economic and psychological strain of life under lockdown.”¹⁶⁷ The National

¹⁵⁹ Emma Tucker & Peter Nickeas, *The US Saw Significant Crime Rise Across Major Cities in 2020. And It’s Not Letting Up*, CNN, <https://edition.cnn.com/2021/04/03/us/us-crime-rate-rise-2020/index.html> [<https://perma.cc/6TCU-NQ3R>] (Apr. 3, 2021, 6:52 PM); see also Adam Gelb, *America’s Surge in Violence: Why We Must Reduce Violent Crime for Prison Reform to Work*, USA TODAY (Mar. 9, 2021, 6:01 AM), <https://www.usatoday.com/story/opinion/2021/03/09/why-reducing-violence-essential-prison-reform-work-column/4626310001/> [<https://perma.cc/5SDF-HRAQ>].

¹⁶⁰ Tucker & Nickeas, *supra* note 159; see also Gelb, *supra* note 159.

¹⁶¹ Josiah Bates, *U.S. Crime Is Still Dramatically Higher than Before the Pandemic*, TIME, <https://time.com/6201797/crime-murder-rate-us-high-2022/> [<https://perma.cc/8VXP-LLPX>] (July, 29, 2022, 9:51 AM).

¹⁶² *Id.*

¹⁶³ Rob Arthur & Jeff Asher, *What Drove the Historically Large Murder Spike in 2020?*, INTERCEPT (Feb. 21, 2021, 4:00 AM), <https://theintercept.com/2021/02/21/2020-murder-homicide-rate-causes/> [<https://perma.cc/F9BC-EFJ3>].

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

Commission on COVID-19 and Criminal Justice has deemed the crime surge “a ‘large and troubling increase’ with ‘no modern precedent.’”¹⁶⁸

The rapidly increasing crime rate has already predictably resulted in calls to reverse several reform proposals that aim to reduce the severity of the criminal justice system, including the recent “defund the police” campaigns.¹⁶⁹ Activists have been urged to “recalibrate and shift back toward a traditional pro-law-and-order political platform” and “punish statewide attorneys general and federal legislators alike for throwing law enforcement under the bus”¹⁷⁰ And it has been expressly noted that President Biden is planning reforms to address the increasing crime rate:

A nationwide surge in violent crime has emerged as a growing area of concern inside the White House, where President Joe Biden and his aides have listened with alarm as local authorities warn a brutal summer of killing lies ahead. Biden plans to address the spike in shootings, armed robberies and vicious assaults on Wednesday afternoon following a meeting with state and local officials, law enforcement representatives and others involved in combating the trend.¹⁷¹

A fear of crime is not only affected by the actual crime rate but other considerations as well. To this end, perceptions are often more important than reality.¹⁷² Fear in the context of crime has not been clearly defined and instead “has been equated with a variety of emotional states, attitudes, or perceptions (including mistrust, anxiety, perceived risk, fear of strangers, or concern about deteriorating neighborhoods).”¹⁷³ Fear of crime may be “construed to include fear for others, extending even to one’s neighborhood, city, or nation.”¹⁷⁴ But most research, at least in the United States, focuses on personal fear.¹⁷⁵

Fear of crime depends on several factors, including actual crime rates.¹⁷⁶ “[A]t a micro level, it might be expected that people who suffer more crime also experience more fear and, at a macro level, that regions with a higher number of crimes are also considered to be less secure. However, this is rarely the

¹⁶⁸ Josh Hammer, *Recover the Moral Imperative of Law and Order*, CITY J. (Mar. 18, 2021), <https://www.city-journal.org/recover-the-moral-imperative-of-law-and-order> [<https://perma.cc/MW8M-MFNF>].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Jeff Zeleny & Kevin Liptak, *Concerns Rising Inside White House Over Surge in Violent Crime*, CNN (June 22, 2021, 1:20 PM), <https://edition.cnn.com/2021/06/22/politics/crime-surge-white-house-concern/index.html> [<https://perma.cc/XV2B-BHWX>].

¹⁷² See Eric Levitz, *Progressives Don’t Need to Downplay Rising Homicides*, N.Y. MAG.: INTELLIGENCER (July 1, 2021), <https://nymag.com/intelligencer/2021/07/progressives-dont-need-to-downplay-rising-homicides.html> [<https://perma.cc/Q93W-GLF3>].

¹⁷³ Mark Warr, *Public Perceptions and Reactions to Violent Offending and Victimization*, in 4 UNDERSTANDING AND PREVENTING VIOLENCE 1, 3 (National Research Council ed., 1994).

¹⁷⁴ *Id.* at 5.

¹⁷⁵ *Id.*

¹⁷⁶ Rafael Prieto Curiel & Steven Richard Bishop, *Fear of Crime: The Impact of Different Distributions of Victimization*, 4 PALGRAVE COMM’NS 1, 2 (2018).

case.”¹⁷⁷ Analysis shows that “more people are fearful than are actually victimised.”¹⁷⁸ Moreover, elderly people and women usually feel more insecure, while ethnic minorities and poor people tend to be more fearful.¹⁷⁹ Although it is believed that one cause of fear of being victimized is the media, “crime reported on the media is not a reflection of reality, with media placing more emphasis on violent crime, therefore, the impact of the media on the fear of crime is unclear.”¹⁸⁰ Actually being the victim of a crime will certainly lead to fear of crime, and some studies show that past victimization more than doubles fear of crime.¹⁸¹ Additionally, different types of crime lead to different levels of fear.¹⁸² Crime is a rare event, and for this reason, the belief exists that fear is more common than crime itself.¹⁸³

Many assume that there will be less fear in a city where there is less crime, but the results do not necessarily meet this expectation.¹⁸⁴ The primary elements that affect fear of crime are “suffering a crime, sharing experiences with others and having decay of memory of previous opinions and experiences.”¹⁸⁵ Crime can be displaced, meaning that some strategies meant to prevent crime actually just lead to different victims.¹⁸⁶

It has in fact been noted that there is a weak correlation between actual crime and fear of crime. In a 2016 article, Josh Sanburn suggested that crime rates were “near all-time lows” and that “[v]iolent crime ha[d] been plummeting for decades.”¹⁸⁷ Even so, Americans were “more concerned about crime and violence than anytime since the months before Sept. 11.”¹⁸⁸ According to a *Gallup* poll released around the same time, 53 percent of respondents indicated that they “worry ‘a great deal’ about crime and violence, a jump from 39% the year before.”¹⁸⁹ Three potential explanations for the jump were provided: “a jump in violent crime nationwide; high-profile shootings that gained widespread media attention; and the absence of other larger economic or foreign

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 6.

¹⁸⁶ *Id.* at 7.

¹⁸⁷ Josh Sanburn, *Why Americans Are Worrying More About Crime*, TIME (Apr. 7, 2016, 6:24 PM), <https://time.com/4285848/crime-violence-gallup-poll-2016/> [<https://perma.cc/3FDQ-8GDH>].

¹⁸⁸ *Id.* (citing Alyssa Davis, *In U.S., Concern About Crime Climbs to 15-Year High*, GALLUP (Apr. 6, 2016), <https://news.gallup.com/poll/190475/americans-concern-crime-climbs-year-high.aspx> [<https://perma.cc/MGR3-XY5C>]).

¹⁸⁹ *Id.* (“The new figure is the highest since March 2001, when it reached 62%.”).

policy concerns.”¹⁹⁰ Even though at the time there had been a slight increase in violent crime,¹⁹¹ Ryan King, an Ohio State University sociology professor, believed that crime was driven less by these potential explanations and more by “assorted, heinous events in the news.”¹⁹² Politics may also affect the public’s perception of crime.¹⁹³

Others support the idea that media may affect the public’s perception of crime:

In the United States, the proportion of citizens who suffer a violent victimization each year is rather small . . . In American culture, however, news and other forms of communication about violence are ubiquitous and unrelenting, with the result that one is far more likely to hear about, read about, or watch violent events than to experience them.¹⁹⁴

To understand the phenomenon of people being more fearful of crime regardless of the crime rate, one must look beyond the victims themselves and look at those “who suffer forms of indirect victimization.”¹⁹⁵ Additionally, those looking at the issue must consider the information that is shared with the public regarding violent crimes.¹⁹⁶

In attempting to measure fear, one question has consistently been asked: “Is there any area near where you live—that is, within a mile—where you would be afraid to walk alone at night?”¹⁹⁷ Not only does geography affect a person’s fear, but some people in society are more feared than others.¹⁹⁸ Young males apparently are the most frightening people, to both females and other young males.¹⁹⁹ Two other cues are important in assessing danger: darkness²⁰⁰ and “the presence of bystanders or companions,” though the latter does not apply unless those individuals are thought to be dangerous.²⁰¹

¹⁹⁰ *Id.*

¹⁹¹ *Id.* (“According to the FBI, violent crime rose by 1.7% in the first half of 2015 while a number of cities like Baltimore, Chicago, St. Louis and Washington, D.C., have seen significant increases in their murder rates.”).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Warr, *supra* note 173, at 2 (citations omitted).

¹⁹⁵ *Id.* at 2, 19 (“Numerous studies, however, have shown little or no difference in fear between victims and nonvictims, and the issue has remained something of a conundrum among researchers.”).

