

Reforming Criminal Justice

Volume 4: Punishment, Incarceration, and Release

Erik Luna

Editor and Project Director

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College of Law
Arizona State University

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Summary of Report Contents

Volume 1: Introduction and Criminalization

Preface—*Erik Luna*

Criminal Justice Reform: An Introduction—*Clint Bolick*

The Changing Politics of Crime and the Future of Mass Incarceration—
David Cole

Overcriminalization—*Douglas Husak*

Overfederalization—*Stephen F. Smith*

Misdemeanors—*Alexandra Natapoff*

Drug Prohibition and Violence—*Jeffrey A. Miron*

Marijuana Legalization—*Alex Kreit*

Sexual Offenses—*Robert Weisberg*

Firearms and Violence—*Franklin E. Zimring*

Gangs—*Scott H. Decker*

Criminalizing Immigration—*Jennifer M. Chacón*

Extraterritorial Jurisdiction—*Julie Rose O’Sullivan*

Mental Disorder and Criminal Justice—*Stephen J. Morse*

Juvenile Justice—*Barry C. Feld*

Volume 2: Policing

Democratic Accountability and Policing—*Maria Ponomarenko and
Barry Friedman*

Legal Remedies for Police Misconduct—*Rachel A. Harmon*

Stop-and-Frisk—*Henry F. Fradella and Michael D. White*

Race and the New Policing—*Jeffrey Fagan*

Racial Profiling—*David A. Harris*

Race and the Fourth Amendment—*Devon W. Carbado*

Police Use of Force—*L. Song Richardson*

Policing, Databases, and Surveillance—*Christopher Slobogin*

Interrogation and Confessions—*Richard A. Leo*

Eyewitness Identification—*Gary L. Wells*

Informants and Cooperators—*Daniel Richman*

Volume 3: Pretrial and Trial Processes

Grand Jury—*Roger A. Fairfax, Jr.*

Pretrial Detention and Bail—*Megan Stevenson and Sandra G. Mayson*

Prosecutor Institutions and Incentives—*Ronald F. Wright*

Plea Bargaining—*Jenia I. Turner*

Prosecutorial Guidelines—*John F. Pfaff*

Defense Counsel and Public Defense—*Eve Brensike Primus*

Discovery—*Darryl K. Brown*

Forensic Evidence—*Erin Murphy*

Actual Innocence and Wrongful Convictions—*Brandon L. Garrett*

Race and Adjudication—*Paul Butler*

Crime Victims' Rights—*Paul G. Cassell*

Appeals—*Nancy J. King*

Problem-Solving Courts—*Richard Boldt*

Volume 4: Punishment, Incarceration, and Release

Retribution—*Jeffrie G. Murphy*

Deterrence—*Daniel S. Nagin*

Incapacitation—*Shawn D. Bushway*

Mass Incarceration—*Todd R. Clear and James Austin*

Risk Assessment in Sentencing—*John Monahan*

Sentencing Guidelines—*Douglas A. Berman*

Mandatory Minimums—*Erik Luna*

Capital Punishment—*Carol S. Steiker and Jordan M. Steiker*

Race and Sentencing Disparity—*Cassia Spohn*

Community Punishments—*Michael Tonry*

Fines, Fees, and Forfeitures—*Beth A. Colgan*

Correctional Rehabilitation—*Francis T. Cullen*

Prison Conditions—*Sharon Dolovich*

Prisoners with Disabilities—*Margo Schlanger*

Releasing Older Prisoners—*Michael Millemann,
Rebecca Bowman-Rivas, and Elizabeth Smith*

Reentry—*Susan Turner*

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Reforming Criminal Justice

Volume 4: Punishment, Incarceration, and Release

Editor's Note

The present volume of *Reforming Criminal Justice* examines the rationales for punishment, the types of penalties and sentencing schemes, the current state of incarceration and conditions of confinement, and the prospects for inmate release and reintegration. For the most part, the chapters are as advertised (so to speak)—their titles accurately and succinctly convey the topic at hand. The goal of each chapter is to increase both professional and public understanding of the subject matter, to facilitate an appreciation of the relevant scholarly literature and the need for reform, and to offer potential solutions to the problems raised by the underlying topic. This approach is taken in the report's other volumes, which address additional areas of criminal justice that are worthy of attention and even reconsideration.

For interested readers, Volume 1 contains a preface describing the background of this project and the reasons for writing the report, as well as offering a more elaborate introduction to the report's creation and contents. The preface also mentions several limitations, one of which bears repeating here: Each chapter carries the weight only of its author(s). The other participants in this project have not endorsed the arguments made in each chapter. Likewise, an author's references to other chapters in this report are provided for the convenience of the reader and do not indicate that the author necessarily approves of the arguments presented in the cited chapters.

Nonetheless, the authors were chosen to contribute to the report precisely because they are leaders in their respective fields and are known to be thoughtful and reasonable. Their chapters were reviewed in a process involving some of the best and brightest in the academic world. Moreover, this report is not intended as the end-all of debate about criminal justice reform. To the contrary, it hopes to rekindle the discussion with the input of those whose lifework is the study of criminal justice.

— Erik Luna

Volume Table of Contents

Summary of Report Contents	iii
Project Participants.....	vii
Editor's Note.....	1
Volume Table of Contents	3
Retribution	7
<i>Jeffrie G. Murphy, Regents' Professor of Law, Philosophy, and Religious Studies, Arizona State University</i>	
Deterrence	19
<i>Daniel S. Nagin, Teresa & H. John Heinz III University Professor of Public Policy and Statistics, Carnegie Mellon University</i>	
Incapacitation.....	37
<i>Shawn D. Bushway, Professor of Public Administration & Policy and Professor of Criminal Justice, University at Albany, State University of New York</i>	
Mass Incarceration.....	55
<i>Todd R. Clear, University Professor of Criminal Justice, Rutgers University</i>	
<i>James Austin, President, JFA Institute</i>	
Risk Assessment in Sentencing.....	77
<i>John Monahan, John S. Shannon Distinguished Professor of Law, Joel B. Piassick Research Professor of Law, Professor of Psychology, and Professor of Psychiatry and Neurobehavioral Sciences, University of Virginia</i>	
Sentencing Guidelines	95
<i>Douglas A. Berman, Robert J. Watkins/Procter & Gamble Professor of Law, The Ohio State University</i>	
Mandatory Minimums	117
<i>Erik Luna, Amelia D. Lewis Professor of Constitutional & Criminal Law, Arizona State University</i>	

Capital Punishment	147
<i>Carol S. Steiker, Henry J. Friendly Professor of Law and Faculty Co-Director of the Criminal Justice Policy Program, Harvard University</i>	
<i>Jordan M. Steiker, Judge Robert M. Parker Endowed Chair in Law and Director of the Texas Capital Punishment Center, University of Texas</i>	
Race and Sentencing Disparity	169
<i>Cassia Spohn, Foundation Professor of Criminology and Director of the School of Criminology and Criminal Justice, Arizona State University</i>	
Community Punishments	187
<i>Michael Tonry, McKnight Presidential Professor in Criminal Law and Policy, University of Minnesota</i>	
Fines, Fees, and Forfeitures	205
<i>Beth A. Colgan, Assistant Professor of Law, University of California, Los Angeles</i>	
Correctional Rehabilitation	235
<i>Francis T. Cullen, Distinguished Research Professor Emeritus of Criminal Justice and Senior Research Associate, University of Cincinnati</i>	
Prison Conditions	261
<i>Sharon Dolovich, Professor of Law and Director of the UCLA Prison Law and Policy Program, University of California, Los Angeles</i>	
Prisoners with Disabilities	295
<i>Margo Schlanger, Wade H. and Dores M. McCree Collegiate Professor of Law, University of Michigan</i>	
Releasing Older Prisoners	325
<i>Michael Millemann, Professor of Law, University of Maryland</i>	
<i>Rebecca Bowman-Rivas, Law and Social Work Services Program Manager, University of Maryland</i>	
<i>Elizabeth Smith, Forensic Social Work Fellow, University of Maryland</i>	

Reentry	341
<i>Susan Turner, Professor of Criminology, Law, and Society and Director of the Center for Evidence-Based Corrections, University of California, Irvine</i>	
Collateral Consequences.....	371
<i>Gabriel J. Chin, Edward L. Barrett Chair in Law and Martin Luther King, Jr. Professor of Law, University of California, Davis</i>	
Sex Offender Registration and Notification	397
<i>Wayne A. Logan, Gary & Sallyn Pajcic Professor of Law, Florida State University</i>	
Clemency	419
<i>Mark Osler, Robert & Marion Short Distinguished Chair in Law, University of St. Thomas</i>	

Retribution

Jeffrie G. Murphy*

Many scholars and jurists who rightfully deplore the excessive punishments in our system of criminal justice—excessive in both length and cruelty—place the blame for this excess on the influence of retribution and what they view as the vile emotions of anger, hatred, and vengeance that drive retribution. This understanding of retribution is totally mistaken and, indeed, the best corrective for the evils in our present system of punishment is to be found in retribution properly understood. When properly understood retribution will be seen as grounded not in vengeance but in respect for human dignity and a concept of desert grounded in human dignity.

I. RETRIBUTION MISUNDERSTOOD

It is now almost universally agreed among informed and thoughtful people that there is something deeply wrong with America's so-called system of "criminal justice." Too many social problems are dealt with through criminal punishment—problems (such as the "war on drugs") for which the system is mal-adapted—and many of those who are incarcerated in the system are often incarcerated with terms of excessive length in prisons that are rampant with cruelty—rule by gangs and rape being the order of the day—or subject to such soul-destroying treatment as long-term solitary confinement.¹ Such conditions are likely to render inmates worse people when they come out than they were when they went in, particularly given the limited opportunities for adequate health care (including mental health care) and for education or other rehabilitative programs in prison.² For those who have served their sentences,

* Regents' Professor of Law, Philosophy, and Religious Studies, Arizona State University. The first section of the present chapter has been drawn (with permission) from my essay, *The Justice of Retribution*, 18 HEDGEHOG REV. 100 (2016). The remainder of the present chapter contains ideas that have been pursued at much greater length and detail in my chapter, *Last Words on Retribution*, in THE ROUTLEDGE HANDBOOK OF CRIMINAL JUSTICE ETHICS (Jonathan Jacobs & Jonathan Jackson eds., 2017), and in my book, PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION (2012).

1. See generally Jeffrey A. Miron, "Drug Prohibition and Violence," in Volume 1 of the present Report; Scott H. Decker, "Gangs," in Volume 1 of the present Report; Sharon Dolovich, "Prison Conditions," in the present Volume.

2. See, e.g., Margo Schlanger, "Prisoners with Disabilities," in the present Volume; Francis T. Cullen, "Correctional Rehabilitation," in the present Volume.

few mechanisms exist to gain re-entry into society that will allow them to lead meaningful lives.³ In some important respects, we might even say—without too much distortion—that our system of punishment functions as a mechanism for condemning some of our citizens to live in the state of nature.

This is of concern, not just to those who might be dismissed as bleeding-heart, soft-on-crime sentimentalists, but also to those whose credentials as hard-headed realists cannot be doubted. Consider, for example, these comments from Judge Richard Posner dissenting in a prison-conditions case:

There are different ways to look upon the inmates of prisons and jails in the United States. ... One is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect. I do not myself consider [them] in this light. We should have a realistic conception of the composition of the prison and jail population before deciding that they are scum entitled to nothing better than what a vengeful populace and a resource-starved penal system chooses to give them. We must not exaggerate the distinction between “us,” the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.⁴

What is the cause of the deplorable state of the American penal system and what can be done about it? A variety of distinguished scholars and jurists—most recently, Martha Nussbaum in her expanded John Locke Lectures⁵—have suggested that the villain is easy to identify: retribution as the value now dominating the system. Get rid of that value (and the vengeful and angry emotions that drive it) and replace it with something else—mercy or even love perhaps—and the system will be on the road to recovery.

I believe that this diagnosis and suggestion for a cure rests upon a misunderstanding of the concept of retribution. A part of the problem is that jurists and scholars have not always been entirely clear or consistent on what is meant by the concept of retribution. I have, for example, changed my mind about the nature of retribution several times, and, a few years ago, I identified and articulated six different conceptions of retribution—all with some merit in my view.⁶ Alas, the existence of different conceptions may have contributed

3. See, e.g., Susan Turner, “Reentry,” in the present Volume.

4. *Johnson v. Phelan*, 69 F.3d 144, 152 (7th Cir. 1993) (Posner, C. J., dissenting).

5. See MARTHA C. NUSSBAUM, *ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE* (1996).

6. See JEFFRIE G. MURPHY, *PUNISHMENT AND THE MORAL EMOTIONS: ESSAYS IN LAW, MORALITY, AND RELIGION* ch. 6 (2012).

to the belief of many that the very idea of retribution is inherently vague—too much so to play a significant role in deciding which people, if any, may legitimately be punished

Problems of clarity, of course, are not the only problems facing retributivism. In recent times, I have become alarmed at the degree to which the forces of darkness—those willing to support cruelty and perhaps wanting even more of it—have often co-opted the term “retribution” for their own uses. We will find them using the concept of desert—a core concept of genuine retributive thinking—in totally perverted ways. The language of retributive desert has been exploited in claims that absurdly long prison sentences and unspeakably horrendous treatment of prisoners do nothing more than give criminals exactly what they deserve. I have also come to realize that the high-sounding rhetoric of retribution and desert often functions as a cover (perhaps unconscious) for the base passion that 19th-century philosopher Friedrich Nietzsche called *ressentiment*: an unwholesome brew of malice, spite, envy, and cruelty.⁷

Retributive language remains susceptible to similar corruption in our own day. In response to the serious problem of prison rape, for example, some will simply assert—as one of my law students recently said—that prisoners (even those young people in prisons for nonviolent drug offenses) are just getting what they deserve. Likewise, some of my fellow citizens expressed the view that a recent execution in Arizona that took over two hours and seemed to cause the victim non-trivial pain was deserved—one even saying that the convicted man deserved to take longer to die in pain. Unsurprisingly, sophisticated speakers have described retribution as a receptacle for man’s worst impulses, giving “spurious sanctity to society’s craving for vengeance and its desire to make criminals suffer with as little discomfiting reflections as possible.”⁸ Members of the U.S. Supreme Court have repeatedly referred to retribution as synonymous with “vengeance” or “revenge.”⁹ In his valedictory against capital punishment, Justice Stevens proclaimed that “our society has moved away from public and painful retribution toward ever more humane forms of punishment. ... [B]y requiring that an execution be relatively painless, we necessarily [undermine] the very premise on which public approval of the retribution rationale is based.”¹⁰

7. See *id.*, chs. 2 & 4.

8. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1656 (1992).

9. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 189 (1963) (Brennan, J., concurring); *Morissette v. United States*, 342 U.S. 246, 250-51 (1952).

10. *Baze v. Rees*, 553 U.S. 35, 80-81 (2008) (Stevens, J., concurring).

Punishment must be harsh, painful, vengeful—ostensibly pursuant to a theory that, when interpreted as it should be, demands none of these things and, in fact, would reject as unjust the cruel excesses of America’s system of crime and punishment. My view is that what the system needs is more retribution, not less, and that one of the main things wrong with the present system is a significant compromise of that value properly understood. We need, in short, to reclaim retribution in its original and proper sense.

II. RETRIBUTION RECLAIMED

What is retribution’s original and proper sense? If we go all the way back to ancient Greece, the word generally translated as “retribution” is *nemesis*. Although these days *nemesis* is often used (as is the word “retribution”) to mean “imposing harsh punishment,” the actual meaning of both words is “dispensing what is due or deserved.” So when contemporary philosophers of criminal law such as Michael Moore claim to be retributivists,¹¹ they are claiming that a central concept in the justification of punishment should be desert—that punishment should be imposed on criminals because they deserve it and not simply because of, for example, a utilitarian notion of future crime control. Understood in this way, retributive values can just as easily be used to condemn some punishments as too severe as well as condemning some others as not severe enough. The claim that retribution represents a special fondness for harsh punishment is simply false.

As mentioned, both prominent jurists and philosophers have condemned a retributive account of punishment because of a belief that those who favor punishment on such grounds must favor causing pain, something that these critics believe can never be justified by the claim that it is deserved.¹² When the retributivist views punishments as justified suffering, however, the meaning of “suffering” at play here is not “pain.” It is rather suffering in the sense of enduring. (Think here of such phrases as “he does not suffer fools gladly.”) To suffer punishment is to endure having at least a portion of one’s life taken out of the voluntary control of one’s will.¹³ There is no reason to think, however, that what will be endured by the wrongdoer must be painful—unwelcome, of

11. See generally MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997).

12. See *supra* notes 5 & 8-10 and accompanying text; see also T.M. Scanlon, *Giving Desert its Due*, 16 *PHIL. EXPLORATIONS* 101, 102-04 (2013).

13. Herbert Fingarette, for example, made a powerful retributive case that the criminal wrongdoer, having presumed to exercise a level of will that is incompatible with the rule of law, must endure having his will “humbled”—deserving to have his ability to control his own life by his own will limited or restricted to some degree. See Herbert Fingarette, *Punishment and Suffering*, 50 *PROC. & ADDRESSES AM. PHIL. ASS’N* 499 (1977).

course, but not necessarily painful in any ordinary sense of the word “pain.” Indeed, punishments such as torture that involve physical agony will be condemned by the retributivists since they involve reducing a human being to a screaming and defecating animal and are thus incompatible with respecting the humanity or dignity of the person being punished.

Finally, it is important to realize that the common claim that retribution is really the same as revenge or vengeance is simply false. Vengeance is punishment inflicted by victims to whatever degree will satisfy them. This will, of course, often involve inflicting a level of punishment far in excess of what wrongdoers actually deserve as a matter of justice or, if certain victims are committed to the values of love and forgiveness, punishments far less than the wrongdoers actually deserve as a matter of justice. Revenge also engenders an atavistic disdain for the type of procedural guarantees that protect against punishing the innocent. For the retributivist, intentionally punishing an innocent person is a grave wrong—wrong precisely because that person does not deserve to be punished—which cannot be justified as placating the demands of a riotous mob or by appeal to hoary notions of the “blood feud.”

The introduction above of the concept of justice leads naturally to the background moral view that might be used to justify preferring a backward-looking desert model of punishment over a purely future-oriented utilitarian crime-control model. A good place to start here will be with the Enlightenment philosopher Immanuel Kant.¹⁴ Although Kant’s overall justification of punishment is less than fully clear and consistent, a strong thread that runs through it is retributive—using a concept of retribution that draws heavily on the concepts of humanity and dignity and the requirement of justice that human beings must always be treated in ways that respect these values. Since this is not an essay in Kant scholarship, I will in what follows briefly lay out what I regard as an essentially Kantian (if not literally in all ways Kant’s) view of punishment and its retributive foundation.

The Kantian view of the basic dignity of human beings lies in the fact that they are (except for such obvious exceptions as severe mental illness) to be respected as free and autonomous rational beings who can be trusted with the freedom to manage their own lives and who can legitimately be held responsible for what they do—praised for acting rightly and condemned (and sometimes legitimately punished) for doing wrong. A Kantian on punishment could thus

14. I have discussed in detail Kant’s views on punishment in Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509 (1987).

welcome the claim by another German philosopher, Georg W.F. Hegel, that we as human beings have the right to be punished¹⁵—a right to be treated as responsible agents and not condescendingly insulted by the claim that we are such victims of our genes and social circumstances that we are really defective or diseased individuals more in need of therapy than punishment. (This will be true of some people, of course, but the Kantian will not accept this as the default position.) To say that a person deserves punishment is, when one considers the condescending therapeutic alternative or pure social-control rationale, to pay that person a kind of compliment.

The idea of human dignity is the basis of Kant's famous categorical imperative—a fundamental principle of morality that, in one of its forms, claims that human beings must never be treated as means only but must always be respected as ends in themselves.¹⁶ This would rule out the punishment of the innocent or punishment of those who for other reasons (a valid excuse or justification for example) do not deserve to be punished no matter how much future crime control might be accomplished by this punishment. It would also rule out punishing offenders in excess of what they can reasonably be thought of as deserving simply to obtain some hoped for good future consequence. "You are being punished, whether you really deserve it or not, as a means to the future social good of crime control." How could a person of conscience look a criminal in the eye and say that? A person of conscience could, I think, look a criminal in the eye if one could truly say "You are being punished because, given your culpable wrongdoing, you brought it on yourself and deserve it."

Some will, of course, argue that so many criminals are from groups so oppressed by poverty or racism that there is a sense in which their crime is society's fault—not theirs—and that therefore they did not bring their criminality on themselves or deserve punishment for it. Put in such a simplistic form, the claim is in my view insulting to poor people and members of racial minorities—most of whom manage, in spite of the obstacles they have faced, to live exemplary moral lives of which they can legitimately be proud. To the degree that there is some truth in the claim—and there is indeed some truth—I believe that the best way to formulate that claim is within the framework of a retributive outlook on punishment. These true claims do not, in my view, cry out for the application of some value such as mercy or love or compassion but rather serve as the basis for an argument that the relevant individuals do not

15. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 123 (Allen W. Wood ed. & H. B. Nisbet trans., 1991) (1821).

16. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 52-54 (Robert P. Wolff ed. & Lewis W. Beck trans., 1969) (1785).

deserve punishments of a certain kind or level and that it would be unjust for them to receive such punishments.¹⁷

One of the important things to realize about desert and justice is that they are obligatory—they impose specific and clear non-optional duties. Mercy, on the other hand, is generally regarded as a free gift—an act of grace that is good to perform but not a matter of justice or duty since nobody has a right to it. (“The quality of mercy is not [con]strained” as Shakespeare’s Portia has it.)¹⁸ Christians of course regard love as a duty, but former Archbishop of Canterbury William Temple has some useful counsel about the social and legal role of that duty: “It is axiomatic that love should be the dominant Christian impulse and that justice is the primary form of love in social organization.”¹⁹

If, as psychologists are increasingly claiming, long-term solitary confinement is soul-destroying—destroying the very core of a person’s character and sense of self—then mercy is not the value that will form the basis of a powerful condemnation of this practice. The condemnation would become a kind of generosity—a non-obligatory way of being nice. Surely it must be said that the condemnation is more than this: a binding duty of justice, a duty to respect the rights that all persons (including criminals) have as human beings possessed of human dignity. Kant put the point this way: Punishment must “be freed from any mistreatment that could make the humanity of the person suffering it into something abominable.”²⁰

The philosopher of language J. L. Austin placed a very high premium on clarity. A critic of his once said that clarity is not enough, and Austin replied that there will be plenty of time to go into that after we have achieved clarity on something.²¹ There surely is more to love and compassion than justice, but perhaps there will be plenty of time to go into that after we have managed to achieve a level of justice far in excess of what can now be found in our present system of criminal punishment.

III. A FEW LIMITS AND CAUTIONS ON RETRIBUTION

Properly understood, retributive desert is always a very strong reason that favors punishment and, other things being equal, the punishment that is

17. Cf. Cassia Spohn, “Race and Sentencing Disparity,” in the present Volume.

18. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act IV, sc. I, l. 181 (Jay L. Halio ed., 1993) (1596).

19. LORD DENNING, *THE INFLUENCE OF RELIGION ON LAW* 3 (1997) (quoting Temple).

20. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 142 (Mary Gregor ed. & trans., 1991) (1797).

21. See J.L. AUSTIN, *A Plea for Excuses*, in *PHILOSOPHICAL PAPERS* 137 (1961).

deserved should be inflicted.²² But other things are not always equal since not all evils are part of the legitimate concern of the liberal state (a point I will discuss below) and since consequences of sufficient gravity sometimes require that certain principles be overridden. As I have noted above, for example, I believe that much of the treatment given prisoners in the United States is so inhumane that it is wildly beyond what any human being deserves. Does this mean that I believe that the doors of all the prisons in America should immediately be opened and everyone in them, including the most violent and dangerous, be allowed to run free and prey on the innocent? No. (I might, however, favor letting out many nonviolent offenders for these reasons.) Conversely, I would support not punishing those who deserve to be punished if so doing would, for example, cause serious threat of the collapse of democratic government and a return to tyranny or something of a similarly horrendous nature, as may have been the case in Chile after Pinochet left office or in South Africa with the end of apartheid. Absent such threats, however, I would favor punishing at least the worst of them (the torturers, rapists, and murderers and those in power who instructed them to act in this way).

So it is false to claim that retributivism will never allow consequential considerations to override considerations of retributive desert in cases in which not to do this seems just plain wrong.²³ In saying this, however, I would insist that we should keep vividly aware that—when desert values are being trumped by consequential considerations—we are not simply doing what is right (end of story) but are rather, out of a regrettable necessity, violating an important principle if we continue to punish in excess of desert or do not punish those who are deserving. This is a choice between evils and in such a choice the evil that is left in place (because one chose to avoid an ever greater evil) remains an evil. A retributive outlook preserves this sense of something wrong having regrettably been necessary in a way that a consequential theory would not.

With this understanding, one might acknowledge that a (if not the) general justifying aim of having the practice or institution of criminal law is the consequential one of crime control.²⁴ But this aim, I think, must be joined by retributive desert as another general justifying aim or, at the very least, have the aim of crime control constrained by a variety of related retributive desert

22. Indeed, many critics of retributivism (and some of its defenders) think that retribution always requires punishment. See, e.g., T.M. Scanlon, *Punishment and the Rule of Law*, in *DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS* 257 (Harold Hongju Koh & Ronald C. Slye eds., 1999); CARLOS NINO, *RADICAL EVIL ON TRIAL* (1996).

23. For discussions of consequential considerations, see Daniel S. Nagin, "Deterrence," in the present Volume; and Shawn D. Bushway, "Incapacitation," in the present Volume.

24. See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* ch. 1 (1968).

considerations—considerations that include, of course, legal guilt but also involve far more than legal guilt. One important reason for having a system of punishment is to give morally evil people the suffering that they deserve but that only a subset of such people, for consequential reasons, will actually be identified as legitimate targets for punishment—namely, bad people whose badness has a tendency to undermine the social order of rights that it is the business of the liberal state to maintain.

For this reason, I believe it would be a great mistake to say that the sole purpose of criminal punishment is to make people suffer for doing evil and being culpable for that evil. If we adopted such a broad view of the goal of punishment, we would need to punish people for things that are really not the business of the liberal state and would compromise important liberal values. Consider, for example, betrayals of intimacy. I happen to regard the betrayal of a friend or spouse, in selfish pursuit of one's own personal interests, as a very grave evil and I will be happy if those who commit such evil wind up being miserable. I would not, however, want such people to be subject to criminal punishment since I do not think that attempting to regulate private intimacy among adults is a legitimate goal of the liberal state and would, if attempted, involve intrusions into personal privacy that would be quite unacceptable.

Think of this in social-contract terms. Would rational people, in seeking to form a society, adopt the highly intrusive and costly mechanism of criminal punishment simply to achieve the moral result that evil people suffer in proper proportion to their iniquity? Surely not. Such people will very likely as a first crack adopt such a system and its associated costs (in liberty and treasure) for Hobbesian reasons—namely the desire to remain secure in the enjoyment of their rights and liberties and not have these threatened or undermined by those who would wrongfully subject them to attack. If morally decent they will come to want the coercive apparatus of the state, even when pursuing the laudable goal of crime control, to be constrained by a commitment to the kind of retributive desert values that I outlined in the earlier part of this chapter but aiming at such values as the sole purpose of criminal law will not seem a rational option for them.

Also, as I have argued in several of the essays in my book *Punishment and the Moral Emotions*,²⁵ there are important cautions in the writings of those who condemn retribution and advocate its replacement by such values as love, mercy, and forgiveness. Although such replacement is unwise and rests on a misunderstanding of retribution, these writers have seen an important danger

25. See MURPHY, PUNISHMENT AND THE MORAL EMOTIONS, *supra* note 6, chs. 3 & 6-8.

in a retributive approach—namely, that it will tempt some people (all of us perhaps) to become self-righteously censorious and become so enthusiastic in our desire to give people their just deserts that we become tempted to punish too many things and punish with excessive severity—thereby compromising the very values for which retributivists stand.

Retributivists are no more immune to the temptations of human depravity than are those who advocate punishment on other grounds, and so it is good to keep in mind Friedrich Nietzsche's wise counsel that we should mistrust any person in whom the urge to punish is strong. "Anyone who fights with monsters should make sure that he does not in the process become a monster himself."²⁶ Even Kant was able to see the dangers of being consumed by a corrupt version of his own brand of retributivism and counseled against this corruption in his *Doctrine of Virtue*: "[N]o punishment ... may be inflicted out of hatred. Hence men have a duty to cultivate a conciliatory spirit. ... But this must not be confused with placid toleration of injuries."²⁷ So those who recommend that love, mercy, and forgiveness play a role in our thinking about criminal punishment are, in my view, best interpreted as providing not an alternative to retribution but rather an important caution about its dangers.

RECOMMENDATIONS

Suppose that retribution, correctly understood, started to play a significant role in penal reform. What might some of these reforms be? I have already suggested retributivist grounds for opposing the soul-destroying results of long-term solitary confinement. Here are a few more suggestions:

1. **There should be significant limitations of the current practice of avoiding trials through plea bargaining.** Although plea bargaining has legitimate functions, it too often involves frightening a defendant (who may be of limited intelligence and provided with poor legal representation) into pleading guilty to something he did not do by persuading him that if he goes to trial he will almost certainly be convicted of something even worse (that he also did not do) with a longer sentence.²⁸ When prosecutors are able to stack multiple (and often overlapping) charges against a defendant, he is in effect terrorized into pleading guilty to avoid the risk

26. FRIEDRICH W. NIETZSCHE, *BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE* 168 (Marion Faber trans., 1998) (1886).

27. IMMANUEL KANT, *THE DOCTRINE OF VIRTUE* 460-61 (Mary J. Gregor trans., 1964) (1797).

28. See generally Jenia I. Turner, "Plea Bargaining," in Volume 3 of the present Report.

of trial. This kind of assembly-line justice may be economically efficient but ignores the kind of individuation that is required by respect for the dignity of persons. Surely the defendant deserves better.

2. **The crime itself will be defined with retributive desert playing a significant role—e.g., mens rea will be required for all crimes (no strict liability), even if this undermines utility to some degree.**²⁹ This will require significant reform in defining so-called “public welfare” or regulatory crimes, for instance, and will require the abolition of the strictest form of the felony murder rule.
3. **The grading of criminal offenses will be a function of retributive desert—the higher the grade, the heavier the punishment.** Given the influence of the Model Penal Code, this condition is widely satisfied already but there are still some areas that would benefit from more thought. Consider, for example, the grading of homicide offenses—premeditated deliberate intentional killing often graded as the most severe. However, as Samuel Pillsbury has suggested, there are retributive reasons why this ranking may be mistaken.³⁰ If the goal is to give a wrongdoer the punishment that he deserves, then does the mercy killer deserve being thought of as the worst of the worst simply because his killing is intentional, deliberate, and premeditated? Is he worse than those who are guilty of what is called in some jurisdictions “depraved-heart murder”—a killing that results from recklessness so extreme that it reveals a wanton indifference to the value of human life? As things now stand, the premeditated killer will be convicted of first-degree (perhaps capital) murder and the depraved-heart killer of second-degree murder. My own retributive instincts tell me that this ranking is wrong.
4. **After conviction, considerations of desert will play a significant role in clemency or parole—at which time such states of character as remorse or its absence may be regarded as relevant.** As a general matter (there are some exceptions), the truly remorseful and reformed criminal strikes me as deserving a shorter prison term than the criminal who remains hardened, hateful, and unrepentant. The dangers of faking are always significant, of course, and so it would be reasonable to suggest that these considerations play a greater role in clemency than in sentencing. One will generally have

29. See Douglas Husak, “Overcriminalization,” in Volume 1 of the present Report.

30. See SAMUEL PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* (1998).

a more reliable assessment of the sincerity of claimed repentance when one has over time had an opportunity to observe the criminal while in prison—more time than one has at the trial and sentencing stage.³¹

5. **Prison conditions will be considered a part of punishment and Eighth Amendment constraints against cruel and unusual punishments will meaningfully and significantly apply to them.** Except in one kind of case (a case in which prison officials are reckless with respect to prevention) the United State Supreme Court has been unwilling to extend the Eighth Amendment ban on cruel and unusual punishments to such things as a failure to prevent rape, failure to control abuse from prison gangs, or putting a stop to those long periods of solitary confinement that are destructive of an inmate's very personality. The general court doctrine has been that these are not punishments but are rather prison conditions—a piece of pure formalism if ever there was one. When sending people to prison, we are now in effect often simply throwing them into the state of nature and have forgotten the wisdom of the old maxim that we send people to prison as punishment not for punishment. There may be considerable deterrence value in leaving things as they are since any normal person will surely be terrorized by the fear of being thrown into an environment of rape and abuse. But does any human being deserve such callous and inhumane treatment? Such treatment shows no consideration at all for what his dignity as a human being demands.
6. **Punishments of excessive length are to be avoided.** Consider the individual who commits fairly low-level nonviolent drug felonies. Does this individual deserve to spend the rest of his life in prison—even if he has committed three such felonies and thus falls afoul of the “three strikes and you’re out” slogan? Does he deserve the same sentence that might be given for a rapist or murderer? I think not.³²

I have in this chapter attempted to make a case that retribution, properly understood, should guide much of our thinking about the reforms needed in our criminal justice system. It should not be all that guides our thinking, of course, but it deserves to reclaim a place at the table where such reforms are being discussed—a place to which it has long been denied because of misunderstanding and even misrepresentation of what retribution is and because the language of retribution has often been co-opted by the forces of darkness.

31. See MURPHY, PUNISHMENT AND THE MORAL EMOTIONS, *supra* note 6, ch. 7. For a discussion of clemency, see Mark Osler, “Clemency,” in the present Volume.

32. See, e.g., Erik Luna, “Mandatory Minimums,” in the present Volume.

Deterrence

Daniel S. Nagin*

The criminal justice system in a democratic society serves many vital social purposes. Among the most important is deterring crime. Going back to the pioneering work of the Enlightenment philosopher Cesare Beccaria, deterrence theorists have distinguished between the certainty and severity of punishment. Conventional wisdom, backed by considerable research evidence, is that the certainty of punishment, not its severity, is the more effective deterrent. Recent reviews of that evidence has led me to a refinement of the certainty principle—it is the certainty of apprehension not the severity of the ensuing consequences that is the more effective deterrent. This conclusion has several important implications for policy. First, it calls into question the effectiveness of over four decades of U.S. crime-control policy predicated on the premise that lengthy prison sentences are an effective deterrent to crime. Second, according to the revised certainty principle, crime-prevention policy should instead focus on bolstering the certainty of apprehension. Such policies mostly involve increasing police numbers or better use of the police by their strategic deployment in ways that heighten their presence in high-crime areas and/or reduce criminal opportunities at such places.

INTRODUCTION

The criminal justice system in a democratic society serves many vital social purposes. Among the most important is preventing crime. The system's activities may prevent crime by three mechanisms. One is incapacitation.¹ Convicted offenders are often punished with imprisonment. Incapacitation refers to the crimes averted by their physical isolation during the period of their incarceration. Two other mechanisms involve possible behavioral responses. The *threat* of punishment may discourage criminal acts. In economics, this effect is called deterrence, whereas in criminology, it is referred to as general deterrence. The second behavioral mechanism concerns the effect of the *actual experience* of punishment on reoffending. In criminology, this effect is termed

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1. See Shawn D. Bushway, "Incapacitation," in the present Volume.

specific deterrence. Note, however, that there are many sound reasons for suspecting that the experience of punishment might not have the chastening effect that is implied by the label but instead might increase, not decrease, future offending. However labeled, the primary focus of this chapter is research evidence on the crime-prevention effects of the threat of punishment, which will hereafter be referred to as deterrence.

A discussion of the policy implications of the research evidence on deterrence, however, requires consideration of the evidence on specific deterrence and incapacitation because the three are inextricably linked.² Incapacitation and specific deterrence (i.e., the effect of the experience of punishment) are the fallout of the failure of deterrence to prevent the crime from happening in the first place. More than 250 years ago, Cesare Beccaria observed “it is better to prevent crimes than punish them.”³ Crime prevention by incapacitation necessarily requires higher imprisonment rates and all the attendant social costs. Concerning specific deterrence, research has shown that the experience of punishment specifically as it relates to imprisonment does not have a chastening effect on future crime. My own review of this evidence has led my co-authors and me to the conclusion: “Compared with noncustodial sanctions, incarceration appears to have a null or mildly criminogenic effect on future criminal behavior.”⁴ By contrast, if crime can be deterred from occurring, there is no perpetrator to punish, and, as Beccaria points out, all the ensuing social costs attending imprisonment are thereby averted.⁵

Beccaria’s observation about the social value of preventing crime rather than punishing it is also a reminder of his conclusion: “One of the greatest curbs on crime is not the cruelty of punishments, but their infallibility.... The certainty of punishment even if moderate will always make a stronger impression.”⁶ Research conducted two centuries after this pronouncement generally supports Beccaria’s prediction. However, recent reviews of the

2. For a review of the evidence on specific deterrence, particularly as it relates to imprisonment, see Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115 (2009). For a review of the evidence on incapacitation, see Bushway, *supra* note 1.

3. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 93 (Henry Paolucci trans., 1963) (1964).

4. Nagin, Cullen & Jonson, *supra* note 2. While imprisoned, an individual may benefit from rehabilitation programs—see generally Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume—but I know of no study that evaluates whether such benefits are sufficient to outweigh any negative effect of the overall prison experience.

5. BECCARIA, *supra* note 3.

6. *Id.* at 58.

deterrence literature by myself and co-authors⁷ have led me to a refinement of Beccaria's "certainty principle"—it is the certainty of apprehension, not the severity of the ensuing consequences, that is the more effective deterrent. The revised certainty principle has two important implications. First, it calls into question the effectiveness of over four decades of U.S. crime-control policy predicated on the premise that lengthy prison sentences are an effective deterrent to crime. For reasons that I will elaborate upon, lengthy prison sentences are also a very inefficient way of preventing crime by incapacitation. Second, according to the revised certainty principle, crime-prevention policy should instead focus on bolstering the certainty of apprehension. Such policies mostly involve increasing police numbers or better use of the police by their strategic deployment in ways that heighten their presence in high-crime areas and/or reduce criminal opportunities at such places.

I. THEORY OF DETERRENCE

Since Beccaria and the other co-founder of deterrence theory, Jeremy Bentham, three key concepts have underlaid theories about deterrence—the certainty, severity, and immediacy of punishment. Certainty refers to the probability of legal sanction given commission of crime; severity refers to the onerousness of the legal consequences if a sanction is imposed; and immediacy (a.k.a. celerity) refers to the lapse in time between commission of the crime and its punishment. Most modern theories of deterrence, whether originating from economics or from the rational-choice tradition in criminology, focus only on the certainty and severity of punishment. Immediacy has been given far less attention. In part, the inattention to immediacy reflects the difficulty of measuring it. However, another factor is that even in theory, the swiftness of punishment, except for the payment of a monetary fine, has an ambiguous incentive effect. While it is always advantageous to delay payment of a monetary fine, there is nothing irrational about a desire to get non-monetary punishment over with. Further complicating matters is that most non-monetary legal sanctions (e.g., imprisonment) are themselves experienced over time.

As discussed below, there is far more empirical support for the deterrent effect of changes in the certainty of punishment than changes in the severity of punishment. One explanation for the larger deterrent effectiveness of certainty compared to severity involves informal sanction costs such as censure by

7. Robert Apel & Daniel S. Nagin, *General Deterrence: A Review of Recent Evidence*, in *CRIME AND PUBLIC POLICY* (James Q. Wilson & Joan Petersilia eds., 2012); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 *CRIMINOLOGY & PUB. POL'Y* 13 (2011); Daniel S. Nagin, *Deterrence in the 21st Century: A Review of the Evidence*, 42 *CRIME & JUST.* 199 (2013).

friends and family and loss of social and economic standing. Informal costs may far exceed formal sanction costs and also may be more closely tied to the certainty of punishment than the severity of formal sanctions. Consequently, merely being arrested for committing a crime may trigger the imposition of informal sanctions regardless of the severity of the ensuing consequences. Williams and Hawkins use the term “fear of arrest” to label the deterrent effect of informal-sanction cost.⁸

The concept of fear of arrest is a reminder that the certainty of punishment is itself a product of a series of conditional probabilities associated with various stages of the criminal justice system—probability of apprehension, probability of conviction given apprehension, and so on. Each of these conditional probabilities has costs associated with them, and there is no reason in principle that equal changes in each should necessarily have the same deterrent effect. Stated differently, a 1% increase in probability of apprehension effect may have a very different deterrent effect than a 1% increase in the probability of imprisonment given conviction.

II. REVIEW OF THE EVIDENCE

A. DETERRENT EFFECT OF IMPRISONMENT

There have been two distinct waves of studies of the deterrent effect of imprisonment. Studies in the 1960s and 1970s, which were primarily cross-sectional analyses of states, examined the relationship of the state’s crime rate to the certainty of punishment, measured by the ratio of prison admissions to reported crimes, and the severity of punishment measured by median time served in prison. These studies suffered from a number of serious statistical flaws.⁹ One was that they confounded deterrent and incapacitation effects. The second was more fundamental. There are many good reasons for believing that crime rates and sanction levels mutually influence each other. Indeed, Becker’s classic economic theory of crime¹⁰ is predicated on their mutual (endogenous) determination. As a consequence, it was not possible to make a determination whether the associations between crime rates and sanction levels measured by these studies reflected the effect of sanction levels on crime or crime on sanction levels. Stated differently, it was not possible to distinguish cause from effect.

8. Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 L. & Soc’y REV. 545 (1986).

9. ALFRED BLUMSTEIN ET AL., *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* (1978).

10. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

In response to these deficiencies, a second generation of studies emerged in the 1990s. Unlike the first-generation studies, second-generation studies had a longitudinal component in which data were analyzed not only across states but also over time. Another important difference is that the second-generation studies did not attempt to estimate certainty and severity effects separately. Instead, they examined the relationship between the crime rate and rate of imprisonment (prisoners per capita).

Durlauf and Nagin discuss at length the reasons why these studies provide little useful information on deterrence. One is that, like the earlier studies, they confound deterrent and incapacitation effects. Second, like the earlier studies, with the possible exception of Levitt¹¹ and Johnson and Raphael,¹² they do not resolve the identification problem resulting from the endogenous determination of crime rates and imprisonment rates. Third, all of these studies suffer from an important theoretical flaw. Prison population is not a policy variable; rather, it is an outcome of sanction policies dictating who goes to prison and for how long—namely, the certainty and severity of punishment. In all incentive-based theories of criminal behavior in the tradition of Bentham and Beccaria, including most importantly Becker's, the deterrence response to sanction threats is posed in terms of the certainty and severity of punishment, not the imprisonment rate. Therefore, to predict how changes in certainty and severity might affect the crime rate requires knowledge of the relationship of the crime rate to certainty and severity as separate entities, which is not provided by the literature relating the crime rate to the imprisonment rate.

I turn now to five studies that in my judgment report convincing evidence of the deterrent effect of incarceration. They also nicely illustrate diversity in the deterrent response to the threat of imprisonment. These studies are: Weisburd, Einat, and Kowalski,¹³ who studied the use of imprisonment to enforce fine payment and found a substantial deterrent effect; Helland and Tabarrok,¹⁴ who analyzed the deterrent effect of California's third-strike provision and found a moderate deterrent effect; Raphael and Ludwig,¹⁵ who examined the deterrent

11. Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Legislation*, 111 Q. J. ECON. 319 (1996).

12. Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275 (2012).

13. David Weisburd et al., *The Miracle of the Cells: An Experimental Study of Interventions To Increase Payment of Court-Ordered Financial Obligations*, 7 CRIMINOLOGY & PUB. POL'Y 9 (2008).

14. Eric Helland & Alexander Tabarrok, *Does Three Strikes Deter?: A Nonparametric Estimation*, 42 J. HUM. RESOURCES 309 (2007).

15. Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE (Jens Ludwig & Philip J. Cook eds., 2003).

effect of prison-sentence enhancements for gun crimes and found no effect; and Lee and McCrary¹⁶ and Hjalmarsson,¹⁷ who examined the heightened threat of imprisonment that attends coming under the jurisdiction of the adult courts at the age of majority (i.e., the legal threshold for adulthood, often age 18) and found no deterrent effect.

Weisburd, Einat, and Kowalski¹⁸ reported on a randomized field trial of alternative strategies for incentivizing the payment of court-ordered fines. The most salient finding was that the imminent threat of incarceration provides a powerful incentive to pay delinquent fines, even when the incarceration is only for a short period. They called this effect “the miracle of the cells.” The miracle of the cells provides valuable perspective on the conclusion that the certainty rather than the severity of punishment is the more powerful deterrent. Consistent with the “certainty principle,” the common feature of treatment conditions involving incarceration is a high certainty of imprisonment for failure to pay the fine. However, the fact that the authors labeled the response the “miracle of the cells” and not the “miracle of certainty” is telling. Their choice of label is a reminder that certainty must result in a distasteful consequence in order for it to be a deterrent. The consequences need not be draconian, just sufficiently costly, to deter the prohibited behavior.

Helland and Tabarrok¹⁹ examined whether California’s “three strikes and you’re out” law deters offending among individuals previously convicted of strike-eligible offenses (certain serious and violent felonies). The future offending of individuals convicted of two previous strikable offenses was compared with that of individuals who had been convicted of only one strikable offense but who, in addition, had been tried for a second strikable offense but were ultimately convicted of a nonstrikable offense (which could be any felony). The study demonstrates that these two groups of individuals were comparable on many characteristics such as age, race, and time in prison. Even so, Helland and Tabarrok found that arrest rates were about 20% lower for the group with convictions for two strikable offenses. The authors attributed this reduction

16. David S. Lee & Justin McCrary, *The Deterrent Effect of Prison: Dynamic Theory and Evidence*, 38 *ADVANCES IN ECONOMETRICS* 73 (2017).

17. Randi Hjalmarsson, *Crime and Expected Punishment: Changes in Perceptions at the Age of Criminal Majority*, 11 *AM. L. & ECON. REV.* 209 (2009).

18. Weisburd et al., *supra* note 13.

19. Helland & Tabarrok, *supra* note 14.

to the greatly enhanced sentence that would have accompanied conviction for a third strike offense. Note, however, that their cost-benefit analysis found that the cost of 25 years or more of imprisonment accompanying conviction for the third-strike offense likely far exceeded the crime-avoidance benefits.

Raphael and Ludwig²⁰ examined the deterrent effect of sentence enhancements for gun crimes that formed the basis for a Richmond, Virginia, intervention called Project Exile. Perpetrators of gun crimes, specifically those with a felony record, were targets of federal prosecution that provided for far more-severe prison sentences for weapon use than Virginia state law. Based on an analysis involving comparisons of adult homicide arrest rates with juvenile homicide arrest rates within Richmond and comparisons of Richmond's gun homicide rate with other cities that had comparable pre-intervention homicide rate trends, Raphael and Ludwig concluded that the threat of enhanced sentence had no apparent deterrent effect.²¹

For most crimes, the certainty and severity of punishment increases markedly upon reaching the age of majority, when jurisdiction for criminal wrongdoing shifts from the juvenile to the adult court. In an extraordinarily careful analysis of individual-level crime histories from Florida, Lee and McCrary²² attempted to identify an abrupt decline in offending at age 18, the age of majority in Florida. Their point estimate of the discontinuous change was negative as predicted, but it was very small in magnitude and not even remotely close to statistical significance.

Another analysis of the effect of moving from the jurisdiction of the juvenile to adult courts by Hjalmarsson²³ used the 1997 National Longitudinal Survey of Youth to examine whether young males' perception of incarceration risk changed at the age of criminal majority. She found that, on average, subjective probabilities of being sent to jail for auto theft increased by 5.2 percentage points when youths reached the age of majority in their state of residence. While youths perceived an increase in incarceration risk, she found no convincing evidence of an effect on their self-reported criminal behavior.

These five exemplary studies have important implications for the relationship of sentence length to the crime rate. Figure 1 depicts two alternative forms of the deterrence response function relating crime rate to sentence length. Both are downward-sloping, which captures the idea that increases in severity deter

20. Raphael & Ludwig, *supra* note 15.

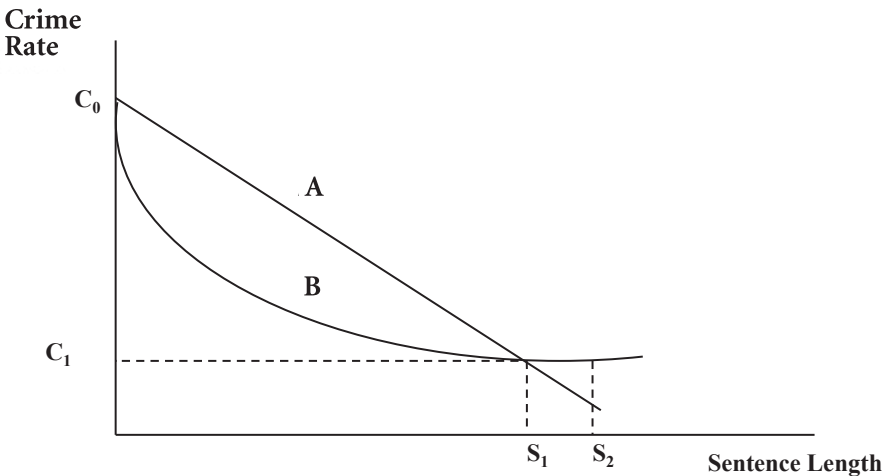
21. *Id.*

22. Lee & McCrary, *supra* note 16.

23. Hjalmarsson, *supra* note 17.

crime. Suppose the status-quo sentence length was S_1 . That would imply that the crime rate, C_1 , is the same for both forms of the response function relating crime rate to sentence length. The curves are also drawn so that they predict the same crime rate for a sentence length of zero. Thus, the absolute deterrent effect of the status-quo sanction level is the same for both curves. However, from a policy perspective, the absolute deterrent effect is not relevant for serious crime because nobody would recommend reducing sentence length to zero. Instead the policy relevant question is how much would crime change by incrementally changing the status quo sanction level, S_1 . Because the two curves have different shapes, they imply different responses to an incremental increase in sentence level to S_2 . The linear curve (A) is meant to depict a response function in which there is a material deterrent effect accompanying the increase to S_2 , whereas the non-linear curve (B) is meant to depict a small crime-reduction response due to diminishing deterrent returns with increasing sentence length. Stated differently, the non-linear curve captures what economists call “diminishing marginal returns,” which in this context means that there are diminishing marginal crime prevention returns resulting from increases in sentence length.

Figure 1: Crime Rate and Sentence Length



My reading of the evidence on the deterrent effect of sentence length is that it implies that the relationship between crime rate and sentence length more closely conforms to curve B than curve A. Raphael and Ludwig²⁴ found no evidence that

24. Raphael & Ludwig, *supra* note 15.

gun-crime enhancements deter; Lee and McCrary²⁵ and Hjalmarsson²⁶ found no evidence that the greater penalties that attend moving from the juvenile to the adult justice systems deter; and Helland and Tabarrok²⁷ found only a small deterrent effect from California's third-strike rule. As a consequence, the deterrent return to increasing an already long sentence appears to be small, possibly zero.

The fine-payment experiment also suggests that curve B, not curve A, more closely resembles what in medical jargon would be described as the "dose-response" relationship between crime and sentence length. While the study is not directed at the deterrence of criminal behavior, it does suggest that, unlike increments in long sentences, increments in short sentences do have a material deterrent effect on a crime-prone population.

B. DETERRENT EFFECT OF POLICING

The police may prevent crime through many possible mechanisms. Apprehension of active offenders is a necessary first step for their conviction and punishment. If the sanction involves imprisonment, crime may be prevented by the incapacitation of the apprehended offender. Many police tactics, such as rapid response to calls for service or post-crime investigation, are intended not only to capture the offender but to deter others by projecting a tangible threat of apprehension. Police may, however, deter without actually apprehending criminals—their very presence may deter a motivated offender from carrying out a contemplated criminal act.

Research on the deterrent effect of police has evolved in two distinct literatures. One has focused on the deterrent effect of the level of police numbers. The other has focused on the crime-prevention effectiveness of different strategies for deploying police. These two literatures are reviewed separately.

1. Studies of levels of police numbers and resources

Studies of the effect of police numbers and resources come in two forms. One is an analogue of the imprisonment-rate and crime-rate studies described in the prior section. These studies are based on panel datasets, usually of U.S. cities over the period around 1970 to 2000. They relate the rates of FBI Index Crimes (intentional homicide, rape, robbery, aggravated assault, burglary, and certain forms of theft) to the resources committed to policing as measured by police per capita or police expenditures per capita. Examples of this form

25. Lee & McCrary, *supra* note 16.

26. Hjalmarsson, *supra* note 17.

27. Helland & Tabarrok, *supra* note 14.

of study include Levitt²⁸ and Evans and Owens.²⁹ The second form of study is more targeted and analyzes the impact on crime that results from abrupt changes in the level of policing due, for example, to terror alerts. Both types of studies consistently find that greater police resources reduce crime.

In my view, the most convincing evidence comes from the abrupt-change type of study in circumstances where the regime change is clearly attributable to an event unrelated to the crime rate. For example, in September 1944, German soldiers occupying Denmark arrested the entire Danish police force. According to an account by Andenaes,³⁰ crime rates rose immediately but not uniformly. The frequency of street crimes like robbery, whose control depends heavily upon visible police presence, rose sharply. By contrast, crimes like fraud were less affected.³¹

Contemporary tests of the police-crime relationship based on abrupt decreases in police presence investigate the impact on crime of reductions in police presence and productivity as a result of large budget cuts or lawsuits following racial-profiling scandals.³² Such studies have examined the Cincinnati Police Department,³³ the New Jersey State Police,³⁴ and the Oregon State Police.³⁵ Each of these studies concludes that decreases in police presence and activity substantially increase crime. For example, Shi studied the fallout from an incident in Cincinnati in which a white police officer shot and killed an unarmed African-American suspect.³⁶ The incident was followed by rioting, heavy media attention, a federal civil-rights investigation, and the indictment of the officer in question. These events created an unofficial incentive for officers from the Cincinnati Police Department to curtail their use of arrest for misdemeanor crimes. Shi demonstrated measurable declines in police

28. Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270 (1997).

29. Williams N. Evans & Emily G. Owens, *COPS and Crime*, 91 J. PUB. ECON. 181 (2007).

30. JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE (1974).

31. For other examples of crime increases following a collapse of police presence, see Lawrence W. Sherman & John E. Eck, *Policing for Crime Prevention*, in EVIDENCE-BASED CRIME PREVENTION (2003).

32. For a discussion of racial profiling, see David A. Harris, "Racial Profiling," in Volume 2 of the present Report.

33. Lan Shi, *The Limits of Oversight in Policing: Evidence from the 2001 Cincinnati Riot*, 93 J. PUB. ECON. 99 (2009).

34. Paul Heaton, *Understanding the Effects of Antiprofiling Policies*, 53 J.L. & ECON. 29 (2010).

35. Greg DeAngelo & Benjamin Hansen, *Life and Death in the Fast Lane: Police Enforcement and Roadway Safety* (Mar. 29 2010) (unpublished manuscript), http://benjaminhansen.yolasite.com/resources/Life_And_Death_5_29.pdf.

36. Shi, *supra* note 33.

productivity in the aftermath of the riot and also documented a substantial increase in criminal activity.

The ongoing threat of terrorism has also provided a number of unique opportunities to study the impact of police resource allocation in cities around the world, including the District of Columbia,³⁷ Buenos Aires,³⁸ Stockholm,³⁹ and London.⁴⁰ The Klick and Tabarrok study⁴¹ examined the effect on crime in the Mall area of Washington, D.C., of the color-coded alert system implemented in the aftermath of the September 11, 2001, terrorist attacks. The purpose of the alerts was to signal federal, state, and local law enforcement agencies to occasions when it might be prudent to divert resources to sensitive locations, such as the Mall. Klick and Tabarrok used daily police reports of crime for the period starting in March 2002 to July 2003, during which time the terrorism alert level rose from “elevated” (yellow) to “high” (orange) and back down to “elevated” on four occasions.⁴² During high alerts, anecdotal evidence suggested that police presence increased by 50 percent. Such increases were associated with statistically significant crime reductions

To summarize, studies of police presence consistently find that putting more police officers on the street has a substantial deterrent effect on serious crime. Yet these police manpower studies speak only to the number and allocation of police officers and not to what police officers actually do on the street beyond making arrests.

2. Police deployment and crime

Much research has examined the crime-prevention effectiveness of alternative strategies for deploying police resources. This research has largely been conducted by criminologists. Among this group of researchers, the preferred research designs are interrupted time series studies of the effect of

37. Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 J.L. & ECON. 267 (2005).

38. Rafael Di Tella & Ernesto Schargrodsky, *Do Police Reduce Crime? Estimates Using the Allocation of Police Forces after a Terrorist Attack*, 94 AM. ECON. REV. 115 (2004).

39. Panu Poutvaara & Mikael Priks, *Hooliganism in the Shadow of a Terrorist Attack and the Tsunami: Do Police Reduce Group Violence?* (2006) (unpublished manuscript).

40. Mirko Draca et al., *Panic on the Streets of London: Police, Crime and the July 2005 Terror Attacks*, 101 AM. ECON. REV. 2157 (2011).

41. Klick & Tabarrok, *supra* note 37.

42. *Id.*

targeted interventions and true randomized experiments. The discussion that follows draws heavily upon two excellent reviews of this research by Weisburd and Eck⁴³ and Braga.⁴⁴

For the most part, deployment strategies affect the certainty of punishment through their impact on the probability of apprehension. One way to increase apprehension risk is to mobilize police in a fashion that increases the probability that an offender is arrested after committing a crime. I have described police acting in this role as apprehension agents.⁴⁵ Strong evidence of a deterrent as opposed to an incapacitation effect resulting from the apprehension of criminals is limited. Studies of the effect of rapid response to calls for service⁴⁶ did not directly test for deterrence but found no evidence of improved apprehension effectiveness. This may be because most calls for service occur well after the crime, with the result that the perpetrator has fled the scene. Similarly, apprehension risk is probably not materially increased by improved investigations.⁴⁷

The second source of deterrence from police activities involves averting crime in the first place. In this circumstance, there is no apprehension because there is no offense. I have described police acting in this role as sentinels.⁴⁸ In my view, the sentinel role is the primary source of deterrence from policing. Thus, measures of apprehension risk based only on enforcement actions in response to crimes that actually occur, such as arrests per reported crime, are not valid measures of the apprehension risk represented by criminal opportunities not acted upon because the risk was deemed too high.⁴⁹

43. David Weisburd & John E. Eck, *What Can Police Do to Reduce Crime, Disorder, and Fear?*, 593 ANNALS AM. ACAD. POL. & SOC. SCI. 42 (2004).

44. ANTHONY ALAN BRAGA, *POLICE ENFORCEMENT STRATEGIES TO PREVENT CRIME IN HOT SPOT AREAS* (2008).

45. Daniel S. Nagin, *Deterrence in the 21st Century: A Review of the Evidence*, 42 CRIME & JUST. 199 (2013).

46. WILLIAM SPELMAN & D. K. BROWN, *CALLING THE POLICE: A REPLICATION OF THE CITIZEN REPORTING COMPONENT OF THE KANSAS CITY RESPONSE TIME ANALYSIS* (Police Executive Research Forum, 1981).

47. ANTHONY A. BRAGA ET AL., *MOVING THE WORK OF CRIMINAL INVESTIGATORS TOWARDS CRIME CONTROL* (2011), <http://www.hks.harvard.edu/content/download/67524/1242906/version/1/file/NPIP-MovingtheWorkofCriminalInvestigatorsTowa-03-11.pdf> [<http://perma.cc/RB9B-NUJC>]; JOHN E. ECK, *HELPFUL HINTS FOR THE TRADITION-BOUND CHIEF* (FRESH PERSPECTIVES) (1992); Jan M. Chaiken et al., *The Criminal Investigation Process: A Summary Report*, 3 POL'Y ANALYSIS 187 (1977).

48. Nagin, *supra* note 45.

49. Philip J. Cook, *The Clearance Rate as a Measure of Criminal Justice System Effectiveness*, 11 J. PUB. ECON. 135 (1979).

One example of sentinel-like police deployment strategies that have been shown to be effective in averting crime in the first place is “hot spots” policing. The idea of hot-spots policing stems from a striking empirical regularity uncovered by Sherman and colleagues,⁵⁰ who found that only 3% of addresses and intersections (“places,” as they were called) in Minneapolis produced 50% of all calls to the police. Twenty-five years later in a study in Seattle, Washington, Weisburd and colleagues⁵¹ reported that between 4% and 5% of street segments in the city accounted for 50% of crime incidents for each year over a 14-year period.

The first test of the effectiveness of concentrating police resources on crime hot spots was conducted by Sherman and Weisburd.⁵² In this randomized experiment, hot spots in the experimental group were subjected to, on average, a doubling of police patrol intensity compared to hot spots in the control group. Declines in total crime calls ranged from 6% to 13%. In another randomized experiment, Weisburd and Green⁵³ found that hot-spots policing was similarly effective in suppressing drug markets.

Braga’s informative review of hot-spots policing summarizes the findings from nine experimental or quasi-experimental evaluations.⁵⁴ The targets of the police actions varied. Some hot spots were generally high-crime locations, whereas others were characterized by specific crime problems like drug trafficking. All but two of the studies found evidence of significant reductions in crime. Further, no evidence was found of material crime displacement to immediately surrounding locations. On the contrary, some studies found evidence of crime reductions, not increases, in the surrounding locations—a “diffusion of crime-control benefits” to non-targeted locales. Note also that the findings from the previously described econometric studies of focused police actions—for example, in response to terror alert level—buttress the conclusion that the strategic targeting of police resources can be very effective in reducing crime.

A second example of a sentinel-like policing strategy is problem-oriented policing. Problem-oriented policing involves organizing residents and property owners to help police identify the sources of violent and property crime, and then targeting these problems with focused deterrence-based warnings to

50. Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 *CRIMINOLOGY* 27 (1989).

51. Weisburd & Eck, *supra* note 43.

52. Lawrence W. Sherman & David Weisburd, *General Deterrent Effects of Police Patrol in Crime ‘Hot Spots’: A Randomized Study*, 12 *JUST. Q.* 625 (1995).

53. David Weisburd & Lorraine Green, *Policing Drug Hot Spots: The Jersey City Drug Market Analysis Experiment*, 12 *JUST. Q.* 711 (1995).

54. BRAGA, *supra* note 44.

repeat offenders, increased police, citizen and technological monitoring, and better control of physical and social disorders. It also involves orchestrated efforts between police and prosecutors to increase sanction costs.

One of the most highly publicized instances of problem-oriented policing is Boston's Operation Ceasefire.⁵⁵ The objective of the operation was to prevent inter-gang gun violence using two deterrence-based strategies. The first strategy was to target enforcement against suppliers of weapons to Boston's violent youth gangs. The second involved a more novel approach. The youth gangs themselves were assembled by the police on multiple occasions, in order to send the message that the response to any instance of serious violence would be "pulling every lever" legally available to punish gang members collectively. This included a salient severity-related dimension—vigorous prosecution for unrelated, nonviolent crimes such as drug dealing. Thus, the aim of Operation Ceasefire was to deter violent crime by increasing the certainty and severity of punishment, but only in targeted circumstances—specifically, if the gang members commit a violent crime.

Since Operation Ceasefire, the strategy of "pulling every lever" has been the centerpiece of field interventions in many large and small U.S. cities, including: Richmond, Virginia; Chicago, Illinois; Stockton, California; High Point, North Carolina; and Pittsburgh, Pennsylvania.⁵⁶ Independent evaluations have also been conducted of some of these interventions.⁵⁷ The conclusions of these evaluations are varied, but Cook's characterization of the much publicized High Point drug-market intervention seems apt: initial conclusions of eye-catchingly large effects have been replaced with far more modest assessments

55. DAVID M. KENNEDY ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, REDUCING GUN VIOLENCE: THE BOSTON GUN PROJECT'S OPERATION CEASEFIRE (2001).

56. For an extended description of these interventions and the philosophy behind them, written by one of the architects of the "pulling every lever" strategy, see DAVID M. KENNEDY, DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION (2009).

57. See Philip J. Cook & Jens Ludwig, *Aiming for Evidence-Based Gun Policy*, 25 J. POL'Y ANALYSIS & MGMT. 691 (2006) (Boston); Steven Raphael & Jens Ludwig, *Prison Sentence Enhancements: The Case of Project Exile*, in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE (Jens Ludwig & Philip J. Cook eds., 2003) (Richmond); Andrew V. Papachristos, Tracey L. Meares & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUD. 223 (2007) (Chicago); Jeremy M. Wilson & Steven Chermak, *Community-Driven Violence Reduction Programs*, 10 CRIMINOLOGY & PUB. POL'Y 993 (2011) (Pittsburgh); Nicholas Corsaro et al., *The Impact of Drug Market Pulling Levers Policing on Neighborhood Violence: An Evaluation of the High Point Drug Market Intervention*, 11 CRIMINOLOGY & PUB. POL'Y 167 (2012) (High Point).

of effect sizes and cautions about the generalizability of the results.⁵⁸ Reuter and Pollack wondered whether a successful intervention in a small urban area such as High Point can be replicated in a large city such as Chicago.⁵⁹ Ferrier and Ludwig pointed out the difficulty understanding the mechanism that underlies a seemingly successful intervention that pulls many levers.⁶⁰ Despite concerns, these interventions illustrate the potential for combining elements of both certainty and severity enhancement to generate a targeted deterrent effect.

III. POLICY IMPLICATIONS

As noted in the introduction, an incarceration-based sanction policy that is designed to reduce crime by incapacitation will necessarily increase the rate of imprisonment. In contrast, if the crime-control policy also prevents crime by deterrence, it may be possible to reduce both imprisonment and crime—successful prevention by any mechanism, whether by deterrence or otherwise, has the virtue of averting not only crime but also the punishment of perpetrators. Hence, it is important to identify policies that decrease crime without having material impacts on imprisonment or, better yet, reduces it. Identification of such policies requires recognition of three important conclusions that have emerged from my recent reviews of the research evidence on general and specific deterrence.

First, there is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficient to justify their social and economic costs. Such severity-based deterrence measures include “three strikes and you’re out,” life without the possibility of parole, and other laws that mandate lengthy prison sentences.⁶¹ Further, while incapacitation is not the focus of this chapter,⁶² it is difficult to justify lengthy prison sentences on the basis of crime prevented by incapacitation. Aging is nature’s best cure for crime. A U.S. Bureau of Justice Statistics study found that released prisoners who were 40 years old or older had a three-year rearrest rate for

58. Phillip J. Cook, *The Impact of Drug Market Pulling Levers Policing on Neighborhood Violence: An Evaluation of the High Point Drug Market Intervention*, 11 CRIMINOLOGY & PUB. POL’Y 161 (2012).

59. Peter Reuter & Harold A. Pollack, *Good Markets Make Bad Neighbors: Regulating Open-Air Drug Markets*, 11 CRIMINOLOGY & PUB. POL’Y 211 (2012).

60. Megan Ferrier & Jens Ludwig, *Crime Policy and Informal Social Control*, 10 CRIMINOLOGY & PUB. POL’Y 1029 (2011).

61. For a discussion of such laws, see Erik Luna, “Mandatory Minimums,” in the present Volume.

62. See Bushway, *supra* note 1.

violent crimes 56% lower than their 24-year-old or younger counterparts.⁶³ Aging is a necessary accompaniment to serving a lengthy sentence and the age-crime linkage implies that recidivism risk declines with age.⁶⁴ The broad-based application of lengthy sentences in the United States is turning the nation's prisons into old-age homes.

Second, based on the earlier noted review of the experience of imprisonment on recidivism,⁶⁵ I have concluded that there is little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions such as probation.⁶⁶ Instead, the evidence suggests that reoffending is either unaffected or increased.

Third, there is substantial evidence that increasing the visibility of the police by hiring more officers and allocating existing officers in ways that materially heighten the perceived risk of apprehension can deter crime. This evidence is consistent with the perceptual deterrence literature that surveys individuals on their sanction-risk perceptions and relates these perceptions to their actual or intended offending behavior.⁶⁷ This literature found that perceived certainty of punishment is associated with reduced self-reported or intended offending.⁶⁸

Thus, I conclude, as have many prior reviews of deterrence research, that evidence in support of the deterrent effect of various measures of the certainty of punishment is far more convincing and consistent than for the severity of punishment. However, as noted in the introduction, the certainty of punishment is conceptually and mathematically the product of a series of conditional probabilities—the probability of apprehension given commission of a crime, the probability of prosecution given apprehension, the probability of conviction given prosecution, and the probability of sanction given conviction. The evidence in support of certainty's deterrent effect pertains

63. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<http://perma.cc/ESQ5-8RAV>].

64. For a case study on this topic, see Michael Millemann, Rebecca Bowman-Rivas & Elizabeth Smith, "Releasing Older Prisoners," in the present Volume.

65. Nagin, Cullen & Jonson, *supra* note 2.

66. For a discussion of non-custodial sanctions, see Michael Tonry, "Community Punishments," in the present Volume.

67. Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1 (1998).

68. *Id.*

almost exclusively to apprehension probability. Consequently, the conclusion that certainty, not severity, is the more effective deterrent is more precisely stated this way: The certainty of apprehension, and not the severity of the ensuing legal consequence, is the more effective deterrent.

RECOMMENDATIONS

This more precise statement has at least three important policy implications for criminal justice reform efforts:

1. **Lengthy prison sentences cannot be justified on the basis of crimes prevented by deterrence**, and as noted above, they are difficult to justify based on incapacitation benefits. Thus, the case for lengthy prison sentences must rest on retributive considerations.⁶⁹
2. **The empirical evidence from the policing and perceptual deterrence literature is silent on the deterrent effectiveness of policies that mandate incarceration after apprehension.** Such policies include mandatory minimum sentencing laws or sentencing guidelines that mandate incarceration. Thus, the revised certainty principle does not imply that policies mandating severe legal consequences have demonstrated deterrent effects.
3. **Crime prevention would be enhanced by shifting resources from imprisonment to policing** or, in periods of declining criminal justice system budgets, that policing should get a larger share of a smaller overall budget.

69. For a discussion of such considerations, see Jeffrie G. Murphy, "Retribution," in the present Volume.

Incapacitation

Shawn D. Bushway*

People who are incarcerated are incapacitated: they do not commit as many crimes as they would have in the absence of incarceration. The best modern estimates for the size of the effect are modest, in the neighborhood of two to five serious crimes per year of prison time. These effects are larger if incarceration is used in a more targeted way for higher-rate offenders, but will inevitably decline as incarceration is used more heavily. This chapter reviews the research and presents the following basic recommendations for policy: (1) incapacitation should not be relied on as a primary motivation for a broad-based incarceration regime; (2) incapacitation cannot be used to justify the current levels of incarceration in the United States; (3) “release valve” policies to reduce the prison population in the short term should focus on releasing individuals who are at lowest risk for offending; and (4) policymakers should be aware of the relative incapacitative effects of different policies, even if their main motives do not include incapacitation.

INTRODUCTION

There are many different purposes of sentencing in criminal law, including the utilitarian goals of deterrence, rehabilitation and incapacitation, and the retributive goal of just deserts.¹ Incapacitation reduces crime by literally preventing someone from committing crime in society through direct control during the incarceration experience—or, more bluntly, “[a] thug in prison can’t mug your sister.”² This directness is the main attraction of incapacitation.

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1. Michael Tonry, *Purposes and Functions of Sentencing*, 34 *CRIME & JUST.* 1 (2006). See Jeffrie G. Murphy, “Retribution,” in the present Volume; Daniel S. Nagin, “Deterrence,” in the present Volume; Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume.

2. Ben Wattenberg, *Circling Crime Hawk*, *WASH. TIMES* (June 10, 1999).

While it is not impossible to commit a crime in prison, the possibility is limited by the direct control exerted by the correctional system.³

The size of these benefits depends directly on the offending behavior of those individuals who are incarcerated. Incapacitation benefits will be larger for policies that manage to incarcerate higher-rate criminals. Most criminologists believe that criminal offending is highly skewed among the offending population, with a relatively small minority of all offenders responsible for the majority of all crimes.⁴ Selective incapacitation focuses on the idea that policymakers can prospectively identify the most active offenders prior to their period of peak activity, and prevent a great deal of crime through “selectively” incapacitating these high-risk individuals.⁵ Legal scholars sometimes object to the idea of selective incapacitation on the legal or ethical grounds that the policy is at least implicitly “punishing” the offender for future crimes not yet committed, rather than the crime for which the person has been convicted.⁶

Whatever the ethics or legal support for this idea, selective incapacitation also implies that there will be declining marginal returns for incarceration, at least with respect to incapacitation. If society starts by incapacitating the highest-rate and most frequent offenders, additional incarceration will generate reduced benefits from incapacitation as society incarcerates lower-rate, less frequent offenders.⁷ A concise way of saying this is that there are inefficiencies of scale—the impact gets smaller the more incarceration a society uses. The incapacitative impact of incarceration is also inherently time-limited. A prison cell can only incapacitate a criminal for the time that he is in prison.

This prison cell might be accomplishing other goals. There are existing theories of sentencing that present unified goals of rehabilitation or retribution.⁸ However, most current sentencing regimes represent a relative

3. Serious crimes in prison are included in most measures of reported crime and therefore most modern measures of incapacitation account for serious crimes in prison. However, minor crimes in prison are often handled through administrative mechanisms, and maybe undercounted in official measures of crime. Nevertheless, most researchers assume that the net suppression is positive. For an alternative viewpoint, see Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. L. REV. 1 (2017).

4. Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 CRIME & JUST. 359 (2003).

5. PETER W. GREENWOOD & ALLAN ABRAHAMSE, *SELECTIVE INCAPACITATION* (1982).

6. Kathleen Auerhahn, *Selective Incapacitation and the Problem of Prediction*, 37 CRIMINOLOGY 703 (1999); Binder & Notterman, *supra* note 3.

7. Anne Morrison Piehl et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY & PUB. POL’Y 245 (2006).

8. See, e.g., Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1977); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); see also Cullen, *supra* note 1.

hodgepodge or muddle of goals, some of which may conflict with one another.⁹ This muddle may not be wholly destructive. For example, holistic theories of sentencing which are non-utilitarian, like retribution, routinely acknowledge that these retributive sentences can incidentally (and productively) accomplish utilitarian goals, like incapacitation.¹⁰ From this viewpoint, incapacitation is only problematic if it becomes the central driving force for a sentencing regime.

Although common in the 1980s,¹¹ it is no longer common to see arguments for incapacitation as the guiding force for a sentencing regime. It is much more common to see arguments for specific non-systemic reforms or policies on the basis of the incapacitation. As a result, this chapter will not discuss incapacitation as a driving force for an entire sentencing regime. This chapter simply asks whether, and to what extent, social science supports the idea that incarceration as a sentence might prevent crime in society. A realistic assessment of the potential incapacitative benefit of incarceration at the margin should help policymakers assess any potential reforms or policy changes that would cause changes in incarceration. The chapter proceeds with a discussion of the existing empirical research that seeks to estimate the magnitude of the incapacitative benefit of incarceration, followed by a discussion about future directions for research and recommendations for policymakers.

I. ESTIMATING THE MAGNITUDE OF INCAPACITATION

There are two basic approaches to the study of incapacitation. The first approach, which Spelman refers to as “bottom up,” is derived from criminal-career literature.¹² The criminal-career approach comes from operations research, and involves the use of detailed equations that identify the specific parameters that contribute to an observed offending rate.¹³ Factors such as the rate of onset and desistance, along with parameters that capture the intermittency of offending, are also estimated by criminal-career scholars. The second approach, which Spelman refers to as “top down,” relies on aggregate data from places to estimate the impact of prison on crime rates.¹⁴

The bottom-up approach uses estimates of an individual’s offending rate to generate simulated estimates of the amount of crime averted by specific imprisonment policies. For example, inmates have been asked while incarcerated

9. Tonry, *supra* note 1.

10. Robinson & Darley, *supra* note 8.

11. EDWIN W. ZEDLEWSKI, *MAKING CONFINEMENT DECISIONS* (1987).

12. William Spelman, *What Recent Studies Do (and Don’t) Tell Us about Imprisonment and Crime*, 27 *CRIME & JUST.* 419 (2000).

13. Piquero, Farrington & Blumstein, *supra* note 4.

14. Spelman, *supra* note 12.

to describe their offending prior to the current term of incarceration.¹⁵ These responses are then used to generate estimates of the annual amount of crime committed while the person is free, which is then used to generate an estimate of the benefits of a year of incarceration in terms of the number of crimes prevented.

Initially, research using this approach reported extremely high benefits from incapacitation, on the order of almost 200 felony crimes per prisoner year.¹⁶ Almost immediately, scholars identified some serious flaws with this approach.¹⁷ Data on self-reported crimes is highly skewed, with a few offenders reporting a great many crimes. As a result, the average number will grossly overstate the marginal benefit from incarcerating the next person. In addition, these self-reported crimes were occurring right before the person went to prison, arguably the peak (and inflated) period of activity during a person's "criminal career." More recent research has reached a consensus around 15 to 20 felony or Uniform Crime Report Part I crimes (murder and non-negligent homicide, rape, robbery, aggravated assault, burglary, motor vehicle theft, larceny-theft, and arson) per year in prison, on average.¹⁸ However, there is no way of knowing whether a given policy change will incapacitate the average offender, or someone who commits less crime on average.

There is also no way of knowing whether the person placed into prison was simply replaced by someone else who would have otherwise not committed crime. The possibility of replacement is most plausible in the case of drug crimes, where dealers could be replaced by others. The problem of replacement is similar to the problem of displacement in the case of place-based crime prevention. Crime might be reduced in a particular area by increasing police presence, for example, thus making a "crime generating" place less capable of generating crime.¹⁹ But if criminals simply go to another place, their crimes may be displaced to the new area and overall crime rates may not be reduced by this policy. By the same token, crime is not reduced by incapacitation if a person is incarcerated and is promptly replaced by another individual who now commits the same crimes the other person would have committed absent incarceration. It is difficult to identify the extent of replacement empirically.²⁰

15. ZEDLEWSKI, *supra* note 11.

16. *Id.*

17. Franklin E. Zimring & Gordon Hawkins, *The New Mathematics of Imprisonment*, 35 CRIME & DELINQ. 169 (1988).

18. Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE CRIMINOLOGY 267 (2007).

19. David Weisburd et al., *Does Crime Just Move Around the Corner? A Controlled Study of Spatial Displacement and Diffusion of Crime Control Benefits*, 44 CRIMINOLOGY 549 (2006).

20. Binder & Notterman, *supra* note 3.

The “top down” approach gets around the problem of replacement by focusing on the total amount of crime committed in a place rather than on the crime committed (or not committed) by a particular person. A change in the number of crimes committed in a certain place that can be directly tied to changes in the number of people in prison will generate an estimate of the incapacitation effect that is net of replacement. While this approach has the twin advantages of controlling for replacement while linking policy directly to the outcome of interest, it also faces numerous empirical challenges. Places with higher crime rates also tend to put more people in prison. Failure to account for this problem will lead to estimates of the incapacitation effect that are too low. Attempts to causally identify the impact of prison on crime must therefore break this link by identifying variation in the incarceration rate that is independent of the crime rate. This independent variation is called exogenous variation by social scientists. Experiments can cause this exogenous variation, although it is hard to create experimental variation in incarceration.

“Natural” experiments can also create exogenous variation. For example, Steve Levitt observed that some states in the U.S. were forced by the courts to reduce their incarceration levels due to charges of overcrowding.²¹ Initially, at least, states under court sanction could meet this mandate only by releasing prisoners. Likewise, the Italian government routinely releases up to 35% of its prison population through periodic “collective pardons.”²² This pardon process creates variation in the incarceration rate over time and in different places, because the pardons release varying amounts of prisoners to each Italian region. These two studies generated similar estimates of 15 to 20 felony crimes prevented per year in prison. It is interesting that this number aligns well with the individual estimates from the “bottom up” approach.

In a similar way, Lofstrom and Raphael used county-level variation caused by California’s Public Safety Realignment Act (Realignment), a 2011 law designed to reduce prison overcrowding in response to a court order.²³ I have argued that Realignment is roughly comparable to the policy change observed by Levitt.²⁴

21. Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319 (1996).

22. Alessandro Barbarino & Giovanni Mastrobuoni, *The Incapacitation Effect of Incarceration: Evidence from Several Italian Collective Pardons*, 6 AM. ECON. J. 1 (2014).

23. Magnus Lofstrom & Steven Raphael, *Incarceration and Crime: Evidence from California’s Public Safety Realignment Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 196 (2016).

24. Shawn D. Bushway, *Evaluating Realignment: What Do We Learn About the Impact of Incarceration on Crime?*, 15 CRIMINOLOGY & PUB. POL’Y 309 (2016); see also Levitt, *supra* note 21.

Lofstrom and Raphael found point estimates that are roughly one-tenth the magnitude of the earlier estimates (half the size in elasticity terms), although a lack of precision cannot completely rule out much larger estimates.²⁵

Johnson and Raphael provided some insight into the disparity between these estimates with a panel analysis of 50 states and the District of Columbia from 1978 to 2004, a period of increasing incarceration.²⁶ Their instrument relied on their estimate for the permanent (as opposed to the transitory) change in incarceration. Johnson and Rucker provided estimates from 1978 to 1990 that were very consistent with the Levitt results. However, they found smaller numbers (about two crimes a year) for the most recent period (1992-2004), which is consistent with the fact that not all potential incarcerants offend at the same rate. As incarceration rates increased in the United States, it is reasonable that the offending rate of the marginal incarcerants decreases.²⁷ Raphael and Stoll replicated this analysis for U.S. states from 2000 to 2010, and again reported lower estimates during this period of higher incarceration, estimates that are similar to the results from the Lofstrom and Raphael realignment study.²⁸

Of course, we need not focus solely on the overall rates of incarceration, given that the policies can focus on specific types of offenders. Ben Vollaard studied the “habitual offender” policy in the Netherlands, which incarcerated very high-rate property offenders for one to two years.²⁹ Vollaard’s estimates are huge, suggesting that the policy prevents over 50 reported crimes per year of prison for one person. This very large effect size is plausible because of the policy’s laser focus on very high-rate habitual offenders in a country with a very low incarceration rate. The average offender sentenced under the law had 31 prior convictions, almost all for minor property offenses. The policy is implemented only as a last resort, after the person has shown no response to treatment. Vollaard also showed that the size of the incapacitation effect declines with increased use—a result that is consistent with the idea of declining marginal returns from incapacitation.

Because the “top down” approach is at the aggregate level, not the individual level, the actual characteristics of those for whom the effect is largest is hard to estimate. Indeed, the main advantage of the first, “bottom up” approach is that

25. See Bushway, *Evaluating Realignment*, *supra* note 24.

26. Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275 (2012).

27. Piehl et al., *supra* note 7.

28. STEVEN RAPHAEL & MICHAEL A. STOLL, THE HAMILTON PROJECT: BROOKINGS INST., A NEW APPROACH TO REDUCING INCARCERATION WHILE MAINTAINING LOW RATES OF CRIME (2014); *see also* Lofstrom & Raphael, *supra* note 23.

29. Ben Vollaard, *Preventing Crime through Selective Incapacitation*, 123 ECON. J. 262 (2013).

it uses data from individuals, and allows researchers to estimate a distribution of benefits from incapacitation. The main advantage of the second, “top down” approach is that it provides a useful counterfactual, comparing the crime-control effects of two different policies that can be described substantively. However, it can only hint at variation in incapacitation effects because the estimates are for places, not people. More broadly, but for the same reasons, this approach cannot prove that the effects estimated from this approach are due only to incapacitation.

In each of the aggregate papers, the deterrent threat of incarceration has also changed as has the potential for specific deterrence and rehabilitation. For example, an individual contemplating crime in a state with a court-imposed cap on incarceration might plausibly assume that his chance of incarceration is less if he was to commit a crime. Individuals who are part of collective pardons might not be able to complete rehabilitation programs, or might decide that incarceration is not as bad as they had previously thought, and therefore commit more crimes than they would have without the collective pardon. While Vollaard argued that the observed impact in the Netherlands was due to the incapacitation of chronic drug-addicted offenders who were no longer “deterable” or amenable to treatment, he also acknowledged that it is still at least possible that there was also deterrent value to the statute. Evaluations of three-strike laws in the U.S. using individual-level data have plausibly identified deterrence for individuals exposed to the risk of the third strike.³⁰

Kessler and Levitt attempted to differentiate between incapacitative effects and deterrent effects by looking at the timing of effects on crime.³¹ For example, three-strikes laws impose long prison sentences for multiple or repeat offenders. These individuals would have been incarcerated even without the three-strike provisions: the difference is that they may now have a 10- or 15-year sentence instead of a 5-year sentence. As a result, there will be no additional incapacitative benefit to these particular laws in the short run. An immediate change in the crime rates after the implementation of the law can then be plausibly considered to be a deterrent rather than an incapacitative effect. Long-term effects can be plausibly attributed to both deterrence and incapacitation. They find both short-term and long-term effects, suggesting evidence for both incapacitation and deterrence.

30. Eric Helland & Alexander Tabarrok, *Does Three Strikes Deter? A Nonparametric Estimation*, 42 J. HUM. RESOURCES 309 (2007).

31. Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish between Deterrence and Incapacitation*, 42 J.L. & ECON. 343 (1999).

Miles and Ludwig argued that reliable and valid estimates of incapacitation are too difficult to obtain, and that time would be better spent generating estimates of the aggregate effects of prison using natural experiments.³² Although these aggregate measures would not enable the researcher to isolate the mechanism by which crime declined, it would give policymakers clear guidance with which to conduct cost-benefit analyses of prison. In a cost-benefit analyses, the costs of incarceration are compared with the monetized benefits of preventing a certain numbers of crimes. The monetary costs of crime are generated using direct accounting methods, compensatory damages from civil lawsuits, and methods that attempt to put an estimate on individuals' willingness to pay to avoid victimization. From the perspective of Miles and Ludwig, generating a clean estimate of the crime-reducing benefits of a policy would then provide room to concentrate on generating good estimates of the costs and benefits of such a policy. Whether the effect of incarceration was due to incapacitation or deterrence or some other process would be both unknown and irrelevant.

The logic of this argument is compelling—ultimately, what policymakers need to know is the treatment effect of incarceration. The fact that incarceration can reduce crime through multiple mechanisms is interesting, but not particularly important if the policy choice involves more or less incarceration. However, once policymakers start thinking about the nature of the incarceration experience, the mechanisms become important. Mueller-Smith has found compelling evidence that the spell of incarceration increases the offending rate of an individual after he is released from jail in Harris County, Texas.³³ Bhuller et al. found evidence of exactly the opposite effect for individuals who have served time in Norway.³⁴ It almost goes without saying that Norway has radically different incarceration practices than the jail system in Harris County, Texas. Both studies found evidence of incapacitation. Without breaking down the treatment impact of incarceration into its component parts, policymakers will have little insight into how they can improve upon standard practice.

Fortunately, researchers have begun to develop a new, third approach to estimate the separate incapacitative benefit of incarceration. This new approach relies on individual-level data, like the bottom-up approach, but, as

32. Thomas J. Miles & Jens Ludwig, *The Silence of the Lambdas: Deterring Incapacitation Research*, 23 J. QUANTITATIVE RES. 287 (2007).

33. Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* (Aug. 18, 2015) (unpublished manuscript).

34. MANUDEEP BHULLER ET AL., INCARCERATION, RECIDIVISM, AND EMPLOYMENT (Nat'l Bureau of Econ. Research Working Paper No. 22648, 2016).

in the top-down approach, the researcher creates a useful counterfactual using other observations in the data. The rate of offending generated by the non-incarceration counterfactual becomes the best estimate of the amount of crime prevented through the incarceration of the first individual. The main drawback to this approach is that the focus on individuals means that the approach cannot account for replacement crimes committed by other people. The main attraction of this latter approach is that it does not force the researchers to assume that individuals who are not incarcerated will necessarily look like those who are. Rather, individuals are explicitly identified as comparable on the basis of their observed offending behavior and other characteristics.

In the first example of this approach, Sweeten and Apel studied the self-reported offending of a group of individuals in a contemporary U.S. sample.³⁵ In contrast to most prior research, they did not generate estimates by relying on the reports of offending before incarceration by the same respondents. Rather, they relied on self-reported data from a matched control group (using propensity scoring) of other people who are otherwise similar but not incarcerated. The matching approach controls for observable differences between those who are incarcerated and those who are not. Their approach has the merit of being tied to a specific change in imprisonment policy, namely increasing the numbers who are given prison as a punishment as opposed to extending the lengths of those currently incarcerated. They find estimates of around 10 crimes a year, slightly lower than the estimates from Levitt.³⁶

Their approach has been replicated at least twice, both in the Netherlands. Wermink et al. studied a group of first-time incarcerants using the matching approach of Sweeten and Apel.³⁷ They found a year of prison prevents about two crimes, a number that is very similar to the estimates from the most recent panel studies in the U.S. Although Dutch incarceration rates are much lower than U.S. rates, the focus on first-time prisoners might account for this lower rate of crimes for the control group.

The second Dutch study, by Tollenaar et al., addressed this issue by focusing on the high frequency offenders incarcerated under the program studied by

35. Gary Sweeten & Robert Apel, *Incapacitation: Revisiting an Old Question with a New Method and New Data*, 23 J. QUANTITATIVE CRIMINOLOGY 303 (2007).

36. One possible shortcoming of this approach is that it does not consider the possibility of replacement. This idea is particularly salient for market-driven crimes such as drug dealing. The aggregate analyses should generate estimates net of replacement—the individual estimates will not. The fact that the individual estimates are almost universally lower than the aggregate estimates suggests that the replacement effects are not a major problem.

37. Hilde Wermink et al., *The Incapacitation Effect of First-Time Imprisonment: A Matched Samples Comparison*, 29 J. QUANTITATIVE CRIMINOLOGY 579 (2013).

Vollaard.³⁸ They found estimates of around four crimes a year, which is double that of Wermink et al., but much lower than the estimates from Vollaard. One possible explanation is that Vollaard studied an earlier, more restrictive version of the program that was particularly targeted. Another possibility, supported by additional analysis by Tollenaar et al., is that the programs under study also affected behavior after release—so, as suggested earlier, Vollaard's estimates might have included more than just incapacitation effects.

One problem with this matching approach is that it controls only for observable differences. Emily Owens fashioned an identification strategy that should control for both unobserved and observed differences between those who are incarcerated and those who are not.³⁹ It also fits nicely between the two approaches, because she uses individual-level data and a natural experiment to estimate the causal effect of incapacitation for a subsample of people affected by the policy. She takes advantage of a technical change in Maryland sentencing guidelines that had a substantial effect on the sentence for a subset of sentenced offenders.

The change involved the use of juvenile records in sentencing decisions. Until 2001, these records were included in the criminal history of all individuals up to the age of 25; after 2001, the age for which juvenile histories counted was lowered to 22. Thus some of those aged 23–25 received shorter sentences than they would have received in the earlier years. Owens estimates that this reduced the average sentence under the Maryland guidelines system by about 25% (about 9 to 18 months). She also found that, during this time period when they were at liberty because of the change in rules, youths sentenced after 2001 were arrested on average 2.5 times per year. Taking account of the specific offenses for which they were arrested, and the ratio of recorded arrests to recorded offenses of the same type, she estimates that they were responsible for 1.5 index crimes per year. This provides a relatively precise estimate of their recorded criminal activity during a period when they would have been incarcerated under the previous rules. Like the Dutch estimates, the estimate that Owens develops of crimes averted is smaller by an order of magnitude than the Levitt estimate of 15 to 20 crimes previously cited in the literature.

Two other recent studies have followed Owens in using exogenous variation to compare those in prison to otherwise similar people on probation or parole. Mueller-Smith and Bhuller et al. use random assignment to judges to identify

38. N. Tollenaar et al., *Effectiveness of a Prolonged Incarceration and Rehabilitation Measure for High-Frequency Offenders*, 10 J. EXPERIMENTAL CRIMINOLOGY 29 (2014).

39. Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551 (2009).

the impact of prison vs. probation.⁴⁰ Some judges sentence offenders more harshly than others, so random assignment to judges creates a situation where some offenders get exogenously determined prison rather than probation. As in the Owens study, the offending of the individuals with probation can be used to estimate the incapacitative benefit from prison during the time that the individual would have otherwise been in prison.

The incapacitative impacts of incarceration have at times been ignored by criminologists who focus solely on the differences in recidivism for those assigned to prison versus those who are assigned probation, essentially starting the clock at release rather than from sentencing. Clearly, this ignores one of the potential benefits from incarceration. Mueller-Smith, who studied Harris County Texas, and Bhuller et al., who studied Norway, find modest benefits from incapacitation that are more similar to Owens than Levitt.⁴¹

Of course, incapacitation is not the only consequence of incarceration. Mueller-Smith found that incarceration actually increases offending after release,⁴² while Bhuller et al. found that incarceration decreases offending after release relative to probation.⁴³ Obviously, Harris County and Norway are very different places with very different correctional philosophies. But, the difference in estimates after incarceration point to the importance of remembering that incapacitation is only one of the potential consequences of incarceration.

The possibility exists that these effects could be much bigger for targeted policies focusing on high-rate offenders. Of course, the reality is that only a few people commit crime at a high rate. In the Netherlands, a country of 16 million, only 4,000 people are even eligible for the habitual-offender label in a given year, and even fewer actually receive the penalty. Nevertheless, Vollaard showed that Dutch cities that used the habitual-offender law more liberally also had smaller crime reduction per prison year,⁴⁴ and Tollenaar et al. found much smaller estimates for the Dutch law that widened the scope of the original habitual-offender law.⁴⁵ The reality of a strong positive skew is impossible to avoid—the only way to incarcerate more people is to incarcerate offenders who commit fewer crimes. This leads inevitably to diminishing marginal returns from increased incarceration. In the U.S., which has seen a four-fold increase in the incarceration rate over the last 40 years, researcher after researcher has

40. Mueller-Smith, *supra* note 34; Bhuller et al., *supra* note 35.

41. Mueller-Smith, *supra* note 34; Bhuller et al., *supra* note 35.

42. Mueller-Smith, *supra* note 34.

43. Bhuller et al., *supra* note 35.

44. Vollaard, *supra* note 30.

45. Tollenaar et al., *supra* note 39.

shown that the impact of incarceration on crime has declined during this period.⁴⁶ Incarceration incapacitates, but large effect sizes are not scalable.

II. SELECTIVE INCAPACITATION

In the Netherlands, the habitual-offender statute was used as an option of last resort for an offender with at least 10 felony offenses. As a result, individuals are incapacitated only after they have revealed through their own behavior that they are indeed prolific. However, it is tempting to avoid waiting until someone has committed so many offenses before identifying them as a high-rate offender. Imagine how many crimes could have been prevented in the Netherlands if these individuals could have been identified and incapacitated *before* they were convicted more than 31 times.

Prospectively identifying high-rate offenders, selective incapacitation, holds out this tantalizing prospect of dramatic reductions in crime. It also carries with it some ethical ambiguity, since individuals are essentially being incarcerated for crimes they have not yet committed.⁴⁷ In addition, since the prediction is probabilistic, there will be prediction errors, most notably false positives. False positives are people identified as high-rate offenders who would have stopped without any additional intervention. Because of this concern about false positives, the debate about selective incapacitation can become quite heated.⁴⁸

A reasonable read of the now large literature on identifying chronic offending and recidivism might conclude that criminologists can prospectively identify high-rate offenders with fewer errors than if they were guessing.⁴⁹ It is also true that the accuracy is far from perfect.⁵⁰ The open question is not whether criminologists can predict risk—they can⁵¹—but whether the accuracy is good

46. E.g., Piehl et al., *supra* note 7.

47. Binder & Notterman, *supra* note 3.

48. Auerhahn, *supra* note 6.

49. D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 1 (2006); RICHARD BERK, CRIMINAL JUSTICE FORECASTS OF RISK: A MACHINE LEARNING APPROACH (2012); PREDICTION AND CRIMINOLOGY (David P. Farrington & Roger Tarling eds., 1985); N. Tollenaar & P. van der Heijden, *Which Method Predicts Recidivism Best? A Comparison of Statistical, Machine Learning and Data Mining Predictive Models*, 176 J. ROYAL STAT. SOC'Y 565 (2013).

50. Stephen D. Gottfredson & Don M. Gottfredson, *Behavioral Prediction and the Problem of Incapacitation*, 32 CRIMINOLOGY 441 (1994).

51. See John Monahan, "Risk Assessment in Sentencing," in the present Volume.

enough to create benefits that outweigh not only the costs of incarcerating the accurately identified high-risk offenders, but also the costs generated by incarcerating the false positives.⁵²

There may also be structural or institutional limits to the ability of researchers to prospectively identify high-risk offenders in the current environment.⁵³ Empirical models require data on individuals followed over many years to validate risk-prediction models.⁵⁴ This is not a big problem in places like the Netherlands, since even the prolific offenders in the Netherlands who were subject to the habitual-offender law had spent very little time in prison prior to receiving the sentence enhancement. However, in the U.S., these people would have been incarcerated for substantial periods of time, drastically reducing the amount of time in which their behavior could have been observed. As a result, it would have taken them longer to accumulate the same number of offenses, and prolific offenders will be less obvious in the U.S. than they will be in the Netherlands.

Analysis of selective incapacitation policies is also complicated by the fact that incarceration and criminal justice actions may affect the offending of the incarcerated individuals through specific deterrence, stigmatization, or incapacitation. And these treatments are being assigned in a non-random way to the convicted population. In this context, in which a regime is already trying to implement a treatment, Jeffrey Smith and I have made it clear that it is hard to evaluate the impact of any variable on subsequent offending without an explicit model of what the criminal justice actors are already trying to accomplish.⁵⁵ Almost all risk-prediction models focus on recidivism after release—but the person doing the sentencing presumably cares about the behavior of the individual from the time of sentencing, which would include incapacitation. But, if incapacitation is ignored or not modeled, we will not get a true measure of risk.

To the extent we know what the actors are trying to do, we can more easily interpret the causal impacts of the various actions. Such information is often not available, and we need to make strong assumptions to make much progress

52. Richard Berk, *Asymmetric Loss Functions for Forecasting in Criminal Justice Settings*, 27 J. QUANTITATIVE CRIMINOLOGY 107 (2011) [hereinafter Berk, *Asymmetric Loss Functions*]; Richard Berk, *Balancing the Costs of Forecasting Errors in Parole Decisions*, 74 ALB. L. REV. 1071 (2011) [hereinafter Berk, *Balancing the Costs*].

53. Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52 CRIME & DELINQ. 178 (2006).

54. Elaine P. Eggleston et al., *Methodological Sensitivities to Latent Class Analysis of Long-term Criminal Trajectories*, 20 J. QUANTITATIVE CRIMINOLOGY 1 (2004).

55. Shawn Bushway & Jeffrey Smith, *Sentencing Using Statistical Treatment Rules: What We Don't Know Can Hurt Us*, 23 J. QUANTITATIVE CRIMINOLOGY 377 (2007).

on the question of risk assessment and selective incapacitation, particularly for those offenders who are heavily involved in the criminal justice system—the highest-risk offenders. While there is substantial literature on risk prediction,⁵⁶ very little of this research takes this problem—that the decisions are endogenous with respect to the risk—into account. In light of that fact, researchers and policymakers should be aware that the endogeneity of treatments (with respect to risk) understates the power of risk-prediction models by suppressing the true unobserved risk of the person through treatment, including incapacitation.⁵⁷

Despite the presence of these challenges and ethical concerns,⁵⁸ the use of risk prediction in the U.S. criminal justice system—for sentencing, correctional placement, probation supervision and parole release—has exploded and shows no sign of abating.⁵⁹ Although not all risk prediction is used for selective incapacitation, many of the explicit goals of the Risk, Needs, and Responsivity (RNR) model that now dominates the risk-prediction field are at least consistent with selective incapacitation.⁶⁰ For example, a central tenet of the RNR approach is the identification of low-risk offenders who will not offend even without treatment or supervision. This is selective incapacitation at the other end of the distribution—why incarcerate or otherwise restrict people who are at low risk for offending.⁶¹ The logic of selective incapacitation is the same whether the focus is identifying high-rate or low-rate offenders. It is also far more attractive, and potentially easier, to identify the larger group of low-risk people than it is to identify the small group of high-risk people. In an era when policymakers are seeking to reduce incarceration, using risk tools to identify the lowest-risk individuals to release so as to minimize potential crime increases makes good sense.⁶²

III. INCAPACITATION OUTSIDE THE CONTEXT OF INCARCERATION

The logic of incapacitation need not be limited to the policy of incarceration. For example, research in economics has considered the incapacitative impact of school, which keeps youths out of the community and potentially reduces

56. See Monahan, *supra* note 52.

57. Matthew Kleiman et al., *Using Risk Assessment to Inform Sentencing Decisions for Nonviolent Offenders in Virginia*, 53 CRIME & DELINQ. 106 (2007).

58. Kelly Hannah-Moffat, *Actuarial Sentencing: An “Unsettled” Proposition*, 30 JUST. Q. 270 (2013).

59. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006).

60. Andrews et al., *supra* note 50.

61. Auerhahn, *supra* note 6.

62. Kleiman et al., *supra* note 58.

property crime,⁶³ and of bad weather, which keeps people off the streets.⁶⁴ It is also possible to talk about the incapacitation effect of police and even probation officers, who can detain and otherwise obstruct individuals from committing crime by their presence and actions. House arrest and electronic monitoring, which has become increasingly common in the U.S., may serve as a deterrent, but may also incapacitate people by making it more difficult to engage in criminal behavior. New monitoring policies that require individuals to check in daily for drug and alcohol tests may incapacitate offenders by requiring certain behavior (showing up for Breathalyzer tests) when they would otherwise be drinking.

These alternative forms of incapacitation might not be as complete as imprisonment, but they may also not carry with them the costs associated with concentrating large numbers of offenders in a prison. The costs of creating such potentially violent environments are not typically considered in the average incapacitation study, which focuses only on crimes in the community. In contrast, evaluations of alternative forms of incapacitation do consider the crimes that are committed while under supervision. For example, evaluations of electronic monitoring compare the behavior of people with the monitors to the behavior of people without monitors. No assumption is made that people with monitoring do not commit crime. A realistic appraisal of these new forms of incapacitation starts with a clear understanding of how an environment affects the behavior of the person in the current moment, even if the primary goal of the new environment (e.g., community supervision) is not necessarily incapacitation.

RECOMMENDATIONS

Incapacitation is one real consequence of incarceration. People who are incarcerated do not commit as many crimes as they would have, absent incarceration. This appears to result in a real decline in the number of crimes experienced outside of prison. Although replacement is possible, there is no convincing evidence that the crimes averted by incarceration are simply replaced by the next available potential criminal. The best modern estimates for the size of the effect are modest, in the neighborhood of two to five serious crimes per year. These effects are larger if incarceration is used in a more targeted way for higher-rate offenders, but will inevitably decline as incarceration is used more heavily. The research in this area supports some basic recommendations for policy.

63. Brian A. Jacob & Lars Lefgren, *Are Idle Hands the Devil's Workshop? Incapacitation, Concentration and Juvenile Crime*, 93 AM. ECON. REV. 1560 (2003).

64. Brian A. Jacob, Lars Lefgren & Enrico Moretti, *The Dynamics of Criminal Behavior: Evidence from Weather Shocks*, 42 J. HUM. RESOURCES 489 (2007).

1. **Incapacitation should not be relied on as a primary motivation for a broad-based incarceration regime.** Although incapacitation is real, and there will be some modest decrease in crime associated with most incarceration, incapacitation as an idea is not sufficiently robust to motivate and sustain a systematic sentencing regime. Serious legitimate questions exist about the ethics of selective incapacitation as a primary motive for sentencing.⁶⁵
2. **Incapacitation cannot be used to justify the current levels of incarceration in the United States.** The offender population has a distinct distribution with respect to offending rates. This distribution is skewed, with a few high-rate offenders accounting for the majority of the offenses.⁶⁶ Most incarceration policies, even one that assigns every crime the same probability of a prison sentence, will selectively incarcerate the higher-rate offenders.⁶⁷ However, the nature of the offender distribution means that increased incarceration will have diminished returns to scale in terms of incapacitative benefit. The evidence is clear-cut that current high levels of incarceration have captured a wide swath of the offender population, including those that offend at a low rate. In real terms, this means that the average benefit to a prison cell in terms of crimes prevented has dropped at least in half since the 1970s, and probably more. Simply put, the benefits from incapacitation cannot support the current levels of incarceration in the U.S., even if a person was to believe that incapacitation was the proper (and only) goal of sentencing.
3. **“Release valve” policies to reduce the prison population in the short term should focus on releasing individuals who are at lowest risk for offending.** Not all prison-reduction policies will have the same costs in terms of increased crime due to reduced incapacitation. Higher-risk people have some observable characteristics that can be used to reliably identify higher rates of offending. Most notably, age and number of prior offenses are good predictors of future crime.⁶⁸ Type of crime, despite heightened concerns about violent offenders, is not a good predictor of future crime.⁶⁹ Although incapacitation should not drive incarceration policy more

65. Binder & Notterman, *supra* note 3.

66. MARVIN E. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* (1972); Piquero, Farrington & Blumstein, *supra* note 4.

67. Piquero & Blumstein, *supra* note 18.

68. Paul Gendreau et al., *A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works?*, 34 *CRIMINOLOGY* 575 (1996).

69. *Id.*; PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1994* (2002).

broadly, evidence about the size of the incapacitative benefit should play a role in one-time “release valve” decisions to release prisoners. Such considerations would result in more releases of older offenders, even those who are serving long sentences for serious crimes. More broadly, crime control (or incapacitation) should not be used as an explanation or defense for long, determinate prison sentences, such as life without parole.⁷⁰

4. **Policymakers should be aware of the relative incapacitative effects of different policies, even if their main motives do not include incapacitation.** Retribution requires longer periods of incarceration for violent offenses. This policy might have demonstrably lower crime-reduction benefits than a policy that focuses shorter prison sentences on young, high-rate property offenders. Retribution scholars might legitimately not care about this potential differential impact. Nonetheless, these effects are real, and should inform the policy decisions about the use of incarceration in real-life situations. Risk-assessment tools can play a role in helping identify the relative rates of offending for individuals involved in the criminal justice system. Care should be taken to accurately assess the relative costs of different kinds of errors⁷¹ and the impact of current practice on observed risk.⁷² Care should also be taken to make use of tools that can mitigate the potential for these tools to have a racially disparate impact.⁷³
5. **In certain specific cases, crime can be reduced in places through the use of limited short-term spells of incarceration to incapacitate very high-rate property offenders.** The Dutch experience with the limited use of short spells of incarceration aimed at very high-rate property offenders has demonstrated that targeted incarceration policies can be used selectively to reduce crime.⁷⁴ These policies almost inevitably rely on deterrence and even rehabilitation of those same offenders to achieve the full benefit of incarceration. Moreover, the Dutch experience has also highlighted the very real (and costly) potential trap of these policies—initial success almost inevitably leads to increased use—and rapidly declining benefit. This kind of targeted use of relatively short periods of incarceration for high-rate property offenders should not be confused with the types of

70. See generally Erik Luna, “Mandatory Minimums,” in the present Volume.

71. Berk, *Asymmetric Loss Functions*, *supra* note 53; Berk, *Balancing the Costs*, *supra* note 53.

72. Bushway & Smith, *supra* note 56; Eggleston et al., *supra* note 55.

73. Devin G. Pope & Justin R. Sydnor, *Implementing Anti-Discrimination Policies in Statistical Profiling Models*, 3 AM. ECON. J. 206 (2011).

74. Vollaard, *supra* note 30.

“three strikes and you are out” policies popularized in the United States. Although there is some evidence of deterrence from three-strikes policies,⁷⁵ their incapacitative benefit has not been proven, especially since the added incarceration of these policies is likely to occur many years after the individuals have exited crime. Long terms of incarceration, particularly life sentences without parole, cannot be justified through incapacitation.

75. Helland & Tabarrok, *supra* note 31.

Mass Incarceration

Todd R. Clear* and James Austin†

This chapter addresses a fundamental challenge for criminal justice reform in America: mass incarceration. Using the framework of the “Iron Law of Prison Populations,” we show that the most commonly proposed strategies have limited capacity to make major reductions in the number of people in prison. Diversion strategies are unlikely to target people who would have served much prison time, anyway. Early release for people convicted of less serious crimes likewise misses those who use the greatest number of prison cells. Strategies designed to reduce recidivism rates do not have the proven power to reduce numbers on a large scale. In short, meaningful reductions in prison populations cannot happen without substantial reductions in prison time served for people convicted of violent crimes. Evidence suggests that a prison-population reduction program that includes shorter prison stays for people convicted of violent crimes can be done without endangering public safety.

INTRODUCTION

Beginning in the 1970s, the United States embarked on a three-decade-long shift in its penal policies. In these years, state and federal governments tripled the percentage of convicted felons sentenced to confinement and doubled the length of their sentences. From 1972 to 2009, the U.S. prison population grew by 700%, reaching a peak of 1.6 million inmates.¹ Since 2009, due to reforms enacted by state legislatures, the prison population has declined a few percentage points. This is a welcome but modest trend, as Inimai Chettiar has noted: “At this pace, it would take nearly 75 years to return to the 1985 incarceration rate of 200 per 100,000.”²

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1. JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 11 (2016), http://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated.pdf [<http://perma.cc/3YR5-Q8PN>]; see also Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307 (2009).

2. Inimai Chettiar, *Preface*, in AUSTIN ET AL., *supra* note 1, at 3.

Like other failed social experiments, mass incarceration was not a spasm without a cause. The expansion was driven largely by overly punitive policies enacted beginning in the 1970s and continuing through the 1990s, such as higher new mandatory minimum sentencing laws, “truth in sentencing” laws, and “three strike” laws that imposed automatic life terms on repeat offenders, and an expansion of criminal codes.³ As a consequence of these policies, U.S. prison populations have become exceptionally high, not only as a historical matter but also by international standards—many times higher than comparable democratic nations, thus placing us in the company of repressive autocracies. Indeed, the United States has an incarceration rate nearly four times greater than Poland, the developed democracy with the second-highest rate.⁴

In this chapter, we take as given that: (a) from a cost-benefit perspective, whatever marginal gains there are in public safety are far outweighed by the devastating impact on social, economic, and political justice; and (b) the situation calls for rapid, meaningful reductions in the number of people in prison. In particular, we use the framework of the *Iron Law of Prison Populations* to think about what is required, in policy and practice, to achieve rapid, meaningful reductions in the number of people incarcerated in U.S. prisons. By “rapid,” we mean within a constricted political window—one or maybe two electoral cycles. By “meaningful,” we mean reductions of a magnitude of 50% or thereabouts—enough to make the U.S. rate of imprisoning its citizens no longer shockingly abnormal, by world standards.

The *Iron Law of Prison Populations* is a straightforward way to say that the size of a prison population is created by two factors. The number of prisoners (usually measured as “average daily population” or ADP, but will be referred to here as *prison population*) is fully determined by the number of people sent to prison (*admissions*) and how long they stay in prison (*length of stay*). That is:

$$\text{Prison Population} = \text{Admissions} \times \text{Length of Stay}$$

This simple idea conceals considerable complexity, as we show below. But its simplicity has the advantage of making explicit what should be obvious. Prison populations do not occur as a normal consequence of irresistible societal forces. They are, instead, created by purposeful decisions. Those decisions may themselves be wrapped up in complicated and sometimes confounding dynamics, be they political, economic, or social in nature. But in the end, a

3. See generally Erik Luna, “Mandatory Minimums,” in the present Volume; Douglas Husak, “Overcriminalization,” in Volume 1 of the present Report; Stephen F. Smith, “Overfederalization,” in Volume 1 of the present Report.

4. AUSTIN ET AL., *supra* note 1, at 15.

series of discrete allocation decisions create a given prison population; these decisions, taken together, may be thought of as prison-space allocation practices. Hence, if a different prison population is desired, a replacement allocation practice is needed. These new allocation practices must be designed intentionally, with the desired size and attributes (e.g., gender, race, etc.) of a prison population in mind.

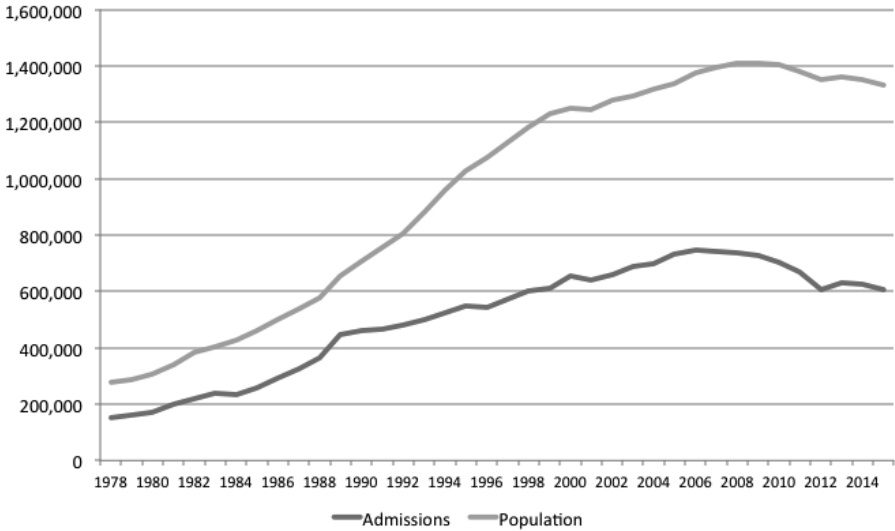
I. FOUR FEATURES OF THE U.S. SYSTEM OF PRISON USE

Four features of the U.S. system of allocating punishments provide the crucial context for designing allocation strategies that can reduce prison populations in the United States:

1. Approximately 90% of the U.S. prison population is housed in state prison systems. Meaningful reductions in the nation's overall incarceration rate are, in actuality, the aggregation of meaningful reductions taking place in various state prison populations.
2. The 50 states and the District of Columbia have each used different allocation strategies to create their prison populations. These strategies have changed in varying ways in each state, over time. The population outcome in each state, thus, is the product of more or less unique sentencing structures and policies that impact prison admissions and length of stay. It follows that changes necessary to reduce prison population will be state-specific, rather than national.
3. Declining crime rates nationally have resulted, in most places, in a corresponding drop in arrests and prison admission numbers. But, in most places, there has not been a corresponding drop in prison population (see Figure 1, below). Consistent with the *Iron Law*, an entrenched prison population in the face of declining crime rates, arrests, and prison admissions can only have occurred by increasing length of stay.
4. There is an equivalence in the exchange rate between prison admissions and length of stay. The net, long-term impact of eliminating one prison admission with a length of stay of 10 years is equivalent to a one-time reduction of 10 prison admissions with a length of stay of one year. The effect of the latter change is a large, immediate reduction in prison population that disappears quickly; whereas the former approach produces a small change that takes a while to disappear. Policy changes thus can have differential impacts on prison population over time through the way they alter admissions and/or length of stay.

Figure 1

State Prison Population and Admissions
1978-2015



Source: Bureau of Justice Statistics, National Corrections Reporting Program

The complexity of these four special features by which prison populations are created in the U.S. can be better understood through discussion of the dynamics of admissions and length of stay. In the next two sections, we illustrate population-relevant dynamics of these two drivers of prison populations.

II. DYNAMICS REGARDING ADMISSIONS

There are two major streams of admissions into prison. People are sentenced to prison from the court, or they are returned to prison by correctional authorities due to problems that occur while they are under community supervision. Each of these streams is targeted as a way to reduce the number of people in prison. Yet there are limits on the amount of prison-population reduction that can be accomplished by “diverting” people to non-custodial options instead of prison.

A. DIVERTING PEOPLE FROM SENTENCES TO PRISON

Problems faced in targeting direct sentences to prison can be illustrated by looking at the issues in a hypothetical prison allocation system whose dynamics are more or less typical of the 50 states and District of Columbia, shown in Table 1. This is not meant to be a complete sentencing system; since

in a fully articulated system, there would be much more complexity. But this hypothetical case follows general patterns of any realistic sentencing system, and we use it to illustrate constraints that arise when reformers try to reduce prison populations by reducing sentences to prison.

Under this hypothetical situation, every 1,000 felony convictions would generate 450 prison sentences. Because almost half the cases go to prison, it would seem at first blush that reducing prison admissions would offer a promising target for reducing overall prison numbers. The strategy would be to develop “front-end” sentencing options that attract what would have been prison-bound cases away from that outcome.

The problems with this strategy become obvious by looking deeper into the allocation system. More than one-fourth of the prison-bound cases come from “extremely” and “very” serious categories. They are often thought to be off-limits for non-custodial sentences; in many jurisdictions, these cases are subject to mandatory prison terms. Among the remaining cases, almost two-fifths of the sentences are for crimes in the “serious” category. For the most part, in cases where there is harm to the victim, policymakers have been reluctant to target them because they are “violent” crimes.⁵

Table 1: Hypothetical State Sentencing for 1,000 Felony Convictions

Level of offense, by seriousness	Felony sentences	Percentage of felony sentences	Percentage non-prison	Prison admissions	Percentage of prison admissions
Extremely serious (death)	50	5%	0%	50	10%
Very serious (harm to victim)	100	10%	10%	90	18%
Serious (less harm victim)	200	20%	30%	140	28%
Less than serious (property)	500	50%	60%	200	40%
Not serious (public order)	150	15%	90%	15	3%
Total	1,000	100%	50%	495	100%

The remaining target group for diverting from prison is the “less than” and “not” serious group. They are two-thirds of the felony sentences and most reformers would agree that it makes sense to target them for an overall prison population reduction strategy. While this group could be approached by a type of reverse “mandatory sentencing” policy, requiring a non-custodial sentence for all of them, in fact nobody has proposed such a restriction on the use of prison. The general strategy for targeting this group is to create a “front-end sentencing alternative” that will be attractive to judges, often also creating various incentives for judges to use those alternatives.

5. The size of this target group makes them attractive, and we return to them below.

The problems with “sentencing alternatives” are well known. In our example, for the people being sentenced within the two least-serious categories, the current odds of going to prison, absent any new programs or policies, are about one in three (and specifically for public-order crimes, the odds are much smaller: one in ten). That means that the base odds that a person sentenced to the new “alternative” would have gotten a non-custodial sentence anyway are about 2 to 1.

In fact, a new front-end alternative could be both sizeable and widely used by judges, and still end up mostly with people who would not have gone to prison in the first place. This kind of net-widening happens with many “alternatives” to incarceration.⁶ It is not easy to ensure that a front-end program is used only (or even primarily) for people who would otherwise be prison-bound. So, the actual diversion numbers are generally significantly less than the program participation rate, and may approach zero. When the number of people who fail these “strict alternative” programs is included,⁷ the net impact can actually be negative. If the target group is non-serious cases that have little risk of prison to begin with, then the net impact is almost always zero.

A more promising category turns out to be the “serious” cases, even though there is usually harm to a victim in these cases. They are attractive because fewer than one-third get non-custodial sentences. For these sorts of cases involving non-fatal, less severe harm to the victim, some reformers have suggested restorative justice (“RJ”) style programs to substitute for prison.⁸ In general, RJ has not demonstrated the ability to capture a large number of cases from this group—they tend to be selective, and they do not process a large volume of cases. Well-tailored RJ-style programs targeting moderately violent crimes can attract some cases away from prison, but the number will likely be small, even under optimistic assumptions.

These problems combine to make front-end strategies a reach. To illustrate, consider a scenario in which a state facing the pre-existing allocation practices

6. See Michael Tonry, “Community Punishments,” in the present Volume; Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST 99 (1996).

7. See Susan Turner, Joan Petersilia & Elizabeth Piper Deschenes, *Evaluating Intensive Supervision Probation/Parole (ISP) for Drug Offenders*, 38 CRIME & DELINQ. 539 (1992); Todd Clear & Patricia L. Hardyman, *The New Intensive Supervision Movement*, 36 CRIME & DELINQ. 42 (1990); JOAN PETERSILIA & SUSAN TURNER, RAND, INTENSIVE SUPERVISION OF HIGH-RISK PROBATIONERS: FINDINGS FROM THREE CALIFORNIA EXPERIMENTS (Dec. 1990).

8. DANIELLE SERED, ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/accounting-for-violence/legacy_downloads/accounting-for-violence.pdf.

laid out in Table 1 implemented several new front-end options. One might be an Intensive Supervision Program (“ISP”) that targets “less” and “not” serious felonies. With an operating capacity of 100 cases, the ISP would be designed to divert one-fifth of the entire admissions stream. Let’s say, to be generous, that this particular ISP is more successful than most at getting true diversions, and half the cases would have gone to prison without it. Assume, finally, that the state set up an RJ program targeting “serious” cases with a capacity of 24, two-thirds of whom would have gone to prison. The net impact of these two reforms is about a 15% reduction in the admissions flow. But would there be a corresponding 15% decline in the prison population? Probably not.

One reason is that under ISP programs, many people fail and end up in back in prison. In our example, if half the ISP cases fail, either by being rearrested or failing to abide by the rules, and one-third of the RJ cases drop out, then the net reduction in prison admissions is more like 6%. Even more important, as we note below, the types of cases targeted by such front-end diversion programs tend to have a very short prison stay so diverting them has less of an impact on prison population than the numbers of cases would imply.

In sum, attempting to alter admissions in ways that would achieve substantial reductions in the number of people in prison is problematic. The logical place to start—less serious crimes—does not easily lead to true diversions. The kinds of serious crimes that would translate into true diversions would not easily yield large enough numbers to make a meaningful impact.

B. REDUCING FAILURES ON COMMUNITY SUPERVISION

People who are admitted to prison because they fail under community supervision are thought to be an attractive target for prison-population reduction for two reasons. As a key stream of prison admissions, reductions in the number of community-supervision failures directly translate into reduced admissions.⁹ The numbers available to be targeted can be quite substantial. In 2015, there were 561,406 state prison admissions, of which 160,288 (about 30%) were for parole supervision violations;¹⁰ add the number who go to prison as probation violators and the full scale of the community-supervision stream emerges. Nationally, perhaps a majority of people admitted to prison are headed there because they failed community supervision.

9. If they can succeed under supervision, they also represent a net gain in social value for the community.

10. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2015 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

These failures are of three types. Some people are arrested and convicted of a new crime, and go to prison on a new sentence. Some are rearrested and returned to prison in lieu of conviction. Still others fail to meet a supervision requirement (e.g., “dirty” drug test, absconding, etc.) and are sent to prison, even though they are not charged with a new crime. Estimates of the rates of community-supervision failure vary widely, and depend on the definition of failure. For 2015, approximately 60% of state and local probationers were classified as “successful” when their supervision was terminated.¹¹ The same applies to state parolees, and these rates have been basically unchanged since 2005.¹² About half of the state prisoners who are released onto parole are returned to prison within three years, and these rates have remained essentially unchanged since 1983.¹³ In other words, decades of work to improve the success of community-supervision efforts have proven largely fruitless, as measured by national trends.

Notwithstanding these national numbers, state-level community-supervision policies and outcomes vary dramatically, so generalizations are problematic. For a few states, community-supervision failures without new convictions, called “technical revocations,” can be half or more of all prison admissions. This makes technical revocation an attractive target for prison-population reduction initiatives. In other states where technical revocation is used more sparingly, community-supervision failures can still be one-fifth to one-third of admissions—again suggesting that this is a promising target.

There are two types of strategies to reduce the number of people who go back to prison for community-supervision failures: policy alternatives to interrupt the pattern of technical revocation such as “graduated sanctions,” and treatment programs designed to reduce reoffending rates.

Policy strategies seek to put intervening steps between the decision by a probation or parole officer to charge a client with a rules violation and the decision of a sentencing authority to return that client to prison. Each step siphons off cases from the stream into prison, and the result is fewer admissions. Because these systems are administrative, requiring little or no legislative authority, they can be quickly implemented and can have rapid and sizeable

11. *Probation and Parole FAQs*, AM. PROB. & PAROLE ASS’N, https://www.appa-net.org/eweb/DynamicPage.aspx?WebCode=VB_FAQ.

12. DANIELLE KAEBLE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2015 (2016), <https://www.bjs.gov/content/pub/pdf/ppus15.pdf>.

13. MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

effects on the number of people admitted to prison.¹⁴ Treatment programs attempt to reduce the frequency and/or seriousness of rules violations in the first place. Often combined with policy strategies (treatment is one of the required “steps”), these approaches operate in order to change behavior. Common approaches include anger-management training, community-service work, increased reporting, shock incarceration, and the like.

Revocation reduction, as a target, has obvious attractions, but it faces major structural limitations on its capacity to deliver meaningful reductions in the number of people in prison. For one thing, even though there can be a large number of people flowing into prison on this stream, they may not account for much of the daily prison population. Many violators return to prison for much less than a year, and diverting them into some policy or treatment “step” may produce a great deal of action at that step without translating into much aggregate reduction in the prison number.

Say, for example, that 30% of a given state’s prison admissions are currently technical revocations of probation or parole, either with no new arrest or in lieu of an arrest. These are cases where correctional policy could change the decision to go to prison, because there is no new conviction by a court. Let’s say, as well, that the average technical revocation of this type results in four months in prison—not an unusual number. Finally, let’s assume that everyone in that 30% technical revocation rate is covered by a new policy that requires some sort of treatment intervention instead of revocation. How much would it reduce the prison population?

The temptation is to say that 30% of the flow into prison has been stopped. That may be true, but the related impact on the average daily population, depends on two more statistics: the average length of stay for the other 70% and the proportion out of the 30% who succeed in the new program.

Let’s say that the length of stay for the remaining 70% of admissions (excluding life sentences) is 28 months—a reasonable figure. Let’s further assume that the new intervention is wildly successful, such that 75% of the technical revocation cases finish the program without incident for the remainder of their sentence. Under these assumptions, a revocation program that accepts 30% of the prison intake would result in just over a 3% reduction in the population. But that is an optimistic number, based on strong assumptions of program success getting and keeping cases. If the new intervention captures only half the eligible revocations, and if it succeeds with them half the time—a profile

14. Michelle Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 *LAW & POL’Y* 51 (2013).

more characteristic of these kinds of policy interventions—the reduction in prison population is about 1%. If the proportion of technical revocations in the admissions stream is less than 30%, the impact shrinks even more.

In other words, even under friendly assumptions, a strategy that focuses on technical revocations holds limited promise for meaningfully reducing the number of people in prison. Indeed, that has been the experience of these strategies as they have been rolled out. A more effective way to target this stream would be to entirely prohibit prison returns for mere rules violations. This is almost never proposed, but it, too, would face obstacles. As Joan Petersilia has pointed out, many, if not most, technical revocations have an arrest as the underlying problem leading to the revocation.¹⁵ For these cases, a prohibition on technical revocations might only lead to a prosecution.

III. DYNAMICS REGARDING LENGTH OF STAY

Length-of-stay increases have been at the core of the size of the prison population for the last 30 years. Since it has often been observed that 95% or so of those who are imprisoned will eventually be released, adjustments in length of stay are an obvious target. Obviously, if some of them are released earlier, then the number of people in prison will go down. Here again, however, the eventual reduction in the number of people in prison is not always commensurate with the number who are released early.

A. REDUCING SENTENCES FOR THOSE ADMITTED TO PRISON

To illustrate, we again turn to the hypothetical state jurisdiction shown in Table 1, to which we add a column with the average (mean) length of stay. In Table 2, the statewide mean length of stay is 43 months, with a median length of stay of 30 months (with a high of 180 months for 5% of the entry cohort to a low of 6 months). The cohort will produce a “steady state” prison population of 1,758 inmates. A small across-the-board reduction in length of stay of three months would reduce the hypothetical prison population by only 124 inmates ($495 \text{ admissions} \times 3 \text{ months} / 12 = 124 \text{ inmate population}$). The impact on the length of stay for “extremely,” “very,” and “serious” crimes would be small, with time-served reductions ranging from a high of 10% to a low of less than 2%. For the other types of crimes, the impact is much more substantial, reducing the length of stay by one-fourth to one-half.

15. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 *CRIME & JUST.* 207 (2008).

**Table 2: Hypothetical State Lengths of Stay for an Admissions Cohort
(Based on 1,000 felony cases from Table 1)**

Level of offense, by seriousness	Percentage of the total felony sentences	Prison admissions	Mean length of stay (months)	Prison population (based on total years served)	Percentage of prison population (based on total years served)
Extremely serious (death)	5%	50	180	750	43%
Very serious (harm to victim)	10%	90	60	450	26%
Serious (less harm victim)	20%	140	30	350	20%
Less than serious (property)	50%	200	12	200	11%
Not serious (public order)	15%	15	6	8	0%
Total	100%	495	43	1,758	100%

But across-the-board reduction has not been seriously proposed anywhere (although we would point out that across-the-board *increases* have quite frequently been on the table). Instead, the common plan is to do something about “drug” and “low-risk property” offenders. In Table 2, these would be “less than” and “not” serious cases. The three-month reduction for them is a large overall cut in their individual prison time, puts 215 people out earlier than before, and has less than half the overall impact of an equivalent across-the-board reduction—about a 3% reduction in total months for the cohort.

These illustrations are for an admission cohort. The impact will not be rapid. Prison-population reductions for this cohort will take effect gradually, as the number of people behind bars steadily decreases. That is an “all things being equal” long-term reduction, of course. If, for example, it takes a decade for these changes in admission sentences to produce a “meaningful” reduction in the number of people in prison, it is reliable only if, in the intervening years, legislatures do nothing to add to the number of people in prison. That assumption is a stretch.

B. RELEASING PEOPLE WHO ARE CURRENTLY INCARCERATED EARLIER

Because the impact of changes in length of stay for new admission cohorts is so gradual, reformers tend to think about reductions in sentence length for the current population in prison. This is a more fruitful way to think about the problem, for two reasons. First, the connection between the length of the sentence imposed by the judge and the time served on that sentence is not as close as we might think. That means that adjustments in sentencing designed to affect length of stay may be ineffectual. Second, a change in length of stay for the current population has an immediate effect on the population, and if the changes are permanent, the effect is lasting.

In fact, a variety of mechanisms operate at the release-from-prison stage to adjust downward the sentence imposed by the court. About one-third of the states have parole release; every state has one or more forms of “good time”; and states have different patterns of credit for time served while awaiting trial. In direct opposition to these sentence-reduction mechanisms, almost every state has some form of “truth in sentencing,” requiring a minimum percentage of the judicial sentence to be served for certain types of crimes. The net effect of the downward options on the one hand and the “truth” requirements on the other is that sentencing patterns are not as important as they once were for *Iron Law* mathematics. In fact, the sentences that judges are imposing today seem to be a bit shorter than they were a decade ago,¹⁶ even though the amount of time people serve before being released from prison is considerably longer.¹⁷ A major reason for the seemingly anomalous disconnect between sentencing and length of stay is that post-sentencing mechanisms such as parole and good time play out differently than before. Nationally, the number of people released on parole has been cut in half, while the number of people subject to “truth in sentencing” statutes has skyrocketed following the 1994 Violent Crime Control and Law Enforcement Act.

The resulting longer sentences for more-serious crimes have led to a stacking up of those cases in the prison system. While people convicted of drug-related crimes may be a large portion of the admissions to prisons, they do not stay there very long. People convicted of very serious crimes are comparatively less frequent in the entering cohort, but they stay in prison longer, becoming a larger portion of the daily population.

Table 3 shows the results of this “stacking” effect for the U.S. daily prison population. The more-serious cases end up occupying an increasing proportion of prison space, while the less-serious cases come in and go out, taking up less space overall. The powerful effect of sentence length is shown in the way people convicted of violent crimes end up comprising the majority of the prison population. The relative difference between these more-serious cases and less-serious crimes means that it is difficult to get a significant impact on the average daily prison population without a sizeable reduction in the sentence length of the more-serious cases, for they have more impact on the total prison capacity used than the less-serious cases.

16. JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017).

17. James Austin, *Reducing Americas Correctional Populations: A Strategic Plan*, 12 JUST. RES. & POL’Y 1 (2010).

Table 3. State Prison Admissions, Population, and Length of Stay, by Offense

Offense	Prison Population	Prison Admissions	Prison Length of Stay (months)
Violent	53%	28%	50
Murder	12%	2%	172
Manslaughter	2%	2%	110
Rape	5%	1%	92
Other sex	7%	4%	51
Robbery	14%	8%	53
Assault	11%	10%	30
Other violent	3%	2%	24
Property	18%	29%	20
Burglary	10%	11%	25
Larceny/theft	3%	7%	17
MV theft	1%	3%	18
Fraud	2%	4%	17
Other property	2%	1%	15
Drug	17%	28%	20
Public order	10%	15%	21
Other	1%	1%	30

Source: Bureau of Justice Statistics, National Corrections Reporting Program.

It is important to emphasize that Table 3 should not be read in the same way as Tables 1 and 2. The daily population count (Table 3) is very different from a cohort. The effects of changes in sentencing for the latter can be estimated “going forward,” in the way we interpreted the first two figures. Table 3 is instead a “snapshot” of the current prison population, and it includes people who are just beginning their terms as well as others who are nearing release. The total cell months associated with people convicted of the violent crimes should not be read as the amount of time this group will do, starting now. It is rather what will have happened with this prison population group by the time it has finished the term in prison. No doubt some of those who have been convicted of murder are now in month 170, on the threshold of release, while others are in month two, staring at a long stretch in prison. Likewise, the 50 cell months associated with people convicted of violent crimes is not what all admissions in

the group account for, but rather reflects what the group in prison at the time of the snapshot will collectively cost in terms of prison cells at the conclusion of their terms.

Table 3 does aptly show an important implication of the *Iron Law*, however. When the objective is to reduce the number of people in prison, changing length of stay for the current population is the most promising target for immediate impact. The effect of changing sentence length for people who are serving time for serious crimes will be immediate because they are a large portion of the population. It will also be lasting, because they will not be replaced in the prison population very rapidly, and the effect of reduction in their sentences will reduce demand for cell space longer into the future. If changes in length of stay for the current population continue to apply to future admissions cohorts, the impact will be permanent.

IV. COMBINING THE FOUR FEATURES OF PRISON USE AND THE *IRON LAW*

We have illustrated a strategy of analysis that uses the *Iron Law* to identify which aspects of prison admissions and length of stay provide more-attractive targets for reducing prison counts rapidly and meaningfully. The *Iron Law* states that prison demand is created by a combination of two forces—how many people go to prison and how long they stay. In a real sense, the demand for prison space is allocated across a population of people convicted of crimes, and the question the *Iron Law* poses is: What different strategies of admissions and length of stay would create substantially lower levels of demand for prison space?

We identified the streams that make up the flow of admissions to prison, and disaggregated the streams into levels of crime seriousness. We then estimated how various adjustments in those streams might ultimately change the number of people in prison. From this, we concluded that admissions, generally speaking, are a weak target for achieving rapid and meaningful reductions in the number of people in prison. We then turned to length of stay, and showed that disaggregated rates of aggregate prison time mean that, even though less-serious crimes are far more numerous in the justice system, it is the more-serious crimes that make up the more attractive target for reducing prison populations, because their collective impact in prison counts is so much larger, per case.

We used a hypothetical prison allocation system to illustrate how it works. Our hypothetical numbers were more or less reasonable, but since jurisdictional differences are an overriding feature of the U.S. justice system, actual numbers

could turn out differently when going from one state to another. Thus, what we present here is a way of looking at the problem rather than an answer to the problem. Our experience in places where we have done this analysis on actual state data suggests that our conclusions about admissions and length of stay are not wildly out of sync with reality. But we are not advocating a set of policies; rather, we are suggesting a strategy for establishing and modeling those policies.

V. FURTHER IMPLICATIONS OF THE IRON LAW

This approach is equally important for what it suggests is *not* promising. Three of these are considered truisms in the mass-incarceration reduction business: “first-time nonviolent offenders”; “the drug war”; and “recidivism-reduction programs.”

The “first-time/nonviolent offender” population is simply not enough of a factor in the prison population to provide a sufficient pool of candidates. It is true that there are plenty of these cases in the justice system, but by far most do not go to prison. When they do, they do not stay long. The prison-reduction payoff of focusing on this group is mediocre at best. The potential for backfire with this group is not insubstantial, either, through net-widening or the collateral consequences of criminal labeling. To the extent that this is a young group, recidivism rates may be higher than anticipated. To the extent that this is a poor and underprivileged group, programmatic needs may be extensive. That is, while there may be good reasons to impose less correctional coercion on first-timers and people convicted of nonviolent crimes, ending mass incarceration is not one of them.

A similar analysis applies to “drug offenders,” with two caveats. First, people caught up in the drug trade are a much larger portion of the federal prison population than they are in the states. For the federal jurisdiction, a significant reduction in sentence length for people convicted of drug crimes will likely have a very meaningful, potentially immediate impact (not only on the number of people in the federal system, but on the quality of justice dispensed).¹⁸ Second, many of those convicted of drug crimes have a high likelihood of recidivism. They may, over the course of their lives, have numerous interactions with the justice system, and so the cost savings at any one stage of their interaction with the system may not carry over to their lifetime of involvement.

18. For discussions of drug criminalization and legalization, see Jeffrey A. Miron, “Drug Prohibition and Violence,” in Volume 1 of the present Report; and Alex Kreit, “Marijuana Legalization,” in Volume 1 of the present Report.

“Recidivism-reduction programs” are also quite popular. Who can dispute the value of helping people who have broken the law turn their lives around? Programs that have demonstrated track records of success should be made widely available.¹⁹ But the *Iron Law* suggests that the ceiling of their impact on prison populations is lower than most people would expect.

There is a vast literature now on the effectiveness of correctional programs.²⁰ Most of them do not work. Those that do work tend to be tailored to specific problems that cause the risk, and they focus on high-risk cases. Generic treatments do not make much of a difference. Neither do programs that are applied to lower-risk individuals. So we begin with the proposition that proven recidivism-reduction programs will be applicable to only a subset of those who go through the system.

With that caveat, what can be expected of these programs? The very best of them—a substantial minority of those on current offer—reduce recidivism rates by about 20%. This explains why recidivism reduction is such a weak target when it comes to reducing the prison populations meaningfully and rapidly. These programs will be relevant only for, perhaps at best, a third of the correctional population. Not all of those suited for treatment will be in prison or prison-bound. For this group, recidivism-reduction programs, if they run well, will reduce the expected rate of new arrests from, say, 40% to about 32%. This would doubtless be an achievement and would be worth doing. But having one-third of the people in the corrections system return to prison 32% of the time instead of 40% of the time, after some years in treatment, will not change the number of people in prison at any given time very rapidly. Indeed, meaningful reductions will take many years. And even this depends upon extremely optimistic (and mostly untenable) assumptions about program availability and overall program effectiveness. More-reasonable assumptions would lead to even more feeble impacts in the number of people in prison.

Finally, the *Iron Law* takes external factors affecting the prison population as a given. These are well-established factors, such as the number of at-risk males aged 16-40; the number of violent crimes; and the number of felony arrests.²¹ To the extent these forces translate into admissions to prison, the *Iron Law* accounts for them. That said, the impact of crimes and arrests on the number of people in prison is weaker than logic would suggest. Both have been dropping nationally for years, at the same time prison populations have been

19. See generally Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume.

20. See, for example, the Campbell Collaboration’s Systematic Reviews on Crime and Justice, available at <https://www.campbellcollaboration.org/library.html>.

21. See generally John Monahan, “Risk Assessment in Sentencing,” in the present Volume.

rising or stable. The same is true for the at-risk male population, which has been declining steadily for decades. As it turns out, factors operating inside the justice system are far more influential in the number of people in prison than factors external to the system.²²

VI. PEOPLE CONVICTED OF VIOLENT CRIMES AS A POLICY TARGET

The popular conception of prison reform holds that those incarcerated for violent crime cannot have their sentences reduced without endangering public safety. There is a sense that people who have been convicted of violent acts are violent people, prone to recurring violent behavior, and that they cannot be safely allowed in society. Equally, it is thought that when individuals who have been convicted of a violent crime are removed from the community and put in prison, the community becomes safer for their removal. While that may be the case for a fraction of those convicted of violent crime, it is certainly not the case for the majority.

Five well-established empirical realities serve as orienting assumptions about public safety regarding people convicted of violent crime. They are:

1. **A very high proportion of violent crimes are subject to “replacement.”**

Most crimes are committed by young men in groups, a phenomenon referred to as co-offending.²³ When one of those young men is incarcerated, the group may remain, on average, as criminally active as it was before. It may also recruit new group members who themselves replace the missing person (until he returns from prison). In short, a person who is locked up may be prevented from committing crimes while in prison, but the crimes themselves may occur anyway. *This helps explain why, in many impoverished communities, large numbers of young men can be locked up, many of them regularly cycling into and out of prison, while crime rates remain stubbornly high. Under any reasonable policy scenario, a concentration of criminally active people remain in the community, notwithstanding the number of people from that community who are behind bars at any given time.*

22. PEAFF, *supra* note 16.

23. MARCUS FELSON & MARY ECKERT, CRIME AND EVERYDAY LIFE (2016). See generally Shawn D. Bushway, “Incapacitation,” in the present Volume.

2. **Time served in prison does not reduce the chance of recidivism.** People are neither rehabilitated nor deterred by longer stays in prison.²⁴ Longer time served delays the re-entry process but does not affect the likelihood of success in terms of preventing recidivism. The vast majority of people who go to prison are eventually released, and the likelihood of any individual returning to prison would not increase if he were released a few months sooner. *This means that, all things being equal, longer prison sentences do not tend to prevent criminal activity through deterring recidivism; the effect instead is to delay the new criminal event.*
3. **Recidivism rates for people convicted of violent crimes are, on average, lower than those for people with nonviolent criminal histories, and the rates of repeat violent crime are not high.** People who are in prison for violent crimes actually have a slightly lower recidivism rate than those who are in prison for property or drug crimes. When a person convicted of a violent crime recidivates, the rate of the new crime turning out to be violent is not markedly different (and for some categories of crime, smaller) than the rate for those convicted of nonviolent crimes.²⁵ *This suggests that the effects on public safety of prison reduction policies will be no worse (and potentially marginally better) by a prison reduction of individuals convicted of violent crimes as they would be by a reduction of people convicted of nonviolent crimes.*
4. **People exhibit a strong tendency to age out of criminal careers, and this is equally true for those with violent criminal histories as it is for others.** It is often said that “there is no re-entry program more powerful than having a 35th birthday.” While individual criminal careers vary dramatically, on average, this effect of “aging out” applies. Holding people in prison past the age of 40 has demonstrably limited impact on the likelihood of crime.²⁶ *This means that prison sentences for violent crime that result in imprisonment into old age have little or no public-safety value.*²⁷

24. See Daniel S. Nagin, “Deterrence,” in the present Volume; Cullen, *supra* note 19; Francis T. Cullen, Cheryl Lero Johnson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48 (2011).

25. DUROSE, COOPER & SNYDER, *supra* note 13.

26. Shadd Maruna, *Reentry as a Rite of Passage*, 13 PUNISHMENT & SOC’Y 3 (2011).

27. See, e.g., Michael Millemann, Rebecca Bowman-Rivas & Elizabeth Smith, “Releasing Older Prisoners,” in the present Volume.

Taking these four orienting ideas into account, it follows that delaying the release of a person because the crime of conviction involved violence does not alter the likelihood that either the person will commit a new crime or that the new crimes committed by people released from prison will involve greater levels of violence. In other words, longer time served for people convicted of violent crimes does not make the community safer from violent crime.

VII. OBTAINING MEANINGFUL REDUCTIONS IN PRISON COUNTS

In a recent report released by the Brennan Center for Justice,²⁸ a team of scholars concluded that almost 40% of people incarcerated in the United States are behind bars without a compelling public-safety rationale. This type of number may seem shocking, but achieving a reduction in the number of people in prison at that scale is not a radical proposal. For one thing, a 40% reduction in today's U.S. prison numbers would result in an incarceration rate of 282 per 100,000,²⁹ leaving the U.S. higher than every other democratic nation in the world and more than double the rate of any other Western European democracy.

More to the point, this level of reduction is already demonstrably within reach in the United States. New Jersey and New York have both reduced the number of people in their prison systems by more than one-third since the peak year of 1999, with a drop in their incarceration rates that already approaches that 40% national target (the U.S. population has dropped 2.9% since the peak in 2009).³⁰ California, whose prison population peaked in 2006, had since dropped by more than one-fourth.

How did these sizable drops occur? The California story is well known and equally well documented.³¹ The California Public Safety Realignment policy agenda, combined with a reinvigorated Probation Subsidy program and the impact of voter-approved Proposition 47 (downgrading several previous felonies to be misdemeanors), have resulted in over 45,000 people being removed from state prison and placed on probation, in local jails, or in other community alternatives. As depicted in the following table, the entire correctional population has declined by about 185,000 people even as the crime rate has declined.

28. AUSTIN ET AL., *supra* note 1.

29. CARSON & ANDERSON, *supra* note 10.

30. *Fact Sheet: US Prison Population Trends 1999-2014*, THE SENTENCING PROJECT (Feb. 2016), <http://www.sentencingproject.org/wp-content/uploads/2016/02/US-Prison-Population-Trends-1999-2014.pdf>.

31. Chris Kubrin & Carroll Seron, *The Great Experiment: Realigning Criminal Justice in California and Beyond*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (2016).

Table 4: California Correctional Population, 2007-2015

Year	State prison	Local jail	Parole	Felony probation	Totals	Crime rate
2007	173,312	83,184	126,330	269,384	652,210	3,556
2008	171,085	82,397	125,097	269,023	647,602	3,461
2009	168,830	80,866	111,202	266,249	627,147	3,204
2010	162,821	73,445	105,117	255,006	596,389	3,074
2011	160,774	71,293	102,332	247,770	582,169	2,995
2012	133,768	80,136	69,453	249,173	532,530	3,235
2013	132,911	82,019	46,742	254,106	515,778	3,082
2014	134,433	82,527	44,792	244,122	505,874	2,852
2015	127,421	73,891	44,526	221,243	467,081	3,046
Change						
Since 2007	-45,891	-9,293	-81,804	-48,141	-185,129	-510
Since 2014	-7,012	-8,636	-266	-22,879	-38,793	194

Source: Bureau of Justice Statistics Correctional Statistics Series; Federal Bureau of Investigation Uniform Crime Reports

The story in New Jersey and New York is less dramatic but more important. There have been several reform efforts in each location—for example, a statewide drug-court movement in New Jersey and the roll-back of the so-called Rockefeller Drug Laws in New York—but the effect of these legislative efforts has been limited.³² Instead, in New Jersey, where prison reductions lead the nation, a series of reforms of drug-law enforcement, combined with significant changes in parole release and revocation policies, created a sizable impact that added up over almost two decades.³³ In New York, a law-enforcement policy that downgraded many drug-related and other kinds of minor arrests from felonies to misdemeanors is at the heart of major reductions in the number of people going from New York City to state prisons.³⁴ Uncelebrated, but at

32. JIM PARSONS ET AL., VERA INST. OF JUST., END OF AN ERA? THE IMPACT OF DRUG LAW REFORM IN NEW YORK CITY (2015), available at <https://www.vera.org/publications/end-of-an-era-the-impact-of-drug-law-reform-in-new-york-city>. For a discussion of the drug court movement, see Richard C. Boldt, “Problem-Solving Courts,” in Volume 3 of the present Report.

33. THE SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES (2014), <http://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf>.

34. JAMES AUSTIN & MICHAEL JACOBSON, BRENNAN CTR. FOR JUST., HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? (2013), http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf. For a discussion of misdemeanors, see Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

the heart of the situation in both states, has been a relative (and unofficial) moratorium on new sentencing laws, allowing the state's prison system to decline as a consequence of major decreases in serious crime and felony arrests.

RECOMMENDATIONS

These three stories underline the central thesis of this chapter and support the following points:

1. **Large—meaningful—reductions in the number of people in prison can be accomplished without endangering the public.** Overall crime rates have declined and continue to do so in all three states.
2. **No single strategy exists that will apply equally to all the states in the country. Rather, significant reductions can be accomplished in any state by focusing on productive targets.** These may include front end strategies that divert people convicted of low-level crimes from prison, but we would especially emphasize front-end strategies that reduce sentences for all types of crime, across the board. In many places, front end strategies that eliminate or vastly reduce returns to prison for non-criminal and non-serious misconduct on probation or parole can be important, as well. Back-end strategies that reduce length-of-stay, especially for people serving long sentences, may have the most significant impact of all the policy options.
3. **An agenda that can achieve meaningful reductions in the number of people in prison must focus on legal policies and practices rather than social programs and services.** A clear-eyed focus on changing the laws and policies that produce too many people in prison will pay off directly and immediately. That is the main implication of the *Iron Law*, and it is the core challenge before us.

Risk Assessment in Sentencing

John Monahan*

One way to reduce mass incarceration and the fiscal and human sufferings intrinsic to it is to engage in a morally constrained form of risk assessment in sentencing offenders. The assessment of an offender's risk of recidivism was once a central component of criminal sentencing in the United States. In the mid-1970s, however, sentencing based on forward-looking assessments of offender risk was abolished in many jurisdictions in favor of set periods of confinement based solely on backward-looking appraisals of offender blameworthiness. This situation is rapidly changing, however. After a hiatus of 40 years, there has been a resurgence of interest in risk assessment in criminal sentencing. Across the political spectrum, advocates have proposed that mass incarceration can be shrunk without simultaneously jeopardizing the historically low crime rate if we put a morally constrained form of risk assessment back into sentencing.

INTRODUCTION

As the National Research Council recently concluded, the growth in incarceration in the United States since the early 1970s has been “historically unprecedented and internationally unique.”¹ The United States accounts for 5% of the world’s population and 25% of the world’s imprisoned population. Western European democracies have an incarceration rate one-seventh that of the United States. One percent of all American adults—2.3 million people—are currently incarcerated. Nearly 12 million admissions to local jails occur each year. The direct fiscal costs of what has come to be known as “mass incarceration” are widely estimated to be \$80 billion a year.²

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1. NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 2 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

2. See John Monahan & Jennifer Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489 (2016); COALITION FOR PUBLIC SAFETY, www.coalitionforpublicsafety.org.

The broader human costs of mass incarceration, however, are incalculable. The “collateral consequences” of conviction and imprisonment in terms of lifelong restrictions on many forms of employment and housing are stark.³ Even when a specific occupation is not barred to ex-prisoners by statute, the effects of having a criminal record on employability are dramatic. Former prison inmates have vastly higher unemployment rates than non-prisoners, and those who do manage to find employment face a 40% decrease in estimated annual earnings. The effects of a parent’s imprisonment on their children are profound and dire.⁴

I argue here that one way to reduce mass incarceration and the fiscal and human sufferings intrinsic to it is to engage in a morally constrained form of risk assessment in sentencing offenders. It proceeds in four parts. First, I briefly sketch the history of risk assessment in American sentencing and portray the role played by risk assessment in a mixed retributive/utilitarian system of sentencing. Second, I illustrate the uses of risk assessment in several jurisdictions and summarize the current state of the debate among scholars in both law and behavioral science on risk assessment in sentencing. Third, I appraise several different types of potential risk factors for recidivism frequently discussed in the context of sentencing: past crime, demographic characteristics, and psychosocial characteristics. Finally, I offer four specific recommendations regarding the use of risk assessment in sentencing as one means of reducing mass incarceration: (1) employ risk assessment to sentence low-risk offenders to community sanctions or to a shortened period of incarceration; (2) make judicial deference to an offender’s low-risk designation presumptive rather than advisory; (3) do *not* employ risk assessment to increase the time for which high-risk offenders are incarcerated; and (4) charge state sentencing commissions with conducting local empirical validations of any proposed risk-assessment instruments and with vigorously debating the moral and social implications of relying on the risk factors included in those instruments.

I. DESCRIPTION OF EXISTING LAW AND POLICY

A. A BRIEF HISTORY OF RISK ASSESSMENT IN SENTENCING

The most widely used definition of risk assessment describes it as “the process of using risk factors to estimate the likelihood (i.e., probability) of an

3. See Gabriel J. Chin, “Collateral Consequences,” in the present Volume.

4. See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); COALITION FOR PUBLIC SAFETY, *supra* note 2; see generally Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume.

outcome occurring in a population.”⁵ In the case of sentencing, the “population” consists of convicted offenders and the “outcome” is criminal recidivism. “Risk factors” are simply variables that (1) statistically correlate with recidivism, and (2) precede recidivism in time.

The assessment of an offender’s risk of recidivism was once a central component of criminal sentencing in the United States. In California, for example, indeterminate sentencing—whereby an offender is given a relatively low minimum sentence and a relatively high maximum sentence and is released from prison when he or she is believed no longer to present an undue risk of committing a new crime—was introduced in 1917. In the mid-1970s, however, indeterminate sentencing based on forward-looking assessments of offender risk was abolished in California and in many other American jurisdictions in favor of set periods of confinement based on backward-looking appraisals of offender blameworthiness.⁶

This situation is rapidly changing, however. Remarkably, after a hiatus of 40 years, there has been a resurgence of interest in risk assessment in criminal sentencing in many American states. Across the political spectrum, advocates have proposed that one way to begin dialing down mass incarceration without simultaneously jeopardizing the historically low American crime rate is to put risk assessment back into sentencing. It has recently been estimated that courts in at least 20 states have begun to incorporate risk assessment into the sentencing process “in some or all cases.”⁷

B. THE ROLE OF RISK ASSESSMENT IN A HYBRID SYSTEM OF SENTENCING

Almost all scholars of sentencing distinguish two broad and polar opposite approaches to the allocation of criminal punishment. One of these approaches is usually termed *retributive* and the other *utilitarian*. Adherents of the retributive approach believe that an offender’s moral culpability for crime committed in the past should be the sole consideration in determining his or

5. Helena Kraemer et al., *Coming to Terms with the Terms of Risk*, 54 ARCH. GEN. PSYCHIATRY 337, 340 (1997).

6. See Monahan & Skeem, *Risk Assessment*, *supra* note 2; John Monahan & Jennifer Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 FED. SENT’G. REP. 158 (2014); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT’G. REP. 167 (2014). For discussions of determinate sentencing, see Douglas A. Berman, “Sentencing Guidelines,” in the present Volume; and Erik Luna, “Mandatory Minimums,” in the present Volume.

7. Sonja Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809 (2014).

her punishment. In the best known retributive theory, known as “just deserts,” offenders should be punished “because they deserve it, and the severity of their punishment should be proportional to their degree of blameworthiness”⁸ for the crimes they have committed in the past, and to nothing else.

In stark contrast, advocates of the utilitarian approach believe that punishment is justified solely by its ability to decrease future criminal acts by the offender or by deterring other would-be offenders from committing—or continuing to commit—crimes.⁹

Many legal scholars have argued that any workable theory of sentencing must address *both* retributive *and* utilitarian concerns, rather than just one of them. The most influential hybrid theory of sentencing is that developed by Norval Morris,¹⁰ which he called “limiting retributivism.” In Morris’s theory, retributive principles can only set an upper (and perhaps also a lower) limit on the severity of punishment, and within this range of what he called “not undeserved” punishment, utilitarian concerns—such as the offender’s risk of recidivism—can be taken into account. Kevin Reitz elaborates:

Here, proportionality in punishment is understood as an imprecise concept with a margin of error, not reducible to a specific sanction for each case. The “moral calipers” available to human beings are set wide, the theory asserts, producing a substantial range of justifiable sentences for most cases. At some upper boundary, we begin to feel that a penalty is clearly disproportionate in severity and, at a lower point, we intuit that it is clearly too lenient. Imagining a generous spread between the two, limiting retributivism would permit utilitarian purposes to determine sentences within the morally permissible range.¹¹

The American Law Institute’s highly-influential Model Penal Code explicitly adopts the hybrid, limiting retributivism approach to criminal sentencing. In particular, a draft provision provides that state sentencing commissions:

shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety. ...

8. RICHARD S. FRASE, *JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM* 8 (2013). For a discussion of retributive theory, see Jeffrie G. Murphy, “Retribution,” in the present Volume.

9. See generally Daniel S. Nagin, “Deterrence,” in the present Volume; Shawn D. Bushway, “Incapacitation,” in the present Volume.

10. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1977).

11. Kevin Reitz, *Sentencing*, in *CRIME AND PUBLIC POLICY* 472 (James Wilson & Joan Petersilia eds., 2011) (citations omitted).

When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a shorter prison term than indicated in statute or guidelines.¹²

*C. RISK ASSESSMENT IN TWO ILLUSTRATIVE STATES
AND IN THE FEDERAL SYSTEM*

In the words of the Model Penal Code, “On risk assessment as a prison-diversion tool, Virginia has been the leading innovator among American states.”¹³ Pennsylvania is expected to attain similar status in the near future, as planned reforms promoting risk assessment go into effect. Both states’ risk-assessment procedures are summarized here, as well as the risk-assessment procedures currently applied to probationers in the federal system.

1. Virginia

In 1994, the Virginia Legislature required the state’s newly-formed Criminal Sentencing Commission to develop an empirically-based risk-assessment instrument for use in diverting 25% of the “lowest-risk, incarceration-bound, drug and property offenders” to non-jail or prison sanctions such as probation, community service, outpatient substance-abuse treatment, or electronic monitoring.¹⁴ The risk factors included on the original assessment tool developed by the Commission consisted of six types of variables: offense type, whether the offender is currently charged with an additional offense, “offender characteristics” (i.e., gender, age, employment, and marital status), whether the offender had been arrested or confined within the past 18 months, prior felony convictions, and prior adult incarcerations. In 2012, the Commission re-validated its risk-assessment instruments on large samples of eligible drug and larceny/fraud offenders. In these samples, 63% of drug offenders scored in the low-risk group and 37% scored in a higher-risk group, while 43% of the larceny/fraud offenders scored in the low-risk group and 57% scored in a higher-risk group. Recidivism in this research was defined as reconviction

12. MODEL PENAL CODE: SENTENCING § 6B.09(3) (Am. Law Inst., Proposed Final Draft, approved May 24, 2017).

13. *Id.* at 375.

14. Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT’G. REP. 165, 165 (2004); Meredith Farrar-Owens, *The Evolution of Sentencing Guidelines in Virginia: An Example of the Importance of Standardized and Automated Felony Sentencing Data*, 25 FED. SENT’G. REP. 168, 170 (2013). For a discussion such sanctions, see Michael Tonry, “Community Punishments,” in the present Volume.

for a felony offense within three years of release from incarceration. Of drug offenders designated as low risk, 12% recidivated; by comparison, 44% of higher-risk drug offenders recidivated. Of larceny/fraud offenders designated as low risk, 19% recidivated; by comparison, 38% of higher-risk larceny/fraud offenders recidivated.¹⁵

The instruments are administered only to offenders for whom the state's sentencing guidelines recommend incarceration in prison or jail. In addition, offenders must meet certain eligibility criteria (e.g., a criminal history of only nonviolent offenses). If the offender's total score on the instrument is below a given cut-off, he or she is recommended for an alternative, community-based sanction; if the offender's score on the instrument is above that cut-off, the prison or jail term recommended by the sentencing guidelines remains in effect.¹⁶ In fiscal year 2015, among the eligible offenders for whom a risk assessment was conducted, almost half (49%) were assessed as "low risk," and therefore recommended for an alternative community-based sanction. Over one-third (41%) of these jail- or prison-bound offenders who were recommended for an alternative sanction were in fact sentenced to a community-based program by the judge.¹⁷ One reason that a judge would fail to sentence a low-risk offender to a community-based program rather than to incarceration is that a program appropriate for the offender's needs (e.g., drug treatment) does not exist in the offender's home community.

15. VIRGINIA CRIMINAL SENTENCING COMMISSION, 2012 ANNUAL REPORT (2012), <http://www.vcsc.virginia.gov/2012VCSCAnnualReport.pdf>. I am grateful to Meredith Farrar-Owens, the Commission's Director, for her help in obtaining and understanding these data.

16. In 1999, the Virginia Legislature required the Commission to develop a second empirically based instrument, this time in order to identify the *highest* risk rather than the *lowest* risk offenders. More specifically, the Commission developed two largely similar risk assessment instruments for sexually violent offenders, one for rape and one for other types of sexual assault. If the sex offender's score on the instrument exceeds a specified cut-off, the offender's maximum recommended sentence can be increased by as much as a factor of three. I believe that this use of risk assessment to raise sentences clearly violates the limits imposed by the "limiting retributivism" theory of punishment. See *infra* text accompanying note 52.

17. VIRGINIA CRIMINAL SENTENCING COMMISSION, 2015 ANNUAL REPORT (2016), <http://www.vcsc.virginia.gov/2015AnnualReport.pdf>.

2. Pennsylvania

In 2010, the Pennsylvania Legislature enacted a statute that read:

The Commission [on Sentencing] shall adopt a sentence risk assessment instrument for the sentencing court to use to help determine the appropriate sentence within the limits established by law. . . . The risk assessment instrument may be used as an aide in evaluating the relative risk that an offender will reoffend.¹⁸

In response, the Commission on Sentencing developed a risk scale for offenders convicted of offenses of medium severity. The initial scale consisted of eight risk factors: gender, age, county, total number of prior arrests, prior property arrests, prior drug arrests, current property offender, and gravity of the current offense. The Commission validated the risk scale on large samples of offenders. In these samples, 12% of offenders scored in the low-risk group, and 88% scored as higher risk. Recidivism was defined as rearrest for any crime within three years of release from prison. Of offenders designated by the risk scale as low risk, 22% recidivated; by comparison, 56% of higher-risk offenders recidivated. The Commission is now revising its risk scale (e.g., removing “county” as a risk factor) and developing separate risk scales for offenders with differing degrees of offense severity. The formal incorporation of risk assessment in criminal sentencing in Pennsylvania is still pending.¹⁹

3. The federal system

Risk assessment is *not* used to inform sentencing decisions in the federal system. Rather, the Post Conviction Risk Assessment instrument (“PCRA”) is used to inform probation decisions designed to reduce risk—i.e., to identify *whom* to provide with relatively intensive services (namely, higher-risk offenders) and *what* factors to target in those services (e.g., substance abuse, mental illness). When federal probationers are found to violate conditions of probation—including treatment conditions—judges may “revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release . . . without credit for time previously served on postrelease supervision.”²⁰

18. 42 PA. CONS. STAT. § 2154.7(a) (2010).

19. Progress reports are available. See *Risk Assessment Project*, PENNSYLVANIA COMMISSION ON SENTENCING, <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/>. I thank Mark Bergstrom, Executive Director of the Commission, for his help in understanding these data.

20. 18 U.S.C. § 3583(e)(3).

The PCRA is a statistical prediction instrument that was constructed and validated on large, independent samples of federal offenders. Fifteen items are included on the instrument. Each of the items is nested in one of five domains—criminal history (e.g., prior violent arrests), education/employment (e.g., highest level of education, employed at the time of arrest), social networks (e.g., marital status, criminal peers), substance abuse (e.g., current alcohol or drug problem), and attitudes (e.g., antisocial attitudes/values). While under a term of supervision averaging three to four years, 11% of offenders scored by the PCRA as low risk were rearrested for a new crime, while offenders scored by the PCRA as high risk had a rearrest rate of 83% (with offenders scored at intermediate risk being rearrested at rates between these extremes).²¹

II. THE CURRENT STATE OF THE DEBATE ON RISK ASSESSMENT IN SENTENCING

A. THE LEGAL DEBATE

Debates among legal scholars and practitioners on the role of risk assessment in sentencing revolve around two issues. The first relates to sentencing theory. Most sentencing systems and the Model Penal Code ground their prescriptions in the “limiting retributivism” model described above, in which retributive principles set outer limits on the severity of punishment, and within these limits, an offender’s risk of recidivism can be taken into account.

Some prominent legal scholars, however, favor a more unalloyed version of retributivism. There is no role for forward-looking assessments of offenders’ risk of future crime in a purely backward-looking retributive model of sentencing based solely on blameworthiness for crimes already committed. Sonja Starr, for example, refers to the incorporation of risk assessment into sentencing as “evidence-based sentencing” (EBS):

EBS provides sentencing judges with risk scores for each defendant based on variables that, in addition to criminal history, often include gender, age, marital status, and socioeconomic factors such as employment and education. [T]his trend is being pushed by progressive reform advocates who hope it will reduce incarceration

21. Christopher Lowenkamp et al., *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 PSYCHOL. SERV. 87 (2013).

rates by enabling courts to identify low-risk offenders. [These advocates] are making a mistake. As currently practiced, EBS should be seen neither as progressive nor as especially scientific—and it is almost surely unconstitutional.²²

The second issue of legal contention regarding the role of risk assessment in sentencing has to do with whether the risk factors used to assess violence risk are merely “proxies” for race or poverty. Former Attorney General Eric Holder, for example, expressed hesitation about using risk assessment to inform sentencing decisions:

By basing sentencing decisions on static factors and immutable characteristics—like the defendant’s education level, socioeconomic background, or neighborhood—[risk assessments] may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society. Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant’s history of criminal conduct. They should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place.²³

Whether evidence-based risk assessment exacerbates, ameliorates, or has no effect on racial or socioeconomic disparities is sentencing, however, is a relative inquiry: risk assessment *compared to what*? If evidence-based risk assessment is compared to judges’ intuitive and subjective consideration of an offender’s likelihood of recidivism in sentencing, then evidence-based risk assessment will emerge as more transparent, more consistent, and more accurate than judicial hunch.²⁴ If evidence-based risk assessment is compared to the use of

22. Starr, *supra* note 7, at 805. See generally John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006); Christopher Slobogin, *Risk Assessment*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* (Joan Petersilia & Kevin Reitz eds., 2012).

23. Eric Holder, Attorney General Eric Holder Speaks at the National Association of Criminal Defense Lawyers 57th Annual Meeting (2014), U.S. DEP’T OF JUSTICE, <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th>. See generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007). The “proxy” issue has become much more contentious since the recent publication of Julia Angwin et al., *Machine Bias: There’s Software Used Across the County to Predict Future Criminals. And It’s Biased Against Blacks*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>. In response, see Anthony Flores et al., *False Positives, False Negatives, and False Analyses: A Rejoinder*, 80 FED. PROB. 38 (2016).

24. Monahan & Skeem, *Risk Assessment*, *supra* note 2.

sentencing guidelines that heavily rely on criminal history—the single variable that accounts most dramatically for racial disparity in imprisonment rates²⁵—then the comparative virtues of relying on evidence-based risk assessment begin to become apparent.

B. THE SCIENTIFIC DEBATE

Only one scientific issue generates much controversy in the field of risk assessment: can accurate inferences about an individual person—in this case, about a convicted offender—be drawn from data derived from groups of people (in this case, from groups of convicted offenders)? Some scholars have taken the position that “on the basis of empirical findings, statistical theory, and logic, it is clear that predictions of future offending cannot be achieved, with any degree of confidence, in the individual case.”²⁶

Many other scholars have taken the contrary view, however, arguing that group-based data can be highly informative when making decisions about individual cases. Consider three examples from other forms of risk assessment. In the insurance industry, “until an individual insured is treated as a member of a group, it is impossible to know his expected loss, because for practical purposes that concept is a statistical one based on group probabilities. Without relying on such probabilities, it would be impossible to set a price for insurance coverage at all.”²⁷ In weather forecasting, a wealth of data are available on given events occurring under specified conditions. Therefore, when meteorologists “predict a 70 percent chance of rain, there is measurable precipitation just about 70 percent of the time.”²⁸ Finally, consider the medical analogy: “Suppose a 50-year-old man learns that half of people with his diagnosis die in five years. He would find this information very useful in deciding whether to purchase an annuity that would begin payouts only after he reached his 65th birthday.”²⁹

25. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201 (2009).

26. David J. Cooke & Christine Michie, *Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice*, 34 LAW & HUM. BEHAV. 259, 259 (2010).

27. KENNETH ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 79 (1986). Several Supreme Court cases have held that insurers that provide employer-based group insurance may not use sex as a group-based risk factor. “These holdings do not, however, apply to insurance sold in individual markets outside of employment, where sex-based discrimination is generally permitted, especially in the context of life insurance.” KENNETH ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 142 (7th ed. 2015).

28. NATIONAL RESEARCH COUNCIL, *IMPROVING RISK COMMUNICATION* 46 (1989).

29. Douglas Mossman, *From Group Data to Useful Probabilities: The Relevance of Actuarial Risk Assessment in Individual Instances*, 43 J. AM. ACAD. PSYCHIATRY & L. 93, 99 (2015).

The debate among scientists on the legitimacy of making individual inferences from group data appears to be subsiding. In the words of two eminent statisticians:

If groups of individuals with high and low propensities for violence recidivism can be distinguished, and courts act upon such distinctions, recidivism will decline to the extent that groups most prone to violence are incapacitated, and infringements upon those least so prone are minimized. And both society and offenders will be better served even if we cannot be sure, based on tight statistical intervals, from precisely which individual offenders this betterment derives.³⁰

III. THE PROCRUSTEAN QUANDARY: WHICH PREDICTIVELY VALID RISK FACTORS TO USE IN SENTENCING?

Abstract jurisprudential debates about the use of risk assessment in sentencing quickly run into a highly practical issue: from a pool of risk factors found to validly predict recidivism, which risk factors are acceptable to include on an assessment instrument? Risk assessment without risk factors would be an incoherent enterprise. The scientific concerns here are straightforward: statistical procedures to establish whether a valid correlation exists between a given risk factor and a given measure of recidivism are uncontroversial, and which comes first—the risk factor or the recidivism—is obvious. Legal, moral, and political concerns are the ones that dominate in choosing, among a set of scientifically valid risk factors, the ones to use in sentencing. More specifically, attributions of blameworthiness not only impose overall limits on *sentence severity*, they also serve as moral constraints on the *type of risk factors* that can be used to assess an offender's likelihood of recidivism.³¹ Consider first the use of prior crime as a risk factor for use in sentencing, then the use of demographic characteristics, and finally the use of psychosocial characteristics.

A. PAST CRIME AS A RISK FACTOR FOR RECIDIVISM

It has long been axiomatic in the field of risk assessment that past crime is the best predictor of future crime. All actuarial risk assessment instruments reflect

30. Peter B. Imrey & A. Philip Dawid, *A Commentary on Statistical Assessment of Violence Recidivism Risk*, 2 STAT. & PUB. POL'Y 25, 40 (2015); see also David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417 (2014); David L. Faigman, Christopher Slobogin & John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 NW. U. L. REV. 859 (2016).

31. Monahan & Skeem, *Risk Assessment*, *supra* note 2.

this empirical truism. The California Static Risk Assessment Instrument, for example, contains 22 risk factors for criminal recidivism, fully 20 of which—all but gender and age—are indices of past crime.³²

The use of past crime is the least controversial risk factor used in sentencing. This is because an offender's prior involvement in crime is taken by many³³ to indicate not only an increased risk that the offender will commit crime in the future, it also aggravates the perception that the offender is blameworthy for the crime for which he or she is being sentenced. That is, "a record of prior offenses bears *both* on the offender's deserts *and* on the likelihood of recidivism."³⁴

The existence of a criminal record is not the only risk factor that reflects an offender's prior involvement in crime. Committing crime while under the influence of drugs, being a member of a criminal gang, or being convicted of the current crime while on legal restraint (i.e., probation, parole, or pre-trial release) all reflect the depth of an offender's engagement in crime and are often used simultaneously to aggravate perceptions of blame for past crime and to increase assessed risk for future crime.³⁵

However, one crucial issue looms over the use of past crime as a risk factor for recidivism. A record of prior criminal arrests and convictions can reflect the differential *involvement* of the members of given groups in criminal behavior, and it can also reflect the differential *selection* of the members of given groups by police to arrest, by prosecutors to indict, and by judges and juries to convict.³⁶ The extent to which the presence of a criminal record signifies differential selection by the criminal justice system rather than differential involvement in criminal behavior is highly contested in debates on risk assessment in sentencing.³⁷ It is noteworthy in this regard that the recently approved Model Penal Code recommends that state sentencing commissions

32. SUSAN TURNER, JAMES HESS & JESSE JANETTA, DEVELOPMENT OF THE CALIFORNIA STATIC RISK ASSESSMENT INSTRUMENT (CSRA) (UCI Center for Evidence-Based Corrections, Nov. 2009), <http://ucicorrections.seweb.uci.edu/files/2009/11/CSRA-Working-Paper.pdf>.

33. Although not by all academics. See Julian V. Roberts, *Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium*, 48 BRIT. J. CRIMINOLOGY 468, 469 (2008) ("a plausible retributive justification for the recidivist sentencing premium has proved as elusive as the legendary resident of Loch Ness").

34. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 87 (1976) (emphases added).

35. Monahan & Skeem, *Risk Assessment*, *supra* note 2; Tonry, *supra* note 6.

36. Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1 (2008).

37. Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680 (2016).

“shall give due consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups.”³⁸

B. DEMOGRAPHIC CHARACTERISTICS AS RISK FACTORS FOR RECIDIVISM

Three demographic variables are most often discussed as risk factors for recidivism: age, gender, and race.³⁹

1. Age

Few would dispute the conclusion offered by Robert Sampson and Janet Lauritsen to the National Research Council’s Panel on the Understanding and Control of Violent Behavior: “Age is one of the major individual-level correlates of violent offending. In general, arrests for violent crime peak around age 18 and decline gradually thereafter.”⁴⁰ Researchers at the Bureau of Justice Statistics studied the recidivism rates of offenders released from prisons in 30 U.S. states. Eighty-four percent of state prisoners age 24 and younger at release were rearrested for non-traffic offenses within five years, compared with 69% of state prisoners age 40 and older at release.⁴¹

38. MODEL PENAL CODE: SENTENCING § 6B.07 (1)(c) (Am. Law Inst., Proposed Final Draft, approved May 24, 2017).

39. A recent nationally representative survey of the general public on the use of gender, age, and race as risk factors in sentencing concluded, “[w]hile over three-quarters of participants were against using race to determine prison sentences, almost half were open to the possibility of using gender and over three-quarters of the participants were open to the possibility of using age to determine prison sentences.” Nicholas Scurich & John Monahan, *Evidence-Based Sentencing: Public Openness and Opposition to Using Gender, Age, and Race as Risk Factors for Recidivism*, 40 LAW & HUM. BEHAV. 36 (2016).

40. Robert J. Sampson & Janet L. Lauritsen, *Violent Victimization and Offending: Individual-, Situational-, and Community-Level Risk Factors*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 18 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994) (citations omitted).

41. MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 12 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

The Pennsylvania Commission on Sentencing recently examined what would happen if age was eliminated from the risk scale it had developed: “[O]ur analyses found that age was the most important demographic factor in predicting recidivism and the removal of that factor would have the most impact on recidivism prediction and scale accuracy.”⁴²

2. Gender

That women commit acts of criminal violence at a much lower rate than men is a staple in criminology and has been known for as long as official records have been kept. The earliest major review of this topic concluded that “sex difference in aggression has been observed in all cultures in which the relevant behavior has been observed. Boys are more aggressive both physically and verbally. ... The sex difference is found as early as social play begins—at age 2 or 2½.”⁴³ Another review concluded that “sex is one of the strongest demographic correlates of violent offending. ... [M]ales are far more likely than females to be arrested for all crimes of violence, including homicide, rape, robbery, and assault.”⁴⁴ Of the persons arrested for committing a violent crime in the United States in 2015, 80% were men and 20% were women.⁴⁵ In terms of recidivism rates, 72% of male state prisoners released in 2005 were rearrested for a violent offense within five years, compared with 61% of female state prisoners.⁴⁶

42. PENNSYLVANIA COMMISSION ON SENTENCING, SPECIAL REPORT: IMPACT OF REMOVING DEMOGRAPHIC FACTORS (2015), <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/phase-ii-reports/special-report-impact-of-removing-demographic-factors/view>; see also John Monahan, Jennifer Skeem & Christopher Lowenkamp, *Age, Risk Assessment, and Sanctioning: Overestimating the Old, Underestimating the Young*, 41 LAW & HUM. BEHAV. 191 (2017).

43. ELEANOR E. MACCOBY & CAROL N. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 352 (1974).

44. Sampson & Lauritsen, *supra* note 40, at 19.

45. *Preliminary Semiannual Uniform Crime Report, January-June 2016*, FEDERAL BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/preliminary-semiannual-uniform-crime-report-januaryjune-2016>.

46. Durose et al., *supra* note 41, at 11. The rearrest rates for any non-traffic offense within five years after release were 78% for male prisoners and 68% for female prisoners. *Id.*

Regarding violence, it is hard to contest the conclusion of Michael Gottfredson and Travis Hirschi's classic, *A General Theory of Crime*: "gender differences appear to be invariant over time and space."⁴⁷

3. Race

The Bureau of Justice Statistics has reported that "[b]y the end of the fifth year after release from prison, white (73.1%) and Hispanic (75.3%) offenders had lower recidivism rates than black offenders (80.8%)."⁴⁸ However, as Richard Frase has articulated, settled law has taken race off the table for use as a risk factor in sentencing:

Race is really in a class by itself. The history of de jure racial discrimination in the United States, and continuing de facto discrimination, make race a highly "suspect" criterion, especially when it is used to support policies that disfavor minorities and favor whites (which is the most likely scenario in the sentencing

47. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* 145 (1990); see also Jennifer Skeem, John Monahan & Christopher Lowenkamp, *Gender, Risk Assessment, and Sanctioning: The Cost of Treating Women Like Men*, 40 *LAW & HUM. BEHAV.* 580 (2016). A recent decision of the Wisconsin Supreme Court, *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016), allowed the consideration at the time of sentencing of an actuarial risk assessment instrument—the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS")—that includes gender, provided that several "cautions" were given:

Specifically, any PSI [Presentence Investigation Report] containing a COMPAS risk assessment must inform the sentencing court about the following cautions regarding a COMPAS risk assessment's accuracy: (1) the proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined; (2) risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed; (3) some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism; and (4) risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.

Id. at 763–64.

48. Durose et al., *supra* note 41, at 13. These recidivism rates refer to rearrest for any non-traffic offense.

context) [R]ace can never be given any formal role in issues of sentencing severity *even if it is found to be correlated with and predictive of risk*.⁴⁹

C. PSYCHOSOCIAL CHARACTERISTICS AS RISK FACTORS FOR RECIDIVISM

In preparation for the development of its own risk scale to be used in sentencing, the Pennsylvania Commission on Sentencing reviewed 29 existing risk-assessment instruments—containing a total of 125 different risk factors. The five risk factors that the Commission categorized as “psychosocial” that were found most frequently on these existing instruments were: whether the offender was currently employed, his or her highest level of education, whether the offender had criminal friends, the degree of social or marital support available to the offender, and whether the offender had a stable residence.⁵⁰ None of these variables is without controversy, since none bears on an offender’s blameworthiness for having committed crime in the past. Michael Tonry has argued that the use of any of these as risk factors for recidivism in sentencing both “systematically disadvantages minority defendants” and “in effect punish[es] lawful life-style choices that in a free society people are

49. Richard S. Frase, *Recurring Policy Issues of Guidelines (and non-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions*, 26 FED. SENT’G REP. 145, 149 (2014) (emphasis added). Were there any doubts that race is “in a class by itself,” Chief Justice Roberts’ majority opinion in *Buck v. Davis*, 137 S. Ct. 759, 776, 778 (2017), should dispel them: “It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race ... [Buck’s case] is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are.”

50. PENNSYLVANIA COMMISSION ON SENTENCING, INTERIM REPORT 1: REVIEW OF FACTORS USED IN RISK ASSESSMENT INSTRUMENTS (2011), <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/phase-i-reports/interim-report-1-review-of-factors-used-in-risk-assessment-instruments/view>; see also Sarah L. Desmarais, Kiersten L. Johnson & Jay P. Singh, *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 PSYCHOL. SCI. 206 (2016). Similarly, a remarkable recent study of over 47,000 released prisoners in Sweden assessed the risk of conviction for a violent felony during the first two years after release. Among the risk factors that emerged in the final validated model were “male sex, younger age, ... violent index (or most recent) offence, previous violent crime, being never married, fewer years of formal education, being unemployed before prison, low disposable income, living in an area of higher neighbourhood deprivation, and diagnoses of alcohol use disorder, drug use disorder, any mental disorder, and any severe mental disorder.” Seena Fazel et al., *Prediction of Violent Reoffending on Release from Prison: Derivation and External Validation of a Scalable Tool*, 3 LANCET PSYCHIATRY 535, 538 (2016).

entitled to make. ... Free citizens are entitled to decide to be married or not ... even if statistical analyses show that being unmarried is correlated with higher rates of offending and reoffending.”⁵¹

RECOMMENDATIONS

I am led to four recommendations regarding the use of risk assessment in sentencing:

1. **Employ risk assessment to sentence nonviolent offenders at low risk of recidivism to community sanctions or to a shortened period of incarceration.** Within the widely-accepted “limiting retributivism” theory, retributive principles can only set outer limits on the severity of punishment, and within the range set by these limits, utilitarian concerns, such as an offender’s low risk of recidivism, can—and I believe should—be taken into account.⁵²
2. **Make judicial deference to a finding of low-risk on a validated assessment instrument presumptive rather than advisory for nonviolent offenders.** The sentencing judge should be required to state on the record a cogent reason whenever he or she disregards the sentence-lowering implications of a low-risk designation. State sentencing commissions should periodically review the “cogency” of these deviations from presumptive deference to empirical findings of low risk.
3. **Do *not* employ risk assessment to lengthen the period for which high-risk violent offenders are incarcerated beyond the range set by retributive considerations.** Procedures such as those in Virginia by which a finding of high risk alone—without any finding of heightened culpability—can triple the sentence otherwise given to those convicted of sex crimes clearly violates the limits imposed by the “limiting retributivism” theory of punishment.
4. **Charge state sentencing commissions with conducting local empirical validations of any proposed risk-assessment instrument and with vigorously debating the moral and social implications of relying on the specific risk factors to be included on the instrument.** In the words of the Model Penal Code, state sentencing commissions “shall develop actuarial instruments or processes to identify offenders who present an

51. Tonry, *supra* note 6, at 171, 173.

52. Cf. *supra* note 16.

unusually low risk to public safety.”⁵³ The moral and social implications of incorporating demographic and psychosocial risk factors on those actuarial instruments should be subject to thorough public deliberation, particularly in terms of any potentially disparate racial or socioeconomic impact. In order for it to be useful in sentencing, “risk assessment must be both empirically valid and perceived as morally fair across groups.”⁵⁴

The use of risk assessment to identify offenders at the low risk of recidivism and to sentence them either to community sanctions or to a shortened period of institutional confinement is hardly a panacea for mass incarceration. Yet as Richard Frase has argued, “with respect to low-risk assessments, can we afford to renounce any major sources of mitigation, given our inflated American penalty scales and overbroad criminal laws?”⁵⁵

53. MODEL PENAL CODE, *supra* note 12, § 6B.09(3). See Francis T. Cullen, Cheryl L. Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011):

Although the evidence is very limited, it is likely that low-risk offenders are most likely to experience increased recidivism due to incarceration. From a policy perspective, it is essential to screen offenders for their risk level and to be cautious about imprisoning those not deeply entrenched in a criminal career or manifesting attitudes, relationships, and traits associated with recidivism.