¹⁹⁶ *Id.* at 2.

¹⁹⁷ *Id.* at 6, 15 (“There is strong evidence that people commonly perceive crime in geographic terms, meaning that they typify areas as dangerous or, alternatively, as safe zones.”). This question has appeared in several *Gallup* polls, and in 2020, 70 percent of respondents answered this question in the negative. See *Crime*, GALLUP, <https://news.gallup.com/poll/1603/crime.aspx> [<https://perma.cc/CY8D-6N7K>].

¹⁹⁸ See Warr, *supra* note 173, at 18.

¹⁹⁹ See *id.*

²⁰⁰ See *id.* at 19 (noting that “[f]ear of crime is generally higher at night”).

²⁰¹ *Id.*

While the actual incidence of crime and fear of crime are not necessarily directly related, as noted above, many media outlets in the United States are graphically and repeatedly reporting the surge in crime over the past year or so. Thus, in the present climate, it is cardinal that proposed sentencing reforms are not likely to lead to a demonstrable increase in crime. To this end, it is notable that the mood for a retreat from tough on crime policies is abating in the light of the surge in violent crime. A recent report in *The New York Times* noted:

Homicide rates spiked in 2020 and continued to rise last year, albeit less slowly, hitting levels not seen since the 1990s. Other violent crimes also are up. Both increases have occurred nationally, in cities with progressive prosecutors and in cities without.

That's left no clear evidence linking progressive policies to these trends, but critics have been quick to make the connection

Last week, a Quinnipiac University poll of registered voters in New York City found that 74 percent of respondents considered crime a "very serious" problem—the largest share since the survey began asking the question in 1999 and more than 20 percentage points greater than the previous high, which was recorded in January 2016.

Politicians are heeding those concerns. In New York, Mr. Adams, a Democrat, has promised to crack down on crime, and his police commissioner, Keechant Sewell, slammed Mr. Bragg's proposals as threatening the safety of police officers and the public.²⁰²

Accordingly, any criminal justice reforms must be couched against the pragmatism of the increasing reality and fear of violent crime.

B. No Discrimination

Another threshold requirement for sentencing reform is that the changes must not lead to discriminatory outcomes. This is especially the case given the current racist orientation of the criminal justice system and intense community rejection of such racism recently. It has been noted that to dismantle "the insidious manifestations of criminal justice discrimination," it is important to view "contemporary mass incarceration as one historical moment within a much longer and larger antiblack punitive tradition."²⁰³ Unfortunately, racism is part of the fabric of the criminal justice system: law enforcement traces its roots to slavery and colonialism, and at least in the South, "jails and prisons . . . emerged as critical mechanisms to reinforce the institution of slav-

²⁰² Herndon, *supra* note 8; see also James Oliphant, *Democrats Struggle to Find Footing on Violent Crime*, REUTERS (June 3, 2022, 3:14 AM), <https://www.reuters.com/world/us/ahead-us-midterms-democrats-struggle-find-footing-violent-crime-2022-06-03/> [<https://perma.cc/53QC-5F4T>].

²⁰³ Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 263 (2021), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-criminol-060520-033306> [<https://perma.cc/CM7D-XR4N>].

ery.”²⁰⁴ Efforts to maintain law and order even after slavery was abolished did not stray far from the discriminatory model of slavery. For instance, as slavery was abolished in the northern states early in the nineteenth century, the modern penitentiary was created.²⁰⁵ And, in the South, an organized, civilian-based law enforcement system was established and led by white citizens.²⁰⁶ Thus, white citizens still maintained control over black citizens, regardless of whether they were slaves.²⁰⁷ Furthermore, “the defining characteristics of the ‘criminal’ fundamentally influenced the purpose and practice of police power, namely protecting white property and maintaining the social order by controlling the urban poor, enslaved Africans and other marginalized groups.”²⁰⁸

Furthermore, although many believe that “punitive excess, mass incarceration, and racial disparity are comingled,” they are distinct phenomena.²⁰⁹ Based on the history of our nation, even if “mass incarceration and punitive excess were abolished tomorrow, racial disparities would still exist in the range of socioeconomic factors that . . . unduly expose people of color to punishment and whatever social penalties take the place of confinement.”²¹⁰ Until the racial oppression that exists in America is addressed and remedied, full equality and justice are unattainable.²¹¹ Incarceration should be treated “as a last resort instead of a first response to any social problem” because all individuals should be respected.²¹²

As noted earlier, minority groups are imprisoned at higher rates than white Americans. In the United States, the rules are driven by and for wealthy, white defendants and the law better protects these defendants than others, resulting in a system where defendants are disproportionately poor people of color.²¹³ With this in mind, it is not surprising that black and Hispanic defendants are detained at higher rates than white defendants.²¹⁴ Additionally, black defendants are

²⁰⁴ *Id.* at 265.

²⁰⁵ *Id.* at 266.

²⁰⁶ *Id.*

²⁰⁷ *See id.* (“Any person of African descent in the slave states who appeared to be outside of the control of a white master and failed to otherwise prove their free status could be seized and imprisoned by nearly any capable white civilian.”).

²⁰⁸ *Id.* at 267.

²⁰⁹ Theodore R. Johnson, *How Punitive Excess Is a Manifestation of Racism in America*, BRENNAN CTR. FOR JUST. (Apr. 13, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-punitive-excess-manifestation-racism-america> [<https://perma.cc/BA7V-PCDW>].

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Russell M. Gold, *Power Over Procedure*, 57 WAKE FOREST L. REV. 51, 51–52, 56–57 (2022).

²¹⁴ *See id.* at 66.

more likely to be “subject[ed] to those mandatory minimums than are defendants of other races.”²¹⁵

The disparities are not a prison- or jail-specific problem: the juvenile justice system also “impact[s] youth of color disproportionately,” even though youth incarceration has decreased by half in the United States.²¹⁶ Nationwide, when compared to their white peers, black youth are about five times as likely to be incarcerated, while American Indian youth are three times as likely, and Latinx youth are 42 percent more likely to be incarcerated.²¹⁷ Moreover, “[a]fter arrest, youth of color are more likely to be detained pre-adjudication and committed post adjudication. They are also less likely to be diverted from the system.”²¹⁸ These numbers apply regardless of the offense: “African American youth are 4.6 times as likely as their white peers to be incarcerated; that ratio roughly applies for all categories of offenses except violent offenses, where African American youth are 7.1 times as likely to be incarcerated than their white peers.”²¹⁹

Other research also establishes deep-seated racism in criminal law. Black neighborhoods are monitored more closely than white neighborhoods, and “[b]lack people are more likely to be stopped, searched, and arrested even when they are not in their own neighborhoods.”²²⁰ Additionally, a Police Accountability Task Force determined that in Chicago, “police searched Black drivers four times more than they did [w]hite people despite the fact that police found contraband on [w]hite drivers twice as often as they did Black drivers.”²²¹ Racial disparities are a chronic problem in criminal law. In fact, thirty-one states boasted higher racial disparities in 2018 than in 2010.²²²

²¹⁵ *Id.* at 67 n.94 (citing U.S. SENT’G COMM’N, QUICK FACTS: MANDATORY MINIMUM PENALTIES (2021)).

²¹⁶ JOSH ROVNER, SENT’G PROJECT, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST 4–5 (2021), <https://www.sentencingproject.org/publications/racial-disparities-in-youth-incarceration-persist/> [<https://perma.cc/4UJG-246M>]. Approximately “43,580 young people were held in either detention centers, residential treatment facilities, or other confinement settings on a typical day in 2017.” *Id.* at 5.

²¹⁷ *See id.* at 4.

²¹⁸ *Id.*

²¹⁹ *Id.* at 5.

²²⁰ Trevor I. Shoels, *The Color of Collateral Damage: The Mutilating Impact of Collateral Consequences on the Black Community and the Myth of Informed Consent*, 21 J. L. & SOC. DEVIANCE 194, 223–24 (2021) (citing ELIZABETH HINTON ET AL., VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018)).

²²¹ *Id.* at 224 (citing POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE (2016), https://igchicago.org/wp-content/uploads/2017/01/PATF_Final_Report_4_13_16-1.pdf [<https://perma.cc/QNC8-HY5E>]).

²²² *Id.* at 225 (citing AM. C.L. UNION, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM (2020), <https://www.aclu.org/news/criminal-law-reform/a-tale-of-two-countries-racially-targeted-arrests-in-the-era-of-marijuana-reform/> [<https://perma.cc/UDT7-CNLQ>]).

White people are underrepresented when it comes to evaluating the number of arrested individuals. For instance, in 2018, white people “accounted for 60% of U.S. residents but 46% of all persons arrested for rape, robbery, aggravated assault, and other assault, and 39% of all arrestees for nonfatal violent crimes excluding other assault.”²²³ On the other hand, black people were overrepresented: black people made up 33 percent of persons arrested for nonfatal violent crimes and 36 percent for serious nonfatal violent crimes, even though black people only make up 13 percent of the US population.²²⁴ Hispanics were also overrepresented, making up 21 percent of those arrested for nonfatal violent crimes excluding other assaults, despite only representing 18 percent of the US population.²²⁵

The over-policing of black neighborhoods leads to black people being “over-prosecuted . . . and ultimately making them the primary victim of collateral consequences.”²²⁶ Collateral consequences—which often arise from drug convictions—are not viewed the same way as “direct punishment like fines, jail time, and probation,” and such consequences may affect individuals for the rest of their lives.²²⁷ Additionally, collateral consequences are not viewed as punitive, are subject to few limits, and “are not evaluated for overall proportionality, nor is there significant scrutiny for reasonableness.”²²⁸ Collateral consequences also make reentry into society more difficult, particularly for black people who are targeted by such consequences.²²⁹ There is less control over the use of collateral consequences, and federal legislation should be enacted to regulate, particularly since many states are expected to impose collateral consequences in exchange for funding.²³⁰

As Trevor Shoels notes, “collateral consequences are Jim Crow reimaged.”²³¹ During the Jim Crow era, labor camps were used in prisons and black people were given longer sentences and forced to work harder.²³² These charac-

²²³ ALLEN J. BECK, U.S. DEP’T OF JUST., NCJ 255969, RACE AND ETHNICITY OF VIOLENT CRIME OFFENDERS AND ARRESTEES, 2018 1 (2021), <https://bjs.ojp.gov/content/pub/pdf/revcoa18.pdf> [<https://perma.cc/QT6L-TRHG>].

²²⁴ *See id.*

²²⁵ *Id.*

²²⁶ Trevor I. Shoels, *The Color of Collateral Damage: The Mutilating Impact of Collateral Consequences on the Black Community and the Myth of Informed Consent* 3 (Feb. 22, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3777654 [<https://perma.cc/YT4R-Z842>].

²²⁷ *Id.*

²²⁸ Shoels, *supra* note 220, at 214 (quoting Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1807 (2012)).

²²⁹ *Id.* at 215, 227, 238 (“Black men are the most exposed to collateral consequences related to a criminal record.” (citing SENT’G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/NK5Z-L2QN>])).

²³⁰ *See id.* at 217.

²³¹ *Id.* at 249.

²³² *See id.* at 249–50.

teristics “are strikingly similar to the over-prosecution, disproportionate sentencing and mass incarceration that is so prevalent today.”²³³

Racism is a core problem within the criminal justice system, but it is not intractable. Relief from racism is already happening in federal jurisdiction. For example, in sentencing for drug crimes, the racial disparity “shrank from 47 months in 2009 to nothing in 2018.”²³⁴ Considering all types of federal crimes, the discrepancy has also shrunk “from 34 months in 2009 to less than six months in 2018.”²³⁵ This was made possible by Supreme Court rulings allowing judges the ability to impose more lenient sentences for crack dealers and the 2010 Fair Sentencing Act, which “reduced the ratio of crack vs. powder quantities that guided punishment to 18-to-1, from 100-to-1.”²³⁶ In 2013, Attorney General Eric H. Holder Jr. also instructed federal prosecutors not to seek the maximum penalty if a drug trafficker was low-level and nonviolent.²³⁷ Of course, the DOJ under President Donald Trump rescinded this guidance and “renewed emphasis on pursuing maximum penalties.”²³⁸ Although the use of mandatory minimums rose under Trump, white defendants were more likely to be affected than black defendants.²³⁹ Since winning the election, President Biden has undone Trump’s policy of imposing mandatory minimums.²⁴⁰ Racial disparities have also decreased at the state level.²⁴¹

There is also evidence that penalties invoked in some parts of the United States do not involve bias—whether actual or subconscious. A recent article examining life sentences for homicide defendants noted that “of thirty-six studies completed in the late 1990s and early 2000s, only four found that defendant race had an impact on outcomes”²⁴² after considering other variables, including, for instance, the location where the offender was sentenced, the victim’s race,

²³³ *Id.* at 250.

²³⁴ Charles Lane, *Here’s Some Hope for Supporters of Criminal Justice Reform*, WASH. POST (Mar. 30, 2021, 7:11 PM), https://www.washingtonpost.com/opinions/heres-some-hope-for-supporters-of-criminal-justice-reform/2021/03/30/d41a1d72-9194-11eb-9668-89be11273c09_story.html [<https://perma.cc/DC3X-BTQ9>] (citing Michael T. Light, *The Declining Significance of Race in Criminal Sentencing: Evidence from US Federal Courts*, 100 SOC. FORCES 1110 (2021)).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* (“From 2000 to 2016, the ratio of Black offenders under the supervision of criminal justice (in prison, in jail, on probation or on parole) to White offenders declined from 8.3-to-1 to 5.1-to-1.” (citing WILLIAM J. SABOL ET AL., COUNCIL ON CRIM. JUST., TRENDS IN CORRECTIONAL CONTROL BY RACE AND SEX 1 (2019))).

²⁴² Michael M. O’Hear & Darren Wheelock, *Life ‘With’ or ‘Without’?: An Empirical Study of Homicide Sentencing*, 2021 J. EMPIRICAL LEGAL STUD. 1, 8 (citing Glenn L. Pierce et al., *Race and Death Sentencing for Oklahoma Homicides Committed Between 1990 and 2012*, 107 J. CRIM. L. & CRIMINOLOGY 733, 739–40 (2017)).

and the offender's age.²⁴³ Additionally, while racial disparities may be evident in decisions to incarcerate an offender, such disparities are not as common when it comes to determining sentence length.²⁴⁴

Additionally, research suggests that unconscious bias only influences judges in a subtle way.²⁴⁵ For instance, Judge Bernice Donald of the United States Court of Appeals for the Sixth Circuit, along with Professors Jeffrey Rachlinski and Andrew Wistrich, conducted a study in which judges were asked to assess hypothetical cases in which the race of the defendants were manipulated.²⁴⁶ Samuel R. Sommers and Phoebe C. Ellsworth first used this exercise and “found that white lay adults given the problem were more likely to convict the Black defendant than the white defendant.”²⁴⁷ The study involving judges showed no difference in conviction rates, though implicit bias did affect their judgment of juvenile offenders.²⁴⁸ Lawyers may be able to de-bias a judge while presenting their case, but studies addressing lawyers' implicit bias show that lawyers can be biased themselves and may be “part of the problem rather than part of the solution.”²⁴⁹ To avoid implicit bias, judges can avoid hurried rulings; take breaks, rest, and eat; use checklists and objective criteria; write opinions; seek feedback; obtain training about implicit bias; remind themselves of the commitment to fairness and impartiality; promote diversity in chambers and the court as a whole; consider the opposite; and audit judicial performance.²⁵⁰

Thus, although there is wide-reaching racism in the criminal justice system, it is not an intractable problem if there is a conscious and concerted effort to deal with the issue. Any reforms to the sentencing system must be acutely aware of this consideration.

IV. IDEAL THEORETICAL FRAMEWORK

In reforming the sentencing system, there are five key, broad structural changes that need to be addressed.

A. *Proportionate Sentences*

An important design parameter to achieving a just sentencing system is to ensure that the level of punishment is commensurate with the severity of the

²⁴³ *Id.* at 8–10.

²⁴⁴ *See id.* at 15 (citing Ryan D. King & Michael T. Light, *Have Racial and Ethnic Disparities in Sentencing Declined?*, 48 CRIME & JUST. 365, 373 (2019)).

²⁴⁵ Bernice Donald et al., *Getting Explicit About Implicit Bias*, 104 JUDICATURE 75, 76 (2020-21).

²⁴⁶ *Id.* at 76, 80.

²⁴⁷ *Id.* at 76.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 77–78.

²⁵⁰ *Id.* at 79–80.

offense. This reflects the application of the principle of proportionality, which has two elements: (1) the seriousness of the crime, and (2) the harshness of the sanction. Further, the principle has a quantitative component, in that those two limbs must be matched. Thus, for the principle to be satisfied, the seriousness of the crime must be equivalent to the harshness of the penalty.²⁵¹

Proportionality is loosely recognized in the Eighth Amendment’s prohibition on cruel and unusual punishment, which is not only limited to capital punishment.²⁵² The United States Supreme Court applies the evolving standards of decency doctrine and uses a two-part test to determine whether a punishment passes muster under the Eighth Amendment.²⁵³ The first part—a proxy for unusualness—requires courts to look at objective data to determine whether the punishment is still constitutional, while the second part—a proxy for cruelty—requires courts to determine whether the punishment is justified by its purpose, whether that is retribution, deterrence, incapacitation, or rehabilitation.²⁵⁴ The Court has only narrowly applied the evolving standard of decency analysis to non-capital, non-JLWOP (juvenile life without parole) cases.²⁵⁵ Most state constitutions also prohibit disproportionate punishment, and the majority of states follow the Supreme Court’s analytical approach.²⁵⁶

Despite this, the US sentencing system is overly punitive. The punitive system of the modern era traces its roots back to President Nixon’s “War on Drugs.”²⁵⁷ Punishments include not only excessively long prison terms but also “the extensive criminalization of social problems such as homelessness and mental illness . . . the imposition of fines and fees that exacerbate poverty . . . and the new technologies that place the entire public under a form of state surveillance.”²⁵⁸ It is this “Era of Punitive Excess” that allows poor people and people of color to be further marginalized.²⁵⁹ Although many researchers

²⁵¹ JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION* 6 (2004).

²⁵² U.S. CONST. amend. VIII (1787); see also William W. Berry III, *Cruel & Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1634 (2021).