Id. at 60S (emphasis in original).

54. Skeem, Monahan & Lowenkamp, *supra* note 47, at 582.

55. Frase, *Recurring Policy Issues*, *supra* note 49, at 151.

Sentencing Guidelines

*Douglas A. Berman**

In the 50 years since Judge Frankel and others began questioning the theory and practices of wholly discretionary sentencing systems, there has been extraordinary evolution in the laws, policies, politics, and practices of U.S. sentencing systems nationwide. Though the uneven and often uninspired experiences of the federal system have often cast a negative light on the “guideline model” of sentencing reform, there still is no serious dispute that a well-designed guideline structure provides the best means for the express articulation of sound standards to inform and shape individual sentencing outcomes and to promote transparency and the rule of law throughout a jurisdiction’s sentencing system. There are challenges to designing and managing the particulars of an effective guideline sentencing system, but these are challenges that lawmakers should embrace, not avoid.

I. DEVELOPMENT OF THE GUIDELINE MODEL OF SENTENCING REFORM

A. LAWLESSNESS IN SENTENCING

For the first three-quarters of the 20th century, vast discretion was the hallmark of both state and federal sentencing. Trial judges had nearly unfettered authority to impose upon defendants any sentence from within broad statutory ranges provided for offenses, and parole officials had authority to release prisoners any time after they had served a portion of their nominal sentence.¹ Such a discretionary sentencing process was integral to a system that formally premised punishment decisions and offender treatments upon a rehabilitative model. Broad judicial discretion in the ascription of sentencing terms—complemented by parole officials exercising similar discretion concerning

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1. See generally S. REP. NO. 98-225, at 38-49 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221-32 (reviewing federal sentencing before modern reforms); FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981).

actual prison release dates—seemed necessary to ensure sentences could be individually tailored to the particular rehabilitative prospects and progress of each offender.²

In traditional discretionary sentencing systems, all three branches of government had a role in determining an offender's punishment, but fundamental issues of sentencing policy were never formally resolved and rarely even addressed. As Judge Marvin Frankel stressed in commentaries that fueled nationwide reforms, in discretionary systems no institution or individual was ever called upon to justify or explain any sentencing decision.³ Because legislatures had “not done the most rudimentary job of enacting meaningful sentencing ‘laws,’”⁴ sentencing judges and parole officials exercised broad discretion in the absence of any rules, standards, or criteria for assessing factors pertinent to sentencing decisions.

Judge Frankel's astute criticisms of discretionary sentencing systems were lodged in the early 1970s around the time academics and advocates were questioning the effectiveness and appropriateness of sentencing focused exclusively around the “rehabilitative ideal.”⁵ Criminal justice researchers were also growing acutely aware of disparities stemming from discretionary sentencing systems.⁶ Empirical and anecdotal evidence indicated that sentencing judges' exercise of broad and largely unreviewable discretion resulted in substantial and undue differences in the types and lengths of sentences meted out to similar defendants, and some studies found that personal factors

2. See Andrew von Hirsch, *The Sentencing Commission's Functions*, in *THE SENTENCING COMMISSION AND ITS GUIDELINES* 3 (Andrew von Hirsch et al. eds., 1987) (“[W]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender's need for treatment.”).

3. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1 (1972); see also Kevin R. Reitz, *Sentencing Reform in the States*, 64 U. COLO. L. REV. 645, 650 n.21 (1993) (calling Frankel's criticisms the “most influential work of criminal scholarship in the last 20 years [which] charted the general outline of sentencing reform through the 1980s and into the 1990s”). Senator Edward Kennedy dubbed Judge Frankel the “father of sentencing reform.” 128 CONG. REC. 26,503 (1982).

4. FRANKEL, *CRIMINAL SENTENCES*, *supra* note 3, at 7.

5. See AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE* (1971); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975); ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* (1975). See generally ALLEN, *supra* note 1, at 7-20 (discussing the “wide and precipitous decline of penal rehabilitationism” as a foundational theory for the criminal justice system); Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume.

6. See Martin L. Forst, *Sentencing Disparity: An Overview of Research and Issues*, in *SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY* 9-23 (Martin L. Forst ed., 1982) (reviewing research concerning sentencing disparity).

such as an offender's race, gender, and socioeconomic status were impacting sentencing outcomes and accounted for certain disparities.⁷

While some attributed sentencing disparities to the failure of judges to exercise their broad discretion soundly,⁸ Judge Frankel recognized that the disparity was a symptom of the greater disease of "lawlessness in sentencing." The failure of legislatures "even to study and resolve ... questions of justification and purpose" left sentencing judges "wandering in deserts of uncharted discretion," and thus necessarily produced "a wild array of sentencing judgments without any semblance of consistency."⁹ Disparity was the "inevitable" result of a system that lacked guiding standards and thereby forced each judge to rely upon his or her own individual sense of justice.¹⁰

B. SENTENCING GUIDELINES AND SENTENCING COMMISSIONS

Since "lawlessness" was the fundamental problem in discretionary sentencing systems, Judge Frankel stressed that the solution was to seek "some immediate, if not immutable, remedies by lawmaking."¹¹ Specifically, Frankel called for the development of a "code of penal law" that would "prescribe guidelines for the application and assessment" of "the numerous factors affecting the length or severity of sentences."¹²

7. See, e.g., Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272-74 (1977) (explaining that "the data on unjust sentencing disparity have indeed become quite overwhelming"); Ilene Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990) (detailing studies showing widespread, unwarranted sentencing disparities); William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 359-62 (1991) (reviewing studies revealing the impact of racial discrimination at sentencing).

8. See Peter A. Ozanne, *Judicial Review: A Case for Sentencing Guidelines and Just Deserts*, in SENTENCING REFORM, *supra* note 6, at 185 (noting that "[p]roponents of sentencing reform have been quick to blame the courts for sentencing disparity").

9. FRANKEL, CRIMINAL SENTENCES, *supra* note 3, at 7-8.

10. See *id.* at 105-06 ("Without binding guides on such questions [concerning the purposes and justifications of criminal sanctions], it is inevitable that individual sentencers will strike out on a multiplicity of courses chosen by each decision-maker for himself."); Michael H. Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315, 323 (1978) ("Without other meaningful guidance, federal district court judges must rely primarily on their personal senses of justice and inevitably will impose widely disparate sentences.").

11. Frankel, *Lawlessness in Sentencing*, *supra* note 3, at 40.

12. FRANKEL, CRIMINAL SENTENCES, *supra* note 3, at 103-18; see also Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 656 (1993) (statement of Marvin Frankel) (explaining that the "overriding objective" of sentencing guideline reforms "was to subject sentencing to law").

Embracing the spirit and substance of Judge Frankel's ideas, nearly all criminal justice experts and scholars soon came to propose or endorse some form of "sentencing guidelines."¹³ Frankel and others expected that, through the formulation of explicit sentencing rules, a guideline system would facilitate the development of clearly defined and principled sentencing law and procedures. In the words of another reform advocate, sentencing guidelines provided a "way of introducing policy and purpose into what has largely been a normless sanctioning system."¹⁴

Importantly, Frankel and others advised that legislatures—because of limited time and expertise, as well as the distorting influences of day-to-day politics—were not the ideal institution for developing all the particulars of a sentencing guideline system. Many reformers expressed particular concern that short-term "gettough" passions would create unavoidable political pressures upon legislatures to enact unduly severe sentences that would prove unwise and costly.¹⁵ Such concerns prompted Judge Frankel to propose the creation of a special administrative agency—a national "Commission on Sentencing"—to help address the problems of lawlessness in sentencing.¹⁶ Judge Frankel and other reformers reasoned that a permanent commission, consisting of knowledgeable experts insulated from political pressures with the opportunity to study sentencing, was well-suited to the sort of detailed sentencing lawmaking that the "guidelines model" required.

Minnesota became the first jurisdiction to turn Judge Frankel's ideas into a full-fledged reality when in 1978 the Minnesota Legislature established the Minnesota Sentencing Guidelines Commission to develop comprehensive

13. See, e.g., FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 3-6 (1976) [hereinafter FAIR AND CERTAIN PUNISHMENT]; DAVID FOGEL, "...WE ARE THE LIVING PROOF...": THE JUSTICE MODEL FOR CORRECTIONS (1976); NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (1979) [hereinafter MODEL SENTENCING ACT]; PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); VON HIRSCH, *supra* note 5; see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3 (1988) ("At the federal level before 1985, scholars and practitioners in the criminal justice community almost unanimously favored the concept of guidelines.").

14. Von Hirsch, *supra* note 2, at 368.

15. Marvin E. Frankel & Leonard Orland, *Sentencing Commission and Guidelines*, 73 GEO. L.J. 225, 232-35 (1984); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1, 8-9 (1991) (detailing reformers' fears that "it was inevitable that the legislature would impose inappropriately stiff punishments in order to take a popular stand against crime").

16. See FRANKEL, CRIMINAL SENTENCES, *supra* note 3, at 118-24; see also Frankel, *Lawlessness in Sentencing*, *supra* note 3, at 50-54.

sentencing guidelines.¹⁷ Pennsylvania and Washington state followed suit,¹⁸ and the federal government joined this sentencing reform movement through the passage of the Sentencing Reform Act of 1984. Throughout subsequent decades, nearly every state adopted some form of structured sentencing that reflected and responded to Judge Frankel's call for the development of sentencing law. Though a number of states created sentencing law only through mandatory sentencing statutes, numerous states created sentencing commissions to develop comprehensive guideline schemes.¹⁹

Fast-forward nearly 50 years since Judge Frankel and others began questioning the theory and practices of discretionary sentencing systems, and there has been extraordinary evolution in the laws, policies, politics, and practices of U.S. sentencing systems nationwide. Though there is considerable variation in the form and impact of structured sentencing reforms, the overall transformation of the sentencing enterprise throughout the United States has been remarkable. The discretionary indeterminate sentencing systems that had been dominant for nearly a century have been replaced by a wide array of sentencing laws and structures that govern and control sentencing decision-making. And, throughout this sentencing reform revolution, the insights and recommendations of Judge Frankel have endured and thrived. This reality is evident in state and federal criminal codes where statements of sentencing purpose and various types of sentencing law and guidelines prominently appear. It is also clearly evidenced by the American Law Institute multi-year project to revise the *Model Penal Code's* sentencing chapter: The ALI's "model" reform is built around an institutional structure that, after articulating general sentencing purposes, calls for the creation of a sentencing commission to be tasked with the construction and revision of a guideline system to inform the ultimate decisions of sentencing judges.²⁰

17. See 1978 Minn. Laws ch. 723 (enabling statute); MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE (1980) (initial version of the Minnesota sentencing guidelines). See generally DALE PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA'S SENTENCING GUIDELINES (1988) (discussing Minnesota's enactment and early experiences with sentencing guidelines).

18. See generally *A Summary of the Minnesota, Washington, and Pennsylvania Guidelines*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 177-88 (Andrew von Hirsch et al. eds., 1987) (reviewing major components of guidelines developed in Minnesota, Washington and Pennsylvania).

19. See Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 70 (2000) (providing table summarizing development of sentencing guidelines systems); SENTENCING GUIDELINES RES. CTR., www.sentencing.umn.edu (last visited Mar. 20, 2017).

20. See generally MODEL PENAL CODE: SENTENCING (Tentative Draft No. 1, 2007).

II. UPS AND DOWNS OF FEDERAL SENTENCING AND ITS GUIDELINES

The federal guideline sentencing system was built on Judge Frankel's sound foundational vision, but most scholars and practitioners have viewed the implementation and evolution of the system deeply flawed. Congress and the U.S. Sentencing Commission have been roundly criticized for producing sentencing laws and guidelines marked by excessive complexity, rigidity, and severity. A major Supreme Court ruling has at best tempered (or perhaps aggravated) the system's flaws by making the federal sentencing guidelines advisory rather than mandatory. Since their inception and to the present day, many have come to single out the federal sentencing guidelines in the landscape of sentencing systems primarily as an example of how *not* to implement Judge Frankel's reform ideas.

A. CONGRESS EMBRACES THEN DISTORTS A GUIDELINE SENTENCING SYSTEM

In 1975, Sen. Edward Kennedy introduced a bill to reform the federal sentencing system, calling for, among other things, the abolition of parole and the creation of a federal sentencing commission to produce sentencing guidelines.²¹ Kennedy's bill served as the foundation for what became, after a lengthy legislative process, the Sentencing Reform Act of 1984 (SRA). The SRA created the United States Sentencing Commission to develop the particulars of federal sentencing standards within a guideline regime, and the SRA's "sweeping" reforms seemed poised to, in the words of Norval Morris, "at last bring principle, coherence, predictability, and justice to sentencing criminal offenders."²²

Unfortunately, in the years that followed the passage of the SRA, Congress and the Sentencing Commission made mistakes large and small that contributed to myriad problems within the federal sentencing system. Congress's primary transgressions involved disrespecting and disrupting the SRA's institutional structure for sentencing lawmaking through the enactment of a series of severe and rigid mandatory minimum sentencing statutes. The same year it enacted the SRA, Congress also established mandatory minimum penalties for certain drug and gun offenses, and the 1986 Anti-Drug Abuse Act included mandatory minimum 5- and 10-year prison terms linked to precise drug quantities for

21. See S. 2699, 94th Cong. (1975).

22. Morris, *supra* note 7, at 285.

all trafficking offenses.²³ Over the next decade, Congress continued to enact new sentencing mandates—including the federal version of “three strikes and you’re out”—in successive federal crime bills.²⁴

As a matter of substantive sentencing policy, these mandatory sentencing laws have always been unwise. Researchers and practitioners have documented that, in practice, mandatory sentencing laws regularly produce unjust outcomes, both in the individual case and across a range of cases, because they base prison terms on a single factor and functionally shift undue sentencing power to prosecutors when selecting charges and plea terms.²⁵ In a cogent and comprehensive 1991 report, the U.S. Sentencing Commission confirmed that the mandatory sentencing laws Congress enacted throughout the 1980s were not achieving their purported goals.²⁶ In a 1995 report, the Sentencing Commission documented that Congress’s disparate treatment of powder cocaine and crack cocaine in mandatory sentencing laws had a disproportionate and unduly severe impact on minority defendants.²⁷

Beyond their substantive deficiencies, Congress’s enactment of mandatory sentencing statutes undermined the SRA’s structure and philosophy for sound sentencing lawmaking. Mandatory sentencing laws, which require a specific sentencing outcome based on one aspect of an offense, are inherently incompatible with the SRA’s guideline system calling for sentences based on “the nature and circumstances of the offense and the history and characteristics of

23. See Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 99 (1999) (detailing all the mandatory minimum sentencing provisions enacted by Congress).

24. *Id.*; see also *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf> (last visited Mar. 20, 2017).

25. See Erik Luna, “Mandatory Minimums,” in the present Volume; BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* (1994); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 65-66 (2009) (“Experienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms ... are a bad idea.... It is why nearly every authoritative nonpartisan law reform organization that has considered the subject, including the American Law Institute in the Model Penal Code (1962), the American Bar Association in each edition of its Criminal Justice Standards (e.g., 1968, standard 2.3; 1994, standard 18-3.21[b]), the Federal Courts Study Committee (1990), and the U.S. Sentencing Commission (1991) have opposed enactment, and favored repeal, of mandatory penalties.”).

26. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991).

27. See U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

the defendant.”²⁸ Particularly problematic were the broad and severe mandatory drug-sentencing provisions Congress enacted while the Sentencing Commission was developing its initial guidelines. The Commission had to alter its initial guidelines in an effort to harmonize, as best it could, the mandatory sentences imposed by Congress with a sound guideline structure.²⁹ But because of the narrow focus of mandatory provisions, these statutes necessarily precluded the Commission from fulfilling fully the SRA’s commitment to “enhance the individualization of sentences [by requiring] a comprehensive examination of the characteristics of the particular offense and the particular offender.”³⁰

B. THE SENTENCING COMMISSION’S PROBLEMATIC GUIDELINE WORK

The U.S. Sentencing Commission’s approach to the construction and development of sentencing guidelines exacerbated problems Congress created through enactment of mandatory minimum statutes. The Sentencing Commission produced an initial set of guidelines that were lengthy and highly detailed, notable for their overall complexity. The initial *Guidelines Manual* comprised more than 200 pages, contained over 100 multi-section guidelines,

28. 18 U.S.C. § 3553(a)(1); see U.S. SENTENCING COMM’N, *supra* note 26, at 26 (“[M]andatory minimums are both structurally and functionally at odds with sentencing guidelines and the goals the guidelines seek to achieve.”); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194 (1993) (“Whereas the guidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the guidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record.”).

29. See Ronnie M. Scotkin, *The Development of the Federal Sentencing Guideline for Drug Trafficking Offenses*, 26 CRIM. L. BULL. 50, 52 (1990) (explaining that Congress’s mandatory minimums “effectively restricted the Commission’s discretion in establishing guidelines for drug trafficking offenses”); William W. Wilkins, Jr. et. al, *Competing Sentencing Policies in a “War on Drugs” Era*, 28 WAKE FOREST L. REV. 305, 319-21 (1993) (detailing how mandatory minimums forced the Commission to alter its standard approach to guideline development).

30. S. REP. NO. 98-225, at 52-53 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3235-36; see also Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649 (2016) (detailing numerous ways mandatory minimum sentencing provisions have distorted the development and application of the federal sentencing guidelines).

and described a complicated nine-step sentencing process culminating in the determination of an offender's applicable sentencing range from within a 258-box grid called the "Sentencing Table."³¹

The substance of the U.S. Sentencing Commission's guidelines proved no more palatable to judges than their bulk. The federal guidelines' instructions to sentencing judges focus on precise offense conduct, requiring sentencing judges to add up points to determine which of 43 possible "offense levels" apply in a particular case.³² For many federal offenses—particularly drug crimes and financial crimes—the seriousness of the offense within the guidelines is assessed through quantitative measures: for drug crimes, the type and quantity of the drugs involved; for financial crimes, the amount of loss.³³ Without regard for an offender's role in this offense, greater quantities of drugs or larger losses result in a much more severe sentence, with these "quantified harms" often eclipsing all other sentencing factors in the determination of recommended prison terms.

The size, structure and substance of the initial *Guidelines Manual* prompted many federal sentencing judges to criticize the guidelines for setting forth "a mechanistic administrative formula"³⁴ that converted judges into "rubber-stamp bureaucrats" or "judicial accountants" in the sentencing process.³⁵ The strict language and intricacies of guideline provisions—which apparently reflected the original Sentencing Commission's concern that incorporating too

31. See U.S. SENTENCING COMM'N, SENTENCING GUIDELINES AND POLICY STATEMENTS §1B1.1 (1987) (setting forth nine steps to be followed for imposing a sentence on an offender) [hereinafter 1987 USSG]; *id.* ch. 5, pt. A, at 5.1-5.2 (setting forth Sentencing Table); see also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 949 (1991) (lamenting that the "effort to produce guidelines or presumptive sentences for every case encouraged excessive aggregation" and suggesting that "the 258-box federal sentencing grid ... should be relegated to a place near the Edsel in a museum of twentieth-century bad ideas").

32. From the beginning and through today, the first four steps in the sentencing process described in the Guidelines Manual are concerned exclusively with offense conduct. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 1B1.1 (2016).

33. See *id.* § 2D1.1(c); *id.* § 2B1.1(b).

34. *United States v. Bogle*, 689 F. Supp. 1121, 1163 (S.D. Fla. 1988) (Aronovitz, J., concurring); see also *United States v. Russell*, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988) (asserting guidelines "reduce the role of the sentencing judge to filling in the blanks and applying a rigid, mechanical formula").

35. Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992); Ellsworth A. Van Graafeiland, *Some Thoughts on the Sentencing Reform Act of 1984*, 31 VILL. L. REV. 1291, 1293-94 (1986) (criticizing Commission's "sentencing by the numbers" as "too depersonalized, too complicated, too punitive, and too burdensome of application"); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 99-100 (1988) (calling guidelines "a complex parlor game").

much of a role for judicial discretion could subvert efforts to reduce sentencing disparity³⁶—frustrated sentencing judges, as did the severity of prison terms resulting from guideline calculations.

Sentencing judges were particularly troubled by the Sentencing Commission's restrictive treatment of judicial authority to depart from the guidelines. Congress in the SRA provided that judges should be permitted to sentence outside guideline ranges whenever they identified an "aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission ... that should result" in a different sentence.³⁷ But, in discussing judges' departure authority in the initial *Guidelines Manual*, the Commission intimated that the guidelines were comprehensive and complete, and that judges would not and should not find many reasons or opportunities to deviate from their precise terms. The Commission indicated that guideline departures should be rare and that relatively few cases should involve factors that it had "not adequately taken into consideration."³⁸ And through a series of policy statements, the Commission declared many potentially mitigating characteristics "not ordinarily relevant" or entirely irrelevant to whether a defendant should receive a departure below the guideline sentencing range.³⁹

Throughout the first decade of guideline sentencing in the federal system, the Sentencing Commission further exacerbated concerns about the rigidity

36. See Barbara S. Meierhoefer, *Individualized and Systemic Justice in the Federal Sentencing Process*, 29 AM. CRIM. L. REV. 889, 891 (1992) ("The Sentencing Commission chose to issue very detailed Guidelines ... [a]s a result, the Guidelines lean heavily to the side of reducing disparity at the expense of sentencing flexibility."); Nagel, *supra* note 7, at 934 (explaining that, in formulating the guidelines, the Commission's "emphasis was more on making sentences alike"); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 632 (1992) (noting that "the way that the Sentencing Commission read its statute and defined its task ... made uniformity the key objective of the guidelines").

37. 18 U.S.C. § 3553(b) (2012).

38. 1987 USSG, *supra* note 31, ch. 1, pt. A, intro. cmt. 4(b), at 1.7; see also KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 72-75 (1998) (detailing how "the Commission has gone out of its way to limit downward departures"); Terence F. MacCarthy & Nancy B. Murnighan, *The Seventh Circuit and Departures from the Sentencing Guidelines: Sentencing By Numbers*, 67 CHI.-KENT L. REV. 51, 56 (1991) (detailing how the guidelines "indicat[ed] the Commission's belief that courts will rarely in fact need to exercise their legal freedom to depart").

39. See 1987 USSG, *supra* note 31, §§ 5H1.1-1.6 (stating age, education, vocational skills, mental and emotional conditions, physical condition, previous employment record, family ties and responsibilities, and community ties are "not ordinarily relevant in determining whether a sentence should be outside the guidelines"); *id.* §5H1.4 (providing that drug dependence or alcohol abuse "is not a reason for imposing a sentence below the guidelines").

and severity of its guidelines through amendments that largely overruled judicial decisions developing possible grounds for departing downward from guideline ranges.⁴⁰ Advocacy from the U.S. Department of Justice, in courts, in Congress, and in the Sentencing Commission, further contributed to guideline amendments and statutory developments that preserved and reified the guidelines' inflexibility and toughness.⁴¹ And complexity concerns have persisted as the guidelines have been amended nearly 800 times in less than three decades,⁴² and as the *Guidelines Manual* has grown to more than 500 pages of sentencing instructions.⁴³

The scope and process for the consideration of offense conduct within the guidelines has been an additional factor and concern in the operation of the federal sentencing guidelines (and one that may have ultimately sparked new constitutional doctrines). Seeking to reduce the significance of prosecutorial charging and plea choices, the federal sentencing guidelines require consideration of all "relevant conduct" in the determination of applicable sentencing ranges.⁴⁴ Consequently, federal sentencing judges are required in guideline determinations to take into account certain conduct that was never formally charged or proven, and even must sometimes consider evidence related to a charge on which a defendant was acquitted at trial.⁴⁵

40. See Judy Clarke, *The Sentencing Guidelines: What a Mess*, FED. PROBATION, Dec. 1991, at 45 (reviewing Commission amendments which seemed to overrule judicial efforts consider offender characteristics).

41. See, e.g., Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1332-40 (2005) (lamenting that the "positions taken by the Department on sentencing, both in Congress and before the Sentencing Commission, have been notable for their almost invariable advocacy of ever-tougher sentencing rules and virtually unyielding opposition to any mitigation of existing sentencing levels"); Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT'G REP. 310 (2003) (describing sentencing provisions of PROTECT Act championed by the Justice Department to limit judicial departures from the guidelines).

42. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL app. C (2016).

43. See *id.*

44. See *id.* § 1B1.3.

45. See, e.g., *United States v. Watts*, 519 U.S. 148 (1997) (holding that the Constitution did not bar guideline increases in a defendant's punishment based on "conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence"); see also Laurie P. Cohen, *How Judges Punish Defendants for Offense Unproved in Court*, WALL ST. J., Sept. 20, 2004, at A1 (discussing individual federal cases in which defendants received large sentence increases based on unproved offense conduct).

C. THE SUPREME COURT'S CONSTITUTIONAL JOLT TO GUIDELINE SYSTEMS

In 2004 and 2005, a somewhat unexpected turn in the U.S. Supreme Court's Sixth Amendment jurisprudence jolted state and federal guideline sentencing systems. Prior to the emergence of this new jurisprudence, the Supreme Court had repeatedly indicated that sentencing proceedings were to be treated constitutionally differently—and could be far less procedurally regulated—than a traditional criminal trial.⁴⁶ But after confronting new procedural issues as a result of new substantive sentencing laws, the Supreme Court started to express constitutional doubts about judicial fact-finding and traditionally lax sentencing procedures.⁴⁷ In 2000, the Supreme Court formally held in *Apprendi v. New Jersey* that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁴⁸ The import and impact of this constitutional principle for guideline sentencing systems became apparent via the Supreme Court's 2004 ruling in *Blakely v. Washington*, which invalidated judicial fact-finding to enhance sentences within a state guideline system.⁴⁹ Shortly thereafter, in *United States v. Booker*, the Supreme Court declared unconstitutional the federal sentencing guideline system's reliance on judicial fact-finding.⁵⁰

The Supreme Court's landmark *Booker* decision—which had two majority opinions emerging from two distinct coalitions of Justices—first declared that the federal sentencing guidelines, by depending on judges to find facts at sentencing for determining applicable guideline ranges, violated the Sixth Amendment's jury trial right. But the prescribed remedy for this Sixth Amendment problem was not to require jury findings but rather to recast the federal sentencing guidelines as “effectively advisory.”⁵¹ So, through the dual rulings of dueling majorities, the Supreme Court in *Booker* declared that the federal sentencing system could no longer mandate sentences based on judicial fact-finding, but it remedied this problem by granting sentencing judges new authority to vary from guidelines ranges after engaging in the very same judicial fact-finding and guideline calculations they had conducted when the guidelines were mandatory.

46. See generally Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 388-401 (2006) (reviewing Supreme Court jurisprudence on sentencing procedures).

47. See *Jones v. United States*, 526 U.S. 227 (1999); Berman, *supra* note 46.

48. 530 U.S. 466, 490 (2000).

49. 542 U.S. 296 (2004).

50. 543 U.S. 220 (2005).

51. *Id.* at 245.

The development and application of the Supreme Court's modern Sixth Amendment jurisprudence to preclude judicial fact-finding in mandatory but not advisory guideline systems has stirred much controversy and debate among policymakers, practitioners, and academics.⁵² But after an initial wave of uncertainty and litigation, most state sentencing guideline systems have been able to make modest and manageable adjustments to their sentencing procedures to accommodate the Supreme Court's new constitutional rules.⁵³ In the federal sentencing system, the *Booker* decision's conversion of guidelines from mandates to advice has been largely perceived, especially by federal district judges, federal defense attorneys and some academics, as a positive improvement to a sentencing system long viewed as needing major reform.⁵⁴

District judges and defense attorneys have generally championed the post-*Booker* federal sentencing system largely because the "advisory" status of the guidelines helps alleviate sentencing rigidity and severity problems. Free from having to follow the guidelines and from having non-guideline sentences subject to searching appellate review, federal district judges now more regularly sentence below the guidelines' recommended prison terms, particularly in drug, fraud and child-pornography cases involving first-time offenders.⁵⁵ Sentencing judges have utilized their new post-*Booker* discretion to give greater attention to mitigating offender characteristics generally deemed off-limits

52. See generally Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37 (2006); Frank O. Bowman III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might yet Be Mended*, 77 U. CHI. L. REV. 367, 377 (2010); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005).

53. See Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 785-88 (2008) (detailing that about half of the roughly states with sentencing schemes impacted by *Blakely* created means for jury determination of some aggravating sentencing factors while other made their guidelines advisory); see also Richard S. Frase, *Blakely in Minnesota, Two Years Out: Guidelines Sentencing Is Alive and Well*, 4 OHIO ST. J. CRIM. L. 73 (2007).

54. See U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010 (2010) (reporting large percentage of federal district judges favoring advisory guidelines to prior mandatory system or fully discretionary system); Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1667-81 (2012) (detailing the "success of advisory guidelines"); Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 262 (2009).

55. See U.S. SENTENCING COMM'N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at fig. G (2015); Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1024-25 (2016) (noting how in certain fraud cases "the rate at which judges impose non-government-sponsored below-range sentences has increased dramatically").

by the guidelines, and many practitioners and academics have joined district judges in lauding the post-*Booker* system for having made a rigid and harsh federal sentencing system more balanced and proportional.

But not everyone sees federal sentencing after *Booker* as an improved guideline system worth preserving. Some are quick to note that the post-*Booker* system retains many of the complexity, severity, and procedural problems that drew wide criticisms before *Booker* while layering on the new problem of sentencing judges now having essentially unreviewable discretion to follow or ignore guideline recommendations as they see fit.⁵⁶ The U.S. Department of Justice and the U.S. Sentencing Commission have expressed concern that *Booker*'s jolt of judicial discretion has produced, over time, increased sentencing disparity as some sets of judges regularly follow the advisory guidelines while others regularly do not.⁵⁷ And though subject to much empirical debate, at least some research suggests that post-*Booker* increases in interjudge disparity has also served to increase racial sentencing disparity.⁵⁸ Perhaps most tellingly given their unique perspectives on the virtues and vices of the *Booker* advisory guideline system, the current Acting Chair of the U.S. Sentencing Commission (Judge William Pryor) and a former Commission Chair (Judge William Sessions) have both suggested in print major "fixes" to the post-*Booker* federal sentencing system through the creation of new, significantly simplified, binding guidelines.⁵⁹

56. See, e.g., Frank O. Bowman III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT'G REP. 356 (2012); Ryan W. Scott, *Booker's Ironies*, 47 U. TOL. L. REV. 695 (2016).

57. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 8 (2012) (noting that after *Booker* "the rates of nongovernment sponsored below range sentences were sufficiently varied within each district to cause concern that similar offenders committing similar crimes were sentenced differently depending upon the judge"); Letter from Jonathan J. Wroblewski, Dir., Office of Pol'y & Legis., U.S. Dep't of Justice, to William K. Sessions III, Chair, U.S. Sentencing Comm'n (June 28, 2010) (expressing concern about federal sentencing fragmenting into "two separate regimes [which] leads to unwarranted sentencing disparities").

58. Compare Scott, *supra* note 56, at 717 (reviewing studies indicating "that racial disparities have increased in the aftermath of *Booker*"); with Hofer, *supra* note 30, at 689 (contending that "*Booker* contributed to a decrease in the most significant source of racial disparity" in the federal sentencing system).

59. See William Pryor, *Returning To Marvin Frankel's First Principles In Federal Sentencing*, 29 FED. SENT'G REP. 95 (2017) (calling for a new "system of presumptive guidelines, a radically simpler system with wider sentencing ranges and fewer enhancements"); William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J. L. & POL. 305 (2011) (urging reforms to "streamline individual guidelines ... and also simplify the Sentencing Table in Chapter Five of the Guidelines Manual to provide for fewer and broader sentencing ranges").

III. LESSONS LEARNED AND PERSISTENT CONCERNS

A. THE ENDURING WISDOM OF SENTENCING GUIDELINES

Despite the many ugly facets of the federal system's experience with guidelines, no policymaker or researcher has ever called for a return to a wholly discretionary system with judges having unfettered and unreviewable authority to impose any sentence from within broad statutory ranges. Despite a wide array of concerns and criticisms about a wide array of sentencing laws and procedures in state and federal guideline systems, nobody seems to believe—indeed, nobody has even been heard to suggest—that a return to the type of sentencing Judge Frankel decried as “lawless” is even worth considering.

The modern consensus supporting the creation of sentencing law includes a significant affinity for that law to take the form of formal guidelines. Policymakers, practitioners, and researchers often report or at least acknowledge many system-wide and case-specific benefits flow from modern guideline-type reforms in the nearly two dozen U.S. states (and the District of Columbia) using some form of this modern sentencing structure.⁶⁰ As Richard Frase has crisply explained, “state guidelines are popular because they have proven more effective than alternative sentencing regimes as a means to promote consistency and fairness, set priorities in the use of limited correctional resources, and manage the growth in prison populations.”⁶¹ As mentioned earlier, the American Law Institute's multi-year project to revise the *Model Penal Code's* sentencing chapter is built around what it calls the commission-guidelines model,⁶² and its reporter noted that “after five years of study, the commission-guidelines model became the cornerstone of the American Bar Association's Criminal Justice Standards for Sentencing, published in 1994 [and] in 2006, the bipartisan Constitution Project also recommended the commission-guidelines structure to federal and state policymakers as part of its ongoing sentencing initiative.”⁶³ In other words, every serious modern study of U.S. sentencing has reached the conclusion that a well-designed guideline structure provides the best means for the express articulation of sound standards to inform and shape individual sentencing outcomes and to promote transparency and the rule of law throughout a sentencing system.

60. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

61. *Id.* at 1192.

62. See MODEL PENAL CODE: SENTENCING (Tentative Draft No. 1, 2007).

63. *Id.*

The uneven federal experience with sentencing guidelines documents that the particularized implementation and application of a guideline system will significantly influence how, and how well, guidelines advance the consistent and deliberative application of proportionate punishments in individual cases and across an entire criminal justice system. The federal guideline system's emphasis on precise quantifiable offense harms and its de-emphasis of potential mitigating offender characteristics contributed to harmfully complex, rigid, and severe sentencing rules for federal judges. State guideline systems have generally been much more successful in the view of all stakeholders and researchers in part because state legislatures and commissions have kept guideline rules relatively simple: By focusing primarily on the offenses of conviction, and through the use of broader sentencing ranges and more liberal departure criteria, state guidelines have generally achieved a more sound and satisfying balance between sentencing directives and judicial discretion.

The wisdom of Judge Frankel's reform advocacy is reflected not only in enduring affinity for sentencing guidelines, but also in the widespread creation of sentencing commissions. Though state commissions have taken on various forms and assumed varying responsibilities, modern experiences have reinforced that a permanent and independent specialized agency is best positioned to develop, monitor, assess, and revise successful sentencing guidelines.⁶⁴ And the basic mandate for any commission, as well articulated by Michael Tonry, should be to develop "guidelines that classify offenses and offenders in reasonable ways, that authorize sentences that accord with the sensibilities of most of the judges and prosecutors charged to apply them, and that allow sufficient flexibility for the individualization of sentences to take account of special circumstances and of applicable rehabilitative and incapacitative considerations."⁶⁵

B. PROSECUTORIAL POWERS AND (OVER)RELIANCE ON IMPRISONMENT

Though prosecutors have always been able to exercise some control over a defendant's sentence through charging decisions and plea negotiations, guideline sentencing systems can formally and functionally enhance the power of prosecutors to dictate specific sentencing outcomes. Scholars have long expressed concerns that structured and determinate sentencing systems will

64. See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715 (2005); Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179 (2007).

65. Michael Tonry, *The Functions of Sentencing & Sentencing Reform*, 58 STAN. L. REV. 37, 66 (2005).

problematically transfer undo sentencing authority and discretion from judges to prosecutors,⁶⁶ but no sentencing system has yet devised an easy or effective way to ensure prosecutorial power and discretion to influence sentencing outcomes is limited or always exercised in transparent, fair, and appropriate ways. Indeed, efforts to mute the impact of prosecutorial decisions in the federal system by requiring consideration of uncharged “relevant conduct” through intricate guideline sentencing criteria has, in various ways, only further enhanced the functional powers of prosecutors to influence sentencing outcomes.

The unique combination of intricate offense-oriented sentencing guidelines buttressed by numerous severe mandatory minimum sentencing statutes has given federal prosecutors many means to constrain or dramatically shape a judge’s sentencing decision-making.⁶⁷ But even in less complex and less severe state guideline systems, prosecutorial charging and plea-bargaining decisions can and will often significantly impact what particular sentence or ranges are available or likely to be imposed by a judge.⁶⁸ The very consistency and transparency that guideline sentencing structures foster enhance the ability of prosecutors to predict and assess the likely impact of their charging and bargaining decisions, and their functional power is further enhanced because, as the U.S. Supreme Court has noted, the “criminal justice today is for the most part a system of pleas, not a system of trials.”⁶⁹ Consequently, the goals of achieving greater sentencing consistency and proportionality through sentencing guideline structures will always be impacted, and can be dramatically undercut, by the discretionary, largely unreviewable, and often opaque charging and bargaining work of a jurisdiction’s prosecutors.

The modern move toward sentencing guideline systems drafted by legislatures and commissions has likely played at least some role in the modern American

66. See Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for “Fixed” and “Presumptive” Sentencing*, 126 U. PA. L. REV. 550, 550-51 (1978).

67. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 244 (2005); Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. 2199, 2233-40 (2014); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252-59 (2004).

68. See Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006); see also John F. Pfaff, “Prosecutorial Guidelines,” in Volume 3 of the present Report; Jenia I. Turner, “Plea Bargaining,” in Volume 3 of the present Report.

69. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). As the Supreme Court further noted, “ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” *Id.*

reliance on incarceration (and lengthy terms of incarceration) as a first-order punishment option. In principle, a guideline system need not and should not be more penal than any other sentencing system—indeed, a well-designed and well-managed guideline system can play an important role in regulating prison growth and can also guide prosecutors and judges toward considering alternatives to imprisonment for certain classes of offenses and offenders. But, in practice, the modern sentencing guideline era has coincided with the modern American mass-incarceration era.⁷⁰ Various big and small factors may account for sentencing guidelines contributing, directly and indirectly, to excessive use and excessive terms of incarceration in recent decades. For example, months of prison time rather than alternative punishments are easier to map onto a guideline grid; legislatures and sentencing commissions, making pre-emptive decisions about crime and punishment, will always tend to be more punitive than judges in response to any real or perceived crime problem; and emphasis on sentencing uniformity fuels a “leveling-up” dynamic where distinctly lenient sentences lead to calls for consistently harsher guidelines while distinctly harsh sentences rarely lead to efforts to ensure more consistent leniency.⁷¹

Encouragingly, as the human, social, and economic costs of modern mass incarceration are becoming a greater concern for not only advocates but also policymakers, we are seeing growing efforts to modify and leverage guideline sentencing systems to reduce sentence severity and prison populations.⁷² But in both state and federal systems, significantly lowering whatever “prison numbers” are linked to particular offenses and offenders is still always a significant political and practical challenge, and there is continuing reason to fear that sentencing guideline systems’ institutional and substantive structures often make it much easier for sentences to be ratcheted up rather than ratcheted down.

C. HOBGOBLINS AND DEEPER VALUES

To parrot Ralph Waldo Emerson, one final profound criticism of modern sentencing reforms might be that a foolish consistency has become the hobgoblin of little guideline systems. Guideline sentencing reforms have

70. See generally Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume.

71. See Lynn Adelman & Jon Deitrich, *Marvin Frankel’s Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 239, 250-257 (2008) (arguing that “America’s history of harsh sentencing” and undue concern for sentencing uniformity made it inevitable that a guideline system would increase sentencing severity).

72. In the federal system, Congress’s passage of the Fair Sentencing Act of 2010 to reduce crack cocaine sentences, along with the U.S. Sentencing Commission’s reductions in the severity of the crack guidelines and then all the drug guidelines, has served to reduce the prison sentences of nearly a quarter of the federal prison population in recent years.

robustly responded to Judge Frankel's call to bring law to sentencing, but Judge Frankel's ultimate goal and advocacy was for sentencing decision-making to be informed by principle and purpose. Too often the development and evolution of guideline sentencing law has not been concerned sufficiently (or arguably concerned at all) with deeper values that go beyond superficial accounts of sentencing consistency or apparent disparities. As articulated recently by Richard A. Bierschbach and Stephanos Bibas, in more than a few modern guideline sentencing systems, it can seem that "math supplanted morality."⁷³

Once again, the federal sentencing system provides an example of this "values vacuity" problem and raises questions as to whether the guideline model itself or just its federal expression accounts for it. One member of the original U.S. Sentencing Commission famously dissented from the original federal guidelines because they failed to embrace a particular philosophy of sentencing,⁷⁴ and the original Commission's refusal to embrace any defined sentencing theory may in part account for the system's subsequent obsession with measures of disparity and guideline compliance rather than the achievement of deeper purposes. In turn, many years into the operation of the federal guideline system, Michael Tonry noted how "latent functions of sentencing policy—using sentencing to achieve personal, ideological, or politically partisan goals—sometimes fundamentally" eclipsed pursuit of principled overt goals by many practitioners and policymakers.⁷⁵ And even after the Supreme Court's *Booker* decision required federal sentencing decision-making to attend specifically to the provisions of the Sentencing Reform Act that articulate the traditional purposes of punishment,⁷⁶ tens of thousands of federal criminal defendants are sentenced each year without any serious, sustained, and explicit discussion among federal judges or other stakeholders about whether the federal sentencing process or specific sentencing outcomes are truly serving these purposes (or any other purposes).

Sentencing guideline systems should make it easier, not harder, for policymakers and practitioners to engage with substantive and structural

73. Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1455, 1465 (2016).

74. Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18121, 18125-27 (May 1, 1987); see also Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1 (1987) ("system that adopts no distributive principle and relies upon a mathematical average of past sentences, provides 'bastardized' sentences").

75. Tonry, *supra* note 65, at 64.

76. 543 U.S. 220, 245 (2005) (explaining that judges, with the guidelines now advisory, must "tailor the sentence in light of other statutory concerns" set forth in § 3553(a)).

values more dynamic and deeper than just uniformity or disparity. Indeed, state guideline systems have been better-received by judges and practitioners, and have generally been perceived as more successful by researchers and commentators, when they have been developed by legislators and commissions with avowed policy commitments and systemic goals. Critically, an array of distinct types of goals can be pursued within guideline systems—guidelines might focus on substantive goals like retributivism and deterrence,⁷⁷ on procedural goals like transparency and giving voice to varied stakeholders in the sentencing process, on functional goals like managing prison populations or case-processing efficiency. But, while we now have no shortage of sentencing law throughout the United States, arguably there still is a shortage of principle and purpose in much of our nation's sentencing decision-making. More than two decades ago, the American Bar Association during its revision of recommended sentencing standards observed that “without reasonably clear identification of goals and purposes, the administration of criminal justice will be inconsistent, incoherent, and ineffectual.”⁷⁸ Guideline systems hold great potential, though potential that is not always easily realized, in enabling the articulation of goals and purposes so that sentencing systems can be consistent, coherent, and effectual.

RECOMMENDATIONS

The forgoing review of the modern history of guideline sentencing reforms suggests at least the three following recommendations for lawmakers and policy advocates.

1. **Each jurisdiction should create a permanent sentencing commission with responsibility for creating and refining sentencing guidelines to guide and structure sentencing decision-making.** Throughout the United States, guidelines sentencing systems created and monitored by sentencing commissions have consistently proven more effective than alternative regimes at facilitating the development of sensible and transparent sentencing law that promotes consistency and fairness in individual sentencing outcomes and helps set penal priorities and manage the growth in prison populations over time.
2. **In their development and revision, sentencing guidelines should not be too intricate, too rigid, or too severe.** Across a number of metrics and in the view of nearly all stakeholders, relatively simple guideline structures

77. For discussions of these goals, see Jeffrie G. Murphy, “Retribution,” in the present Volume; and Daniel S. Nagin, “Deterrence,” in the present Volume.

78. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 18-2.1 cmt. (3d ed. 1994).

that focus primarily on conviction offenses, using broader sentencing ranges and providing liberal rules for departure from the ranges, have generally achieved a more sound and satisfying balance between sentencing directives and judicial discretion in operation.

3. **Policymakers should ensure that a permanent sentencing commission is given sound policy direction, sufficient independence, and adequate resources to create, monitor, and modify guideline sentencing rules over time.** The myriad challenges in designing and managing the particulars of an effective guideline sentencing system not only demand the creation of a permanent sentencing commission, but also demand giving this commission the political freedom and procedural tools essential to its substantive work.

Mandatory Minimums

Erik Luna*

Mandatory minimum sentencing laws eliminate judicial discretion to impose sentences below the statutory minimum. These laws, known as “mandatory minimums,” can produce punishment that is unjust in its disproportionality. Studies have also shown that mandatory minimums are unlikely to reduce future crime. As a practical matter, mandatory minimums transfer sentencing power from judges to prosecutors, who may place unfair pressures on defendants to plead guilty while also distorting the legal framework of separated powers. The laws tend to create sentencing disparities by treating similar offenders differently and different offenders the same. Because of their inflexible nature, mandatory minimums encourage manipulations of the system and even outright deceit. The laws have helped make the United States the most punitive nation in the Western world. For these and other reasons, mandatory minimums should be reformed.

INTRODUCTION

A mandatory minimum sentence requires that an individual convicted of a given offense be incarcerated for at least the minimum term set by statute. These so-called “mandatory minimums” have been the focus of recent calls for change in American criminal justice.¹ Reform efforts have been supported by practitioners, researchers, public interest groups, and prominent legal organizations such as the American Bar Association and the American Law Institute. Likewise, numerous judges have voiced dismay at the excessive punishment that courts are required to impose pursuant to mandatory minimums, including Justice Stephen Breyer, Justice Anthony Kennedy, and the late Chief Justice William Rehnquist.

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1. For citations to those calling for reform, see Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 1–4 (2010); and Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 65–66 (2009).

The most interesting and potentially influential opposition to mandatory minimums has come from government officials and political conservatives. At various times in their careers, the previous four presidents have all doubted the wisdom of long mandatory sentences. Current and former members of Congress, several attorneys general and other high-level law enforcement officials, and even a former “drug czar” have disputed the justice of mandatory minimums. In addition, conservative commentators and organizations (e.g., the American Conservative Union and Americans for Tax Reform) have called for the review of mandatory minimums. Some opinion polls even suggest that opposition is growing within the general public.²

Nonetheless, the reform or elimination of mandatory minimums may face long-standing political hurdles. Even during periods of low crime rates, the public has expressed fear of victimization and a belief that criminals were not receiving harsh enough punishment. Lawmakers have responded in kind with new crimes and stiffer penalties, including mandatory sentencing statutes. Conversely, reform proposals have carried a career-ending risk for politicians, who could be labeled “soft on crime” by allegedly providing the means for dangerous criminals to escape with lenient sentences. This political dynamic has stymied previous efforts to reform mandatory minimums. In fact, the laws remained politically popular well into the new millennium. As one U.S. Attorney noted in 2007, “[E]very Administration and each Congress on a bipartisan basis has ... supported mandatory minimum sentencing statutes for the most serious of offenses.”³ Moreover, recent rumblings by the U.S. Department of Justice suggest a counter-movement is afoot in favor of federal mandatory minimums.⁴

So although there is reason for hope in some reforms to mandatory minimums, further change will require concerted, broad-based, and well-informed support. This chapter provides the basic background on mandatory minimum sentences and some of the principal arguments for their reform. The

2. For instance, one survey found that a majority of those polled opposed mandatory minimums for nonviolent offenses and stated that they would vote for a congressional candidate who supports ending such sentences. See FAMS. AGAINST MANDATORY MINIMUMS, OMNIBUS SURVEY (2008), <http://www.famm.org/Repository/Files/FAMM%20poll%20no%20embargo.pdf>; see also Luna & Cassell, *supra* note 1, at 3 n.8.

3. Richard B. Roper, *Mandatory Sentencing*, 19 FED. SENT’G REP. 351, 352 (2007).

4. See, e.g., Rebecca R. Ruiz, *Sessions to Toughen Rules on Prosecuting Drug Crimes*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/jeff-sessions-sentencing-criminal-justice.html?_r=0; Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASH. POST (Apr. 8, 2017), https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.5be32846d997.

criticisms of mandatory minimums are long-standing and well-documented; they should be known to any policymaker with the ability to shape these laws.

I. BACKGROUND

Enacted by statute, mandatory minimums set the lower limits for sentencing particular offenses and particular offenders. If a defendant is convicted of a given crime, his offense meets some criterion, or he has a certain criminal history—typically measured by objective factors, such as the quantity of drugs possessed, the presence of a firearm, or the number of prior felony convictions—then he must be sentenced to at least the legislatively prescribed prison term. The sentencing judge has no discretion to impose a lesser term (though she may have the authority to dole out a longer sentence).

To be clear, this chapter is not concerned with every conceivable law that, in theory, might be classified as a mandatory minimum. After all, every sentencing statute that requires incarceration is, in some sense, a “mandatory minimum”—even if the underlying crime is a misdemeanor carrying a compulsory punishment of, say, one day in jail. This chapter focuses instead on felonies with mandatory terms usually measured in years of imprisonment. Admittedly, there is a certain pedigree to such sentencing schemes. Congress enacted the first batch of mandatory minimums in the late 18th century,⁵ and new mandatory minimums have been added over the ensuing two centuries, both in the federal and state systems. Until recent times, however, such laws were enacted only occasionally and did not target entire classes of crimes.⁶

The modern rise of mandatory sentencing can be traced to an increasing punitiveness in the American approach to criminal justice. For instance, scholars have argued that U.S. crime-control policy has been shaped by a series of “moral panics,” where intense outbursts of emotion impede rational deliberation, lead individuals to overestimate a perceived threat and to demonize a particular group, and thereby generate a public demand for swift and stern government action.⁷ Politicians have exploited citizen anxiety over crime and security, best exemplified by the declaration of a “war” on crime (or drugs or, most recently, terrorism), such that the United States now governs through crime.⁸ Moreover,

5. See U.S. SENT’G COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7–9 (2011) [hereinafter 2011 SPECIAL REPORT].

6. See U.S. SENT’G COMM’N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (1991) [hereinafter 1991 SPECIAL REPORT].

7. See MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE ch. 4 (2004).

8. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

scholars agree that the media portrayal of crime increases the public's demand for punitive policies—which, in turn, provides an incentive for lawmakers to create new crimes and increase punishments in order to be seen as “tough on crime,” a time-tested way to win an election.

This understanding helps explain the rise and persistence of mandatory minimums. Their enactment often does not involve “any careful consideration” of the ultimate effects, Chief Justice Rehnquist once noted. Instead, mandatory minimums “are frequently the result of floor amendments to demonstrate emphatically that legislators want to ‘get tough on crime.’”⁹ Consider, for instance, the enactment of 18 U.S.C. § 924(c) as part of the Gun Control Act of 1968. The legislation was a response to public fear over street crime, civil unrest, and the murder of Martin Luther King, Jr. The day after the assassination of Robert F. Kennedy, § 924(c) was proposed as a floor amendment and passed that same day with no congressional hearings or committee reports, only a speech by the amendment's sponsor about its catchphrase goal “to persuade the man who is tempted to commit a federal felony to leave his gun at home.”¹⁰ Since then, Congress has amended the law several times and converted it into one of the nation's most draconian punishment statutes. Under § 924(c), possessing a firearm during a predicate crime, including any drug offense, carries a 5-year mandatory minimum sentence. Any additional violation results in a 25-year mandatory minimum sentence, where each violation must be served consecutively (i.e., one after the other).

Another example comes from the passage of the Anti-Drug Abuse Act of 1986, which created a regime of mandatory minimum sentences of 5 or 10 years' imprisonment based on the type and amount of drug involved.¹¹ Among other things, the legislation produced a 100:1 ratio of crack to powder cocaine penalties. For instance, trafficking 50 grams of crack cocaine (less than 2 ounces) and trafficking 5,000 grams of powder cocaine (approximately 11 pounds) resulted in the same 10-year mandatory minimum sentence. A driving force behind the law was the media frenzy and moral panic over crack cocaine following the overdose death of basketball star Len Bias.¹² The bill was pushed forward in a headlong, result-oriented surge, and enacted without hearings or input from experts. Some lawmakers conceded that the legislation attempted to appease an electorate that had become hysterical over an alleged epidemic of

9. William H. Rehnquist, *Luncheon Address (June 18, 1993)*, in U.S. SENT'G COMM'N, DRUGS AND VIOLENCE IN AMERICA 283, 287 (1993).

10. 114 CONG. REC. 22,231 (1968) (statement of Rep. Poff).

11. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

12. See Luna & Cassell, *supra* note 1, at 25–26.

crack cocaine, which was fed in part by inflammatory claims about the drug. At the height of the Bias incident, a *Washington Post* editorial giped that in the prevailing *can-you-top-this* environment, “an amendment to execute pushers only after flogging and hacking them” might have been enacted by Congress.¹³ Ironically, it was later revealed that Bias died from ingesting powder cocaine, not crack.¹⁴ But by then, it didn’t matter. Indeed, Congress would create a 5-year mandatory minimum sentence for simple possession of 5 grams of crack cocaine, meaning that about a teaspoon of crack possessed for personal use would result in a half-decade term in federal prison.¹⁵ Congress was not alone, however, as many states would adopt laws codifying dramatic sentencing disparities between crack and powder cocaine.¹⁶

Still another example is provided by get-tough recidivist statutes, epitomized by the so-called “three strikes and you’re out” laws. Although the basic concept—increasing the punishment for repeat offenders—has existed for centuries in law, the ferocity of modern recidivist statutes is a relatively recent development. Under these laws, an offender must receive a life sentence or a multi-decade prison term if he has been convicted of a specified number of predicate felonies or “strikes.” Pursuant to California’s law, for instance, an offender with one prior serious or violent felony conviction must receive twice the sentence otherwise prescribed for his current felony conviction. As originally enacted, the law required a minimum sentence of 25 years to life for a felony conviction where the offender had at least two prior serious or violent felony convictions, even if the current felony was neither serious nor violent.¹⁷

In 1993, the underlying bill was stalled in committee and appeared unlikely to receive even a general legislative vote, until a single harrowing event captured the media’s attention and the public’s imagination: the kidnapping and murder of 12-year-old Polly Klaas.¹⁸ The story horrified not only the victim’s hometown of Petaluma, California, but also the entire country, receiving national news coverage and stimulating a surge in public fear of crime and violence, all in spite of declining crime rates. When the story broke that the killer had an extensive

13. Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 40 FED. B. NEWS & J. 158, 159 n.30 (1993) (quoting editorial).

14. See, e.g., Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, BOS. GLOBE, July 5, 2006, at 7.

15. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

16. NICOLE D. PORTER & VALERIE WRIGHT, THE SENTENCING PROJECT, CRACKED JUSTICE 2 (2011).

17. See CAL. PENAL CODE § 667 (West 1994) (codified legislation); CAL. PENAL CODE § 1170.12 (West 1994) (codified ballot initiative).

18. See Erik Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 3–7 (1998) (describing background of three strikes law).

rap sheet, California lawmakers raced to revive the anti-recidivist proposal and expressed their adamant support for it. Many used the incident and the ensuing public fear to their political advantage, making “three strikes” the catchphrase of choice during the 1994 campaign. No politician dared oppose the law. One state senator confessed, “I don’t think we have any choice [but to pass it],” while another candidly admitted, “I’m going to vote for these turkeys because constituents want me to.”¹⁹ Other states have passed harsh criminal laws in similar contexts, where politicians see a vote against such laws as an act of political suicide. Some of these laws have created or toughened mandatory minimums in the wake of horrifying crimes against sympathetic victims. These statutes can be both well-intentioned and shortsighted, as lawmakers respond to shocking fact-patterns by enacting overly broad sentencing provisions without considering the ultimate consequences.

The last years of the 20th century did witness at least a few acts of moderation. In 1994, for instance, Congress created a so-called “safety valve” in recognition that, for some offenders “who most warrant proportionally lower sentences” and “are the least culpable” by definition, “mandatory minimums generally operate to block the sentence from reflecting mitigating factors.”²⁰ The safety valve allows federal judges to go below an otherwise applicable mandatory minimum sentence in low-level drug cases involving essentially nonviolent, first-time offenders who have disclosed all relevant information to the government.²¹ Although applicable only to certain drug crimes and criminals,²² the safety valve is commonly seen as a successful (albeit limited) means of preventing unjust punishments without hampering the general objectives of sentencing.

In the new millennium, there have been even more promising signs for those who oppose mandatory minimums. In August 2010, President Obama signed into law the Fair Sentencing Act, which reduced the sentencing disparity between crack and powder cocaine offenses.²³ In particular, the law eliminated the mandatory minimum for simple possession of crack cocaine—the first

19. *Id.* at 5 n.37.

20. H.R. REP. NO. 103-460 (1994). *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985 (1994) (creating safety valve); U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 5C1.2 (2016) (incorporating safety valve into federal sentencing guidelines).

21. *See* 18 U.S.C. § 3553(f).

22. *See, e.g.,* U.S. SENTENCING COMM’N, 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.44 (2016) (safety valve employed in 13.7% of all drug cases where a mandatory minimum would have applied).

23. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

time a federal mandatory minimum had been repealed since the Nixon administration—and it reduced the crack/powder disparity, from 100:1 to 18:1, by upping the required amount of crack cocaine to trigger a mandatory sentence.²⁴ The law received broad bipartisan support, including the backing of conservative lawmakers and commentators, as well as prominent law enforcement organizations. At a policy level, the Justice Department issued memoranda instructing federal prosecutors that they need not always seek the harshest possible sentences;²⁵ that they should avoid excessive mandatory penalties for low-level, nonviolent drug offenses;²⁶ and that prosecutors should not use a recidivist enhancement to extract plea bargains.²⁷ In addition, President Obama commuted over 1,700 federal sentences—more than any president in U.S. history—with the vast majority of the commutations involving drug offenders, many of whom were imprisoned pursuant to mandatory minimums.²⁸

Changes to mandatory sentencing laws and policies have also occurred at the state level. Since the turn of the millennium, some two dozen American jurisdictions have enacted some kind of reform to their mandatory minimum laws.²⁹ In November 2012, for instance, California voters overwhelmingly adopted Proposition 36—the Three Strikes Reform Act—a ballot initiative that modified the most severe aspect of the state’s recidivist law. With a few exceptions, California’s three-strikes statute now requires a sentence of 25 years to life only when a defendant’s current conviction is for a serious or violent

24. In other words, it now takes 28 grams of crack cocaine to trigger a 5-year mandatory sentence and 280 grams of crack cocaine to generate a 10-year mandatory sentence.

25. See Memorandum from Eric Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010).

26. See Memorandum from Eric Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to the United States Attorneys & Assistant Attorney General for the Criminal Division, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013).

27. See Memorandum from Eric Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to Department of Justice Attorneys, Guidance Regarding § 851 Enhancements in Plea Negotiations (Sept. 24, 2014).

28. For a discussion of clemency and its reform, see Mark Osler, “Clemency,” in the present Volume.

29. See FAMS. AGAINST MANDATORY MINIMUMS, RECENT STATE-LEVEL REFORMS TO MANDATORY MINIMUM LAWS (2016), <http://famm.org/wp-content/uploads/2013/08/Recent-State-Reforms-June-2016.pdf>; *Justice Reinvestment Initiative Brings Sentencing Reforms in 23 States*, PEW CHARITABLE TRUSTS (Jan. 22, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/01/states-modify-sentencing-laws-through-justice-reinvestment>; RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. OF JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES (2014).

felony. The Three Strikes Reform Act also allows a court to reduce the term of imprisonment for an inmate sentenced under the prior regime but whose third strike was not a serious or violent felony.

These recent changes provide reason for hope among reformers. The political norm that favors more crimes and harsher punishments, including mandatory minimums, may turn out to be a mile wide but only an inch deep. In fact, we may be reaching a tipping point in criminal justice as evidenced by the growing ranks of reform advocates. As mentioned at the outset, however, it may still be possible to paint a legislator who votes to repeal mandatory minimums as being “soft on crime.” There may even be a counter-reform movement brewing among some law enforcement officials, epitomized by the Justice Department’s recent policy reversal that now requires federal prosecutors to pursue the most severe possible punishment, “including mandatory minimum sentences.”³⁰ Reform advocates need to be well-informed on the arguments for and against mandatory sentencing statutes, beginning with claims grounded in the philosophy of punishment.

II. PUNISHMENT THEORY

Generally speaking, theories of punishment can be separated into two philosophical camps: consequentialist (or teleological) theories and non-consequentialist (or deontological) theories. The approaches are distinguished by their focus and goals. Consequentialist theories are forward-looking, concerned with the future consequences of punishment. Nonconsequentialist theories are backward-looking, interested solely in past acts and mental states.

When it comes to mandatory minimums, discussion of these theories is not merely an academic exercise. Punishment philosophy informs the practice of sentencing, as codified in the penal law or administered by criminal justice actors, and the transition from theory to practice can produce troublesome consequences in the real world. Scholars have suggested that mandatory minimum sentences are part of “ominous trends in our penal practices,”³¹ stemming, at least in part, from politicians co-opting punishment theories to rationalize seemingly irrational punishment systems.

30. Memorandum from Jefferson B. Sessions, Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors, Department Charging and Sentencing Policy 1 (May 10, 2017).

31. Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1839 (1999); see also Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751 (1999); Markus D. Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689 (1995).

A. RETRIBUTION

The best-known nonconsequentialist rationale for the criminal sanction, (deontological) retributivism, often conceives of punishment as “just deserts”—an offender deserves to be punished because of his moral blameworthiness. Under this theory, moral blameworthiness may be seen as a function of an offender’s subjective state of mind, the wrongful nature of his acts, and the harm he has caused. Retributivism thereby incorporates limiting principles on systems of criminal justice. Among other things, penalties must be based on the depravity of the offense and not merely the danger posed by the offender. Retributivism does not advocate disproportionate punishment based on a heightened risk of recidivism alone. More generally, all theories of retribution require that punishment be proportionate to the gravity of the offense, and any decent retributive theory demands an upper sentencing limit.³² Indeed, the notion of proportionality between crime and punishment expresses a common principle of justice, a limitation on government power that has been recognized throughout history and across cultures,³³ and a precept “deeply rooted and frequently repeated in common-law jurisprudence.”³⁴

Admittedly, the principle of proportionality raises difficult issues in sentencing. In measuring the gravity of an offense for proportionality analysis, one might look to, among other things, “the harm caused or threatened to the victim or society.”³⁵ Although harm is a notoriously thorny idea,³⁶ most agree that the basic criminal harms involve acts or threats of physical violence and non-consensual or fraudulent deprivations of others’ property.³⁷ The issue of proportionality might also be informed by comparative analysis, such as whether the sentence in a given case exceeds that for far more serious crimes and criminals.

According to proponents of mandatory minimums, those who are sentenced under these laws—purportedly, high-level offenders who perpetrate violent and serious crimes—can only be assured of receiving their just deserts through

32. See generally ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* (2005).

33. See *Mandatory Minimum Sentencing Provisions Under Federal Law: Hearing Before the U.S. Sent’g Comm’n* 1 n.3 (2010) (statement of Erik Luna), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Luna.pdf.

34. *Solem v. Helm*, 463 U.S. 277, 284–85 (1983).

35. *Id.* at 288–93; see also *Rummel v. Estelle*, 445 U.S. 263, 275 (1980).

36. See generally Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

37. See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, *INTUITIONS OF JUSTICE: IMPLICATIONS FOR CRIMINAL LAW AND JUSTICE POLICY* 1 (2007).

long, compulsory sentences. Few retributivists would balk at a life sentence for a serial murderer, for instance, and most mandatory minimums imposed for serious crimes of violence (e.g., forcible rape) will fall within the rough boundaries of deserved punishment.³⁸ The problem is that mandatory minimum statutes can be grossly overinclusive. In enacting such statutes, lawmakers tend to imagine an exceptionally serious offense and set the mandatory minimum they consider fitting for a particularly egregious offender. But they do not take into consideration a far less serious crime or less culpable criminal who nonetheless might be sentenced under the law.³⁹ Mandatory minimums eliminate judicial discretion to impose a prison term lower than the statutory floor, making case-specific information about the offense and offender irrelevant, at least to the extent that these facts might call for a below-minimum sentence. For this reason, mandatory minimums are unaffected by proportionality concerns and can pierce retributive boundaries with excessive punishment.

Consider, for instance, the problems that have arisen under certain recidivist laws, where an offender must receive a life sentence or a multi-decade prison term if he has been convicted of a specified number of predicate felonies. Such a lengthy sentence for sometimes trivial offenses—life imprisonment for a three-time nonviolent larcenist,⁴⁰ for instance, or a 25-year to life sentence for petty theft by a recidivist⁴¹—proves almost impossible to reconcile with traditional conceptions of retribution. The same is true of mandatory minimum sentences under 18 U.S.C. § 924(c). In very discrete situations, the crime’s low predicates of any drug and a firearm, and the high penalties that ensue—a 5-year mandatory sentence for the first count and 25-year sentences for each subsequent count—might be justifiably employed against, say, a brutal drug lord or the occasional dictator who turns his country into a narco-state. But when applied to the vast majority of offenders, low-level drug dealers who neither threaten violence nor cause injury, the results can be grotesque. In one § 924(c) case, for instance, a defendant received a 55-year term of imprisonment for low-level marijuana distribution while possessing (but not brandishing or using) a firearm.⁴² This punishment exceeded the sentence for, among others, an aircraft hijacker, a second-degree murderer, a kidnapper, and a child rapist.

38. See, e.g., THE CONSTITUTION PROJECT, PRINCIPLES FOR DESIGN AND REFORM OF SENTENCING SYSTEMS: A BACKGROUND REPORT 26 (2010), <http://www.constitutionproject.org/pdf/34.pdf>.

39. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 92.

40. See *Rummel v. Estelle*, 445 U.S. 263 (1980).

41. See *Ewing v. California*, 538 U.S. 11 (2003) (25-year-to-life sentence for defendant convicted of stealing three golf clubs, worth \$399 apiece); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (same for theft of \$150 worth of videotapes).

42. See *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004).

In fact, the sentence was more than twice the federal sentence for a kingpin of a major drug-trafficking ring in which a death results, and more than four times the sentence for a marijuana dealer who shoots an innocent person during a drug transaction.⁴³

Given such cases, it is unsurprising that many judges, and even some prosecutors, believe that mandatory minimums are too severe and can result in disproportionate punishment.⁴⁴

B. CRIME PREVENTION

As mentioned above, consequentialist theories are forward-looking in their focus on the future consequences of punishment. The primary consequentialist theory—utilitarianism—imposes criminal penalties only to the extent that social benefits outweigh the costs of punishment. In particular, the imposition of criminal sanctions might: discourage the offender from committing future crimes (specific deterrence); dissuade others from committing future crimes (general deterrence); or disable the particular offender from committing future crimes (incapacitation).⁴⁵

According to their advocates, mandatory minimums both deter and incapacitate offenders. With respect to deterrence, mandatory minimum sentences are sometimes justified as sending an unmistakable message to criminals. Some offenses require certain minimum punishments, advocates claim. They argue that because of the wide diversity of views on the appropriate level of punishment for offenders, legislators—not judges—are in the best position to make sentencing determinations.⁴⁶ The certain, predictable, and harsh sentences forewarn offenders of the consequences of their behavior

43. See *id.* at 1244–46, 1258–59. In the interest of full disclosure, I served as appellate counsel in the *Angelos* case and assisted in efforts to achieve Mr. Angelos’s eventual release. See, e.g., Erik Luna & Mark Osler, *Mercy in the Age of Mandatory Minimums*, U.S. NEWS & WORLD REP. (Aug. 5, 2016), <https://www.usnews.com/opinion/articles/2016-08-05/president-obamas-clemency-initiative-doesnt-go-far-enough>.

44. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 93–94.

45. Another utilitarian goal is rehabilitation, that punishment can reform a particular offender against committing future crimes. See Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume. As far as I know, no plausible argument has been made that mandatory sentencing serves rehabilitation.

46. For a discussion on some of the arguments in defense of mandatory minimums, see EVAN BERNICK & PAUL J. LARKIN, JR., THE HERITAGE FOUNDATION, RECONSIDERING MANDATORY MINIMUM SENTENCES: THE ARGUMENTS FOR AND AGAINST POTENTIAL REFORMS 4 (2014).

upon apprehension and conviction.⁴⁷ Proponents contend that mandatory minimums also incapacitate the most incorrigible criminals and thereby prevent them from committing crime.⁴⁸

None of these claims receives robust empirical support, however, as most researchers have rejected crime-control arguments for mandatory sentencing laws. There is little evidence that lengthy prison terms serve specific deterrence. Rather, imprisonment either has no effect on an inmate's future offending or perhaps even increases recidivism.⁴⁹ This is hardly surprising given the absence of meaningful rehabilitative programs for inmates and, worse yet, the deplorable conditions of incarceration facilities.⁵⁰ It has often been argued that prisons serve as "colleges for criminals," where offenders are psychologically damaged by incarceration, for instance, or learn new anti-social skills from their criminally involved peers, and thus come out more likely to recidivate. They may also be at risk of reoffending because of imprisonment's social and economic consequences, such as the difficulties of obtaining gainful, lawful employment after release.⁵¹

As for general deterrence, research has largely failed to show that mandatory minimums decrease the commission of crime, and some studies suggest that such punishment schemes may even generate more serious crime.⁵² Regardless, any deterrence-based reduction in crime is far outweighed by the increased

47. See, e.g., Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159 (2002) (finding that California's three-strikes law prevented 8 murders, almost 4,000 aggravated assaults, over 10,000 robberies, and more than 384,000 burglaries in its first two years of operation). For a refutation of these findings, see, for example, Tonry, *Mostly Unintended Effects*, *supra* note 1, at 99–100.

48. Cf. Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551 (2009) (finding that, on average, "the social benefit of the crimes averted by incapacitation is slightly higher than the marginal cost to the state of imposing a 1-year sentence enhancement"). As discussed below, any incapacitative benefit from mandatory minimums is likely to be modest and outweighed by other considerations.

49. See Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115 (2009); Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* (Aug. 18, 2015) (working paper), <http://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>.

50. See Sharon Dolovich, "Prison Conditions," in the present Volume.

51. See Gabriel J. Chin, "Collateral Consequences," in the present Volume; Susan Turner, "Reentry," in the present Volume.

52. See, e.g., Tomislav V. Kovandzic, John J. Sloan & Lynne M. Vieraitis, *Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effects of "Three Strikes" in U.S. Cities (1980-1999)*, 1 CRIMINOLOGY & PUB. POL'Y 399 (2002); Thomas B. Marvell & Carlisle Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. LEGAL STUD. 89 (2001).

costs of incarceration from long mandatory sentences.⁵³ Again, this is not a surprising conclusion. If we assume that criminals act rationally—pursuant to an assessment of the advantages and disadvantages of criminality—the potential cost of committing a particular offense is not, as some politicians maintain, the allowable punishment under law. Instead, it is a mere fraction of the prescribed sanction, given that potential punishment must be discounted by the probability of apprehension and conviction for the given offense.⁵⁴ And given that most felony convictions already lead to incarceration, the enactment of mandatory minimums will have only a marginal impact on the certainty of imprisonment.⁵⁵

Besides, criminals are not likely to be well-informed, rational actors in the classic economic model. To begin with, people know very little about criminal justice, including sentencing schemes and severity, and thus are unlikely to be deterred by mandatory minimums.⁵⁶ Even assuming someone knows the relevant sentence for a prospective crime, a long mandatory term may be heavily discounted in the mind of a risk-taking offender, who places greater emphasis on immediate gains (e.g., stolen goods in hand) over deferred losses (e.g., punishment extending into the distant future).⁵⁷ This may be particularly true of those from deprived socioeconomic or familial backgrounds.⁵⁸ In addition, some offenders may commit crime in pursuit of intangible, nonquantifiable ends, such as respect, glory, or attention,⁵⁹ while other offenders are driven by

53. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 134–40, 154–55 (Jeremy Travis et al. eds., 2014); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 231 (2013); 2011 SPECIAL REPORT, *supra* note 5, at 98; JONATHAN P. CAULKINS ET AL., *MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY?* 143–44 (1997); BARBARA S. VINCENT & PAUL J. HOFER, *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* 11–16 (1994); Tonry, *Mostly Unintended Effects*, *supra* note 1, at 90–100. As discussed elsewhere, the most effective deterrent of crime is the certainty of punishment—the likelihood that an individual will be punished if they commit a crime—not the severity of the punishment itself. See Daniel S. Nagin, “Deterrence,” in the present Volume.

54. See NAT'L RESEARCH COUNCIL, *supra* note 53, at 140; Mark A.R. Kleiman, *Community Corrections as the Front Line in Crime Control*, 46 UCLA L. REV. 1909, 1915–16 (1999).

55. See NAT'L RESEARCH COUNCIL, *supra* note 53, at 133; *see also id.* at 140.

56. See Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 181–84 (2003); Julian V. Roberts, *Public Opinion and Mandatory Sentencing: A Review of International Findings*, 30 CRIM. JUST. & BEHAV. 483 (2003).

57. See, e.g., A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999).

58. See Alfred Blumstein, *Prisons*, in CRIME 415 (James Q. Wilson & Joan Petersilia eds., 1994).

59. See, e.g., JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 80–110 (1988); Elijah Anderson, *The Code of the Streets*, ATL. MONTHLY, May 1994, at 81, 81–94.

“impulsive, irrational, or abnormal” desires.⁶⁰ These individuals are undeterred by the existence of mandatory minimums.

Mandatory minimum sentences are also unlikely to reduce crime by incapacitation,⁶¹ at least given the overbreadth of such laws and their failure to focus on those most likely to recidivate. Among other things, offenders typically age out of the criminal lifestyle, usually in their 30s,⁶² meaning that long mandatory sentences may require the continued incarceration of individuals who would not be engaged in crime. In such cases, the extra years of imprisonment will not incapacitate otherwise active criminals and thus will not result in reduced crime. Instead, prisons become geriatric facilities.⁶³ Although selective incapacitation—choosing offenders based on certain predictors of future criminality⁶⁴—may work in discrete circumstances, mandatory minimums sentences work as meat cleavers, not scalpels, and thus generate high levels of false positives (i.e., incapacitated offenders who would not otherwise be committing crimes). Moreover, certain offenses subject to mandatory minimums can draw upon a large supply of potential participants. With drug organizations, for instance, an arrested dealer or courier may be quickly replaced by another, eliminating any crime-reduction benefit.⁶⁵ More generally, any incapacitation-based effect from mandatory minimums was likely achieved years ago, due to the diminishing marginal returns of locking more people up in an age of mass incarceration.⁶⁶

Based on the foregoing arguments and others, most scholars have rejected crime-control arguments for mandatory sentencing laws.⁶⁷ By virtually all measures, there is no reason to believe that mandatory minimums have any meaningful impact on crime rates.⁶⁸

60. JAMES Q. WILSON, THINKING ABOUT CRIME 118 (rev. ed. 1983); see also NAT'L RESEARCH COUNCIL, *supra* note 53, at 133–34; Kleiman, *supra* note 54, at 1917 (“Repeat offenders tend to be reckless and impulsive.”).

61. See generally Shawn D. Bushway, “Incapacitation,” in the present Volume.

62. See, e.g., David P. Farrington, *Developmental and Life-Course Criminology: Key Theoretical and Empirical Issues*, 41 CRIMINOLOGY 221 (2003).

63. For an interesting case study, see Michael Millemann et al., “Releasing Older Offenders,” in the present Volume.

64. See John Monahan, “Risk Assessment in Sentencing,” in the present Volume.

65. See, e.g., Tonry, *Mostly Unintended Effects*, *supra* note 1, at 102.

66. See NAT'L RESEARCH COUNCIL, *supra* note 53, at 143; Bushway, *supra* note 61.

67. See NAT'L RESEARCH COUNCIL, *supra* note 53, at 156.

68. See Tonry, *Mostly Unintended Effects*, *supra* note 1, at 100.

III. SENTENCING POWER

A. AGENCY COSTS AND PLEA BARGAINING

Despite the foregoing problems with mandatory minimums, the executive branch may have an interest in retaining or even expanding these laws. Perhaps the most perverse example comes from prison-guard unions, which have sponsored and lobbied for harsher sentencing laws.⁶⁹ By incarcerating more criminals for longer periods of time, mandatory minimums certainly serve the guards' professional interests in guaranteed employment. California's "three-strikes law sponsor is the correctional officers' union," Justice Kennedy emphasized, "and that is sick!"⁷⁰ Police and prosecutors also have an interest in get-tough policies, namely, the expansion of their power. The more crimes on the books and the harsher the punishments, the more power that police and prosecutors can exercise throughout the criminal process.⁷¹ For instance, harsh sentences bound by mandatory minimums provide the government enormous leverage to extract plea bargains and information from defendants, leading to more convictions and closed cases.

This is, indeed, the best argument in favor of mandatory minimums. The threat of long, obligatory sentences tends to encourage plea bargaining, which, if successful, averts the substantial costs associated with trial. In fact, over 90% of all prosecutions end by guilty plea,⁷² with mandatory minimum sentences helping to keep that figure extremely high. Moreover, the possibility of a long sentence provides a powerful incentive for members of a criminal group to provide information to law enforcement and to assist in the prosecution of other offenders. Low-level participants can avoid mandatory minimums by informing on bigger players, or so the argument goes, thereby allowing prosecutors to move up the chain of command. Certainly, many prosecutors believe that the threat of a long prison term is essential to securing cooperation, and this belief likely plays a very strong role in the tendency of prosecutors to advocate for new mandatory sentencing provisions and against the repeal or reform of existing mandatory minimums.

69. See Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 436 n.242 (1997).

70. Carol J. Williams, *Justice Kennedy Laments the State of Prisons in California, U.S.*, L.A. TIMES, Feb. 4, 2010.

71. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

72. See, e.g., LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011).

Some organized criminal enterprises may be impossible to unravel and eventually put out of business, supporters argue, unless the government has the leverage provided by severe punishment. Mob prosecutions provide a standard example, where much information and trial evidence might be unattainable without the stick of long sentences (and the carrot of immunity grants). The same obstacles may apply in other forms of concerted criminality, from violent street gangs to sophisticated white-collar offenders. Aside from the pragmatic benefits, a defendant might earn a form of moral credit through his willingness to cooperate with law enforcement. The providing of information and the acceptance of responsibility may demonstrate genuine remorsefulness on the part of the offender and a willingness to help redress the harm that he may have caused.

To be clear, plea bargaining is not some unmitigated good. Several years ago, a federal judge declared that the U.S. Justice Department was “so addicted to plea bargaining to leverage its law enforcement resources to an overwhelming conviction rate that the focus of our entire criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen.”⁷³ When individuals demand their day in court or plea negotiations fail, “the government routinely imposes a stiff penalty upon defendants who exercise their constitutional right to trial by jury.”⁷⁴ More recently, a report by Human Rights Watch documented how prosecutors threaten charges involving heavy mandatory minimums unless a defendant pleads guilty to charges that do not carry a mandatory sentence.⁷⁵

There is a genuine question as to the propriety of extracting information and guilty pleas through the threat of mandatory minimums.⁷⁶ Such practices impose a sort of “trial tax” on defendants who exercise their constitutional rights to trial by jury, proof beyond a reasonable doubt, and other trial-related guarantees—the tax being the mandatory minimum sentence that otherwise would not have been imposed. Moreover, the statistics seem to challenge any categorical assertions of government necessity.⁷⁷ In the federal system, in fact, the rate of

73. United States v. Green, 346 F. Supp. 2d 259, 265 (D. Mass. 2004).

74. *Id.* at 264.

75. See HUMAN RIGHTS WATCH, AN OFFER YOU CAN’T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013); see also H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U.L. REV. 63, 67–85 (2012).

76. See 2011 SPECIAL REPORT, *supra* note 5, at 99.

77. See *id.*; Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 826 (2017) (“The proportion of drug offenders convicted of an offense carrying a mandatory minimum penalty is now the lowest it has been since 1993. Yet despite the fears of some, defendants are pleading guilty at the same rates as they were before ... and cooperation rates have at least been stable, and may have even slightly increased.”).

cooperation in mandatory minimum cases is comparable to the average in all federal cases.⁷⁸ As it turns out, most recipients of federal drug minimums are couriers, mules, and street-level dealers, not kingpins or leaders in international drug cartels.⁷⁹ “Were there no mandatories, defendants now affected by them would remain subject to all the pressures that face every criminal defendant,” Professor Michael Tonry has noted. “They would simply no longer face out-of-the-ordinary—and therefore unfair—pressures resulting from the rigidity and excessive severity of mandatory minimum sentencing laws.”⁸⁰

B. SEPARATION OF POWERS

Mandatory sentencing laws are not only unfair—they distort the legal framework. In particular, mandatory minimums effectively transfer sentencing authority from trial judges to prosecutors, who may pre-set punishment through creative investigative and charging practices.⁸¹ Undoubtedly, law enforcement is well-intentioned in many cases. But it would be a mistake to assume that good faith will prevent the misuse of mandatory minimums. Serious and violent offenders may have served as the inspiration for mandatory minimums, but, as mentioned earlier, the statutes themselves are not tailored to these criminals alone and instead act as grants of power to prosecutors to apply the laws as they see fit, even to minor participants in nonviolent offenses.

Expressing a view held by many jurists, Justice Kennedy described as “misguided” the “transfer of sentencing discretion” from judges to prosecutors, “often not much older than the defendant.”

Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.⁸²

78. See Luna & Cassell, *supra* note 1, at 19 n.73.

79. See, e.g., U.S. SENT’G COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 20–21, 85 (2007), http://www.ussc.gov/r_congress/cocaine2007.pdf [hereinafter COCAINE AND FEDERAL SENTENCING].

80. Tonry, *Mostly Unintended Effects*, *supra* note 1, at 67 n.1.

81. See *infra* notes 102–03 and accompanying text.

82. Hon. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

Prosecutors and judges occupy distinct but overlapping roles in the criminal justice system. The prosecutor is empowered with the discretion to instigate charges against a defendant, amass evidence of crime, and seek convictions as an adversary in the trial process. It has long been held that the prosecutor is more than an ordinary party, however, given the power he wields and the principal he represents (i.e., the citizenry). Still, prosecutors are influenced by the ordinary human motivations that may at times cause a loss of perspective—path dependence, career advancement, immodesty, and occasional vindictiveness⁸³—leading to the misapplication of mandatory minimums. In most cases, however, no external check prevents the imposition of an unjust mandatory term.

By contrast, the judge functions as a neutral arbiter and dispassionate decision-maker in individual cases. The sentencing judge is the one neutral party in the courtroom who benefits from neither harsh punishment nor lenient treatment; he has no vested interest in the outcome of a case other than that justice be done. Indeed, trial court judges are in the best position to make the highly contextual, fact-laden decision about the proper punishment in particular cases. They are familiar with the environment in which offenses occur; they have been involved in every part of the court process; they have seen the evidence firsthand; and they have been in a position to evaluate the credibility of each witness and each argument. And as Justice Kennedy mentioned, trial judges have the benefit of experience in reasoned, transparent discretion, making them the precise individuals who should decide the complicated, fact-specific issues of sentencing. But with mandatory minimums, judges are denied this authority as sentences inevitably follow from prosecutorial choices in charging.

But the shift in power is more than misguided—it implicates the separation-of-powers doctrine. Liberal society has long been concerned with arbitrary, oppressive authority stemming from the accumulation of too much power in too few hands. The Framers' solution was to create a system of checks and balances, distributing power across government institutions in a manner that prevents any entity from exercising excessive authority and sets each body as a restraint on the others. Along these lines, the U.S. Constitution (and, indeed, every state government) employs a separation of powers among co-equal branches—the legislative, executive, and judicial—each having “mutual relations” in a series of checks and balances.⁸⁴

83. See, e.g., Luna & Cassell, *supra* note 1, at 26 n.115.

84. THE FEDERALIST No. 51 (James Madison).

As a matter of history and experience, an autonomous court system under the guidance of impartial jurists is considered the most indispensable aspect of American constitutional democracy. An independent judiciary was meant to protect individuals from the prejudices and heedlessness of political actors and the public.⁸⁵ To check such abuses, the courts were historically entrusted with certain fundamental legal decisions, including dispositive criminal justice issues that demand evenhanded judgment. Among these quintessential judicial functions is the imposition of punishment on another human being. “Traditionally,” noted the U.S. Supreme Court in 1993, “sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant.”⁸⁶ This eclectic approach attempted to accommodate the diverse rationales for punishment—from retributive principles of just deserts to consequential considerations of deterrence, rehabilitation, and incapacitation—thus allowing trial judges to craft a proper sentence based on an array of factors and legitimate conceptions of justice.

Indeed, the Supreme Court has described this judicial tradition as “uniform and constant,” where sentencing judges “consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”⁸⁷ As such, there is “wisdom, even the necessity, of sentencing procedures that take into account individual circumstances,”⁸⁸ drawing upon the judge’s familiarity with the case and face-to-face interaction with the defendant, the victim, and their families. By taking away this authority and giving it to the executive branch, mandatory minimums have undermined not only a fundamental check on law enforcement, but an important tradition in the American criminal justice system. On this point, there appears to be significant support across a broad spectrum of groups that mandatory minimums should be reformed to allow for individualized sentencing by judges.⁸⁹

85. See, e.g., THE FEDERALIST No. 78 (Alexander Hamilton).

86. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).

87. *Koon v. United States*, 518 U.S. 81, 113 (1996).

88. *Id.* at 92.

89. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 95.

IV. DISPARITY AND ITS DISCONTENTS

A. DISPARITY AND PUNITIVENESS

Proponents of mandatory minimums often raise the problems with earlier sentencing systems, which were described as “lawless”⁹⁰ and a major source of public cynicism. As just mentioned, trial judges traditionally exercised discretion in determining sentences within broad statutory ranges. This discretion purportedly generated intolerable (even unconstitutional) disparities among defendants, with sentences turning on the temperament of a given judge or irrelevant factors such as race and class. Proponents argue that mandatory minimums help eliminate these inequalities by providing uniformity and fairness for defendants, certainty and predictability of outcomes, and a higher level of truth and integrity in sentencing.

Opponents of mandatory minimums sometimes challenge the image of vast disparity in punishment prior to the enactment of determinate sentencing.⁹¹ But even accepting the historical accuracy of the conventional narrative, mandatory minimums may have done little to eliminate punishment discrepancies among similarly situated defendants. Inconsistent application of mandatory minimums has only exacerbated disparities, opponents argue, expanding the sentencing differentials in analogous cases. Indeed, mandatory minimums tend to magnify disparity through their punitiveness. After all, differences in sentencing matter far more in systems where idiosyncratic judgments produce terms of imprisonment differing by years or even decades, as compared to systems where the eccentricities of decision-makers can only generate differentials of days or months.

In the United States, mandatory minimums are part of a punishment spree of unprecedented proportions. From the mid-1920s to the mid-1970s, the prison population ratio hovered around 100 inmates in state and federal prisons per 100,000 residents, with a low of 79 in 1925 to a high of 137 in 1939. With the U.S. declaring “wars” on crime, drugs, etc., over the past four decades, the rate quintupled to around 500 prison inmates per 100,000 people.⁹² A recent report found that “1% of adult males living in the United States were

90. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). For a discussion of the prior approach and subsequent reforms, see Douglas A. Berman, “Sentencing Guidelines,” in the present Volume.

91. See, e.g., KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 106–12 (1998).

92. See BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* ONLINE tbl.6.28.2012, <http://www.albany.edu/sourcebook/pdf/t6282012.pdf>.

serving prison sentences of greater than 1 year.”⁹³ Since 1980, in fact, the federal prison population has increased tenfold, for instance, while the average federal sentence more than doubled, due in no small part to mandatory minimums.⁹⁴ Moreover, empirical work suggests that the U.S. punishment binge is the result of prosecutorial decision-making, particularly the willingness of prosecutors to file felony charges.⁹⁵ The United States has become the global incarceration leader with nearly 700 jail and prison inmates for every 100,000 inhabitants and a total custodial population of more than 2.2 million people, constituting almost a quarter of the world’s inmates.⁹⁶

All told, America is the single most punitive nation in the Western world. A statistical review of eight Western nations found that “the high U.S. imprisonment rate results primarily from much greater lengths of prison sentence by every punitiveness measure we were able to use—years of imprisonment per recorded crime or conviction, or average sentence length given a commitment—than are imposed in other countries.”⁹⁷ The U.S. imprisonment rate was also a function of the relatively high probability of imprisonment upon conviction. Comparisons of probable case outcomes further support the exceptional nature of U.S. sentencing. European nations certainly differ as to the likely punishment in standard cases, but those differences can pale in comparison to their collective divergence from U.S. sentences. The social consequences of America’s punitiveness are substantial, with some jurisdictions spending more on prison than higher education, and certain areas (especially poor, mostly minority communities) suffering utter devastation from the loss of people, resources, and respect for law.⁹⁸

93. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PRISONERS IN 2015, at 8 (2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>. The report did have some good news, including a decrease in both the U.S. imprisonment rate and the total number of prisoners. See *id.* at 1, 8.

94. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.6.57, <http://www.albany.edu/sourcebook/pdf/t657.pdf>; PEW CHARITABLE TRUSTS, PRISON TIME SURGES FOR FEDERAL INMATES (2015), http://www.pewtrusts.org/~media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf; Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 FED. SENT’G REP. 12 (1999).

95. See John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (Jan. 23, 2012) (working paper), <http://perma.cc/K5QG-LHCQPfaff>.

96. See ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST (11th ed., 2016); see also Roy Walmsley, *Trends in World Prison Population*, in INTERNATIONAL STATISTICS ON CRIME AND JUSTICE 153 (Stefan Harrendorf et al. eds., 2010).

97. Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, 33 CRIME & JUST. 347, 348 (2006).