²⁵³ See Berry, *supra* note 251, at 1631.

²⁵⁴ *Id.* at 1631–32 (citing William W. Berry III, *Evolved Standards, Evolving Justices? The Case for a Broader Application of the Eighth Amendment*, 96 WASH. UNIV. L. REV. 105, 109–11 (2018)).

²⁵⁵ See *id.* at 1633–36.

²⁵⁶ *Id.* at 1636–37.

²⁵⁷ See Andrew Cohen, *The American ‘Punisher’s Brain,’* BRENNAN CTR. FOR JUST. (May 17, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/american-punishers-brain> [<https://perma.cc/9KUM-JFP3>] (“Our penchant for punitive sentencing goes back beyond the Constitution or the Pilgrims or even British common law. It goes back further than the Magna Carta or the Code of Hammurabi or the Talmud, back to the dawn of human history . . .”).

²⁵⁸ Jeremy Travis & Bruce Western, *The Era of Punitive Excess*, BRENNAN CTR. FOR JUST. (Apr. 13, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess> [<https://perma.cc/34CR-YRTM>].

²⁵⁹ *Id.*

focus on the disproportionate incarceration of African Americans and Latinos, “disparities can be found in every dimension of the punishment landscape, from arrest patterns to pretrial detention to the imposition of fines and fees.”²⁶⁰ Additionally, poor people are often punished and are overexposed to police, court, and prison contact as a result of their circumstances.²⁶¹ Punishing the poor, however, is an inappropriate response: “If the problems of crime, disorderly behavior, and idleness are characteristic of the social conditions of poverty, then justice is found through the abatement of those social conditions rather than punishing those who live in them.”²⁶²

The punitive nature of the criminal justice system is further exemplified in “the belief that our law enforcement institutions—judges, police, prosecutors, prison officials—are expert at identifying the truly dangerous,” which is a belief rooted in racism.²⁶³ Even though efforts have been made to make these individuals more efficient in carrying out justice, the push to rely on algorithms to properly identify dangerous individuals only “erases rather than removes the racist legacies of this approach.”²⁶⁴ America’s “punisher’s brain,” as coined by Colorado Judge Morris Hoffman, allows us to sentence the condemned in inhumane ways through long sentences in unsanitary conditions, though “a growing body of evidence has undermined long-perceived links between public safety and the length of prison sentences.”²⁶⁵ Many other countries focus on rehabilitation rather than punishment,²⁶⁶ and this likely accounts for lower crime and recidivism rates in such countries.²⁶⁷

Unfortunately, the punitive nature of our criminal justice system does not stop when an offender leaves prison: “Roughly 600,000 people leave prisons every year hoping that their punishment has ended, only to encounter a combination of laws, rules, and biases forming barriers that block them from jobs, housing, and fundamental participation in our political, economic, and cultural life.”²⁶⁸ To end mass incarceration, these “collateral consequences” must be

²⁶⁰ *Id.*

²⁶¹ *See id.*

²⁶² *Id.*

²⁶³ Jonathan Simon, *Losing Our Punitive Civic Religion*, BRENNAN CTR. FOR JUST. (Apr. 13, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/losing-our-punitive-civic-religion> [<https://perma.cc/B77X-TUJW>].

²⁶⁴ *Id.*

²⁶⁵ *See* Cohen, *supra* note 257.

²⁶⁶ *See, e.g., id.* (noting that Germany’s Prison Act has a goal of helping prisoners “lead lives of ‘social responsibility free of crime’ upon release,” while convicted offenders in both Germany and the Netherlands “never spend any measurable time in prison,” but instead are “diverted into other programs, or forced to pay fines, or given suspended sentences”).

²⁶⁷ *Id.*

²⁶⁸ Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> [<https://perma.cc/P9DD-HSEW>].

eliminated and restoration must be the goal of criminal justice.²⁶⁹ Both the private sector and government play a part in limiting opportunities for individuals who were incarcerated.²⁷⁰ For instance, Devah Pager's study, "*The Mark of a Criminal Record*," concluded that "a criminal conviction reduced the likelihood of a job applicant receiving a callback by 50 percent for white applicants and by nearly two-thirds for Black applicants."²⁷¹ The government is as complicit as private parties in limiting opportunities, considering individuals convicted of some drug crimes ineligible for government assistance.²⁷² Although many states have relaxed this policy as allowed by Congress, this does not go far enough in reducing the effects of such limitations.²⁷³ Insofar as voting rights go, "30 states disenfranchise at least some people based on past convictions."²⁷⁴ Citizens of other countries also experience collateral consequences following incarceration, but collateral consequences in the United States are unique in "their depth, severity, and pervasiveness."²⁷⁵

Media coverage also affects the punishment offenders receive. For instance, one study shows that crime coverage increases the harshness of sentencing, but the study also reveals that this harshness can be mitigated through judicial selection.²⁷⁶ In terms of sentencing harshness, media coverage can lead to increased sentencing lengths, and this was true even when "alternative explanations to changes in sentencing were considered, including specific case characteristics, unique court-level considerations, county-level demographics, and general time trends."²⁷⁷ The media adds to judges' own concern about public safety and increased crime and "amplifies such a fear with respect to minority groups (predominantly Blacks)," though judges may not themselves be aware of such a correlation.²⁷⁸ Even if it is difficult to limit the effects of the media generally, it is possible to minimize the racial aspects of such effects, though it is likely impossible to have a truly independent judiciary.²⁷⁹

The level of punishment imposed in America is often so extreme that even some prosecutors and police have called for lighter sentencing. In April 2021, more than sixty current and former elected prosecutors and law enforcement leaders published a Joint Statement on Sentencing Second Chances and Addressing Past Extreme Sentences (Joint Statement), in which they indicated that "we will not end mass incarceration until we address the substantial number of

²⁶⁹ *Id.*

²⁷⁰ *See id.*

²⁷¹ *Id.* (citing Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937 (2003)).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ Itay Ravid, *Judging by the Cover: On the Relationship Between Media Coverage on Crime and Harshness in Sentencing*, 93 S. CAL. L. REV. 1121, 1121 (2020).

²⁷⁷ *Id.* at 1174.

²⁷⁸ *Id.* at 1175.

²⁷⁹ *Id.* at 1176–77.

individuals serving lengthy sentences who pose little or no risk to public safety.”²⁸⁰ In the Joint Statement, the authors called on their colleagues to (1) address the nation’s large prison populations, (2) adopt measures allowing prosecutors and judges “to review and reduce extreme prison sentences”, and (3) adopt “more humane and evidence-based sentencing and release policies and practices.”²⁸¹ According to the signatories:

We continue to incarcerate hundreds of thousands of individuals who currently pose little to no risk to community safety, including many elderly people who cost the United States over \$16 billion a year for care. Mandatory sentences that require people to serve a set minimum number of years for a given crime, notwithstanding their unique circumstances or safety risk, have also needlessly incarcerated people past the point of any public safety benefit. Our country currently has more people serving life sentences than the *total number* of people who were incarcerated in 1970. And we have the dubious distinction of an incarceration rate second to no other country.²⁸²

Admittedly, the system is in place to protect public safety, but the system is faulty in that it “has few mechanisms to ensure that *only* those who still pose a serious safety risk remain behind bars.”²⁸³ Because of this, prisons are overcrowded, and corrections budgets are skyrocketing, which robs communities of the resources they need, resources that “could *enhance* community safety and well-being.”²⁸⁴ Furthermore, as noted in the Joint Statement, “harsh sentences are *not* effective at promoting public safety.”²⁸⁵ For instance, it is frequently unnecessary to imprison individuals past middle age if they committed crimes in their youth:

Data confirms that the majority of individuals, including those who commit serious crimes, do so only within a 5 to 10 year window of the original offense, and even those with the highest rates of reoffending have recidivism rates approaching zero by the time they reach the age of 40.²⁸⁶

It is important not only to address the cases of individuals who have languished behind bars for years, but also to look at how future sentencing can be improved.²⁸⁷ The signatories also proposed several reforms: (1) the creation of vehicles for sentencing review, (2) the creation of sentencing review units and

²⁸⁰ FAIR & JUST PROSECUTION, JOINT STATEMENT ON SENTENCING SECOND CHANCES AND ADDRESSING PAST EXTREME SENTENCES 1 (2021), <https://fairandjustprosecution.org/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf> [<https://perma.cc/GZ7H-MP7H>].

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 2.

²⁸⁷ *Id.*

processes, (3) the expanded use of compassionate release, and (4) high-level approval before prosecutors recommend decades-long sentences.²⁸⁸

Additionally, science promises to assist in determining the appropriate level of punishment, especially when it comes to the death penalty. “From the development of an offender’s brain, to the composition of lethal injection drugs, even to measurements of pain, knowledge of various scientific fields is becoming central to understanding whether a punishment is unconstitutionally cruel and unusual.”²⁸⁹ Courts are limited in how they can use science to reach their decisions, but science can be used to determine which offenders are eligible for particular punishments or to show how certain punishments affect the punished, which would be considered as part of the proportionality of the punishment.²⁹⁰ The Supreme Court, however, has often taken the approach of exempting groups of offenders from the death penalty rather than doing so for specific individuals, limiting the need for science, which would come into play more with examining whether an individual’s punishment is appropriate.²⁹¹ Even if science does take on a greater role, it is still the justices and judges who must consider the data and reach legal conclusions.²⁹² Of course, the justice or judge reaching any legal conclusions must be able to understand and process the scientific data.²⁹³

While proportionality is an established sentencing law principle, it 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.²⁹⁴ 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.