98. See Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008).

Through their punitiveness, mandatory minimums have helped America achieve this ignominious status. For instance, criminal law experts in six European nations were queried as to the expected sentence for a first-time offender convicted of selling relatively small amounts of marijuana (8 ounces) and possessing (but not brandishing or using) firearms. The likely punishment in each country was as follows: a sentence of two to four years' imprisonment in England; a one-year sentence or probation in France; a five-year sentence or less in Germany; a fine of € 300-350 in the Netherlands; a three-and-a-half-year sentence or less in Poland; and a one-year sentence or less in Sweden.⁹⁹ By comparison, this fact-pattern generated a mandatory minimum sentence of 55 years' imprisonment in an actual federal case prosecuted under 18 U.S.C. § 924(c).¹⁰⁰ Moreover, such a harsh sentence would be at least a theoretical possibility in a few other American jurisdictions. At one point, the U.S. Department of Justice even suggested "some reforms of existing mandatory minimum sentencing statutes are needed ... to eliminate excess severity in current statutory sentencing laws and to help address the unsustainable growth in the federal prison population."¹⁰¹

B. DISPARITY AND UNIFORMITY

As discussed in the previous section, the source of disparity is manifest: Mandatory minimums effectively transfer sentencing authority from trial judges to prosecutors,¹⁰² which has resulted in troubling punishment differentials among offenders with similar culpability. In truth, mandatory minimums are not mandatory at all, but instead discretionary sentencing laws susceptible to the haphazard and even perverse charging and plea bargaining decisions of prosecutors.¹⁰³ These often dispositive decisions are made in a largely opaque process with almost no external oversight.

99. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1496–1501 (2010).

100. See *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004). See also *supra* notes 42–43 and accompanying text (discussing case).

101. 2011 SPECIAL REPORT, *supra* note 5, at 94 (quoting testimony of U.S. Justice Department representative).

102. See *supra* notes 81–89 and accompanying text.

103. See Tonry, *Mostly Unintended Effects*, *supra* note 1, at 67–68; *Mandatory Minimum Sentencing Provisions Under Federal Law: Hearing Before the U.S. Sent'g Comm'n* 1 n.3 (2010) (statement of Stephen J. Schulhofer, Professor of Law, N.Y.U. Sch. of Law), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20100527/Testimony_Schulhofer.pdf.

A number of studies have confirmed that mandatory minimums tend to generate disparate sentences among similarly situated offenders.¹⁰⁴ For many commentators, however, the most troubling issue is the appearance, if not reality, of disparities along racial, ethnic, or class-based lines.¹⁰⁵ To be sure, there is an ongoing debate about correlation versus causation; in other words, whether the disproportionate impact of mandatory minimums on minorities might be based on any number of factors other than race or ethnicity. Nonetheless, a relationship has emerged between mandatory punishments and people of color, which can have a profoundly harmful meaning and effect regardless of causation.¹⁰⁶

Inconsistent application of mandatory minimums has not only exacerbated disparities by expanding the sentencing differentials between analogous cases, it has generated inequality by requiring the same base sentences in patently dissimilar cases. In other words, mandatory minimums have not only fostered *undue disparity* in sentencing, they have created *undue uniformity* by demanding the same punishment for disparate crimes and criminals.¹⁰⁷ Equality in the classical sense requires decision-makers not only to treat like cases alike, but also to treat dissimilar cases differently. It would thus be a violation of equality for relevantly dissimilar offenders to receive analogous sentences, just as it would be for relevantly similar offenders to receive disparate sentences.

Mandatory minimums often violate the idea that different cases should be treated differently by accentuating certain quantifiable variables in fixing punishment. This offers the illusion of equality through the semblance of mathematical objectivity, while disregarding all other information about the defendant and his life. So although mandatory minimums provide equal punishment when certain objects are equal—the existence of a firearm, the quantity of drugs, the number of prior convictions, what have you—this grouping of defendants cannot ensure moral equality: the equal treatment of individuals whose crimes, backgrounds, and prospects are so analogous as to justify identical sentences and, conversely, the unequal (but judicious) treatment of individuals whose crimes, personal histories, and prospects are materially different. Mandatory minimums operate with a sort of *numerical* equality—not unlike the “majestic equality” of the criminal justice system

104. See, e.g., Luna & Cassell, *supra* note 1, at 18 n.70.

105. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 101–02; BRENNAN CTR. FOR JUST., RACIAL DISPARITIES IN FEDERAL PROSECUTIONS 11 (2010).

106. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 101–02; Letter from Pat Nolan et al., to Hon. John A. Boehner, House Minority Leader (May 25, 2010), <http://www.famm.org/Repository/Files/BOEHNER%20LETTER.pdf>; Erik Luna, *Race, Crime, and Institutional Design*, 66 LAW & CONTEMP. PROBS. 183, 183–87 (2003).

107. 2011 SPECIAL REPORT, *supra* note 5, at 90.

described by Anatole France¹⁰⁸—offering equal punishment for those who are not equal.

Consider, for instance, the so-called “cliff” effect of mandatory minimums that draw seemingly trivial lines with huge consequences.¹⁰⁹ The most striking examples often involve illegal drugs, where offenders face steep cliffs at quantity cutoffs. Someone caught with, say, 0.9 grams of LSD might receive a relatively short sentence—but add on a fraction of a gram and a half-decade in federal prison necessarily follows, with the defendant falling off the metaphorical cliff.¹¹⁰ Likewise, mandatory minimums can have a “tariff” effect, where some basic fact triggers the same minimum sentence regardless of whether the defendant was, for instance, a low-level drug courier or instead a narcotics kingpin.¹¹¹ Perversely, the tariff may be levied on the least culpable members in a criminal episode. Unlike those in leadership positions, low-level offenders often lack the type of valuable information that can be used as a bargaining chip with prosecutors.¹¹²

C. MANIPULATION AND ACCURACY

To obtain maximum leverage to extract pleas, law enforcement may engage in a process known as “count stacking” or “charge stacking.” For purposes of charging, the government divides up a single criminal episode into multiple crimes, each carrying its own mandatory sentence that then can be stacked, one on top of the other, to produce heavier punishment.¹¹³ This may be particularly troubling when the government procures further crimes through its own actions, as when law enforcement arranges a number of controlled drug buys in order to achieve a lengthy sentence. In multi-defendant cases, there is also an issue of fairness when disparate punishment is the result of a “race to the prosecutor’s office,” with the defendant who pleads first—sometimes the one who has the savviest or most experienced defense counsel—avoiding a long mandatory sentence.

108. ANATOLE FRANCE, *THE RED LILY* 91 (1894), *quoted in* JOHN BARTLETT, *FAMILIAR QUOTATIONS* 550 (Justin Kaplan ed., 1992) (“The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, beg in the streets or steal bread.”).

109. See 2011 SPECIAL REPORT, *supra* note 5, at 91.

110. See 21 U.S.C. § 841(b)(1)(B)(v).

111. See, e.g., *United States v. Brigham*, 977 F.2d 317 (7th Cir. 1992).

112. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, 99; COCAINE AND FEDERAL SENTENCING, *supra* note 79, at 20–21, 85.

113. See, e.g., Luna & Cassell, *supra* note 1, at 14.

Moreover, the mechanical nature of mandatory minimums can entangle all criminal justice actors in an oxymoronic process where facts are bargainable, from the amount of drugs to the existence of a gun. The participants will figuratively “swallow the gun” to avoid a factual record that would require mandatory sentence.¹¹⁴ To be sure, these manipulations may appear reasonable in difficult cases by evading excessive sentences demanded under a mandatory minimum. Regardless of benign intent, however, the distortive effect of mandatory minimums on transparency and truth can only undercut the legitimacy of the criminal justice system and its actors. The moral authority of criminal law depends on the perception of both substantive and procedural justice, and a system that allows, if not requires, duplicity tends to breed contempt for the law.¹¹⁵ A legitimate, properly functioning criminal justice system would not tolerate such deception and instead would demand that the case facts be true, not from some kind of omniscient perspective, but as best as humans can discern.

Due to its opaque nature, prosecutorial decision-making has proven almost impossible to fully understand and reform. Scholars and institutions like the U.S. Sentencing Commission have tried for decades to crack open this “black box” with limited success. Needless to say, mandatory sentencing schemes only aggravate the difficulties in evaluating and improving the prosecutorial function. Worse yet, mandatory minimums may undermine the principal benefit of transparency and truth in the criminal justice system: accurate outcomes. The accumulation of power by prosecutors through severe sentencing laws has resulted in a dramatic shift from trials to plea bargains and the near extinction of acquittals. As a result, some defendants who might have been acquitted at trial are now convicted by plea bargaining, which diminishes the chances of discovering the truth through the trial process and, in exceptional cases, may

114. See, e.g., *United States v. Mercer*, 472 F. Supp. 2d 1319, 1323 (D. Utah. 2007); David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645, 674–75 (2004).

115. See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); see also Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1154–65 (2000).

increase the possibility of wrongful convictions.¹¹⁶ In fact, recent cases have demonstrated how mandatory minimums can generate fabricated testimony and wrongful convictions.¹¹⁷

Mandatory minimums may even have a backlash effect, making community members less likely to report suspicious behavior and cooperate with law enforcement out of concern that their neighbors may receive draconian punishment.¹¹⁸ Likewise, when victims of actual violence notice that their assailants receive shorter terms than imposed on nonviolent offenders via mandatory minimums, the message received is that their pain and suffering is less important than abstract governmental objectives, like winning the “war on drugs.”¹¹⁹ Over the long haul, lay citizens may refuse to cooperate with prosecutors, and conscientious jurors may engage in nullification, not because they believe the defendant to be innocent or the allegations unproven, but out of fear that an unjust sentence will necessarily ensue.¹²⁰

RECOMMENDATIONS

Given the foregoing flaws and others in mandatory sentencing statutes, former U.S. District Court Judge John Martin offered this terse but accurate assessment of mandatory minimums: “They are cruel, unfair, a waste of resources, and bad law enforcement policy. Other than that they are a great idea.”¹²¹ Here are a few potential reforms to mandatory minimums, roughly ranked from minimalist to maximalist in approach:

1. **Do no (new) harm.** Politicians should not create new mandatory minimum sentencing statutes or expand those currently on the books. Whatever one thinks of the current slate of mandatory minimums, no

116. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 150–54 (2005). Although Professor Wright’s study focused on the pre-Booker mandatory guidelines, his critique applies with equal force to statutory minimums. See also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 164–65, 180 (2014). Cf. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

117. See, e.g., 2011 SPECIAL REPORT, *supra* note 5, at 97; see also Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

118. See 2011 SPECIAL REPORT, *supra* note 5, at 99; Schulhofer, *supra* note 103, at 16–18.

119. See *United States v. Angelos*, 345 F. Supp. 2d 1227, 1251 (D. Utah 2004).

120. See *id.* at 1252.

121. Hon. John S. Martin, Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 311, 317 (2004).

plausible case can be made that existing statutes are somehow insufficient for law enforcement purposes.

2. **Create court mechanisms to prevent a patently unjust application of mandatory minimums.** One much-discussed reform is the adoption of “safety valve” provisions that permit a judge to sentence a defendant below a mandatory minimum when certain criteria are met. A few states have such provisions to prevent injustices under their mandatory sentencing laws.¹²² As mentioned earlier,¹²³ the federal system also contains a safety valve, although the current version is rather limited and applicable only to certain drug crimes. It should be expanded to be more generally available to defendants who might otherwise receive an excessive prison sentence.¹²⁴ Among other things, a safety-valve provision could require that the sentencing court provide specific reasons for employing the provision in a given case, thereby creating a written record that can be examined by an appellate court. A more elaborate vehicle would have juries participate in the determination of whether a mandatory minimum sentence is excessive.¹²⁵ For instance, a trial judge could provide the defendant’s criminal history and other relevant information to the jury, which would then deliberate and recommend a sentence to the court. If that recommendation were less than the mandatory minimum, the judge could then be authorized (but not required) to impose a sentence below the mandatory term.
3. **Empower correctional or parole authorities to reconsider sentencing length.** Another possible reform would involve a post-incarceration mechanism to reconsider the length of prisoners serving long mandatory minimum sentences.¹²⁶ This could be done by empowering (or reviving) a parole commission to evaluate current prison sentences under mandatory minimums and consider whether it makes sense to continue to incarcerate long-serving inmates. A somewhat similar approach would be to enact or expand so-called “compassionate release” provisions that exist in several jurisdictions. The existing federal provision authorizes the U.S. Bureau of Prisons to make a motion to the district court for the release of a prisoner

122. See Gregory Newburn, *Mandatory Minimum Sentencing Reform Saves States Money and Reduces Crime Rates*, THE STATE FACTOR, Mar. 2016, at 6-7, <https://www.alec.org/app/uploads/2016/03/2016-March-ALEC-CJR-State-Factor-Mandatory-Minimum-Sentencing-Reform-Saves-States-Money-and-Reduces-Crime-Rates.pdf>.

123. See *supra* notes 20–22 and accompanying text.

124. See Luna & Cassell, *supra* note 1, at 61–63.

125. See *id.* at 78–80.

126. See *id.* at 81–82; Tonry, *Mostly Unintended Effects*, *supra* note 1, at 105–06.

who is at least 70 years old and has served at least 30 years in prison, or for other “extraordinary and compelling reasons.”¹²⁷ The Bureau of Prisons has interpreted this authority very narrowly, however, effectively limiting release to those with terminal illnesses or severely debilitating and irreversible conditions. Congress could expand this authority to include additional circumstances where the bureau could use parole or other forms of discretionary release to discharge prisoners who have already served significant sentences pursuant to mandatory minimums.¹²⁸

4. **Limit the scope and impact of mandatory minimums.** The problematic cases involving mandatory minimums can be mitigated by narrowing their reach and effect. Obviously, the length of mandatory minimums could be reduced, with, for instance, a troubling 5-year minimum sentence scaled back to a 1-year mandatory term. Such reductions could be done discretely to particular statutes or across the board to all mandatory minimums. Alternatively, mandatory minimums could be converted into presumptive sentences, where judges have the authority to issue a lower sentence so long as they provide good reasons as to why the presumption should not apply in a given case.¹²⁹ Mandatory sentencing statutes could also be limited in scope to avoid their application in cases of less serious crimes or criminals. Multi-year mandatory minimums might be eliminated for nonviolent drug crimes, for instance, and offenses by juveniles and nonviolent property crimes might be removed as predicate offenses for recidivist statutes such as three-strikes laws. Another ready-made fix would be to preclude the “stacking” of mandatory minimum sentences, such as those pursuant to 18 U.S.C. § 924(c),¹³⁰ which can result in a lifetime’s worth of punishment for just a few days of criminal activity. Still other reforms could check the use of mandatory minimums against bit players in criminal schemes by, for example, constraining the application of conspiracy doctrine and accomplice liability as the basis for long mandatory sentences.¹³¹ Finally, mandatory minimums might be subject to temporal limits through so-called “sunset clauses,” where the statutes would automatically lapse after a certain time period unless lawmakers voted to extend the laws.¹³²

127. 18 U.S.C. § 3582(c)(1).

128. See Luna & Cassell, *supra* note 1, at 82.

129. See Tonry, *Mostly Unintended Effects*, *supra* note 1, at 103–04.

130. See Luna & Cassell, *supra* note 1, at 80–81.

131. See Schulhofer, *supra* note 103, at 26–27.

132. See Tonry, *Mostly Unintended Effects*, *supra* note 1, 104.

5. **Eliminate mandatory minimum sentences.** For many crimes, particularly those that do not involve violence, mandatory minimums could be eliminated. “In a sensible world of rational policy making, no mandatory penalty laws would be enacted. Those that exist would be repealed. That would be the simplest way to address the problems revealed by the literature,” Professor Tonry argued.¹³³ “That is not the world we live in,” he noted, but perhaps someday it will be. Until then, lesser reforms should be pursued.

133. *Id.* at 103.

Capital Punishment

Carol S. Steiker* and Jordan M. Steiker†

American capital punishment is at a crossroads. Capital sentencing and executions have declined markedly. Several states have recently abolished the death penalty and others have imposed moratoria on executions. Despite extensive constitutional doctrines regulating state capital practices, state capital systems are still fraught with arbitrariness, inaccuracy, and unfairness. Many of the problems facing American capital punishment are intractable and likely unamenable to significant improvement or reform. This chapter describes the obstacles to reform and the case for moratorium or repeal. It then offers three concrete proposals for retentionist jurisdictions, focusing on improving capital representation, centralizing prosecutorial charging decisions, and limiting the application of the death penalty against persons with serious mental illness.

INTRODUCTION

Capital punishment in the United States is in a state of flux and fragility. After the Supreme Court reinstated the death penalty in 1976, having temporarily abolished it in 1972 in the landmark case of *Furman v. Georgia*,¹ the use of capital punishment rose along virtually every dimension for the next quarter-century. Death sentencing reached its modern-era (post-1976) peak in 1996, when 315 new death sentences were returned.² Executions reached their modern-era peak in 1999, when 98 people were executed.³ Public support for the death penalty rose, peaking in 1994, when 80% of respondents to a Gallup poll favored the death penalty for the crime of murder and only 16% opposed

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1. 408 U.S. 238 (1972). The cases reinstating the death penalty in 1976 were *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); and *Jurek v. Texas*, 428 U.S. 262 (1976).

2. See *Death Sentences in the United States Since 1977 by State and by Year*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited May 8, 2017).

3. See *Facts About the Death Penalty: Number of Executions Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited May 8, 2017).

it.⁴ New York state reinstated the death penalty in 1995, and Congress expanded the federal death penalty to 60 additional federal crimes in the Violent Crime Control and Law Enforcement Act of 1994.⁵ Congress also sharply limited the availability of federal judicial review of state criminal proceedings with the express purpose of expediting state executions through the Anti-Terrorism and Effective Death Penalty Act of 1996.⁶

Since 2000, however, capital punishment in the United States has seen sharp downturns along virtually every dimension. In 2016, only 30 death sentences were returned nationwide, a decline of more than 90% from the modern-era peak. Similarly, only 20 executions took place nationwide, down almost 80% from the modern-era peak. Public support, measured by the Gallup polling organization, hit a modern-era low, with 60% in favor of the death penalty for murder and 37% against. New York invalidated its capital statute a decade after reinstating it, having conducted no executions during the reinstatement period. New Jersey, New Mexico, Illinois, Connecticut, Maryland, and Nebraska all legislatively repealed their capital statutes, though Nebraska's death penalty was reinstated by referendum in November 2016. Several federal and state courts declared certain capital schemes unconstitutional in their entirety. For example, a federal judge in California declared California's death-penalty system unconstitutional in 2014, though the decision was overturned on procedural grounds.⁷ The Connecticut Supreme Court declared the death penalty unconstitutional under the Connecticut Constitution in 2015, sparing the 11 people on death row at the time of the state's legislative repeal, which was prospective only.⁸ Other courts, including the U.S. Supreme Court, have increasingly upheld constitutional challenges to discrete aspects of capital practices, such as standards for the exemption of offenders with intellectual disability and lethal-injection protocols.⁹

4. *Gallup Historical Trends: Death Penalty*, GALLUP (May 8, 2017), <http://www.gallup.com/poll/1606/death-penalty.aspx>.

5. Act of Jan. 4, 1995, ch. 1, 1995 N.Y. Laws 1; Pub. L. No. 103-322, 108 Stat. 1796 (1994).

6. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

7. *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

8. *State v. Santiago*, 122 A.3d 1 (Conn. 2015).

9. See, e.g., *Moore v. Texas*, 137 S. Ct. 1039 (2017) (rejecting Texas' standard for evaluating claims of exemption from the death penalty based on intellectual disability); *In re Ohio Execution Protocol*, 853 F.3d 822 (6th Cir. 2017) (upholding preliminary injunction against Ohio's use of midazolam in its lethal injection protocol), *rev'd en banc*, 2017 WL 2784503 (6th Cir. June 28, 2017).

The death penalty's precipitous decline over the past 15 years is due largely to growing concerns about the fairness, accuracy, and effectiveness of the capital justice process across the United States. These concerns are well-founded and difficult to adequately address through constitutional regulation or legislative reform. Consequently, the most appropriate path forward may well be moratorium or repeal, solutions embraced by a growing number of jurisdictions. In jurisdictions in which moratorium and repeal are not viable options, however, there are discrete policy changes that are worth pursuing to address some central problems in the administration of capital punishment. In what follows, we document the concerns that have led to the death penalty's recent decline and explain why moratorium or repeal is the most appropriate course of action. We also sketch three discrete policy changes nonetheless worth pursuing: (1) enhanced capital defense services; (2) centralized capital charging processes; and (3) exemption from capital punishment for offenders with serious mental illness.

I. THE CASE FOR MORATORIUM OR REPEAL

While European abolition of the death penalty was achieved largely as a result of a consensus that capital punishment runs afoul of the respect for human dignity that is a universal human right, the sharp decline of the death penalty in the United States reflects growing awareness of irremediable problems in its administration. These problems are numerous and varied, but most of them can usefully be grouped into three categories: (1) fairness, (2) accuracy, and (3) effectiveness. Together, these issues have led a substantial number of jurisdictions to repeal their capital statutes or to adopt moratoria on executions until the problems can be adequately addressed. In light of the systemic and intractable nature of the problems at issue, repeal or moratorium is the most appropriate course of action where it is feasible.

A. FAIRNESS

Concerns about fairness in the administration of capital punishment arise from the enormous discretion generated by the structure of the capital justice process. Most capital statutes make death-eligible murder an extremely broad offense that includes offenders who are non-triggerman accomplices to felony murder, offenses in which the deceased is a member of one of the oft-expanded groups of specially protected victims, and offenses that are otherwise deemed especially "heinous" or "vile," among many other avenues to eligibility. These statutes give county prosecutors great leeway to decide whether and whom

to charge capital.¹⁰ Not surprisingly, the result is wildly divergent capital charging decisions even within states, with geography rather than heinousness determining who is sentenced to death. A recent study revealed that 2% of the counties in the country accounted for the majority of death sentences nationwide since 1976 (and for *all* the death sentences imposed nationwide in 2012, the last full year of the study).¹¹ Another study that was cited numerous times in the Connecticut Supreme Court's constitutional abolition of the death penalty revealed that geography was the single most influential factor in the application of the death penalty within that state.¹²

The discretion of county prosecutors in capital charging decisions is compounded by the discretion of capital sentencing juries. In American history, capital sentencing traditionally remained the province of juries even as judges took on responsibility for most ordinary criminal sentencing. The centrality of the jury was extended and underscored by the Supreme Court's conclusion in 2002 that aggravating factors, usually considered during the sentencing phase of capital trials, are functionally elements of the offense of capital murder and thus constitutionally *required* to be found by the jury.¹³ The broad eligibility for capital murder created by expansive aggravating factors, coupled with the wide-ranging information presented to juries as mitigating evidence, grants substantial discretion to capital sentencing juries to impose or withhold death sentences. As a result, many studies have found significant disparities in sentencing outcomes on the basis of race, gender, and other irrelevant factors.¹⁴ The Supreme Court has essentially closed the door to constitutional challenges to the influence of race on capital sentencing outcomes by holding that evidence of discriminatory sentencing patterns is insufficient to demonstrate a violation of the Equal Protection Clause;

10. For discussions of prosecutorial discretion, see Ronald F. Wright, "Prosecutor Institutions and Incentives," in Volume 3 of the present Report; and John F. Pfaff, "Prosecutorial Guidelines," in Volume 3 of the present Report.

11. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL (Oct. 2013), <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

12. See John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637, 673 (2014).

13. *Ring v. Arizona*, 536 U.S. 584 (2002).

14. See Donohue, *supra* note 12 (documenting race and gender disparities in Connecticut); G. Ben Cohen, McCleskey's *Omission: The Racial Geography of Retribution*, 10 OHIO ST. J. CRIM. L. 65, 73–74 (2012) (collecting studies documenting race-of-the-victim disparities in Virginia, Arkansas, California, Colorado, Florida, Illinois, Kentucky, Maryland, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, and Virginia); see also Paul Butler, "Race and Adjudication," in Volume 3 of the present Report; Cassia Spohn, "Race and Sentencing Disparity," in the present Volume.

rather, defendants must introduce evidence of racial discrimination in their individual cases.¹⁵ But “smoking gun” evidence of this type is exceedingly rare, and thus racial disparities continue without legal remedy.

B. ACCURACY

Even more disturbing than arbitrary and discriminatory patterns in the distribution of capital sentences is evidence of wrongful convictions in capital cases. In 2003, Republican Gov. George Ryan granted mass clemency to the more than 160 inmates on death row in Illinois in the wake of 13 exonerations of condemned inmates in that state in less than 20 years. The problem of wrongful convictions in capital cases has since been shown to reach far beyond Illinois or any subset of jurisdictions. Researchers estimate that approximately 4% of those sentenced to death nationwide are actually innocent.¹⁶

One of these researchers has argued convincingly that erroneous convictions occur disproportionately in capital cases because of special circumstances that affect the investigation and prosecution of capital murder. Those circumstances include pressure on the police to clear homicides; the absence of live witnesses in homicide cases; greater incentives for the real killers and others to lie; greater use of coercive or manipulative interrogation techniques; greater publicity and public outrage around capital crimes; the “death qualification” of capital juries, which makes such juries more likely to convict; greater willingness by defense counsel to compromise the guilt phase of capital trials to avoid death during the sentencing phase; and the lessening of the perceived burden of proof due to the heinousness of the offense.¹⁷ One of the most comprehensive recent studies of wrongful convictions (both capital and non-capital) has identified other common causes of conviction of the innocent, such as faulty forensic evidence, false confessions, mistaken eyewitness testimony, unreliable jailhouse informants, and ineffective defense counsel.¹⁸ Although it is possible to attempt to address some of these factors through judicial rulings or legislative reform, many of the

15. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

16. See, e.g., Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT’L ACAD. SCI. 7230 (2014).

17. See Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

18. See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011). See generally Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report; Richard A. Leo, “Interrogation and Confessions,” in Volume 2 of the present Report; Gary L. Wells, “Eyewitness Identification,” in Volume 2 of the present Report; Daniel Richman, “Informants and Cooperators,” in Volume 2 of the present Report; Eve Brensike Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report; Erin Murphy, “Forensic Evidence,” in Volume 3 of the present Report.

causes of wrongful convictions—such as pressures on investigators, prosecutors, and defense counsel, the mistakes or lies of witnesses, and the effects of publicity and emotional decision-making on juries—are not easily remedied. As a result, others have followed Gov. Ryan’s lead in abandoning their support for the death penalty because of the inevitability of wrongful executions.¹⁹

C. EFFECTIVENESS

The arbitrariness and unreliability of capital punishment described above render the death penalty incapable of meeting the twin purposes recognized by the Supreme Court: retribution and deterrence.²⁰ Given that current patterns of imposition of the death penalty are better explained by geography and race than by heinousness of the crime, the death penalty does not accord with retributive values, as it is not limited to or reliably applied against “the worst of the worst.”²¹ Similarly, arbitrariness and error in the imposition of capital sentences undermine the death penalty’s ability to promote deterrence.

But even beyond the problems of arbitrariness and error, two other factors prevent the death penalty from achieving its purported ends. First, even though juvenile offenders and offenders with intellectual disability have been constitutionally exempted from the death penalty,²² offenders with mental illness remain eligible for capital punishment and are disproportionately represented on death row. A recent study found that 43% of inmates executed between 2000 and 2015 had received a mental-illness diagnosis at some point in their lives, a much higher percentage than those in the general public.²³ Those suffering from mental illness at the time of their offenses likely have reduced culpability for their behavior as a result of their illness, undermining

19. See, e.g., Mark L. Earley, *A Pink Cadillac, an IQ of 63, and a Fourteen-Year-Old from South Carolina: Why I Can No Longer Support the Death Penalty*, 49 U. RICH. L. REV. 811 (2015) (former attorney general of Virginia who oversaw 36 executions explaining his changed stance on the death penalty).

20. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (“The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”). For a discussion of these purposes, see Jeffrie G. Murphy, “Retribution,” in the present Volume; and Daniel S. Nagin, “Deterrence,” in the present Volume.

21. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”).

22. See *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304 (2002) (offenders with intellectual disability).

23. See Frank R. Baumgartner & Betsy Neill, *Does The Death Penalty Target People Who Are Mentally Ill? We Checked*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/?utm_term=.b9c6076d2d5e.

the retributive justice of a death sentence. Similarly, mentally ill offenders are less likely to be able to rationally consider the costs and benefits of their actions and thus are less likely to be subject to any deterrent effect that the death penalty might have. Such considerations are precisely what led the Supreme Court to exempt juvenile offenders and offenders with intellectual disability from the ambit of the death penalty. The continued eligibility of the mentally ill for capital punishment in every American jurisdiction that imposes it significantly undermines the ability of the punishment to meet its penological goals.

Second, even if the death penalty were imposed with complete fairness and accuracy and only on those in perfect mental health, it would *still* be unlikely to promote its penological purposes because of its declining use and the lengthy delays that exist between the imposition of death sentences and their execution. The enormous declines in the imposition of the death penalty have rendered it an exceedingly rare sentence that in recent years has yielded executions, on average, nearly 18 years after the sentence is imposed.²⁴ Moreover, these are only the death sentences that actually result in executions. Many sentences are permanently vacated, and many death-sentenced inmates die of other causes before they can be executed. Executing a minority of death-sentenced offenders decades after their crimes—when both they and the communities seeking retribution for their crimes have often changed dramatically—yields only attenuated retributive justice, if that. Moreover, the ability of capital punishment to promote deterrence is fatally undermined by its delayed and uncertain implementation, as speed and certainty in the imposition of criminal sanctions are widely recognized as key to their deterrent effect.²⁵ A blue-ribbon panel of experts recently reviewed 30 years of empirical evidence and found it insufficient to establish a deterrent effect of capital punishment.²⁶

The lengthy delays that inhibit the effectiveness of capital punishment are largely the product of the constitutional requirements for capital trials and the capital review process imposed by the U.S. Supreme Court. Even if it were possible (or legal) for jurisdictions to minimize or avoid some of these requirements in order to reduce delays, such avoidance would undermine the fairness and accuracy of the capital justice process, resulting in an impossible choice. As Justice Breyer noted, “In this world, or at least in this Nation, we can

24. See *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting).

25. See generally Nagin, *supra* note 20.

26. See NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY (D. Nagin & J. Pepper eds., 2012).

have a death penalty that at least arguably serves legitimate penological purposes or we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both."²⁷

In the absence of the capacity to fulfill some legitimate penological purpose, the death penalty becomes an exercise in "the gratuitous infliction of suffering" that calls into question not only its wisdom but also its constitutionality under the Eighth Amendment, as the Supreme Court recognized in its 1972 decision in *Furman*.²⁸

D. MORATORIUM OR REPEAL

The above concerns have prompted the precipitous decline in the use of the death penalty since 2000 and have increasingly led to wholesale repeal or moratoria across a wide swath of jurisdictions. After New York's highest court invalidated its capital statute, the New York Legislature refused to reinstate the death penalty in 2005, and the governor ordered the state's execution apparatus dismantled in 2008. Six additional state legislatures (New Jersey, New Mexico, Illinois, Connecticut, Maryland, and Nebraska) voted affirmatively to repeal their capital statutes in the past decade (although Nebraska's statute was reinstated by referendum in 2016). Four additional states (Colorado, Pennsylvania, Oregon, and Washington) currently have gubernatorial moratoria on executions. A recent comprehensive report by the bipartisan Oklahoma Death Penalty Review Commission—co-chaired by former Gov. Brad Henry, former United States Magistrate Judge Andy Lester, and former Oklahoma Court of Criminal Appeals Judge Reta Strubhar—recommends that Oklahoma adopt a moratorium on executions until the state's legislature, executive branch, and judiciary take actions to address the systemic flaws in Oklahoma's death-penalty system.

The actions of state elected officials rejecting or restraining the death penalty have been echoed in decisions by judges addressing the constitutionality of federal and state death-penalty statutes and in the work of nonpartisan legal organizations. Two federal trial court judges have questioned the

27. *Glossip*, 135 S. Ct. at 2772 (Breyer, J., dissenting).

28. *Furman*, 408 U.S. at 312 (White, J., concurring) (explaining that a "penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment").

constitutionality of the federal death-penalty statute in its entirety.²⁹ A federal trial court judge declared the California death penalty unconstitutional (though the decision was overturned on appeal), and the Connecticut Supreme Court declared capital punishment unconstitutional under that state's Constitution.³⁰ Two sitting Supreme Court justices have questioned the constitutionality of the death penalty throughout the country.³¹ The nation's largest legal organization, the American Bar Association, voted for a moratorium on capital punishment in 1997, a decision that has found further support in the ABA's critical assessments of state death-penalty practices over the ensuing two decades.³²

Perhaps most significantly, the nation's premier legal think tank, the American Law Institute, voted in 2009 to withdraw the death-penalty provisions of its influential Model Penal Code—provisions that had provided the template for the modern death-penalty statutes upheld in 1976 and currently in force throughout the United States. The ALI explained that its withdrawal was motivated by “the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”³³ The ALI not only withdrew its model death-penalty provisions but also indicated its intention not to undertake any further attempts at law reform in the area of capital punishment, underscoring the “intractable” nature of the problems that it identified. In the words of Adam Liptak, reporting on the ALI's decision for the *New York Times*, “What the institute was saying is that the capital justice system in the United States is irretrievably broken.”³⁴

29. See *United States v. Quinones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002) (declaring federal death penalty statute unconstitutional), *rev'd*, 313 F.3d 49 (2d Cir. 2002); *United States v. Fell*, No. 5:01-cr-12-01, 2016 WL 7238930 (D. Vt. Dec. 13, 2016) (denying motion to declare federal death penalty statute unconstitutional, but raising constitutional questions for the Supreme Court to consider).

30. *Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015); *State v. Santiago*, 122 A.3d 1 (Conn. 2015).

31. *Glossip*, 135 S. Ct. at 2726 (Breyer, J., dissenting, joined by Ginsburg, J.) (suggesting that the Court receive “full briefing on ... whether the death penalty violates the Constitution”).

32. See *State Death Penalty Assessments*, AM. BAR ASS'N, http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited May 8, 2017).

33. See Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 354 (2010). As a matter of full disclosure, we (Carol Steiker and Jordan Steiker) were the authors of a report to the ALI recommending that it withdraw the death penalty provisions of the Model Penal Code.

34. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES (Jan. 4, 2010), <http://www.nytimes.com/2010/01/05/us/05bar.html>.

The growing recognition of the magnitude and difficulty of the problems in the capital justice system, by many of those most knowledgeable about the workings of the system, strongly suggests that the most appropriate course of action with regard to the death penalty is repeal or moratorium pending system overhaul.

II. ENHANCED CAPITAL DEFENSE SERVICES

Notwithstanding the strong reasons offered above for suspending or abolishing states' death-penalty schemes, there are several steps states should take short of moratoria and abolition to improve prevailing capital practices. The area most in need of reform is capital representation. The Court's approval of several capital statutes in 1976 following its invalidation of prevailing schemes in 1972 heralded the modern era of capital punishment. Perhaps nothing changed more dramatically as a result of the Court's intervention and the new statutory schemes than the demands placed on the capital defense function. The statutes upheld by the Court called for bifurcated proceedings, in which capital sentencers would separately decide the questions of guilt/innocence and whether the death penalty should be imposed.³⁵ The uniform creation of a "punishment phase" in the new state schemes meant that capital lawyers would have to dedicate time, thought, and resources to the issue of punishment, whereas prior capital practice tended to focus primarily on the question of guilt of the underlying offense. The new statutes included mandatory appeals, and in the wake of the new statutes, states updated and expanded opportunities for death-sentenced inmates to challenge their convictions and sentences in state post-conviction proceedings. Congress, too, created a right to counsel for indigent death-sentenced inmates in federal habeas proceedings.³⁶ In addition, the Supreme Court's intervention brought a whole new set of capital-specific doctrines governing, among other things, the selection of capital juries,³⁷ the adequacy of state's "aggravating factors,"³⁸ the sufficiency of state schemes to facilitate consideration of mitigating evidence,³⁹ proportionality limits on the imposition of the death penalty,⁴⁰ and newly recognized requirements of "heightened reliability" in capital cases.⁴¹

35. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

36. 18 U.S.C. § 3599 (2012).

37. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

38. *Godfrey v. Georgia*, 446 U.S. 420 (1980).

39. *Lockett v. Ohio*, 438 U.S. 586 (1978).

40. *Coker v. Georgia*, 433 U.S. 584 (1977).

41. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Defense lawyers were ill-equipped to meet the challenges posed by the new structure of state capital schemes and the newly recognized federal constitutional limits applicable to state capital regimes. By the mid-1970s, there was simply no functioning capital defense bar in virtually any jurisdiction.⁴² At the trial level, though there were many lawyers with experience trying capital cases, such lawyers tended to be “generalists” who treated such cases as they would other cases involving serious felonies; they had no experience investigating and presenting mitigation evidence relevant to the newly established punishment phase. Nor were such lawyers trained to negotiate settlements in capital cases; the prevailing practice was to contest guilt and hope for the best. Moreover, trial lawyers lacked experience navigating two separate trials and often poorly coordinated their guilt/innocence and punishment-phase defenses, in ways that were not only unhelpful to their clients but often counterproductive. For the few lawyers who endeavored to meet the challenges posed by the emphasis on mitigation in the post-*Furman* statutes, they lacked the resources to be successful. States often capped the amount of compensation available in capital trials at absurdly low levels, making investigation and presentation of evidence a practical impossibility, especially when expert testimony was essential to the mitigation case.

Representation on direct appeal and in newly expanded state habeas proceedings was likewise poor. Just as there were no “capital trial lawyers” in the mid-1970s, there were few if any experts in capital appeals and state postconviction representation. In many states, trial lawyers would file their own direct appeals, and they often lacked knowledge about the emerging constitutional doctrines governing capital trials; they also lacked the time and resources to mount comprehensive challenges to the new state statutory provisions, even ones that were manifestly vulnerable given the Court’s new capital doctrines. State postconviction proceedings became newly significant, because they offered capital defendants the opportunity to develop new facts relevant to the constitutionality of their convictions and sentences (most notably, challenges to the adequacy of trial representation and the disclosure obligations for prosecutors under *Brady v. Maryland*).⁴³ But lawyers appointed to undertake such representation, like their trial counterparts, tended to ignore the investigative responsibilities that came with the new postconviction opportunities; such lawyers often confined their challenges to “record-based” claims, many of which were unreviewable in state postconviction

42. See CAROL STEIKER & JORDAN STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT* 196–97 (2016).

43. 373 U.S. 83 (1963).

proceedings. Representation on federal habeas was mixed at best. In some states the Administrative Office of the U.S. Courts created specialized offices for federal habeas representation, but in many other jurisdictions lawyers were appointed to represent inmates in individual cases, often with no standards or qualifications for appointed counsel. The resulting representation on federal habeas ran the full gamut—from professional, effective representation in some cases to ineffective, uninspired representation in others. The increased complexity of the federal habeas forum, especially after the passage of the Anti-Terrorism and Effective Death Penalty Act,⁴⁴ magnified the significance of disparities in federal habeas representation.

In 1989, the American Bar Association, alarmed by the uneven and inadequate representation in capital cases, issued *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*,⁴⁵ which sought to specify both the duties of individual lawyers in capital cases and the obligations of states to craft institutional structures that would adequately support the capital defense mission. By the early 1990s, the deficiencies in capital representation were increasingly apparent. Stephen Bright, a leading capital attorney in Georgia, penned a comprehensive critique of prevailing representation practices.⁴⁶ He concluded that the lottery for death sentences condemned by *Furman* essentially had been replaced by a new lottery—one in which the distribution of the American death penalty turned on the quality of counsel at various stages. He offered numerous illustrations of how poor lawyering at trial, on appeal, or in postconviction proceedings resulted in death sentences and executions, and the extent to which individual lawyers, states, and judges routinely failed to ensure adequate representation.

In 1997, the ABA passed a resolution calling for a moratorium on executions in the United States because of concerns about continuing unfairness, inaccuracy, and discrimination in the administration of the death penalty.⁴⁷ The first ground listed in support of its moratorium was the failure of states to embrace or satisfy the requirements of the *Guidelines*.⁴⁸ The ABA subsequently updated its

44. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

45. AM. BAR ASS'N, *GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES* (1989), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf.

46. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

47. *Death Penalty Moratorium Resolution*, AM. BAR ASS'N (1997), http://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/moratorium-1997.html.

48. See *id.*

guidelines in 2003,⁴⁹ providing even greater detail about the minimally necessary tasks and structures for effective capital representation. The ABA also created a project to review state implementation of its death-penalty recommendations, which subsequently issued numerous state-by-state reports along numerous dimensions, including adherence to the representation *Guidelines*.⁵⁰

Much has changed since 1976. There are more lawyers trained in capital defense, at trial, on appeal, and in postconviction proceedings. States almost uniformly provide greater resources than they did in the 1970s and '80s. Yet fundamental problems remain. No state thus far has satisfied all of the *Guidelines'* recommendations: many states fail to adequately police the qualifications of lawyers at all stages; they fail to impose appropriate workload limits; they do not ensure adequate training for capital-specific tasks; they do not ensure sufficient insulation of defense counsel to encourage independent, zealous defense; and they do not guarantee sufficient funding for attorney compensation, mitigation investigation, and experts. Perhaps most fundamentally, states simply have not designed plans, as required by the *Guidelines*, to ensure "high quality legal representation in death penalty cases."⁵¹

It might be thought that these failures are less pressing given the sharp decline in capital sentences over the past two decades. If only a few dozen offenders are sentenced to death nationwide each year, why does the inadequacy of capital defense systems even matter? First, capital sentences will continue to be imposed—perhaps in even greater proportion—on those defendants with mediocre or poor representation. Prosecutors are increasingly exercising their discretion to settle cases.⁵² In turn, defense lawyers who work diligently in pretrial negotiations to identify grounds for a non-death sentence, develop a relationship with their clients to facilitate a plea, and persuasively present their case for settlement will not likely find their clients among the increasingly small number of offenders in their jurisdiction whom prosecutors take to trial. The substantial decline in public demand for death sentences and the accompanying rise in the costs associated with capital trials and appeals provide

49. AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (2003) [hereinafter 2003 ABA GUIDELINES], https://www.americanbar.org/groups/committees/death_penalty_representation/resources/aba_guidelines/2003-guidelines.html.

50. See *State Death Penalty Assessments*, AM. BAR ASS'N, http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last visited May 8, 2017) (the state-by-state reports of the ABA Death Penalty Due Process Review Project, formerly known as the ABA Moratorium Implementation Project).

51. See 2003 ABA GUIDELINES *supra* note 49, § 2.1.

52. For a discussion of plea bargaining, see Jenia I. Turner, "Plea Bargaining," in Volume 3 of the present Report.

strong incentives for prosecutors to seek death only in those cases where there will be a one-sided contest. Just as Bright decried the American death-penalty system in the 1990s as one that assigned the death penalty for the worst lawyer rather than the worst crime, so too will disparities in representation continue to account for the inequitable distribution of death sentences going forward.

Second, and perhaps more importantly, close to 3,000 offenders currently remain on death row, and the quality of representation for those offenders will continue to bear on the accuracy and fairness of the American death penalty. Inadequate representation continues to plague the appeals and postconviction processes. Many states continue to rely on court-appointed lawyers to handle these cases, frequently with inadequate appointment standards and almost uniformly without systems for monitoring performance. Resources for postconviction lawyers vary tremendously across jurisdictions and even within them.

Postconviction lawyers in particular are essential to uncovering errors at trial, including the reliability of outdated forensic science. Many cases of wrongful conviction have been uncovered in postconviction litigation, yet significant swaths of cases involve no serious postconviction investigation. Postconviction litigation is also essential to policing the adequacy of trial counsel, but postconviction proceedings often fail to serve this purpose. The federal constitutional standard to prevail on claims of ineffective assistance of counsel is notoriously demanding, affording strong deference to the strategic choices of trial counsel.⁵³ Constitutional litigation simply does not catch the many cases in which subpar representation contributed to a death verdict. Indeed, federal habeas courts must provide “double deference” in cases where state courts have rejected claims of inadequate representation, deferring to the state court’s own deferential review of trial representation.⁵⁴ And if inadequate postconviction lawyering results in an improper conviction or sentence being sustained, there is no recourse: Prevailing constitutional doctrine holds that inadequate representation in state postconviction or federal habeas is not a grounds for relief.⁵⁵ Inmates who receive inadequate representation at all levels find the quickest path to execution.

53. *Strickland v. Washington*, 466 U.S. 668 (1984); *Burger v. Kemp*, 483 U.S. 776 (1987).

54. 28 U.S.C. § 2244(d)(1) (2012) (allowing relief for claims adjudicated in state court only if state court decision denying relief is contrary to, or an unreasonable application of, clearly established federal law).

55. *Murray v. Giarratano*, 492 U.S. 1 (1989) (rejecting constitutional right to representation for indigent prisoners seeking postconviction relief in capital cases).

Given the inadequacy of constitutional litigation to solve the problems of deficient representation, and the importance of high-quality representation to the fair, accurate, and nondiscriminatory application of the death penalty, it is incumbent upon states to reform their systems of capital representation. The *ABA Guidelines* provide a detailed road map for establishing an appropriate system. States could go a long way toward compliance with the *Guidelines* by opting to fund capital offices at every level (trial, direct appeal, and state postconviction proceedings). Although capital defender offices are not a failsafe against inadequate lawyering, appointment systems carry too many inherent risks. Appointment systems undermine attorney independence, as judges frequently choose lawyers for reasons unrelated to excellence in representation and sometimes incompatible with such representation (e.g., patronage or diminished likelihood of “making trouble”). Appointed lawyers often lack the resources and training to adhere to prevailing norms. Capital defender offices yield economies of scale and provide for specialization and expertise. Many of the key *Guidelines* recommendations—establishing a defense team, training of attorneys, monitoring of attorneys, and provision of resources—are much easier to ensure in the context of statewide or regional capital defender offices.

Thus, we conclude that the best way to improve the delivery of capital representation services is to establish capital defense offices at all levels (trial, direct appeal, and state postconviction). The goal of such offices should be to facilitate compliance with the *ABA Guidelines* for effective capital representation.

III. CENTRALIZED CAPITAL CHARGING PROCESSES

In the pre-*Furman* era, one of the central concerns about the American death penalty was its relatively infrequent application both in terms of death sentences and executions. The problem was compounded by the widespread perception that the few recipients of capital punishment were not selected based on the severity of their crimes but on the basis of arbitrary or discriminatory factors. That concern did not disappear after the Court upheld capital statutes in 1976 and states experienced a significant climb in capital sentences and executions through the 1990s. But in recent years, as death sentences have experienced remarkable declines, the concern about arbitrariness and discrimination has taken a new form: prevailing death sentences are increasingly concentrated in

a small number of counties within a small number of states.⁵⁶ In the period 2004-2009, only 1% of counties in the U.S. returned on average at least one death sentence per year.⁵⁷

This geographical concentration of death sentences is problematic for several reasons. First, such concentration suggests that the site of the crime rather than its seriousness will determine whether an offender receives a death sentence. Second, and relatedly, it suggests increased politicization of the death penalty, with manifestly different outcomes based on the charging inclinations of local prosecutors. Third, where geography overlaps with race, the resulting death sentences might be not merely arbitrary but also discriminatory. Fourth, when only a handful of counties are producing the bulk of contemporary sentences, the death sentences produced might overstate contemporary support for the death penalty; the decisions of a few prosecutors will generate death sentences at the same time that the rest of the country turns its back on the death penalty.

The best mechanism for avoiding geographical concentration of death sentences—and ensuring even-handed application of state capital punishment laws—is to require local prosecutors to consult with a statewide entity before seeking the death penalty. The statewide entity, which would include prosecutors from around the state, would deliberate about the appropriateness of seeking death in light of present and past cases. States could structure the process so that local prosecutors could not seek death unless their decisions were ratified by the statewide entity.

This recommendation faces several challenges. Some prosecutors would argue that the decision to seek death is a purely local prerogative and is properly informed by local opinion. On this view, locally informed charging decisions produce a “mini-federalism” akin to the federalism that allows some states to retain and use the death penalty frequently and others to abolish it altogether. The problem with this argument is that local counties operate under the same state capital punishment law: Treating offenders differently because they live under different legal regimes is distinguishable from treating offenders differently despite common criminal statutes. Moreover, the notion that prosecutors are simply responding to “local demand” in seeking death is undercut by the widespread practice of death-qualifying juries. In many high death-sentencing counties, such as Philadelphia and Harris County (Houston), popular support for the death penalty is not higher than the level of support in nearby low death-sentencing counties; the removal of potential jurors

56. See DIETER, *supra* note 11.

57. *Id.* at 10.

who have qualms about the death penalty allows prosecution preferences to overcome local preferences, and the popular election of district attorneys does not necessarily cure this disconnect.

A second objection is that a statewide committee would have difficulty enumerating workable criteria to ensure consistency across cases. This objection is a powerful one, because capital cases do not fall neatly into “death” and “life” categories. Numerous tangible and intangible factors inform the death-penalty decision. But the objection proves too much. If it is impossible to generate workable criteria to ensure consistency across cases, the death penalty is hopelessly arbitrary. Consideration by a statewide committee whether to endorse a decision to seek death would provide a valuable check against local overreaching and force actors within the system to reflect on fairness across cases.

A third objection would criticize the “one-way ratchet” of this proposed statewide process. Only decisions to seek the death penalty would be reviewable by the statewide entity; decisions declining to seek death would be unreviewable. On this objection, the goal of even-handed enforcement must account for *under*-enforcement as well as *over*-enforcement of the death penalty. This objection is powerful as well, but the practical obstacles to *requiring* local authorities to seek death against their considered judgment are overwhelming. Local actors will inevitably have to carry out the prosecution; if local authorities regard the death penalty as inappropriate, it is impossible to control the resources and vigor they bring to the effort. Moreover, given the rarity of homicide cases in which death is sought, the administrative expense of reviewing each decision declining to seek death would be significant and undermine the workability of statewide review. Finally, the central goal of statewide review is to ensure that the death penalty is truly reserved for the “worst of the worst.” Allowing some very aggravated cases to slip through the cracks is less problematic in the present moment than the possibility that the indiscriminate use of the death penalty by some local prosecutors runs against statewide community standards.

Thus, we conclude that states that authorize local authorities to make capital charging decisions should establish a statewide entity with the power to review and reject decisions to seek death by local prosecutors.

IV. EXEMPTION FROM CAPITAL PUNISHMENT FOR OFFENDERS WITH SERIOUS MENTAL ILLNESS

Although the U.S. Supreme Court has constitutionally exempted juvenile offenders and offenders with intellectual disability from the ambit of the death penalty, it has not extended a similar exemption to offenders with severe mental illness, despite similarities in the limitations faced by all three groups of offenders.⁵⁸ Nor has any active death-penalty state passed legislation enacting such an exemption, despite the fact that polls indicate that a substantial majority of Americans oppose the death penalty for the mentally ill.⁵⁹ Such an exemption would advance the accuracy of the capital justice process, given the inability of many of those with mental illness to assist in their defense. Moreover, such an exemption would remove from death eligibility those whose punishment would least advance the goals of retribution and deterrence.

Four national organizations—the American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill, and the American Bar Association—have taken formal positions opposing the execution of defendants with severe mental illness. The ABA has developed a detailed, concrete policy proposal, elaborated at length in a recently published white paper. The ABA’s proposal is as follows:

Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.⁶⁰

58. For a discussion of mental illness, see Stephen J. Morse, “Mental Disorder and Criminal Justice,” in Volume 1 of the present Report.

59. See, e.g., *POLL: Americans Oppose Death Penalty for Mentally Ill by 2-1*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/5956> (last visited May 8, 2017).

60. AM. BAR ASS’N DUE PROCESS REV. PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 7–8 (Dec. 2016), http://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

The ABA resolution's accompanying report explains that this paragraph is meant to apply only to those with "severe" mental disorders and disabilities, such as schizophrenia and schizoaffective disorder, bipolar disorders, major depressive disorder, and post-traumatic stress disorder (PTSD). The report specifically excludes from this exemption those whose conditions are manifested primarily by criminal behavior or voluntary substance use. The resolution also recommends exempting from execution some capital defendants who develop a severe mental disorder or disability after a death sentence has been imposed.⁶¹

The ABA's proposed exemption for capital defendants with severe mental illness has served as a template for a significant number of states in which legislative exemptions have recently been proposed. Legislators in seven states—Arkansas, Indiana, Ohio, South Dakota, Tennessee, Texas, and Virginia—have recently proposed bills that would prohibit the death penalty for defendants who suffered from a serious mental illness at the time of their offense.⁶² These bills, which have all had bipartisan support, have largely tracked the ABA proposal.

Despite strong public support for such legislation in opinion polls, opponents, including many prosecutors, argue that the exemption is unnecessary because of existing protections afforded by competency reviews, the insanity defense, and the availability of mitigating evidence. Such arguments are unfounded. The standard for competency to stand trial is an extremely low one, and many defendants are cleared as competent for the purposes of trial despite undeniably suffering from severe mental illness. Moreover, the competency determination addresses the defendant's mental state only at the time of trial or the time of execution and does not address the defendant's mental state at the time of the offense.⁶³ The insanity defense, which *does* address the defendant's mental state at the time of the offense, likewise generally sets a very low bar for sanity. As a consequence, the insanity offense is infrequently invoked and

61. *Id.* at 8.

62. Rebecca Beitsch, *States Consider Barring Death Penalty for Severely Mentally Ill*, PEW CHARITABLE TRUSTS (Apr. 17, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/04/17/states-consider-barring-death-penalty-for-severely-mentally-ill>.

63. To determine a defendant's competence to stand trial, the court must ask whether, at the time of trial, the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). As for competence to be executed, courts must determine that, at the time of execution, "those who are executed know the fact of their impending execution and the reason for it." *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring in part and concurring in the judgment); see also *Panetti v. Quarterman*, 551 U.S. 930, 959–60 (2007) (the condemned's understanding of the reason for his impending execution must be rational rather than delusional).

even more infrequently successful, as it applies only to a narrow category of individuals with very particular manifestations of mental illness. Finally, the ability of capital defense lawyers to ask sentencing jurors to consider a defendant's mental illness as mitigating has often proved unavailing in light of the common misperceptions that lay jurors have about mental illness.

The Supreme Court has recognized as a constitutional matter that offenders with intellectual disability may face a special risk of wrongful conviction and death sentencing because of their impaired ability to consult with counsel, their potentially inappropriate affect in court, and the risk that juries will consider them more dangerous because of their disability.⁶⁴ Defendants with severe mental illness face similar risks for similar reasons, and thus an exemption would increase the accuracy of the capital justice system. In addition, the Supreme Court has recognized that the execution of offenders with intellectual disability and juvenile offenders does not serve the retributive or deterrent purposes of capital punishment because of the reduced culpability of such offenders and their lessened susceptibility to deterrence.⁶⁵ Exactly the same considerations apply to offenders with severe mental illness, and thus an exemption would remove from the ambit of the death penalty those for whom the punishment would least serve any legitimate penological purposes.

We conclude that states should adopt an exemption from capital punishment for offenders with severe mental illness, tracking the general contours of the exemption proposed by the American Bar Association.

RECOMMENDATIONS

In light of the irremediable systemic problems in the administration of the death penalty in the United States, the most appropriate course of action is moratorium or repeal of the death penalty where it is feasible. In the absence of moratorium or repeal, we recommend three discrete policy changes to address some widespread problems in state capital justice systems:

1. To improve the delivery of capital representation services, states should establish capital defense offices at all levels (trial, direct appeal, and state postconviction). The establishment of such offices should be undertaken to facilitate compliance with the ABA *Guidelines* for effective capital representation.

64. See *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002).

65. *Id.* at 319–20 (offenders with intellectual disability); *Roper v. Simmons*, 543 U.S. 551, 569–73 (2005) (juvenile offenders).

2. States should establish a statewide entity with the power to review and reject decisions to seek death by local prosecutors.
3. States should adopt an exemption from capital punishment for offenders with severe mental illness, tracking the general contours of the exemption proposed by the American Bar Association.

Race and Sentencing Disparity

Cassia Spohn*

Although the overt and widespread racism that characterized the operation of the criminal justice system during the early part of the 20th century has largely been eliminated, racial disparities in sentencing and punishment persist. Research conducted during the past four decades concludes that the continuing—some would say, worsening—racial disparity in incarceration rates and use of the death penalty can be attributed to the policies pursued during the war on drugs and to criminal justice officials' use of race-linked stereotypes of culpability and dangerousness. Remedying the situation and ensuring that imprisonment will no longer be a normal part of the life course for young black and Hispanic men will require reducing the size of the prison population through decarceration, reforming the sentencing process so that a larger proportion of offenders convicted of nonserious crimes are given an alternative to incarceration, and abolishing or severely restricting use of the death penalty.

INTRODUCTION

In the late 1930s, Dr. Gunnar Myrdal, an economics professor at the University of Stockholm, was invited by the Carnegie Corporation of New York to undertake a “comprehensive study of the Negro in America.”¹ Myrdal’s examination of “courts, sentences and prisons,”² which relied primarily on anecdotal accounts of differential treatment of blacks and whites in Southern court systems, documented widespread racial discrimination in court processing and sentencing. Although Myrdal highlighted disparities in provision of counsel, bail, jury selection, and trial, he reserved his harshest criticism for the differences in punishment imposed on similarly situated white and black defendants and on those who victimized whites rather than blacks. He noted that grand juries routinely refused to indict whites for crimes against blacks, that whites who were indicted for crimes against blacks were rarely convicted,

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1. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND AMERICAN DEMOCRACY* vi (1944).

2. *Id.* at 247.

and that those who were convicted received only the mildest punishment. He also pointed out that crimes by blacks against other blacks were not regarded as serious and, as a result, also were unlikely to result in indictment, conviction, or appropriate punishment. By contrast, blacks convicted of, or even suspected of, crimes against whites were subject to the harshest treatment. Myrdal concluded that “[t]his whole judicial system of courts, sentences and prisons in the South is overripe for fundamental reforms.”³

Myrdal’s conclusion was based on his assessment of the situation regarding race and punishment in the early part of the 20th century, and the situation obviously has changed since then. Legislative reforms and Supreme Court decisions protecting the rights of criminal defendants, coupled with changing attitudes toward race and race relations, have made it less likely that criminal justice officials will systematically treat defendants of different races differently. The stigma assigned to crimes and the severity of punishment imposed on those convicted of crimes no longer reflect overt discrimination based on the race of the defendant and the race of the victim. Thus, whites who commit crimes against blacks are not beyond the reach of the criminal justice system, blacks who victimize other blacks are not immune from punishment, and blacks who victimize whites do not routinely receive disproportionately harsh sentences.

Although most commentators would agree that the flagrant racism described in *An American Dilemma* has been eliminated, most also would argue that significant punishment inequities persist. As evidence of this, consider that in 2004, the United States celebrated the 50th anniversary of *Brown v. Board of Education*,⁴ the landmark Supreme Court case that ordered desegregation of public schools. Also in 2004, the Sentencing Project issued a report entitled *Schools and Prisons: Fifty Years after Brown v. Board of Education*.⁵ The report noted that, whereas many institutions in society had become more diverse and more responsive to people of color in the wake of the *Brown* decision, the American criminal justice system had taken “a giant step backward.”⁶ To illustrate this, the report pointed out that in 2004, there were *nine times* as many black Americans in prison or jail as on the day the *Brown* decision was handed down—the number increased from 98,000 to 884,500.⁷ The authors of the report concluded that “such an outcome should be shocking to all Americans.”⁸

3. *Id.* at 555.

4. 347 U.S. 483 (1954).

5. THE SENTENCING PROJECT, *SCHOOLS AND PRISONS: FIFTY YEARS AFTER BROWN V. BOARD OF EDUCATION* (2004), <https://static.prisonpolicy.org/scans/sp/brownvboard.pdf>.

6. *Id.* at 5.

7. *Id.*

8. *Id.*

The situation has not improved significantly in the decade since the Sentencing Project issued its report. Racial minorities—and especially young black and Hispanic men—are substantially more likely than whites to be serving time in prison; they also face significantly higher odds than whites of receiving life sentences, life sentences without the possibility of parole, and the death penalty. Reducing—not to mention eliminating—these disparities will require bold policy reforms that go beyond simply reducing the discretion of prosecutors, judges, and corrections officials. The most obvious solution—decarceration—may be both politically unpalatable and, given the current mood of the country, infeasible. Other reforms include the elimination of mandatory minimum sentences, restrictions on the use of life-without-parole sentences, the repeal or modification of three-strikes and truth-in-sentencing laws, and either repealing the death penalty or passing legislation designed to make it easier for those on death row to challenge their sentences based on racial discrimination. Although these policy changes will not—indeed cannot—eliminate the overt and implicit racial discrimination that leads to disparate punishment, they will reduce the punitive bite of conviction for non-serious crimes, help bring the U.S. incarceration rate more in line with the rates of other Western democracies, and reduce the racial disparities that result from implementation of these “tough on crime” policies.

These issues are discussed in the following sections of this chapter. Part I will discuss current statistics on race and punishment, with a focus on demonstrating that, legal reforms and Supreme Court decisions notwithstanding, there remains substantial racial and ethnic disparity in punishment. Part II focuses on explanations for the disproportionate number of blacks and Hispanics under the control of the criminal justice system. Part III discusses policy reforms designed to improve the current situation and ensure that imprisonment will no longer be a typical life event for young black and Hispanic men.

I. THE CURRENT SITUATION

There is compelling evidence of racial disparity in punishment in the United States.⁹ In 2015, blacks comprised about 13% of the U.S. population, but 39% of all state and federal prison inmates. Hispanics were 17% of the U.S. population but 24% of prison inmates. By contrast, non-Hispanic whites made up 63% of the total population but only 37% of the prison population. Stated another way, people of color comprised only 30% of the U.S. population

9. The following statistics come from E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2015 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

but almost two-thirds of all prison inmates. Imprisonment rates vary by both race/ethnicity and sex. In 2015, for example, 2,613 of every 100,000 African-American men, 1,043 of every 100,000 Hispanic men, and 457 of every 100,000 white men were incarcerated in a state or federal prison; this means that the incarceration rate for African-American men was about six times the rate for white men and that the incarceration rate for Hispanic men was 2.3 times the rate for white men. The incarceration rates for women, although much lower than the rates for men, revealed a similar pattern of disparity: 103 of every 100,000 for African-Americans, 63 of every 100,000 for Hispanics, and 52 of every 100,000 for whites. There also is evidence that blacks and Hispanics are more likely than whites to be serving life (and life without the possibility of parole) sentences.¹⁰ A Sentencing Project report on the expansion of life sentences revealed that blacks comprised 47.2% of those serving life sentences and 58% of those serving life sentences with no possibility of parole in state and federal prisons in 2012. The proportion of blacks among those serving life sentences was even higher in states such as Maryland (77.4%), Georgia (72%), and Mississippi (62.3%). Hispanics made up 16.4% of those serving life sentences nationwide, with the largest proportions in New Mexico (44.1%), California (35.7%), and Arizona (30.9%). According to David Garland, statistics such as those reported above suggest the “systematic imprisonment of whole groups of the population.”¹¹

There is also clear and convincing evidence of racial disparity in the application of the death penalty.¹² In 2016, there were 2,905 prisoners under sentence of death in the United States. Of these, 42.3% were white, 41.8% were black, and 13.1% were Hispanic. Similar disparities are found in statistics regarding those executed by the states and by the federal government. Of the 1,419 prisoners executed from 1977 through 2016, 55.6% were white, 34.5% were black, 8.3% were Hispanic, and 1.6% were Native American or Asian. Despite the fact that they make up only 13% of the population, blacks comprise more than 40% of those under sentence of death and more than a third of those executed since 1977. There also is evidence that those who murder whites are sentenced to death and executed at disproportionately high rates. From

10. The following statistics come from THE SENTENCING PROJECT, *LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA* (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

11. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1* (David Garland ed., 2001).

12. The following statistics come from *Death Row USA*, NAACP LEGAL DEF. & EDUC. FUND (2016), <http://www.naacpldf.org/death-row-usa>. For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in the present Volume.

1977 through 2016, 75.6% of the persons executed were convicted of killing whites, 15.3% were convicted of killing blacks, and 6.9% were convicted of killing Hispanics. These disparities were particularly pronounced for the crime of rape (use of the death penalty for rape was ruled unconstitutional in 1977 in *Coker v. Georgia*).¹³ Among those executed for rape from 1930 through 1972, 89% (405 of the 455 who were executed) were black men.¹⁴ During this time period, Louisiana, Mississippi, Oklahoma, Virginia, West Virginia, and the District of Columbia executed 66 black men, but not a single white man, for the crime of rape.¹⁵

II. LITERATURE REVIEW

The statistics presented in the previous section provide compelling historical and contemporary evidence of racial *disparity* in punishment. They indicate that the sentences imposed on black and Hispanic offenders have been and continue to be different—that is, harsher—than the sentences imposed on white offenders. These statistics, however, do not tell us *why* this occurs. They do not tell us whether the racial disparities in imprisonment and use of the death penalty reflect racial discrimination and, if so, whether that discrimination is institutional or contextual, overt or implicit.

Explanations for the disproportionate number of blacks and Hispanics under the control of the criminal justice system are complex. A number of studies determined that a large portion of the racial disparity in incarceration rates can be attributed to racial differences in offending patterns and criminal histories.¹⁶ As the National Research Council's Panel on Sentencing Research concluded in 1983, "[f]actors other than racial discrimination in the sentencing process account for most of the disproportionate representation of black males in U.S. prisons."¹⁷ Although there is recent evidence that the proportion of the racial disparity in incarceration unexplained by racial differences in arrest rates

13. *Coker v. Georgia*, 486 U.S. 584 (1977); see also *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

14. LAWRENCE A. GREENFIELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1991 (1992), <https://www.bjs.gov/content/pub/pdf/cp91.pdf>.

15. Marvin E. Wolfgang & Marc Reidel, *Rape, Race, and the Death Penalty in Georgia*, 45 AM. J. ORTHOPSYCHIATRY 658 (1975).

16. See Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743 (1993).

17. NAT'L RESEARCH COUNCIL, 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 92 (Alfred Blumstein et al. eds., 1983).

is increasing,¹⁸ as well as evidence that racial differences in offending patterns cannot account for racial differences in incarceration for drug offenses,¹⁹ most scholars contend that the conclusion presented by the Panel on Sentencing Research in 1983 is still valid today.

Not all of the racial disparity, however, can be explained away in this fashion. Critics contend that at least some of the over-incarceration of racial minorities is a result of criminal justice policies and practices with racially disparate effects. As one commentator noted, “[a] conclusion that black overrepresentation among prisoners is not primarily the result of racial bias does not mean that there is no racism in the system.”²⁰ Alexander’s critique is even more pointed. As she put it, “[t]he fact that more than half of the young black men in any large American city are currently under the control of the criminal justice system (or saddled with criminal records) is not—as many argue—just a symptom of poverty or poor choices, but rather evidence of a new racial caste system at work.”²¹

Researchers have conducted dozens of studies designed to untangle the complex relationship between race and punishment and to determine if racial disparities result from overt or unconscious racial bias and/or the implementation of policies and practices with racially disparate effects. Over this time period, the research questions became more theoretically sophisticated and the methodologies used to answer those questions more analytically rigorous; the answers to these questions also changed over time. A comprehensive review of this body of research is beyond the scope of this paper. Instead, I focus on the non-capital sentencing process and the conclusions emanating from five waves of research published over the past eight decades.

Studies conducted during the first two waves of sentencing research—which began during the 1930s and continued through the 1970s—often concluded that racial disparities in sentencing reflected racial discrimination and that “equality

18. See Eric P. Baumer, *Reassessing and Redirecting Research on Race and Sentencing*, 30 JUST. Q. 231 (2013); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1 (2008); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

19. See Katharine Beckett et al., *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419 (2005); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995).

20. TONRY, *supra* note 19, at 49.

21. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16 (2010).

before the law is a social fiction.”²² Reviews of these early studies, however, found that most of them were methodologically flawed.²³ Many—including the somewhat more methodologically sophisticated studies from the 1960s and 1970s—employed inadequate or no controls for crime seriousness and prior criminal record, and most used inappropriate statistical techniques to isolate the effect of race. Kleck’s evaluation of 40 noncapital sentencing studies revealed that many of them found no evidence that race affected sentence outcomes and most that did find such evidence either did not control for prior record or used a crude measure that simply distinguished between offenders with some type of criminal history and those with no criminal history. According to Kleck, “the more adequate the control for prior record, the less likely it is that a study will produce findings supporting a discrimination hypothesis.”²⁴

The conclusions presented by these early reviews, coupled with the findings of its own review of sentencing research, led the National Research Council’s Panel on Sentencing Research to claim that the sentencing process, although not racially neutral, was not characterized by systematic and widespread racial discrimination.²⁵ Rather, “some pockets of discrimination are found for particular judges, particular crime types, and in particular settings.”²⁶ The panel echoed the concerns voiced by Hagan and Kleck regarding the absence of controls for prior criminal record in many of the early studies. Members of the panel also noted that even more recent and methodologically rigorous studies (i.e., those published in the late 1970s and early 1980s) suffered from measurement error and sample-selection problems that raised “the threat of serious biases in the estimates of discrimination effects.”²⁷

The findings of studies published during the third wave of sentencing-disparity research suggested that these conclusions might have been premature.²⁸ Social scientists conducting research in the 1970s and 1980s challenged the no-discrimination thesis and suggested that racial disparities in sentencing had not declined or disappeared but had become more subtle and difficult to detect.

22. Thorsten Sellin, *Race Prejudice in the Administration of Justice*, 41 AM. J. SOC. 212, 217 (1935).

23. See John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC’Y REV. 357 (1974); Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

24. Kleck, *supra* note 23, at 792.

25. NAT’L RESEARCH COUNCIL, *supra* note 17.

26. *Id.* at 93.

27. *Id.* at 109.

28. For a review of this research, see Marjorie S. Zatz, *The Changing Forms of Racial/Ethnic Biases in Sentencing*, 25 J. RES. CRIME & DELINQ. 69 (1987).

They contended that testing only for direct race effects was insufficient and asserted that disentangling the effects of race and other predictors of sentence severity required tests for indirect race effects and the use of interactive, as well as additive, models. Methodological refinements and the availability of more-complete data enabled third-wave researchers to test hypotheses regarding these indirect and interactive effects of race on sentencing. Although some researchers uncovered evidence of direct racial bias, others demonstrated that race affected sentence severity indirectly through its effect on variables such as pretrial status or type of attorney, or that race interacted with other variables to produce harsher sentences for racial minorities for some types of crimes (e.g., less serious crimes), in some types of settings (e.g., the South), or for some types of offenders (e.g., the unemployed). Research conducted during this third wave also revealed that blacks who victimized whites were sentenced much more harshly than either blacks who victimized other blacks or whites who victimized blacks. According to Zatz, these third-wave studies indicated “that both overt and more subtle forms of bias against minority defendants *did* occur, at least in some social contexts.”²⁹

During the fourth wave of race and sentencing research, researchers began to investigate the effect of race on sentencing severity using data from jurisdictions—including the federal district courts—with determinate sentencing and sentencing guidelines.³⁰ Research conducted during this era, which was published from the mid-1980s through the mid-2000s, improved on research from the earlier eras in a number of important ways. Although the studies varied in terms of their analytical rigor, most did not suffer from the serious methodological deficiencies that characterized the early research. The research conducted during this era used appropriate multivariate statistical techniques and controlled for relevant legal and extralegal variables; most studies also included a wide variety of offenses rather than only one or two types of offenses, and many of them tested interactive as well as additive models. Finally, many of these fourth-wave studies, particularly those conducted using federal data, examined the effect of ethnicity as well as race.

29. *Id.* at 70.

30. For reviews of this research, see Theodore G. Chiricos & Charles Crawford, *Race and Imprisonment: A Contextual Assessment of the Evidence*, in *ETHNICITY, RACE, AND CRIME: PERSPECTIVES ACROSS TIME AND PLACE* (Darnell F. Hawkins ed., 1995); Ojmarrh Mitchell, *A Meta-Analysis of Race and Sentencing Research: Explaining the Inconsistencies*, 21 *J. QUANTITATIVE CRIMINOLOGY* 439 (2005); and Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 *CRIMINAL JUSTICE 2000: POLICIES, PROCESS, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM* 427 (2000).

My review of state and federal sentencing studies that used data from the 1980s and 1990s highlighted the importance of attempting to identify “the structural and contextual conditions that are most likely to result in racial discrimination.”³¹ Many of the 40 studies I examined found a direct race effect. At both the state and federal level, there was evidence that blacks and Hispanics were more likely than whites to be sentenced to prison; at the federal level, there also was evidence that blacks received longer sentences than whites. Noting that “evidence concerning direct racial effects ... provides few clues to the circumstances under which race matters,” I also evaluated the research for evidence of indirect or contextual discrimination.³² The studies revealed four themes or patterns of contextual effects: (1) the combination of race and ethnicity and other legally irrelevant offender characteristics (e.g., age, sex, education, and employment status) produced greater sentence disparity than race or ethnicity alone; (2) process-related factors such as pretrial detention, pleading guilty, hiring an attorney, and providing evidence or testimony in other cases moderated the effect of race and ethnicity on sentence severity; (3) the severity of punishment was contingent on the race of the victim as well as the race of the offender; and (4) the effects of race and ethnicity were conditioned by the nature of the crime. I concluded that the sentencing reforms implemented during the last quarter of the 20th century had not achieved their goal of eliminating racial disparity and discrimination in sentencing.

The studies conducted during the fourth wave of race and sentencing research improved on earlier work in a number of important ways. Nonetheless, as Baumer argued recently, even this fourth wave of research left a number of questions unanswered.³³ Of particular importance is that the typical race and sentencing study from this era—which relied on what Baumer refers to as “the modal approach” involving regression-based analysis of the final sentencing outcome—could not identify the mechanisms that led to racially disparate sentencing. Stated differently, even these more theoretically and methodologically sophisticated fourth-wave studies were unable to explain *why* racial minorities were sentenced more harshly than whites, whether disparate treatment was found only at sentencing or accumulated as cases moved through the court process, or whether the disparities reflected decisions made by prosecutors as well as judges. These criticisms of research on racial justice are

31. Spohn, *supra* note 30, at 443 (quoting John Hagan & Kristin Bumiller, *Making Sense of Sentencing: A Review and Critique of Sentencing Research* in NAT'L RESEARCH COUNCIL, 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 21 (Alfred Blumstein et al. eds., 1983)).

32. *Id.* at 458.

33. Baumer, *supra* note 18; see also Jeffrey T. Ulmer, *Recent Developments and New Directions in Sentencing Research*, 29 JUST. Q. 1 (2012).

not new. Forty years ago, Hagan called for studies that better captured “transit through the criminal justice system” especially as it operates “cumulatively to the disadvantage of minority group defendants.”³⁴ Four decades later, Baumer reiterated this concern, arguing that “it would be highly beneficial if the next generation of scholars delved deeper into the various ways that ‘race’ [matters] across multiple stages of the criminal justice process.”³⁵

Researchers are just beginning to address these issues. During this fifth wave of research on race/ethnicity and sentencing, the focus has begun to shift from the final sentencing outcome to the life course of a criminal case and the ways in which disparities accumulate as the case progresses through the criminal process. Arguing that a key limitation of existing sentencing research is its failure to consider the conditioning effects of the many consequential case-processing decisions that precede the final punishment decision, these fifth-wave scholars point out that focusing on a single decision-making stage (i.e., sentencing) may mask disparities originating at other discretionary points in the system.

Although select work demonstrates that early charging decisions³⁶ or intermediate bail and pretrial detention decisions³⁷ can affect final sentencing outcomes, there are only a handful of studies that address the issue of cumulative disparity in the prosecution and sentencing of criminal defendants.³⁸ Together, these studies reveal the importance of examining decisions that precede the final sentencing decision and of attempting to tease out the ways in which these earlier decisions affect sentencing. For example, Sutton found that blacks and Latinos were substantially more likely than whites to be detained prior to trial; that pretrial detention had differential effects on the likelihood of a guilty plea for whites, blacks, and Latinos; and that both pretrial detention and guilty

34. Hagan, *supra* note 23, at 379.

35. Baumer, *supra* note 18, at 240.

36. See Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394 (2010); Sonia B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2 (2013); see also John F. Pfaff, “Prosecutorial Guidelines,” in Volume 3 of the present Report.

37. Cassia Spohn, *Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage*, 57 U. KAN. L. REV. 879 (2009); see also Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in Volume 3 of the present Report.

38. See Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014); Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005); Lisa Stolzenberg, Stewart J. D’Alessio & David Eitle, *Race and Cumulative Discrimination in the Prosecution of Criminal Defendants*, 3 RACE & JUST. 275 (2013); John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 SOC. SCI. RES. 1207 (2013).

pleas affected sentence outcomes. Sutton also found that “once prior events are fully taken into account, Latinos and blacks experience about the same rather large cumulative disadvantage,” but that the mechanisms that produced this cumulative disadvantage varied for defendants in the two racial groups.³⁹ Kutateladze and his colleagues, who used data on a large sample of white, black, Latino, and Asian defendants charged with misdemeanors and felonies in New York City, similarly found strong evidence of disparity in pretrial detention, plea offers, and use of incarceration: for each of these outcomes, blacks and Latinos were treated more harshly and Asians were treated more leniently than whites. Moreover, pretrial detention had a large and statistically significant effect on subsequent outcomes. They also found that blacks, and to a lesser extent Latinos, were more likely than whites to suffer from cumulative disadvantage; for both felonies and misdemeanors, the most disadvantaged combination of outcomes (pretrial detention, case not dismissed, custodial plea offer [misdemeanors only], and incarceration) was most likely for blacks and Latinos and least likely for Asians.⁴⁰

As this review demonstrates, research examining the relationship between race/ethnicity and sentencing has evolved both theoretically and methodologically over the past eight decades. Of particular importance is the fact that the questions asked have changed dramatically. Most researchers now acknowledge that it is overly simplistic to ask whether race and ethnicity matter at sentencing. The more interesting questions—and those whose answers will help us understand the mechanisms underlying the harsher punishment imposed on blacks and Hispanics—revolve around the contexts in which or the circumstances under which race and ethnicity influence sentencing and the ways in which disparities accumulate over the life course of a criminal case. The statistical techniques used to answer these questions also have changed; researchers have moved from bivariate comparisons of outcomes for members of different racial groups, to multivariate and multilevel models incorporating relevant control variables, to propensity score matching methods designed to ensure that offenders in each racial group are equivalent, to structural equation models that identify direct, indirect, and total racial effects and to use of techniques that allow the calculation of cumulative effects. As the fifth wave of race and sentencing research continues to unfold, more-definitive answers to questions regarding race, ethnicity, and punishment should be forthcoming.

39. Sutton, *supra* note 38, at 1217.

40. Kutateladze et al., *supra* note 38.

III. ASSESSMENT

Concerns about disparity, discrimination, and unfairness in sentencing are not new. In 1918, the Bureau of the Census published a report on the “Negro Population.”⁴¹ The authors of the report noted that blacks made up only 11% of the population but constituted 22% of the inmates of prisons, jails, reform schools, and workhouses. The authors then posed a question that would spark debate and generate controversy for the next hundred years:

While these figures ... will probably be generally accepted as indicating that there is more criminality and lawbreaking among Negroes than among whites and while that conclusion is probably justified by the facts ... it is a question whether the difference ... may not be to some extent the result of discrimination in the treatment of white and Negro offenders on the part of the community and the courts.⁴²

This question—whether the disproportionate number of racial minorities incarcerated in state and federal prisons might be “to some extent the result of discrimination”—is a question that is still being asked today. That it reflects the fact that the racial disparity in imprisonment documented by the Bureau of the Census *has worsened over time*, to the point that blacks and Hispanics now make up three quarters of all persons locked up in our nation’s prisons.

What can be done to remedy the situation and to ensure that imprisonment will no longer be a “common life event”⁴³ for young black and Hispanic men? In the 1970s, critics of the sentencing process lobbied for reforms designed to curb discretion, reduce disparity and discrimination, and achieve proportionality and parsimony in sentencing. The initial focus of reform efforts was the indeterminate sentence, in which the judge imposed a minimum and maximum sentence and the parole board determined the date of release. Under indeterminate sentencing, sentences were tailored to the individual offender, and discretion was distributed not only to the criminal justice officials who determined the sentence but also to corrections officials and the parole board. The result of this process was “a system of sentencing in which there was little understanding or predictability as to who would be imprisoned and for how long.”⁴⁴

41. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *NEGRO POPULATION: 1700-1915* (1918).

42. *Id.* at 448.

43. WESTERN, *supra* note 18, at 31.

44. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, *NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 6* (1996), <https://www.ncjrs.gov/pdffiles/strsent.pdf>.

Both liberal and conservative reformers challenged the principles underlying the indeterminate sentence. Liberals and civil-rights activists argued that indeterminate sentencing was arbitrary and capricious and therefore violated defendants' rights to equal protection and due process of law.⁴⁵ Liberal critics were also apprehensive about the potential for racial bias under indeterminate sentencing. They asserted that "racial discrimination in the criminal justice system was epidemic, that judges, parole boards, and corrections officials could not be trusted, and that tight controls on officials' discretion offered the only way to limit racial disparities."⁴⁶ Political conservatives, on the other hand, argued that the emphasis on rehabilitation too often resulted in excessively lenient treatment of offenders who had committed serious crimes or had serious criminal histories.⁴⁷ They also charged that sentences that were not linked to crime seriousness and offender culpability were unjust.

After a few initial "missteps," in which jurisdictions attempted to *eliminate* discretion altogether through flat-time sentencing, states and the federal government adopted structured sentencing proposals designed to *control* the discretion of sentencing judges. A number of states adopted determinate sentencing policies that offered judges a limited number of sentencing options and included enhancements for use of a weapon, presence of a prior criminal record, or infliction of serious injury. Other states and the federal government adopted sentence guidelines that incorporated crime seriousness and prior criminal record into a sentencing "grid" that judges were to use in determining the appropriate sentence. Other reforms enacted at both the federal and state level included mandatory minimum penalties for certain types of offenses (especially drug and weapons offenses), "three-strikes-and-you're-out" laws that mandated long prison sentences for repeat offenders, and truth-in-sentencing statutes that required offenders to serve a larger portion of the sentence before being released.⁴⁸

Advocates of these policy changes believed that their enactment would result in fairer—that is, less disparate and discriminatory—sentence outcomes. Although there is evidence that sentences are more uniform and less disparate in jurisdictions with sentencing guidelines, there is little evidence that the reforms reduced or eliminated the racial and ethnic disparities that were the

45. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

46. TONRY, *supra* note 19, at 164.

47. See JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975). For a discussion of rehabilitation, see Francis T. Cullen, "Correctional Rehabilitation," in the present Volume.

48. See generally Douglas A. Berman, "Sentencing Guidelines," in the present Volume; Erik Luna, "Mandatory Minimums," in the present Volume.

focus of the sentencing reform movement. Studies of sentences imposed under federal and state guidelines reveal that blacks and Hispanics continue to receive harsher outcomes than whites, and research focusing on mandatory minimum sentences, three-strikes provisions, and habitual offender laws also find that the application of these provisions disadvantages racial minorities. These findings imply that prosecutors and judges are reluctant to base sentences on only crime seriousness and prior criminal record and that statutorily irrelevant factors such as race and ethnicity (as well as sex, age, and social class) may be factually relevant to criminal justice officials' assessments of dangerousness, threat, and culpability. They attest to the validity of Tonry's assertion that "[t] here is, unfortunately, no way around the dilemma that sentencing is inherently discretionary and that discretion leads to disparities."⁴⁹

This suggests that the problem of racial and ethnic disparities in sentencing and punishment requires something more than the passage of legislation designed to reduce the discretion of prosecutors, judges, and corrections officials. The most obvious solution—decarceration—may also be the most politically unpalatable, as releasing large numbers of offenders before they have served most of their sentences or reducing the incarceration rate will inevitably trigger charges that those who advocate these solutions are “soft on crime.” Nonetheless, as Tonry and Melewski convincingly demonstrate,⁵⁰ it is the only solution that will significantly reduce the prison population and, in so doing, reduce the number of imprisoned black Americans. Although reducing racial bias and discrimination in the criminal justice system is important and should continue to be a goal of policy efforts, doing so will not appreciably affect the number of blacks and Hispanics behind bars. By contrast, if imprisonment rates were returned to 1980 levels, the black incarceration rate would fall from 2,661 to 827 per 100,000 and there would be 702,400 fewer black Americans locked up in our nation's prisons.⁵¹ According to Tonry and Melewski, “[t]o attempt to limit damage done to people now entangled in the arms of the criminal justice system, devices need to be created for reducing the lengths of current prison sentences and releasing hundreds of thousands of people from prison.”⁵²

49. MICHAEL TONRY, SENTENCING MATTERS 180 (1996).

50. Tonry & Melewski, *supra* note 18.

51. *Id.* at 36.

52. *Id.* at 37.

Assuming that large-scale decarceration is unlikely,⁵³ what is to be done? A number of policy reforms would reduce the likelihood that those convicted of crimes will go to prison and the severity of sentences imposed on those who are incarcerated. These reforms include the elimination of mandatory minimum sentences, restrictions on the use of life-without-parole sentences, and the repeal or modification of three-strikes and truth-in-sentencing laws.⁵⁴ Each of these sentencing “reforms” played a role in the imprisonment boom that ensnared disproportionately large numbers of racial minorities. Modifying or repealing them will reduce the punitive bite of conviction for non-serious crimes, help bring the U.S. incarceration rate more in line with the rates of other Western democracies, and reduce the racial disparities that result from implementation of these policies.

A final area of reform concerns the death penalty.⁵⁵ Following the Supreme Court’s decision in *McCleskey v. Kemp*,⁵⁶ in which the Justices ruled against McCleskey’s claim of racial discrimination in the application of the death penalty, the U.S. House of Representatives added the Racial Justice Act to the Omnibus Crime Bill of 1994. A slim majority of the House voted for the provision, which would have allowed condemned offenders to challenge their death sentences using statistical evidence showing a pattern of racial discrimination in the capital sentencing process in their jurisdictions. Under this provision, the offender would not have had to show that criminal justice officials acted with discriminatory purpose in his or her case. Opponents of the Racial Justice Act argued that it would effectively abolish the death penalty in the United States and the provision eventually was eliminated from the crime bill. Although racial-justice acts were enacted in Kentucky in 1998 and in North Carolina in 2009, the North Carolina Legislature repealed the act in 2013; no other states have enacted racial-justice acts.

53. There is, however, evidence of growing skepticism about the use and effectiveness of incarceration in the United States. See, e.g., Joan Petersilia & Frank Cullen, *Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons*, 2 STAN. J. CRIM. L. & POL’Y 1 (2015); Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume. For example, in 2011 the California Legislature passed the Public Safety Realignment Act, A.B. 109, 2011-2012 Leg., Reg. Sess. (Cal. 2011); which, among other things, provided that offenders sentenced after October 1, 2011, on non-serious, non-violent and non-sex offenses are, with certain limited exceptions, no longer eligible for state prison sentences. Other states have revised or eliminated mandatory minimum sentences that have contributed to mass incarceration.

54. See, e.g., Luna, *supra* note 48.

55. See, e.g., Steiker & Steiker, *supra* note 12.

56. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

The defeat of the Racial Justice Act in Congress and the failure of the issue to gain traction in the states, coupled with persuasive evidence of racial disparity in the application of the death penalty, suggest that the remedy for racial bias in the capital sentencing process is abolition of the death penalty. Advocates for reforming the process contend that the capital sentencing process can be fixed through the enactment of reforms (e.g., access to post-conviction DNA testing, funding to pay for DNA tests requested by indigent offenders, and establishing standards on qualifications and experience for defense attorneys in capital cases) designed to ensure that innocent persons are not convicted and sentenced to death.⁵⁷ Those who advocate abolishing the death penalty contend that the system is fatally flawed. To support their position, these “new abolitionists”⁵⁸ cite mounting evidence of wrongful conviction of those on death row, as well as evidence that the death penalty is administered in an arbitrary and racially discriminatory manner. They also contend that the implementation of the proposed procedural rules cannot solve the problems inherent in the capital sentencing process. According to Sarat, the underlying problem is that “[p]articipants in the legal system—whether white or black—demonize young black males, seeing them as more deserving of death as a punishment because of their perceived dangerousness. These cultural effects clearly are not remediable.”⁵⁹

Reducing the racial disproportionality in our nation’s prisons and eliminating racial bias in the non-capital and capital sentencing processes should be highly prioritized goals of policymakers and politicians. The mass imprisonment of young black (and Hispanic) men (and women) has altered their life-course trajectories, which, in turn, has had dire consequences for their families, children, and communities. Evidence that race infects the sentencing process undermines respect for the law and casts doubt on the ability of the criminal justice system to ensure due process for all and equal protection under the law. The policy changes needed to accomplish these goals and to erase the legacy of several decades of insensitivity to the plight of racial minorities in this country are straightforward. Policymakers must significantly reduce, through decarceration, the number of men and women locked up in our nation’s

57. For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report.

58. Austin Sarat, *Recapturing the Spirit of Furman: The American Bar Association and the New Abolitionist Politics*, 61 LAW & CONTEMP. PROBS. 5 (1998); AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* (1998).

59. Sarat, *Recapturing the Spirit*, *supra* note 58, at 26.

prisons and must modify or repeal sentencing laws and practices that make imprisonment for decades the rule rather than the exception to the rule and that lead to racially tainted death sentences and execution.

RECOMMENDATIONS

It is clear that reducing racial and ethnic disparities in sentencing and punishment requires something more than the passage of legislation designed to reduce incrementally the discretion of prosecutors, judges, and corrections officials. Given that the most obvious solution—decarceration—is unlikely to garner widespread support, policymakers can implement a number of reforms designed to reduce both the punitive bite of incarceration and the disparity in punishment.

1. Eliminate mandatory minimum sentences, severely restrict the use of life-without-parole sentences, and repeal or modify three-strikes and truth-in-sentencing laws.
2. Abolish the death penalty.
3. Enact Racial Justice Acts designed to allow offenders to challenge their sentences with statistical evidence showing a pattern of racial/ethnic discrimination in sentencing.

Community Punishments

Michael Tonry*

The case for use of community punishments in a rational society is a no-brainer. Compared with confinement in a jail or prison, they are less expensive to administer, less likely to lead to future offending, and more humane. They do less collateral damage to the lives and futures of offenders and their loved ones. They can be scaled to the seriousness of crimes for which they are imposed. When well-managed, well-targeted, and adequately funded, they result in lower reoffending rates. Those are among the reasons why most Western countries use community punishments much more, and imprisonment much less, than do American jurisdictions.

INTRODUCTION

In 2010, the most recent year for which standardized national European data are available, 9.6% of convicted offenders in Sweden were sentenced to confinement.¹ In Germany, 5.4% of convicted offenders. In Finland, 3.1%.² By contrast, in the United States in 2009, also the most recent year for which national data are available, 73% of people convicted of felonies were sentenced to jail or prison, including 83% of violent, 75% of property, and 71% of drug offenders.³ In the federal courts in 2015, 92.8% of convicted people were sentenced to confinement.⁴

Stop for a minute and think about the contrast between the extreme cases. Ninety-three percent of convicted U.S. federal offenders received prison sentences; 97% of convicted Finnish offenders did not. The explanation for

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1. No other country operates parallel local and state confinement systems. European prison data accordingly are equivalent to combined American jail and prison data. European sentencing data do not include traffic or administrative offenses. The offenses covered are equivalent to American felonies and misdemeanors combined.

2. EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS (5th ed. 2014), http://www.heuni.fi/material/attachments/heuni/reports/qRMWoCVTF/HEUNI_report_80_European_Sourcebook.pdf.

3. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

4. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. D (2015), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureD.pdf>.

that stunning difference is neither that most federal offenders have committed substantially more serious crimes than most Finnish offenders nor that Finland is an extraordinarily pacific, Eden-like place. Well under 5% of sentenced federal offenders in 2015 were convicted of violent crimes; nearly a third were convicted of immigration offenses (mostly minor), a fifth of drug offenses, and a fifth of property offenses. Both Finland and the United States have crime patterns and rates that fall in the middle among developed countries.⁵ After the United States, Finland has and long has had the highest homicide rate among Western developed countries. The Finnish rate is typically two to three times as high as those of other Western European countries.

The difference in punishment patterns between the United States and all other Western developed countries results from differences in the salience of crime and punishment as a political issue and in cultural attitudes toward the severity of punishment. These differences can be seen in the American retention and all other Western countries' abandonment of capital punishment,⁶ in the presence of three-strikes, truth in sentencing, life without parole, and mandatory minimum sentence laws in the United States, and their absence from other countries' sentencing laws,⁷ and in four decades of largely failed efforts to encourage the use of community punishments in the United States. The single most common finding of evaluations of community punishment programs meant to be used by judges in place of imprisonment has long been that they are more often imposed on people who otherwise would have received lesser punishments than on people who would have been locked up.⁸

The United States cannot avoid continued mass incarceration unless use of community punishments increases enormously for people who otherwise would be (and now are) sentenced to confinement.⁹ Shorter prison terms and repeal of mandatory minimum sentence and similar laws also are necessary, but those things by themselves will not do the job. A wide range of community punishments could be adopted that are commonly used in other Western countries. These include resolution by mediation; diversion from prosecution conditioned on payment of fines, making restitution, or performance of

5. JAN VAN DIJK ET AL., *CRIMINAL VICTIMISATION IN INTERNATIONAL PERSPECTIVE: KEY FINDINGS FROM THE 2004–2005 ICVS AND EU ICS* (2007).

6. See generally Carol S. Steiker & Jordan M. Steiker, "Capital Punishment," in the present Volume.

7. See, e.g., Erik Luna, "Mandatory Minimums," in the present Volume.

8. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990).

9. For a discussion of mass incarceration, see Todd R. Clear & James Austin, "Mass Incarceration," in the present Volume.

community service; much greater use of fines for non-trivial crimes; suspended prison sentences; community service; and diverse forms of supervision and community-based treatment.

A complete package will also include substantially increased use of unconditional discharges following conviction and sentences to unsupervised probation. In neither instance do convicted offenders thereby escape punishment. Anyone convicted of crime has endured fear and anxiety. All experience demeaning assembly-line processing. Many spend overnight in jail awaiting a preliminary hearing. Many remain in jail until they are convicted. All will understand, as a classic study of criminal courts long ago showed, that “the process is the punishment.”¹⁰ For such cases, unconditional discharges should be the norm, unsupervised probation the exception. Otherwise, probation agencies will have to allocate resources to lowest-risk offenders, and probationers who judges believe do not warrant further state intrusion in their lives will be at risk of revocations and imprisonments for violation of technical conditions. New crimes, when they occur, should be handled as new crimes.

If policymakers want to adopt policies based on evidence, doing so is rational, cost-effective, and easy. Community programs that are well-conceived, well-managed, well-targeted, and adequately financed have repeatedly been shown to reduce reoffending.¹¹ Many hundreds of evaluations have shown that participants in community punishments achieve reoffending rates no worse than those of comparable people sentenced to confinement. That last finding means that, except concerning a small percentage of unusually dangerous people, vast sums spent on imprisonment are—from a crime-prevention perspective—wasted. Historian James M. McPherson said, of the pre-Civil War Southern response to abolitionism, “The South closed its mind.”¹² American policymakers of the past three decades likewise closed their minds to meaningful use of community punishments in place of imprisonment. Not much will happen until that attitude changes.

A steadily accumulating literature confirms the observation two centuries ago by John Howard, the first prominent English prison reformer, that prisons are “schools for crime.”¹³ All else being equal, people sentenced to imprisonment

10. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

11. E.g., DORIS LAYTON MACKENZIE, *WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS* (2006).

12. James M. McPherson, *America's Greatest Movement*, N.Y. REV. BOOKS, Oct. 26, 2016, at 64 (reviewing MANISHA SINHA, *THE SLAVE'S CAUSE: A HISTORY OF ABOLITIONISM* (2016)).

13. See generally JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES* (1777).

are more, not less, likely to reoffend than are comparable people sentenced to community punishments.¹⁴ There is nothing surprising about this. Prisoners are immersed in inmate subcultures and intensively exposed to the deviant values of chronic offenders. Many prisons are brutal and brutalizing places to which prisoners must accommodate for self-protection.¹⁵ Almost all prisons are resource-poor and unable to provide adequate drug, mental-health, and other treatment, training, and educational programs to meet prisoners' needs.¹⁶

Being sentenced to imprisonment undermines and often impoverishes prisoners' families and children. The resulting stigma and collateral legal consequences foreclose opportunities and access to resources that make released prisoners' later lives more difficult and their employment prospects worse.¹⁷

Nothing I've written here is new, controversial, or likely to surprise knowledgeable corrections professionals or other well-informed people. Most of it has been well known for decades, some of it for centuries. Nonetheless, it has largely been ignored since imprisonment rates began their 35-year increase in 1973. Despite the alternatives-to-corrections movement in the 1970s, the intermediate-punishments movement of the 1980s, and the community-corrections initiatives that began in the 1990s, most community punishments programs are under-funded, poorly managed, and lack adequate access to services and treatment programs.

Creating effective community punishments will require much more than new programs, increased funding, and better management. It will require a change of heart by policymakers. Despite much ballyhoo, however, bipartisan support for change shows few signs of happening. One compelling sign is the failure of most "justice reinvestment" efforts to reduce prison populations substantially and reallocate enormous foreseeable savings in prison expenditure to community-corrections programs. Most have not produced substantial declines in actual as opposed to projected prison populations. Where prisoner numbers have fallen significantly, the savings have seldom been reallocated

14. Daniel S. Nagin et al., *Imprisonment and Re-offending*, 38 CRIME & JUST. 115 (2009); Francis Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011).

15. See Sharon Dolovich, "Prison Conditions," in the present Volume.

16. Cf. Margo Schlanger, "Prisoners with Disabilities," in the present Volume.

17. NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCE* (2014). For a discussion of collateral consequences see Gabriel J. Chin, "Collateral Consequences," in the present Volume.

to community corrections.¹⁸ If and when the change of heart occurs, the knowledge exists to create and run effective programs.

The indications are not yet especially good. Despite the work of conservative organizations such as Justice Fellowship and the Texas Public Policy Foundation, and the Right on Crime initiative both organizations support, no bipartisan consensus has yet emerged that massive policy changes are required because mass incarceration is unjust, unwise, and ineffective. A handful of liberal reform advocates have long said this. Some spokesmen for Right on Crime say it. In 2014, former Republican House Speaker Newt Gingrich and former Democratic White House staffer Van Jones wrote, "It would be hard to overstate the scale of this tragedy. For a nation that loves freedom and cherishes our rights to life, liberty and the pursuit of happiness, the situation should be intolerable. It is destroying lives and communities."¹⁹ Many conservative critics of the status quo, however, make no such admission. Instead they propose new policies for first and nonviolent offenders, say that current policies cost too much, and promote policies aimed primarily at saving money and reducing recidivism.²⁰ But tinkering to save a few dollars will not accomplish much. Meaningful, lasting reform will occur only when it becomes widely accepted that mass incarceration is morally wrong, not merely fiscally foolish.

In this article, I offer an overview of the past four decades of experience and accumulated knowledge concerning community punishments. That is followed by a short set of proposals of what policymakers should do if they want to reduce the use of imprisonment and the harms it causes. One, not otherwise discussed, is that use of community punishments for minor and low-risk offenders should be drastically reduced. Relative to other developed countries, overuse of community supervision in the United States is as extreme as overuse of imprisonment.

18. JAMES AUSTIN ET AL., *ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT* (2013); NANCY LAVIGNE ET AL., *URBAN INST., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT* (2014).

19. Newt Gingrich & Van Jones, *Prison System Is Failing America*, CNN (May 22, 2014), <http://www.cnn.com/2014/05/21/opinion/gingrich-jonesprison-system-fails-america/index.html>.

20. See MICHAEL H. TONRY, *SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025*, at 206 (2016).

I. COMMUNITY PUNISHMENTS SINCE THE 1970s

Community punishments in the United States are imposed following criminal convictions, or as conditions following release from prison.²¹ Usually they do not involve confinement. They include nominally and intensively supervised probation; fines and restitution; community service; and participation in community-based treatment programs of various sorts. Sometimes, but comparatively rarely, they involve intermittent confinement—for example, in programs in which participants leave prisons, jails, or halfway houses to work or attend school. Sometimes, but again comparatively rarely, they are imposed as the back component of “split” sentences that include a short period of confinement.

Use of community punishments expanded substantially in most Western countries during the 1970s, 1980s, and 1990s when crime rates, including homicide rates, increased almost everywhere by three to four times before peaking and dropping precipitously.²² Legislation in many countries authorized new community punishments and new or expanded programs that allowed prosecutors or judges to divert cases on the condition that fines or restitution be paid or community service be performed. The policy aims were almost always the same: to reduce the flow of people into to imprisonment and find less damaging but proportionate ways to punish wrongdoers. The new initiatives mostly achieved their goals. Despite harsher public attitudes toward violent and sexual offending, in most countries imprisonment rates remained stable or increased only slightly during the period of rising crime rates, and have since declined. There have been three distinct phases of attempted but largely unsuccessful efforts to establish community punishments as prison alternatives in the United States: “alternatives to incarceration” in the 1970s, “intermediate punishments” in the 1980s, and an array of initiatives since the early 1990s. Most were meant to replace sentences to imprisonment. Few did.

21. By contrast, laws in many European countries authorize prosecutors to resolve cases without convictions if suspects agree to pay fines or restitution or perform community service. See, e.g., Thomas Weigend, *No News Is Good News: Sentencing in Germany Since 2000*, 45 *CRIME & JUST.* 83 (2016) (discussing conditional dismissals in Germany); Henk van de Bunt & Jean-Louis van Gelder, *The Dutch Prosecution Service*, 41 *CRIME & JUST.* 117 (2012) (discussing transactions in the Netherlands).

22. Michael Tonry, *Why Crime Rates Are Falling Throughout the Western World*, 43 *CRIME & JUST.* 1 (2014).

A. ALTERNATIVES TO IMPRISONMENT IN THE 1970s

The several-decade rise in crime rates in the United States that began in the 1960s, and was followed by sharp declines beginning in the early 1990s, paralleled patterns in other countries. However, the policy responses were radically different. Rather than attempt to restrain growth in use of imprisonment by creating new and expanded community-punishment programs, legislators enacted laws intended to send more people to prison and to make many of them stay there longer.

Legislators in some states, and corrections officials in many, also created new community corrections programs that sought to reduce prison use by diverting convicted offenders from imprisonment. In practice, the new initiatives were comparatively seldom used for otherwise prison-bound offenders and, as I explain below, often produced net increases in prison populations and corrections budgets.²³

During the heyday of the Law Enforcement Assistance Administration in the 1970s, enormous numbers of pilot and demonstration projects were established and evaluated.²⁴ They included victim-offender mediation, restitution, and community-service programs meant explicitly to serve as “alternatives to incarceration.” Evaluations typically were methodologically weak, but their three main findings were consistent with findings of later, stronger evaluations. First, judges seldom used the new programs as substitutes for imprisonment. Second, participation in them was seldom shown significantly to reduce reoffending. Third, though, participants’ reoffending rates were seldom higher than those of comparable people in control groups.

It is ironic that community service, mediation, and restitution failed; all were pioneered in the United States.²⁵ In a wide range of other Western countries, perhaps most extensively in Scandinavia, all three were widely adopted and have been extensively used to divert people from imprisonment.²⁶

By the 1980s in the United States, however, it became evident that the alternatives movement was bucking an emerging law-and-order political culture. Officials became tougher. Judges and prosecutors sent more people to prison for longer times, and parole boards held them there longer before

23. MORRIS & TONRY, *supra* note 8.

24. See, e.g., MARGUERITE WARREN ET AL., *RESTITUTION IN LAW AND PRACTICE: THE EXPERIENCE OF TEN PROGRAMS* (1983) (discussing restitution); DOUGLAS C. McDONALD, *PUNISHMENT WITHOUT WALLS: COMMUNITY SERVICE SENTENCES IN NEW YORK CITY* (1986) (discussing community service).

25. MORRIS & TONRY, *supra* note 8.

26. Michael Tonry, *Differences in National Sentencing Systems and the Differences They Make*, 45 CRIME & JUST. 1 (2016); Tapio Lappi-Seppälä, *Nordic Sentencing*, 45 CRIME & JUST. 17 (2016).

release.²⁷ Judges and prosecutors were not especially interested in diverting prison-bound offenders to “softer” punishments. This had a number of results. Most mediation, community service, and restitution programs disappeared when federal funding ceased; few legislators supported their goals and were willing to spend money on them.

Proponents of prison-diversion initiatives tried to match the angrier temper of the times. They dropped the politically and symbolically inexpedient term “alternatives to incarceration” and replaced it with the tougher-sounding “intermediate punishments.” With the change in nomenclature, however, came a fundamental change in many community-penalty programs: Originally conceived as reformatory efforts meant to keep offenders out of prison and help them live law-abiding mainstream lives, they were reconceived as intrusive, closely supervised programs aimed primarily at recidivism reduction.

B. INTERMEDIATE PUNISHMENTS IN THE 1980s

Norval Morris and I acknowledged the changed ethos by using intermediate “punishments” rather than “sanctions” in the title of a 1990 book on community penalties.²⁸ The most prominent 1970s initiatives sought to redress crimes in positive ways and help victims and offenders get on with their lives. The major intermediate punishments of the 1980s—intensive supervision, electronic monitoring, home detention, frequent drug testing—instead emphasized surveillance to identify breaches of conditions and new crimes. They often included frequent random drug tests and unannounced home visits by probation officers, increasingly armed and often accompanied by police officers. A new conception of probation officers as law enforcement officials replaced an earlier, traditional conception as social workers.

Numerous intermediate punishment programs were established in the 1980s. They were conceived as falling between prison and routine probation but in their promoters’ minds generally had the same ultimate purpose as the 1970s “alternatives”—to divert convicted offenders from prison. The logic was that “alternatives to imprisonment” failed because judges considered them insufficiently punitive; the solution was to make community punishments look more punitive, intrusive, and stigmatizing. That happened. The new programs were more intrusive and controlling, they were often strictly enforced, and majorities of participants wound up in prison for breaches of conditions. The perverse result was that programs meant to divert people from prison

27. Alfred Blumstein & Allen Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17 (1999).

28. MORRIS & TONRY, *supra* note 8.

and save money instead sent more people to prison and increased costs. In retrospect, proponents of intermediate punishments made a huge mistake in not anticipating that the new programs would be used to toughen sentencing rather than, as they hoped, to reduce the use of imprisonment.

Examples illustrate the toughening dynamic. The National Institute of Justice (NIJ) provided funding for several states to establish and evaluate day-fine systems for use as prison alternatives. Day fines are common in Germany and Scandinavia as penalties for low- and moderate-severity offenses. The seriousness of the crime determines the number of day-fine units (for example, 30). The individual's daily income (adjusted for wealth) determines the amount of a single unit. A low-income offender might be required to pay 20 euros per day and an affluent one 300. The NIJ evaluation design called for randomized allocation of eligible offenders to day fines or to whatever sentence the judge ordinarily would order. The projects failed. In most, despite the federal grants that paid for the pilot projects, practitioners refused to implement day fines at all. In none did practitioners agree to random allocation.²⁹

Intensive supervision programs offer a second example. NIJ funded a multi-jurisdiction experiment to determine the programs' effects on recidivism. Eligible offenders were to be randomly allocated by judges or corrections officials to intensive supervision or the default disposition. Researchers would track the experiences of program participants and control group members to learn what happened. There was, however, an insuperable obstacle. Judges in all participating jurisdictions refused to follow the experimental research design and insisted on being able to sentence eligible offenders to imprisonment on a case-by-case basis. Follow-ups of programs in which parole or probation officials randomly allocated cases showed that intensive supervision had no effects on recidivism rates but increased revocation rates. This was no surprise because, evaluators found, the closer supervision disclosed more breaches of conditions and the program operators seldom had adequate access to treatment programs and other services.³⁰

Changes in the ethos of parole and probation revocation practice illustrate a third obstacle. Throughout the 1980s, probation and parole revocations and their shares of prison admissions steadily increased as judges' and parole boards' attitudes toward offenders became more unforgiving. Officials responded more harshly to breaches of conditions than in earlier periods, especially for

29. Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49 (1990); Cheryl Lero Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517 (2015).

30. Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 CRIME & JUST. 281 (1993).

technical violations such as failing drug tests or not appearing for scheduled appointments.³¹ In some states, revocations came to constitute a large fraction, often more than half, of all prison admissions.

The new intermediate punishments often had the perverse effect that more, not fewer, offenders wound up in prison.³² Their rationale was that diversion of prison-bound offenders would reduce prison crowding and save substantial money because the per capita costs of intermediate-punishment programs—typically \$1,000 to \$10,000—are a small fraction of the per capita cost of imprisonment (\$30,000 to \$75,000, depending on the state). The experience was otherwise.

The new programs typically resulted in extensive “net-widening.” Evaluations consistently showed that judges used new tougher community sanctions mostly to impose harsher punishments on people who previously were sentenced to ordinary probation. They were comparatively seldom ordered for people who previously would have been imprisoned. Because the more intensive new programs were strictly enforced, half to two-thirds of participants were commonly imprisoned following revocations for breaches of conditions. People who previously received ordinary probation were bumped up to intermediate punishments and, when they breached conditions, were bumped up again to imprisonment. More, not fewer, people wound up in prisons, and corrections costs went up, not down.

C. COMMUNITY PUNISHMENTS SINCE THE EARLY 1990s

From one perspective, a lot has happened since the early 1990s. From another, little.

1. A lot has happened

There has been substantial program development, most conspicuously under the banners “drug and other problem-solving courts”³³ and “prisoner reentry.” Research on the effectiveness of treatment programs has burgeoned; more is known, and known more confidently, about the effects and operation

31. Michael Tonry, *Stated and Latent Functions of ISP*, 36 CRIME & DELINQUENCY 174 (1990).

32. MORRIS & TONRY, *supra* note 8.

33. See Richard C. Boldt, “Problem-Solving Courts,” in Volume 3 of the present Report.

of a wide variety of programs and services. Under the right circumstances, many kinds of programs can enhance participants' human capital and reduce their reoffending.³⁴

Many judges want to impose sentences that do something more constructive, and more humane, than simply send troubled people to jail or prison. Drug courts, mental-health courts, and other specialized problem-solving courts for domestic violence, gun crimes, drunk driving, and military veterans have proliferated. The first drug court was established in Miami in the early 1990s. By 2017, there were thousands and many hundreds of other problem-solving courts. Well-regarded evaluations and research reviews conclude that well-run and targeted specialty courts produce better results than business as usual.³⁵ The vast majority were established before credible evidence of effectiveness was available, because judges and others believed them to be the right thing to do. Despite the large numbers of programs, caseloads are typically small, however, and can deal with only a tiny fraction of offenders who could benefit.

The reentry movement took off early in this century, heralded by writings of Jeremy Travis³⁶ and Joan Petersilia.³⁷ They observed that hundreds of thousands of people are released from prison each year and it is in everyone's interest that as many as possible achieve satisfying, law-abiding lives. Those arguments were widely accepted. Within a few years, federal funding became available to support state programs. Programs were established in most, probably all, states. Reentry targets people being released from jail or prison, ideally providing continuity of treatments and services provided inside the institution and assistance in meeting the challenges of reentering mainstream life.

In practice, little or nothing about reentry is new except the term and the enthusiasm. Programs and service for people released from prison are indistinguishable from those traditionally provided parolees and probationers in community settings. Evaluations of reentry programs produce the same kind

34. MacKENZIE, *supra* note 11; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION* (2008). For a discussion of rehabilitation, see Francis T. Cullen, "Correctional Rehabilitation," in the present Volume.

35. Ojmarrh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-traditional Drug Courts*, 40 J. CRIM. JUST. 60 (2012).

36. Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, SENT'G & CORRECTIONS (May 2000), <http://www.ncjrs.gov/pdffilesi/nij/181413.pdf>; JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005).

37. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003).

of mixed findings as do evaluations of community-corrections programs more generally. Well-run, adequately funded programs can achieve good results; poorly run and funded programs do not.³⁸

The big change in the past quarter-century is that many more people believe that correctional treatment programs can, under the right circumstances, reduce reoffending. In 1990, “nothing works” remained the predominant and much more influential view. Landmarks that underlay the change include the “Drug treatment works!” conclusion of the President’s Commission on Model State Drug Laws in 1993,³⁹ work by Canadian scholars beginning in the 1980s that demonstrated the effectiveness of cognitive-skills training and proposed best-implementation practices, and a long list of meta-analyses and systematic reviews of evaluations of community-corrections programs that showed positive results.⁴⁰

2. Little has happened

Nothing fundamental has changed. The prison population has declined only modestly since its 2011 peak, almost none of the harshest sentencing laws enacted in the 1980s and 1990s have been repealed, and the risk-averse politics of crime control of the 1990s remain predominant. Law reforms focus on nonviolent first offenders. The massive investment in community-corrections programs needed to capitalize on new knowledge has not happened.

Like flies in amber, policies and programs that emerged from ways of thinking consistent with the crime-control politics of the 1980s continue to win support. Here is a popular example.⁴¹ More than 150 corrections programs have emulated

38. Jonson & Cullen, *supra* note 29.

39. THE PRESIDENT’S COMMISSION ON MODEL STATE DRUG LAWS (1993), <http://www.namsdl.org/final-report-the-presidents-commission-on-model-state-drug-laws.cfm>.

40. Francis Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299 (2013) [hereinafter Cullen, *Rehabilitation*]; Francis T. Cullen et al., *Reinventing Community Corrections*, 46 CRIME & JUST. 1 (2017) [hereinafter Cullen et al., *Reinventing Community Corrections*].

41. A second is contemporary preoccupation with use of predictions of reoffending in sentencing and parole decision making. Enormous ethical and technical issues stand in the way. E.g., BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2014); Sonja B. Starr, *Evidence-based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT’G REP. 167 (2014). Ethical issues include use of predictive variables such as age, sex, and social status characteristics correlated with race and ethnicity. Technical issues include high false positive rates (people predicted to reoffend who will not but are treated more severely), routine failure to validate instruments on populations to which they are applied, and failure to restrict the reoffending outcome measure to serious sexual and violent offending.

Hawaii's Project HOPE, a probation initiative based on "swift, fair, and certain" sanctions.⁴² Probationers are told that any breach of conditions will result in immediate sanctions, initially modest but progressing in severity with each subsequent breach, eventually resulting in revocation and a trip to prison for a period of years. An initial evaluation purported to show that probationers subjected to the program reoffended less often than others and were less likely to be imprisoned.⁴³ NIJ funded a series of replications that were evaluated using randomized assignments of eligible offenders to treatment and control groups. The new evaluations concluded that the programs were ineffective.⁴⁴

Project HOPE was misconceived from the outset. "Swift, fair, and certain" is much more apt for conditioning dogs or horses than for dealing with disadvantaged low-level offenders, many drug-dependent or mentally ill, and most living socially disorganized lives. What they as a group need is structured access to diverse services and forms of support to help them address human-capital deficiencies and establish pro-social patterns of living. Operation HOPE treated compliance with probation conditions as an end in itself.

HOPE is inconsistent with ways of thinking that are necessary if successful use of community punishments is to be greatly increased. HOPE is fundamentally punitive and indifferent to the complexities of the lives of the people it affects. A disadvantaged, socially inadequate person subjected to HOPE will remain a disadvantaged, socially inadequate person even if he or she successfully completes a probation term.

II. INVIGORATING COMMUNITY PUNISHMENTS

There were two overriding causes of the failures of the alternatives-to-incarceration and intermediate-punishments movements. Policymakers were committed to a regime of harsh punishments and unwilling to invest substantial resources in community programs. Judges and prosecutors were

42. MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LOW CRIME AND LOW PUNISHMENT* (2009).

43. ANGELA HAWKEN & MARK KLEIMAN, *MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS. EVALUATING HAWAII'S HOPE* (Dec. 2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>.

44. Pamela K. Lattimore et al., *Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?*, 15 *CRIMINOLOGY & PUB. POL'Y* 1103 (2016); Daniel J. O'Connell et al., *Decide Your Time: A Randomized Trial of a Drug Testing and Graduated Sanctions Program for Probationers*, 15 *CRIMINOLOGY & PUB. POL'Y* 1073 (2016).

unwilling to divert offenders whom they believed deserved to be sent to prison. Community punishments were seldom seen as appropriate for other than the most minor crimes.

American sentencing norms are incomparably more severe than those in other Western countries. Normal sentences for thefts, burglaries, assaults, and auto thefts in Scandinavia, Germany, the Netherlands, and most of Europe are community punishments or prison sentences measured in weeks or months; a decision instead to impose day fines or community service does not create stark differences. Those offenses typically result in lengthy jail terms or multi-year prison terms in the United States. Diversion to community punishments creates stark differences. If a community penalty must be seen as being as burdensome as a multi-year prison sentence, little room is available for vast expansion in their use.

Assuming that politicians and practitioners wanted people convicted of non-trivial offenses to be sentenced to community punishments, the way forward is clear. A large literature offers advice on effective targeting and management of community corrections and treatment programs.⁴⁵ I make no effort to summarize it here. Instead I offer an action list of community penalty programs that would be established if sentencing were to be made rational, evidence-based, and humane, and if mass incarceration is to be reduced.

RECOMMENDATIONS

1. **Reduce use of community punishments for minor and low-risk offenders.** American judges and parole boards much too often use community punishments for people convicted of minor crimes and for people who present little risk of reoffending. In 2015, American prisons and jails held 2.17 million people. Another 4.65 million were under community supervision. Calculated as population rates, both of those numbers are vastly higher than in any other Western country.⁴⁶ Current use of community supervision is enormously wasteful; the vast majority of people being supervised present little risk to public safety. One of the most robust findings of the last two decades' research on correctional programs is that resources should target high-risk offenders. The current failure to do that makes little sense from cost-effectiveness or public-safety

45. Cullen, *Rehabilitation*, *supra* note 40; Cullen et al., *Reinventing Community Corrections*, *supra* note 40.

46. DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015 (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>.

perspectives. The following proposals call for increased use of a wide range of community punishments, but assume that they will be deployed in ways that are cost-effective and sensibly targeted.

2. **Prosecutorial diversion and community punishments.** One way to avoid judicial reluctance to divert convicted offenders from imprisonment is to keep cases out of judges' hands. Most European countries use one or both of two approaches. German conditional dismissals and Dutch transactions offer suspects, usually on a take-it-or-leave-it basis, without negotiation, the opportunity to accept the fine, restitution, or community service that would be imposed if they were formally charged and convicted. If they accept, the charge is conditionally dismissed. The Scandinavians, the Dutch, and several other countries offer parallel programs, usually referred to as penal orders, that involve a conviction and a community penalty. Large percentages of all resolved cases result from these kinds of diversionary programs.⁴⁷ For the obvious reason of collateral consequences, programs that do not involve convictions are preferable for the United States.
3. **Mediation, restitution, and restorative justice.** Some European countries handle diversion by means of pre-charge mediation, restitution, and restorative justice programs.⁴⁸ If victims and offenders agree on a resolution of the offense, or if the defendant pays restitution, the charge is dismissed. In Norway and Finland, a large fraction of resolved cases are disposed of via mediation. In concept, such programs should be congenial to American attitudes because they involve victim agreement or restitution of victim losses.
4. **Fines and community service.** Both fines and community service are in principle ideal community punishments to be used in lieu of imprisonment. Both can easily be scaled in proportion to the seriousness of the crimes for which they are imposed. Day fines are frequently used in Germany and Scandinavia for minor and moderately serious, including violent, crimes. In the United States, however, the absence of income supports for poor people means that most criminal defendants lack sufficient money to pay fines.⁴⁹

That problem need not, however, obstruct much wider use of community service. Ironically, the first publicized modern community-service programs were pioneered in the United States for use in lieu of

47. Petter Asp, *The Prosecutor in Swedish Law*, 41 CRIME & JUST. 141 (1993); Bunk & Gelder, *supra* note 21; Weigend, *supra* note 21.

48. Lappi-Seppälä, *supra* note 26.

49. See Beth A. Colgan, "Fines, Fees, and Forfeitures," in the present Volume.

imprisonment for women convicted of welfare fraud. The idea was quickly and successfully emulated in England and Wales, Scotland, and The Netherlands and later spread throughout Europe. By the 1990s, however, American use of community service as a freestanding punishment had largely ended. When it was used, it was as one among many conditions of probation.⁵⁰ This is the federal court practice. No freestanding community punishments other than probation are authorized in the federal sentencing guidelines: All are available only as probation conditions.

Community service ought to be an obviously appropriate community penalty in the United States. It is essentially a fine on time, paid in work installments, and scaled to the seriousness of crime.

5. **Probation with treatment conditions.** The evaluation literature on correctional treatment shows that a wide range of programs when adequately funded, managed, and targeted, can change people's lives. Many including drug treatment, cognitive skills training, vocational training, educational programs, and mental-health treatment are self-evidently appropriate conditions for probation sentences in fitting cases. Sometimes they may involve intensive supervision or intermittent confinement in treatment facilities.

Whether such sentences are effective, however, fundamentally depends on the availability, adequate funding, and professional operation of treatment facilities. Simply imposing treatment conditions or intensive supervision, without assuring that necessary services can be provided and that necessary programs are available, invites failure. Failure is also likely if supervision is rigid and unforgiving. Many conditions that affect offenders, including especially alcohol and drug dependence and mental illness, almost inevitably result in relapses. Like overeating or nicotine addiction, alcohol and drug dependence are chronic, relapsing problems. Failures are foreseeable. The realistic goal is not immediate abstinence (as in Project HOPE), but fewer relapses, and longer intervals between them, as part of efforts to help offenders establish satisfying, law-abiding lives.

CONCLUSION

Community punishments should be used much less for people whose characteristics and lives do not warrant them, and much more for people who would otherwise receive jail or prison sentences. Diverting a large percentage of people now sentenced to jail or prison into well-run, adequately funded,

50. MORRIS & TONRY, *supra* note 8.

professionally operated community punishments could save huge amounts of money, substantially reduce imprisonment rates, and be more crime-preventive than the current regime. Crime prevention would result from the reduced reoffending rates that good community programs can deliver and from reduction of the effects of the criminogenic conditions to which people are exposed in prison. Community punishments would do much less harm to offenders and their families than prison and jail sentences now do.

Whether large-scale diversion from imprisonment to community punishments will happen will depend on political will. So far, little is evident. Sentencing and parole initiatives have focused on minor and first offenders.⁵¹ Federal efforts to stimulate development of specialty courts and reentry programs have been modest, far less than is needed. States so far have not been prepared to make the substantial investments required. Justice-reinvestment initiatives have targeted low-hanging fruit but more importantly have offered a free lunch: Legislators need not appropriate substantial new sums but simply tweak sentencing laws or revocation policies in order to reduce prison spending and reallocate all or part of any savings. Even then, justice reinvestment has seldom resulted in major funding increases for community punishments.

Community punishments could accomplish much that is good. For that to happen on a large scale, policymakers must be prepared in the short term to reduce prison populations substantially, and recycle much of the savings, or appropriate new funds for community punishments on a scale that so far seems unimaginable. Adoption of either or both of those approaches will depend on determination to reduce the scale of American imprisonment and the lengths of current prison sentences. Substituting 100 or 240 hours of community service, or probation with drug treatment, for a multi-year prison term will always be a hard sell.

51. Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238 (2016); TONRY, SENTENCING FRAGMENTS, *supra* note 20.

Fines, Fees, and Forfeitures

Beth A. Colgan*

The use of fines, fees, and forfeitures has expanded significantly in recent years as lawmakers have sought to fund criminal justice systems without raising taxes. Concerns are growing, however, that inadequately designed systems for the use of such economic sanctions have problematic policy outcomes, such as the distortion of criminal justice priorities, exacerbation of financial vulnerability of people living at or near poverty, increased crime, jail overcrowding, and even decreased revenue. In addition, the imposition and collections of fines, fees, and forfeitures in many jurisdictions are arguably unconstitutional, and therefore create the risk of often costly litigation. This chapter provides an overview of those policy and constitutional problems and provides several concrete solutions for reforming the use of fines, fees, and forfeitures.

INTRODUCTION

The use of fines,¹ fees, and forfeitures of cash and property are long-standing practices² that have boomed in recent years as lawmakers have sought to fund an

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1. I use the term “fines” here to include statutory fines as well as surcharges, the latter of which are imposed as an additional set amount or percentage of the underlying statutory fine and which are often designated for a particular purpose. *See, e.g.*, CAL. PENAL CODE § 1465.8 (\$40 surcharge designated for court operations). I also include restitution made directly payable to crime victims. Criminal debt resulting from restitution awards implicate the same concerns regarding entrenched poverty, familial disruption, criminal justice involvement, and jail overcrowding described in Part I.B, *infra*. Further, restitution raises many of the same constitutional issues described in Part II. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660 (1983) (prohibiting probation revocation for failure to pay restitution without a determination of whether the defendant had the ability to pay); *Paroline v. United States*, 134 S. Ct. 1710, 1726 (2014) (suggesting that it would interpret the term “fine” to include restitution for purposes of the Excessive Fines Clause). And while restitution is not designed in the first instance to generate revenue for the government, because it has the capacity to offset other governmental expenses, it also can distort criminal justice incentives such as those described in Part I.A, *infra*. Finally, this chapter does not address unique issues that might be raised with respect to the use of fines, fees, and forfeitures in the white-collar context or against corporate defendants.
2. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 107 CAL. L. REV. 277 (2014).

expanding criminal justice system without raising taxes.³ In many jurisdictions, economic sanctions begin accruing from the moment one is stopped by the police (e.g., fees for law enforcement costs and pretrial detention), to trial (e.g., public-defender fees or jury costs), through sentencing (e.g., incarceration or probation costs, statutory fines, surcharges, and restitution), and collections (e.g., interest charges or collection fees).⁴ For those without the means to pay, the consequences can be drastic. The inability to pay economic sanctions may result in the imposition of what have come to be known as “poverty penalties”: interest and collections costs, probation and a host of related fees for probation services, the loss of government licenses and benefits, and even incarceration.⁵ The use of forfeitures is also ubiquitous,⁶ including the growing use of what are known as “civil asset forfeitures,” which are imposed without a criminal

3. See COUNCIL FOR ECONOMIC ADVISORS, FINES, FEES, AND BAIL 3 (Issue Brief Dec. 2015); KATHERINE D. MARTIN ET AL., HARVARD KENNEDY SCHOOL & NAT’L INST. OF JUSTICE, SHACKLED TO DEBT: CRIMINAL JUSTICE FINANCIAL OBLIGATIONS AND THE BARRIERS TO RE-ENTRY THEY CREATE 4 (Jan. 2017); DICK M. CARPENTER II ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE 5 (2d ed. 2015) (noting that the value of federal forfeitures increased 4,667% between 1986 and 2014).

4. See Colgan, *supra* note 2, at 284–90.

5. See CRIMINAL JUSTICE POLICY PROGRAM, HARVARD LAW SCHOOL, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 15–16 (2016); Colgan, *supra* note 2, at 282; HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER FUNDED” PROBATION INDUSTRY 39 (2014) [hereinafter HRW].

6. See, e.g., CARPENTER, *supra* note 3; see also Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1432 (2001).

conviction.⁷ Like fines and fees, forfeitures can be financially devastating as the loss of funds that would otherwise be used to cover basic needs—a vehicle one depends on to get to work or school, or a family home—can have profound consequences for those against whom forfeiture is imposed.

Systems for imposing and collecting fines, fees, and forfeitures are often poorly designed. As a result, in the United States today, 10 million people hold criminal debt from fines and fees totaling over \$50 billion,⁸ and forfeiture has become a billion-dollar industry based largely on the use of civil asset forfeitures obtained without a criminal conviction.⁹ Abuses in both systems have resulted

7. See Bruce L. Benson, *Escalating the War on Drugs: Causes and Unintended Consequences*, 20 STAN. L. & POL'Y REV. 293, 297 (2009). In contrast to civil asset forfeitures, there are two types of conviction-based forfeitures. "Criminal forfeitures" are imposed through criminal sentencing as a direct punishment, *see, e.g.*, *Alexander v. United States*, 509 U.S. 544, 548 (1993); and "civil forfeitures" are obtained through a civil proceeding used to finalize a forfeiture agreed to by a defendant in a plea bargain resolving a related criminal matter or following an adjudication of guilt. *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 604-05 (1993). For ease of reference, throughout this chapter I use the term "forfeiture" when referring to all three forms of forfeiture, and "civil asset forfeiture" when referring specifically to that practice. An additional distinction in the forfeiture context relates to the items that are forfeited. An "instrumentality" is money or property that is otherwise legal to possess but is used as a means of conducting the alleged criminal activity (e.g., a vehicle used to transport illegal narcotics). "Criminal proceeds" are monies gained from criminal activity and may be "direct" (e.g., money obtained for the sale of narcotics) or "indirect" (e.g., a house purchased with direct proceeds). "Contraband" is a moniker attached to tangible items that are illegal to possess either because they are inherently illegal (e.g., illegal narcotics) or made illegal by the circumstances of the offense (e.g., alcohol transported in violation of state law). This chapter is concerned with the first two categories—instrumentalities and criminal proceeds—as both presume criminal activity has occurred (which may not be proven in the case of civil asset forfeitures) and because the forfeiture of funds, a vehicle, or a home, may have devastating consequences for the defendant and her family, which may raise constitutional issues as noted herein. *See, e.g.*, Pamela Brown, *Parent's House Seized After Son's Drug Bust*, CNN (Sept. 8, 2014).

8. MARTIN, *supra* note 3, at 5.

9. *See, e.g.*, Michael Sallah et al., *Stop and Seize*, WASH. POST (Sept. 6, 2014) (reporting that between September 2001 and September 2014, the federal Equitable Sharing Program involved seizures valued at over \$2.5 billion dollars).

in a surge in efforts by advocates¹⁰ and investigative reporters¹¹ to document and challenge the real, and often alarming, consequences of relying on criminal justice systems to generate revenue. Fueled by public outcry regarding the use of “modern-day debtors’ prisons” in places like Ferguson, Missouri,¹² and jurisdictions around the country,¹³ as well as a plethora of incidents in which law enforcement have seized money or property and sought its forfeiture without any meaningful evidence of criminal activity,¹⁴ calls for reform now have support from both conservative and liberal camps.¹⁵

These systems have also captured the attention of scholars from a variety of fields, including law, sociology, economics, and criminology. In this chapter, I provide a brief examination of two lines of scholarship that explore poorly designed systems involving fines, fees, and forfeitures. The first analyzes the policy implications of the use of criminal justice systems to generate revenue. The second involves explication of constitutional deficiencies that arise in poorly designed systems. This chapter concludes with a series of policy recommendations tied to these lines of scholarship for the reform of the use of fines, fees, and forfeitures.

10. See, e.g., JESSICA FEIERMAN ET AL., JUVENILE LAW CTR., DEBTORS’ PRISON FOR KIDS? THE HIGH COST OF FINES AND FEES IN THE JUVENILE JUSTICE SYSTEM (2016); HUMAN RIGHTS WATCH, *supra* note 5; ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010).

11. For examples of investigative reporting related to the use of fines and fees, see Sarah Stillman, *Get Out of Jail, Inc.*, NEW YORKER (June 23, 2014); Joseph Shapiro, *Supreme Court Rules Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014); Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014). For examples of investigative reporting related to the use of forfeitures, see Robert O’Hara, Jr. & Michael Sallah, *They Fought the Law, Who Won?*, WASH. POST (Sept. 8, 2014); Robert O’Hara, Jr. & Michael Sallah, *Police Intelligence Targets Cash*, WASH. POST (Sept. 7, 2014); Sallah et al., *supra* note 9; Sarah Stillman, *Taken*, NEW YORKER (Aug. 12, 2013).

12. See U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015) [hereinafter FERGUSON REPORT].

13. See, e.g., LAWYER’S COMM. FOR CIVIL RIGHTS ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA (2015).

14. See, e.g., Christopher Ingraham, *How Police Took \$53,000 from a Christian Rock Band, an Orphanage, and a Church*, WASH. POST (Apr. 25, 2016).

15. See, e.g., AM. LEGIS. EXCHANGE COUNCIL, RESOLUTION ON CRIMINAL JUSTICE FINES AND FEES (2016) (calling for graduation of economic sanctions to account for ability to pay); ACLU, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTORS’ PRISONS (2010) (calling for an end to abusive practices related to economic sanctions); Mary Hudetz, *Charles Koch, ACLU Form Unusual Alliance In Pushing States to Overhaul Asset Forfeiture Rules*, U.S. NEWS & WORLD REP. (Oct. 15, 2015).

I. POLICY IMPLICATIONS

Scholarship regarding the policy implications of inadequately designed systems for imposing and collecting fines, fees, and forfeitures have focused on two key problems. First, increasing evidence suggests that absent meaningful restrictions, the use of such economic sanctions risks distorting the focus of criminal justice incentives both by promoting revenue goals over public safety and interfering with checks and balances that would otherwise help guard against some problematic practices. Second, where fines, fees, and forfeitures are imposed and collected in a manner that contributes to economic and social instability for those who are financially vulnerable, they undermine governmental aims related to reductions in poverty, crime control, mass incarceration, and depletion of government resources. Both sets of issues are addressed below.

A. DISTORTION OF CRIMINAL JUSTICE INCENTIVES

The revenue-generating capacity of fines, fees, and forfeitures risks perverting governmental incentives in two distinct ways. First, by promoting policing and adjudication methods that are most likely to increase revenue, governmental actors may fail to consider, or even implement policies that directly conflict with, public-safety needs. Second, systems that allow law enforcement and prosecutors to retain cash and property seized undermines the checks and balances otherwise afforded through normal budgeting practices.

While there is a debate in the literature regarding whether government officials respond to financial, rather than only political, incentives as a general matter,¹⁶ investigations into specific systems, empirical studies, and anecdotal evidence have linked the use of fines, fees, and forfeitures to practices driven by the goal of revenue generation rather than public safety. For example, the Department of Justice's investigation into the municipal court system in Ferguson, Missouri, uncovered e-mails between city officials and the chief of police in which police staffing decisions were altered to increase money generated from traffic tickets without consideration of the impact such changes would have on traffic safety or community policing efforts.¹⁷ Similarly, an empirical analysis of traffic ticketing in North Carolina from 1990 to 2003

16. Compare Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016); and Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001); with Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

17. See FERGUSON REPORT, *supra* note 12, at 10, 13–14.

found that, “[c]ontrolling for demographic, economic, and enforcement factors ... there is a statistically significant increase in the number of traffic tickets issued in the year immediately following a decline in local government revenue,”¹⁸ suggesting that revenue generation, rather than public safety, drove the extent to which traffic laws were enforced.

There is also significant evidence that revenue rather than public safety drives policing decisions related to forfeitures. Eric Blumenson and Eva Nilsen have documented examples of how the thirst for cash has led to shifts in police practices. For example, a traditional drug buy-bust sting operation would involve the use of an undercover officer posing as a person interested in buying illegal drugs; following the exchange, the police would of course seize the drugs and therefore remove them from circulation.¹⁹ With the incentive of forfeiture laws, however, law enforcement has come to rely more heavily on the “reverse sting,” under which the police pose as the dealer rather than the buyer, so that upon conclusion of the transaction, they can seize the cash used in the sale.²⁰ Blumenson and Nilsen also cite to congressional testimony of former New York City Police Commissioner Patrick Murphy, who explained that financial incentives led to a policy whereby police would “impose roadblocks on the southbound lanes of I-95, which carry the cash to make drug buys, rather than the northbound lanes, which carry the drugs.”²¹ While both reverse stings and forfeitures of cash arguably interrupt the illicit drug trade, the focus on obtaining cash rather than seizing drugs indicates that policing decisions are influenced by the revenue-generating power of forfeiture.

Further, forfeitures may be incentivizing policing of particular offenses where seizures of cash or property are most easily made, which would result in prioritizing the policing of drug crimes over violent offenses, which may in turn exacerbate problematic policing practices that disproportionately affect poor and minority communities.²² For example, one study testing the effects of allowing police to retain funds and assets seized in drug arrests found that it shifted the focus of police to activities that may produce forfeitures, and, in

18. Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71 (2009).

19. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 67–68 (1998).

20. *Id.*

21. *Id.*; see also Benson, *supra* note 7, at 315–16 (describing similar practices in Volusia County, Florida).

22. See, e.g., C.J. Claramella, *Poor Neighborhoods Hit Hardest by Asset Forfeiture in Chicago, Data Shows*, REASON (June 13, 2017). For a discussion of some of these practices, see Jeffrey Fagan, “Race and the New Policing,” in the present Volume.

particular, increased arrests related to drug activity as compared to total arrests by nearly 20%.²³ Further, in cities like Philadelphia and Washington, D.C., it appears that police may be going so far as to seize small amounts of cash—in many cases less than \$20—during stop-and-frisk incidents.²⁴ In other words, pressure to generate revenue may have significant implications for when and how policing occurs that may undermine public safety and intensify public concern regarding police-citizen encounters. The risk is that the focus on revenue generation will interfere with other policy considerations, including public safety.

A separate perversion of criminal justice priorities may occur where law enforcement entities or prosecutors are allowed to keep forfeited cash and property for their agency's own use, as is the case in many jurisdictions.²⁵ Allowing law enforcement and prosecutors to retain funds removes the check set through budgeting processes, as it provides them the ability to set priorities that may contradict or interfere with crime-control aims of the legislative branch or the public at large.²⁶ For example, under the federal "Equitable Sharing Program," the federal government "adopts" seizures of cash and property made by local and state law enforcement, thereby pulling the seized assets under federal forfeiture laws, which are at times more expansive than state laws in terms of what may be seized and more restrictive regarding the provision of procedural protections.²⁷ In exchange, the federal government keeps 10% of the liquidated value of the items seized.²⁸ This infusion of funds

23. Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 284 (2000); see also Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1696 (2010) (explaining how policing priorities may be designed "to trigger forfeiture laws and to demonstrate a record of productivity that may be used to support applications for sizeable federal grants"); Blumensen & Nielsen, *supra* note 19, at 68–69, 78–79 (describing Department of Justice policies that diverted prosecutorial resources away from other offenses and to crimes where forfeitures are likely in order to increase resources).

24. See Robert O'Hara, Jr. & Steven Rich, *D.C. Police Plan for Future Seizure Proceeds Years in Advance in City Budget Documents*, WASH. POST (Nov. 15, 2014); ACLU, *GUILTY PROPERTY: HOW LAW ENFORCEMENT TAKES \$1 MILLION IN CASH FROM INNOCENT PHILADELPHIANS EVERY YEAR—AND GETS AWAY WITH IT* 5 (June 2015).

25. See Rachel A. Harmon, *Federal Programs and the Real Cost of Policing*, 90 N.Y.U. L. REV. 870, 954–55 (2015); Benson, *supra* note 7, at 301–02.

26. See Nick Sibilla, *Civil Forfeiture Now Requires a Criminal Conviction in Montana and New Mexico*, FORBES (July 2, 2015) (quoting Las Cruces, New Mexico City Attorney Pete Connelly discussing civil asset forfeiture and stating, "We could be czars. We could own the city.").

27. See Benson, *supra* note 7, at 303.

28. *Id.* at 302–03 (explaining that at the beginning of the Equitable Sharing Program, the federal government retained 20% of the seizure's value, which was later reduced to 10%).

not only allows law enforcement to sidestep state restrictions on forfeiture, the retention of the profits of forfeiture insulates them from budgeting restrictions that would otherwise establish state and local control over policing overall.²⁹

As indicated in the discussion of reforms at the end of this chapter, any concern regarding the way in which fines, fees, and forfeitures may distort criminal justice incentives does not require their elimination. Rather, reforms are needed to create sufficient protections to restrict their use so that criminal justice priorities are properly focused on public safety, rather than revenue generation.

B. UNDERMINING OTHER GOVERNMENTAL AIMS

Separate and distinct from the potential that inadequately designed systems for fines, fees, and forfeitures will distort criminal justice incentives, such systems can also undermine other governmental aims due to their inherently regressive nature. By entrenching or exacerbating the financial vulnerability of people and their families, fines, fees, and forfeitures can create long-term instability and familial disruption, increase criminal justice involvement, aggravate jail overcrowding, and—perhaps ironically—decrease net revenue.

Fines, fees, and forfeitures can have devastating consequences on those who are financially vulnerable,³⁰ particularly in low-income communities and communities of color that are most likely to be heavily policed.³¹ In the context of fines and fees, many grappling with criminal debt report having to choose between making payments on the debt and meeting basic needs like food, shelter, and hygiene.³² At the same time, existing criminal debt can make obtaining and maintaining housing and employment difficult for several reasons: it undermines a debtor's credit rating, which may be used by prospective landlords and employers in screening processes;³³ it may prevent debtors from sealing or expunging criminal records;³⁴ and it can result in the loss of professional or driver's licenses, the latter of which can be particularly harmful for those who live in areas without meaningful access to public

29. Harmon, *supra* note 25; *see also* Benson, *supra* note 7.

30. Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions As Misguided Policy*, 10 J. CRIMINOLOGY & PUB. POL'Y 509, 516–17 (2011).

31. *See, e.g.*, JOHN PAWASARAT, U. OF WISCONSIN-MILWAUKEE EMPLOYMENT & TRAINING INST., THE DRIVERS LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 11, 19 (June 2005); MATHILDE LAISNE ET AL., VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 18–19, 22 (2017); *see also* Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report; Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool for Systemic Reform*, 58 WM. & MARY L. REV. 1179 (2017).

32. Beckett & Harris, *supra* note 30, at 517; LAISNE, *supra* note 31, at 16.

33. Beckett & Harris, *supra* note 30, at 517–18.

34. *See, e.g.*, FEIERMAN, *supra* note 10, at 20.

transportation.³⁵ The instability with respect to basic needs and the hindrances such debt creates to establishing housing and employment affect not just the debtor, but also her family. For example, the Bureau of Justice Assistance and Council of State Governments have linked the increased use of fines and fees to the inability to pay child support,³⁶ thereby undermining both the child's economic well-being and the government's interest in child-support enforcement. Further, a debtor unable to make payments on fines and fees may be restricted from public housing benefits, forcing the debtor's family to either separate or lose their housing as well.³⁷ In other words, unmanageable fines and fees can result in disruption or even disunification of families.

Though it does not result in ongoing debt, the forfeiture of funds or property may also leave people and their families in financially precarious circumstances. With, or more often without,³⁸ a criminal conviction, people may lose funds they depend upon to meet basic needs,³⁹ vehicles upon which they depend for transportation to work or school,⁴⁰ or the homes in which they live.⁴¹

A concern expressed by both the United States Supreme Court⁴² and commentators,⁴³ and borne out in research, is that punishments that promote economic instability may result in increased criminal justice involvement. Recent studies, for example, have shown that people may engage in criminal activity for the purpose of paying off unmanageable criminal debt.⁴⁴ Additionally, while early studies of the link between fines and fees and recidivism amongst juveniles

35. PAWASARAT, *supra* note 31, at 1; *see also* MARGY WALLER, BROOKINGS INST., HIGH COSTS OR HIGH OPPORTUNITY COST? TRANSPORTATION AND FAMILY ECONOMIC SUCCESS 3 (2005).

36. RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'T JUSTICE CTR., REPAYING DEBTS 7–8 (2007).

37. *See* Colgan, *supra* note 2, at 293.

38. *See infra* notes 144–146 and accompanying text.

39. *See, e.g.*, Jolene Guitierrez Kruger, *DEA to Traveler: Thanks, I'll Take that Cash*, ALBUQUERQUE J. (May 6, 2015) (reporting that after stopping a young man who was traveling to move to Los Angeles, DEA Agents seized his entire life savings; the man stated: "I told [the DEA agents] I had no money and no means to survive in Los Angeles if they took my money. They told me that it was my responsibility to figure out how I was going to do that.").

40. *See, e.g.*, O'Hara & Rich, *supra* note 24 (regarding car seized from mother who had loaned the car to a son who was arrested for a misdemeanor drug charge).

41. *See, e.g.*, Brown, *supra* note 7 (describing the forfeiture of a family home in Philadelphia, Pennsylvania, after police accused the homeowner's son of selling \$40 worth of heroin from the home).

42. *Bearden v. Georgia*, 461 U.S. 660, 671 (1983).

43. MCLEAN & THOMPSON, *supra* note 36, at 22.

44. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1785–86 (2010); FOSTER COOK, THE BURDEN OF CRIMINAL JUSTICE DEBT IN ALABAMA: 2014 PARTICIPANT SELF-REPORT SURVEY 11–12 (2014).

showed mixed results,⁴⁵ a 2016 empirical analysis of the use of economic sanctions in juvenile court showed that, when controlling for demographic characteristics of court-involved juveniles and crime type, the use of fines and fees as punishment significantly increased the likelihood of recidivism.⁴⁶

Further, studies show that economic, housing, and social stability are critical in reducing recidivism, suggesting that punishments that result in destabilization in these areas will have crime-inducing effects. For example, researchers have found that increased access to employment and ability to earn promotes rehabilitation.⁴⁷ If one's employment opportunities are limited due to ongoing criminal debt that makes employers less likely to hire, or because a poverty penalty or collateral consequence⁴⁸ limiting one's ability to obtain a professional license or the driver's license one needs to attend job interviews or maintain employment, the rehabilitative potential of employment is lost. A lack of access to housing can exacerbate these issues, as it interferes with employment opportunities,⁴⁹ and may exacerbate mental-health and chemical-dependency issues, thereby undermining rehabilitative goals.⁵⁰ Even people at high risk for reoffending have a significantly reduced risk of doing so if homelessness can be avoided.⁵¹ In other words, fines, fees, and forfeitures that detract from the ability to pay housing costs, policies that push those who cannot pay economic sanctions out of public housing, or the forfeiture of a home, all risk placing people in situations in which the likelihood of recidivism is heightened. In contrast, researchers have linked pro-social activities, including the promotion

45. See, e.g., Anne L. Scheider, *Restitution and Recidivism Rates of Juvenile Offenders: Results from Four Experimental Studies*, 24 CRIMINOLOGY 533 (1986) (finding that only two of four studies indicated a reduction in recidivism where juveniles were sentenced to restitution as compared to incarceration or probation).

46. Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System-Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, YOUTH VIOLENCE & JUST. (Sept. 2016).

47. See, e.g., Jeffrey Grogger, *Certainty v. Severity of Punishment*, 29 ECON. INQUIRY 297, 305 (1991).

48. See Gabriel J. Chin, "Collateral Consequences," in the present Volume.

49. See, e.g., Joe Graffam et al., *Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals*, 40 J. OFFENDER REHABILITATION 147 (2004); CATERINA GOUVIS ROMAN & JEREMY TRAVIS, URBAN INST., *TAKING STOCK: HOUSING, HOMELESSNESS, AND PRISONER REENTRY* (2004).

50. See, e.g., JOCELYN FONTAINE & JENNIFER BIESS, URBAN INST., *HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS* 7–8 (2012) (summarizing literature on supportive housing programs).

51. Faith E. Lutz et al., *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 CRIM. JUST. & BEHAV. 471 (2013) (showing that homelessness significantly increased risk of recidivism among high risk offenders).

of familial ties, to reductions in recidivism.⁵² But, as noted above, the loss of housing and employment as a result of fines, fees, or forfeitures can interrupt the family unit, for example, by forcing families to separate in order to maintain housing benefits for some family members. In short, separately and collectively, these practices undermine the governmental interest in reducing recidivism by making ongoing criminal justice involvement more likely.

Whether due to increased recidivism or the use of incarceration as a penalty for the failure to pay, fines and fees also exacerbate the effects of mass incarceration in many jurisdictions, particularly with respect to the overcrowding of local and county jails. While it is difficult to know how many people are incarcerated at any given time in relation to criminal debt because that data is rarely tracked, available information indicates that in many places, debtors account for nearly a quarter of jail populations,⁵³ and that those numbers may be significantly higher in some jurisdictions.⁵⁴ This can at times lead to the misuse of jail facilities, such as in Rutherford County, Tennessee, in which the incarceration of people for the failure to make payments to a private probation company contracted to collect criminal debt resulted in the jail holding three people in cells designed to hold one person only,⁵⁵ creating a risk of litigation related to unconstitutional jail conditions.⁵⁶

Systems in which courts impose economic sanctions on people with no meaningful ability to pay also may result in wasted government resources, whereby good money is effectively thrown after bad. For example, where people cannot pay off fines and fees immediately, courts often require that they return to court periodically to show that they are unable to pay, clogging the docket with hearings and taking valuable judicial and administrative time.⁵⁷ The use of poverty

52. See, e.g., Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382 (2011) (noting consistency through scholarly literature that recidivism rates decrease for people who maintain familial ties and finding that familial ties also improve the likelihood of employment); see also Graffam, *supra* note 49.

53. See, e.g., Randal Seyler, *Local ACLU Chapter Seeks Jail Oversight Committee*, SILVER CITY SUN-NEWS (July 6, 2015) (reporting that a quarter of all jail inmates in Grant County, New Mexico, are incarcerated for a failure to pay fines and fees).

54. See generally FERGUSON REPORT, *supra* note 12.

55. See Ben Hall, *Sheriff Calls Rutherford County's Probation System a "Rat Wheel,"* NEWSCHANNEL 5 NETWORK (Jan. 17, 2016), <http://www.newschannel5.com/news/newschannel-5-investigates/sheriff-calls-rutherford-countys-probation-system-a-rat-wheel>.

56. See, e.g., *Brown v. Plata*, 563 U.S. 493 (2013); Sharon Dolovich, "Prison Conditions," in the present Volume.

57. See, e.g., CHRISTIAN HENRICHSON ET AL., *THE COSTS AND CONSEQUENCES OF BAIL, FINES AND FEES IN NEW ORLEANS: TECHNICAL REPORT* 29–34 (2017).

penalties can also create unnecessary expense. A recent study conducted by the Vera Institute of Justice in New Orleans, Louisiana, showed that, even setting aside the costs of employing court and administrative staff and law enforcement to engage in collections, its use of incarceration to address the inability to pay bail, fines, and fees created a \$1.9 million annual deficit.⁵⁸

In sum, both existing research and an ever-increasing pool of anecdotal evidence suggest that imposing and collecting fines, fees, and forfeitures can undercut important governmental aims by increasing the precarious financial condition of its most vulnerable constituents, increasing crime rates, contributing to jail overcrowding, and depleting government funds. Again, this is not to say that fines, fees, and forfeitures cannot be used in a manner that promotes positive outcomes; but significant reforms such as those set forth at the end of this chapter are necessary to avoid the negative consequences that may easily stem from poorly designed systems.

II. CONSTITUTIONAL IMPLICATIONS OF POLICING FOR PROFIT

Constitutional scholars have identified myriad ways in which inadequately designed systems involving fines, fees, and forfeitures are constitutionally deficient.⁵⁹ Lawmakers should take heed not only because crafting a constitutional system is normatively desirable, but also because litigation of these issues is

58. LAISNE, *supra* note 31, at 22–24; see, e.g., Scott Dolan, *Taxpayers Lose as Maine Counties Jail Indigents Over Unpaid Fines*, PORTLAND PRESS HERALD (May 31, 2015) (reporting that in Cumberland County, Maine, where the cost of jailing “13 individuals for a combined total of 232 days was \$25,990—to recoup \$10,489 in fines or restitution”). For a discussion of pretrial detention and bail, see Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in Volume 3 of the present Report.

59. The scholarly literature focuses primarily on the constitutionality or lack thereof under the United States Constitution, as I do here. There may, however, be further constitutional limitations to the use of fines, fees, and forfeitures under state constitutions. See generally Note, *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2016).

increasingly likely due to a recent boom in class-action lawsuits successfully challenging practices related to fines and fees,⁶⁰ and the Supreme Court's willingness to strike down forfeitures that offend constitutional bounds.⁶¹

A. EXCESSIVE-FINES CLAUSE AND THE CONSTITUTIONAL
IMPORTANCE OF FINANCIAL EFFECT

Along with excessive bail and cruel and unusual punishment, the Eighth Amendment to the United States Constitution prohibits the imposition of "excessive fines."⁶² In addition to determining that the Excessive Fines Clause applies not just to fines per se, but to financial penalties that are at least partially punitive (including forfeitures),⁶³ the Supreme Court has held that a determination of constitutional excessiveness requires application of a gross disproportionality test in which the seriousness of the offense is weighed against the severity of the punishment.⁶⁴ Because the Court has addressed the Excessive Fines Clause's meaning on only four occasions,⁶⁵ however, there are several issues regarding the Clause's scope that remain ripe for development, including the question of whether consideration of a defendant's ability to pay is relevant to assessing punishment severity. Legal scholarship to date has focused primarily on two aspects of Eighth Amendment doctrine to assess that open question: the Supreme Court's use of an originalist (historical) method of interpretation, as well as the underlying principles that inform its proportionality jurisprudence. Both approaches shed light on why the Court is likely to determine that the financial effect of fines, fees, or forfeitures on a defendant is relevant to whether it is excessive in violation of the Eighth Amendment.

60. See, e.g., Robert Patrick, *Judge Approves \$4.7 Million Settlement to Those Jailed for Unpaid Fines in Jennings*, ST. LOUIS POST-DISPATCH (Dec. 14, 2016).

61. See, e.g., *United States v. Bajakajian*, 524 U.S. 321 (1998). In March 2017, Justice Clarence Thomas effectively invited additional litigation regarding the constitutionality of civil asset forfeiture. See *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., statement respecting denial of certiorari) (noting the importance of the claim but also that petitioner's claim was untimely). The Supreme Court's willingness to cabin forfeiture practices is also seen in a unanimous 2017 decision strictly construing a federal forfeiture statute to preclude joint and several liability. See *Honeycutt v. United States*, 137 S. Ct. 1626 (2017).

62. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

63. *Austin v. United States*, 509 U.S. 602, 604–05 (1993); *Alexander v. United States*, 509 U.S. 544, 548 (1993).

64. *Bajakajian*, 524 U.S. at 334.

65. See Colgan, *supra* note 2, at 281.

The Supreme Court has engaged in an originalist analysis in an attempt to assess what would have rendered a fine “excessive” at the time of the Eighth Amendment’s ratification in 1791. In doing so, the Court pointed to a provision of Magna Carta, an English charter devised in the 13th century that influenced the English Bill of Rights and, in turn, the American Bill of Rights.⁶⁶ The provision allowed the imposition of amercements (a predecessor to the modern fine), but explicitly prohibited penalties that would impoverish a defendant by impeding his ability to secure a livelihood, thereby necessitating an analysis of the defendant’s financial circumstances.⁶⁷ The Court ultimately did not decide whether the Excessive Fines Clause mandated a similar analysis because the defendant’s ability to absorb the forfeiture at issue was not raised in the case,⁶⁸ but scholarship assessing the historical use of economic punishments would support answering that question in the affirmative.

Both analyses of colonial and early American statutes and court records leading up to the ratification of the Eighth Amendment⁶⁹ and the English experience with fines and the adoption of the English Bill of Rights⁷⁰ strongly support a broad interpretation of excessiveness that would include consideration of financial effect on the defendant. In particular, while the protection of one’s livelihood in Magna Carta was at times inconsistently applied in the early American experience, a consciousness of the need to avoid the risk that economic sanctions may impoverish is visible in the historical record, including in statutes that explicitly referenced Magna Carta or that required consideration of financial effect.⁷¹

As with the historical vantage, assessing the use of practices related to fines, fees, and forfeitures in light of the Court’s proportionality precedence also supports a conclusion that the financial effect of fines, fees, and forfeitures is relevant to the question of excessiveness.⁷² The Supreme Court borrowed the gross disproportionality test for assessing whether an economic sanction is “excessive,” from its jurisprudence regarding the Cruel and Unusual

66. See *Bajakajian*, 524 U.S. 335–36; Colgan, *supra* note 2, at 320.

67. See Colgan, *supra* note 2, at 320–21.

68. See Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern “Debtors’ Prison,”* 65 UCLA L. REV. (forthcoming 2018).

69. See Colgan, *supra* note 2, at 320–21.

70. See *id.* at 321–22; Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833 (2013); Robert B. Durham, *The Cruel and Unusual Punishments and Excessive Fines Clauses*, 26 AM. CRIM. L. REV. 1617 (1989).

71. See Colgan, *supra* note 2, at 330–35.

72. See Colgan, *supra* note 68.

Punishments Clause.⁷³ In that arena, the Court has repeatedly returned to several key principles.

One such principle is the importance of equality in sentencing, in which two people who are equally culpable for the same offense should receive equal punishment.⁷⁴ Yet, when applied to people who have no meaningful ability to pay, poverty penalties that impose additional sanctions such as interest, collections fees, probation, or incarceration for the failure to pay effectively sanction a person's poverty rather than her culpability for the underlying offense. Even setting aside poverty penalties, the principle of equality is undermined by the inherently regressive nature of fines, fees, and forfeitures.⁷⁵ If two people—equally culpable for the same offense—receive an identical fine, and that fine creates little to no financial hardship for one person but places the other at risk of being unable to meet basic needs or results in ongoing instability, the disparate severity of the punishment suggests that equally culpable defendants are not, in fact, being treated equally.

Another principle involves the importance of comparative proportionality of sentencing, in which a less serious offense should receive a lower sentence than a more serious offense.⁷⁶ Yet, particularly for people who are subject to long-term, and perhaps perpetual, criminal debt, the seriousness of the offense is rendered effectively irrelevant; whether that debt stems from a traffic offense or a burglary, the need to make continual payments against the outstanding debt is the same, and the distinction between offenses is undermined.

The Court has also taken into account the expressive function of punishment in its proportionality jurisprudence.⁷⁷ There are at least two ways in which the use of poverty penalties and the imposition of unmanageable debt are problematic in this regard. First, for people who are subject to such sanctions, the message expressed can often be that the justice system prizes revenue

73. See *Bajakajian*, 524 U.S. 321.

74. See, e.g., *Solem v. Helm*, 463 U.S. 277, 292-93 (1983).

75. Even though there is significant disagreement among scholars as to whether subjective experience is relevant to the validity of sentences involving incarceration, the very same scholars agree that the failure to account for financial effect in the context of economic sanctions improperly prizes formal equality over substantive equality. See, e.g., Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 190-92, 226 (2009) (arguing that both the subjective experience of incarceration and financial sanctions are relevant to whether punishment is justified under retributive principles); Kenneth W. Simmons, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 4-5, 6 n.11 (2009) (rejecting the consideration of subjective experience of incarceration but embracing the subjective experience of financial sanctions).

76. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008).

77. See, e.g., *Graham v. Florida*, 560 U.S. 48, 72 (2010).

generation over fairness. Second, by subjecting people to punishment triggered by their inability to pay rather than the nature of the underlying offense, it creates a punishment that is more severe than the degree of the public's desire to condemn the underlying offense, something evident by the increasing, and bipartisan, public support for reform.

An additional concern in the Court's proportionality jurisprudence involves the potential crime-inducing effects and related social harms that can be created by the imposition of excessive punishments.⁷⁸ As detailed above, the imposition of fines, fees, and forfeitures that a person has no meaningful ability to pay or that destabilize one's employment, housing, and familial ties, not only fails to deter crime but can instead push people into criminal activity, with exacerbation of mass incarceration and wasteful government spending in tow. It is also linked to a laundry list of ills, such as barriers to employment, increases in housing instability and homelessness, decreases in child-support payments, and promotion of family disunification.

Finally, the Supreme Court has recognized that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man,"⁷⁹ and therefore upholding the dignity of a defendant is central to the idea of whether a punishment is constitutionally viable or, instead, excessive.⁸⁰ Poorly designed systems for imposing and collecting fines, fees, and forfeitures miss this mark. Such systems place those with limited means in the position of having to choose between basic necessities like food, shelter, and hygiene on the one hand and paying unmanageable debt on the other. In some jurisdictions, those who cannot pay are disenfranchised from the vote, thus blocking them from participating in the democratic community. And in many cases, people are kept forever in the shadow of the criminal system by criminal debts that are effectively perpetual. As a result, the dignity and autonomy of those subjected to economic sanctions they cannot pay is undermined and ignored, offending the Eighth Amendment's dignity constraint.⁸¹

78. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

79. *Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (plurality opinion).

80. See *Gregg v. Georgia*, 458 U.S. 153, 173 (1976) (plurality opinion) (explaining that the Eighth Amendment's dignity constraint "means, at least, that the punishment not be 'excessive'"); see also Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129.

81. See Colgan, *supra* note 68.

*B. DUE PROCESS CLAUSE AND THE PROHIBITION ON PRIZING
REVENUE GENERATION OVER FAIRNESS*

For nearly a century, the Supreme Court has consistently ruled that the Due Process Clause is violated by placing governmental actors with adjudicative authority over whether economic sanctions are assessed in a position where fairness may be overcome by a desire to generate revenue for the government or for personal gain.⁸² Yet many jurisdictions have designed systems involving fines, fees, and forfeitures that directly violate this long-standing doctrine.⁸³

To establish governmental self-dealing, the Court has looked at whether a jurisdiction relies heavily on punishments with revenue-generating capacity to offset the need for taxation or to stabilize and maintain the jurisdiction's finances.⁸⁴ Another signal that a system has run afoul of due process exists where governmental actors with responsibility for generating funds are given decision-making authority over the assessment of such a punishment.⁸⁵ The Court has also looked to the volume of cases on a trial court's docket through which funds may accrue for signals that the system is driven by a desire to generate revenue.⁸⁶ Yet evidence is mounting that jurisdictions across the country are using economic sanctions imposed against both adults and juveniles for the purpose of avoiding the need to increase taxes to fund not just criminal justice-related services, but a wide variety of governmental services such as infrastructure projects, educational services, and more.⁸⁷ National Public Radio and the National Center for State Courts found that, in recent years, "48 states have increased criminal and civil court fees, added new ones, or both."⁸⁸ Further, in an increasing number of jurisdictions, judges responsible for imposing fines and fees report feeling pressured to do so in

82. See *Connally v. Georgia*, 429 U.S. 245 (1977); *Ward v. Village of Monroe*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

83. See, e.g., Colgan, *supra* note 31, at Part I.A.1.

84. See *Ward*, 409 U.S. at 58; *Tumey*, 273 U.S. at 533.

85. See *Tumey*, 273 U.S. at 533–34 (describing mayor's dual role as judicial officer and county executive); *Ward*, 409 U.S. at 39 (describing mayor's control over police chief's determination to file charges).

86. See *Ward*, 409 U.S. at 58 (citing police chief's testimony that the mayor ordered him to charge violations in the municipal, rather than county, court whenever possible so that the village could retain economic sanctions imposed); *Tumey*, 273 U.S. at 520 (describing mayor's statement that the town's liquor court would only operate when the town is short on funds).

87. See, e.g., M. Scott Carter & Cifton Adcock, *Prisoners of Debt: Justice System Imposes Steep Fines, Fees*, OKLAHOMA WATCH (Jan. 31, 2015).

88. Shapiro, *Court Fees Rise*, *supra* note 11.

order to generate revenue.⁸⁹ And, as noted above, ticketing and court dockets in some jurisdictions rise in response to fiscal downturns, evidencing the aim of revenue generation.⁹⁰

Further, while the cases regarding governmental self-dealing to reach the Court to date have involved fines and fees rather than forfeitures, the vast scope of forfeiture practices implicate similar due process concerns.⁹¹ Forfeiture in general, and civil asset forfeiture in particular, has come to be regarded by law enforcement in many jurisdictions as a “tax-liberating gold mine.”⁹² Further, processes for opposing civil asset forfeiture are so complex and expensive that such forfeitures are rarely challenged,⁹³ meaning that the law enforcement officer seizing the cash or property effectively becomes the adjudicative actor, and one whose agency is often directly benefited by the funds seized. Finally, the volume of civil asset forfeitures in particular indicates that seizures are driven at least in part by a desire to generate revenue. Between September 2001 and September 2014, law enforcement made nearly 62,000 seizures under the federal Equitable Sharing program alone, over 80% of which were handled as civil asset forfeitures and therefore did not involve a criminal indictment, let alone a conviction.⁹⁴ Those seizures valued over \$2.5 billion, of which “[s]tate and local authorities kept more than \$1.7 billion.”⁹⁵ As with fines and fees, the failure to design forfeiture practices to ensure that revenue generation is not a primary motivator leaves open the risk that the drive for revenue generation will overwhelm the need for fairness in violation of due process.

89. See, e.g., Sydney Brownstone, *Leaked E-mail: What a King County Superior Court Judge Really Thinks About Raising the Cost of Traffic Ticket Fines*, THE STRANGER (May 21, 2015).

90. See Garrett & Wagner, *supra* note 18; see also Colgan, *supra* note 31, at Part I.A.

91. There is a debate in the literature on the application of the Due Process Clause to forfeiture as to whether modern forfeiture practices, and particularly civil asset forfeitures, are or are not consistent with the historical use of forfeiture as punishment. Compare Caleb Nelson, *The Constitutionality of Civil Forfeiture*, 125 YALE L.J. 2446 (2016) (arguing that three features of civil forfeiture proceedings—that they proceed *in rem*, that people must file timely claims, and that claimants do not have full constitutional protections—are consistent with early American forfeiture practices); with Donald J. Bourdeaux & A.C. Pritchard, *Innocence Lost: Bennis v. Michigan and the Forfeiture Tradition*, 61 MO. L. REV. 593 (1996) (critiquing the Court’s originalist interpretation of early American forfeitures as inconsistent with historical practice). Regardless of the answer to that query, the use of forfeiture in a manner that prizes revenue generation over fairness is inconsistent with the Court’s concern regarding self-dealing.

92. Sallah, *supra* note 9 (quoting Illinois Deputy Ron Hain).

93. O’Hara & Sallah, *They Fought the Law*, *supra* note 11.

94. Robert O’Hara, Jr. & Steven Rich, *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014).

95. *Id.*

C. EQUAL PROTECTION AND DUE PROCESS CLAUSE
RESTRICTIONS RELATED TO COLLECTIONS

The Equal Protection and Due Process Clauses prohibit the automatic conversion of unpaid economic sanctions into incarceration, which implicates practices in many jurisdictions that use incarceration as a penalty for the failure to pay. The Court first addressed an equal protection challenge to the use of fines and fees in *Williams v. Illinois*⁹⁶ in 1970 and again in *Tate v. Short*⁹⁷ in 1971. In both cases, the Court held that the use of incarceration as a substitute punishment for fines and fees where the defendant had no ability to pay violated the Fourteenth Amendment because the choice to satisfy the sanctions and avoid incarceration was nonexistent for indigent defendants.⁹⁸ Just over a decade later, in *Bearden v. Georgia*, the Court examined the revocation of probation for the failure to pay statutory fines and restitution.⁹⁹ Relying on both the Equal Protection and Due Process Clauses together, the Court held that where payment of economic sanctions is a condition of probation, a court may not revoke probation without considering whether the failure to pay was willful or due instead to an inability to pay despite bona fide efforts.¹⁰⁰

While the *Bearden* Court did leave open the possibility of revoking probation and imposing a term of confinement even where a defendant lacked funds despite bona fide attempts to obtain the means to pay, it held that incarceration could be available only where no alternative form of punishment could satisfy the state's punishment goals.¹⁰¹ It then systematically dismantled the state of Georgia's arguments that imposing a punishment triggered by an inability to pay satisfied its punitive aims. The Court explained that the governmental interest in punishment is fully satisfied by the use of economic sanctions within the defendant's means because such sanctions create a "pinch on the purse" in response to the defendant's culpability,¹⁰² and that the decision to employ an economic sanction in the first instance meant the state had disclaimed its

96. *Williams v. Illinois*, 399 U.S. 235 (1970).

97. *Tate v. Short*, 401 U.S. 395 (1971).

98. *See Tate*, 401 U.S. at 396-98; *Williams*, 399 U.S. at 236-37, 244-45.

99. *Bearden v. Georgia*, 461 U.S. 660 (1983).

100. *Id.* at 672.

101. *Id.* at 672-73.

102. *Id.* at 671-72.

interest in incapacitation.¹⁰³ The Court then emphasized the potential breadth of non-incarcerative alternative sanctions that lawmakers could devise to ensure that poverty does not trigger enhanced punishment.¹⁰⁴

There is limited scholarly literature examining these claims, undoubtedly because the Court's restrictions on the use of incarceration as a poverty penalty have been so clear. As a result, recent scholarship related to these limitations has focused on documenting the failure of states and municipalities to adhere to the *Williams-Tate-Bearden* line, and pressing for compliance with its dictates.¹⁰⁵ In addition, a boom in litigation has forced several jurisdictions into compliance, at times in conjunction with significant financial penalties.¹⁰⁶

D. THE RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

There are two key questions in the context of the right to counsel related to the use of fines, fees, and forfeitures: first, whether either the Sixth Amendment or the Due Process Clause affords a constitutional right to counsel in the type of systems for imposing and collecting economic sanctions in use today; and second, whether systems for collecting and distributing fees for the use of indigent defense counsel pass constitutional muster.

The Supreme Court has recognized a right to counsel under both the Sixth Amendment¹⁰⁷ and the Due Process Clause,¹⁰⁸ but it is an open question as to whether those rights extend to protect people who are, at least as an initial matter, subject to fines, fees, and forfeitures. In *Scott v. Illinois*, the Court declined to extend the Sixth Amendment right to counsel to cases in which only financial penalties, and not incarceration, are on the line.¹⁰⁹ Yet, in *Alabama v. Shelton*, the Court left open the question of whether a Sixth Amendment right to counsel exists where a jurisdiction imposes fines and fees at sentencing for which the failure to pay triggers incarceration even without a formal suspended

103. *Id.* at 667. For a discussion of incapacitation, see Shawn D. Bushway, "Incapacitation," in the present Volume.

104. *Bearden*, 461 U.S. at 672–73.

105. See, e.g., Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016); Jessica M. Eaglin, *Improving Economic Sanctions in the States*, 99 MINN. L. REV. 1837 (2015).

106. See, e.g., Patrick, *supra* note 60.

107. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

108. See *Powell v. Alabama*, 287 U.S. 45 (1932).

109. *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979).

sentence,¹¹⁰ leaving a gray area in jurisdictions that use poverty penalties such as incarceration for failure to pay.

But even setting aside that open question, there is reason to believe that the *Scott* limitation is ripe for review. Not only might the *Scott* Court's understanding of the relative severity between financial penalties and incarceration be anachronistic,¹¹¹ the decision also suffers from a failure to consider whether cases for which financial sanctions are imposed raise difficult factual or constitutional questions necessitating the need for counsel to ensure that the outcome of the trial is reliable.¹¹² Yet cases resulting in the imposition of fines, fees, and forfeitures may be riddled with factual and constitutional issues which lay people are ill-suited to raise,¹¹³ suggesting that *Scott* was wrongly decided.

In addition to the Sixth Amendment right to counsel, the Supreme Court has signaled that there may be a due process right to counsel in hearings related to the collection of economic sanctions. In a 2011 case involving the right to counsel in child-support hearings, *Turner v. Rogers*, the Court noted in an aside that it may recognize a due process right to counsel in hearings involving the collection of debt owed to the government, particularly where either the government is represented by counsel or where the proceeding does not provide procedural safeguards such as "adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings."¹¹⁴ Collections practices in many jurisdictions fall directly within this mold.

110. *Alabama v. Shelton*, 535 U.S. 654 (2002). The *Shelton* Court declined to address the question of whether counsel is required where a court imposes "pay-only-probation." See *id.* at 672–73. In pay-only probation systems, probation is used exclusively as a collections mechanism, and is not attached to a suspended term of incarceration, but incarceration may occur as a response to a failure to pay. See HUMAN RIGHTS WATCH, *supra* note 5, at 25–26. Though novel at the time the Court handed down its opinion, see *Shelton*, 535 U.S. at 673, in subsequent years pay-only probation has been on the rise, see HUMAN RIGHTS WATCH, *supra* note 5, at 39. Other jurisdictions use arrest warrants, rather than probation orders, to the same effect. See, e.g., Colgan, *supra* note 31, at Part I.A.

111. See John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013) (arguing that the actual incarceration line no longer comports with the realities of misdemeanor punishment, particularly due to the imposition of collateral consequences).

112. Compare *Scott*, 440 U.S. at 373–74; with *Shelton*, 535 U.S. at 666; and *Argersinger v. Hamlin*, 407 U.S. 25, 35 (1972).

113. See Colgan, *supra* note 31, at Part I; see also *Argersinger*, 407 U.S. at 33 (noting that petty offenses "often bristle with thorny constitutional questions").

114. *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011); see also *Colson v. Joyce*, 646 F. Supp. 102 (D. Me. 1986) (determining that due process mandated right to counsel at failure to pay hearings because counsel would "appreciably decrease the risk of an erroneous decision").

Of course, the Catch-22 of a denial of the right to counsel to assist with one's legal claims is that the enforcement mechanism for the right is to bring a legal claim. But because defendants for whom the claim is relevant are necessarily without counsel, litigation pushing the Court to rethink and extend the right to counsel has been limited. Since the *Turner* decision was announced in 2011, for example, it appears that no lower appellate courts have considered whether *Turner* should be interpreted to allow for a right to counsel in criminal debt-collection hearings, and that the only adjudication of the issue at the trial level has arisen in two cases resolved through a joint settlement agreement involving the city of Montgomery, Alabama, and a pending class-action suit against Ferguson, Missouri.¹¹⁵ Therefore, despite the promise of the rule, it remains under-theorized.

The second issue with respect to access to counsel involves systems in which access to counsel is provided, but defendants—who qualify for defense services only because they are indigent—are charged fees for their representation. While the Court has upheld the ability of jurisdictions to recoup indigent-defense expenses as a general matter,¹¹⁶ practices in many jurisdictions raise a host of constitutional concerns. First, the imposition of poverty penalties against an indigent defendant unable to pay indigent-defense fees arguably violates *Gideon v. Wainwright* because it effectively punishes indigent defendants for the very quality that triggers the availability of the right.¹¹⁷ Second, indigent-defense fees and the threat of poverty penalties may result in the unconstitutional chilling of the Sixth Amendment right to counsel by incentivizing defendants to waive the right when they otherwise would not have.¹¹⁸ Third, the distribution of indigent-defense fees (as well as other forms of economic sanctions) to indigent-defense counsel creates a system by which

115. In order to assess the extent to which the *Turner* claim is being developed in the lower courts, I reviewed each case citing *Turner* as identified by Westlaw as of February 1, 2017. Of the 189 cases identified, none involved the assessment of *Turner's* dicta regarding debt collection proceedings where the debt was owed to the state. For trial level cases, see *Mitchell v. City of Montgomery*, 2014 WL 11099432 at *5 (M.D. Al. Nov. 17, 2014); *Cleveland v. City of Montgomery*, 2014 WL 6461900 at *5 (M.D. Al. Nov. 17, 2014); *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016, 1033–34 (E.D. Mo. 2015). Though the compilation of cases may not capture every trial or appellate court considering the issue, the low number of cases identified gives a reasonable sense of how infrequently the question is being addressed in the lower courts.

116. See *Fuller v. Oregon*, 417 U.S. 40, 47–48 (1974) (upholding a fee recoupment statute because it provided protections for those unable to pay including a hearing to determine the defendant's means and the effect of the sanction and the authority for the court to waive fees).

117. See Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929 (2014).

118. See, e.g., Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J. L. REFORM 323, 357–69 (2009).

defense counsel are financially dependent upon conviction and imposition of punishment against their own clients.¹¹⁹ This may allow the reversal of criminal convictions for ineffective assistance of counsel due to the conflicts of interest created by such systems.¹²⁰

RECOMMENDATIONS

As the manner in which governments employ fines, fees, and forfeitures for punishment has continued to unfold, attention to the reform of such systems has increased. For example, a 2016 report from the Criminal Justice Policy Program at Harvard Law School¹²¹ and a 2017 joint report from the Harvard Kennedy School of Government and the Bureau of Justice Assistance¹²² provide numerous policy recommendations to transform the use of fines and fees to avoid the policy and constitutional problems described herein. The following non-exhaustive list of recommendations is intended to complement those efforts by highlighting reforms to the use of fines and fees, as well as forfeitures, that are directly related to the scholarly literature detailed in this chapter's previous sections. While the implications for government budgeting are necessarily dependent on the unique circumstances of a given jurisdiction, each proposal contains a brief indication as to whether it is likely to be revenue-enhancing, revenue-neutral, or would entail additional expenditures of government resources.

1. **Eliminate poverty penalties and other policies that negatively impact ability to pay.** A deep irony of many systems involving fines, fees, and forfeitures is that the governmental interest in obtaining full payment is undermined by public policies that make it more likely that people will have no meaningful ability to pay. As detailed above, poverty penalties make it more difficult for people to obtain and maintain housing and employment and to remain connected to family, each of which in turn contributes to an inability to pay economic sanctions. Further, any number of other direct and collateral consequences of conviction can reduce the capacity to pay.¹²³ For example, certain convictions—particularly related to drug offenses—result in exclusion from public housing or obtaining

119. See, e.g., Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2055–68 (2006); ACLU, *supra* note 15, at 26–27.

120. See, e.g., Anderson, *supra* note 118, at 368–69.

121. See CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 5.

122. See MARTIN, *supra* note 3.

123. See Chin, *supra* note 48.

occupational licenses,¹²⁴ ultimately making it less likely a person will be able to satisfy fines and fees or recover from forfeiture. Lawmakers would be well-served to eliminate poverty penalties altogether, and also to study the ways in which direct and collateral consequences undermine the viability of using economic sanctions as a means of punishment.¹²⁵

The elimination of certain poverty penalties, such as incarceration or probation, is likely to be revenue-enhancing as the costs associated with such penalties often outweigh funds collected.¹²⁶ Eliminating others—such as interest, collections costs, and other fees—may result in the loss of some revenue, though it is likely in many jurisdictions that the change will be revenue-neutral. Though such penalties are intended to recoup costs to the government for collections-related practices, it is unclear whether administrative expenditures are really recouped both because chasing after debt requires the expenditure of resources and because the added debt may make it less likely that debtors pay economic sanctions.¹²⁷

2. **Create systems for meaningful consideration of financial effect.** As detailed above, the failure to account for the financial effect of fines, fees, and forfeitures places people who are financially vulnerable in precarious straits, and in so doing undermines governmental interests related to its constituents' economic and social stability, crime reduction, administration of jails, and efficient government spending. Further, not attending to the financial effect of such punishments may violate the Excessive Fines Clause of the Eighth Amendment on the front end and risks significant Equal Protection and Due Process Clause problems during collections.

In a forthcoming work, I examine a largely forgotten period in the late 1980s and early 1990s, in which a handful of jurisdictions around the country experimented with a model for graduating economic sanctions according to ability to pay known as the “day-fine.”¹²⁸ Day-fines involve a two-step process in which a penalty unit is assessed based on offense seriousness, and then that unit is multiplied by the defendant's adjusted

124. See, e.g., MO. REV. STAT. 328.150 (prohibition on obtaining a barber's license); see also Colgan, *supra* note 117, at 1933–34 (detailing exclusion from public housing and various forms of employment including truck driving and agriculture).

125. See also Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report.

126. See *supra* note 58 and accompanying text.

127. See Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. (forthcoming 2017) (documenting increases in collections of fines and fees where economic sanctions were graduated to be within the defendant's capacity to pay).

128. See *id.*

daily income, resulting in the economic sanction to be imposed. While the day-fines experiments suffered from some design flaws,¹²⁹ they show that a well-designed system for graduating economic sanctions is fully consistent with the efficient administration of the courts and may even result in improved revenue generation due to increased payments, as well as a decrease of expenditures related to collections, supervision, and incarceration.¹³⁰ In other words, attending to a defendant's ability to pay fines, fees, and forfeitures has the potential to not only be fairer, but also to be revenue-enhancing.

3. **Develop non-incarcerative alternative sanctions.** Even with the use of graduated economic sanctions, there will be some subset of defendants who are destitute,¹³¹ and therefore effectively unable to pay economic sanctions of any kind. Rethinking the use of fines, fees, and forfeitures provides an opportunity to consider alternative forms of punishment.¹³² In devising alternatives, lawmakers should take care to ensure that the alternatives are not disproportionate to the underlying offense (in particular by prohibiting the use of incarceration as a substitute for economic sanctions), and that alternatives are designed to avoid unintended consequences that undermine other societal interests. For example, while community service is often offered as a substitution for the use of economic sanctions (albeit one that is unworkable for people who are unable to participate due to

129. See Michael Tonry, "Community Punishments," in the present Volume.

130. See Colgan, *supra* note 127; see also SUSAN TURNER & JOAN PETERSILIA, RAND CORP., DAY FINES IN FOUR U.S. JURISDICTIONS 6 (1996); DOUGLAS C. McDONALD ET AL., NAT'L INST. OF JUST., DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS 6 (1992). The graduation of economic sanctions will, in some subset of cases, implicate restitution. As the Court has recognized, imposing restitution on a defendant who has no meaningful ability to pay it does not "suddenly make restitution forthcoming," *Bearden v. Georgia*, 461 U.S. 660 (1983), and the unfortunate but unsurprising reality is that a significant portion of restitution remains unpaid, see McLEAN AND THOMPSON, *supra* note 36, at 7. A pre-existing mechanism may help reach the goal of graduating economic sanctions—including restitution—while also making crime victims whole. Each state has a restitution fund as part of the federal Crime Victims Compensation program, which consists of a mix of federal dollars and, in many states, a portion of fines and surcharges collected. See *State Links*, NAT'L ASSOC. OF CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?sid=6> (last visited June 15, 2017). With some adjustments, those restitution funds could be used to pay victims immediately for direct losses. This would mean lawmakers may need to distribute a higher portion of amounts collected from statutory fines and surcharges toward the restitution fund, prizing restitution over the myriad other purposes for which statutory fines and fees are applied.

131. A recent study shows that 1.5 million households in the United States live on cash incomes of \$2.00 or less per day. KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA (2016).

132. See Tonry, *supra* note 129.

issues such as disability or child care), it may have negative consequences for local labor markets or fail to adequately protect those sentenced to perform labor,¹³³ and therefore should be carefully constructed to avoid such pitfalls.