It has been established that the crimes that cause most immediate and long-term damage to victims are sexual and violent offenses.²⁹⁵ The harshest sanction is incarceration (with the obvious exception of the death penalty—which is rarely invoked²⁹⁶), and hence it logically makes sense that this should be re-

²⁸⁸ *Id.* at 2–3.

²⁸⁹ Meghan J. Ryan, *Science and the Eighth Amendment* (SMU Dedman Sch. L. Legal Stud. Rsch. Paper No. 503, 2020), <https://ssrn.com/abstract=3806981> [<https://perma.cc/7KEV-BF5F>] (revised in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* (Meghan J. Ryan & William W. Berry III eds., 2020)).

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Mirko Bagaric & Sandeep Gopalan, *Sound Principles, Undesirable Outcomes: Justice Scalia’s Paradoxical Eighth Amendment Jurisprudence*, 50 AKRON L. REV. 301, 303 (2016) (discussing how the proportionality principle should be operationalized).

²⁹⁵ *Id.* at 327.

²⁹⁶ See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<https://perma.cc/SCY8-LLUN>] (Sept. 19, 2022).

served for serious violent and sexual offenses. While this is a crude calibration, it would result in a considerable reduction in incarceration numbers given that 40 percent of current prisoners are serving a sentence for other types of offenses.²⁹⁷

This raises for consideration the appropriate length of prison terms for sexual and violent offenders and the sanctions that can serve as alternatives for other offenders. This second issue largely hinges on the greater use of technology and is discussed further below. A key consideration regarding the appropriate length of prison terms for sexual and violent offenders and how to deal with other offenders 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,²⁹⁸ and most offenders—more than 90 percent—will at some point be released from prison.²⁹⁹ This takes us to the next reform proposal.

B. *More Accurately Predict Recidivism Rates*

Predictions of future behavior are necessarily speculative and involve considerable error. This is also true when it comes to predictions of offender recidivism, which traditionally have consisted of unstructured assessments by judges that rely heavily on an offender's prior criminal history. In a bid to improve accuracy, some parts of the criminal justice system, including determinations, are increasingly using risk and needs assessment tools.³⁰⁰ These instruments use a large number of variables, some of which are static (such as prior criminal history) and others of which are dynamic (such as educational courses that have been completed) to determine the likelihood that an offender will commit offenses in the future.³⁰¹ These tools are being increasingly used in the sentencing process,³⁰² however, need considerable refinement in order to improve their accuracy and reliability.³⁰³

The PATTERN instrument discussed in the context of the FIRST STEP Act above is the newest risk and needs assessment tool that has been developed at the federal level. It is arguably also the most sophisticated. A recent report summarizing the outcome of the PATTERN released in July 2021 noted that it has been very effective. Key takeaways include:

²⁹⁷ Sawyer & Wagner, *supra* note 42.

²⁹⁸ Jenny E. Carroll, *Safety, Crisis, and Criminal Law*, 52 ARIZ. STATE L.J. 769, 778 (2021).

²⁹⁹ NATHAN JAMES, CONG. RSCH SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 4 (2015).

³⁰⁰ *Id.* at 23.

³⁰¹ See generally Itay Ravid & Amit Haim, *Progressive Algorithms*, 12 U.C. IRVINE L. REV. 527 (2022).

³⁰² See generally Bagaric et al., *supra* note 4.

³⁰³ See generally *id.*; Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487 (2021).

Nearly half (47 percent) of the BOP population assessed by PATTERN is at minimum or low risk of recidivism. As of November 2020, the PATTERN risk profile for the 130,669 people in BOP custody was: 15 percent at minimum risk, 32 percent at low risk, 20 percent at medium risk, and 33 percent at high risk (NIJ 2021). . . . The racial and ethnic backgrounds of people eligible and ineligible for the ETCs are similar. Roughly 40 percent of people who are eligible are Black and 28 percent are Hispanic, whereas 35 percent of people who are ineligible are Black and 31 percent are Hispanic (IRC 2020). . . . Preliminary recidivism rates for people released under the First Step Act are low. Overall, only 11 percent of about 7,000 people released under the First Step Act have recidivated, with an average follow-up period of 10.5 months (DOJ 2020).³⁰⁴

While no instrument will be totally accurate in predicting recidivism, given the damage that is caused by crime, it is important to ensure that the instruments are as precise as can be achieved.³⁰⁵ Offenders who are wrongly evaluated as being 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, but a premium should be attached where the risk and needs assessment indicates that an offender has a meaningful risk of recidivism.

In order to ensure ongoing improvement in development of predictive instruments, the tools must be transparent in terms of setting out that they are used to predict an offender's risk of recidivism, and they must exclude consideration of certain immutable traits such as race,³⁰⁶ or at least "ensure that individuals are not treated differently on the basis of membership in a protected class."³⁰⁷ Ongoing evaluation and refinement of the tools is necessary to ensure and improve their efficacy and adapt to changing offender profiles and traits.

C. Decriminalize Drug Use

An important part of the solution to reducing prison numbers is decriminalizing drug offenses. The decriminalization of drugs involves the reduction or removal of preexisting controls and penalties for drug offenses, and in particular low-level offenses relating to the use and possession of small amounts of drugs. A core aspect of the decriminalization of drugs involves a shift towards

³⁰⁴ JULIE SAMUELS & EMILY TIRY, JUST. POL'Y CTR., IMPLEMENTATION OF THE FIRST STEP ACT: THE RISK AND NEEDS ASSESSMENT SYSTEM 3-4 (2021).

³⁰⁵ See Mirko Bagaric et al., *The Solution to the Pervasive Bias and Discrimination in the Criminal Justice System: Transparent and Fair Artificial Intelligence*, 59 AM. CRIM. L. REV. 95, 138-39 (2022) (examining the criteria that these instruments should comply with).

³⁰⁶ Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework* 119 MICH L. REV. 291, 390 (2020).

³⁰⁷ *Id.* at 291.

harm reduction, treating drug use principally as a health problem not criminal matter, via the imposition of noncriminal sanctions.³⁰⁸

There is a slow but evident move towards the decriminalization of drug use. In 2011, the Global Commission on Drug Policy called for an end to the criminalization of drug use and noted that despite the vast expenditure on the criminalization and repressive measures directed at producers, traffickers, and consumers of illegal drugs, it has clearly failed “to effectively curtail supply or consumption.”³⁰⁹ Further, the United Nations General Assembly Special Session on the World Drug Problem unanimously declared that substance abuse should be treated as public health issue as opposed to a criminal offense.³¹⁰ This is not enough—research is desperately needed to establish the effectiveness of this approach and to address racial disparities.³¹¹ The National Institute on Drug Abuse is actively taking steps to establish and fund research on this front.³¹² This is a necessary step because, as others have observed, if “the supposed justification for prohibiting access to recreational drugs is to protect people from harm and promote public health, it has surely failed.”³¹³

Portugal is one of the most groundbreaking countries in terms of the breadth and scope of its approach to drug decriminalization. Drug use and possession were decriminalized in Portugal in 2001 in response to what the Portuguese government perceived as a nationwide and uncontrollable drug problem, exacerbated by a criminalization regime that was effectively draining all of the financial and human resources out of the country.³¹⁴ Decriminalization in Portugal was enacted following the issuance of an expert study by the Commission for a National Drug Strategy that recommended a drug strategy premised around the core principles of harm reduction, prevention, and reintegration of the drug user into society.³¹⁵ The Commission concluded that decriminalization was the most advantageous strategy to fight the growing drug problem in Portugal. Significantly, the ultimate objective of the strategy recommended by the Commission was to reduce drug usage and abuse.³¹⁶

³⁰⁸ See GLEN GREENWALD, *DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES* 11 (2009).

³⁰⁹ GLOB. COMM’N ON DRUG POL’Y, *WAR ON DRUGS* 2 (2011) [hereinafter *WAR ON DRUGS*].

³¹⁰ Nora D. Volkow, *Addiction Should Be Treated, Not Penalized*, *HEALTH AFFS. FOREFRONT* (Apr. 27, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210421.168499/full/> [https://perma.cc/ZM8D-Y49X].

³¹¹ *See id.*

³¹² *See id.*

³¹³ Joseph T.F. Roberts, *Ending the War on Drugs: Public Attitudes and Incremental Change*, 21 *AM. J. BIOETHICS* 26, 26 (2021) (arguing for strategy of “incremental change, starting with the liberalization of cannabis,” as opposed to “immediate liberalization of all drugs”).

³¹⁴ GREENWALD, *supra* note 308, at 1.

³¹⁵ Ximene Rego et al., *20 years of Portuguese Drug Policy - Developments, Challenges and the Quest for Human Rights*, 16 *SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POL’Y* (2021).

³¹⁶ *Id.*

The strategy eventually implemented in Portugal relied heavily upon the recommendations outlined by the Commission. In 2001, Portugal decriminalized all drug use (and no distinction was made between hard or soft drugs),³¹⁷ so long as the amount of drugs does not exceed up to ten days' worth of an average daily dose of drugs that are intended only for personal use.³¹⁸ Instead of being a crime, drug use became a misdemeanor which is dealt with administratively.³¹⁹

The impact of the decriminalization laws in Portugal has been well documented and on nearly all relevant measures, it has proven to be an outstanding success.³²⁰ A report by the Transform Drug Policy Foundation in 2021, summarized many of the research findings about the impact of Portugal's drug policy about two decades after it was implemented.³²¹ Among the key findings is that drug deaths in Portugal dropped considerably after the reforms, and they are now considerably below the average in the European Union (six deaths per million among people aged fifteen to sixty-four in Portugal compared to the EU average of 23.7 per million).³²² There has also been a considerable drop in crime. Prior to the drug reforms, in 2001 over 40 percent of Portuguese inmates were held for drug offenses, and 70 percent of reported crime was connected to drugs.³²³ The proportion of inmates in Portuguese prisons has now fallen considerably to 15.7 percent, which is below the European average of 18 percent.³²⁴ The levels of drug use in Portugal are now also well below the European average—after slightly increasing in the first five years following the reforms.³²⁵

There would not be a need to decriminalize drug crimes in the United States but for the “War on Drugs,” which, according to Richard Nixon's domestic policy advisor John Ehrlichman, “had begun as a racially motivated crusade to criminalize Blacks and the anti-war left.”³²⁶ Aside from this, there are other laws in place that appear fair on their face but “have a racially discrimina-

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ See Alex Stevens & Caitlin E. Hughes, *A Resounding Success or a Disastrous Failure: Re-Examining the Interpretation of Evidence on the Portuguese Decriminalisation of Illicit Drugs*, 31 *DRUG & ALCOHOL REV.* 101, 103–04 (2012); Brian Vastag, *5 Years After: Portugal's Drug Decriminalization Policy Shows Positive Results*, *SCI. AM.* (Apr. 7, 2009), <https://www.scientificamerican.com/article/portugal-drug-decriminalization> [<https://perma.cc/UV2T-NZES>].

³²¹ HARVEY SLADE, *TRANSFORM DRUG POL'Y FOUND., DRUG DECRIMINALISATION IN PORTUGAL: SETTING THE RECORD STRAIGHT 1* (2021).

³²² *Id.* at 2.

³²³ *Id.* at 3.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, *BRENNAN CTR. FOR JUST.* (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs> [<https://perma.cc/S9GT-DC7K>].

tory impact that is structurally embedded in many police departments, prosecutor's offices, and courtrooms."³²⁷ Since the late 1980s, black people have been "disproportionately arrested, convicted, and imprisoned for possession and distribution of crack cocaine."³²⁸ Despite the fact that National Institute for Drug Abuse surveys show large numbers of documented crack cocaine use by white people, black users were overwhelmingly and disproportionately arrested and faced severe penalties.³²⁹ Such policies and practices must be abolished, and as noted by Taifa, "[w]e must not be content with piecemeal reform and baby-step progress. Indeed, rather than steps, it is time for leaps and bounds."³³⁰ Mandatory minimums must be abolished, and a health-focused approach to substance abuse must be taken.³³¹

Many others have also called for substance abuse to be treated rather than punished.³³² For instance, Nora D. Volkow addressed the fact that black people and other communities of color have suffered when it comes to substance use and substance use disorders because "entrenched punitive approaches have exacerbated stigma and made it hard to implement appropriate medical care."³³³ To this point, white and black people are similar in their use of drugs, yet they often face different legal consequences.³³⁴ Volkow provides an illustration: "Even though they use cannabis at similar rates, for instance, Black people were nearly four times more likely to be arrested for cannabis possession than White people in 2018."³³⁵ According to Jeffrey Miron and Erin Partin, the rate of incarceration of black people is five times that of white people for low-level drug offenses.³³⁶

Moreover, punishment does not resolve substance abuse or related problems.³³⁷ Over half the incarcerated population has an untreated substance use disorder, and once they are released, there is no guarantee they will receive treatment, as public health strategies to assist with drug abuse are unevenly distributed by race and ethnicity.³³⁸

This move towards decriminalization of drugs has commenced in the United States. More than two-thirds of Americans support legalizing marijuana.³³⁹

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

³³² See Volkow, *supra* note 310.

³³³ *Id.*

³³⁴ *Id.*; see also Jeffrey Miron & Erin Partin, *Ending the War on Drugs Is an Essential Step Toward Racial Justice*, 21 AM. J. BIOETHICS 1, 1 (2021).

³³⁵ Volkow, *supra* note 310.

³³⁶ Miron & Partin, *supra* note 334, at 1.

³³⁷ Volkow, *supra* note 310.

³³⁸ See *id.* ("Compared to White people, Black and Hispanic people are more likely to be imprisoned after drug arrests than to be diverted into treatment programs.").

³³⁹ Miron & Partin, *supra* note 334, at 1.

In 2021, four states (New Jersey, New Mexico, New York, and Virginia) legalized recreational marijuana, and these same states also enacted criminal policy reform and social equity provisions.³⁴⁰ All four of these states clear many misdemeanor convictions, three will clear certain felonies, and one state allows petitions to be presented to have certain felonies cleared.³⁴¹

Additionally, three of the states used the legalization of marijuana “to enact more general expungement and criminal record reforms.”³⁴² For instance, Virginia enacted a bill providing for automatic sealing of nonconvictions and some misdemeanors.³⁴³ The reforms also focused “on addressing the past harms and disparities of marijuana enforcement in a more rigorous way than in most earlier legalization efforts”³⁴⁴ The state that has gone the furthest to decriminalize drug use is Oregon, which in 2020 passed Measure 110.³⁴⁵ As a result of this ballot measure, possession of small amounts of drugs (such as less than two grams of cocaine or one gram of heroin) is now a civil citation that attracts a fine of \$100, as opposed to being a criminal offense.³⁴⁶ The measure also downgrades possession of larger amounts of drugs from felonies to misdemeanors.³⁴⁷

While the Oregon reform is only relatively recent, early data shows that the results have been promising.³⁴⁸ Prior to decriminalization, in 2019, police made more than sixty-seven hundred arrests and courts imposed more than four thousand convictions for drug possession.³⁴⁹ By comparison, in the six-month period between February and August 2021, there were eighteen hundred arrests and 364 convictions for drug possession.³⁵⁰ Moreover, decriminalization did not lead to an increase in what is often drug-related crime, with property crimes decreasing during the same period.³⁵¹

In a further potentially significant move towards drug legalization, the House of Representatives passed H.R. 3617, known as the Marijuana Oppor-

³⁴⁰ DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., DRUG ENF’T AND POL’Y CTR., MARIJUANA LEGALIZATION AND EXPUNGEMENT IN EARLY 2021 1 (2021).

³⁴¹ *Id.*

³⁴² *Id.* at 5.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ Sophie Quinton, *Oregon’s Drug Decriminalization May Spread, Despite Unclear Results*, PEW CHARITABLE TRS. (Nov. 3, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/11/03/oregons-drug-decriminalization-may-spread-despite-unclear-results> [https://perma.cc/JJL2-TAB5]; see also Eric Westervelt, *Oregon’s Pioneering Drug Decriminalization Experiment Is Now Facing the Hard Test*, NPR (June 18, 2021, 5:00 AM), <https://www.npr.org/2021/06/18/1007022652/oregons-pioneering-drug-decriminalization-experiment-is-now-facing-the-hard-test> [https://perma.cc/T9GU-JEY9].

³⁴⁶ Quinton, *supra* note 345.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

tunity Reinvestment and Expungement Act (or MORE Act) in 2022.³⁵² The legislation would decriminalize marijuana at the federal level.³⁵³ It is not clear whether the measure will be voted on in the Senate or whether it has the support of President Joe Biden.³⁵⁴ However, the measure is significant because it gives national prominence to the drug legalization issue.

Given the above trends and effects, a sound argument can be made that decriminalization policies should not be introduced throughout the United States. The Oregon model should be implemented throughout the country. The imposition of nonincarceration penalties for small, personal usage drug possession offenses will improve the health outcomes of drug users, lead to a corresponding decrease in drug trafficking offenses, and reduce the wealth and resources of organized crime gangs.

D. Develop New Criminal Sanctions

There is also a need to develop new sanctions as alternatives to prison. We have previously suggested that new sanctions need to be developed, which involve technologically monitoring offenders whose confinement is mainly restricted to their home.³⁵⁵

In response to the pandemic, about twenty-four thousand offenders have been released on home confinement.³⁵⁶ In the final days of Trump's administration, however, a policy was put in place "that would revoke home confinement for those [released] inmates as soon as the government lifts its emergency declaration over the coronavirus."³⁵⁷ But as advocates and lawmakers have argued, this natural social experiment provides credible evidence that home-based confinement sanctions can be effective.³⁵⁸ Roughly forty-five hundred of these inmates are left with uncertainty as to whether they could be forced back into prison; but according to Bureau of Prisons (BOP) Director Michael Carvajal, only twenty-one inmates released on home confinement were sent back to prison due to rule violations, and only one person had committed a new crime.³⁵⁹

³⁵² Felicia Sonmez & Mike DeBonis, *House Passes Bill Decriminalizing Marijuana; Senate Fortunes Unclear*, WASH. POST, (Apr. 1, 2022, 2:33 PM), <https://www.washingtonpost.com/politics/2022/04/01/house-passes-bill-decriminalizing-marijuana-senate-fortunes-unclear/> [<https://perma.cc/G95F-NFR8>].