In the short-term, the development of non-incarcerative alternative sanctions will require additional governmental expenditures. There is strong evidence, however, to believe that in the long term, such expenditures could prove to have significant financial benefits. A meta-analysis conducted by the Washington State Institute for Public Policy (WSIPP), a nonpartisan research center created by the Washington Legislature, involved the measurement of the benefit-to-cost ratio created by reduced recidivism and criminal justice involvement of various programs, many of which could be the basis of promising alternative sanctions. For example, for every dollar spent, the benefit-to-cost ratio for employment training and job assistance in the community was \$18.17, for day reporting centers was \$5.71, and restorative justice conferencing was \$3.49, to name a few.¹³⁴ Therefore, while developing alternative sanctions may require additional expenditures initially, over time, these alternative sanctions carry the promise of reduced systems costs through reductions in crime.

4. Restrict the use of fines, fees, and forfeitures in cases involving juveniles.

The bulk of attention regarding these practices has been focused on the use of fines, fees, and forfeitures in adult courts, but the same practices are used against juveniles.¹³⁵ A 2016 report by the Juvenile Law Center, for example, documented the imposition of economic sanctions and poverty penalties against juveniles adjudicated delinquent and their families.¹³⁶ A related empirical investigation by Alex Piquero and Wesley Jennings linked the use of economic sanctions with increased rates of recidivism among juveniles.¹³⁷ In 2017, the Policy Advocacy Clinic at the University of California-Berkeley School of Law released an in-depth examination of the use of administrative fees in juvenile courts in California, and the resulting harms to low-

133. See, e.g., Noah Zatz, *Get to Work or Go to Jail: Free Labor in the Shadow of Mass Incarceration*, ACSBLOG (Nov. 16, 2015).

134. See *Benefit-Cost Results*, WASH. STATE INST. FOR PUB. POL'Y, <http://www.wsipp.wa.gov/BenefitCost> (last updated Dec. 2016).

135. For a discussion of juvenile justice issues, see Barry C. Feld, "Juvenile Justice," in Volume 1 of the present Report.

136. See generally FEIERMAN, *supra* note 10.

137. See generally Piquero & Jennings, *supra* note 46.

income juveniles and their families.¹³⁸ Each of these reports affords a better understanding of how juvenile courts are also contributing to the modern debtors' prison crisis. Lawmakers should consider reviewing juvenile court practices to assess the extent to which the use of economic sanctions conflict with the juvenile justice system's primary aim of rehabilitation and the constitutional rights articulated above.

Again, while the reduction of the use of economic sanctions in juvenile courts may require the development of non-incarcerative alternatives, as in the adult context there is the potential to improve outcomes while simultaneously reducing governmental expenditures. The WSIPP meta-analysis, for example, showed that, with respect to juveniles, for every dollar spent, education and employment training had a benefit-to-cost ratio of \$31.24, various therapy programs had benefit-to-cost ratios ranging between \$1.64 and \$28.56, and participation in mentoring programs had a benefit-to-cost ratio of \$6.53.¹³⁹ The use of supportive programming in lieu of economic sanctions has the potential for significant fiscal benefit while promoting the rehabilitative aim of juvenile justice systems.

5. **Require criminal conviction for forfeiture.** With widespread support among both conservative and liberal organizations,¹⁴⁰ a growing number of states prohibit the use of civil asset forfeiture, requiring instead that forfeitures may occur only upon criminal conviction.¹⁴¹ Unlike the reforms discussed above, there is no question that this proposal will result in a considerable reduction in the revenue-generating capacity of forfeiture programs, given that approximately 80% of cases processed through the federal Equitable Sharing Program are civil asset forfeitures, and therefore completed without a conviction and in many cases without criminal charges ever being filed.¹⁴²

The benefits of this reform, and the reason for its bipartisan support, involve the perception that civil asset forfeiture perverts the presumption of innocence that is the bedrock of criminal justice in the United States by eliminating the requirement that the government prove guilt beyond a reasonable doubt and instead forcing people to prove their innocence.¹⁴³

138. See generally POLICY ADVOCACY CLINIC, BERKELEY LAW, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA (2017).

139. See *Benefit-Cost Results*, *supra* note 134.

140. See *supra* note 15 and accompanying text.

141. See, e.g., Sibilla, *supra* note 26; see also Nelson, *supra* note 91, at 2451.

142. O'Hara & Rich, *supra* note 94.

143. See *supra* note 7 and accompanying text.

There is good reason for this concern, as evidence is mounting that a significant percentage of civil asset forfeitures involve seizures that cannot even pass reduced evidentiary standards. For example, in an in-depth investigative report by the *Washington Post* examining nearly 62,000 cash seizures,¹⁴⁴ only a small fraction of the seizures were challenged, likely due to the lack of access to counsel.¹⁴⁵ In over 41% (4,455) of cases where challenges were raised, however, the government agreed to give back all or a portion of the cash or property, often in exchange for an agreement not to sue regarding the circumstances surrounding its seizure by law enforcement.¹⁴⁶ Therefore, even though this reform will eliminate a significant revenue stream, the requirement of criminal conviction promotes fairness and provides an important protection against government overreach.

6. **Insulate criminal justice actors.** A key component of reforming the use of fines, fees, and forfeitures is to ensure that criminal justice actors are insulated from the pressure to generate revenue and from the benefits of revenue produced from those economic sanctions. Two key reforms in this context involve full funding of criminal justice systems and ensuring that funds are directed away from the control of those criminal justice actors with significant authority over the imposition of fines, fees, and forfeitures.

Jurisdictions across the country have decimated criminal justice budgets related to all facets of the system, and in particular, for the maintenance of the courts. As just one example, the Oklahoma Legislature cut its funding of district courts by “60 percent between 2008 and 2012”¹⁴⁷ As a result, judges find themselves under pressure to support increases in economic sanctions that bolster judicial budgets,¹⁴⁸ which can lead to an unconstitutional breakdown that pits revenue generation against the due process right to fair proceedings.¹⁴⁹ Lawmakers should take care to

144. See Sallah, *supra* note 9.

145. See *id.*; O'Hara & Sallah, *They Fought the Law*, *supra* note 11.

146. See Sallah, *supra* note 9; O'Hara & Sallah, *They Fought the Law*, *supra* note 11 (regarding a case where the government agreed to return \$13,630 seized in exchange for an agreement not to sue); *id.* (reporting that in its investigation, the *Washington Post* found more than 1,000 cases involving agreements not to sue).

147. Carter & Adcock, *supra* note 87.

148. See, e.g., ACLU, *supra* note 15, at 25–28; Brownstone, *supra* note 89.

149. See, e.g., Colgan, *supra* note 31, at Part I.A.1.

insulate judicial actors from the jurisdiction's financial interests to avoid tainting the judicial process, and do so in part by providing full funding to the courts.¹⁵⁰

In addition, lawmakers can also reduce the profit motive that exists for criminal justice actors involved in the imposition of fines, fees, and forfeitures. For example, so long as law enforcement agencies are allowed to retain funds seized through forfeiture processes, the risk remains that law enforcement priorities will be distorted to focus on crimes for which revenue are readily available rather than crimes—including violent crimes—that do not carry forfeiture opportunities.¹⁵¹ Lawmakers can reduce this incentive by requiring that money obtained through forfeiture is transferred to a general or other fund unrelated to law enforcement or prosecution spending, a practice already in place in several jurisdictions.¹⁵²

Full funding of criminal justice systems is, of course, not revenue-neutral. However, although revenue generated through forfeiture will be significantly reduced if the prior reform requiring a criminal conviction is adopted, forfeitures obtained in conjunction with a criminal conviction can also generate significant revenue.¹⁵³ That revenue in turn could be used to bolster criminal justice budgets—and even to fund law enforcement and prosecution activities in a manner promoting budgetary oversight of criminal justice priorities—which has the dual benefit of reducing the profit incentive created through retention of forfeited cash and property while also decreasing the need to rely on fines and fees to fund the criminal justice system.

7. **Provide meaningful access to indigent-defense counsel.** While as detailed above, open questions remain regarding the reach of the constitutional right to counsel under the Sixth Amendment and Due Process Clause, it is important to understand that whether people are provided access to counsel is not simply a constitutional issue—which provides only a floor for when provision of counsel is required—but a policy choice within

150. See Natapoff, *supra* note 125.

151. John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171 (2001) (“The primary implication tied to these findings is that a conflict of interest between effective crime control and creative fiscal management will persist so long as law enforcement agencies remain dependent on civil asset forfeiture.”).

152. See, e.g., Nelson, *supra* note 91.

153. See, e.g., *State v. Goodenow*, 282 P.3d 8 (Or. Ct. App. 2012) (upholding the forfeiture of \$960,843 that constituted direct proceeds of the crime of conviction).

lawmakers' control.¹⁵⁴ Provision of counsel provides an important check against the worst consequences of the use of fines, fees, and forfeitures, because as jurisdictions began slipping further and further from the constitutional dictates detailed in Part II of this chapter, counsel has the capacity to seek the enforcement of those restrictions.¹⁵⁵

Of course, the use of counsel as a check against governmental abuses is meaningful only if access to counsel is expanded and indigent-defense systems are fully funded so that counsel has the capacity to issue challenges to unconstitutional activity.¹⁵⁶ This is an expensive endeavor, but one that has the benefit of helping check jurisdictions before they slip into systemic and unconstitutional practices, and thereby helps ward off the likelihood of costly litigation on those grounds.¹⁵⁷ And, as with other aspects of the criminal justice system, funds collected through properly designed fines, fees, and forfeitures, with insulation to ensure indigent-defense budgets are not dependent upon the imposition of such economic sanctions on defense clients, could be used to fund indigent-defense programs.¹⁵⁸

8. **Implement data-collection practices.** Finally, as reforms are instituted regarding the use of fines, fees, and forfeitures, it is important to collect data regarding a wide variety of issues, including changes in the average amount of fines collected, collection outcomes, and changes in recidivism. While data collection does require the outlay of resources, it is critical for assessing whether reforms are functioning as intended, need adjustment, or are insufficient to address the types of policy and constitutional concerns detailed herein. Therefore, as with criminal justice reforms more broadly, data collection helps provide a foundation for transparency regarding the operation of criminal justice systems and an opportunity to ensure that the ills that stem from poorly designed systems for imposing and collecting fines, fees, and forfeitures are in fact cured.

154. See, e.g., Colgan, *supra* note 31, at Part III.B.

155. See generally *id.*

156. See *id.* at Part III.B; Eve Brensike Primus, "Defense Counsel and Public Defense," in Volume 3 of the present Report.

157. See *supra* note 60 and accompanying text.

158. Jennifer Earl, *Civil Asset Forfeiture: Fund Public Defenders Instead of the Police*, THE HILL (Feb. 15, 2017).

Correctional Rehabilitation

Francis T. Cullen*

Beginning in the late 1960s, the rehabilitative ideal suffered a stunning decline, sharply criticized for permitting inequality in sentencing, coercion inside prisons, and treatment programs that did not work to reduce recidivism. The get-tough era that ensued proved to be a policy nightmare, marked by mass imprisonment, the intentional infliction of pain on offenders, and ineffective interventions. Elected officials of both political parties have reached a consensus that reforms are needed that take a more balanced crime-control approach that includes efforts to improve offenders' lives. Conditions are conducive for this policy turning point to occur. Thus, opinion polls are clear in showing that the American public supports offender rehabilitation as a core correctional goal. Scientific advances also have been achieved that identify a treatment paradigm—the risk-need-responsivity (RNR) model—capable of lowering reoffending. The challenge remains to implement evidence-based treatment practices and, more broadly, to create legal processes that afford offenders the opportunity to earn true redemption and thus escape the burdens of a criminal record.

INTRODUCTION

Each day in the United States, 6,730,900 residents—or about 1 in 37 adults among us—are under some form of correctional supervision. More than 2.1 million Americans are guarded behind jail or prison bars and nearly 4.7 million are watched on probation or parole.¹ Considerable commentary exists on whether such mass incarceration and mass community supervision constitute a major domestic policy failure. The general consensus among criminologists, and increasingly among policymakers, is that current levels of correctional

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1. DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 1–2 (2016).

intervention are excessive.² A key task is to determine how to curb such excess, especially in the use of imprisonment.³

However, this focus on the *size* of the correctional enterprise and how to get it under control has often come at the expense of policymakers focusing seriously on the *quality* of this enterprise. Regardless of whether the correctional population sticks at more than 6.7 million or declines a million or two, a critical question will persist: What should correctional agencies do with those they lock up or supervise in the community? Legal theorists often answer this question by taking one of two positions: The purpose is to exact retribution on offenders—giving them their just deserts—or the purpose is utilitarian or consequentialist where a sanction is a means to achieve an end such as reducing crime.⁴ In practice, however, American corrections has long been a battle between those who wish to inflict punishment on the convicted versus those who believe that the wayward should be rehabilitated.⁵

For the past four decades, the “punitive imperative”—as Clear and Frost refer to it—was vividly on display, as policymakers succeeded in toughening the response to crime through measures such as the building and crowding of correctional facilities, mandatory minimum sentences, truth-in-sentencing laws, three-strikes laws, the imposition of austere living conditions within prisons, boot camps, and intensive supervision probation and parole programs.⁶

2. See, e.g., TRAVIS C. PRATT, *ADDICTED TO INCARCERATION: CORRECTIONAL POLICY AND THE POLITICS OF MISINFORMATION IN THE UNITED STATES* (2009); JONATHAN SIMON, *MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA* (2014); Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC’Y 53 (2017); Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume.

3. Joan Petersilia & Francis T. Cullen, *Liberal But Not Stupid: Meeting the Promise of Downsizing Prisons*, 2 STAN. J. CRIM. L. & POL’Y 1 (2015).

4. See, e.g., JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* (1990). See generally Jeffrie G. Murphy, “Retribution,” in the present Volume; Daniel S. Nagin, “Deterrence,” in the present Volume; Shawn D. Bushway, “Incapacitation,” in the present Volume; John Monahan, “Risk Assessment in Sentencing,” in the present Volume.

5. FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* (2d ed. 2013).

6. TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* (2014); see also Douglas A. Berman, “Sentencing Guidelines,” in the present Volume; Erik Luna, “Mandatory Minimums,” in the present Volume; Michael Tonry, “Community Punishments,” in the present Volume; Sharon Dolovich, “Prison Conditions,” in the present Volume.

Within this context, the rehabilitative ideal lost its capacity to function as the governing theory of correctional policy and practice.⁷ But in the midst of a get-tough era, rehabilitation did not vanish in two important respects.⁸

First, although a large reservoir of punitive sentiments exists in the American public, so too does an abiding commitment to rehabilitation. Policy debates are often cast as a clash of incompatible views, with punitive conservatives battling compassionate liberals. Public-opinion polls, however, have shown that Americans are centrist and pragmatic in their correctional attitudes: They want punishment inflicted on the guilty, but they also want offenders to be rehabilitated.⁹ Consistent support for rehabilitation has existed since the 1960s, when Americans were polled on their preferred goals of imprisonment.¹⁰ Such approval of offender treatment remained high even during the height of the “get tough” era. Thus, a 2001 national survey found that 88% of the respondents agreed that “[i]t is important to try to rehabilitate adults who have committed crimes and are now in the correctional system”; for juveniles, this figure jumped to 98%.¹¹ Recent public-opinion studies continue to reveal strong support for rehabilitation, including providing re-entry services to prisoners released to the community.¹² For example, in a 2017 national survey, 87.2% agreed with the same item on the importance of rehabilitation used in the 2001 study.¹³ This public-opinion poll also revealed high support for a range of policies aimed at facilitating the reform of offenders, including “ban-the-box laws,” problem-oriented courts (e.g., for drug, mental health, veterans),

7. CULLEN & GILBERT, *supra* note 5.

8. See generally Shelley Johnson Listwan et al., *Cracks in the Penal Harm Movement: Evidence from the Field*, 7 CRIMINOLOGY & PUB. POL’Y 423 (2008).

9. Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1 (2000); James D. Unnever et al., *The Pragmatic American: Attributions and the Hydraulic Relation Hypothesis*, 27 JUST. Q. 431 (2010).

10. Cullen et al., *supra* note 9.

11. Francis T. Cullen et al., *Public Support for Correctional Rehabilitation in America: Change or Consistency?*, in CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME AND JUSTICE 128 (Julian V. Roberts & Michael Hough eds., 2002); see also Francis T. Cullen et al., *Public Support for Early Intervention: Is Child Saving a ‘Habit of the Heart’?*, 2 VICTIMS & OFFENDERS 109 (2007).

12. Jody Sundt et al., *Public Willingness to Downsize Prisons: Implications from Oregon*, 10 VICTIMS & OFFENDERS 365 (2015); Angela J. Thielo et al., *Rehabilitation in a Red State: Public Support for Correctional Reform in Texas*, 15 CRIMINOLOGY & PUB. POL’Y 137 (2016); see also Cheryl Lero Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517 (2015).

13. Angela J. Thielo, *Redemption in an Era of Penal Harm: Moving Beyond Offender Exclusion* (2017) (unpublished Ph.D. dissertation, University of Cincinnati).

re-entry services, reducing any collateral consequences of conviction that are not shown to prevent recidivism, and rehabilitation ceremonies that declare offenders cured and free from legal restrictions.¹⁴

Second, even if devalued, rehabilitation programs were not fully eliminated, for several reasons: inertia, where maintaining the status quo required less effort than any alternative; they served the function of occupying inmate time (e.g., schooling, work training); and some jurisdictions remained firm in their commitment to treating offenders. More than this, a small group of scholars continued to conduct research aimed at uncovering principles that could guide effective intervention with offenders. As will be discussed, their investigations built a strong empirical case that a rehabilitative, human-service approach to corrections could reduce recidivism. Their inquiries also demonstrated that punitive programs were largely ineffective. This agenda has been instrumental in restoring legitimacy to the rehabilitative ideal.¹⁵ Still, to retain this hard-won credibility, much more needs to be done.

Importantly, correctional rehabilitation can be justified on moral grounds as a humane alternative to efforts to inflict pain on the convicted and for the investment it makes in offenders' lives (e.g., improves their citizenship, mental health, human capital). But treatment's legitimacy hinges most fully on its ability to fulfill its promise to make offenders less likely to recidivate. This utilitarian claim ultimately is an empirical question—rehabilitation programs either do or do not work. Accordingly, the effectiveness of treatment interventions has been the central policy question of the last half-century. As will be reviewed, rehabilitation declined because its long-standing advocates, liberals, came to believe that the rhetoric of good intentions did not match the harm incurred when interventions were put into practice. Only by demonstrating that treatment programs worked—and worked better than punitive programs—could the status of rehabilitation be restored.

This chapter tells the story of rehabilitation—its rise during the first seven decades of the 20th century, its sudden decline in the 1970s and beyond, and its use of evidence-based corrections to reclaim legitimacy and be a counterpoint to the punitive imperative. An attempt will be made to assess what next steps

14. *Id.* See, e.g., Richard C. Boldt, "Problem-Solving Courts," in Volume 3 of the present Report; Gabriel J. Chin, "Collateral Consequences," in the present Volume; Wayne A. Logan, "Sex Offender Registration and Notification," in the present Volume; Susan Turner, "Reentry," in the present Volume.

15. Francis T. Cullen, *The Twelve People Who Saved Rehabilitation: How the Science of Criminology Made a Difference—The American Society of Criminology 2004 Presidential Address*, 43 CRIMINOLOGY 1 (2005).

advocates of offender treatment must take to solidify the gains made thus far. The chapter ends with a short but important list of policy recommendations.

Before embarking on this account, three matters merit attention. First, it is necessary to clearly define what is meant by the concept of rehabilitation. Cullen and Jonson¹⁶ have offered the following definition of rehabilitation: “a planned correctional intervention that targets for change internal and/or social criminogenic factors with the goal of reducing recidivism and, where possible, of improving other aspects of an offender’s life.” There are three key components of this definition, each of which carries with it a normative requirement: (1) Treatments with offenders should be planned, having features designed to reduce recidivism. (2) Treatments should identify the causes of crime (i.e., those things that are “criminogenic”) and be capable of changing or curing them. And (3) treatments should be oriented toward human service and, whenever possible, seek to improve offenders’ well-being. Conversely, it is impermissible to inflict needless suffering on or do enduring harm to offenders.

Second, this chapter avoids the debate over which legal theory should govern the sanctioning of offenders, especially at the sentencing phase. This matter is complex and unsettled, and a strong case can be made for rehabilitation serving as a central principle in guiding sentencing and the conditions under which offenders are supervised or confined.¹⁷ But to a large extent, the discussion here is more pragmatic in focus. The argument set forth is that rehabilitation is already integral to corrections and that, when undertaken in appropriate ways, it improves offenders’ lives and public safety.

Third, the rehabilitative ideal is rooted in the desire of “doing good” for offenders.¹⁸ As noted ahead, good intentions do not always translate into good results. Rehabilitation can be coercive and harmful if undertaken with malice or inexpertly. It also is the case that treating rather than punishing offenders does not mean that rehabilitation is necessarily lenient. A growing literature shows that offenders often perceive even prison terms as preferable to interventions that are intended to be less punitive and more helpful.¹⁹ Insisting that offenders make the effort to change their thinking and behavior may not be seen as

16. Francis T. Cullen & Cheryl Lero Jonson, *Rehabilitation and Treatment Programs*, in CRIME AND PUBLIC POLICY 293, 295 (James Q. Wilson & Joan Petersilia eds., 2011).

17. For further discussion of these issues, see FRANCIS T. CULLEN & CHERYL LERO, CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES (2d ed. 2017); PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY (Andrew von Hirsch et al. eds., 2009).

18. See WILLARD GAYLIN ET AL., DOING GOOD: THE LIMITS OF BENEVOLENCE (1978).

19. See, e.g., Joan Petersilia & Elizabeth Piper Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, 74 PRISON J. 306 (1994); Erik J. Wodahl et al., *Offender Perceptions of Graduated Sanctions*, 59 CRIME & DELINQ. 1185 (2013).

“easier” than sitting in a cell unbothered until their sentence is completed. In the end, the issue is not whether offenders “like” treatment but rather whether rehabilitative interventions are delivered ethically and effectively.

I. POLICY ISSUE: DOES REHABILITATION WORK?

A. THE REHABILITATIVE IDEAL

What is the rehabilitative ideal? In many ways, it is based on the medical model that is used to cure physical ailments. Thus, similar to illness, crime is not seen as chosen in the sense that it flows from the exercise of free will at the point the decision to offend occurs. Rather, choices are influenced, if not highly determined, by causal factors, which today are often referred to as “risk factors.” These factors may lie within the individual (biological or psychological) or originate outside the individual (social). Regardless, if they are not accurately diagnosed and treated, then offenders will not be cured and their wayward conduct will continue. By contrast, rehabilitation is possible when the causes underlying an individuals’ criminality are identified and then are prescribed the appropriate treatment.

The rehabilitative ideal views as unscientific, if not as uncivilized, the traditional legal approach of calibrating punishment to the nature of the crime, a practice that supposedly achieves equal justice and, some would argue, deterrence. The obvious difficulty is that two people who commit the same crime—for example, shoplifting—might do so for quite different reasons (e.g., a desperate need for money, pressured by peers, impulsive due to low self-control). Imposing a one-size-fits-all sanction makes no more sense than treating every patient with a disease exactly the same. Imposing punishment on offenders is similarly nonsensical—whether this is a fine or a prison sentence. How does inflicting pain—a “cost”—on offenders cure the underlying causes of their behavior? Notably, this is one reason why scholars embracing rehabilitation predict that punitive interventions will have minimal effects: They do not target for change the engines of criminal behavior—risk factors.

The promise of rehabilitating offenders, however, hinges on two challenging assumptions. First, the rehabilitative ideal assumes that those undertaking rehabilitation have the expertise to diagnose criminogenic risk factors and then to deliver an appropriate treatment intervention effectively. In reality, treatment expertise and knowledge have often been sorely lacking, with offenders subjected to interventions that merit the designation of “correctional

quackery.”²⁰ Second, the rehabilitative ideal assumes that correctional staff will exercise their discretion according to therapeutic principles and according to what is in the best interests of offenders. Allocating this trust is essential because discretion is essential to delivering individualized interventions that can address why each person entered crime. The stubborn reality, however, is that rehabilitation occurs within a correctional system in which staff decisions can be influenced not only by legitimate treatment priorities but also by political and custodial considerations. As Rothman has cautioned, in such circumstances, “conscience” often is corrupted by the need to satisfy “convenience.”²¹

The first clear statement of the rehabilitative ideal occurred in 1870 at the National Congress on Penitentiary and Reformatory Discipline. In the aftermath of the Civil War, the nation’s prisons were crowded, filled to the brim by the so-called “dangerous classes of impoverished immigrants.” Correctional elites could have defined these offenders as the “other” and as beyond redemption. Instead, meeting in Cincinnati, the leading prison administrators and reformers reaffirmed that “the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering.”²² In their *Declaration of Principles*—a roster of policies that could be written today—they favored the classification of inmates, the use of rewards more than punishments, inmate education and industrial training, the special training of guards, and efforts to reintegrate prisoners back into society by providing work and encouragement. Their key recommendation, however, was the indeterminate sentence, which would keep offenders in prison not for a set time based on the seriousness of their crime but until they were reformed. As they noted, only in this way would “the prisoner’s destiny ... be placed measurably in his own hands.”²³

In the first two decades of the 20th century—the Progressive era—these ideas came to guide the development of a modern correctional system. The emerging social sciences provided confidence that the causes of crime could be identified more reliably, and the political climate of this “age of reform” was ripe for social engineering. Notably, the rehabilitative ideal provided the conceptual foundation for the renovation of the system. Sentencing became

20. Edward J. Latessa et al., *Beyond Correctional Quackery: Professionalism and the Possibility of Effective Treatment*, 66 FED. PROB. 43 (2002).

21. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980).

22. Nat’l Congress on Penitentiary & Reformatory Discipline, *Declaration of Principles Promulgated at Cincinnati, Ohio, 1870*, in PRISON REFORM: CORRECTION AND PREVENTION 39, 39 (Charles Henderson ed., 1910).

23. *Id.*

more indeterminate and led to the creation of parole boards that were assigned the task of deciding when inmates had been cured and could be safely released. Probation and parole supervision were logical necessities because offenders in the community needed help to avoid crime and, if unsuccessful at that task, policing to be sent to prison. Pre-sentence reports, which would document the life details of offenders and be compiled by probation officers, were essential to assist judges in determining whom to incarcerate and whom to keep in the community. Finally, a separate juvenile justice system devoted only to treatment was essential if wayward children were to be saved.²⁴

The rehabilitative ideal's appeal was strong. As soon as it was admitted that criminal behavior was caused, the logic of calibrating punishments to the crime rather than treatments to individual differences collapsed. Embracing rehabilitation—the model of individual treatment—thus seemed rational and civilized, not irrational and vengeful. Secular humanism, with its emphasis on science, and sacred belief, with its emphasis on the universal potential to be saved, coalesced into a hopeful correctional paradigm—one in which the goal was to improve offenders. Children would be the special objects of attention, again having a justice system designed for their special needs. All this would be accomplished without sacrificing social defense. Ever-vigilant probation and parole officers would watch for offenders unable to remain crime-free in the community, and recalcitrant inmates would be kept behind bars—for life, if necessary—until they were cured.

This was the dominant ideology across most of the first seven decades in the 20th century. By the 1950s, the term “corrections” was in vogue and embodied the nature of the enterprise: correcting those found guilty of a crime. None of this to suggest that criminal sanctions—and prisons in particular—lived up to the rehabilitative ideal. Still, among correctional elites, many elected officials, and virtually all criminologists, there was little dispute about the need to pursue this ideal. Then, within a very short period of time—roughly from the latter part of the 1960s to the mid-1970s—the legitimacy of the rehabilitative ideal collapsed, so much so that it was now common to ask: “Is rehabilitation dead?”²⁵ This reversal of fortunes for offender treatment was stunning and consequential.

24. ROTHMAN, *supra* note 21; see also ANTHONY R. PLATT, *THE CHILD SAVERS: THE INVENTION OF JUVENILE DELINQUENCY* (1969); Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report.

25. Francis T. Cullen et al., *Is Rehabilitation Dead? The Myth of the Punitive Public*, 16 J. CRIM. JUST. 303 (1988).

B. TWO CRITIQUES

Two broad critiques contributed to the decline of the rehabilitative ideal: (1) a critique of state discretionary power nourished by a declining confidence in the government, and (2) the “nothing works” critique inspired by Robert Martinson’s review of program evaluations purporting to show that “nothing works” to rehabilitate offenders. Each of these will be briefly discussed.

1. The abuse of discretionary powers

The rehabilitative ideal is rooted in the individual treatment model. Individualizing interventions, however, depends on giving judges, parole boards, and correctional staff wide discretionary power. Just as physicians require the flexibility to prescribe medication or services unique to each patient, so too do those who administer rehabilitation require the leeway to intervene with each offender. Allocating largely unfettered discretionary powers assumes that state officials can be trusted to make scientifically informed decisions in which the reform of offenders is paramount—that they are smart and well-intended, not quacks and crassly self-interested. Rehabilitation advocates had long understood that this standard was more often an aspiration than a reality. Still, imperfection was not seen as a rationale for abandoning the rehabilitative ideal but rather for intensifying its pursuit.²⁶

By the latter part of the 1960s, trust in the state was decreasing precipitously, with polling data showing a “virtual explosion in anti-government feeling.”²⁷ A confidence gap or legitimacy crisis had emerged. Whereas 73% of the public in 1958 believed that government officials would “do what is right just about always or most of the time,” this figure had plummeted to below 40% by the mid-1970s.²⁸ The sources of this sea change in public opinion are well chronicled as a series of major social events rocked the nation: political assassinations, brutal suppression of civil-rights protests, violent insurgencies in inner cities, sustained protests of the Vietnam War, and disclosures of political corruption exemplified by the Watergate scandal. In this context, criticisms of the rehabilitative ideal found an increasingly receptive audience. Rehabilitation’s reputation thus shifted from a progressive ideal that should guide reform efforts, to a mask

26. See, e.g., KARL MENNINGER, *THE CRIME OF PUNISHMENT* (1968).

27. SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND* 16 (1983).

28. *The People and Their Government: Distrust, Discontent, Anger, and Partisan Rancor*, PEW RES. CTR. (Apr. 18, 2010), <http://www.people-press.org/2010/04/18/distrust-discontent-anger-and-partisan-rancor/>.

of benevolence or “noble lie” that was being used to permit and hide the repression of those caught in the iron fist of the state.²⁹

In short, the rehabilitative ideal was being blamed for trusting state officials to do good when, in fact, they were abusing their discretionary powers. In part, this abuse was due to incompetence: Government officials in the correctional system did not have the scientific expertise to deliver effective treatment or to know when someone was cured. But the deeper critique was that these officials had evil intent. For example, judges were indicted for using their discretion not to individualize treatment but to discriminate against the poor and racial minorities. Prisons were a special object for scrutiny, depicted as being inherently inhumane (as Philip Zimbardo’s Stanford Prison Experiment seemed to show).³⁰ In this bleak environment, correctional officers would use the threat of perpetual confinement not as a carrot in a treatment regimen but as a stick to coerce obedience to their authority.³¹

Inspired by this mindset, progressive scholars and reformers embraced efforts to curtail discretion. The linchpin of their favored “justice model” was determinate sentencing, which involved fixed prison terms written into law, equal not individualized punishments, and the abolition of parole release. Conservatives were more than happy to jump on this bandwagon. Whereas liberals criticized the rehabilitative ideal for permitting the *victimization of offenders*, conservatives saw it as permitting the *victimizing of innocent citizens*. They had long reviewed the discretion as allowing judges to hand out lenient sentences and gullible parole boards to be conned into prematurely releasing predators. By the mid-1970s, a massive sentencing reform movement was under way to strip discretion from the system, supported by liberals hoping for short prison sentences and conservatives hoping for longer ones. Over the next several decades, every state would curtail the discretion of judges and/or parole boards through practices such as determinate sentencing, sentencing and parole guidelines, mandatory minimum sentences, three-strikes laws, and truth-in-sentencing laws.³² These reforms concentrated power in the hands of legislators (who wrote mandatory punishments into statutes) and of prosecutors (who used the threat of certain punishment to induce plea bargains). In the prevailing political context, liberal concerns about justice were largely ignored,

29. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 20 (1974); see also CULLEN & GILBERT, *supra* note 5.

30. Teresa C. Kulig et al., *Revisiting the Stanford Prison Experiment: A Case Study in Organized Skepticism*, 28 J. CRIM. JUST. EDUC. 74 (2017).

31. ROTHMAN, *supra* note 21.

32. See, e.g., Berman, *supra* note 6; Luna, *supra* note 6.

whereas conservative preferences for getting tough on crime were heeded—and written into law after law. Although other factors mattered, the attack on the rehabilitative ideal thus helped to usher in a punitive movement that used imprisonment in unprecedented ways.³³

2. Nothing works

In 1974, Robert Martinson published what would become a classic essay in *The Public Interest*, “What Works? Questions and Answers About Prison Reform.”³⁴ In collaboration with Douglas Lipton and Judith Wilks, Martinson assessed 231 studies evaluating correctional interventions, which was subsequently published in a lengthy, dense, and infrequently consulted book.³⁵ By contrast, Martinson’s essay in the more popular forum of *The Public Interest* was provocative, short, and widely read. Indeed, his central conclusion was stark and italicized for emphasis: “*With few and isolated exceptions, the rehabilitative efforts that have reported so far have had no appreciable effect on recidivism.*”³⁶ The last heading in his essay then asked, “Does Nothing Work?” It was clear from the comments that followed both in the text and subsequently in the media (such as on *60 Minutes*) that Martinson was asserting that efforts to reform offenders had proven to be a failure. Certainly, the message that “nothing works” quickly took hold and became an unassailable doctrine in the field.³⁷

Importantly, Martinson’s study did not trigger the decline of the rehabilitative ideal. As noted, nourished by the prevailing mistrust of the state and of welfare ideology, a loss of faith in the therapeutic paradigm was already well under way. Rather, skeptical scholars and many policymakers engaged in a collective incident of confirmation bias, suspending the scientific norm of organized skepticism in favor of the uncritical acceptance of the nothing-works slogan.

33. CULLEN & GILBERT, *supra* note 5. For an example of how this occurred in California, see CANDACE KRUTTSCHNITT & ROSEMARY GARTNER, MARKING TIME IN THE GOLDEN STATE: WOMEN’S IMPRISONMENT IN CALIFORNIA (2005); JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS IN CALIFORNIA (2011).

34. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 522 (1974).

35. For the full report, see DOUGLAS LIPTON ET AL., THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES (1975).

36. Martinson, *supra* note 34, at 525 (alteration in original).

37. For a discussion of these issues, see FRANCIS T. CULLEN, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299 (2013).

For them, Martinson's findings simply told them what they "already knew," adding only the cachet of scientific legitimacy. Put another way, his essay was the final nail drilling shut the rehabilitative ideal's coffin.³⁸

In 1979, his follow-up analysis of 555 studies prompted Martinson to moderate his conclusion, noting that, "contrary to my previous position, some treatment programs *do* have an appreciable effect on recidivism."³⁹ He then explicitly recanted the notion that all interventions were "impotent."⁴⁰ But nobody was listening, because these facts did not confirm the near-universal belief in the nothing-works doctrine. Martinson's original 1974 study continued to be cited as established truth—and to be so for many years to come—whereas his latter study would be ignored. Martinson's tragic suicide not long thereafter on August 11, 1979, meant that he would not be present to trumpet his new findings and to advocate for a more balanced view of rehabilitation.

Importantly, the critique of rehabilitation as permitting discretionary abuse largely vanished from sight. As the conservatives' get-tough mass-imprisonment movement gained steam, it became absurd to blame the mounting ills of the correctional system on the "noble lie" of rehabilitation. In fact, the discretion exercised by correctional officials was usurped by legislators who often competed to see who would enact the latest punitive measure to inflict pain on and lengthen the prison sentences of the convicted. Still, the nothing-works critique remained and could be used at any moment to discredit treatment initiatives.

The enduring effect of Martinson's essay, therefore, was that it *reframed* the debate about rehabilitation from a critique of a discretionary system into a debate over *program effectiveness*. At first, this focus on effectiveness was a decided advantage for critics of the rehabilitative ideal, for they could simply ask: "How can anyone be in favor of something that does not work?" Ironically, however, reframing the debate in this way provided hope to the other side. If advocates of treatment could marshal empirical evidence showing that, in fact, intervention programs were effective, then they could turn the tables on opponents: "How can anyone be against something that does work?" As the next section discusses, this empirical reversal is precisely what happened.⁴¹

38. Francis T. Cullen & Paul Gendreau, *From Nothing Works to What Works: Changing Professional Ideology in the 21st Century*, 81 PRISON J. 313 (2001).

39. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243, 244 (1979) (alteration in original).

40. *Id.* at 254.

41. Cullen, *supra* note 37.

II. LITERATURE REVIEW: EMPIRICAL AND THEORETICAL ISSUES

Two important occurrences—one empirical, one theoretical—were integral to efforts to reaffirm rehabilitation. Advocates first had to show that treatment programs “worked” and then had to create a viable model for implementing treatment within the correctional system. Both of these occurred.

A. PROVING THAT REHABILITATION WORKS

Proving that “rehabilitation works” took place in two stages—the second of which was most consequential. First, treatment advocates reviewed the existing body of studies and demonstrated that many of these evaluations yielded the positive result of reduced recidivism. In 1975, Palmer reanalyzed Martinson’s set of studies and showed that 48% had positive results.⁴² In 1979, Gendreau and Ross provided “bibliotherapy for cynics” by reviewing numerous studies in which programs were found to be effective.⁴³

These reviews, however, did not settle the matter. Where one side might see the treatment glass as half full, the other saw it as half empty. The half-full side used the positive findings to easily falsify the claim that “nothing works.” But Martinson’s original point was more subtle. Although little understood by those reading his work, Martinson divided interventions into 11 categories (e.g., casework and individual counseling, life skills, group methods, leisure-time activities). Within each category, it could not be demonstrated that the interventions were reliably effective. Even if some programs—such as a counseling program—might reduce recidivism some of the time, more often or just as often they did not. Nobody could tell a policymaker, Martinson concluded, that a specific program would work all the time. Subjecting offenders to any given treatment program thus was a crapshoot.

This impasse was largely settled when the program evaluation literature was subjected to an emerging statistical technique called meta-analysis. Meta-analysis quantitatively synthesizes the treatment effects reported by evaluations, ultimately reporting a “mean effect size” and a confidence interval for that effect. In other words, this technique yields a specific number that tells whether a rehabilitation program has a positive, null, or negative relationship with the dependent variable, in this case some measure of recidivism (e.g., arrest, incarceration). Depending on the strength of the association and size of the sample, a narrower or larger confidence interval—that is the range within

42. Ted Palmer, *Martinson Revisited*, 12 J. RES. CRIME & DELINQ. 133 (1975).

43. Paul Gendreau & Robert R. Ross, *Effective Correctional Treatment: Bibliotherapy for Cynics*, 25 CRIME & DELINQ. 463 (1979). See also their follow up essay, Paul Gendreau & Robert R. Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 JUST. Q. 349 (1987).

the real effect likely occurs—can be calculated. In concrete terms, a meta-analysis is like computing a batting average for a treatment program across all the studies that have tested its effects. A high batting average—consistently producing high reductions in recidivism in study after study—is a good thing. Note that Martinson essentially predicted that rehabilitation would have a zero batting average, with studies showing effective results canceled out by those that were ineffective. “Nothing works” thus means no overall effect across all types of programs, and no effect for any given program type or modality.

A number of meta-analyses appeared that reached the same conclusion: Across all types of correctional interventions, treatment programs were effective in reducing recidivism by about 10%. Rehabilitation worked!⁴⁴ Because of the large sample size of the studies evaluated and the sophistication of the methods used, the meta-analyses conducted by Mark Lipsey and his associates proved particularly convincing.⁴⁵ Lipsey’s credibility also could not be questioned, because he had no dog in the hunt—he was not an identifiable treatment advocate. Still, a 0.10 effect size is modest at best—perhaps enough to silence the nothing-works crowd but not enough to revive the rehabilitative ideal and direct program implementation. Importantly, however, the meta-analyses revealed that across types of treatment, the effects were not homogenous but *heterogeneous*. That is, some intervention modalities were highly effective, whereas others were ineffective, if not criminogenic. Two critical insights were gained from this unpacking of treatment effects.⁴⁶

First, interventions that are punitive—that emphasize deterrence, discipline, or surveillance—have weak, null, or iatrogenic effects on recidivism (e.g., boot camps, scared-straight programs, intensive supervision). To assess “what works to reduce re-offending,” McGuire assessed 100 meta-analyses or systematic reviews. His dismal conclusion is that “the only recurrently negative mean effect sizes reported to date are those obtained from criminal sanctions or deterrence-based methods. Punitive sanctions repeatedly emerge as a failed strategy for

44. For discussion of the empirical literature that emerged at this time, see Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, in 3 POLICIES, PROCESSES, AND DECISIONS OF THE CRIMINAL JUSTICE SYSTEM—CRIMINAL JUSTICE 2000, at 109 (Julie Horney ed., 2000).

45. See, e.g., MARK W. LIPSEY ET AL., *EFFECTIVE INTERVENTION WITH SERIOUS OFFENDERS* (2000); see also Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297 (2007).

46. Cullen & Gendreau, *supra* note 44; Sarah M. Manchak & Francis T. Cullen, *Intervening Effectively with Juvenile Offenders: Answers from Meta-Analysis*, in *THE DEVELOPMENT OF CRIMINAL AND ANTISOCIAL BEHAVIOR: THEORETICAL FOUNDATIONS AND PRACTICAL APPLICATIONS* 477 (Julien Morizot & Lila Kazemian eds., 2015).

altering offenders' behaviour."⁴⁷ Second, interventions that are therapeutic and emphasize a human-service approach are most likely to achieve substantial reductions in recidivism.⁴⁸ Taken together, these findings directly contradicted not only the nothing-works doctrine but also claims, widespread during the get-tough era, that punishment was an effective correctional tool to improve public safety by specifically deterring offenders.

The empirical evidence has helped to re-establish the legitimacy of the rehabilitative ideal. It no longer can claim to be the dominant model, but it is clearly the case that offender treatment is seen in most places as an important correctional goal. In part, the ideal's reaffirmation is due to the movement over the past two decades—not only within corrections but also in medicine, corrections, and even baseball—to base decisions on evidence. Thus, just as the data supportive of treatment were amassing, evidence-based corrections was itself ascending.⁴⁹ In this context, claims that treatment works took on increased salience. The difficulty, however, was moving from this generic conclusion to implementing programs within correctional agencies. It is one thing to say that rehabilitation works better than punishment, but it is quite another to tell correctional staff how specifically they should treat offenders. Importantly, Canadian scholars took up this challenge, and it is to that story that we now turn.

B. THE CANADIANS' RNR MODEL

In the delivery of medical treatments, physicians reserve the most serious interventions—such as sophisticated testing, emergency-room services, and hospitalization—for the sickest patients. Those who experience low-risk ailments either get better on their own or receive minimal interventions. Once a high-risk patient is seen, the doctor assesses the individual to discover what is causing the illness. And once the causes are identified, a medical intervention

47. James McGuire, 'What Works' to Reduce Re-Offending: 18 Years On, in *WHAT WORKS IN OFFENDER REHABILITATION: AN EVIDENCE-BASED APPROACH TO ASSESSMENT AND TREATMENT* 20, 30 (Leam A. Craig et al. eds., 2013). For a similar conclusion, see Doris Layton MacKenzie & David P. Farrington, *Preventing Future Offending of Delinquents and Offenders: What Have We Learned from Experiments and Meta-Analyses?*, 15 J. EXPERIMENTAL CRIMINOLOGY 565 (2015). Further, for the limited effects of prison on recidivism, see Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011).

48. JAMES BONTA & D.A. ANDREWS, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (6th ed. 2017); Mark W. Lipsey, *The Primary Factors that Characterize Effective Interventions with Juvenile Offenders: A Meta-Analytic Overview*, 4 VICTIMS & OFFENDERS 124 (2009).

49. Francis T. Cullen et al., *Eight Lessons from Moneyball: The High Cost of Ignoring Evidence-Based Corrections*, 4 VICTIMS & OFFENDERS 197 (2009); Doris Layton MacKenzie, *Evidence-Based Corrections: Identifying What Works*, 46 CRIME & DELINQ. 457 (2000).

is prescribed that is responsive to these factors—that is, one capable of curing these deficits. All this makes sense, and, in fact, it is not clear what would be an alternative strategy to the following: (1) concentrate on high-risk cases; (2) find the factors established by science to cause the disease; and (3) select treatment shown by science to eliminate the disease-causing factors.

The logic expressed in the above paragraph mirrors the logic of the dominant rehabilitation approach, known by the acronym of its three core principles: the RNR model or the risk-need-responsivity model. Thus, this perspective argues that treatment programs will be most effective if they comply with three principles. First, *the risk principle* (R) advises that correctional interventions should focus on high-risk offenders. Low-risk offenders should receive little or no attention and certainly not be incarcerated. Second, *the need principle* (N) advises that interventions target for change empirically established predictors of recidivism that are “dynamic” or can be changed. For example, race or age are “static” risk factors. By contrast, pro-criminal attitudes or pro-criminal associates can be altered—replaced, that is, by pro-conventional friends and associates. The key is to give priority to those factors demonstrated to be strongly related to recidivism. Finally, *the responsivity principle* (R) advises that staff use treatments that are capable of changing dynamic risk factors—that is, that are “responsive” to them. The most effective strategies fall into the category of cognitive-behavioral therapy.⁵⁰ Notably, the inventors of the RNR model used rigorous science, including meta-analyses, to identify which risk factors to target for change and which treatments to employ when intervening with offenders.⁵¹

As a brief aside, cognitive-behavioral therapy—also known as “CBT”—is a widely used treatment approach that is applied to reduce a range of psychological disorders and behavioral problems, of which crime is but one target for cure. Its central premise is that incorrect or maladaptive cognitions lead and help to maintain problematic emotions and conduct. As explained by Spiegler and Guevremont, there are two main approaches to CBT:

Cognitive restructuring therapy, the first model, teaches clients to change distorted and erroneous cognitions that are maintaining their problem behaviors. Cognitive restructuring involves recognizing maladaptive cognitions and substituting more adaptive cognitions for them. Cognitive restructuring is used

50. BONTA & ANDREWS, *supra* note 48.

51. For an early example of this commitment, see D.A. Andrews et al., *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369 (1990).

when clients' problems are maintained by an excess of maladaptive thoughts. The other model is cognitive-behavioral coping skills therapy, which teaches clients adaptive responses—both cognitive and over behavioral—to deal effectively with difficult situations they encounter. That model is appropriate for problems that are maintained by a deficit in adaptive cognitions.⁵²

Both approaches are used with offenders.⁵³ To give but one example, Anger Control Therapy (ACT) involves five steps aimed at instructing wayward youths on how to control their anger that underlies their aggressive and delinquent conduct. In the ACT model, these youths are taught the following sequential steps: (1) how to recognize "external events and internal self-statements that ... trigger their anger"; (2) how to "recognize the physiological clues," such as a "tense jaw" and "flushed face," that "alert" them to the onset of their anger; (3) how to rely on "techniques for dealing with the identified anger," such as "self-statements" to "calm down" or "cool off"; (4) how to use "reducers, such as "visualizing peaceful scenes" and "counting backward," that lower anger levels; and (5) how to evaluate "how well they controlled the anger" and then "to praise themselves if they performed effectively."⁵⁴

The origins of the RNR model extend to the 1980s and to a group of Canadian psychologists who had worked in correctional settings. Unaffected by the nothing-works doctrine reigning among their southern neighbors, Donald Andrews, James Bonta, Paul Gendreau, and their colleagues embarked on an effort to create a systematic model of offender assessment and treatment. The model covers 15 principles, with the three RNR principles at its core.⁵⁵ However, its first principle—Respect for the Person and the Normative Climate—is equally important: "Services are delivered with respect for the person, including respect for personal autonomy, being humane, ethical, just, legal, and being otherwise normative."⁵⁶ Demeaning and inflicting gratuitous pain on offenders are strongly rejected.

52. MICHAEL D. SPIEGLER & DAVID C. GUEVREMONT, *CONTEMPORARY BEHAVIOR THERAPY* 305 (3d ed. 1998).

53. See Patricia Van Voorhis & David Lester, *Cognitive Therapies*, in *CORRECTIONAL COUNSELING AND REHABILITATION* (Patricia Van Voorhis et al. eds., 5th ed. 2004).

54. *Id.* at 202–03.

55. For a list of the principles, see BONTA & ANDREWS, *supra* note 48, at 176–77. For an early statement, see Paul Gendreau, *The Principles of Effective Intervention with Offenders*, in *CHOOSING CORRECTIONAL OPTIONS THAT WORK: DEFINING THE DEMAND AND EVALUATING THE SUPPLY* 117 (Alan T. Harland ed., 1996).

56. BONTA & ANDREWS, *supra* note 48, at 176.

The strength of the RNR model is that it consists of three interrelated components, the first two of which have been alluded to already: criminological, correctional, and technological.⁵⁷ First, the *criminological component* refers to the model's underlying theory of crime. Importantly, this is not a complete causal explanation but rather a treatment theory because it focuses on dynamic, proximate risk factors that can be changed. It ignores static factors (e.g., age); it also ignores distal factors, such as neighborhood social disorganization, that are beyond correctional intervention.

As adherents of cognitive-social learning theory, the Canadians assume "that all behavior, including criminal behavior, is learned."⁵⁸ Risk factors are salient because they influence the cognitive decision to commit a crime by making it more rewarding or less costly. Research has confirmed the causal importance of eight factors, but two seem particularly important—pro-criminal attitudes and associates. The other six predictive factors include: criminal history, antisocial personality patterns (e.g., low self-control, callousness), family/marital quality of interpersonal relationships, school/work quality of interpersonal relationships and performance, substance abuse, and leisure/recreation involvement and satisfaction. Referred to as the "central eight," these risk factors are also called "criminogenic needs" because they are deficits that must be fixed if recidivism is to be lowered. For example, the effects of pro-criminal associates can be addressed through an intervention that reduces these interactions and replaces them with pro-social relationships. Finally, although criminal history is not explicitly a dynamic risk factor, it still represents a promising target for change. As Bonta and Andrews note, "A history cannot be changed, but appropriate intermediate targets for change include building up new noncriminal behaviors in high-risk situations and building self-efficacy beliefs supporting rehabilitation."⁵⁹

Second, the *correctional component* is the RNR model described above. Because the underlying criminological component is based on cognitive-social learning theory, preferred interventions fall under the category of cognitive-behavioral therapies. These treatments are "responsive" to—that is, can change—the "criminogenic needs" represented by the central eight risk factors. Again, this model mandates following the risk principle, meaning that services be delivered to high-risk offenders. These offenders have substantial

57. For a description of these components, see Cullen, *supra* note 37; Paula Smith, *The Psychology of Criminal Conduct*, in THE OXFORD HANDBOOK OF CRIMINOLOGICAL THEORY 69 (Francis T. Cullen & Pamela Wilcox eds., 2013).

58. BONTA & ANDREWS, *supra* note 48, at 48.

59. *Id.* at 45.

criminogenic needs to be addressed. Focusing on low-risk offenders is similar to hospitalizing patients with a cold: The intervention is not medically required and might expose them to conditions that will worsen their health.

Third, the *technological component* refers to the “instruments needed to ensure that the treatment is administered with integrity. In short, it is not sufficient to know what to do; it also is essential to know how to do it.”⁶⁰ Thus, a unique contribution of the Canadians is that they developed two technologies that would allow the RNR model to be used by practitioners in the field. First, the RNR model depends on offender assessment so that treatment can be delivered to high-risk offenders. Toward this end, the Canadians designed the Level of Service Inventory, which has undergone different advances. The Level of Service Inventory-Revised, known as the LSI-R, has been used in more than half the states and in a number of other nations; in 2012, it was estimated to have been given to more than a million offenders in the past year.⁶¹ As described by Bonta and Andrews, the “LSI-R samples 54 risk and needs (mostly criminogenic) items, each scored in a zero-one format and distributed across 10 subcomponents (e.g., criminal history, education/employment, companions, substance abuse).”⁶² Recently, the LSI has added a case-management component in which the assessment is followed by a plan for how best to intervene with the offender. Here, observe Bonta and Andrews, “correctional staff must prioritize the criminogenic needs of the offender, engage the offender in setting concrete targets for change, and choose a means to reach these goals.”⁶³ In short, the technology component is used to identify the criminological component that is then treated through the correctional component.

Second, the Canadians also developed the technology to assess the extent to which an agency as a whole was adhering to the RNR model—the Correctional Program Assessment Inventory. The CPAI, as this tool is typically known, consists of 10 subscales used by trained evaluators to assess an organization’s capacity to deliver treatment with integrity (e.g., organizational culture, program implementation/maintenance, use of core correctional practices).

60. Smith, *supra* note 57, at 73.

61. Cullen, *supra* note 37, at 345.

62. BONTA & ANDREWS, *supra* note 48, at 195.

63. *Id.* at 201. This new assessment tool is called the Level of Service/Case Management Inventory or the LS/CMI.

The goal is to improve agency performance by asking “them to consider what their program is about and why they do what they do.”⁶⁴ Scores on the CPAI are strongly correlated with reductions in recidivism.⁶⁵

In short, Andrews, Bonta, Gendreau, and their Canadian colleagues moved the treatment enterprise far beyond the generic statement that “rehabilitation works.” In a theoretically grounded and evidence-based model, they provided both concrete instructions on how to intervene with offenders (follow the RNR principles) and the technology needed to undertake such intervention. As a consequence, the Canadians’ RNR model is now the dominant treatment paradigm in North America and, increasingly, across the globe.⁶⁶

III. ANALYSIS AND ASSESSMENT

Currently, it is generally agreed that the nothing-works doctrine is incorrect and that treatment interventions can be effective. The future for correctional reform also appears bright. The punitive paradigm that justified the mass-imprisonment movement is bankrupt. Whatever value it possessed has long since been exceeded by its social and economic costs; few policymakers are still riding the get-tough bandwagon.⁶⁷ The American public remains strongly supportive of the rehabilitative ideal. In this context, the opportunity may exist to implement a range of reforms, including the expansion of treatment programs. The challenge is how best to proceed from here and capitalize on this possibility to show the value of rehabilitation programs. Five considerations seem relevant.

First, the RNR model merits its status as the leading treatment paradigm. It should be recognized as a resource to be used not only within specific treatment programs but also within everyday correctional contexts. For example, as noted, there are nearly 4.7 million offenders on probation and parole, most of whom will have regularly scheduled meetings with their supervising officer. Such supervision is not strongly related to recidivism reduction.⁶⁸ These office visits often involve routine check-ins, unstructured conversation, drug tests,

64. BONTA & ANDREWS, *supra* note 48, at 250.

65. See, e.g., Christopher T. Lowenkamp et al., *Does Correctional Program Quality Really Matter? The Importance of Adhering to the Principles of Effective Intervention*, 5 CRIMINOLOGY & PUB. POL’Y 201 (2006).

66. For a systematic analysis of the RNR model, see RONEN ZIV, *THE FUTURE OF CORRECTIONAL REHABILITATION: MOVING BEYOND THE RNR MODEL AND GOOD LIVES MODEL DEBATE* (2018).

67. Petersilia & Cullen, *supra* note 3; Derek Cohen, *Right on Crime: Conservative Reform in the Era of Mass Imprisonment* (2017) (unpublished Ph.D. dissertation, University of Cincinnati).

68. LACEY SCHAEFER ET AL., *ENVIRONMENTAL CORRECTIONS: A NEW PARADIGM FOR SUPERVISING OFFENDERS IN THE COMMUNITY* (2016).

and, if the supervisee has erred in some way, threats of revocation. Bonta and his colleagues, however, have used the RNR model and its suggested core correctional practices to design a 25-minute meeting that is oriented toward “strategic supervision.” Officers are enrolled in the Strategic Training Initiative in Community Supervision (STICS), which involves 10 modules that cover RNR principles and practices. Equipped with STICS training, officers divide an office visit, which would last under a half-hour, into four components: (1) a check-in component, a few minutes in duration, used to build relationships and address any crises; (2) a review component used to reflect on the previous session and skill building through homework; (3) an intervention component, lasting about 15 minutes, in which cognitive-behavioral techniques (e.g., a role-playing exercise) are used to convey pro-social attitudes and skills; and (4) a homework component used to reinforce learning that has occurred in the visit. Notably, research on STICS and two similar supervision models has shown promising results in reducing recidivism.⁶⁹

This kind of strategic use of the RNR model might also be implemented in prison settings, perhaps in units designed as therapeutic communities and perhaps across institutions as a whole. A recent survey of state departments of corrections (30 responding) reported that more than half train correctional officers in cognitive-behavioral interventions and more than a third train them in the RNR model. However, on average, officers receive less than 2.5 hours of training in each of these areas.⁷⁰ Given these inroads, the time may be ripe for experimentation on how RNR principles and practices could improve inmate management and pro-social development.

Second, the RNR model should not be seen as the only rehabilitation program for offenders. Especially in prison, work and educational (academic and vocational) programs consume time and are a potential means for inmate reform. Some evidence exists that these programs can be effective.⁷¹ However, their impact on recidivism might be greater if they were placed under the umbrella of the RNR model and informed by core correctional practices.⁷²

69. For a review of STICS and relevant evaluation research, see BONTA & ANDREWS, *supra* note 48, at 257. See also Francis T. Cullen et al., *Reinventing Community Corrections*, 46 CRIME & JUST. 27 (2017).

70. Alexander L. Burton, Creating a Correctional Officer Academy: Implications from a National Survey (2017) (unpublished M.S. demonstration project, University of Cincinnati).

71. DORIS LAYTON MACKENZIE, WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS (2006); Cullen & Jonson, *Rehabilitation*, *supra* note 16.

72. BONTA & ANDREWS, *supra* note 48, at 147.

Further, sometimes called “creative corrections,” a competing approach to rehabilitation has emerged that focuses less on fixing deficits (“criminogenic needs”) and more on identifying and building on offender strengths.⁷³ In addition to positive psychology, this perspective is rooted in desistance research, especially the finding that life-course-persistent offenders who desist embrace redemption-oriented identities and experience quality relationships.⁷⁴ Increasing these strengths or positive factors is seen to provide a means out of a criminal career. The “Good Lives Model” (GLM) is the leading treatment paradigm of the genre.⁷⁵ As opposed to the RNR model, the GLM is concerned not only with risk management but also with offender well-being. The GLM starts by working with offenders to identify their core life goals or human needs (called “primary goods”) and then helping them to achieve a “good life” using pro-social rather than criminal means (called “secondary goods”). Once an offender’s unique set of strengths are assessed, a therapist can show the person how to employ these positive qualities to attain the goals that matter most to him or her. For example, if an offender has a capacity for empathy, this strength can be used to enable the person to build rewarding pro-social relationships (e.g., closer ties to family or a romantic partner) that fulfill the goal for connectedness. Or, if an offender has a talent for art, this skill might be used to obtain employment, fulfilling the goal of excellence at work.⁷⁶

At this stage, insufficient research is available to establish the viability of the GLM and similar types of creative correctional interventions.⁷⁷ Still, however valuable the RNR model is, corrections would benefit from having multiple intervention strategies of equal vitality. One way to achieve this goal is to follow the Canadians’ strategy of developing a treatment model that has evidence-based criminological, correctional, and technological components.⁷⁸

Third, beware of correctional programs emphasizing punishment and deterrence, especially those that seem intuitively appealing. They often burst on the scene with fanfare and become a fad that spreads across the nation.

73. WHAT ELSE WORKS? CREATIVE WORK WITH OFFENDERS (Jo Brayford et al. eds., 2010).

74. See SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (2001); ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE (2003).

75. TONY WARD & SHADD MARUNA, REHABILITATION: BEYOND THE RISK PARADIGM (2007).

76. For a detailed review of the theoretical principles and correctional practices of the GLM, see ZIV, *supra* note 66.

77. For a critical analysis of the relative merits of the RNR model and the GLM, see ZIV, *supra* note 66.

78. Francis T. Cullen, *Taking Rehabilitation Seriously: Creativity, Science, and the Challenge of Offender Change*, 14 PUNISHMENT & SOC’Y 94 (2012).

But because they have a weak theory of recidivism (e.g., crime is beneficial), they ignore and thus do not treat the known predictors of recidivism (e.g., Bonta and Andrews's "central eight"). Boot camps are one recent example of a discipline-oriented program that was implemented widely but now has fallen into disrepute.⁷⁹ A more recent example is Project HOPE, which emphasizes the use of "swift-certain-fair" sanctions (e.g., two-day jail sentence) whenever a probationer or parolee fails a drug test, misses an appointment, or violates some other supervision condition. Just-published experimental research, however, casts doubt on the effectiveness of this intervention strategy.⁸⁰

Fourth, knowing what to do does not mean doing it or doing it well. Virtually every discussion of treatment intervention ends with a warning that effectiveness depends on the quality of program implementation.⁸¹ Moving toward this goal means starting with a proven treatment model, such as the RNR. The next step is using a proven diagnostic tool, such as the CPAI, to assess program deficiencies and how to fix them. On a broader level, correctional staff must be seen as professionals, a designation that includes a strong ethical code and expertise in their field of endeavor.⁸² It is admirable to tell staff to use cognitive-behavioral therapy, but what is the likelihood that they will have any clue of how to deliver this intervention? Effective training—whether in a correctional academy, on-site, or on-line—is essential. Finally, program integrity and effectiveness hinge on accountability. Correctional managers are typically evaluated on their ability to maintain organizational quiescence, not on how much recidivism they reduce. Whether a program is implemented well has little impact on their job security or advancement. Similar to reforms in

79. Francis T. Cullen et al., *The Rise and Fall of Boot Camps: A Case Study in Common-Sense Corrections*, 40 J. OFFENDER REHABILITATION 53 (2005).

80. See PAMELA K. LATTIMORE ET AL., SUMMARY FINDINGS FROM THE NATIONAL EVALUATION OF THE HONEST OPPORTUNITY PROBATION WITH ENFORCEMENT DEMONSTRATION FIELD EXPERIMENT: THE HOPE DFE EVALUATION (2016); Francis T. Cullen et al., *It's Hopeless: Choosing a Better Correctional Future*, 15 CRIMINOLOGY & PUB. POL'Y 1215 (2016). For critical analyses, see Francis T. Cullen et al., *When Bad News Arrives: Project HOPE in a Post-Factual World*, J. CONTEMP. CRIM. JUST. (forthcoming 2018); Stephanie A. Duriez et al., *Is Project HOPE Creating a False Sense of Hope? A Case Study in Correctional Popularity*, 78 FED. PROB. 57 (2014).

81. See, e.g., ANN CHIH LIN, REFORM IN THE MAKING: THE IMPLEMENTATION OF SOCIAL POLICY IN PRISON (2000). Note that the issue of implementation involves not only the initial installation of the program as designed but also factors that maintain its integrity over time, such as continuing staff training and adequate budgetary support.

82. Francis T. Cullen, *Making Corrections Work: It's Time for a New Penology*, 21 J. COMMUNITY CORRECTIONS 5, 15–18 (2011); Edward J. Latessa et al., *Beyond Correctional Quackery: Professionalism and the Possibility of Effective Treatment*, 66 FED. PROB. 43 (2002).

police management (e.g., Compstat), however, it is possible to use a mixture of incentives (positive ones preferred) to reward what should be valued: less reoffending by those sentenced to a community agency or prison facility.⁸³

Fifth, in correctional rehabilitation, staff members have the obligation to provide effective treatment and to motivate offenders to seek behavioral change. Offenders ultimately have the obligation to engage in the change process and to pursue a good life. But rehabilitation is only the first step toward a greater goal—redemption or the full acceptance back into society as an equal citizen. In this process, offenders must do their part by achieving rehabilitation, refraining from crime, and contributing to society. Ultimately, however, for redemption to be earned, it must be made possible by the state. Two considerations are important. First, policymakers should not create needless legal barriers to offender inclusion, such as counterproductive collateral consequences that attach to a conviction.⁸⁴ Second, these officials should create public ceremonies that signify that an offender is legally rehabilitated, that the offender's criminal record is expunged, and that the offender's acceptance into the community is complete.⁸⁵ Public support for this initiative appears high. As noted, a 2017 national survey found that 81.4% of the sample agreed that rehabilitation ceremonies that declared ex-offenders "rehabilitated" and "free from all legal penalties and other collateral sanctions" would "help them reintegrate back into the community and stay out of crime."⁸⁶

RECOMMENDATIONS

Over the past half-century, correctional scholars have taken up two challenges: showing that treatment interventions "work" and showing how best to undertake interventions with offenders. This knowledge construction is significant given the difficulty of the task. Indeed, treatment staff see offenders only after a life course of criminal development that is typically accompanied by an array of personal and social deficits (e.g., antisocial attitudes, low educational attainment). Staff are asked to save these wayward souls with limited training and resources, in daunting environments (e.g., disadvantaged communities, prisons), and few extra rewards for a job well done. In this context, it is perhaps remarkable to discover that treatment programs are effective and, if done appropriately, can yield significant reductions in recidivism.

83. Francis T. Cullen et al., *The Accountable Prison*, 28 J. CONTEMP. CRIM. JUST. 77 (2012); Cullen et al., *Reinventing Community Corrections*, *supra* note 69.

84. See, e.g., Chin, *supra* note 14.

85. For a discussion, see Cullen, *supra* note 37.

86. Thielo, *supra* note 13, at 88 tbl.3.16.

Research in this area is particularly valuable because it gives clear instructions about what to do, and not to do, with offenders. This chapter has attempted to provide a context for understanding these issues. It is now possible to conclude by conveying five policy recommendations:

1. **Do not use punishment to change behavior.** Correctional programs that are punitively oriented—that is, that use surveillance, discipline, control, threats, incarceration, or other unpleasant sanctions—have a long history of failure. They do not target for change the known risk factors for recidivism. They should not be used. New interventions of this genre should be viewed with considerable skepticism. They almost certainly will fail or, at best, have limited effectiveness.
2. **Do use rehabilitation to change behavior.** The research is equally clear that a therapeutic or human-service approach to corrections is most likely to reduce recidivism. These interventions are aimed at helping offenders to acquire the cognitions, problem-solving and coping skills, and human capital needed to overcome the deficits that place them at risk of criminal conduct. Such modalities might include various forms of counseling programs (e.g., individual, family, group) or skill-building programs (e.g., CBT, social skills, academic/employment).⁸⁷ Programs with a therapeutic or human-service orientation should be used.
3. **Use the RNR model until an equally effective model is developed.** The RNR model is built upon theory and research that are grounded in science and explained in detail in Bonta and Andrews's *The Psychology of Criminal Conduct*—a 449-page compendium of treatment knowledge that should be read by all. The RNR model is the most coherent and empirically supported rehabilitation approach, and thus it should now be considered the preferred option when undertaking offender treatment. Using alternative modalities—however well-intended—risks opportunity costs that will decrease offenders' prospects for reform and thus endanger public safety. At the same time, other promising intervention strategies should continue to be evaluated. The ultimate goal should be to have multiple effective treatment options available for use by practitioners.
4. **Professionalize correctional treatment, introducing accountability for using ethical and effective interventions with offenders.** Two hallmarks of any profession are adherence to a code of ethics and the use of specialized knowledge. It is no longer permissible for offenders—whatever their deficiencies or ill behavior—to be responded to in gratuitously

87. See Lipsey, *supra* note 48, at 142–43.

mean-spirited ways or to be subjected to unproven, if not disproven, “treatments” that amount to little more than quackery. As with others who treat human beings—such as physicians and psychologists—undertaking correctional rehabilitation must be seen as a profession governed by ethics (e.g., a “Correctional Hippocratic Oath”)⁸⁸ and by the use of interventions that are evidence-based. Correctional managers and their staff should be held accountable for avoiding malpractice and for achieving reasonable reductions in recidivism. In short, unethical, ineffective, and unaccountable treatment practices should not be tolerated and should be replaced by interventions that are based on the principles of ethical human-service delivery, evidence-based programs, and accountability for improving offenders’ lives and increasing public safety.

5. **Link rehabilitation to a policy of offender redemption.** Scholars have documented the numerous barriers—informal and legal—that offenders experience in attempting to re-enter society after a conviction, whether following a trial or a stay behind bars. One way to mitigate these criminogenic obstacles is to offer offenders the possibility of full legal redemption, which hopefully will increase their acceptance by community members. The past half-century was a period in which offender exclusion was embraced through the use of punitive rhetoric, mass imprisonment, and the endless imposition of collateral consequences. At present, however, a movement for offender inclusion is under way that embraces policies such as “ban the box” in employment applications, prison downsizing and justice reinvestment, and calls to eliminate many collateral consequences. The context thus is promising for considering formal ceremonies that would signify that an offender’s rehabilitation is complete and that this individual is a candidate for legal redemption. Earning redemption might involve completing a designated treatment program and booster sessions, remaining crime-free for a period of time (e.g., three to seven years depending on an offender’s criminal history), and performing good works in their community (e.g., volunteering in a local nonprofit organization). Rehabilitation thus should be seen not only as an end in and of itself but as a means for achieving redemptions—that is, of erasing what James Jacobs has called “the eternal criminal record.”⁸⁹

88. For a discussion of a Correctional Hippocratic Oath, see Cullen, *supra* note 82, at 16.

89. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015).

Prison Conditions

Sharon Dolovich*

In American prisons, two of the worst pathologies—hypermasculine performance and gang activity—are best understood as strategies of self-help engaged in by people who cannot trust the prison authorities to keep them safe. Given the choice, the overwhelming majority of people in prison would prefer to drop the mask and be themselves. But letting down one's guard is a luxury enjoyed only by people who feel safe. If we want the people we incarcerate to grow and change, we need to design and operate the prisons so that people can be in company with others without needing to be constantly afraid. In this chapter, I identify several strategies prison administrators can pursue in their facilities right now to reduce the threat of violence in men's prisons and therefore enhance prisoners' safety without resorting to solitary confinement. But keeping people safe while enabling them to interact with others, though essential, is not sufficient. It is also necessary to provide access to meaningful pursuits that can give individual prisoners a sense of purpose. Only then will people living behind bars be able to fully step away from the culture of the prison and reorient themselves in a healthy, pro-social, and productive direction.

I. THE PROBLEM AND WHY WE SHOULD CARE

Over the past few years, mass incarceration has become a widely acknowledged fact of the American penal system.¹ So has the racial skew of this phenomenon, with its marked overrepresentation of people of color, and African-Americans in particular.² Equally well-recognized are the ways expansion of imprisonment has compromised a range of institutions and

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1. See, e.g., Todd R. Clear & James Austin, "Mass Incarceration," in the present Volume.
2. See, e.g., Cassia Spohn, "Race and Sentencing Disparity," in the present Volume.

social goods necessary for a healthy, well-functioning polity, including stable families and communities, access to education, housing, and employment, and fair opportunities for democratic participation.

With this awareness has come a seeming agreement across the political spectrum that the American prisoner population must be reduced. Efforts to this end have emerged across the country, in red states as well as blue. All this is to the good. But what is often missing from the policy discussion is consideration of what the dramatic expansion of the American carceral system has meant for the day-to-day experience of the more than 2.2 million men and women currently living behind bars in the United States.³ A conversation focused solely on how to reduce this number risks missing the obvious fact that, in the meantime, the American carceral system is failing daily to ensure safe and humane conditions for the people who live inside.

Why should this failure concern us? My own view is that keeping people safe and enabling them to live productive and meaningful lives even while they are locked up is a moral imperative, a non-negotiable obligation society has towards the people it has chosen to incarcerate. This view is increasingly shared by people across the political spectrum, including many Evangelical Christians, whose faith informs a deep commitment to second chances and the possibility of redemption, and who therefore refuse to see people only in terms of the worst thing they have ever done.⁴

But there are also at least two purely instrumental reasons for caring what life is like for those in prison. The first is public safety. In the United States, the vast majority of people who wind up behind bars are eventually released,⁵ which means that treating people inhumanely while they are in custody is ultimately self-defeating.⁶ America's prisoners are already among society's most disadvantaged members: disproportionately likely to be suffering from

3. *Criminal Justice Facts*, SENT'G PROJECT, <http://www.sentencingproject.org/criminal-justice-facts/> (last visited Mar. 28, 2017).

4. See, e.g., Galen Carey, *Limit the Use of Solitary Confinement in Prisons and Jails*, NAT'L ASS'N EVANGELICALS (Feb. 25, 2014), <https://www.nae.net/limit-the-use-of-solitary-confinement-in-prisons-and-jails/>; *Alternative Punishment for Nonviolent Crimes*, NAT'L ASS'N EVANGELICALS (Nov. 2013), <https://www.nae.net/alternative-punishment-for-nonviolent-crimes/>; *Support for Smarter Sentencing Act*, NAT'L ASS'N OF EVANGELICALS (Aug. 1, 2013), <https://www.nae.net/support-for-smarter-sentencing-act/>.

5. See generally Susan Turner, "Reentry," in the present Volume.

6. See TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REENTRY TRENDS IN THE UNITED STATES (2004), <https://www.bjs.gov/content/pub/pdf/reentry.pdf> ("At least 95% of all State prisoners will be released from prison at some point; nearly 80% will be released to parole supervision.").

drug addiction, severe mental illness, and learning disabilities; to be indigent, unskilled, and poorly educated; and to have been subjected to serious abuse and/or neglect as children.⁷ Given the fear, stress, and deprivation that prison frequently entails, being incarcerated for extended periods is almost certain to leave people even more unfit for law-abiding and productive lives than when they went in. Even those individuals who manage to stay relatively safe and healthy while inside are likely to find it difficult to adjust to freedom after years of constant tension and watchfulness in an environment that fosters distrust and apprehensiveness towards others. Under these circumstances, it should be no surprise that some people who have done time respond to the considerable challenges of returning to society with anger, aggression, and even violence. This is plainly no way to encourage successful reentry. And absent effective social reintegration of the people newly released from prison, the harms the carceral system inflicts are sure to be exported, one way or another, to the community at large.⁸

The second instrumental reason to care if people in custody are treated humanely is that the safety and well-being of prison staff may depend upon it. Prisons that are scary and stressful for prisoners are also scary and stressful for the correctional officers (COs) and other staff who work inside. COs have some of the highest levels of depression, anxiety, substance abuse, and suicide of any profession.⁹ Their families also suffer an elevated risk of violence at home.¹⁰ All these pathologies are manifestations of the extreme stress and psychic pain COs and other prison staff can experience on a regular basis in environments defined by anger, resentment, tension, and fear. Prisons cannot be safe and healthy places to work unless they are safe and healthy places to live.

What would a safe and healthy prison look like? At a minimum, in such places, personal security could be taken for granted, and people would have no

7. Cf. Stephen J. Morse, "Mental Disorder and Criminal Justice," in Volume 1 of the present Report; Margo Schlanger, "Prisoners with Disabilities," in the present Volume.

8. Not to be overlooked is the significant public health dimension of this concern: the close quarters and insufficient institutional attention to prisoners' health also makes prisons breeding grounds for all manner of infectious diseases, including hepatitis C, MRSA, various STDs (HIV, syphilis, gonorrhea, etc.), and even tuberculosis. The failure to take prisoners' health seriously creates an increased risk of the spread of these conditions to families and communities once people are released from custody. I thank Sean Barry for sharing his expertise on this issue.

9. See JAIME BROWER, OFFICE OF JUSTICE PROGRAMS DIAGNOSTIC CENTER, U.S. DEP'T OF JUSTICE, CORRECTIONAL OFFICER WELLNESS AND SAFETY LITERATURE REVIEW 10–12 (2013), https://www.ojpdnasticcenter.org/sites/default/files/spotlight/download/CorrectionalOfficerWellnessSafety_LitReview.pdf.

10. See Colby Valentine et al., *Correctional Officers and Domestic Violence: Experiences and Attitudes*, 27 J. FAM. VIOLENCE 531 (2012).

need to be constantly looking over their shoulders. Removing all trace of fear would allow people living in custody to be calm and unafraid in the company of staff and other prisoners and to focus on building the most meaningful lives possible within the confines they face. The priority could be on personal growth and self-development, not mere survival. In such a climate, the way would be open for individuals to interact with others on terms of mutual respect and to decide for themselves how they want to conduct themselves, rather than having their priorities and reactions determined by others.

Unfortunately, the conditions of life in too many prisons around the country—especially men’s prisons, on which I focus here¹¹—diverge substantially from this vision. Instead, every day, hundreds of thousands of people, not trusting the authorities to keep them safe, feel compelled to engage in various forms of self-help in a bid to assure their own safety. Such strategies range from constant vigilance and wary reticence in all interpersonal interactions to hypermasculine posturing and even aggression toward others in the hope of deterring would-be victimizers.¹² In this environment, gang affiliation is a rational response.

As might be expected, living this way over extended periods takes a serious toll, physically as well as psychologically. Given the choice, the overwhelming majority of people in prison would prefer an environment in which they could drop the mask and be themselves. But letting down one’s guard is a luxury enjoyed only by people who feel safe. The key to humane prison conditions lies in this simple truth: prisons are tense and dangerous places to the degree that prisoners feel unsafe. If we want the people we incarcerate to grow and change, and if we want them to cultivate a capacity for productive and pro-social engagement with others and the world around them, we need to create the conditions in which personal growth is a conceivable possibility. This means designing and operating prisons so that people can be in company with others without needing to be constantly afraid and on guard.

11. Although my focus in this chapter is on men’s prisons, many of the lessons to be drawn—most notably the need to keep people in custody safe from harm, to treat them with respect, and to provide decent living conditions and access to humanizing pursuits—apply equally to women’s prisons.

12. See generally Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 1002–13 (2012) [hereinafter Dolovich, *Two Models*]. Trans women housed in men’s facilities have a different set of strategies to keep themselves safe. These often involve “hooking up” with a more powerful male-identified prisoner, exchanging sexual access for protection from violence and predation by others. See Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 AM. CRIM. L. REV. 1, 11–19 (2011) [hereinafter Dolovich, *Strategic Segregation*]; see also Dolovich, *Two Models*, *supra*, at 1025.

To be sure, even as it is, many people do manage to grow and develop in positive and productive ways while in prison. But in most cases, this feat is achieved in spite of the prison environment, not because of it. Any prison redemption story will always feature some account of how the narrative's subject managed to ensure their own safety. If personal growth and self-reflection are to be possible for more than just a lucky few, prison administrators and policymakers must make a priority of keeping everyone safe. A person cannot grow and mature, much less repent or feel remorse, if they are perpetually scared, stressed out, or on edge.

Some facilities currently opt to ensure the safety of vulnerable prisoners with what is euphemistically known as “protective custody,” but which in reality is simply social isolation in solitary confinement. The logic is understandable: someone locked down in a single cell at least cannot be stabbed or raped by fellow prisoners. But this approach is no real solution, for two reasons. First, a strategy of social isolation cannot be scaled. It is simply too expensive and resource-intensive to hold all prisoners in solitary confinement. Second and more importantly, if the goal is meaningful self-reflection and personal growth on a path to productive pursuits and effective social integration, social isolation is entirely counterproductive.¹³ Recent experiments with extended solitary confinement in American prisons have made clear that this carceral practice causes serious psychological harm, leaving people deeply ill-equipped to engage with others in healthy, pro-social ways. In one authoritative study of long-term solitary in California's Pelican Bay prison, Craig Haney found that “nearly 90% of inmates suffered a psychopathological effect, and nearly half suffered from ‘extreme forms of psychopathology,’” including suicidal ideations, hallucinations, perceptual distortions, chronic depression, social

13. In practice, solitary confinement cannot even guarantee physical safety. For one thing, in many facilities, people in solitary confinement—including protective custody—are often double celled, which means that people are locked up in pairs in a very small space with access to few if any pro-social outlets for the frustration and anger such conditions will inevitably engender. There is thus a real danger of in-cell violence between cellmates. And even when people in solitary are single celled, doors can be unlocked and access achieved regardless of policy. The myriad cases of physical and sexual assault against people being held in protective custody testify to this disturbing reality.

withdrawal, confused thought processes, and irrational anger.¹⁴ These findings should have come as no surprise. More than a century ago, in an 1890 case challenging solitary confinement in Colorado prisons, the United States Supreme Court roundly condemned this custodial practice, which had been widely used in several states, most notably New York and Pennsylvania.¹⁵ The problem, the Court explained, was the psychological damage it caused:

A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.¹⁶

It turns out that social interaction is necessary for psychological stability and mental health. Without it, it may not take long for individuals to lose the capacity for ordinary pro-social interaction. What people need in prison is safety without isolation.

There are many strategies available to prison administrators to pursue in their facilities that would reduce the threat of violence in men's prisons and therefore enhance prisoners' safety without resorting to solitary confinement. In this chapter, I identify several such strategies. But keeping people safe while affording them an ongoing ability to interact with others, though essential, is not sufficient. It is also necessary to provide access to meaningful pursuits

14. See John Stinneford, *Original Meaning and the End of Long-Term Solitary Confinement* (unpublished manuscript) (on file with the author) (quoting Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 *CRIME & DELINQ.* 124, 127 (2003)). One 2010 study, undertaken by the Colorado Corrections Department, seemed to reach the opposite conclusion, finding "not just a lack of deterioration in mental health after long periods with virtually no human contact, but also, incredibly, some slight improvement." Susan Greene, *Greene: Questioning Study that Showed Inmates in Solitary Get Better*, *DENVER POST* (Nov. 6, 2010), <http://www.denverpost.com/2010/11/06/greene-questioning-study-that-showed-inmates-in-solitary-get-better/>. But that study was widely criticized on methodological grounds, and is at odds with the great weight of the evidence, which overwhelmingly bears out Haney's findings. For a critical analysis of the Colorado study, see Stuart Grassian, *"Fatal Flaws" in the Colorado Solitary Confinement Study*, *SOLITARY WATCH* (Nov. 15, 2010), <http://solitarywatch.com/2010/11/15/fatal-flaws-in-the-colorado-solitary-confinement-study/>.

15. *In re Medley*, 134 U.S. 160, 168 (1890). In the late 18th and early 19th centuries, Pennsylvania and New York pioneered this approach, designing entire carceral facilities on a model of solitary confinement. But it quickly became clear that, instead of promoting self-reflection, enforced social isolation was an incubator for extreme psychological dysfunction of the sort Haney found at Pelican Bay.

16. *Id.* at 168.

that can give individual prisoners a sense of purpose. Only then will people living behind bars be able to fully step away from the culture of the prison and reorient themselves in healthy, pro-social, and productive directions.

The remainder of this chapter proceeds as follows. Part II briefly identifies two key reasons for the current state of American prisons: extreme overcrowding and the commitment to penal harm that defined the American approach to punishment for the past three decades or more. Part III zeroes in on the worst defining pathologies of the inmate culture in many men's prisons—hypermasculine performance and gang activity—and locates their persistence in the constant fear experienced by people who live 24/7 in environments where their physical safety cannot be guaranteed. Part IV explores the limits of back-end judicial review as the primary means to regulate prison conditions. It argues that, notwithstanding the ongoing importance of constitutional review, the most promising mechanism for significantly improving the lives of prisoners is direct, front-end policymaking by those actors with the authority to decide how prisons are run. Part V is the practical heart of the chapter. It identifies a number of reforms that, if implemented, would go far to improving conditions of confinement in American prisons. Part V.A focuses on several macro-level changes—most prominent among them a major reduction in prison overcrowding nationwide—that would make a profound difference to prisoners' quality of life. Unfortunately, as Part V.A explains, such changes would require both considerable financial investment and a deep ideological shift in the nation's disposition toward prisoners, and are thus unlikely to come about in the near term. The remainder of Part V is therefore focused on more localized policy initiatives that are currently available to policymakers. Part V.B offers seven recommendations in the areas of classification and monitoring and of staff-prisoner relations, and Part V.C identifies two further strategies designed to promote positive personal growth and self-respect on the part of people in custody, who typically lack avenues for either. Although none of these recommendations will entirely transform the prison environment, each promises to reduce violence on the inside and thereby to ease the debilitating stress and fear that many people in prison live with on a daily basis. As Part V.C explains, this change would open the way for people in prison to pursue meaningful personal projects and cultivate a sense of purpose beyond mere survival—and suggests that, the more they are able to do so, the safer and more humane the prison environment is sure to be. Finally, Part VI calls attention to the unmistakable connection between safety and humanity, and the vital lesson

to be gleaned from this link—that we can never hope to ignite and deepen in the people we incarcerate a respect for the worth and humanity of others unless and until we are prepared to extend the same respect and recognition to them.

Although this chapter is focused largely on prisons, in many respects, the challenge of ensuring prisoners’ personal safety is still greater in jails.¹⁷ This is especially the case in big jails with constant turnover, where housing assignments are often based on the most cursory classification assessments.¹⁸ In such facilities, the steady population churn only intensifies the fear of violence, as detainees continually find themselves in close proximity to new and unknown companions, any one of whom may pose a threat. Still, many of the strategies I identify as likely to improve the safety of people in prison are applicable to the jail context as well¹⁹—as is the baseline precondition for deep and lasting reform to the conditions of confinement: a substantial reduction in the sheer number of people being held behind bars.²⁰

II. HOW DID WE GET HERE? OVERCROWDING AND THE COMMITMENT TO PENAL HARM

Even at the best of times, the project of ensuring safe and humane conditions for people in prison is a challenging one. When the state incarcerates, it removes people from their homes and communities and holds them against their will, in close quarters with total strangers, for days, months, and even years at a time. However justified the state may have been in taking this step, people in this position are nonetheless likely to be frustrated, resentful, and angry, not to mention scared and even traumatized by the experience.

Now imagine adding to this potent mix the pressures created by chronic overcrowding. Every carceral facility is designed and built to a rated capacity reflecting the number of prisoners it is equipped to accommodate. This measure pertains not only to the number of beds and minimum square footage of living

17. Prisons, administered by the state, are those facilities designed to hold people sentenced to more than one year. Although people regularly come and go, the average prison sentence is 4–5 years, which means that people in prison typically settle into their housing units and build their lives as best they can within obvious constraints. Jails, by contrast, are run by local municipalities. They hold people awaiting trial or sentencing or people who receive custodial sentences of less than one year.

18. Nationwide, approximately 10–12 million people are booked into jail annually. Many are out in a few hours, but many others stay for months and in some cases even for years.

19. Indeed, it was through my research in the L.A. County Jail, the biggest jail system in the country, that I developed my understanding of many of the strategies I propose in Part V of this chapter.

20. See, e.g., Megan Stevenson & Sandra G. Mayson, “Pretrial Detention and Bail,” in Volume 3 of the present Report; Clear & Austin, *supra* note 1.

space per person, but also to the space allotted for the many services every institution must provide, including medical clinics, infirmary beds, mental-health services, kitchens and dining rooms, laundry, canteen, law libraries, educational programming, and recreation. When prisons are overcrowded, it is not just that prisoners are jammed into dormitories or doubled up into small cells designed for a single person. Overcrowding also means that there is insufficient capacity for all these vital services, which all but guarantees that illness and disease will go untreated, that people will face long waits for pretty much everything, and that levels of frustration, stress, and anger will remain high. In the prison context, this is a recipe for disorder, volatility, and violence.²¹ Adding to the dysfunction is the fact that, in overcrowded prisons, most people will lack access to meaningful and productive pursuits that might provide a reason to resist the pathological dynamics such environments breed.

Overcrowding is thus a major reason why conditions in American prisons and jails are as unsafe and unstable as they too frequently are. A second reason is the decades-long commitment among policymakers to what Francis Cullen once called the philosophy of “penal harm.” On this approach, “the essence of the penal sanction is to so harm or hurt offenders that they will stop offending to avoid a continuation or repeat of penal harm.”²² Regardless of whether penal harm is an effective way to reduce crime—a doubtful proposition²³—

21. As psychiatrist Terry Kupers explains,

In crowded, noisy, unhygienic environments, human beings tend to treat each other terribly. Imagine sleeping in a converted gymnasium with 150 to 200 prisoners. There are constant lines to use the toilets and phones, and altercations erupt when one irritable prisoner thinks another has been on the phone too long. There are rows of bunks blocking the view, so beatings and rapes can go on in one part of the dorm while officers sit at their desks in another area. The noise level is so loud that muffled screams cannot be heard. Meanwhile the constant noise and unhygienic conditions cause irritability on everyone’s part. Individuals who are vulnerable to attack and sexual assault—for example, smaller men, men suffering from serious mental illness, and gay or transgender persons—have no cell to retreat to when they feel endangered.

Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, in *THE TRAUMA OF PSYCHOLOGICAL TORTURE* 127, 130 (Almerindo Ojeda ed., 2008). As Kupers puts it, “[i]s it any wonder that research clearly links prison crowding with increased rates of violence, psychiatric breakdowns, rapes, and suicides”? *Id.*

22. *NCJRS Abstract*, NAT’L CRIM. JUST. REFERENCE SERV., <https://www.ncjrs.gov/App/publications/abstract.aspx?ID=156425> (last visited Aug. 7, 2017) (providing an abstract of Francis T. Cullen, *Assessing the Penal Harm Movement*, 32 J. RES. CRIME & DELINQ. 338 (1995)); see also Cullen, *supra*, at 341–43 (discussing TODD R. CLEAR, *HARM IN AMERICAN PENOLOGY: OFFENDERS, VICTIMS, AND THEIR COMMUNITIES* 4 (1994)).

23. See generally Daniel S. Nagin, “Deterrence,” in the present Volume; Shawn D. Bushway, “Incapacitation,” in the present Volume.

this disposition has for decades fed a collective indifference to the personal security and well-being of the people society has chosen to incarcerate, and an utter unconcern with whether, while they are inside, they will have access to the means to preserve their personal identities and to grow and develop as moral actors. Instead, thanks to the penal harm philosophy, warehousing—in demoralizing, dehumanizing, and often dangerous conditions—became the order of the day. Throw in insufficient staffing and the adversarial “us” versus “them” dynamic between prisoners and staff that frequently defines the culture of the prison, and you have an environment in which people in custody cannot rely on prison officials to keep them safe.

III. WHAT HAPPENS IN PRISON WHEN PEOPLE ARE AFRAID? HYPERMASCULINE POSTURING AND PRISON GANGS

When people in prison realize that the staff cannot guarantee their safety, they do what anyone would do in the same situation: they avail themselves of whatever forms of self-help seem most likely to ensure their own protection. In prisons that are overcrowded, understaffed, and under-resourced, people generally have only two options: protect themselves as best they can on their own, or band together with other prisoners in a collective bid for mutual security.

Each of these strategies carries its own pathologies. At the individual level, this situation generates what might be called a *hypermasculinity imperative*.²⁴ This imperative puts pressure on people to seem “hard and tough, and [not] show weakness.”²⁵ The archetype of the stoic, weightlifting, muscle-bound prisoner has its origins in this dynamic. The imperative not to be seen as weak can dominate the lives of men in custody, especially in high-security facilities. Men cannot be perpetually violent, but they can—and in the worst prison environments, must—be constantly vigilant lest they convey an impression of vulnerability. This pressure on prisoners can feed a culture of belligerence, posturing, emotional repression, and ready violence that rewards indifference to others and impels the strong to victimize the weak.