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ See generally Bagaric et al., *supra* note 4 (discussing, at length, the workings and justification of the proposed new sanction).

³⁵⁶ Harper Neidig, *DOJ Faces Big Decision on Home Confinement*, THE HILL (May 9, 2021, 8:00 AM), <https://thehill.com/homenews/administration/552447-doj-faces-big-decision-on-home-confinement> [<https://perma.cc/4JDA-X2VQ>].

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* ("Ames Grawert, a senior counsel at the Brennan Center for Justice . . . , said that from an empirical standpoint, the program's nearly nonexistent recidivism rates were shocking.").

As of May, the Biden administration had not yet rescinded Trump's policy,³⁶⁰ though President Biden planned to use his clemency powers to commute or pardon incarcerated people.³⁶¹ Additionally, Carvajal assured lawmakers that "[i]f they have successfully been out there, we're going to use good judgment and common sense and work within the law to make sure that we place them appropriately."³⁶² Many advocates and experts "see the home confinement policy as a radical experiment that yielded positive results," but many also believe that more could have been done to reduce the incarcerated population and stop the spread of COVID-19.³⁶³

In order to persuasively call to substantially reduce prison numbers, it is necessary to provide for an alternative sanction that can be used as a substitute to imprisonment for many offenders who currently receive prison sentences. Two key criteria should be applied in devising the new sanction.

First, the alternative sanction should secure the benefits stemming from sending offenders to prison. Second, it should strive to eliminate or reduce the disadvantages associated with prison. Imprisonment has two important purposes: protecting the community from further offending for the duration of the term and imposing a hardship proportionate to the seriousness of the crime. The disadvantages of prison are the prohibitive financial cost to the community, the considerable incidental burdens that it imposes on offenders (in the form reduced life expectancy and lifetime earnings), and the damaging impact it has on the family of offenders. Against this backdrop, the main features of the proposed sanction are set out.

The key feature of the new sanction is the capacity to monitor the actions of offenders and confine them to designated locations in an efficient and effective manner. This can now be done without the need to build high concrete walls. GPS tracking is already used in many parts of the United States for home detention orders.³⁶⁴ GPS tracking can be supplemented by sensor technology that can monitor the movements of offenders in real time to greatly diminish

³⁶⁰ Kristine Phillips, *Inmates Sent Home During COVID-19 Got Jobs, Started School. Now, They Face Possible Return to Prison*, USA TODAY, May 5, 2021, ProQuest, Doc. ID No. 2521975800 (quoting advocates urging President Biden to rescind the policy, including Kevin Ring, president of Families Against Mandatory Minimums, who said, "It's not simply that (the Justice Department) should fix it. They should fix it yesterday. . . . They know how to change Trump policies they don't like, right away.").

³⁶¹ Neidig, *supra* note 356.

³⁶² Phillips, *supra* note 360.

³⁶³ Neidig, *supra* note 356 (quoting Douglas Berman, a law professor at Ohio State University, who said, "I certainly went into the pandemic era thinking that Congress should authorize BOP to let a lot of people out and not just the ones about to get out anyway, not just the lowest-risk folks, that this was a time where it was worth being even bolder . . .").

³⁶⁴ See generally April Glaser, *Incarcerated at Home: The Rise of Ankle Monitors and House Arrest During the Pandemic*, NBC NEWS (July 5, 2021, 8:30 AM), <https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008> [<https://perma.cc/5YJQ-4U3J>].

the prospect of offending.³⁶⁵ The sensor equipment would utilize the same technology that is currently used in a number of contexts, including detecting if a patient falls in a hospital or in directing driverless cars. Sensors could be utilized to detect suspicious movement by offenders (such as if they picked up an implement or applied force to another person), and this would trigger a camera that 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 the offender to desist from his or her current actions or directing police to where the offender is situated. The efficacy of the equipment would be secured by ensuring that tamperproof sensor equipment and visual recording equipment are attached to the body of offenders.³⁶⁶

It is likely that this sanction would have considerable benefits beyond confining the offender to designated locations. Research shows that the most effective 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.³⁶⁷ Thus, offenders who are aware that their actions are being monitored are unlikely to commit a crime; and if they do, the sensor equipment will provide direct evidence regarding their involvement in the offense.³⁶⁸

The sanction can be adopted to match the severity and nature of the crime in a number of ways. First, the duration of the monitoring can be varied, from a matter of months to years. Second, the area of confinement can also be controlled. For example, offenders who have committed relatively minor offenses could be permitted to move within ten miles of their home, while more serious offenders would be required to stay within the confines of their home and workplace.

This sanction is especially apposite for offenders who have not committed sexual or violent offenses, which, as noted above, constitutes approximately 40 percent of all inmates. The sanction could also be 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.

The last reform to the sentencing system is more wide-ranging.

E. Develop Effective Strategies to Reduce the Incidence of Crime

While this Article focuses on the sentencing system, in order to reduce the incarceration rate in a significant and durable manner, it is important to deal

³⁶⁵ See *id.* (reporting on the utility of electronic monitoring).

³⁶⁶ Bagaric et al., *supra* note 4, at 104.

³⁶⁷ DONALD RITCHIE, SENT'G ADVISORY COUNCIL, DOES IMPRISONMENT DETER? A REVIEW OF THE EVIDENCE 2 (2011), https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Does_Imprisonment_Deter_A_Review_of_the_Evidence.pdf [<https://perma.cc/U8JK-MW27>].

³⁶⁸ Bagaric et al., *supra* note 4, at 104.

with the cause of crime. Given the current, strong community sentiment stemming from the Black Lives Matter (BLM) movement for effective changes to the system, it is timely to raise express awareness in favor of more wide-reaching reforms.³⁶⁹ This is an important consideration because the criminal system arguably puts too high a value on accountability as the purpose behind incarceration. Accountability for those who commit crimes is viewed favorably in the United States and other nations.³⁷⁰ But, “[I]f left unsaid is why crimes, which generally are complex social events with many causes, should be thought of as creating a ‘debt,’ and why punishment should be seen as a ‘repayment.’”³⁷¹ Although not alone, the United States is unique in its devotion to ensuring individuals, particularly those who commit crimes against humanity, are held accountable for their actions.³⁷²

A recent study shows that “crime reduction efforts account for less than half of the crime drop since 1990 and essentially *none* of the crime drop since 2000.”³⁷³ To this end, it has recently been noted that the crime rate varies according to the generation in which a person is born: millennials seem to commit less crime than earlier generations.³⁷⁴ This further supports the view that policies aimed at reducing delinquency in children are the most effective means to reduce crime.³⁷⁵ According to Bill Spelman, who authored the study, “[t]he best way to reduce crime in the future is probably what caused it to drop in the first place: helping our families, neighborhoods and schools raise kids who are respectful of others and don’t need to steal to get by. It’s time we shifted focus from stopping bad guys to helping kids be good guys.”³⁷⁶

More generally, other interventions/strategies are demonstrating how crime reduction can be achieved. For instance, at least one recent study focused on not just stopping crime in those individuals who have not committed crimes yet, but on preventing those who have already committed crimes from committing more crimes.³⁷⁷ By better understanding what leads one to commit crime, it is possible to develop plans to encourage desistance.³⁷⁸ Some studies have examined discount rates, or the “rate at which existing offenders discount the fu-

³⁶⁹ See generally Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 LAW & INEQ. 1 (2015) (discussing imprisonment as it relates to poverty and suggesting reforms).

³⁷⁰ Simon, *supra* note 263.

³⁷¹ *Id.*

³⁷² See *id.*

³⁷³ *Millennials Commit Less Crime than Prior Generations*, UT NEWS (May 10, 2021), <https://news.utexas.edu/2021/05/10/millennials-commit-less-crime-than-prior-generations/> [<https://perma.cc/38XV-YZNB>].

³⁷⁴ *Id.* (“The age group born between 1946 and 1964, commonly known as baby boomers, was the most criminally active in modern history.”).

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ See generally JENNIFER L. DOLEAC, *ENCOURAGING DESISTANCE FROM CRIME* (2020).

³⁷⁸ See *id.* at 3.

ture,” which “is a personal characteristic with important policy implications, as it helps determine which interventions affect behavior.”³⁷⁹ For instance, “changing payoffs that are only realized in the distant future are unlikely to change decisions about whether to engage in crime in the present.”³⁸⁰ Additionally, there is evidence that “[i]ncarceration provides an opportunity to intervene in an offender’s life with programs that individuals might not voluntarily engage in otherwise,” making some prison-based intervention successful.³⁸¹

While the causes of crime are multifaceted and often poorly understood, there is one clear factor that has a very strong link with criminal behavior. Education is a key ingredient of individual and community flourishing.³⁸² This extends to compliance with criminal law and avoiding involvement with the criminal justice system. In short, the more educated a person is, the less likely that they will be sentenced to imprisonment. The most recent DOJ report concerning education levels of prisoners was conducted in 2003.³⁸³ The results were very illuminating. The study showed that 65 percent of incarcerated people in the United States had not gained a high school diploma, less than 23 percent had obtained just a high school diploma, and less than 13 percent had received a secondary education.³⁸⁴ A high school education makes it five times less likely that a person will be imprisoned.³⁸⁵ It is tenfold for a college education.³⁸⁶

More recently, it has been noted that the education levels of Americans increased between 1980 and 2008; however, during that period, the population of incarcerated individuals with less than a high school diploma also grew.³⁸⁷ This trend is also demonstrated by studies in several states. A report released in 2014 by Minnesota’s corrections department showed that over 74 percent of incoming prisoners did not have a high school diploma, and only 17 percent had a postsecondary education.³⁸⁸ In Georgia, more than 50 percent of prisoners do

³⁷⁹ *Id.* at 4.

³⁸⁰ *Id.* at 6.

³⁸¹ *Id.* at 26.

³⁸² See Blake Strode, *A Holistic Approach to Legal Advocacy*, BRENNAN CTR. FOR JUST. (Sept. 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/holistic-approach-legal-advocacy> [<https://perma.cc/D6SS-2LQ6>] (offering broader solutions to improve the criminal justice system).

³⁸³ CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf> [<https://perma.cc/6UNT-XF8Z>].

³⁸⁴ *Id.*

³⁸⁵ See Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 11 (2010), <https://www.amacad.org/publication/incarceration-social-inequality> [<https://perma.cc/B8XL-BY5U>].

³⁸⁶ See *id.*

³⁸⁷ See BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS 16 (2012).

³⁸⁸ Caitlin Curley, *How Education Deficiency Drives Mass Incarceration*, GENBIZ (Nov. 18, 2016), <https://genbiz.com/education-deficiency-drives-mass-incarceration> [<https://perma.cc/A559-QL4C>].

not have a high school diploma and less than 10 percent have attended college.³⁸⁹

Moreover, access to education has a strong connection with wealth, and, in this way, educational attainment is racialized. Studies show African Americans are significantly more likely to live in poorer areas.³⁹⁰ White and Asian neighborhoods have a much higher median income than other races.³⁹¹ In fact, the median wealth of white neighborhoods is thirteen times the median wealth of black neighborhoods.³⁹² And schools in areas with greater poverty receive less funding.³⁹³

Reducing incarceration rates through educational reforms should focus not only on lifting educational standards throughout America—especially in poorer areas—but also on in-prison education. Offenders under twenty-one years of age who are released from federal prison are rearrested at higher rates than any other age group, with individuals who did not have a high school degree being rearrested at the highest rate (60.4 percent), compared to those with a college degree being rearrested at a rate of 19.1 percent.³⁹⁴ Prisoners who participate in any type of educational program while incarcerated are 43 percent less likely to return to prison.³⁹⁵ Educating inmates will thus demonstrably reduce their rate of reoffending.

Investing in prison education programs will necessitate up-front funding, but the potential long-term economic benefits are significant. As noted earlier,

³⁸⁹ GA. DEP'T OF CORR., INMATE STATISTICAL PROFILE: INMATES ADMITTED DURING FY2016 36 (2016), https://gdc.ga.gov/sites/default/files/pdf/profile_inmate_admissions_fy2016.pdf [https://perma.cc/9NBJ-LUHR].

³⁹⁰ Stuart M. Butler & Jonathan Grabinsky, *Tackling the Legacy of Persistent Urban Inequality and Concentrated Poverty*, BROOKINGS (Nov. 16, 2020), <https://www.brookings.edu/blog/up-front/2020/11/16/tackling-the-legacy-of-persistent-urban-inequality-and-concentrated-poverty/> [https://perma.cc/79XJ-48B4].

³⁹¹ Sean F. Reardon et al., *Neighborhood Income Composition by Household Race and Income, 1990–2009*, 660 AAPSS: ANNALS 78, 85, 88 (2015), <https://inequality.stanford.edu/sites/default/files/Neighborhood%20Income%20Composition%20by%20Race%20and%20Income.pdf> [https://perma.cc/8M2B-3M3P].

³⁹² Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), <https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [https://perma.cc/Z5Y8-UPLL].

³⁹³ Press Release, U.S. Dep't of Educ., More than 40% of Low-Income Schools Don't Get a Fair Share of State and Local Funds, Department of Education Research Finds (Nov. 30, 2011), <https://www.ed.gov/news/press-releases/more-40-low-income-schools-dont-get-fair-share-state-and-local-funds-department-> [https://perma.cc/KGW2-2V8T].

³⁹⁴ KIM STEVEN HUNT & ROBERT DUMVILLE, U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5, 24 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [https://perma.cc/F5RN-737B].

³⁹⁵ Doug Irving, *The Case for Correctional Education in U.S. Prisons*, RAND CORP.: RAND REV. (Jan. 3, 2016), <https://www.rand.org/blog/rand-review/2016/01/course-correction-the-case-for-correctional-education.html> [https://perma.cc/JHQ5-DDCY].

it costs taxpayers in the United States approximately \$34,000 to house a prisoner for one year.³⁹⁶ The total spending on United States prisons is more than \$80 billion annually.³⁹⁷ For every dollar spent on prison education, taxpayers are estimated to save four to five dollars that would otherwise be spent on incarceration.³⁹⁸ While this figure is somewhat crude, it has been shown that Missouri saved an average of \$25,000 per year for every incarcerated individual who did not return to prison, and nationally the US economy is estimated to lose about \$60 billion per year due to loss of labor from high rates of incarcerated persons.³⁹⁹

Therefore, investing in prisoner education is good for the individual, good for decreasing recidivism, and good for local and national economies. Education gives individuals a voice, creates opportunities, and opens doors to a better future. It can also repair damage to individual self-esteem and confidence.⁴⁰⁰ And, ultimately, education is a better use of tax dollars than funding institutions and practices that result in high recidivism rates.

CONCLUSION

There is considerable impetus for reform of the criminal justice system. Fifty years of being tough on crime, with the disproportionate burden of criminal law falling on the most socially disadvantaged Americans, has been a massive policy failure. The failure has been so pronounced that despite the intuitive impulse to punish criminals, the weight of community and political sentiment now supports fundamental criminal justice reform. The need to make extensive reforms to the criminal justice system has been highlighted by the BLM move-

³⁹⁶ PEW CHARITABLE TRS., *supra* note 51 (\$34,000 for jails); CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS 2010-2015* 7 (2017), <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> [<https://perma.cc/2WYC-CGQ7>] (forty-five state average for prisons was \$33,274); KEN HYLE, U.S. DEP'T. OF JUST., BUREAU OF PRISONS, *ANNUAL DETERMINATION OF AVERAGE COST OF INCARCERATION FEE (COIF) (2001)*, <https://www.federalregister.gov/documents/2021/09/01/2021-18800/annual-determination-of-average-cost-of-incarceration-fee-coif> [<https://perma.cc/26JY-S7UP>] (between \$35,663 and \$39,158 for federal prisoners).

³⁹⁷ Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [<https://perma.cc/UF97-HQHW>].

³⁹⁸ Irving, *supra* note 395.

³⁹⁹ David Skorton & Glenn Altschuler, *College Behind Bars: How Educating Prisoners Pays Off*, FORBES (Mar. 25, 2013, 5:43 AM), <https://www.forbes.com/sites/collegeprose/2013/03/25/college-behind-bars-how-educating-prisoners-pays-off/?sh=1eb12d6d2707> [<https://perma.cc/ZK8Z-YCU5>]; Kathleen Bender, *Education Opportunities in Prison Are Key to Reducing Crime*, CTR. FOR AM. PROGRESS (Mar. 2, 2018), <https://www.americanprogress.org/article/education-opportunities-prison-key-reducing-crime/> [<https://perma.cc/H4TN-QU8A>].

⁴⁰⁰ Edward A. Parker, *The Social-Psychological Impact of a College Education on the Prison Inmate*, 41 J. CORR. EDUC. 140, 143-44 (1990).

ment. This Article has focused on the reforms that should occur to the sentencing stage of the criminal justice process. In proposing the reforms, a key guiding principle has been the need to achieve a balance between theoretical purity and what is pragmatically achievable. The last consideration is especially important in light of the current increase in violent crime across much of the United States.

There are five key reforms that need to be made to the sentencing system. The first is to take the principle of proportionality seriously. This requires a clear understanding of the extent to which respective criminal offenses harm people and this then needs to be calibrated to the harshness of the criminal sanctions. The second major reform requires the decriminalization of drug use, and for this to be treated as a health, not criminal justice, issue. Third, we need to get better at identifying which offenders are likely to reoffend. This can only be achieved by using predictive algorithms to inform this aspect of the sentencing determinations. The fourth key recommendation is to make greater use of technological advances to develop a new criminal sanction that monitors the movements and activities of offenders while at home in the community. This would serve as a substitute for most prison terms that are currently imposed. Finally, attention needs to be focused on ameliorating the long-term causes of crime. To this end, educational outcomes of the most economically and socially disadvantaged Americans need to be improved. If reforms of this nature are not implemented in the short-term future, it is likely that the current groundswell of support for criminal justice change will subside, thereby entrenching America's unenviable reputation as the world's largest and most gratuitous incarcerator.

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