Such an environment, moreover, is fertile ground for prison gangs, which represent the primary vehicle for mutual protection. Gang culture thrives where people are afraid and anxious not to be seen as weak.²⁶ The gang code

24. See Dolovich, *Two Models*, *supra* note 12, at 971.

25. See Derrick Corley, *Prison Friendships*, in PRISON MASCULINITIES 106 (Don Sabo et al. eds., 2001).

26. As Haney explains, “[g]angs only flourish in a jail or prison society where there is a strong undercurrent of fear and reminders of one’s own vulnerability.” Craig Haney, *The Perversions of Prison: On the Origins of Hypermasculinity and Sexual Violence in Confinement*, 48 AM. CRIM. L. REV. 121, 136 (2011). See generally Scott H. Decker, “Gangs,” in Volume 1 of the present Report.

demands overt and persistent displays of toughness and invulnerability, as well as a propensity for violence—all core components of hypermasculinity. At the same time, demonstrated dedication to the rigors of gang life is the perfect way to command respect and protect against aspersions of weakness, cowardice, or being a “sissy.” For men in custody, gang involvement—especially in a leadership role, which can carry power and status—helps to ensure personal security in a climate in which the unaffiliated make easy targets.

The collective dehumanization of people in custody has fueled a notion of prisoners as subhuman—and, at the extreme, as animals or even monsters.²⁷ To some extent, this is simply rank animus. But to many outsiders, hypermasculine performance and the prison gang culture it feeds can seem so inexplicable, so amoral, so Hobbesian state-of-nature that it is hard to feel empathy and understanding. What many observers fail to recognize, however, is that, especially in general population (GP) units,²⁸ hypermasculine posturing is a mechanism of self-protection employed by people who feel vulnerable to harm. As for the ubiquity of prison gangs and related pathologies, although GP units vary between—and even within—institutions in the degree to which residents feel at risk, men in GP nearly always feel the need to band together and collectively project an image of toughness and implacability in order to ensure their mutual protection.²⁹

It is crucial to recognize that the vast majority of people who live this way would not do so if they felt they had a choice. In most cases, prisoners’ hypermasculine posturing and ensuing pathologies arise not from an inherent preference for violence, but from fear. It may, in other words, not be the prisoners who make the prison, but rather the prison—and in particular the widespread failure of the system to keep people safe—that makes the prisoners.³⁰

This way of living, if adaptive, is nonetheless deeply corrosive, psychologically and morally as well as physically. Many people do their best to stay away

27. See Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 288–95 (2011) (explaining the process by which people with criminal convictions are socially constructed as “moral monsters” and identifying the social purposes this construction may serve).

28. These same dynamics are also evident in specialized housing units—for example, the massive “sensitive needs yards” in the California prisons. But they are often definitive of the GP experience, which is why I focus on GP here.

29. As Shon Hopwood observes in a memoir of his time in federal prison, “[y]ou can try to serve your time outside a circle of protection, but chances are you will be stolen from, beat on, and generally abused.” SHON HOPWOOD, *LAW MAN* 63 (2012).

30. For a powerful and moving account of the process by which this transformation occurs, see Haney, *supra* note 26.

from its most extreme manifestations. They keep their heads down and try to do their own time. And depending on the facility, this strategy may well be successful. But any such success is always provisional, and many find the pressure impossible to resist.

As already noted, there are many reasons why it is incumbent on state officials to take steps to shift this set of pathological dynamics in a healthier direction. In Part V, I suggest ways this desirable end might be achieved. But first, I consider the question of how, legally speaking, this situation has been allowed to continue. Surely, the conditions described here cannot be constitutional. But if so, where are the courts?

IV. WHERE ARE THE COURTS? THE LIMITS OF CONSTITUTIONAL LAW AND THE NEED FOR FRONT-END POLICY REFORM

The Eighth Amendment to the United States Constitution prohibits the infliction of “cruel and unusual punishment.”³¹ Although framed in the negative, as something the state may not do, the ongoing nature of incarceration means that the Eighth Amendment in fact imposes on the state a non-negotiable affirmative obligation to provide people in prison with “the minimal civilized measure of life’s necessities.”³² The state, in other words, must meet prisoners’ “basic human needs.”³³ It is beyond question that this obligation encompasses the provision of adequate food and water, protection from extreme temperatures, clean and dry living quarters, and adequate medical and mental-health care. These are basic needs that all human beings must satisfy if they are to avoid serious physical and psychological suffering. But in addition, by virtue of their incarceration, prisoners also need an assurance of physical safety, and this need too is one the state is constitutionally obligated to meet. It is plainly cruel to punish criminal offenders with the strap,³⁴ with rape, or with any other form of brutal corporal treatment. And for the same reason, the state may not place incarcerated offenders in a position of ongoing vulnerability to assault, thus creating conditions that would amount to the same thing.

In part, the state’s affirmative obligation to ensure the physical safety of the people it incarcerates reflects an imperative to prevent the physical pain and

31. U.S. CONST. amend. VIII.

32. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

33. See *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989). As Chief Justice Rehnquist put it, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.” *Id.* at 199–200.

34. See *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

suffering attendant on bodily assault.³⁵ But the need to keep people safe arises equally from the need to minimize the severe *psychological* harm experienced by people in situations of insecurity and uncertainty about their personal safety. There is something deeply dehumanizing about living for extended periods in a state of fear. At worst, people in such circumstances exist in a perpetually anxious and even traumatized state, bereft of any peace of mind and ready to protect themselves whatever the cost. But fear need not reach this fever pitch to take a serious toll. The experience of living in an unsafe environment for months, years, or even decades is sure to be psychologically corrosive even for those able to find pockets of psychic repose.

The Supreme Court has held that prison officials violate the Eighth Amendment when they are “deliberately indifferent” to a substantial risk of serious harm to prisoners. In *Farmer v. Brennan*, the Court held that deliberate indifference cannot be found unless an “official knows of and disregards an excessive risk to inmate health or safety.”³⁶ This means that prison conditions violate the Eighth Amendment when prisoners face a substantial risk of serious harm of which prison officials were aware and to which they did not adequately respond. Above, I argued that hypermasculine posturing and gang activity signal a failure on the part of prison administrators to ensure the personal safety and security of the people we have locked away—a failure of which prison officials, who surely recognize when such destructive and destabilizing self-help strategies dominate the internal prisoner culture in their facilities, must necessarily be aware. If I am right, the obvious presence of these pathologies clearly indicates that state officials (1) have failed to meet prisoners’ basic need for physical and psychological safety and (2) know they have done so, making this failure unconstitutional under governing law.

Constitutional rights, however, are not self-executing. They require some individual or group to mount a constitutional challenge. They require the court to find a violation as a matter of law and to impose some effective remedy, whether an injunction against continued unconstitutional conduct on the part of the state or monetary damages sufficient to incentivize a change in official policy. And they require that the remedy imposed be effectively enforced. Navigating this multistep process to a successful end is a tall order even for well-resourced plaintiffs. In the case of prisoners, the obstacles to meaningful judicial enforcement of their constitutional rights are often insurmountable. To start with, to get a hearing on the merits, people in prison must navigate

35. Cf. Jeffrie G. Murphy, “Retribution,” in the present Volume.

36. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). This holding makes deliberate indifference a synonym for the culpable mental state of criminal recklessness.

a veritable procedural thicket. Among other things, procedural hurdles can include onerous time limits, strict exhaustion requirements, and complex rules concerning when, how, and in what form claims must be filed.³⁷ Because there is no right to counsel for prison-conditions challenges and because most people in prison are indigent, those prisoners seeking to raise constitutional claims in federal courts largely do so without the help of a lawyer. To make matters worse, people trying to litigate constitutional claims from inside a jail or prison will confront innumerable structural obstacles, including those of inadequate law libraries and insufficient legal assistance if they need help with their claims. And most prisoners do need such help, whether because they are illiterate, non-native English speakers, mentally ill, or simply among the more than 96% of American prisoners who are unable to “integrate, interpret, or synthesize” information from complex or lengthy documents, draw complex inferences, or assimilate competing information—all of which, as any law student will attest, are capacities integral to constructing a sound legal argument.³⁸ Collectively, these obstacles mean that even prisoner suits raising valid constitutional claims will often be lost well before a hearing on the merits.

Other structural features of prison-conditions challenges also tell against meaningful judicial enforcement of prisoners’ Eighth Amendment rights. Court-ordered systemic reforms typically arise from class-wide macro-level challenges to the functioning of an individual facility or the state system as a whole. But these cases are especially hard to bring. They are costly and can demand extensive fact-finding, not to mention familiarity with the complicated rules governing such actions. And even when systemic challenges yield a finding of unconstitutionality, they generally require ongoing attention to ensure continued compliance with the court order. Individual prisoners, who typically

37. Many of these hurdles were established by the Prison Litigation Reform Act (PLRA), passed by Congress in 1996. If the judicial process is to fairly entertain prisoner’s constitutional claims, several aspects of that legislation must be reformed, including its strict exhaustion requirement and the attorneys’ fees provisions that dramatically disincentivize lawyers from representing even those prisoners with strongly meritorious constitutional claims.

38. INST. OF EDUC. SCIS., U.S. DEP’T OF EDUC., HIGHLIGHTS FROM THE U.S. PIAAC SURVEY OF INCARCERATED ADULTS: THEIR SKILLS, WORK EXPERIENCE, EDUCATION, AND TRAINING at B-3 (2016), <https://nces.ed.gov/pubs2016/2016040.pdf>; PIAAC 2012/2014 Results, INST. OF EDUC. SCI., <https://nces.ed.gov/surveys/piaac/results/makeselections.aspx> (last visited June 7, 2017) (follow “Make Selections” hyperlink; then under “Select Sample” follow “Prison 18-74” hyperlink; then under “Results” select “Proficiency Level” hyperlink). To be sure, only 13% of all Americans ages 16–74 have this level of literacy. See *id.* But then, we as a society have not generally made the basic health and safety of most Americans contingent on their ability to navigate a complex maze of statutes, regulations, procedures, and judicial opinions.

lack resources, specialized legal knowledge, and the ability to gather evidence, demand discovery, or enforce court orders are virtually always incapable of navigating this process to successful completion.³⁹

Even apart from these hurdles, constitutional enforcement through the courts is a decidedly non-ideal mechanism for motivating far-reaching change.⁴⁰ Judges can only decide individual cases and are greatly limited in the sorts of system-wide remedies they are able to impose, even for claims arising from macro-level dysfunction. This piecemeal approach largely puts effective broad-based systemic reform beyond the power of the courts. And even when prisoners win their cases, the inherently adversarial nature of the judicial process means that prison officials often resist putting court-ordered reforms into effect. As a result, resources that could be more productively directed to identifying and implementing meaningful system-wide change are too often expended in an ongoing game of cat and mouse, as prisoners' advocates seek to force prison administrators to comply with court orders and prison officials try to avoid doing so.

This is not to say that prisoners' rights litigation does not represent a vital channel for ensuring the protection and well-being of people in prison. In the current regulatory environment, courts are indispensable; they allow for the prospect of vindicating individual constitutional rights and play a key role in the collective push to make prisons constitutionally compliant and thus safer and more humane. If, however, the aim is to substantially transform the prison environment, policymaking on the front end will necessarily be a far more efficient and potentially effective channel than back-end judicial review.⁴¹

The question then becomes: Who makes front-end prison policy? The answer is more complicated than might at first be thought. Every state has its own prison system, as does the federal government. In each jurisdiction, prisons are part of the executive branch. State prisons are operated by the state Department of Corrections (DOC), which has authority over them. State DOCs—and, in the case of the federal system, the U.S. Bureau of Prisons (BOP)—are responsible for crafting and promulgating the policies to govern their facilities. In addition, each individual facility has its own chain of

39. There are many dedicated prisoners' rights lawyers across the country who do bring class actions on behalf of prisoners. However, their number is still only a small fraction of what would be required if class-action lawsuits were to effectuate comprehensive reform of prison conditions nationwide.

40. Cf. Rachel A. Harmon, "Legal Remedies for Police Misconduct," in Volume 2 of the present Report.

41. See, e.g., Maria Ponomarenko & Barry Friedman, "Democratic Accountability and Policing," in Volume 2 of the present Report.

command: its own warden, assistant warden, and other command staff. This localized leadership team, with the warden at its head, also has considerable scope to implement policies for their particular institutions. In the most basic sense, therefore, every institution is governed by policy directly dictated both by the DOC and by the warden's office.

But prison regulation is further complicated in two ways. First, although legislatures for the most part stay out of the business of prison regulation, they retain the power to dictate prison policy when they see fit. Second, the enormous discretion accorded to those officials actually running the prison day to day, and especially the line officers who are in regular contact with prisoners, means there can be a great disconnect between the particulars of governing laws or regulations and the way official power is actually exercised on the ground.

Direct, front-end prison policy is thus created at four distinct levels: by the agency charged with crafting such policies; by the warden and his or her leadership team in each individual facility; by legislators, who retain the power to determine internal prison practices; and by line officers, whose direct and immediate interaction with people in custody gives them the power to determine to a large degree the quality of an individual prisoner's experience, regardless of the finer points of the operative policy or law. And perhaps with the exception of individual line officers, who exercise considerable discretion on the ground but whose conduct as a formal matter is dictated by policy directives from higher up the chain of command, all these actors have the legal authority to determine how the prisons will be run—to propose, mandate, and pursue new approaches. This complicated environment means that prison regulation is generally a patchwork, varying widely among facilities. Among other regulatory challenges thereby created, this situation often forces advocates to challenge troubling practices one prison at a time. But it also means that there are many possible points of entry for ideas as to how to do things differently.

For simplicity's sake, the discussion to follow is addressed to prison officials, a term that could encompass either policymakers at the relevant state agency or any officer—whether in an administrative role or working the line—who is authorized or empowered to dictate policy in a given prison. In addition, as noted, it is open to legislatures to pass laws directing prison officials to adopt certain practices by statute, which means that legislators are also among this chapter's intended audience.

Strategies are available that would substantially improve the conditions of confinement in American prisons. In what follows, I identify some of them. In Part V.A, I flag the macro-level changes without which broad and lasting change will be impossible—and highlight several significant obstacles to their achievement. I then turn to the more localized strategies that may be readily pursued right now, the implementation of which would make an appreciable difference to prisoners' day-to-day experience. The prescription I offer is simple: safety without isolation and meaningful opportunities for personal growth and self-development. If we want people to grow and change in prison, which we say we do, then we have to create the conditions in which growth and change are conceivable. This means doing everything possible to ensure that people in custody need not feel afraid, and also requires offering channels through which they can engage in self-reflection, cultivate a sense of purpose, and reorient their energies and efforts away from the pathologies of hypermasculine performance and gang activity and toward pursuits that are pro-social, healthy, and productive.

V. MAKING PRISONS SAFER: A PRACTICAL GUIDE

A. OVERCROWDING AND THE NON-NEGOTIABLE NEED FOR WHOLESALE STRUCTURAL CHANGE

The serious threat to prisoners' physical and psychological health and well-being posed by existing prison conditions is no secret.⁴² Nor is it a mystery as to what it would take to meaningfully change this situation. Short of entirely rethinking the nation's approach to criminal punishment, to appreciably transform conditions in American prisons would at a minimum require:

1. A dramatic reduction in the number of people in custody.
2. Substantially increased staffing.
3. Significant investment in developing and operating effective systems for delivering medical and mental-health care to prisoners.

42. One study found that "[w]hen Americans think about someone they know being incarcerated, the vast majority, 84 percent, say they would be concerned about the person's physical safety. And 76 percent say they would be concerned about the person's health." JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUST., *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS* 29 (2006), http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (citing a "[s]urvey in March and April of 2006 by Princeton Survey Research Associates International for the National Center for State Courts and the Commission on Safety and Abuse in America's Prisons").

4. A breaking down of the “us” versus “them” dynamic that tends to exist between custodial staff and the incarcerated.

Of all these necessary changes, the most immediately crucial is to reduce the enormous number of people behind bars. As already noted, overcrowding inherently increases stress levels in prison and automatically complicates any efforts to reduce violence and keep people safe. Indeed, good prison management can be stymied without open bed space, since excess capacity allows for the immediate transfer of individual prisoners when needed to prevent violence or quell unrest. Overcrowding eliminates extra beds, and overcrowded facilities perpetually operate above their design capacity. To take one notable example, before the Supreme Court order in *Brown v. Plata*⁴³ required California to reduce the population density of its prisons, the average facility in the state was running at more than 200% capacity,⁴⁴ with 11 prisons exceeding 214% capacity⁴⁵ and one facility operating at almost 260% capacity.⁴⁶ When facilities are this crowded, people wind up sleeping in hallways and program spaces like gymnasiums and chapels on an effectively permanent basis.⁴⁷ Under such conditions, no facility can properly ensure the safety of its prisoners or staff.⁴⁸ And, it bears noting, until prison staff feel safe on the job, staffing shortages will continue to plague prisons nationwide. Staff vacancies are a perennial problem in carceral facilities. In most cases, however, the reason these vacancies persist is not a lack of qualified people or low pay, but because overcrowded prisons, filled with people who are themselves scared, stressed, and angry, are invariably experienced by employees as scary, stressful, and traumatizing places to work.

If a reduction in crowding is paramount, each of the prescriptions listed above must also be met if our prisons are ever to be meaningfully safe and

43. *Brown v. Plata*, 563 U.S. 493 (2011) (upholding the three-judge panel order issued in *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000 (E.D. & N.D. Cal. Jan. 12, 2010)).

44. See CAL. DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT SEPTEMBER 30, 2007 (2007) (reporting an occupancy rate in the state's prisons of 203.7% of design capacity overall and 207.5% for women's facilities).

45. See *id.*

46. See *id.* (reporting that Avenal State Prison, with a design capacity of 2926, was housing 7592 prisoners, for occupancy rate of 259.7%).

47. During a recent tour of L.A. County's Century Regional Detention Facility (CRDF), the deputy leading the tour referred casually to “day-room sleepers,” a term that proved to refer to the people “housed” in triple bunks placed around the perimeter of the day rooms. Each 100-person unit had roughly 20-30 people so classified, who between them shared the single bathroom intended to serve people in the unit when they were out of their cells.

48. Indeed, when facilities are this crowded, COs struggle to provide even for prisoners' most basic daily needs—meals, meds, showers, etc.

humane for those inside. Insufficient staffing necessarily translates into reduced protection and increased harm. A facility that does not deliver adequate medical and mental-health care will routinely inflict gratuitous pain and suffering on people in custody (not to mention guarantee the export of potentially harmful conditions—including communicable diseases and untreated mental illness—to society at large as people are released). And given the vast discretion afforded to COs in the exercise of their authority, a persistent culture of hostility between COs and prisoners will often lead to the gratuitous humiliation and harm of prisoners by the very people charged with keeping them safe.

None of these goals will be easy to achieve. To the contrary, each will require a heavy lift: a considerable investment of resources, the political will to make hard choices, and a commitment to dramatically reorienting a carceral culture currently disposed to view people in custody as dangerous, untrustworthy, and something less than human. Among other things, seriously tackling these challenges would require a wholesale rejection of the philosophy of penal harm.

The question of how to bring about this ideological shift is well beyond the scope of this chapter. But even if we cannot in short order transform public perceptions—and even absent broader systemic changes along the lines just sketched—there are still things that may be done to help to reduce violence and fear and thus to contain some of the most dehumanizing aspects of modern prison life. Certainly, prisons are complex institutions that vary widely, and what works in one context may not work in another. There are, however, some strategies that seem likely to reduce violence in the prison and thus decrease the overall level of psychic distress that plagues people in prison when—and because—they are afraid.

B. NO NEED TO WAIT: SEVEN STRATEGIES FOR MAKING PRISONS SAFER RIGHT NOW

1. Classification and monitoring

To begin with, there are several population-management strategies that deploy classification and ongoing monitoring to reduce contact between those people who are vulnerable to physical or sexual abuse in prison and those who are likely predators. Although perhaps counterintuitive, prison officials often respond to reports of victimization by removing the victim from the situation. In most cases, this means transferring the victim from GP to “protective custody” (a.k.a. solitary confinement). This strategy has several predictable effects. First, it disincentivizes prisoners who have experienced abuse from reporting the matter to COs, since they may prefer living with the fear of a

repeated assault to the deep psychic harm of extended social isolation. Second, it assures predatory prisoners that they will pay no price for abusing others. To the contrary, this response places the heaviest burden on those who are victimized, while allowing perpetrators to continue on as before. Officials committed to safer prisons should flip this script. Rather than waiting for reports of abuse from prisoners who have been victimized—who, even apart from the disincentive of protective custody, generally face great pressure not to “snitch”—prison officials should make it a standard practice to monitor units in an ongoing way to identify emergent predators and automatically remove predatory individuals as soon as they become known.

RECOMMENDATION: Monitor housing units in an ongoing way to identify emergent predators, and automatically remove predatory individuals as soon as they become known.

Ideally, for reasons already explored,⁴⁹ officials would not respond by transferring those predatory prisoners removed from GP to solitary confinement. The difficulty is that the obvious alternative—simply relocating them to a different GP dorm—could well expose other vulnerable prisoners in GP to the threat of predation. One possible fix is to pursue policies designed to predispose individual prisoners to choose of their own accord to leave off victimizing others. I suggest policies of this sort in Part V.C. At a minimum, however, to reduce the possibility of victimization throughout their facilities, prison officials should be more proactive from the outset in adopting policies designed to identify and separate out likely victims from likely predators for housing purposes, both when people arrive in the facility and regularly thereafter. Officials should also maintain a strict boundary between likely victims and likely predators in all areas of the prison, including but not limited to housing units.

RECOMMENDATION: Adopt policies designed to identify and separate likely victims from likely predators for housing purposes, both when people arrive in the facility and regularly thereafter.

RECOMMENDATION: Maintain a strict boundary between likely victims and likely predators in all areas of the prison, including but not limited to housing units.

This approach is consistent with the requirements of the *National Standards to Prevent, Deter and Respond to Prison Rape*, officially adopted by the United States Department of Justice in May 2012 pursuant to the Prison Rape

49. See *supra* notes 14–16 and accompanying text.

Elimination Act (PREA).⁵⁰ These standards require that “[a]ll inmates [should] be assessed during intake and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates, ... with the goal of keeping separate those at a high risk of being sexually victimized from those [likely to be] sexually abusive.”⁵¹ They also provide a list of criteria prison officials can use to identify people who are potentially at risk. These include whether “the inmate has a mental, physical, or developmental disability,” “has previously been incarcerated,” “has prior convictions for sex offenses,” “is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming,” or “has previously experienced sexual victimization.”⁵² As written, this regulation is directed exclusively at identifying likely victims of sexual abuse in custody. But its list of criteria are as good a guide as any for identifying likely victims of nonsexual physical abuse as well. All carceral facilities are required to abide by the 2012 PREA standards, which means that prison officials should already be implementing policies for assessing all individuals for likely vulnerability both on intake and pursuant to any transfer. But prison officials should go further and commit to using these criteria to guide ongoing monitoring of housing units with the aim of staying on top of shifting dynamics in existing populations.

Viewing classification as an ongoing process is especially important given that the initial intake process may not always be an effective mechanism for accurately determining a person’s risk of being victimized. In at least one major metropolitan jail with which I am familiar, intake is typically accomplished in short order by officers who sit behind glass staring at computer screens without any meaningful sightlines to the people being classified. A person’s security level—which determines their housing assignments—is thus made by someone unable to assess physical size or robustness, much less disability or prior experience of victimization (to name just two considerations identified in the PREA standards as relevant for determining vulnerability to abuse). And even adequate intake procedures will not tell the whole story as to an individual’s risk of being victimized. For example, a person who may not have seemed vulnerable on intake by virtue of their physical size may still find themselves at a relative disadvantage compared to others in the housing unit to which they are assigned.

50. Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

51. Screening for Risk of Victimization and Abusiveness, 28 C.F.R. §§ 115.41(a), 115.42(a) (2017). PREA was passed by Congress in 2003. *See* Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601 (2012).

52. Use of Screening Information, 28 C.F.R. § 115.41(d)(1)-(10) (2017).

In short, risk assessment for purposes of separating likely victims from likely assailants cannot be restricted to intake or transfer and must instead be regarded as an ongoing, dynamic process that plays out over the whole course of a person's prison term. And the process itself must be sufficiently intensive to determine the safest housing placement for each individual. This sort of in-depth process is already being implemented in the San Francisco County Jail system, where classification officers can spend up to 45 minutes interviewing each new admit, to determine not only whether he might be vulnerable or predatory but also his relative strength and where he is likely to fall in the pecking order of the unit to which he is assigned. For instance, might he emerge as a victim in a standard GP unit? As a predator in a unit of vulnerable inmates? San Francisco County has an annual admission rate of between 30,000 and 37,000 people. This number is considerably higher than many state prison systems. If a jail system that size can pursue this approach to classification, it ought also to be feasible in many prisons and many other jails nationwide.

2. Communication and mutual trust between prisoners and staff

Equally important, correctional officers must have the opportunity to get to know personally the individuals in the units they oversee, and thus to come to see them as people and not merely as stereotypes. Absent familiarity and shared understanding at a human level, trust and mutual respect will be impossible to cultivate—and so, in turn, will any meaningful channels of communication. Without trust, people in custody will be unwilling to share information with officers about the threats they personally face. And without this information, even COs of goodwill cannot take the steps necessary to keep prisoners safe.

How to foster mutual trust and respect between COs and those in custody? One obvious first step would be to ensure continuity of staffing as much as possible, to allow staff to get to know the people in their custody as individuals.

RECOMMENDATION: Ensure continuity of staffing as much as possible, to allow staff to get to know the people in their custody as individuals, not merely as stereotypes.

In my own research inside L.A. County's Men's Central Jail, I saw firsthand the positive effect continuity of staffing can have on CO-prisoner relations. The unit I studied, known internally as K6G, was a segregation unit with an unusually high recidivism rate,⁵³ which meant that, although it was jail and not prison, people cumulatively were doing enough time to come to know

53. The K6G unit houses all gay men and trans women in the Jail. For more on this unit, see Dolovich, *Strategic Segregation*, *supra* note 12; and Dolovich, *Two Models*, *supra* note 12.

and be known to the officers. On the staff side, the two officers in charge of K6G classification had between them spent more than 35 years assigned to the unit. These officers, Senior Deputy Randy Bell and Deputy Bart Lanni, interviewed at some length every new person sent to the unit, and personally reconnected, if only briefly, with everyone who had been there before and had turned up again. Over time, this practice enabled Bell and Lanni to get to know personally every person in the unit—and every detainee was able to form their own personalized assessment of the two officers. Admittedly, this pair of deputies, who have since retired, were unusual in the extent to which they treated prisoners with evenhandedness and respect. But the notable bonds of trust and consequent channel of communication that existed between them and the people in their custody—a channel that was frequently used by unit residents to convey information about conflicts in the dorms—could only have arisen in the first place because Bell and Lanni stayed put.⁵⁴

The more usual practice in many facilities is to regularly rotate staffing assignments. The typical reason offered is the need to minimize opportunities for fraternization with prisoners, which can lead to corruption. But there are more effective ways to reduce corruption among COs—approaches that would not also disrupt opportunities for the development of mutual acquaintance between prisoners and staff. The process of “turning” COs very often begins with prisoners enlisting friendly staff to bring contraband into the facility. Having done so once, staff become ripe for blackmail and/or primed for the lure of large payouts for additional deliveries and provision of other services. Prison officials serious about stopping this process before it starts should thus implement policies designed to block COs from bringing unauthorized articles into the prison.

RECOMMENDATION: Implement—and rigorously enforce—policies designed to block COs from bringing unauthorized articles into the prison.

To begin with, as a matter of course, prison administrators should require all uniformed officers and other staff—without exception—to pass through metal detectors on entering the facility, and should take all possible steps to prevent collusion among officers either to circumvent this requirement or to shield those found with contraband from any negative repercussions. Administrators should also implement a policy of random on-site searches of COs’ lockers, bags, and

54. For extended discussion of the process by which trust, communication and mutual respect developed between these two officers and the residents of K6G, see Dolovich, *Two Models*, *supra* note 12, at 1036–46.

clothing; commit to prosecuting to the fullest extent of the law any COs caught smuggling contraband into the prison (and follow through on this commitment); and otherwise make clear that any such smuggling will not be tolerated.

Taking such steps would generate several positive benefits for the prison environment. First, as noted, doing so would help to diffuse the risk of corrupting fraternization without also foreclosing the development of mutual recognition and understanding between staff and prisoners that may arise with the opportunity to get to know one another over time. Second, these moves would substantially reduce the flow of contraband into the prisons; it is an open secret that prison staff often serve as a major conduit for items like cell phones and drugs. Third and finally, of particular relevance to the theme of this chapter, both reducing the presence of contraband and preventing staff from introducing it into the prison would greatly enhance prisoner safety. This is so for several reasons. Most obviously, the presence and trade of contraband inside a prison directly compromises a facility's good order and stability. A flourishing black market equates to power and control for those individuals most connected to its operation, who are invariably among the most fear-inducing elements in a facility. It carries a strong risk of violence among prisoners, as dealers punish unpaid debts and as various internal factions vie for dominance over distribution and sales. And perhaps especially concerning, when staff traffic in contraband, their loyalties shift to the prisoners with whom they deal. The first and only obligation of a correctional officer is to do what is required to ensure a safe and orderly institutional environment for those who live and work inside. Not only are COs who are in league with a prison's black marketeers at constant risk of violating that duty, but in the worst cases, they may actually use their official authority to promote and assist the internal criminal enterprise, thereby affirmatively undermining the prison's security and good order and putting lives at risk.

What is needed are mechanisms for above-board, pro-social interpersonal interaction between staff and prisoners. Certainly, even assuming opportunities for this sort of contact, it will not be easy for prisoners and prison officials to develop bonds of trust; many men in custody have learned from experience to view COs as antagonists, not allies.⁵⁵ Overcoming long-standing barriers will take hard work and a concerted effort to dismantle the cultural obstacles

55. To take one unfortunate example that helps to explain this lack of trust, prisoners at risk of rape who seek protection from correctional officers will at times report being advised to "fight or fuck"—that is, to fight their aggressors or suffer the consequences. See James E. Robertson, "Fight or F..." and *Constitutional Liberty: An Inmate's Right To Self-Defense When Targeted By Aggressors*, 29 IND. L. REV. 339 (1995).

that too often keep COs from regarding people in prison as human beings deserving of respect (and vice versa). But hard as it may be to achieve, prison officials must do all they can to foster a culture of respect toward people in custody as a way of, among other things, building trust, creating channels of communication between staff and prisoners, enabling staff to identify threats and resolve problems when they arise, and helping to counter the demeaning effects of incarceration.⁵⁶

Given the internal staff cultures of many prison environments today, this is admittedly a tall order. But prison administrators need not await wholesale transformation to begin exercising leadership in this regard. Some obvious practices prison officials could adopt without delay to help build a culture of respect in their facilities include modeling and insisting on mutually respectful behavior, taking prisoners' grievances seriously, demonstrating a commitment to rooting out facts rather than taking line officers' assertions at face value, and implementing a zero-tolerance policy for gratuitous humiliation and abuse of prisoners by staff. To be sure, there may be resistance from staff who are uninterested in this sort of cultural shift. Leadership in this area may thus also demand the making of hard decisions as to which staff to retain and promote, and how to handle those who refuse to modify their approach.

RECOMMENDATION: Exercise leadership to foster an official culture of respect toward people in custody.

Any pushback by prison staff against efforts to change a prison's culture in these ways will invariably be framed in terms of security; it will be said that, unless prisoners may be regularly made to understand who holds the power in the facility, COs will be unable to exercise control over them and thus unable to contain the violence and disorder sure to ensue. But this formulation has it exactly backward. It is the climate of dehumanization and disrespect of prisoners by staff that feeds the violence and disorder. How so? For one thing, COs who refuse to treat prisoners as human beings deserving of respect are COs who will not take the necessary steps to identify and respond to threats

56. Transforming the internal culture of the prison along these lines is a considerable challenge. It is not, however, impossible; even now, there are prisoners' advocates working with prison officials around the country to shift the attitudes COs bring to the job and their perceptions of the people in their custody.

to prisoners' safety.⁵⁷ Moreover, in an environment governed by an imperative of hypermasculinity, any displays of disrespect, from any source, can be toxic. This latter effect should be obvious from the urgency and immediacy with which many men in prison police displays of "disrespect" and respond to all perceived slights, however minor, with unhesitating aggression. Again, this textbook aspect of hypermasculine performance is best understood as a defensive strategy against the ever-present threat of being "dissed" and thereby revealed to be weak and therefore a "punk"—i.e., someone to be derided, humiliated, and targeted for abuse by fellow prisoners. Under these circumstances, staying safe means meeting disrespect, whatever the source, with overt shows of ready pugnacity. And when the primary source of safety lies in hypermasculine performance, disrespect from staff can be as provocative as disrespect from fellow prisoners.

In such an environment, the best thing officers can do to ease the tension and minimize the threat of disorder is to treat prisoners with as much respect and consideration as possible. There will inevitably be some subset of the prisoner population who will persist in disruption and violent behavior regardless of how they are treated. That is the nature of prison. But even in such cases, the situation will always be less volatile if officers respond as calmly and respectfully as possible. And in most cases, people in custody will repay genuinely respectful treatment in kind. The effect of this virtuous circle would be a safer and less stressful environment for everyone, staff included.

When considering staff-prisoner dynamics, there is a further troubling fact that must be faced: hypermasculine posturing is not the sole purview of prisoners. Staff too—especially young male officers—can also be prone to performing hypermasculinity, complete with belligerence, a hair-trigger temper, and a readiness to resolve conflict with violence. Here as well this conduct is best understood as a strategy of self-protection, often adopted by new COs with limited experience, who may be afraid and feel unsafe at work. Such fear is understandable. COs have a tough and even dangerous job. They are often far outnumbered by prisoners and operate in an environment defined by resentment and mutual distrust, in which, badge and uniform notwithstanding, even COs cannot be fully confident in the institution's ability to keep them safe. Especially for those staff members with little experience navigating this world,

57. An extreme example of this dynamic is found in Kenneth E. Hartman's prison memoir, *Mother California*. He reports that, on his arrival at Folsom State Prison in the early 1980s, he and the other new arrivals were met by a prison official who offered two "admonitions": "If you try to escape, we'll kill you. If you put your hands on one of my guards, we'll kill you. Other than that, we don't give a shit what you do to each other." According to Hartman, "[n]o more accurate description of Folsom [wa]s ever offered." KENNETH E. HARTMAN, *MOTHER CALIFORNIA: A STORY OF REDEMPTION BEHIND BARS* 35 (2009).

fear is an entirely natural reaction. And as with many prisoners, some COs find that the best way to manage their fear—and to prevent being “punked,” an anxiety COs often share with prisoners, though they may use a different label⁵⁸—is to act as hard and tough as possible. In some cases, especially when the CO in question is new to the job, prisoners will endure instances of arbitrary abuse or displays of power with tolerance and forbearance, seeing it for what it is: the conduct of someone who is trying to manage his fear and inexperience. But on the whole, hypermasculine performance on the part of COs only exacerbates tensions and resentments within the facility. A prison system committed to a climate of respect toward the people in custody should thus root out and refuse to tolerate gratuitous hypermasculine posturing on the part of staff.

RECOMMENDATION: Condemn and root out any and all hypermasculine posturing on the part of staff.

C. HARNESSING THE POWER OF SELF-RESPECT: TWO INDIRECT STRATEGIES FOR MAKING PRISONS SAFER AND MORE HUMANE

To this point, the recommendations I have offered have focused largely on strategies of institutional design, ways of managing a prison’s population and shaping its official culture to curtail the practices likely to aggravate tensions and foster fear. As a first cut, this focus is entirely appropriate: As I have been arguing, we cannot expect men in prison to leave off hypermasculine posturing and gang activity unless they can be confident in their ongoing safety. And without the policy changes proposed thus far, it will be difficult for any institution to meaningfully shift its institutional dynamics in the direction of greater safety. All this, of course, comes with a crucial caveat: Without a significant reduction in overcrowding, there will be a hard upper limit on just how safe and humane any carceral facility can be. Still, the strategies offered thus far represent steps that are currently available to prison officials committed to making their facilities as safe and humane as possible despite existing population pressures.

There remains, however, a further pair of promising strategies that, if pursued in conjunction with the recommendations sketched above, could leverage an increased sense of safety to help put those individuals open to self-development

58. Prison staff are often on their guard against being “manipulated,” “played,” or “conned” by prisoners. To some extent, this stance is appropriate in an environment where prisoners will often try to get what they can from unwary employees. But the heightened sensitivity to this possibility with which officers will often approach interactions with prisoners suggests that more is at stake for COs in this regard than simply wanting to enforce the rules.

on a path to meaningful growth and change. These strategies directly engage that collection of policies and practices often styled as “rehabilitative,” but which are perhaps more appropriately characterized as *humanizing*.

In this chapter, I have repeatedly maintained that fear is inconsistent with the sort of self-reflection and self-development necessary for meaningful personal growth. What also bears emphasis is that people who are given the opportunity to grow and develop as moral actors will be much less inclined to engage in the pathological behaviors that undermine efforts to keep violence to a minimum. There is, in other words, the potential here for a powerful virtuous circle, one that policymakers serious about making prisons safer and more humane ought to do all they can to trigger.

There are many possible ways to characterize the mechanisms by which opportunities for personal growth and self-development can enhance the safety of carceral facilities. I would frame it in terms of respect—specifically, the positive, mutually reinforcing effects of individual self-respect and respect for others. It is only when people feel themselves to be treated with respect that they are able to cultivate feelings of self-worth and self-regard. These particular feelings are rare commodities among people in prison, since the experience of incarceration so often carries with it feelings of shame, humiliation, and self-loathing. Society has a strong interest in helping people overcome these destructive feelings, for a very simple reason: People who hate themselves, who lack a sense of self-worth, will be hard-pressed to regard others as deserving of respect, much less treat them that way. Yet if individuals can once be brought to view themselves in a more positive light, as worthy and contributing members of society, it becomes possible for them to discover and nourish in themselves the capacity to recognize and affirm and respect the humanity of those around them.⁵⁹ And once this happens, the desire to engage in productive pursuits and to leave others alone to do the same—or even to collaborate with others to create positive change—will inevitably follow.

59. There may well be some few people in prison who, regardless of how they are treated, will never be capable of recognizing and respecting the humanity of others, whether because they have been so brutalized by past experience that they are beyond meaningful human connection or because they are sociopaths, born lacking the basic capacity for empathy or mutual concern. But if so, they make up an extremely small portion of the more than 2.2 million people currently behind bars in the United States. *Cf.* Dolovich, *supra* note 27, at 300 (“Unless the disposition of dangerous violent predator is epidemic in American society—a possibility arguably disproved by common sense and by the relatively few serial murders, rapes, and other extremely violent actions compared with the sheer number of convicted offenders—some other explanation is needed for the vast scope of the carceral system.”).

Evidence of this positive feedback loop can be seen in the success of dedicated veterans' units that have arisen in prisons and jails around the country. These units, in place in Florida, California, Illinois, and elsewhere, house men who served in the military prior to their incarceration.⁶⁰ For many people in this group, their military service is the period in their lives of which they are most proud. By highlighting their veteran status and making it the basis of their housing assignments, the prison is officially acknowledging their sacrifice and social contribution, and affirming their identity as something other than convicted offender and prisoner. This official validation seems in turn to enable a sense of community, shared identity, and even solidarity among residents, and thus to promote mutual tolerance and respect instead of hostility and friction. Notably, residents of such units report that they feel no need to be constantly on their guard against one another and in fact attest to a sense of community that fosters positive mutual engagement and cooperation.⁶¹

The example of veterans' units demonstrates the way distinct strategies for promoting safety can be mutually reinforcing. In these units, not only are prisoners able to develop respect for one another, but the approach offers a direct channel for positive interactions with COs, since the officers assigned to these units are often military veterans themselves. This common formative experience seems to allow staff and prisoners a way to transcend the standard "us" versus "them" dynamic that too often prevails in custody. The resulting mutual accord enhances residents' sense of safety and further reduces the need for engaging in ultimately destabilizing strategies of self-help.

The example of veterans' units suggests that prison officials should consider carving off groups of people whose common identities or interests might provide a basis for mutual affinity and understanding, and housing them together apart from GP.⁶²

60. See Lizette Alvarez, *In Florida, Using Military Discipline to Help Veterans in Prison*, N.Y. TIMES, Dec. 12, 2011, at A14. I know of no analogous units in women's facilities. This is likely because the vast majority of veterans in prison are men. See JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *VETERANS IN PRISON AND JAIL 2011–12*, at 4 tbl. 3 (2015) (reporting that of the 131,500 veterans in prison in 2011–2012, 130,100 were male (98.9%)); see also *id.* (reporting that of the 50,000 veterans in jail during the same years, 48,400 or 96.8% were male).

61. Alvarez quotes to this effect one man in Florida's veterans' unit, "who served as a sergeant and a machinist in the Army for 20 years" and "wound up in prison in 2002 after he killed three people in a trucking crash." As he put it, "[t]here is no more stress in here Generally, we all get along very well. We help each other out There is honesty, responsibility. It's like you have teamwork." Alvarez, *supra* note 60.

62. For a detailed study in one such affinity-based unit—the L.A. County Jail's K6G unit, which exclusively houses gay men and trans women—see Dolovich, *Strategic Segregation*, *supra* note 12; and Dolovich, *Two Models*, *supra* note 12.

RECOMMENDATION: Consider carving off groups of people whose common identities or interests might provide a basis for mutual affinity and understanding, and housing them together apart from GP.

Another possible candidate group for this approach is men who are committed fathers to their children or who wish to be. Not only is the identity of “father” humanizing in itself, but it could also provide the basis for healthier and more respectful interactions among men who know themselves to share a common motivation and a crucial life experience. Such a unit might also benefit from being staffed by officers who are themselves devoted fathers. As an added advantage, bringing together such men would also facilitate programming oriented toward enhancing parenting skills and family connections more generally.

Equally promising and with the potential for much broader reach are programming dorms of a more general sort, housing people with a demonstrated commitment to educational or other pro-social pursuits (scholastic, artistic, vocational, etc.). This experience would not only enable residents to build new skills but could also promote feelings of individual self-worth and mutually respectful interactions between unit residents. Such dorms already exist in many facilities, often operating as “honor” units, in which people motivated by pro-social and personally meaningful projects are recognized and affirmed as such by the institution. Their success suggests that prison officials ought to consider self-consciously expanding this approach to encompass other possible affinity groups.

To be sure, there are risks involved in taking this step.⁶³ For one thing, separating out from GP those groups of people most likely to help foster a healthy, pro-social environment—say, people of faith or people pursuing their education—may strip the general population of its potentially most positive influences. Furthermore, depending on the group tagged for separate housing, this strategy may raise all the concerns that attend any program of state-sponsored segregation.⁶⁴ For these and other reasons, prison officials might hesitate to rely too heavily on this pathway or to pursue it at all.

Fortunately, there is an alternative approach available to prison officials wishing to enable people in custody to engage in meaningful self-development and thereby foster a positive self-image—an approach that carries few,

63. For extended discussion of these risks, see Dolovich, *Two Models*, *supra* note 12, at 1110–14; and Dolovich, *Strategic Segregation*, *supra* note 12, at 54–87.

64. Even a nonsectarian faith-based unit, for example, might reasonably raise valid fears of discrimination if, say, officers were inclined to favor those prisoners who shared their personal beliefs. It could also invite discrimination against nonbelievers, especially if, as anticipated, a unit for people of faith turned out to be comparatively safe and humane.

if any, risks and indeed has long been recognized to reduce the “pains of imprisonment”⁶⁵ and enhance post-custody success. I am speaking here of a commitment to providing as many individual prisoners as possible with programming opportunities that will allow them to cultivate a sense of purpose, to remain connected to who they are, and to learn and grow as people.⁶⁶

RECOMMENDATION: Provide as many individual prisoners as possible with access to pursuits that will enable meaningful self-development.

Certainly, other pieces of the puzzle must also be in place; most obviously, people must feel safe enough to engage in activities that might otherwise mark them as targets. But once this background condition is met, there are enormous benefits to providing prisoners access to meaningful and challenging educational programs, programs in the arts (theater, music, creative writing, etc.), vocational training, or any other opportunities for self-development and for cultivating a healthy self-respect. Equally beneficial and humanizing are programs that would allow prisoners to maintain and develop meaningful connections with people in the free world, whether family, friends, or other people with common interests.⁶⁷ Not only would these pursuits help people to feel more human, but assuming broad enough reach, they are also likely to trigger a virtuous circle, making prisoners who benefit from these opportunities more inclined to treat others with respect and to reject the destructive behavioral norms often dominant in GP. From this vantage point, the value of helping everyone in custody to find meaningful pathways to personal growth and self-development—the essential precondition for real personal change—should be self-evident. All that remains is an official commitment to making such opportunities widely available to the people who are currently living behind bars.

VI. RESPECT BEGETS RESPECT

American prisons and jails can never be truly safe places for staff or prisoners so long as they remain overcrowded. But policymakers committed to reducing the fear and trauma regularly experienced by people in custody need not await system-wide downsizing to improve conditions in their facilities. In this chapter, I have identified several steps that prison officials and other state actors with the authority to direct prison policy could take right away to increase the

65. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES* 70–72 (1958).

66. See generally Francis T. Cullen, “Correctional Rehabilitation,” in the present Volume.

67. See CRAIG HANEY, *REFORMING PUNISHMENT: PSYCHOLOGICAL LIMITS TO THE PAINS OF IMPRISONMENT* 309 (2006) (“[P]rograms that involve prisoners in meaningful activity and reduce the psychological barriers between prison and the outside world—for example, ones that facilitate and encourage visitation and the maintenance of family ties—can actually change the prison environment in ways that reduce the harmful alienation that often occurs there.”).

personal safety of people in prison without resorting to social isolation. Taking these steps would help to reduce the tension, resentment, and fear that often define the prison experience, and thus ease the pressure on prisoners to adopt strategies of self-help that, if understandable, only compound the danger.

In addition, prison officials serious about making their facilities as safe and humane as possible should zealously promote opportunities that will allow people in prison to find a sense of purpose, to pursue positive and productive personal projects, and to grow and develop as people. The sense of self-worth that would result will not only reorient people in a healthy and pro-social direction—the self-conscious goal of “corrections”—but would also promote the capacity for mutual respect, thereby greatly reducing the appeal of antisocial behavior and setting people on a path to successful reentry.

Fear is corrosive of humanity. If we want the people we incarcerate to affirm the worth of others and to treat them with respect, we must ensure that they can live without fear while they are locked up. But this effect will never be achieved unless and until we as a society are prepared in turn to affirm the essential humanity of the people we incarcerate. This chain of imperatives reflects the tight interconnection between safety and humanity in the prison environment. People in prison cannot be expected to treat others with respect if they cannot feel safe enough to come outside themselves and recognize that other people also suffer when they are afraid. It is only once the fear recedes and people are able to reclaim the psychic space necessary to develop a sense of purpose and self-worth that they can come to recognize others as separate moral beings whose pain and aspirations are as real and as consequential as their own. And the same thing, it bears emphasizing, holds true for the rest of us; we will never fully commit to doing what it takes to ensure safe and humane prison conditions unless and until we are prepared to affirm that those we incarcerate also suffer when they are afraid and that their pain and aspirations are as real and as consequential as our own. For decades, American prison policy, driven by fear and the philosophy of penal harm, has made a virtue of inhumanity. It is past time to try the opposite approach, and to see what good might come of it.

RECOMMENDATIONS

This chapter offers the following recommendations to prison officials committed to making their facilities as safe and humane as possible despite existing population pressures:

1. Monitor units in an ongoing way to identify emergent predators, and automatically remove predatory individuals as soon as they become known. Treat classification as an ongoing process rather than a one-time thing.
2. Identify and separate out likely victims from likely predators for housing purposes, both when people arrive in the facility and regularly thereafter.
3. Maintain a strict boundary between likely victims and likely predators in all areas of the prison, including but not limited to housing units. As prisoners know, abuse can happen anywhere in the facility, not just in the cell blocks or dorms.
4. Ensure continuity of staffing as much as possible, to allow staff to get to know the people in their custody as individuals and not merely as stereotypes. Personal acquaintance and understanding promotes mutual trust. Where there is trust, channels of communication may arise through which staff can come to know of threats to inmate safety and thus be in a position to address them.
5. Implement policies designed to block correctional officers from bringing unauthorized articles into the prison, and rigorously enforce those policies. Benefits will include a reduction in the contraband that can destabilize a facility and in the risk of corruption and criminality on the part of staff.
6. Exercise leadership to foster an official culture of respect toward people in custody. Some obvious practices prison officials could adopt to begin building this culture in their facilities include modeling and insisting on mutually respectful behavior, taking prisoners' grievances seriously, demonstrating a commitment to rooting out facts rather than taking line officers' assertions at face value, and implementing a zero-tolerance policy for gratuitous humiliation and abuse of prisoners by staff.
7. Condemn and refuse to tolerate gratuitous hypermasculine posturing on the part of staff.
8. Consider carving off groups of people whose common identities or interests might provide a basis for mutual affinity and understanding, and housing them together apart from the prison's general population.
9. Provide as many individual prisoners as possible with access to pursuits that allow for personal growth and self-development. Whatever the vehicle—education, employment, arts programming, vocational training, service opportunities, etc.—the key is to help people in prison cultivate a sense of purpose and self-worth and an identity other than “prisoner.”

Prisoners with Disabilities

Margo Schlanger*

A majority of American prisoners have at least one disability. So how jails and prisons deal with those prisoners' needs is central to institutional safety and humaneness, and to reentry success or failure. In this chapter, I explain what current law requires of prison and jail officials, focusing on statutory and constitutional law mandating non-discrimination, accommodation, integration, and treatment. Jails and prisons have been very slow to learn the most general lesson of these strictures, which is that officials must individualize their assessment of and response to prisoners with disabilities. In addition, I look past current law to additional policies that could improve medical and mental-health care for prisoners with disabilities. What is needed are programs that bridge the wall separating the inside and outside of prison, with respect to record-keeping, personnel, and finances; together, these have the potential to greatly improve care, and the lives and prospects, of prisoners with disabilities.

INTRODUCTION

Most American prisoners have at least one disability. The most recent national study, by the U.S. Department of Justice's Bureau of Justice Statistics, found that 10% report a mobility impairment, over 6% report that they are deaf or low-hearing, and over 7% report that they are blind or low-vision (uncorrectable with glasses). Depending on the facility and the definition, 4% to 10% have an intellectual disability. And over half report symptoms that meet the criteria for various mental illnesses; mania and depression predominate, but 15% of state prisoners have symptoms of psychosis such as delusions or hallucinations.¹ Forty percent of prisoners have some kind of chronic medical condition—diabetes, cancer, heart disease, high blood pressure, etc. All these statistics are for post-conviction prisoners; in jails, which house both pretrial detainees and post-conviction prisoners, the rates of disability are substantially higher. Table 1 summarizes some of the data.

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1. More generally, see Stephen J. Morse, "Mental Disorder and Criminal Justice," in Volume 1 of the present Report.

Table 1: Estimates of Disability in Jails and Prisons

	Prisons			Jails		
	All	Men	Women	All	Men	Women
Vision ²	7.1%	7.1%	6.4%	7.3%	7.6%	5.1%
Hearing ³	6.2%	6.2%	5.3%	6.5%	6.6%	6.0%
Ambulatory ⁴	10.1%	9.9%	12.1%	9.5%	8.9%	13.5%
Chronic condition ⁵	41%			40%		
Age 65+ ⁶	2.3%	2.3%	1.2%	NA		
Intellectual or developmental disability ⁷	4-10%			NA		
Mental illness symptoms: All ⁸	49%	48%	62%	60%	59%	70%
Mania ⁹	43%			54%		
Major depression ¹⁰	23%			30%		
Psychotic disorder ¹¹	15%			24%		

Some have even claimed that the massive run-up from the 1970s to the 1990s in prison and jail population was largely the result of “transinstitutionalization”—the effect of housing people with mental illness in jails and prisons rather than

2. JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011-12, at 4–5 tbls.4 & 5 (2015), <http://www.bjs.gov/content/pub/pdf/dpji1112.pdf>. The data in this survey are self-reported in response to the following questions: “Hearing—Are you deaf or do you have serious difficulty hearing? Vision—Are you blind or do you have serious difficulty seeing even when wearing glasses? Ambulatory—Do you have serious difficulty walking or climbing stairs?”

3. *Id.*

4. *Id.*

5. *Id.* at 4–6 tbls.4-6 (“Chronic conditions include cancer, high blood pressure, stroke-related problems, diabetes, heart-related problems, kidney-related problems, arthritis, asthma, and cirrhosis of the liver.”). I used the material in all three source tables to calculate the data in text.

6. E. ANN CARSON, BUREAU OF STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2014, app. tbl.3 (2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf>.

7. JOAN PETERSILLA, DOING JUSTICE? CRIMINAL OFFENDERS WITH DEVELOPMENTAL DISABILITIES 1 (2000), <http://files.eric.ed.gov/fulltext/ED465905.pdf>.

8. See DORRIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1, 4 (2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>. The data in the table are for state prisoners and local jails; this study finds a lower rate among federal prisoners.

9. *Id.* at 1.

10. *Id.*

11. *Id.*

mental hospitals.¹² This is only partially true—Raphael and Stoll demonstrate persuasively that deinstitutionalization has made only a “relatively small contribution to the prison population growth overall” (they estimate 4% to 7% of the growth).¹³ But as they note, it is certainly the case that “in years past,” “a sizable portion of the mentally ill behind bars would not have been” jailed.¹⁴

The numbers mean that how jails and prisons deal with disability is far from a niche issue. Rather, choices relating to disability are central to the operation of U.S. incarcerative facilities—their safety and humaneness, and their success or failure in facilitating the pro-social community reentry of prisoners who get out. In this chapter, I begin by explaining what difference disability makes in jail and prison—how disability affects prisoners’ lives and institutional operations. I next explain how current law instructs prison and jail officials, focusing on the Americans with Disabilities Act and constitutional requirements of non-discrimination, accommodation, integration, and treatment. Jails and prisons have been very slow to learn the most general lesson of these requirements, which is that officials must individualize their assessment of and response to prisoners with disabilities. I make some recommendations along these lines. I also suggest that as a policy matter, individualization would be helpful not just for prisoners with disabilities but for other prisoners, as well. That is, lessons learned (or lessons that should be learned) in the disability arena could fruitfully be applied more broadly.

The learning point works in converse, too; general lessons learned about incarceration can and should be applied to prisoners with disabilities in particular. For example, abundant evidence demonstrates that prisoners’ successful reentry—their transition to productive and pro-social lives in their communities after release from jail and prison—is aided by programs that bridge the separation of prison from the outside world. This broad insight has specific application to prisoners with disabilities. Though the point is pertinent in many ways, I focus in the chapter’s final section on its import for medical and mental-health care, a very significant concern for people with disabilities. To improve care, and the lives and prospects of prisoners with disabilities, what is needed are bridging techniques addressing record-keeping, personnel, and finances. I make some recommendations toward this end.

12. For a literature review, see Dae-Young Kim, *Psychiatric Deinstitutionalization and Prison Population Growth: A Critical Literature Review and Its Implications*, 27 CRIM. JUST. POL’Y REV. 3 (2016).

13. Steven Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rate*, 42 J. LEGAL STUD. 187, 190 (2013).

14. *Id.*

I write this chapter informed by scholarship, policy research, and advocacy reports—the various sources cited, among others. But I bring to it, as well, two decades of experience in prison and jail reform; investigating allegations of civil-rights violations; collaborating with varied stakeholders on reform standards;¹⁵ working with different prison and jail officials on reform efforts in their facilities; and, most recently, monitoring the implementation of a statewide settlement agreement in Kentucky governing policy and practice for deaf and hard-of-hearing prisoners.¹⁶ The chapter’s recommendations thus draw on both written and lived sources of knowledge.

I. WHY IS DISABILITY A CHALLENGE?

Incarceration isn’t easy for anyone. But sharply limited control over one’s own routines and arrangements make life behind bars particularly difficult for prisoners with disabilities. Prisoners with mobility impairments, for example, “cannot readily climb stairs, haul themselves to the top bunk, or walk long distances to meals or the pill line.”¹⁷ Prisoners who are old may “suffer from thin mattresses and winter’s cold”¹⁸ but often cannot obtain a more comfortable bed or an extra blanket. Prisoners who are deaf may not hear, and prisoners with intellectual disabilities may not understand, the orders they must obey under threat of disciplinary consequences that include extension of their term of incarceration. And prisoners with intellectual disabilities may be unable to access medical care or other resources and services, because officials require written requests and they are illiterate.¹⁹

Moreover, many prisoners with either mental or physical disabilities face grave safety threats. They may be vulnerable to extortion, exploitation, threats, and physical and sexual abuse by other prisoners. Prisoners with mental disabilities in particular may be “manipulated by other prisoners into doing

15. See, e.g., AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS (2011).

16. See *Case Profile: Adams v. Kentucky*, CIV. RTS. LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=13462> (last visited Apr. 3, 2017) (describing case and posting monitoring reports).

17. HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 4 (2012), https://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf.

18. *Id.*

19. See generally HUMAN RIGHTS WATCH, CALLOUS AND CRUEL: USE OF FORCE AGAINST INMATES WITH MENTAL DISABILITIES IN US JAILS AND PRISONS (2015), <https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and> (describing neglect of and inappropriate use of force against prisoners with severe mental health problems).

things that get them into deep trouble.”²⁰ As Hans Toch summarized, prisoners with mental illness can be “disturbed and disruptive,” “very troubled and extremely troublesome.”²¹ They are far more likely to be injured in a fight, and to be disciplined for assault.²² In the words of prisoners’ rights advocate Jamie Fellner, they may:

engage in symptomatic behavior that corrections staff find annoying, frightening, and provocative, or which, in some cases, can be dangerous. For example, they may refuse to follow orders to sit down, to come out of a cell, to stop screaming, to change their clothes, to take a shower, or to return a food tray. They may smear feces on themselves or engage in serious self-injury—slicing their arms, necks, bodies; swallowing razor blades, inserting pencils, paper clips, or other objects into their penises. Sometimes prisoners refuse to follow orders because hallucinations and delusions have impaired their connection with reality. An inmate may resist being taken from his cell because, for example, he thinks the officers want to harvest his organs or because she cannot distinguish the officer’s commands from what other voices in her head are telling her.²³

Solitary confinement is a particular concern. Across the country, constitutional litigation has led to orders excluding prisoners with serious mental illness from solitary confinement.²⁴ Nevertheless, people with mental disabilities remain vastly overrepresented in prison and jail restrictive housing units,²⁵ because they are frequently difficult to manage in general population

20. HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 57 (2003), <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf> (quoting TERRY KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* 20 (1999)).

21. CALLOUS AND CRUEL, *supra* note 19 (quoting Hans Toch, *Humpty Dumpty in the Prison*, 16 CORR. MENTAL HEALTH REP. 51 (2014)).

22. See JAMES & GLAZE, *supra* note 8, at 1.

23. CALLOUS AND CRUEL, *supra* note 19.

24. For a compilation of extant orders, see *Special Collection: Solitary Confinement*, CIV. RTS. LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=40> (last visited Apr. 3, 2017).

25. See ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *SPECIAL REPORT: USE OF RESTRICTIVE HOUSING IN U.S. PRISONS AND JAILS, 2011-12*, at 6–7 (2015), <http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf> (relating that prisoners with mental illness reported having spent time in restrictive housing at about twice the rate of other prisoners); see also ASS’N OF ST. CORR. ADM’RS & ARTHUR LIMAN PROGRAM AT YALE L. SCH., *AIMING TO REDUCE TIME-IN-CELL: REPORTS FROM CORRECTIONAL SYSTEMS ON THE NUMBERS OF PRISONERS IN RESTRICTED HOUSING AND ON THE POTENTIAL OF POLICY CHANGES TO BRING ABOUT REFORMS* 48–53 (2016), <https://www.law.yale.edu/system/files/area/center/liman/document/aimingtoreducetic.pdf> (tracing the placement of prisoners with a serious mental health issue in restrictive housing).

and because they often decompensate once in solitary and commit further disciplinary infractions. Two decades ago, U.S. District Judge Thelton Henderson emphasized the toxic effects of solitary confinement for inmates with mental illness.²⁶ In *Madrid v. Gomez*, a case about California's Pelican Bay prison, Judge Henderson wrote that isolated conditions in the Special Housing Unit, or SHU, while not amounting to cruel and unusual punishment for all prisoners, were unconstitutional for those "at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness."²⁷ Vulnerable prisoners included those with pre-existing mental illness, intellectual disabilities, and brain damage.²⁸ Henderson concluded that "[f]or these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe."²⁹ Their resilience compromised by their disability and the jail or prison's unaccommodating response to it, prisoners with mental illness face a much higher risk for suicide both in and out of solitary confinement.³⁰

Sometimes officials affirmatively discriminate against prisoners with disabilities—bar them from programs or jobs,³¹ lock them down in their cells or isolate them in an infirmary³² or administrative segregation housing,³³ even deny them parole as a matter of policy.³⁴ For example, in *Armstrong v. Brown*,

26. See *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

27. *Id.* at 1265

28. *Id.*

29. *Id.*

30. See, e.g., ILL-EQUIPPED, *supra* note 20, at 178.

31. See, e.g., RACHAEL SEEVERS, AVID PRISON PROJECT, MAKING HARD TIME HARDER: PROGRAMMATIC ACCOMMODATIONS FOR INMATES WITH DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT 28 (2016), avidprisonproject.org/Making-Hard-Time-Harder/assets/making-hard-time-harder--pdf-version.pdf (describing involuntary status of "medically unassigned," which barred prisoners from programming necessary to earn credit towards early release).

32. See *id.* at 35 (describing housing of inmates with serious medical conditions in a prison's infirmary, even though they were medically stable).

33. See, e.g., AVID JAIL PROJECT, DISABILITY RIGHTS WASH., CRUEL BUT NOT UNUSUAL: SOLITARY CONFINEMENT IN WASHINGTON'S COUNTY JAILS 14, 17 (2016), http://www.disabilityrightswa.org/sites/default/files/uploads/CruelbutNotUnusual_November2016.pdf (noting that certain county jails in Washington state "automatically" place individuals with physical disabilities or mental illness in solitary confinement); see ACLU, CAGED IN: SOLITARY CONFINEMENT'S DEVASTATING HARM ON PRISONERS WITH PHYSICAL DISABILITIES 6 (2017), https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf ("Prisoners with disabilities are placed into solitary confinement even when it serves no penological purpose. Corrections officials have put prisoners with physical disabilities into solitary confinement because there were no available cells that could accommodate them in a less restrictive environment.").

34. See SEEVERS, *supra* note 31, at 31.

U.S. District Judge Claudia Wilken held that the state was “regularly housing [prisoners with mobility impairments] in administrative segregation due to lack of accessible housing.”³⁵ Physical barriers—steps, inaccessible cell features, and the like—frequently exclude prisoners with disabilities from programs and resources.³⁶ But physical barriers are just the most visible example of the key general problem: When the ordinary rules and ways of incarceration hit prisoners with disabilities harder than others, prisons and jails fail to accommodate their needs.

What is to be done? Four categories of intervention are needed: diversion, accommodation, integration, and treatment (including discharge planning). The first, diversion, is beyond the scope of this chapter, but it should be obvious that one solution to the damage jail and prison cause people with disabilities is to use alternative responses to their offending behavior, reserving incarceration for when it is truly necessary.³⁷ I address accommodation, integration, and treatment below.

II. WHAT DOES THE LAW REQUIRE?

The welfare of prisoners with disabilities is protected by both the Constitution and the two principal federal disability anti-discrimination statutes, the Rehabilitation Act and the Americans with Disabilities Act (ADA). Taken together, the requirements are robust: prison and jail officials must avoid discrimination; individually accommodate disability; maximize integration of prisoners with disabilities with respect to programs, service, and activities; and provide reasonable treatment for serious medical and mental-health conditions. In this section, my interspersed recommendations, accordingly, are consistent with existing law—at least a muscular reading of existing law.

35. Order Granting Motion for Further Enforcement, *Armstrong v. Brown*, No. 94-cv-2307, 2015 WL 496799 (N.D. Cal. Feb. 3, 2015), <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf>.

36. See, e.g., SEEVERS, *supra* note 31, at 19 (architectural barriers in Alabama prisons), 29 (specialized residential trauma treatment for New York women prisoners in a room reachable only via stairs), 32 (Iowa chapel and auditorium accessible only via stairs), 34 (New York commissary in inaccessible building).

37. See, e.g., REBECCA VALLAS, CTR. FOR AM. PROGRESS, *DISABLED BEHIND BARS: THE MASS INCARCERATION OF PEOPLE WITH DISABILITIES IN AMERICA’S JAILS AND PRISONS* (2016), <https://cdn.americanprogress.org/wp-content/uploads/2016/07/15103130/CriminalJusticeDisability-report.pdf>. For a discussion of diversion, see Michael Tonry, “Community Punishments,” in the present Volume.

A. THE RULE AGAINST DISPARATE TREATMENT

Absent some other constitutional harm, the Constitution often allows officials to discriminate against people with disabilities—“so long as their actions toward such individuals are rational.”³⁸ Statutory law, however, is less lenient. Section 504 of the 1973 Rehabilitation Act³⁹ and Title II of the 1990 ADA⁴⁰ prohibit discrimination on the basis of disability in federally conducted or supported services, and state and local government services, respectively.⁴¹ Both statutes protect from exclusion or discrimination prisoners with disabilities⁴² who are “qualified” to participate in the relevant program. The Rehabilitation Act does not define “qualified individual with a disability,” but the ADA does. That definition is:

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the

38. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001).

39. 29 U.S.C. §§ 794 et seq. (2012). The Rehabilitation Act provides, in relevant part, “No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency.” *Id.* § 794(a).

40. 42 U.S.C. §§ 12131 et seq. (2012). Title II provides, in relevant part, “[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” *Id.* § 12132.

41. A very useful summary of the overall statutory framework and its application to prisons and jails is included in the United States’ Memorandum of Law as Amicus Curiae on Issues under the Americans with Disabilities Act and Rehabilitation Act that are Likely to Arise on Summary Judgment or at Trial, *Miller v. Smith*, No. 6:98-cv-109-JEG (S.D. Ga. June 21, 2010), http://www.ada.gov/briefs/miller_amicus.pdf. Note that this brief was filed in June 2010, and there were new regulations—though not very different in pertinent part—published September 2010.

42. Under both the ADA and the Rehabilitation Act, a person has a disability if: (i) a physical or mental impairment substantially limits one or more of his or her major life activities; (ii) he or she has a record of such an impairment; or (iii) he or she is regarded as having such an impairment. 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102(1). Particularly relevant here, “mental” impairments are expressly included if they substantially limit major life activities. The ADA regulations on the definition of disability, 28 C.F.R. § 35.108, are quite capacious. Moreover, in the ADA Amendments Act of 2008, Congress clarified and broadened the definition. Under the Amendments Act, an impairment constitutes a disability even if it: (1) only substantially limits one major life activity; or (2) is episodic or in remission, if it would substantially limit at least one major life activity if active. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3556.

provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.⁴³

The key source for understanding what constitutes disability discrimination is the ADA's Title II regulations; as legislative regulations, these are entitled to substantial deference.⁴⁴ Most simply, discriminating against prisoners "because of" their physical disability, serious mental illness, or intellectual disability, violates the statutory ban against disparate treatment. The ADA regulations explain that public entities must afford qualified people with disabilities the same opportunity as non-disabled people to benefit from the entity's services. This means a prison or jail may not, because of an inmate's disability, deny the inmate the "opportunity to participate" in a service offered to other inmates, may not provide an alternative service "that is not equal to that afforded others," and must provide aids, benefits, or services that would enable the inmate to "gain the same benefit, or to reach the same level of achievement as that provided to others."⁴⁵ A prison violates this regulation, for example, if simply because of their disability, it excludes prisoners with disabilities from a program or assigns prisoners with disabilities to segregation cells—where prisoners are denied most prison privileges, programs, activities, and services. As described in Part I, this kind of discrimination is far from unheard of.⁴⁶

There are, however, defenses. Prison and jail officials can exclude a prisoner with a disability from a program, service, or activity if the exclusion is "necessary for the safe operation of its services, programs, or activities."⁴⁷ Safety requirements must, however, be "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities."⁴⁸ Similarly,

43. 42 U.S.C. § 12131(2).

44. See 42 U.S.C. § 12134(a); see also *Olmstead v. L.C.*, 527 U.S. 581, 597–98 (1999) ("Because the Department is the agency directed by Congress to issue regulations implementing Title II, ... its views warrant respect. We need not inquire whether the degree of deference described in [*Chevron*] is in order."). ADA regulations are also consistent with—but newer, more detailed, and sometimes stricter than—Rehabilitation Act regulations. See 42 U.S.C. § 12201(a) ("nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 [29 U.S.C. §§ 790 et seq.] or the regulations issued by Federal agencies pursuant to such title"); 42 U.S.C. § 12134(b) ("regulations ... shall be consistent with ... the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on Jan. 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29").

45. 28 C.F.R. § 35.130(b)(1).

46. See *supra* notes 32–36 and accompanying text.

47. 28 C.F.R. § 35.130(h).

48. *Id.*

government officials may exclude prisoners with disabilities from programs “when that individual poses a direct threat to the health or safety of others.”⁴⁹ But the Supreme Court has emphasized that under the ADA, “direct threat defense[s] must be ‘based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence.’”⁵⁰ And correspondingly, the regulation again requires substantial individualization:

In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.⁵¹

Thus the ADA’s general ban on disparate treatment has a safety valve—but the safety valve is not satisfied by generalized concern about the abilities or risks of prisoners with disabilities. Disparate treatment is lawful only where participation in a particular program by a particular prisoner with disabilities raises particular—individualized, and proven not assumed—safety risks to others, and only where those risks cannot be mitigated by some kind of tailored modification of the program’s policies, practices, or procedures.

This kind of individualization does not come easily to prisons and jails. Rules behind bars tend to be inflexible. Prisons and jails are mass institutions, and it’s easier for them to implement simple rules, without either case-by-case or more formalized exceptions. Officials occasionally emphasize that special treatment can provoke hard feelings and even violence by other prisoners. But in my experience, inflexibility is often an automatic rather than thoughtful response to a request. In any event, prisons and jails are not left to their own preferences with respect to the general choice of how much individualization is appropriate. The ADA insists on a high degree of particularization.

49. 28 C.F.R. § 35.139(a).

50. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 86 (2002); *see also* *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (“[T]he risk assessment must be based on medical or other objective evidence.”).

51. 28 C.F.R. § 35.139(b).

RECOMMENDATION: Jail and prison officials should not exclude prisoners with disabilities from particular housing units, jobs, or any other programs absent an individualized finding that a prisoner's participation poses significant safety risks that cannot be mitigated.

B. THE REQUIREMENT OF REASONABLE MODIFICATION AND EFFECTIVE COMMUNICATION

Notwithstanding the misgivings of prison and jail officials, the Rehabilitation Act and the ADA require even more individualization⁵² under the conceptual category of “reasonable modification”—the ADA Title II’s (and Title III’s) equivalent of the more familiar “reasonable accommodation” requirement in Title I of the ADA, which addresses employment discrimination.⁵³ The Title II ADA regulations state:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.⁵⁴

A failure to implement a reasonable modification needed by a person with a disability is a type of discrimination; under the ADA, a prison must “take certain pro-active measures to avoid the discrimination proscribed by Title II.”⁵⁵

In addition, both the Rehabilitation Act and the ADA’s regulations require prisons and jails to “take appropriate steps to ensure that communications with ... participants ... are as effective as communications with others.”⁵⁶ The effective-communication mandate protects prisoners with a variety of communication-impairing disabilities—among them, blindness or low vision, deafness or low hearing, and speech impediments. It cashes out as a requirement for provision of “auxiliary aids and services”⁵⁷—interpreters, computer-aided

52. See, e.g., *Wright v. N.Y. St. Dep’t of Corr.*, 831 F.3d 64, 78 (2d Cir. 2016) (“Title II of the ADA, therefore, requires that once a disabled prisoner requests a non-frivolous accommodation, the accommodation should not be denied without an individualized inquiry into its reasonableness.”).

53. See 42 U.S.C. § 12111(8)–(9).

54. 28 C.F.R. § 35.130(b)(7)(i). The separate requirement of program accessibility has a similar defense that no “fundamental alteration in the nature of the service, program or activity or ... undue financial or administrative burdens” are required. 28 C.F.R. § 35.150(a)(3).

55. *Chisolm v. McManimon*, 275 F.3d 315, 324–25 (3d Cir. 2001); see also *Tennessee v. Lane*, 541 U.S. 509, 529 (2004) (describing the reasonable modification requirement as prophylactic).

56. 28 C.F.R. § 35.160(a)(1); 28 C.F.R. § 39.160(a); 28 C.F.R. 42.503(e).

57. 28 C.F.R. § 35.160.

transcription services, assistive listening systems, open and closed captioning, various telephonic communications devices for the deaf, videophones, visual and other non-auditory alert systems, and more.

Federal case law has emphasized that the application of disability-rights law in the prison setting must take account of “[s]ecurity concerns, safety concerns, and administrative exigencies.”⁵⁸ Even so, both reasonable modification and effective communication are robust and broadly relevant requirements. Consider a list of potential problems and ADA-required solutions:

- A prisoner with a mobility impairment cannot walk quickly enough to get to meals on time. Potential modifications: house the prisoner closer to the chow hall; allow additional time for movement and/or meals; if the prisoner uses a wheelchair, provide an aide to push it.
- In a prison that provides indigent prisoners with paper and stamps for letters home, a prisoner with an intellectual disability cannot write such letters because he is illiterate. Potential modifications: allow (and equally subsidize) communication by voice recordings or phone; provide a writer/reader (of his choice) to assist him.
- Successful completion of substance-abuse programming is persuasive evidence of rehabilitation in parole hearings, and requires academic-type coursework a prisoner with a learning disability cannot manage. Potential modifications: provide tutoring or one-on-one instruction.
- Announcements are made over an audio intercom that deaf and hard-of-hearing prisoners cannot understand. Potential modifications: a non-auditory alert system (vibrating pager, or strobe lights); housing a mildly hearing impaired prisoner in a quiet unit, where ambient noise poses less of an obstacle.
- Prison jobs are either required or offer prisoners compensation, but many of the jobs include tasks that a prisoner with a mobility impairment cannot perform. Potential modification: adjust job tasks or provide adaptive equipment to allow the prisoner to do the job.

Anyone familiar with disability law outside of prison would consider these run-of-the-mill accommodations. Similar responses to disability are regularly sought from, and granted by, employers and non-incarcerating government agencies. And yet, observers report—and my own experience confirms—that 27 years after the ADA’s passage, prisons and jails do not yet fully understand that this kind of individualization is required by law. When prisoners seek these

58. Love v. Westville Corr. Ctr., 103 F.3d 558, 561 (7th Cir. 1996).

kinds of reasonable modifications, prison and jail officials frequently deny the request simply by pointing to the general rule.

An example from my work as a settlement monitor illustrates the point. A deaf prisoner, who communicated using sign language, faced disciplinary sanctions for assaulting a correctional officer. As required by the settlement agreement I was monitoring, the prison made arrangements for sign-language interpretation for him. This was accomplished using video remote interpretation—a video communication setup where the remote sign-language interpreter hears the person speaking through a computer microphone, and signs the interpretation to the deaf listener, and vice versa. In this case, however, the inmate had been assigned “max assault status”—which meant that whenever he was out of his cell, prison rules required him to be handcuffed, rendering him unable to sign. Rather than altering the restraint rule, prison officials conducting the hearing asked him only yes or no questions, so he could nod or shake his head to respond. My intervention was simply to ask the warden if there was some way to safeguard everyone’s safety but also provide the prisoner effective communication. The warden and his staff quickly developed such a method; the prisoner’s belly chain was tethered to a bolt in a wall, so he couldn’t move very far; under those conditions, everyone was comfortable unhandcuffing him. This accommodation allowed him to access both interpretation for various communication needs and also to use a videophone. It was not expensive or difficult; it merely required individualized consideration.

Accommodation failures seem to me even more prevalent with respect to less familiar accommodations that have fewer analogues outside of jail and prison. Along these lines, I have argued in prior work that the ADA’s reasonable-modification requirement compels individualization with respect to disciplinary and restrictive housing policy. For example, the ADA’s reasonable-modification mandate, properly understood, compels jail and prison officials to take account of mental illness or intellectual disability in making housing decisions, which often assign disabled prisoners to double cells in which conflict and violence are likely.⁵⁹ It forbids use of solitary confinement as a routine management technique to cope with the difficulties presented by prisoners with disabilities.⁶⁰ And it requires jails and prisons to treat behavior that manifests serious mental illness or intellectual disability as a mental-health or habilitation matter, rather

59. See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1221 (N.D. Cal. 1995).

60. See U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE STATE CORRECTIONAL INSTITUTION AT CRESSON AND NOTICE OF EXPANDED INVESTIGATION 1, 32–33 (2013), https://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf.

than an occasion for force or discipline.⁶¹ Thus far, these kinds of claims have been raised only occasionally. Nonetheless, anti-discrimination remedies along these lines have been incorporated in the dozen or so major solitary-confinement settlements in recent years.⁶² In addition, there is some, albeit limited, support in federal district court opinions: In a couple of cases, district courts have held that the ADA requires modification of disciplinary procedures.⁶³ Similarly, at least one court has held that administrative classification processes used to put prisoners into solitary confinement must be reasonably modified to take account of the needs of prisoners with disabilities.⁶⁴ And finally, a recent district court opinion accepted a reasonable-modification argument seeking greater access for prisoners with disabilities to a solitary confinement “step-down” program.⁶⁵

61. See, e.g., Private Settlement Agreement at 12, *Disability Advocates, Inc. v. N.Y. St. Off. of Mental Health*, No. 1:02-cv-04002-GEL (S.D.N.Y. Apr. 27, 2007), <http://www.clearinghouse.net/chDocs/public/PC-NY-0048-0002.pdf>; Settlement Agreement and General Release at 16, *Disability Rights Network of Pa. v. Wetzel*, No. 1:13-cv-00635-JEJ (M.D. Pa. Jan. 9, 2015), <http://www.clearinghouse.net/chDocs/public/PC-PA-0031-0003.pdf>.

62. See, e.g., *supra* note 61. For a more complete timeline listing and linking to the key cases, and their settlements, see Amy Fettig & Margo Schlanger, *Milestones in Solitary Reform*, SOLITARY WATCH, <http://solitarywatch.com/resources/timelines/milestones/> (last visited Apr. 3, 2017); and for court documents, see *Special Collection: Solitary Confinement*, CIV. RTS. LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=40> (last visited Apr. 3, 2017).

63. See *Scherer v. Pa. Dep’t of Corr.*, No. 3:04-cv-00191-KRG, 2007 WL 4111412, at *44 (W.D. Pa. Nov. 16, 2007) (because the prisoner’s misconduct may have been a result of his mental illness, “the lack of modification of its disciplinary procedures to account for ... [his] mental illness ... possibly resulted in a violation of Title II of the ADA.”); *Purcell v. Pa. Dep’t of Corr.*, No. 3:00-CV-00181-LPL, 2006 WL 891449, at *13 (W.D. Pa. Mar. 31, 2006) (finding a genuine issue of material fact as to whether a “reasonable accommodation” was denied when the Department of Corrections refused to circulate a memo to the staff concerning a prisoner’s Tourette’s Syndrome to explain that some of his behaviors were related to his condition, not intentional violations of prison rules).

64. See *Biselli v. Cty. of Ventura*, No. 09-cv-08694 CAS (Ex), 2012 U.S. Dist. LEXIS 79326, at *44–45 (C.D. Cal. June 4, 2012) (placement in administrative segregation based on conduct specifically linked to mental illness, without input from mental health staff, may constitute a violation of the ADA).

65. See *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM, 2013 WL 3296569, at *9 (D. Colo. July 1, 2013) (rejecting a motion to dismiss for failure to state a claim given plaintiff’s argument “that he has been unable to complete the requirements of the leveling-out program successfully because of his mental impairment and because CDOC officials have prevented him from obtaining adequate treatment and accommodation so that he may progress out of solitary confinement”); see also Reporter’s Transcript: Hearing on Motion for Summary Judgment and Final Trial Preparation Conference at 41, *Sardakowski v. Clements*, No. 12-cv-01326-RBJ-KLM (D. Colo. Feb. 25, 2014), <http://www.clearinghouse.net/chDocs/public/PC-CO-0024-0002.pdf> (rejecting defendants’ motion for summary judgment on the same claim).

Still, implementation of this kind of individualized approach to housing and discipline remains rare. I don't think jails' and prisons' reluctance to embrace individualized approaches to housing and discipline, or to operations more generally, can be justified doctrinally. True, the ADA's obligation to make "reasonable modifications in policies, practices, or procedures" is not unbounded; a modification is not required if it would "fundamentally alter the nature of the service, program, or activity."⁶⁶ The nature of the requested change matters. As in so many situations, whether it is considered "fundamental" turns in part on the level of generality used to describe the program and its "essential aspect[s]."⁶⁷ Is the essence of solitary confinement its restrictive nature, or that it adequately safeguards safety and security? Is the essence of prison discipline that it punishes misconduct, or that it punishes culpable misconduct? And so on. But again, the ADA pushes towards individualization and flexibility. The very idea that some aspects of a program or policy are fundamental—but others are not—means that prisoner restrictions that have been treated as irrevocably bound together are conceptually untied. And the assertion of the defense—that a particular change to a prison policy or practice a prisoner with a disability seeks is a fundamental alteration that a prison is not required to undertake, rather than a reasonable modification that it must—puts the onus on the jail or prison to justify why it cannot make a requested change, if not for everyone, than for this particular disabled prisoner. As Professors Brittany Glidden and Laura Rovner summarized the point, "Because the accommodations should be specific and individualized, prison officials must demonstrate why in each case the particular prisoner cannot receive the requested services. As a result, it becomes more difficult for the prison to rely on generalized assertions of 'safety' to support the deprivations and instead forces an articulation of the reason for the particular condition."⁶⁸

Constitutional requirements may frequently also play a role. True, the requirement of reasonable modification is not itself constitutional in stature. The Supreme Court explained in *Board of Trustees v. Garrett* that the Equal Protection Clause does not require states "to make special accommodations for the disabled, so long as their actions toward such individuals are rational."⁶⁹ However, when reasonable modification to a prison policy or practice is necessary to avoid serious harm to a prisoner, both the Eighth Amendment's Cruel and Unusual Punishments Clause (for convicted prisoners) and the

66. 28 C.F.R. § 35.130(b)(1)(7)(i).

67. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683 (2001).

68. Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 DENV. U. L. REV. 55, 69 (2012).

69. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

Fourteenth Amendment's Due Process Clause (for pretrial detainees) compel such modification. Under both, government officials must "respond[] reasonably to ... risk[s]"⁷⁰ to prisoners, where those risks threaten the "minimal civilized measure of life's necessities."⁷¹ This obligation includes, for example, nutrition, sanitation, large-muscle exercise, and protection from harm by other prisoners. So if some overarching prison policy or practice, applicable to prisoners with and without disabilities alike, poses an obstacle to a prisoner with a disability getting enough food, or living in sanitary conditions, or avoiding assaults by other prisoners, modification of that policy is required not just by the ADA but also by the Constitution.⁷²

RECOMMENDATION: Jail and prison officials should embrace the ADA's requirement of individualized modifications to policies and practices when useful for prisoners with disabilities' equal participation in and access to services.

C. THE INTEGRATION MANDATE

The ADA regulations include a provision, usually termed the "integration mandate," that directs that "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."⁷³ The regulation that deals specially with program access in prisons and jails adds some detail to this general mandate. It provides, in pertinent part:

- (b)(2) Public entities shall ensure that inmates or detainees with disabilities are housed in the most integrated setting appropriate to the needs of the individuals. Unless it is appropriate to make an exception, a public entity—
 - (i) Shall not place inmates or detainees with disabilities in inappropriate security classifications because no accessible cells or beds are available;
 - (ii) Shall not place inmates or detainees with disabilities in designated medical areas unless they are actually receiving medical care or treatment; [and]
 - (iii) Shall not place inmates or detainees with disabilities in

70. *Farmer v. Brennan*, 511 U.S. 825, 844 (1994).

71. *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

72. *Cf. United States v. Georgia*, 546 U.S. 151, 157 (2006) ("Goodman's claims for money damages against the State under Title II were evidently based, at least in large part, on conduct that independently violated" the Cruel and Unusual Punishments Clause).

73. 28 C.E.R. § 35.130(d).

facilities that do not offer the same programs as the facilities where they would otherwise be housed.⁷⁴

Prisons often house prisoners with disabilities in various kinds of special housing that are, if not quite solitary confinement, at least close to it; they impose far more locked-down time than ordinary housing, restrict access to property, limit various privileges, etc. This kind of dedicated housing for people with disabilities (as well as infirmary assignments for prisoners not actually in need of in-patient medical care) violate the plain dictates of the ADA's regulations if the housing area is not "the most integrated setting appropriate" to the prisoners' needs.⁷⁵ As the DOJ further explained in a brief filed in 2013, "[P]risoners with disabilities cannot be automatically placed in restrictive housing for mere convenience ... the individualized assessment should, at a minimum, include a determination of whether the individual with a disability continues to pose a risk, whether any risk is eliminated after mental health treatment, and whether the segregation is medically indicated."⁷⁶

Similarly, a prison violates the ADA regulation if, for example, all the mental-health housing is high security, so that prisoners who would otherwise have access to gentler conditions in minimum or medium security are forced into harsher environments in order to get treatment.⁷⁷ As already described, in *Armstrong v. California*, the U.S. District Court for the Northern District of California found that the plaintiff prisoners, who had mobility impairments, were being housed in solitary confinement simply because there were no accessible cells available elsewhere.⁷⁸ This, Judge Wilken held, violated the clear terms of the provisions quoted above.⁷⁹

More commonly, though, confinement of prisoners with disabilities to restrictive housing is not because of a shortage of accessible cells elsewhere, but rather because prisons choose to manage difficult, disability-related

74. 28 C.F.R. § 35.152.

75. 28 C.F.R. § 35.130(d).

76. Response of the United States of America to Defendants' Motion in Limine No.4: To Exclude the Statement of Interest at 4, *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Nov. 12, 2013), <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0041.pdf> (and Appendix).

77. This argument was made in some detail by the plaintiffs in the pioneering case *Disability Advocates, Inc. v. N.Y. State Office of Mental Health*, 1:02-cv-04002-GEL (S.D.N.Y. 2007), <http://www.clearinghouse.net/detail.php?id=5560>.

78. See Order Granting Motion for Further Enforcement, *Armstrong v. Brown*, No. 94-cv-02307-CW, 2015 WL 496799 (N.D. Cal. Feb. 3, 2015), <http://www.clearinghouse.net/chDocs/public/PC-CA-0001-0040.pdf>.

79. *Id.* at 1.

behavior with solitary confinement rather than less harsh housing assignments and services. In *Olmstead v. L.C.*, the Supreme Court required states to deinstitutionalize people with disabilities who had been unjustifiably assigned to receive various state-provided services in segregated institutions rather than in the community.⁸⁰ In prison or jail, when solitary confinement is triggered by a prisoner's disability (and resulting conduct), that means that prison services are provided in a setting that lessens the prisoner's contact with other, non-disabled prisoners. This is "segregated" not only in the way the term is used in prison, but also in the way the term is used in the *Olmstead* opinion to describe civil institutionalization, which the Court held can be a form of unlawful discrimination.⁸¹

The ADA's integration mandate presumes that such segregation is harmful. That is, the regulation itself bans an under-justified decision to isolate people with disabilities from other, non-disabled people; plaintiffs need not demonstrate how that decision hurts them. In addition, a decade of litigation under *Olmstead* in other settings has established that the solution for violations of the integration mandate is the provision of services in integrated settings that avoid the need to segregate.⁸² For example, in *United States v. Delaware*, an *Olmstead* settlement between the DOJ and the state of Delaware required statewide crisis services to "[p]rovide timely and accessible support to individuals with mental illness experiencing a behavioral health crisis, including a crisis due to substance abuse."⁸³ The settlement detailed numerous items that would form a "continuum of support services intended to meet the varying

80. 527 U.S. 581 (1999). For more on *Olmstead* and its implementation, see U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., STATEMENT OF THE DEPARTMENT OF JUSTICE ON ENFORCEMENT OF THE INTEGRATION MANDATE OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND *OLMSTEAD V. L.C.* (2011), http://www.ada.gov/olmstead/q&a_olmstead.pdf.

81. *Olmstead*, 527 U.S. at 598. The plaintiffs in California's *Coleman* litigation, a class action on behalf of prisoners with serious mental illness, have made the fullest version of this argument. See Notice of Motion & Motion for Enforcement of Court Orders & Affirmative Relief Re: Improper Housing & Treatment of Seriously Mentally Ill Prisoners in Segregation, *Coleman v. Brown*, 2:90-cv-00520-LKK-JFM (E.D. Cal. May 6, 2013), <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0066.pdf>; Plaintiffs' Post-Trial Brief Regarding Enforcement of Court Orders and Affirmative Relief Regarding Improper Housing and Treatment of Seriously Mentally Ill Prisoners in Segregation, *Coleman v. Brown*, 2:90-cv-00520-LKK-DAD (E.D. Cal. Jan. 21, 2014), <http://www.clearinghouse.net/chDocs/public/PC-CA-0002-0065.pdf>. In the end, the District Court did not address the argument, ruling entirely on constitutional grounds. *Coleman v. Brown*, 28 F. Supp. 3d 1068 (E.D. Cal. 2014).

82. See generally Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012).

83. Settlement Agreement at 3, *United States v. Delaware*, 1:11-cv-00591-LPS (D. Del. July 6, 2011), <http://www.clearinghouse.net/chDocs/public/PB-DE-0003-0002.pdf>.

needs of individuals with mental illness.”⁸⁴ This included Assertive Community Treatment teams—multidisciplinary groups “including a psychiatrist, a nurse, a psychologist, a social worker, a substance abuse specialist, a vocational rehabilitation specialist and a peer specialist”—to “deliver comprehensive, individualized, and flexible support, services, and rehabilitation to individuals in their homes and communities,” and various kinds of case management.⁸⁵ And it provided for “an array of supportive services that vary according to people’s changing needs and promote housing stability” and “integrated opportunities for people to earn a living or to develop academic or functional skills.”⁸⁶ Other *Olmstead* decrees contain similar provisions.⁸⁷

The Delaware settlement and other *Olmstead* cases provide a very helpful model for how prisons could comply with the integration mandate, managing the needs of prisoners with disabilities to keep them out of the segregated solitary-confinement setting. The possibilities are broad: provision of coaching and mental-health treatment and other supports, perhaps assignment to a one-person cell to minimize intra-cell conflict, and many more.

RECOMMENDATION: Prisons and jails should avoid separating prisoners with disabilities from other prisoners, and should implement supports helpful to avoid the need for such separation, including coaching, mental-health treatment, single cells where useful, and others.

D. KEY FEATURES OF IMPLEMENTATION PROCESSES

As I’ve already argued, individualization and integration do not come naturally to jails and prisons—total institutions that prefer standardized to singular treatment. It may be helpful, then, to explore briefly how a jail or prison could maximize its ability to implement the recommendations I’ve just made by using four procedural components: interaction with the prisoner, notice to the prisoner of available services and accommodations, structured consideration, and concentrated development of expertise and responsibility.

Because disability-related needs are so varied, disability-rights statutes often require what is often called an “interactive process” for the development of accommodations. The ADA’s Title I (employment) regulation urges that an “informal, interactive process” “may be necessary” to “identify the

84. *Id.* at 6.

85. *Id.* at 5–6.

86. *Id.* at 7–8.

87. See *Special Collection: Olmstead Cases*, CIV. RTS. LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/results.php?searchSpecialCollection=7> (last visited Apr. 3, 2017) (listing cases).

precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”⁸⁸ The EEOC’s guidance explains that the procedure should be “flexible [and] interactive” and should “involve[] both the employer and the [employee] with a disability.”⁸⁹ And, as one federal appellate court has explained, this approach is not “especially burdensome.” The idea is simply to:

meet with the employee who requests an accommodation, request information about the condition and what limitations the employee has, ask the employee what he or she specifically wants, show some sign of having considered employee’s request, and offer and discuss available alternatives when the request is too burdensome.⁹⁰

Similarly, the Individuals with Disabilities Education Act (IDEA) requires that a child’s individualized education program be developed in a process that is calculated to understand the child’s needs and goals, and that includes his or her parents.⁹¹ Particularly under the IDEA, part of the process is providing information to the parent on rights and available services and accommodations.⁹²

ADA Title II’s regulations do not include “interactive process” language, but courts have nonetheless imported the approach, which is sensibly geared toward assessing individualized needs and solutions.⁹³ In a prison or a jail, an interactive process has two advantages. First, it involves the prisoner, who is best equipped to know his own needs and circumstances. Second, it structures a focused consideration of the disability issues—the situation, the potential solutions, and their pros and cons.

It’s useful to designate who as well as what the process includes. Disability accommodation requires knowledge of what the law requires—the content of the sections preceding this one. Equally important, it requires knowledge of multiple technologies and techniques. Take a relatively easy question: What can be done to provide access to telephone communication to a prisoner who is too hard of hearing to use a regular phone, but who doesn’t sign? To answer

88. 29 C.F.R. § 1630.2(o)(3).

89. 29 C.F.R. pt. 1630, App.

90. *Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 162 (3d Cir. 1999).

91. 20 U.S.C. § 1414(d)(1)(B).

92. On parental involvement in the IEP process in general, see MARK C. WEBER, *SPECIAL EDUCATION LAW AND LITIGATION TREATISE* § 5.2 (citing 34 C.F.R. §§ 300.343(c)(iii), 300.346(a)(1)(i), 300.346(b)).

93. See, e.g., *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

requires awareness of the range of devices available—for example, amplifiers (including their interaction with hearing aids), or devices such as captioned telephones.⁹⁴ In correctional facilities, there are added complications. What kinds of amplifiers are sturdy enough for congregate facilities and capable of use with (usually low-tech and analog signal) prison pay phones? How can a captioned telephone be linked to the prison phone-billing system? And so on. In the case I am monitoring, a variety of obstacles to the state's first installation of a captioned telephone took several months to solve. The point is, it is essential for each facility to designate a disability or ADA coordinator who can develop the requisite regulatory and practical expertise. The ADA Title II regulations require designation of a "responsible employee" at the agency level,⁹⁵ but in my experience, few prisons or jails have anyone playing this role.

All this is the base for a procedural recommendation:

RECOMMENDATION: Jails and prisons should create a process for consideration of disability issues, which should include notice to prisoners with disabilities of their rights and available resources, services, and accommodations; and individualized consideration of the prisoners' requests and any alternatives. A designated ADA coordinator should develop appropriate expertise in disability, legal requirements, and technical solutions for disability-related needs.

E. TREATMENT—INCLUDING INTAKE AND DISCHARGE PLANNING

People with disabilities frequently have chronic and serious medical/mental-health treatment needs. Jails and prisons are constitutionally required to meet those needs.⁹⁶ That requirement extends not only to treatment in jail and prison (including prompt medical and mental-health assessment and management), but the period of time post-release before a released prisoner can reasonably

94. See *Internet Protocol (IP) Captioned Telephone Service*, FCC, <https://www.fcc.gov/consumers/guides/internet-protocol-ip-captioned-telephone-service> (last visited Apr. 3, 2017) ("CTS [captioned telephone service] allows a person with hearing loss but who can use his or her own voice and has some residual hearing, to speak directly to the called party and then listen, to the extent possible, to the other party and simultaneously read captions of what the other party is saying").

95. 28 C.F.R. § 35.107(a). On what an effective ADA coordinator needs to know and be empowered to do, see U.S. DEP'T OF JUSTICE, ADA BEST PRACTICES TOOL KIT FOR STATE AND LOCAL GOVERNMENTS (2006) <https://www.ada.gov/pcatoolkit/chap2toolkit.pdf>.

96. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

obtain external treatment.⁹⁷ In addition, the ADA and Rehabilitation Act require, at the very least, elimination of obstacles to treatment: As the Supreme Court noted in *Pennsylvania Department of Corrections v. Yeskey*, medical care is among the “services, programs, or activities” encompassed by the statutory text.⁹⁸ The Court confirmed the point in *United States v. Georgia*, when it deemed “quite plausible” the plaintiff’s claim that “deliberate refusal of prison officials to accommodate [his] disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs constituted ‘exclu[sion] from participation in or ... den[ial of] the benefits of’ the prison’s ‘services, programs, or activities.’”⁹⁹

But the statutory disability claims may reach further. After all, without treatment, prisoners with both physical and mental disabilities are more likely to run into trouble of various kinds, leading them to disciplinary or administrative exclusions from facility programs, services, and activities. A prisoner who needs but does not have a hearing aid may face disciplinary consequences for noncompliance with directives he cannot hear—and will certainly be unable to benefit from many programs. The latter is also true for a prisoner whose abilities are compromised by an untreated chronic illness. The ADA and Rehabilitation Act don’t require most government entities to provide medical care. But it seems to me a plausible argument that in prison and jail,

97. See *Wakefield v. Thompson*, 177 F.3d 1160, 1164 (9th Cir. 1999) (“[T]he state must provide an outgoing prisoner who is receiving and continues to require medication with a supply sufficient to ensure that he has that medication available during the period of time reasonably necessary to permit him to consult a doctor and obtain a new supply.”); *Lugo v. Senkowski*, 114 F. Supp. 2d 111, 115 (N.D.N.Y. 2000) (“The State has a duty to provide medical services for an outgoing prisoner who is receiving continuing treatment at the time of his release for the period of time reasonably necessary for him to obtain treatment on his own behalf.”); see also *Brad H. v. City of New York*, 712 N.Y.S.2d 336 (Sup. Ct. 2000), order *aff’d*, 716 N.Y.S.2d 852 (Sup. Ct. App. Div. 2000) (similar outcome under state law).

98. *Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206 (1998).

99. *United States v. Georgia*, 546 U.S. 151, 157 (2006) (alterations in original).

where medical and mental-health care are among the services provided, denial of particular treatments needed by people with disabilities also constitutes actionable discrimination.¹⁰⁰

In any event, the resulting recommendation is a simple one to state, though complex to comply with:

RECOMMENDATION: Jails and prisons should provide appropriate intake assessment, treatment, and discharge planning for the medical and mental-health needs of people with disabilities.

F. THE LARGER LESSON

It's not only prisoners with disabilities who can benefit from individualization. I've just argued, for example, that a prisoner with an intellectual disability that renders him illiterate, and therefore unable to take advantage of subsidies for letters home, should receive an accommodation—subsidized phone calls, a reader/writer, or something similar. Such an accommodation is equally useful to any prisoner who is illiterate, even if he does not have an intellectual disability. Likewise, for anyone who is in segregated housing because of a security risk, it only makes sense for prison officials to limit the restrictions to what is actually necessary. There's no reason, for example, to restrict access to phone calls, books, or television for a prisoner temporarily locked down because of threats against her. Even when the ADA is not requiring the more individualized approach, it's sensible to unbundle the potential privilege restrictions and apply only the ones that are necessary.

III. BRIDGING THE PRISON WALLS

Abundant evidence demonstrates that prisoners' successful reentry—their transition to productive and pro-social lives in their communities after release from jail and prison—is aided by programs that bridge the walls that separate

100. See, e.g., Plaintiff's Response to Motion for Summary Judgment, *Anderson v. Colorado*, No. 10-cv-01005-WYD-KMT (D. Colo. July 21, 2011), <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0006.pdf>; Plaintiff's Trial Brief, *Anderson v. Colorado*, No. 10-cv-01005-WYD-KMT (D. Colo. Apr. 23, 2012), <http://www.clearinghouse.net/chDocs/public/PC-CO-0017-0007.pdf>. In these pleadings, the plaintiff argued that the ADA and Rehabilitation Act barred the prison's "refus[al] to provide the reasonable accommodation (in the form of treatment and medication) necessary to permit Mr. Anderson to be integrated with other prisoners," and, in the alternative, that "if—even with proper medication and treatment—his mental illness requires that he be kept in ad seg, he is qualified for a number of programs and benefits that he is now being denied based solely on that placement. Because that is tantamount to denying him these programs and benefits based on his disability, it constitutes illegal discrimination under the ADA and RA." Plaintiff's Response to Motion for Summary Judgment, *supra*, at 42. The court denied these claims on the facts. *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1146–48 (D. Colo. 2012).

prison from the outside world. We know that effective reentry planning “starts on the inside and continues upon release.”¹⁰¹ Among the most effective bridging methods is when “[t]he same re-entry planner or case manager works with the detainee on the inside and on the outside and serves as an advocate for his successful re-entry.”¹⁰² Mentor programs often use a similar strategy; mentors begin working with prisoners prerelease, and continue through a reentry period.¹⁰³

This broad insight has specific application to prisoners with disabilities and their medical and mental-health care. To improve care, and the lives and prospects of prisoners with disabilities, what is needed are wall-bridging techniques addressing record-keeping, personnel, and finances. The idea is not complicated. If jail and prison health care could be integrated with community health care in these three arenas, the result would not be merely improved health behind bars but improved community health.

1. Health records

Transitions are a dangerous time for health services. At hospitals, the most dangerous hours of the day are the shift changes. For prisoners with acute health needs, one dangerous time is arrival at a new facility—when medication is often confiscated, skipped, or lost; health histories can be hazardously incomplete; and (particularly in jail) the prisoner is often in crisis. Another dangerous time is release—when prisoners usually leave with only a few days’ worth, if that, of any medication, without a doctor’s appointment to get a refill, and often far from their families without transportation home.¹⁰⁴

101. ROBERT WOOD JOHNSON FOUND., LINKING RE-ENTRY PLANNING TO COMMUNITY-BASED CORRECTIONAL CARE 2 (2009), http://www.thebridginggroup.com/pdf/Linking_Re-Entry_Planning_to_Community-Based_Correctional_Care_Zack_2009.pdf. See generally Susan Turner, “Reentry,” in the present Volume.

102. ROBERT WOOD JOHNSON FOUND., *supra* note 101, at 2.

103. See SHAWN BAULDRY ET AL., MENTORING FORMERLY INCARCERATED ADULTS: INSIGHTS FROM THE READY4WORK REENTRY INITIATIVE 7 tbl.2 (2009), <http://ppv.issuelab.org/resources/1948/1948.pdf>; see also BYRON R. JOHNSON & DAVID B. LARSON, THE INNERCHANGE FREEDOM INITIATIVE: A PRELIMINARY EVALUATION OF A FAITH-BASED PRISON PROGRAM 16 (2008), <http://www.baylor.edu/content/services/document.php/25903.pdf> (“It was hoped that the mentoring relationship that was developed while the offender was still in prison would continue during the difficult months following release from prison.”).

104. See, e.g., Jacques Baillargeon et al., *Accessing Antiretroviral Therapy Following Release from Prison*, 301 JAMA 848, 855 (2009) (“In this 4-year study of HIV-infected inmates released from the nation’s largest state prison system, we found that only 5% of released inmates filled a prescription for ART medications soon enough ... to avoid treatment interruption.”)

An integrated system of health records shared between community and jail health providers doesn't altogether solve the problem, but it can help. For example, when medications are needed right away on incarceration, an existing prescription record could be an enormous help. More generally, to quote the talking points from one innovative county's presentation on their implementation of such a system, integrated records "improve access to timely and appropriate health care information during clinical encounters" and "improve the overall clinical care of the client by the connection with community providers."¹⁰⁵

RECOMMENDATION: Health records in jails and prisons should be electronic and integrated with community health records.

2. Personnel

In medical and mental-health care as in other areas, people are the best bridges. There are a variety of models.¹⁰⁶ In both New York City and Washtenaw County, Michigan, for example, mental-health care in the jail is provided by the same agency, and sometimes the same people, as mental-health care outside.¹⁰⁷ In two Rhode Island programs for HIV-infected inmates, the personnel who stay constant are not the treating professionals but case managers.¹⁰⁸ In another Michigan county program, a "medical navigator" and community health workers begin meeting with prisoners months prior to their release, and continue with case-management services post-release.¹⁰⁹

Community service providers are useful for three reasons: continuity of care; expertise in available community services; and non-prison attitude. The

105. SAMHSA-HRSA CTR. FOR INTEGRATED HEALTH SOLUTIONS, BRIDGING CRIMINAL JUSTICE SYSTEMS AND COMMUNITY HEALTHCARE: INTEGRATION'S ROLE IN REENTRY (2013), http://www.integration.samhsa.gov/Presentation_FINAL.pdf. The program described is for the Multnomah County Health Department; see also BEN BUTLER, CMTY. ORIENTED CORR. HEALTH SERVS., JAILS AND HEALTH INFORMATION TECHNOLOGY: A FRAMEWORK FOR CREATING CONNECTIVITY (2013), http://www.cochs.org/files/HIT-paper/cochs_health_it_case_study.pdf, for a case study of this and several other projects.

106. I lean here largely (though not entirely) on programs cited in Kavita Patel et al., *Integrating Correctional And Community Health Care For Formerly Incarcerated People Who Are Eligible For Medicaid*, 33 HEALTH AFF. 468 (2014), <http://content.healthaffairs.org/content/33/3/468.long>.

107. See BUTLER, *supra* note 105, at 14; *Correctional Services Description*, EWASHTENAW, <http://www.ewashtenaw.org/government/sheriff/divisions/corrections/correctional-services> (last visited Feb. 15, 2017).

108. Patel et al., *supra* note 106, at 469-70.

109. *Michigan Pathways Project Links Ex-Prisoners to Medical Services, Contributing to a Decline in Recidivism*, AGENCY HEALTHCARE RES. & QUALITY (Feb. 2, 2009), <https://innovations.ahrq.gov/profiles/michigan-pathways-project-links-ex-prisoners-medical-services-contributing-decline>.

first two are self-explanatory. The third is equally important. Correctional facility doctors and nurses can be expert and compassionate providers. But sometimes prisons and jails become the employers of last resort for subpar clinicians. A number of states have a practice of granting “restricted licenses” to doctors who work in prisons but do not meet the requirements for full licensure.¹¹⁰ And in some states, doctors whose disciplinary records make them unattractive employees elsewhere find jobs in the prison system.¹¹¹ Even when clinicians have unrestricted licenses and clean records, research establishes that prison doctors and nurses tend to be more jaded and less empathetic toward their patients when compared with their civilian counterparts.¹¹² As experienced correctional physician Robert Greifinger has summarized: “There is far too much cynicism regarding inmates among correctional health care professionals, who work in environments of constant tension. Too often these professionals are skeptical about inmates’ concerns and complaints, believing that the inmates (who do often exaggerate) are malingering for secondary gain. Correctional health care staff also frequently incorporate the custody staff’s fear that humane responsiveness is coddling that can lead to anarchy.”¹¹³

When medical and mental-health staff work both in and out of correctional facilities, that counteracts both the tendency toward lower hiring standards and lower levels of compassion toward the patients. Even if in a particular setting it makes sense to hire people who work only in a correctional facility, it is helpful in terms of hiring, supervision, and mindset if their employing organization is focused on community as well as correctional care.

RECOMMENDATION: Medical and mental-health staff in jails and prisons should have employing organizations whose focus is on community in addition to correctional care.

110. See John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement: A Report of The Commission on Safety and Abuse in America’s Prisons*, 22 WASH. U. J.L. & POL’Y 385, 443–44 (2006).

111. See Cindy Chang, *Many Doctors Treating State’s Prisoners Have Disciplinary Records Themselves*, THE TIMES-PICAYUNE (July 29, 2012), http://www.nola.com/crime/index.ssf/2012/07/many_doctors_treating_states_p.html.

112. See Naveen Dhawan et al., *Physician Empathy and Compassion for Inmate-Patients in the Correctional Health Care Setting*, 13 J. CORR. HEALTH CARE 257, 264 (2007) (“[C]orrectional physicians describe a developmental course in which they become increasingly able to empathize with inmates during a period of years of working in a correctional setting.”); Kristine E. Shields & Dorothy de Moya, *Correctional Health Care Nurses’ Attitudes Toward Inmates*, 4 J. CORR. HEALTH CARE 37, 37 (1997).

113. Robert B. Greifinger, *Inmates As Public Health Sentinels*, 22 WASH. U. J.L. & POL’Y, 253, 262 (2006).

3. Finances and discharge planning

Finally, there is simply no justification for the current law and practices governing the financing of inmate health care. As so often in health law, this issue is technically complicated. Since its inception, Medicaid has excluded “inmates of public institutions” from “federal financial participation”—which is to say, coverage.¹¹⁴ That exclusion has never affected inmate eligibility to enroll, just their actual receipt of Medicaid benefits.¹¹⁵ Nonetheless, even prisoners who were eligible, because of age or disability, have most often had their Medicaid enrollment terminated rather than merely suspended, during their time in jail and prison. The result was months of delay for former inmates to be reapproved for Medicaid on release from incarceration.¹¹⁶

In the past, the use of Medicaid termination rather than suspension did not affect most prisoners, however, because they were not Medicaid-eligible in any event. As adults without dependent children and without a Social Security Administration-recognized disability, they did not meet their states’ eligibility criteria notwithstanding their low income. The Affordable Care Act (ACA) changed that part of the picture when it allowed states to expand Medicaid coverage to everyone who earns up to 138% of the federal poverty level and is under 65 (People 65 and older are covered under Medicare).¹¹⁷ As of January 2017, 31 states and the District of Columbia had signed up for the ACA’s Medicaid expansion funding.¹¹⁸ The result is that nearly all inmates in those states are now Medicaid-eligible. Enrollment comes with two benefits for them and their jailers: First, Medicaid will cover a large portion of the cost of care delivered outside the institution—at a hospital, for example—when the prisoner has been admitted to that hospital for 24 hours or more. Second, Medicaid enrollment greatly smooths the transition to community health care on release. To realize these benefits, however, states need to enroll their inmates—and to suspend rather than terminate prisoner participation in the

114. 42 C.F.R. § 435.1009(a)(1).

115. See Letter from Glenn Stanton, Acting Dir., Disabled & Elderly Health Programs Grp., to State Medicaid Directors, CMS Assoc. Reg’l Adm’rs for Medicaid (May 25, 2004), <https://www.medicaid.gov/medicaid/ltss/downloads/community-living/ending-chronic-homelessness-smd-letter.pdf> (discussing ending chronic homelessness).

116. See NAT’L ASS’N of CTYS., *HEALTH COVERAGE AND COUNTY JAILS SUSPENSION VS. TERMINATION* 1 (2014), [http://www.naco.org/sites/default/files/documents/Suspension-termination-DEC2014\(2\).pdf](http://www.naco.org/sites/default/files/documents/Suspension-termination-DEC2014(2).pdf); see also 42 C.F.R. § 435.912 (capping Medicaid eligibility determinations based on disability at 90 days and other applications at 45 days).

117. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 271 (2010) (codified at 42 U.S.C. § 1396a).

118. *Current Status of State Medicaid Expansion Decisions*, KAISER FAMILY FOUND. (Jan. 1, 2017), <http://kff.org/health-reform/slide/current-status-of-the-medicaid-expansion-decision/>.

program while they are housed in jail or prison. States have been making real though not complete progress on these fronts.¹¹⁹

Much more broadly (and admittedly unrealistically in the current political climate), to my mind, the exclusion of prisoners from Medicaid makes no sense at all. If the federal government is going to be responsible for health-care costs for poor people, why exclude prisoners? I suppose there's an argument that since the states and local governments are constitutionally required to pay for medical care, Medicaid coverage would not increase access to care, but merely shift the payer (of course, if that's the logic, the exclusion from the exclusion for hospital stays is an oddity). But even if Medicaid continues to exclude prisoners, there is no reason at all that prisoners shouldn't be enrolled, to facilitate coverage for them when they leave. The absence of Medicaid coverage is one of the reasons that the death rate for released prisoners is several times higher than for others of similar age, race, and sex.¹²⁰ The availability of insurance makes discharge planning possible: case managers can connect inmates heading toward release with providers in their community and can even schedule necessary post-release appointments.

RECOMMENDATION: Congress should extend Medicaid coverage for Medicaid-eligible prisoners. In the alternative, jails and prisons should enroll all eligible prisoners in Medicaid, and suspend rather than terminate Medicaid coverage for prisoners.

RECOMMENDATION: Jail and prison case managers should undertake systematic discharge planning for medical and mental-health care; prisoners should be released with sufficient medication to get them to a scheduled appointment with an appropriate provider.

119. See Sachini N. Bandara et al, *Leveraging the Affordable Care Act to Enroll Justice-Involved Populations in Medicaid*, 34 HEALTH AFF. 2044 (2015); *Medicaid Eligibility for People Leaving Incarceration Is Smart Policy*, FAMILIES USA (July 12, 2016), http://familiesusa.org/sites/default/files/product_documents/ENR_Suspension%20v.%20Termination%20Map%20Infographic_07-12-16.pdf. In addition, in April 2016, the Obama Administration issued guidance on "facilitating access to covered Medicaid services for eligible individuals prior to and after a stay in a correctional institution." That guidance provided that individuals in halfway houses would often be covered by Medicaid (if they had a certain degree of freedom of movement). Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., State Health Official Letter No. 16-007 (Apr. 28, 2016).

120. Ingrid A. Binswanger et al., *Release from Prison—A High Risk of Death for Former Inmates*, 356 NEW ENG. J. MED. 157, 157 (2007).

RECOMMENDATIONS

Here is a summary of this chapter's recommendations:

1. Jail and prison officials should not exclude prisoners with disabilities from particular housing units, jobs, or any other programs absent an individualized finding that a prisoner's participation poses significant safety risks that cannot be mitigated.
2. Jail and prison officials should embrace the ADA's requirement of individualized modifications to policies and practices when useful for prisoners with disabilities' equal participation in and access to services.
3. Prisons and jails should avoid separating prisoners with disabilities from other prisoners, and should implement supports helpful to avoid the need for such separation, including coaching, mental-health treatment, single cells where useful, and others.
4. Jails and prisons should create a process for consideration of disability issues, which should include notice to prisoners with disabilities of their rights and available resources, services, and accommodations; and individualized consideration of the prisoners' requests and any alternatives. A designated ADA coordinator should develop appropriate expertise in disability, legal requirements, and technical solutions for disability-related needs.
5. Jails and prisons should provide appropriate intake assessment, treatment, and discharge planning for the medical and mental-health needs of people with disabilities.
6. Health records in jails and prisons should be electronic and integrated with community health records.
7. Medical and mental-health staff in jails and prisons should have employing organizations whose focus is on community in addition to correctional care.
8. Congress should extend Medicaid coverage for Medicaid-eligible prisoners. In the alternative, jails and prisons should enroll all eligible prisoners in Medicaid, and suspend rather than terminate Medicaid coverage for prisoners.
9. Jail and prison case managers should undertake systematic discharge planning for medical and mental-health care; prisoners should be released with sufficient medication to get them to a scheduled appointment with an appropriate provider.

Releasing Older Prisoners

Michael Millemann,^{*} Rebecca Bowman-Rivas,[†]
and Elizabeth Smith[‡]

The rising number of older prisoners is a major factor in the nation's exponential prison growth over the last four decades. There are now over a quarter million people age 50 or older in state and federal prisons. It is estimated that by 2020, older inmates will represent up to one-third of the prison population. Many are serving life sentences with the possibility of parole for violent crimes, especially murder, committed when they were young. Many of them have redeemed their lives in prison, but will die in prison because of restrictive changes in sentencing and corrections laws and policies during the 1980s and '90s. These are America's most expensive prisoners, costing up to or more than \$60,000 per prisoner a year. The continued incarceration of many serves no public-safety purpose; indeed, it undermines public safety by wasting scarce resources, particularly prison beds. Over the last four years in Maryland, judges have implemented a 2012 appellate court decision by approving the negotiated releases on probation of over 160 long-incarcerated lifers. To date, none of these former inmates has been convicted of a new crime other than driving/traffic offenses. Policymakers and legislatures should be aware of these experiences in making decisions, including cost-effective decisions, about proposed sentencing and release proposals.

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INTRODUCTION

The rising number of older prisoners is a major factor in the nation's exponential prison growth over the last four decades. Preliminarily, we note there is no consensus about what age is "old" for a prisoner, with the commonly stated range being from 50 to 60. It's clear a prisoner's "physical age" is higher than chronological age, and the needs prisoners have for health services begin to significantly increase around the age of 50. There are many factors that produce earlier prisoner aging, including the stress of incarceration, poor nutrition, inadequate health care, the dangers of prison life, and the damaging effects of pre-incarceration behaviors and poverty.¹

In 2013, according to the Bureau of Justice Statistics, there were 1,574,700 state and federal prisoners, six times as many as in 1980.² In 2010, 246,600 were age 50 or older.³ From 1995 to 2010, the number of prisoners age 55 or older nearly quadrupled, from 32,600 to 124,400.⁴ It is estimated that by 2020, older inmates will represent 21% to 33% of the prison population.⁵

There are many reasons for America's aging prison population, including repeal of, or restrictions on parole;⁶ repeat-offender laws;⁷ mandatory minimum

1. TINA CHIU, VERA INST. JUST. CTR. SENTENCING & CORRECTIONS, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, & GERIATRIC 5 (2010); Jeremy Luallen & Ryan Kling, *A Method for Analyzing Changing Prison Populations: Explaining the Growth of the Elderly in Prison*, 38 EVALUATION REV. 459 (2014).

2. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013, at 1, 2 (Sept. 2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf>; HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 24 (2012). For a discussion of mass incarceration, see Todd R. Clear & James Austin, "Mass Incarceration," in the present Volume.

3. OSBORNE ASS'N, THE HIGH COSTS OF LOW RISK: THE CRISIS OF AMERICA'S AGING PRISON POPULATION 2 (2014).

4. HUMAN RIGHTS WATCH, *supra* note 2, at 6, 19.

5. R.V. Rikard & Ed Rosenberg, *Aging Inmates: A Convergence of Trends in the American Criminal Justice System*, 13 J. CORRECTIONAL HEALTH CARE 150, 151 (2007).

6. OSBORNE ASS'N, *supra* note 3, at 5, 7, 8. See generally Francis T. Cullen, "Correctional Rehabilitation," in the present Volume; Douglas A. Berman, "Sentencing Guidelines," in the present Volume.

7. OSBORNE ASS'N, *supra* note 3, at 5; Luallen & Kling, *supra* note 1, at 463 (citing Kathleen Auerhahn, *Selective Incapacitation, Three Strikes, and the Problem of Aging Prison Populations: Using Simulation Modeling to See the Future*, 1 CRIMINOLOGY & PUB. POL'Y 353 (2002)).

sentences;⁸ truth-in-sentencing laws;⁹ longer sentences;¹⁰ more life sentences;¹¹ and limited uses of compassionate/medical release and executive clemency.¹²

In this chapter, we make a series of arguments in support of releasing many more older, long-incarcerated prisoners from the country's prisons and offer recent experiences in Maryland in which over 160 older, long-incarcerated, life-sentenced prisoners were released as evidence that this can be done safely.

I. WHAT THE EXPERTS HAVE SAID ABOUT THE OLDER-PRISONER PROBLEM

A. THE PROBLEM IS SEVERE, GROWING AND VERY EXPENSIVE

Experts from an array of disciplines—including medicine,¹³ social work,¹⁴ mental health,¹⁵ criminology,¹⁶ and law¹⁷—have written about older prisoners, with many points of consensus. To begin with, older prisoners are expensive, costing about \$16 billion per year, including \$8.2 billion in medical care in 2009.¹⁸ It costs twice as much or more, up to \$68,270 per year, to incarcerate an elderly prisoner than a younger one.¹⁹ Indeed, it costs over \$1.5 million to

8. OSBORNE ASS'N, *supra* note 3, at 5. See generally Erik Luna, "Mandatory Minimums," in the present Volume.

9. Among other things, the 1994 Federal Violent Crime Control and Law Enforcement Act required that 50% of program funding go to states that adopt truth-in-sentencing laws. Rikard & Rosenberg, *supra* note 5, at 152.

10. OSBORNE ASS'N, *supra* note 3, at 5.

11. From 1984 to 2008, prisoners serving life sentences in state prisons tripled, from 34,000 to 104,610. HUMAN RIGHTS WATCH, *supra* note 2, at 33 (citing ASHLEY NELLIS & RYAN S. KING, SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 7 (2009)).

12. OSBORNE ASS'N, *supra* note 3, at 5, 7–8. See generally Mark Osler, "Clemency," in the present Volume.

13. Rikard & Rosenberg, *supra* note 5; Brie A. Williams et al., *Addressing the Aging Crisis in U.S. Criminal Justice Healthcare*, 60 J. AM. GERIATRIC SOC'Y 1150 (2012).

14. Cindy Snyder et al., *Older Adult Inmates: The Challenge for Social Work*, 54 SOC. WORK 117 (2009).

15. Tina Maschi & Lindsay Koskinen, *Co-Constructing Community: A Conceptual Map for Reuniting Aging People in Prison With Their Families and Communities*, 21 TRAUMATOLOGY 208 (2015).

16. Lauren C. Porter et al., *How the U.S. Prison Boom Has Changed the Age Distribution of the Prison Population*, 54 CRIMINOLOGY 30 (2016); CHIU, *supra* note 1.

17. Derek Neal & Armin Rick, *The Prison Boom and Sentencing Policy*, 45 J. LEGAL STUD. 1 (2016).

18. ACLU, AT AMERICA'S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY 28 (2012); PEW CHARITABLE TRUSTS & MACARTHUR FOUNDATION, STATE PRISON HEALTH CARE SPENDING 1 (2014) (stating that health care spending peaked at \$ 8.2 billion in 2009 and since declined, due in part to a decrease in state prison populations); OSBORNE ASS'N, *supra* note 3, at 5, 7, 8.

19. ACLU, *supra* note 18, at ii.

imprison a person from age 50 until age 75. This is a major reason that state corrections spending grew by 674% from 1983 to 2008.²⁰

Almost half of prisoners over 50, and over four-fifths over 65, have chronic physical problems.²¹ They visit health facilities five times as frequently as similarly aged persons not incarcerated and often need expensive off-site hospital care for specialized procedures, with enhanced security costs.²² The costs of special diets for older inmates also may double a younger inmate's food costs.²³ Older prisoners have high incidences of mental-health problems as well, including dementia and Alzheimer's disease.²⁴ Only one in three has access to adequate treatment.²⁵

Older prisoners also face dangerous conditions and pose management challenges. At worst, they are victimized (in large numbers). At best, when protected, they struggle to freely move around, faced with having to go up and down stairs, use bunk beds, navigate narrow doorways, and move substantial distances for meals and other services, often without handrails or wheelchair access.²⁶

B. POSSIBLE RESPONSES TO THE OLDER-PRISONER PROBLEM

In the last 15 years, many states have created mechanisms to give prisoners early-release opportunities. These reforms have been largely driven by overcrowding and cost, and more frequently now, have bipartisan support. They include expansions of medical/compassionate release; more earned-time opportunities and reinstitution of traditional parole; limits on parole revocations for technical violations; and development of risk-assessment tools. More recently, "justice reinvestment acts" have included some of these provisions.²⁷

20. *Id.*; CHIU, *supra* note 1, at 4.

21. ACLU, *supra* note 18, at 31; HUMAN RIGHTS WATCH, *supra* note 2, at 73.

22. CHIU, *supra* note 1, at 5; OSBORNE ASS'N, *supra* note 3, at 2.

23. Stan Stojkovic, *Elderly Prisoners: A Growing and Forgotten Group Within Correctional Systems Vulnerable to Elder Abuse*, 19 J. ELDER ABUSE & NEGLECT 97, 104 (2007).

24. OSBORNE ASS'N, *supra* note 3, at 3.

25. *Id.*

26. *Id.* at 4; ACLU, *supra* note 18, at 27.

27. See Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1288 (2011). O'Hear summarizes what he sees as a swinging pendulum: "Parole is making a comeback. Although it was a universal feature of the American criminal justice system as recently as forty years ago, parole fell into precipitous decline over the final three decades of the twentieth century. By 2000, fifteen states and the federal government had abolished parole altogether, while twenty additional states had formally restricted its availability. Since 2000, however, at least thirty-six states have enhanced release opportunities for prison inmates (although some still resist the 'parole' label for their new programs)." *Id.* at 1249.

What almost all of these reforms have in common is the exclusion of long-confined, older prisoners convicted of violent crimes. This is true even when such prisoners are eligible for release under, for example, medical/compassionate release laws. By the end of 2009, 15 states and the District of Columbia had provisions for medical, geriatric releases. Yet these laws are rarely used. “Four factors help explain the difference between the stated intent and the actual impact of geriatric release laws: political considerations and public opinion; narrow eligibility criteria; procedures that discourage inmates from applying for release; and complicated and lengthy referral and review processes.”²⁸

There are obstacles to reform, including politically cultivated public anger and understandable skepticism about cost/benefit arguments. When cost savings are offered, “[p]olicymakers and taxpayers want to know whether costs are simply being shifted to other state agencies, such as social service or health departments, or to the federal government through Medicare or Medicaid reimbursements after individuals return to the community.”²⁹ Cost-effective arguments, however, have factual support.

Release does reduce a significant “collateral cost associated with obtaining [required] medical treatment. Although governments may have to pay for elder inmates’ medical needs regardless of whether they are incarcerated, transactional costs of providing health care in the prison system compound state and federal expenditures.”³⁰

And specialized housing units for older inmates are expensive too. They can include assisted living care,³¹ convalescent care,³² and hospice-care units,³³ as well as special units for inmates with dementia and cognitive impairments.³⁴ Correctional officers must deal with common age-related conditions like loss of vision and hearing, falls and incontinence, and clinically diagnosed cognitive issues. These conditions pose difficult and expensive challenges in prisons.³⁵

We believe that one safe and cost-effective answer to these problems simply is to get many older inmates out of prison, so the state saves the excessive costs of their continued incarceration and they can live their remaining years,

28. CHIU, *supra* note 1, at 2.

29. *Id.* at 8.

30. Jason S. Orduff, *Releasing the Elderly Inmate: A Solution to Overcrowding*, 4 ELDER L.J. 173, 185 (1996).

31. HUMAN RIGHTS WATCH, *supra* note 2, at 50–51, 74.

32. *Id.* at 50–51.

33. *Id.* at 50–51, 83, 84.

34. *Id.* at 6, 52, 53, 55.

35. OSBORNE ASS’N, *supra* note 3, at 3–4, 12; Williams et al., *supra* note 13, at 1475.

sometimes two to three decades, with their families, family members, friends, or in community-based housing.

When released, older prisoners have low recidivist rates, confirming that people “age out” of criminal activity.³⁶ Over 40% of all released inmates recidivate within three years of release, compared to 7% of released prisoners who are 50-64 years old, and 4% who are 65 or older.³⁷ These data are true for those convicted of violent crimes and sentenced to life.³⁸ In sum, older prisoners, when released, have the lowest recidivism rates and pose the least threat to public safety of all prisoners.

If released on parole, the average daily cost will be \$3.50 to \$13.50 a day, or \$1,278 to \$4,928 per year.³⁹ These relatively low numbers reflect the reduced needs for supervision.

We now turn to one state’s recent experiences in *safely* releasing over 160 older, life-sentenced prisoners to make our basic point that thousands of older prisoners serving life sentences across the country can be safely released.

II. RELEASING LONG-INCARCERATED, OLDER PRISONERS SAFELY: THE MARYLAND EXPERIENCE

During the last three years, Maryland courts have released 178 older, life-sentenced prisoners convicted of murder (most) or rape.⁴⁰ The releases of 177 were based on agreements between prosecutors and the prisoners to implement a 2012 decision of the Maryland Court of Appeals granting older prisoners

36. CAL. DEPT. CORRECTIONS & REHABILITATION, OFFICE OF RESEARCH, 2010 ADULT INSTITUTIONS OUTCOME EVALUATION REPORT 15 (2010) (citing D.A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (4th ed. 2006)); Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 556–61 (1983) (criminal propensity tends to peak in the late-teens).

37. OSBORNE ASS’N, *supra* note 3, at 5 (citing PEW CTR. ON THE STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS* (2011)).

38. Dana Goldstein, *The Misleading Math of “Recidivism,”* MARSHALL PROJECT (Dec. 4, 2014); CAL. DEPT. CORRECTIONS & REHABILITATION, *supra* note 36, at 15, 26; ROBERT WEISBERG, DEBBIE A. MUKAMAL & JORDAN D. SEGALL, *LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA* 17 (Stanford Criminal Justice Center 2011); Snyder et al., *supra* note 14, at 34; OSBORNE ASS’N, *supra* note 3, at 2; HUMAN RIGHTS WATCH, *supra* note 2, at 73, 75; ACLU, *supra* note 18, at viii, 47.

39. ACLU, *supra* note 18, at xiv.

40. This information, as well as virtually all of the facts in this chapter, was provided by Becky Kling Feldman, Chief of the Collateral Review Division, Maryland Office of Public Defender, and is current through January 19, 2017. We do not provide citations to further facts unless the information did not come from Ms. Feldman.

new trials.⁴¹ (The other prisoner was retried, acquitted, and released.) In total, there were 235 prisoners entitled to new trials. We call these 235 the “Unger group,” after the name of the case. All were convicted before 1981, most in the 1960s and 1970s, and one in 1952. Rather than retry most of these old cases, most prosecutors negotiated conditional releases. The great majority of the prisoners were resentenced to life sentences with all of the sentence suspended except time served, and put on probation. There will be more releases in the future.⁴²

On average, when released, the 178 released prisoners were 63 years old (from 52 to 82), and had been incarcerated 39 years (from 33 to 62). All but one were men. Eighty-seven percent of those who have been released (whose race is known) were African-American, a rate significantly disproportionate to

41. Unger v. State, 48 A.3d 242, 261 (Md. Ct. App. 2012); *see also* State v. Waine, 122 A.3d 294 (Md. Ct. App. 2015) (reaffirming *Unger*). One of the 178 prisoners was acquitted after a retrial. The underlying issue in *Unger* involved the interpretive authority of juries. Before 1981, trial judges were required by the Maryland Constitution to instruct juries in criminal cases that they—the jurors—were the ultimate judges of the law and what the court said about the law was *advisory only*. Here is a typical instruction by a trial judge (referring to himself as “we”) in a 1976 case:

We say to you at the onset of these remarks that ...you ladies and gentlemen are the judges of not only the facts, as you are in every case, but on the law as well. It is your responsibility in this case to determine ... for yourselves what the law is. Therefore, everything the court says to you in these remarks ... is advisory upon you only. You ... are free to find the law to be other than as the Court says it is and if they wish to do so, counsel will be permitted to argue to you that the law is other than as the Court says it is. We are going to give you our best opinion about the matter, but the final determination of it is solely in your hands.

Transcript of Trial at 153-54, State v. Jerome Chase, No. K-75-1235 (Md. Cir. Ct. Calvert Cty., July 12, 1976) (emphasis added). In 1980, the Maryland Court of Appeals invalidated this instruction because it invited jurors to disregard the presumption of innocence and the government’s obligation to prove guilt beyond a reasonable doubt, among other fundamental rights. *See* Stevenson v. State, 423 A.2d 558 (Md. Ct. App. 1980). In 2012, the *Unger* court made the 1980 decision retroactive, entitling the defendants to new trials.

42. There have been only four retrials, resulting in three convictions and new life sentences and the one acquittal. At retrials, prosecutors have introduced the original transcribed testimony of those witnesses who at the time of the retrials were dead or missing. The process of implementing *Unger* has been protracted and is continuing. As of August 1, 2017, the complete accounting of the 235 was as follows: 178 have been released; 9 died before they could litigate their *Unger* claims; 21 were awaiting new trials after reversals of their convictions and sentences (a number of these will be released by agreement prior to trial); 8 were released to detainers based on other valid convictions and sentences; 7 entered into agreements pursuant to which they pled guilty and were sentenced to fixed terms that required additional but limited incarceration; 3 were reconvicted and sentenced to life; and 9 had pending *Unger* litigation and/or ongoing settlement negotiations.

the races of those arrested for homicide when they were convicted.⁴³ All were sentenced to life with the possibility of parole,⁴⁴ and the Parole Commission had recommended some for parole.⁴⁵

Prosecutors in 17 of Maryland's 24 jurisdictions agreed to releases. They considered the strength of the case against the prisoner; the prisoner's age, prison record, and length of incarceration; the nature and notoriety of the crime; and the prisoner's release plan, among other factors. In a few jurisdictions, prosecutors have refused to negotiate, opposed motions for new trials, and when they lost, have been setting the cases in for retrials.⁴⁶

The 178 were released (individually or in small groups) from maximum- and medium-security prisons.⁴⁷ They have been free an average of approximately two years and six months. How have they done? As of January 19, 2017, *none* had been convicted of a crime other than a traffic/driving offense, and no judge had ordered that probation be revoked *in a single one* of these 178 cases.

To put it another way, Maryland has now released over 75% (178) of all of its lifers (235) who were convicted by juries before 1981 and were still in prison in 2012. Again, this is a continuing project. Because lifers in Maryland are not eligible for minimum security or work-release, the 178 have come out without the benefits of work-release programs and transitional placements in community residential centers. The extraordinary success of this group

43. Feldman data, *supra* note 40. There is no reason to believe that these data are not representative of the Unger group. See generally RACE, CRIME, AND JUSTICE: A READER 246 (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005) (discussing historical homicide offending rates by race and citing many studies conducted on the matter during the time frame in question); see also FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 117 (1965) (showing the total number of homicide arrests by race in the year 1965, and indicating that there were 4,558 arrests of white persons for criminal homicide in the United States that year and 4,245 arrests of black persons for homicide).

44. This was before 1987, when the legislature provided a life without parole option. See Byron L. Warnken, *Life Should Not Mean Life Without Parole (Part III)*, PROFESSOR BYRON L. WARNKEN'S BLOG (Mar. 29, 2011), <http://professorwarnken.com/2011/03/29/life-without-parole/>.

45. Maryland is one of three states in which life-sentenced prisoners cannot be paroled without the approval of the governor. The Maryland Parole Commission does not make public the names of the lifers whom they recommend for parole or commutation to the governor. See *infra* note 52 (providing numbers for lifers the Commission recommended for parole and commutation from 1995-2015).

46. A number of the 43 inmates still litigating their Unger cases or awaiting new trials also have good prison records and parole or commutation recommendations.

47. Life-sentenced prisoners in Maryland have been ineligible for minimum security and work-release since 1995.

strongly suggests that thousands, likely tens of thousands, of long-incarcerated, older prisoners throughout the country can be safely released.⁴⁸

The Unger group had an advantage many other released prisoners do not have. A social worker or supervised social-work student was available to help them successfully reenter the free world. Of the 178, approximately 130 asked for and were given reentry help to assist them in meeting the formidable Rip Van Winkle challenges they have faced.⁴⁹

In the last two decades, older prisoners have been stacking up in Maryland's prisons, as they have around the country. By 2013, there were 712 prisoners over 60, and 2,381 between ages 51 and 60, over 14% of Maryland's prison population.⁵⁰ A significant reason for the logjam is that two relatively recent Democratic governors, who served a total of four terms, refused to approve

48. The Unger group experiences are consistent with national empirical data. *See, e.g.,* WEISBERG ET AL., *supra* note 38. The Stanford report found that the "incidence of commission of serious crimes by recently released lifers has been miniscule," with only 5 of 860 paroled murderers being reincarcerated "for new felonies," and "none" for "life-term crimes." *Id.* at 4, 17.

49. *See generally* Susan Turner, "Reentry," in the present Volume. We are not impartial observers. Our interdisciplinary law school clinic volunteered to help with the legal work in 2012 and to provide essential reentry services to those released, and we are still working on this continuing project. Millemann has been a professor, including in the Clinical Law Program, of the University of Maryland-Carey School of Law since 1974. Bowman-Rivas has been the Manager of the Law and Social Services Program, a part of the Clinical Law Program, for almost 15 years. Smith has been a graduate student and now is a Forensic Social Work Fellow in that program. To date, 3 law professors, over 50 law students, 3 part-time law school social workers, and over 30 social work students have worked on this project in a variety of clinical and other courses and placements. The Open Society Institute-Baltimore (OSI) has funded two part-time social workers. As of January 19, 2017, the social workers and social work students had provided in-prison and post-release services to over 80% of the 178 released. The Maryland Office of Public Defender has been the leader in implementing *Unger*, especially Becky Feldman, *see supra* note 40, and Brian Saccenti, Chief of the Appellate Division. Walter Lomax, Executive Director of the Maryland Restorative Justice Initiative, has been another essential partner. He was a leader in prison and, after having been exonerated after 38 years of wrongful incarceration, has been a counselor, mentor, friend, and, when necessary, a "Dutch uncle" to the Unger group.

50. MARYLAND DEP'T OF PUB. SAFETY & CORR. SERVICES, QUARTERLY INMATE CHARACTERISTICS REPORT 4 (July 2013), http://www.dpscs.state.md.us/publicinfo/pdfs/stats/data-reports/I_and_I-Statistics/Inmate_Characteristics/Quarterly_Inmate_Characteristics/FY2014/2013_July_Inmate_Char.pdf.

paroles of any lifers except one.⁵¹ Maryland is one of three states in which the governor must approve parole before a lifer can be released.⁵² In 1995, Gov. Parris Glendening announced to great fanfare that “life means life,” failing to point out that life *with the possibility of parole* had always before meant just that.⁵³ Now, by executive policy, life with the possibility of parole has been converted into life without parole, with a handful of exceptions.

In 1993, the average period served on a life-with-parole sentence before release was between 20 and 21 years.⁵⁴ This explains why there are so many in the Unger group. Glendening’s new policy was a stark break from tradition.

III. ANALYSIS AND ASSESSMENT: THE RELEVANCE NATIONALLY OF THE UNGER PROJECT EXPERIENCES IN MARYLAND AND IMPORTANCE OF THE SOCIAL-WORK COMPONENT

Maryland, in effect, is conducting a court-imposed experiment to test the potential for safely releasing older, long-incarcerated prisoners across the country. The only bases for selection for the Unger group were that the prisoner was convicted at a jury trial before 1981 and was still locked up in 2012.⁵⁵

51. From 1995 through 2002, and 2007 through 2015, the terms of these two governors, the Parole Commission made 20 recommendations of parole for life-sentenced prisoners; only 1 was approved. It made 45 recommendations of commutation, to reduce life sentences to fixed terms making the prisoner eligible for an imminent or possible future release by the Parole Commission; all were denied. Governor Robert Ehrlich, Jr., a Republican, who served from 2003–2007, approved 6 releases of lifers, largely through commutations. By comparison, from 1985 through 1994, the Parole Commission made 93 recommendations of parole for life-sentenced prisoners (some more than once), and governors approved paroles for 39 prisoners.

52. See FACTSHEET: MARYLAND’S POLICIES AROUND PAROLE-ELIGIBLE LIFE SENTENCES, JUSTICE POLICY INSTITUTE (undated, citing 2010 data), http://www.justicepolicy.org/uploads/justicepolicy/documents/documentary_factsheet.pdf, at 1. The other two states are California and Oklahoma.

53. Kate Shatzkin, *Glendening Acts to End Parole for Inmates with Life Sentences: Those on Work Release Summoned Back to Prison*, BALT. SUN, Sept. 29, 1995, at 2B. The precipitating event occurred when a lifer on work release killed a woman companion and himself. All prisoners on work-release were immediately returned to maximum security prisons. *Id.* A number in the Unger group were on work release in 1993 and weeks or months from parole when they were loaded on buses and shipped back to maximum security prisons, where they remained for three decades or more. After 1995, none were eligible for minimum security or work release.

54. See Darren M. Allen, *Killer Asks for Lighter Sentence: Parole Seeker Cites “Oz” for Hope*, BALT. SUN, June 16, 1993, at 1B (“The lifers now on parole served an average of 20.6 years before being released.” (quoting Paul Davis, Chairman of the Maryland Parole Commission)).

55. In all pre-1981 trials, Maryland judges gave the unconstitutional advisory-law instructions. See *supra* note 41.

With the help of Open Society Institute-Baltimore, we created our own reentry program for the Unger group, and we believe that providing reentry services has been important to this success, but we cannot quantify this. We have learned much.

We were pleasantly surprised by the relatively large numbers who had family members—often sisters and sometimes more-distant relatives—who agreed to take in their prisoner relatives. We estimate that approximately 70% of the 178 were released to relatives. This is an important fact in the cost-benefit analysis. A little under 25% were placed in nursing homes (5), assisted-living arrangements (6), senior buildings (10), and forms of transitional housing (17). The remainder are living with roommates or in rentals (often without leases). These are not hard numbers, however, since housing arrangements are fluid.

To differing degrees, our social workers and students, working with social workers from the Public Defender's Office, have helped those released not only to obtain housing (hands down the hardest part),⁵⁶ but also state identification cards, Social Security cards, and even birth certificates; basic benefits;⁵⁷ Medical Assistance or Medicare; MTA Mobility Assistance; prescriptions; referrals to reentry programs; and, with the more involved clients, help on a daily basis.

Although this may appear to be an expensive and comprehensive safety net, it's not. Many have received, at best, approximately \$370 a month,⁵⁸ and often only \$189 in food stamps (not cash).⁵⁹ For some, this lasted for the period (one month to almost three years) that it took for them (the older ones) to establish eligibility for Supplemental Security Income benefits, a little over \$700 a month. For others, the more limited income has continued. Neither is adequate to cover not just food, but also prescription co-pays, transportation, and the big item for some—housing.

The services we have provided have not only benefitted those released and their families; they also have helped to reassure prosecutors that prisoners could be safely released (prosecutors usually required release plans as conditions of

56. Most in the Unger group are ineligible, because of their criminal records, for most senior housing and all public housing; and they have no credit or rental histories, often placing even cheap rental properties beyond their reach.

57. For example, Supplemental Security Income, Temporary Disability Assistance, and Supplemental Nutrition Assistance (commonly known as "food stamps").

58. The total of Temporary Disability Assistance (which about ten percent received for a time) and Supplemental Nutrition Assistance payments.

59. The monthly amount of Supplemental Nutrition Assistance payments.

release), to reassure the resentencing courts, and to help to create some degree of public confidence in the releases.⁶⁰

In arguing for the releases of older, long-incarcerated prisoners, we add a justice-based consideration. Those in the Unger group are disproportionately African-American. In some of the older cases, African-Americans were not generally summonsed for jury duty.⁶¹ In many cases when African-Americans were summonsed, prosecutors routinely struck them from juries.⁶² It was not until 1986 that the Supreme Court prohibited this.⁶³

In the late 1960s and early 1970s, race relations were inflamed by the backlash against the Civil Rights Movement, the assassination of Dr. Martin Luther King, the violent disturbances in reaction to that event and the angry counter-

60. Initially, the releases generated high-profile controversy. There were headlines about “released murderers” and other critical media coverage. Over time, the continuing releases have become non-stories. Indeed, the more recent coverage, while not disregarding the crimes and awful losses of victims and their survivors, has described the positive features of the lives of those returning home after decades of incarceration. See, e.g., *More than 130 Maryland Lifers Adjust to Freedom After Court Ruling*, NPR (Feb. 17, 2016), <http://www.npr.org/2016/02/17/467118226/more-than-130-maryland-lifers-adjust-to-freedom-after-court-ruling>; *From a Life Term to Life on the Outside: When Aging Felons Are Freed*, NPR (Feb. 18, 2016), <http://www.npr.org/2016/02/18/467057603/from-a-life-term-to-life-on-the-outside-when-aging-felons-are-freed>; Jason Fagon, *Meet the Ungers*, HUFFINGTON POST, <http://highline.huffingtonpost.com/articles/en/meet-the-ungers/>.

61. There was a “key man” system in effect in Baltimore City until 1969, pursuant to which each judge, including each of the 17 judges on the circuit court (then called the Supreme Bench), asked “key men,” friends of the judges, to nominate jurors for criminal trials. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 114 n.562 (1990). After this practice ended in 1969, African American representation in Baltimore City on venire panels increased. However, prosecutors still routinely struck black jurors from the trial (petit) juries until after the U.S. Supreme Court invalidated the practice in 1986.

62. In Maryland in the 1960s and 1970s, legal challenges to the exclusion of minorities from trial juries met with little success. See, e.g., *Brooks v. State*, 240 A.2d 114 (Md. Ct. App. 1968) (of 400 prospective jurors, only 14 were African American, and that—as well as other evidence of exclusion of African Americans from the jury—was not enough to establish a prima facie case of purposeful discrimination).

63. *Batson v. Louisiana*, 476 U.S. 79 (1986).

responses and “Law and Order” rhetoric.⁶⁴ Most of the trials were one to three days long, many of which we would not recognize today as complying with due process. We believe, based upon detailed reviews of the records in many cases, that some in the Unger group likely were factually innocent⁶⁵ and others were not guilty of the degree of homicide (first-degree murder) for which they were convicted. Maryland is a border state. What we found here likely applies to thousands of older prisoners in other states who were convicted before 1981.

In any event, as prisoners get older, the accepted reasons for punishment have less and less application. There is little meaning to rehabilitation, admittedly a value in decline for several decades, when most prison programs and jobs are off-limits to lifers and there is no way out of prison no matter how well you do. Incapacitation is for predictably dangerous people, not predictably safe bets for release.⁶⁶ The incremental difference between 39 years in prison (the average of the 178 released) and life is unlikely to have any deterrent effect, particularly for the many who were convicted when they were teenagers or young adults.⁶⁷ Some may argue that the die-in-prison practice serves retribution, but that depends on one’s theory of retribution,⁶⁸ and is undercut by the fact that when the Unger group was sentenced, the reasonable expectations of the judge, counsel and victims or victim survivors were that, with good behavior, the actual time served would be about 20 to 21 years. This was the accepted measure of retribution when they were sentenced.

64. In the 1960s and early 1970s, Baltimore City was a majority-white city with a substantial white working class population and a growing African-American population. See KENNETH D. DURR, *BEHIND THE BACKLASH: WHITE WORKING-CLASS POLITICS IN BALTIMORE, 1940–1980*, at 126 (2003); HAROLD A. McDOUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* 98 (1993). Race bias was a regular part of life in Baltimore and throughout the State. See SUZANNE E. GREENE ET AL., *MARYLAND: A HISTORY OF ITS PEOPLE* 262 (1986) (discussing racial violence occurring in Maryland in the 1960s). A measure of this was the relative success of George Wallace in the 1964 presidential primary in Maryland. Famous for his “segregation now, segregation tomorrow, segregation forever” pledge as Alabama governor, he got 43% of the vote statewide and generally won the majority-white precincts, including throughout Baltimore City.

65. For a discussion of wrongful convictions, see Brandon L. Garrett, “Actual Innocence and Wrongful Convictions,” in Volume 3 of the present Report.

66. See Shawn D. Bushway, “Incapacitation,” in the present Volume.

67. The average age of the 178 upon incarceration was twenty-four. For a discussion of deterrence, see Daniel S. Nagin, “Deterrence,” in the present Volume.

68. See O’Hear, *supra* note 27 (arguing that retribution should allow for different treatment of defendants convicted of similar crimes based on their performances in prison). For a discussion of retribution, see Jeffrie G. Murphy, “Retribution,” in the present Volume.

RECOMMENDATIONS

We recognize the formidable political obstacles most of our recommendations will face, but make them because we believe they are right, practical, cost-effective, and substantiated by compelling evidence, including the Maryland experience.

1. **Remove the governors' veto powers over parole recommendations in lifer cases, which exist in three states.** Since the Willie Horton affair,⁶⁹ consideration of releases of life-sentenced prisoners convicted of violent crimes has been politically charged. All the reasons for creating parole boards with some distance from governors support taking the governor out of the decisional process. Maryland is a classic example of why governors should not have veto powers. This veto substitutes fear of public anger and of its impact on a political career for reasoned decision-making. It is bad and unnecessarily expensive public policy.
2. **Re-establish and expand parole for life-sentenced prisoners, using a presumptive parole model.** This model requires parole boards to demonstrate with facts why prisoners who meet certain criteria should not be paroled. The proposals to date exclude those convicted of violent crimes.⁷⁰ The length of time served, age, and good behavior might trigger the presumption in lifer cases. A version of this model was imposed in California by court order.⁷¹ Prisoners who are 60 years old or older and have served 25 years or more of their sentences are eligible for a parole hearing at which the issues are "how the inmate's advanced age, long-term confinement, and diminished physical condition, if any, may impact the inmate's potential risk for future violence."⁷² A 2016 account stated "that since the Elderly Parole Program began in February 2014, more than 1,000

69. Beginning on September 21, 1988, the Americans for Bush arm of the National Security Political Action Committee (NSPAC) began running a campaign ad entitled "Weekend Passes" using the Willie Horton case of a work-release prisoner who kidnapped and assaulted a family to attack Democratic nominee Michael Dukakis. The ad closed with the punch line: "Weekend prison passes. Dukakis on crime." See National Security PAC, *Willie Horton 1988 Attack Ad*, YouTube, <https://www.youtube.com/watch?v=Io9KMSSEZ0Y>.

70. Michigan provides one model. See Kathleen Gray, *Mic. House passes bill adopting 'presumptive parole'*, DETROIT FREE PRESS (Oct. 1, 2015), <http://www.freep.com/story/news/2015/10/01/mich-house-passes-bill-adopting-presumptive-parole/73155514/>.

71. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM & No. C01-1351 TEH, 2010 WL 99000 (E.D. Cal. & N.D. Cal. Jan. 12, 2010), *aff'd* *Brown v. Plata*, 563 U.S. 493 (2011).

72. STATE OF CALIFORNIA—BOARD OF PAROLE HEARINGS, MEMORANDUM ON ELDERLY PAROLE PROGRAM (June 16, 2014), http://www.cdcr.ca.gov/BOPH/docs/Policy/Elderly_Parole_Program_Overview.pdf. Attempts to codify the court-ordered elderly parole provision and to reduce the age from 60 to 50 and the time served from 25 to 15 years failed to pass. Sen. Bill 224, 2015-2016 Reg. Sess. (Cal. 2015).

inmates have had parole hearings, with 371 granted parole, 89 deemed ‘not ready,’ and 781 denied release.”⁷³ There are no recidivism data yet for the 371 granted parole. In any event, time served and age should be given extra weight in parole decisions when there is a record of good conduct and a good release plan.

3. **Make parole-eligible, life-sentenced prisoners eligible for prison programs and work-release.** Unless lifers can demonstrate their readiness for release in these ways, there will be reluctance to release them even when they are parole-eligible. Many of our clients have said that their participation in educational courses and programs, including at the college and masters’ levels, were the turning points in their lives.
4. **Expand medical parole for older prisoners and remove exclusions for violent crimes.** Medical-parole laws allow people who are seriously ill to be released to supervision, where they can receive appropriate care in the community. Medical parole should be expanded beyond those facing imminent death who are released into hospice care.
5. **As a state releases larger numbers of older prisoners, close a prison and use the real savings from that, in part, to fund reentry services, and in part, to fund crime-prevention and victim-remediation services.** The confined-until-you-die paradigm undermines public safety by wasting expensive and scarce resources, i.e., prison cells. Although upon release, the vast majority of old and long-incarcerated prisoners will be successful, the provision of essential reentry services will reduce the failures to a few, and encourage public confidence in, and add a humane dimension to, these releases. Other savings might be used to fund victim-compensation and support programs.⁷⁴ In the end, the over-incarceration of older prisoners diverts funds that could be invested in real public-safety initiatives.

73. See Katherine C. Pearson, *Victims Oppose California’s Elderly Parole Program*, ELDER LAW PROF BLOG (Mar. 23, 2016), http://lawprofessors.typepad.com/elder_law/2016/03/victims-oppose-californias-elderly-parole-program-.html.

74. For a discussion of victims in the criminal process, see Paul G. Cassell, “Crime Victims’ Rights,” in Volume 3 of the present Report.

Reentry

Susan Turner*

Incarceration is big business in the United States. At the end of 2015, more than 2.2 million individuals were incarcerated in America's prisons and jails. Although the increase in the prison population has been slowing in recent years, hundreds of thousands of inmates are released annually and return to their communities. This chapter discusses reentry into society for these individuals by briefly describing existing law and policy (including sentencing), prison and pre-release programming, supervision after release, and characteristics of returning individuals. The chapter then describes the challenges to reentry, in terms of education and employment; physical and mental health; families and children; housing; and communities. That is followed by suggestions on how the challenges might be addressed. The chapter concludes with a series of recommendations for policymakers and practitioners.

INTRODUCTION

At the end of 2015, more than 2.2 million individuals were incarcerated in America's prisons and jails.¹ The vast majority of incarcerated individuals will, at some point, be released and return to their communities. In fact, more than 650,000 individuals leave prison each year, after having served an average of 29 months. Corrections costs for these individuals are extremely high. The Bureau of Justice Statistics estimates that over \$80 billion was spent in 2012 by corrections agencies at the federal, state, and local level.² Unfortunately, the vast majority of people leaving prison will not successfully reintegrate; more than two-thirds of released offenders are rearrested for a new crime within three years of release.³ Approximately half will be returned to prison within three

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1. *Incarceration*, SENT'G PROJECT, <http://www.sentencingproject.org/issues/incarceration/> (last visited Apr. 10, 2017).

2. Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2012—Preliminary*, BUREAU JUST. STAT. (Feb. 26, 2015), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239>.

3. *Recidivism*, NAT'L INST. JUST., <https://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx> (last updated June 17, 2014).

years for either a parole or probation violation or an arrest for a new crime.⁴ Although there are many reasons offenders return to crime, one aspect gaining notice is the difficulty released prisoners face integrating back into society. Challenges include poor educational achievement, employment difficulties, limited access to mental- and public-health services, housing restrictions, and limited civic and community opportunities.

With one in a hundred of all Americans and one in nine black males between the ages of 20 and 34 behind bars in 2008,⁵ and 2.3% of children under 18 estimated to have a parent in prison, reentry represents a large social concern. In fact, over the past decade, reentry has become a social movement as academics, policymakers, and practitioners have highlighted the reentry process and documented the challenges. Most importantly, experts have developed principles of effective reentry and suggestions on how to assist individuals returning home, while also protecting public safety of the communities they return to. Reentry is palatable to both liberals and conservatives, as both sides recognize that the prison buildup is no longer financially sustainable.⁶ This chapter starts with a description of existing law and policy related to reentry, followed by a review of reentry challenges and potential solutions, an evaluation of worst and best options, and recommendations for a few policy options.

I. EXISTING LAW AND POLICY

The term “reentry” has been used over the past decade not just in reference to the physical release from a prison or jail sentence, but more broadly to describe the process of reintegrating into the community after serving a criminal sentence. Individuals leave from many types of carceral settings in the United States. Youths, generally those less than 18 years of age, serve time in juvenile facilities.⁷ Jails, most frequently administered by county-level sheriffs (used for pretrial detention and sentenced offenders), generally are reserved for offenders serving sentences less than a year. State prisons house offenders convicted of more-serious crimes, generally felonies. Offenders serving time for federal offenses are housed in prisons operated by the Federal Bureau of

4. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

5. PEW CHARITABLE TRUSTS, *ONE IN 100: BEHIND BARS IN AMERICA 2008*, at 3 (2008).

6. See generally Cheryl Leo Jonson & Francis T. Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517 (2015).

7. See generally Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report.

Prisons. This chapter focuses on inmates sentenced to and released from state prisons, which house more than 86% of all prisoners in the United States.⁸

A. SENTENCING

Offenders in the United States are sentenced under a variety of sentencing structures, which, in turn, affect the reentry experience. States vary vastly in the types of sentencing used; even within a state, different structures can operate. Used by most states until the middle of the 20th century, indeterminate sentencing structures utilized a minimum and maximum sentence determined by the judge at sentencing.⁹ In these systems, decisions about release are made not by the sentencing judge, but generally via a parole board. Pursuant to the rehabilitative goals of sentencing, the parole board reviews an inmate's case file and behavior, and makes a determination whether he or she is "ready" to return to society. Factors taken into account often include participation in rehabilitative programs, expression of remorse for the crime, conduct during incarceration, prior criminal history, and current offense. Additionally, actuarial measures of predictive success can be used—for example, the Salient Factor Score, which considers items measuring prior record, current offense, behavior while on probation, history of opiate dependence, and employment history as predictors for success after release from prison.¹⁰

In the 1970s, a number of states enacted determinate-sentencing legislation.¹¹ At that time, public sentiment was swinging away from rehabilitation to retribution as a goal of punishment. Rather than sentencing an offender to a range of time, determinate sentences were for fixed-length terms, based on the current crime and prior convictions. "Good" time credits (time subtracted from an inmate's sentence for good behavior) can reduce the sentence, but once the sentence is served (minus good time), the inmate is released. For example, California's determinate-sentencing legislation passed in 1977 effectively set a baseline term for felonies, imposing lower and higher terms depending upon

8. DUROSE ET AL., *supra* note 4, at 3.

9. See generally Feld, *supra* note 7; Francis T. Cullen, "Correctional Rehabilitation," in the present Volume; Douglas A. Berman, "Sentencing Guidelines," in the present Volume.

10. Peter B. Hoffman & Sheldon Adelberg, *The Salient Factor Score: A Nontechnical Overview*. 44 FED. PROB. 44 (1980). For a discussion of modern efforts, see John Monahan, "Risk Assessment in Sentencing," in the present Volume.

11. See Kay A. Knapp, *Criminal Sentencing Reform: Legacy for the Correctional System*, in THE AMERICAN PRISON: ISSUES IN RESEARCH AND POLICY 111 (Lynne Goodstein & Doris L. MacKenzie eds., 1989).

aggravating and mitigating factors.¹² With such a system, offenders are released without parole-board consideration of whether they are “ready” for reentry into the community. Unsurprisingly, not being “ready” can translate into higher recidivism rates and difficulties in the transition from prison to community.

As many experts have documented, the latter part of the 20th century was characterized by the “get tough” movement in criminal justice policy.¹³ Many states (and the federal government) passed mandatory sentences for certain crimes, requiring offenders to serve a minimum period of time.¹⁴ Across the country, states enacted laws related to drugs, weapons, and violence; truth-in-sentencing laws; and three-strikes and other habitual-offender laws. One of these, California’s Three Strikes Law passed in 1994, required a minimum 25-year sentence for recidivists convicted of certain felonies.¹⁵ “Get tough” legislation added fuel to America’s incarceration boom. In California, for example, over 25% of the correctional population in 2016 were inmates sentenced under the 1994 recidivist law.¹⁶

B. PRISON AND PRE-RELEASE PROGRAMMING

Prisons balance several missions: providing programming to inmates and trying to keep institutions safe and secure for inmates and staff, all the while protecting the public from escapes.¹⁷ A variety of programs—which differ across and within states—are offered to prisoners to provide rehabilitative services (e.g., academic, vocational, and substance-abuse programs), as well as to provide operational assistance to the prison in performing basic functions related to maintenance, food preparation, and clerical activities. Prisoners also participate in religious and recreational programs, such as sports and fitness, arts, self-help (such as Alcoholics Anonymous and Narcotics Anonymous), and

12. ALBERT J. LIPTON & MARK A. PETERSON, RAND, CALIFORNIA JUSTICE UNDER DETERMINATE SENTENCING: A REVIEW AND AGENDA FOR RESEARCH (June 1980), <https://www.rand.org/content/dam/rand/pubs/reports/2005/R2497.pdf>.

13. E.g., MARC MAUER, SENT’G PROJECT, LESSONS OF THE “GET TOUGH” MOVEMENT IN THE UNITED STATES (2004), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Lessons-of-the-Get-Tough-Movement-in-the-United-States.pdf>.

14. See generally Erik Luna, “Mandatory Minimums,” in the present Volume.

15. The initial legislation only required that the first two felony offenses be serious or violent, as outlined in the California Penal Code. The third could be any felony. In 2012, California voters passed Proposition 36, which changed the law so that the third felony had to be serious and violent.

16. CAL. DEP’T OF CORRECTIONS & REHABILITATION, MONTHLY REPORT OF POPULATION AS OF MIDNIGHT SEPTEMBER 30, 2016, (Oct. 2016), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1609.pdf.

17. RICHARD P. SEITER, CORRECTIONS: AN INTRODUCTION (2014).

other voluntary activities that develop an inmate's character and prospects. Programming also helps reduce idleness, which is seen as a positive benefit given the belief that inactivity is a cause of prison violence.

Rehabilitative programs are aimed at improving an offender's chance of successful reentry. One of the oldest forms of prison programming is education. This is not a surprise since many offenders enter prison with deficits in educational achievement. Fewer than 40% of state inmates have completed high school or the equivalent,¹⁸ and results from the 2003 National Assessment of Adult Literacy Prison Survey show that inmates have lower average literacy rates than the general adult population.¹⁹ The benefits of educational programming in prison have been studied over the years, and correctional education has been shown to improve prisoner outcomes. The most recent meta-analysis of correctional education conducted by RAND showed, among other things, that participating in education reduces recidivism by 13%.²⁰

In addition to education programming, inmates often work inside the prison. This can take on a number of forms. Many of the lower-level administrative activities of the prison are conducted by inmates. For example, inmates may work as lower-level clerks, serve as groundskeepers, and work in kitchens and maintenance. Inmates can also participate in vocational training, more recently referred to as career technical education. These programs train offenders in specific job skills such as carpentering, electronics, food services, and other trades. As part of the meta-analysis mentioned above, RAND researchers found that inmates who participated in vocational training were 28% more likely to be employed after release from prison than those who did not receive such training.²¹ A small percentage of inmates are able to work in prison industries programs, where inmates create products for the prison system itself or other goods to be used by the state or federal governments (e.g., inmate clothing and furniture). Even fewer are able to work in Private Sector Prison Industries Enhancement (PIE) Certification programs, in which private companies hire

18. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS (Jan. 2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf>.

19. ELIZABETH GREENBERG, ERIC DUNLEAVY & MARK KUTNER, NAT'L CTR. FOR EDUC. STAT., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY (May 2007), <https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2007473>.

20. LOIS M. DAVIS ET AL., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS xvi (2013). In the meta-analysis, recidivism was measured a number of ways—including reoffending, rearrest, reconviction, and violation—and the majority of studies examined used reincarceration as the outcome measure.

21. DAVIS ET AL., *supra* note 20.

inmates to produce goods while they are in prison, earning wages comparable to private-sector workers (and much higher than routine prison wages).

A significant portion of inmates enter prison with substance-abuse problems. According to Columbia University researchers, 65% of inmates in U.S. prisons meet the criteria for alcohol or other drug abuse and addiction—a situation that appears to have worsened since the turn of the new century.²² The relationship between drug use and crime is well known, as many offenders commit crimes to get drugs, commit crimes while they are under the influence of drugs, or engage in criminal lifestyles.²³ The hope is that drug treatment while in prison will help offenders break the cycle of drugs and crime when they return to the community. Research supports the effectiveness of drug treatment. For instance, a meta-analysis of 78 studies of drug treatment concluded that treatment had a statistically significant and clinically meaningful effect in reducing crime and drug use.²⁴

C. SUPERVISION AFTER RELEASE TO COMMUNITY

Recent analysis of state prisons shows a rise in reentry-related programs that focus on life skills, parenting, and employment.²⁵ This movement makes sense given that “they all come back”²⁶ (to use the title of Jeremy Travis’s important book): In the vast majority of cases, individuals who are sentenced to prison eventually return to the community. In 2015, over 580,000 prisoners were released back to their communities. Most offenders do not walk out of prison completely free, however, with no restrictions placed on them. In fact, 70% of former inmates are released to some form of required post-custody community supervision by the justice system.²⁷

22. NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE, *BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA’S PRISON POPULATION* (Feb. 2010), <https://www.centeronaddiction.org/addiction-research/reports/behind-bars-ii-substance-abuse-and-america’s-prison-population>.

23. NAT’L INST. ON DRUG ABUSE, *PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS—A RESEARCH-BASED GUIDE* (Apr. 2014), <https://www.drugabuse.gov/publications/principles-drug-abuse-treatment-criminal-justice-populations/introduction>.

24. Michelle S. Phelps, *The Place of Punishment: Variation in the Provision of Inmate Services Staff Across the Punitive Turn*, 40 J. CRIM. JUST. 348, 351 (2012).

25. Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC’Y REV. 33, 54–55 (2011); Phelps, *supra* note 24, at 348–57.

26. JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005).

27. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *PRISONERS IN 2015* (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>.

The most common form of supervision after release is often referred to as parole, although some jurisdictions may use other terms. Parole has been part of the correctional equation for almost 150 years in the United States.²⁸ Parole is a conditional release, where an offender can serve either the remainder of his or her sentence or a specified period of time in the community. While on parole, a returning individual is supervised by parole agents, with terms and conditions that must be followed. The rules generally require parolees to remain crime-free, to get a job, or to participate in education, as well as requirements such as reporting to their parole agent, submitting to drug testing, and limiting association with other criminals. Violations of these “technical conditions,” while not violations of law, can result in parolees being returned to prison to serve additional time.

By contrast, individuals who are released from prison under no supervision include inmates who have “maxed out” on their terms and cannot be returned to prison to serve any portion of their remaining sentence. They are not required to participate in any post-release supervision aimed at assisting them in their reentry or monitoring them to ensure law-abiding behavior. This can have positive and negative consequences. On the one hand, former inmates who are released unconditionally are not subject to the type of intensive surveillance and monitoring that can increase their chances of being returned to prison due to a relatively trivial violation. On the other hand, these individuals may be released into their communities without the benefit of services that may help them succeed in society.

Despite the widespread belief that supervision may be helpful, the literature about its effectiveness is somewhat mixed. For instance, a review by Solomon and her colleagues suggests there is no strong evidence that parole supervision reduces recidivism after release from prison.²⁹ However, this study was unable to examine the nature of parole supervision that individuals were actually receiving in order to understand differences in release practices that may have contributed to the findings. Analyses by Schlager and Robbins suggest that

28. Edward Rhine, *The Present Status and Future Prospects of Parole Boards*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* (Joan Petersilia & Kevin R. Reitz eds., 2012).

29. AMY L. SOLOMON, VERA KACHNOWSKI & AVI BHATI, URBAN INST., DOES PAROLE WORK?: ANALYZING THE IMPACT OF POSTPRISON SUPERVISION ON REARREST OUTCOMES 15 (2005), http://webarchive.urban.org/UploadedPDF/311156_Does_Parole_Work.pdf.

post-release supervision in New Jersey was more effective than unconditional release, although recidivism rates for both groups were high (more than three-quarters of both groups were rearrested within two years of release).³⁰

A major takeaway point concerning reentry for prisoners is that failure rates are often high. Nationally, almost 70% of prisoners released in 2005 were arrested within two years of release.³¹ In California, two-thirds of parolees failed and were returned to prison—at least before the state instituted California Public Safety Realignment legislation, which effectively kept parole violators out of prison.³² Now, parole violators are handled locally and may serve revocation time in county jails. Realignment has reduced pressure on the state prisons but increased workload on local criminal justice agencies.³³ As expected, realignment has reduced the number of offenders returning to prison for technical violations, although arrest and conviction rates have changed only modestly and remain quite high.³⁴

D. CHARACTERISTICS OF RELEASED INDIVIDUALS

In contemplating the reentry process for hundreds of thousands of individuals returning from prisons to communities each year, it is important to recognize that these former inmates, as a group, reflect people disadvantaged in multiple ways. Work conducted by researchers at the Urban Institute provides some of the most detailed information on the characteristics of former inmates returning to the community. According to Visser and Travis, “numerous social and economic disadvantages characterize the vast majority of individuals who are released from prison, including poor educational attainment and employment histories, poor physical and mental health, and alcohol or other drug misuse.”³⁵

30. Melinda D. Schlager & Kelly Robbins, *Does Parole Work?—Revisited: Reframing the Discussion of the Impact of Postprison Supervision on Offender Outcome*, 88 PRISON J. 234, 249 (2008).

31. DUROSE ET AL., *supra* note 4, at 28.

32. RYKEN GRATTET ET AL., PAROLE VIOLATIONS AND REVOCATIONS IN CALIFORNIA 6 (2008).

33. MAGNUS LOFSTROM, STEVEN RAPHAEL & RYKEN GRATTET, PUB. POL’Y INST. OF CAL., IS PUBLIC SAFETY REALIGNMENT REDUCING RECIDIVISM IN CALIFORNIA? (June 2014), http://www.ppic.org/content/pubs/report/R_614MLR.pdf.

34. *Id.*

35. Christy A. Visser & Jeremy Travis, *The Characteristics of Prisoners Returning Home and Effective Reentry Programs and Policies*, in OXFORD HANDBOOK, *supra* note 28, at 689.

The average parolee is male, in his mid-30s, and a member of a racial or ethnic minority group. Almost one-third are on parole for a violent offense and another 31% are on parole for a drug offense.³⁶ Formerly incarcerated individuals suffer an extraordinary level of housing insecurity—defined as homelessness, as well as precursors to homelessness such as relying on others for housing expenses.³⁷ More generally, reentry and its challenges fall disproportionately on segments of the population that are least able to bear the burdens, with, for instance, returning individuals concentrated in core urban counties, in either working-class or poor communities.³⁸

II. LITERATURE REVIEW

A. PROBLEMS ASSOCIATED WITH REENTRY

Individuals exiting from prison face a number of issues upon their return, many of which are interrelated. The components of reentry are so numerous, however, that it is beyond the scope of the current chapter to fully discuss what is known for each. Instead, this next section lays out a number of key concerns. The typical profile of returning individuals only highlights the point that improving chances of successful reintegration into the community will require services for essential needs such as employment, education, housing, drug counseling, health care, and mental-health care. These topics, although often discussed in a reentry context, are not unique to individuals who are exiting prisons or jails. Many of these issues are faced by people who have been convicted of felonies but are placed under probation supervision in the community as a sanction.³⁹

1. Getting a job and education

Employment and job training are high on the list of needs for former inmates. Many returning individuals have histories of poor employment skills and limited work experience before they enter prison.⁴⁰ Although jobs and

36. DANIELLE KAEBLE, LAURA M. MARUSCHAK & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2014, at 7 (2015), <https://www.bjs.gov/content/pub/pdf/ppus14.pdf>. Over the past 10 years, the percentage of parolees being supervised for drug offenses has dropped, while the percentage being supervised for violent offenses has increased, reflecting changes in many sentencing laws across the country.

37. Amanda Geller & Marah A. Curtis, *A Sort of Homecoming: Incarceration and the Housing Security of Urban Men*, 40 SOC. SCI. RES. 4 (2012).

38. JAMES P. LYNCH & WILLIAM J. SABOL, URBAN INST., CRIME POLICY REPORT: PRISONER REENTRY IN PERSPECTIVE (Sept. 2001), <http://www.urban.org/research/publication/prisoner-reentry-perspective>.

39. See generally Michael Tonry, "Community Punishments," in the present Volume.

40. JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2009).

vocational education are offered in correctional facilities, the vast majority of prison jobs are lower-skilled work assignments such as food preparation, general janitorial services, and goods production. When individuals leave prison, many have limited opportunities in their communities and, at best, return to low-wage jobs. Indeed, formerly incarcerated individuals experience what is known as a “wage penalty,” a reduction of between 10% and 30% in lifetime earnings.⁴¹

As a “collateral consequence” of their convictions, former prisoners are barred from certain professions, including child-care, health-care, and financial positions.⁴² Beyond such bans, formerly incarcerated people face a litany of challenges to getting hired. Many employers ask job applicants whether they have ever been convicted of a felony. Employers also check criminal-history records, screening out applicants who were previously incarcerated. Black individuals who had been incarcerated appear to have the most serious challenges with call-backs for employment.⁴³ With limited job skills and long stays in prison reducing positive connections to the community, offenders often return home and start associating with gangs and criminal networks,⁴⁴ moving them further away from legitimate employment opportunities.⁴⁵

The importance of work is significant, as research has shown that work and high quality jobs are associated with lower recidivism.⁴⁶ Finding employment is also important to satisfy release conditions, as many jurisdictions include job training or employment as standard requirements of parole. Although released individuals have the same work aspirations as other members of the community, former inmates may overestimate their chances of obtaining good jobs when they return home. Those individuals who appear to be most successful upon release had worked prior to being incarcerated and participated in job training while in prison and after release.⁴⁷ Moreover, simply getting a

41. Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 527 (2002).

42. See Gabriel J. Chin, “Collateral Consequences,” in the present Volume.

43. Jonson & Cullen, *supra* note 6, at 528.

44. For a discussion of gangs, see Scott H. Decker, “Gangs,” in Volume 1 of the present Report.

45. TRAVIS, *supra* note 26, at 166.

46. See NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* ch. 8 (Jeremy Travis et al. eds., 2014); Christopher Uggen & Jeremy Staff, *Work as a Turning Point for Criminal Offenders*, 5 CORRS. MGMT. Q. 1 (2001).

47. Thomas P. LeBel & Shadd Maruna, *Life on the Outside: Transitioning from Prison to the Community*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* (Joan Petersilia & Kevin R. Reitz eds., 2012).

job may not be sufficient; for obvious reasons, former inmates are less likely to succeed in dead-end, low-paying jobs than higher-paying, quality positions that help establish positive relationships between employers and workers.

As noted earlier, education is the most common form of prison programming, and research has noted positive effects on reentry. The most recent survey by the Bureau of Justice Statistics found that over 85% of state prisons offer secondary education and almost 80% offer basic education.⁴⁸ Unfortunately, however, less than 30% of prisoners participate in educational programming.⁴⁹ This may be due to a number of factors, including fewer programming slots available than needed and the fact that some states have no requirement for mandatory basic education participation. Moreover, educational programming in prison has been subject to funding cuts, which necessarily limit educational access and preparation for post-release life.

During the “get tough” era of the 1990s, post-secondary educational support was reduced drastically when Congress amended the Higher Education Act and eliminated Pell Grant funding for inmates.⁵⁰ Pell Grants were established in the mid-1960s to provide student loans to individuals, including inmates, for post-secondary education. The congressional amendment effectively curtailed opportunities for individuals to earn anything more than a high school equivalent degree during their time incarcerated. As a result, participation in college courses dropped by half from 1991 to 2004.⁵¹ More recently, however, Pell Grants have re-emerged as a pilot program under the Second Chance Act, helping some 12,000 incarcerated students in 67 colleges and universities.⁵²

48. Based on the author’s analysis of the *2005 Census of State and Federal Adult Correctional Facilities*, https://www.bjs.gov/content/pub/pdf/cj43_2005.pdf.

49. Based on the author’s analysis of *The Survey of Inmates in State Correctional Facilities and the Survey of Inmates in Federal Correctional Facilities Questionnaire* (2004), https://www.bjs.gov/content/pub/pdf/sisfc04_q.pdf.

50. U.S. Department of Education Launches Second Chance Pell Pilot Program for Incarcerated Individuals, U.S. DEP’T EDUC. (July 31, 2015), <https://www.ed.gov/news/press-releases/us-department-education-launches-second-chance-pell-pilot-program-incarcerated-individuals>.

51. Anna Crayton & Suzanne R. Neusteter, *The Current State of Correctional Education*, LITERACY INFO. & COMM. SYS. (2008), <https://www.prisonlegalnews.org/news/publications/pricrayton-state-of-correctional-education/>.

52. *12,000 Incarcerated Students to Enroll in Postsecondary Educational and Training Programs Through Education Department’s New Second Chance Pell Pilot Program*, U.S. DEP’T EDUC. (June 2016), <https://www.ed.gov/news/press-releases/12000-incarcerated-students-enroll-postsecondary-educational-and-training-programs-through-education-departments-new-second-chance-pell-pilot-program>.

On the state level, the Great Recession had an impact on correctional education as well. Overall, states experienced budget reductions of 6% for correctional education, with medium-sized and large states experiencing the largest percentage cuts (20% and 10% respectively).⁵³ A common way to cut budgets is to reduce the number of teachers for educational programming. This was evident in California, where, during the recession, education services were slashed by 30%.⁵⁴

2. Physical and mental health

Relative to the community at large, prisoners are in poor health. They have higher rates of tuberculosis, HIV, and hepatitis C, as well as mental-health and substance-abuse problems. In addition, the population of elderly inmates (and their health-care needs) has continued to grow.⁵⁵ Forty-two percent of the state-prison population is estimated to suffer from a chronic medical condition, with hypertension and diabetes being the most common.⁵⁶ As every criminal justice professional knows, mental illness is also a serious concern for the justice system.⁵⁷ Deinstitutionalizing of the mentally ill in the 1960s resulted in the closure of many state hospitals, with thousands of people released without a safety net of community mental-health services. As a consequence, many people suffering from mental illness were arrested, often for minor crimes, and swept up into the criminal process.⁵⁸

Today, the justice system is the de facto mental-health system in the U.S., caring for over 1 million individuals, many in local jails and state prisons.⁵⁹ Rates of serious mental illness—such as schizophrenia, bipolar, or major

53. LOIS M. DAVIS ET AL., RAND, HOW EFFECTIVE IS CORRECTIONAL EDUCATION, AND WHERE DO WE GO FROM HERE? THE RESULTS OF A COMPREHENSIVE EVALUATION (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR500/RR564/RAND_RR564.pdf.

54. CALIFORNIA REHABILITATION OVERSIGHT BOARD, BIENNIAL REPORT (Mar. 2010), <https://www.oig.ca.gov/media/crob/reports/C-ROB%20Biannual%20Report%20March%2015%202010.pdf>.

55. For a case study on this issue, see Michael Millemann, Rebecca Bowman-Rivas & Elizabeth Smith, “Releasing Older Prisoners,” in the present Volume.

56. Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 668 (2009). See generally Margo Schlanger, “Prisoners with Disabilities,” in the present Volume.

57. See generally Stephen J. Morse, “Mental Disorder and Criminal Justice,” in Volume 1 of the present Report.

58. RISDON N. SLATE, JACQUELINE K. BUFFINGTON-VOLLUM & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM* (2d ed. 2013).

59. Sarah M. Manchak & Francis T. Cullen, *When Troubled Offenders Come Home: Removing Barriers to Reentry for Offenders with Mental Illness*, in OFFENDER REENTRY: RETHINKING CRIMINOLOGY AND CRIMINAL JUSTICE 253 (Matthew S. Crow & John Ortiz Smykla eds., 2014).

depression—are several times higher among inmates (double for women and triple for men) than the rates among the general population.⁶⁰ Mental health care is expensive, both in terms of medication for inmates and the staff specially trained to work with those inmates. While in the prison setting, mentally ill offenders are at higher risk of disciplinary infractions, victimization, suicide, and self-injurious behavior due to their symptoms as well as the stigma of mental illness.⁶¹ Moreover, research has shown that offenders with mental illness fail more often in the community than other offenders, frequently for technical offenses rather than new crimes.⁶²

The prevailing approach to treating mentally ill offenders has been to focus on medication and treatment as a direct means to reduce recidivism. Although medication may directly reduce recidivism for a small percentage of offenders, recent research has highlighted the problems with this approach. For the vast majority of mentally ill offenders, the risk factors for crime shared with non-mentally ill offenders (such as homelessness and substance abuse) may be more direct causes of reoffending.⁶³ In other words, higher rates of failure for those with mental illness may simply be due to their having a greater number of serious risk factors for crime.

Prisons are required to provide constitutional levels of care to inmates while incarcerated, but the reality is that many offenders do not receive the care they need before reentering the community. According to one estimate, 65% of all inmates are in need of substance-abuse treatment, and yet only 11% receive such care while they are incarcerated.⁶⁴ As mentioned earlier, substance abuse is a significant factor in crime—alcohol and other drugs are involved in 78% of violent crimes; 83% of property crimes; and 77% of other crimes (e.g., public-order and weapons offenses) and probation and parole violations.⁶⁵ Reentry poses a fragile time for those with mental illness. Without medication management and other services, the symptoms of mentally ill offenders worsen and their

60. *Id.* at 253.

61. SLATE ET AL., *supra* note 58, at 421–26.

62. Manchak & Cullen, *supra* note 59, at 255.

63. *Id.* at 256–57.

64. *New CASA Report Finds: 65% of all U.S. Inmates Meet Medical Criteria for Substance Abuse Addiction, Only 11% Receive any Treatment*, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE (Feb. 26, 2010), <http://www.centeronaddiction.org/newsroom/press-releases/2010-behind-bars-II>.

65. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, *BEHIND BARS II*, *supra* note 22, at 2.

chances of successful reentry diminish. Fortunately, states are getting better at providing mental-health reentry services to inmates, with the vast majority of states reporting that they provide medication for transition into the community for those inmates who had been taking such medication while in prison.⁶⁶

3. Families and children

Large numbers of men and women in prison are parents. Indeed, more children than ever are now affected by America's imprisonment binge. In 2010, for instance, an estimated 2.7 million children had an incarcerated parent.⁶⁷ These children face a number of disadvantages, including: "internalizing" problems such as depression; "externalizing" problems such as aggression and delinquency; long-term physical health problems; school problems such as absenteeism and dropping out; lower incomes; and higher rates of homelessness and being uninsured.⁶⁸

Many offenders return to their families when released. Family support can be critical during reentry, as research shows that prisoners returning to live with their families fare better than those who live alone.⁶⁹ At the same time, released individuals can place new stresses on families who are relied upon for financial assistance. Returning offenders experience employment barriers, as mentioned, which reduces their ability to provide for their families. Many former face outstanding child-support obligations, which further deepens financial worries. Of course, many issues may have existed prior to an individual's incarceration. Returning to a family or neighborhood characterized by drugs and crime places former inmates at increased risk for failure. Needless to say, reintegrating into a family is complex, as offenders must re-establish family bonds and authority.⁷⁰

66. SLATE ET AL., *supra* note 58, at 455–56.

67. PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY (2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf; *see also* STEVE CHRISTIAN, NAT'L CONF. ST. LEGIS., CHILDREN OF INCARCERATED PARENTS (Mar. 2009), <http://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf>.

68. Christopher Uggen & Suzy McElrath, *Parental Incarceration: What We Know and Where We Need to Go*, 104 J. CRIM. L. & CRIMINOLOGY 597, 600 (2014).

69. LeBel & Maruna, *supra* note 47.

70. MARCIA FESTEN ET AL., URBAN INST. & U.S. DEP'T HEALTH & HUM. SERVS., FROM PRISON TO HOME: THE EFFECT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jan. 2002), <https://aspe.hhs.gov/system/files/pdf/74976/report.pdf>.

4. Housing

Housing is one of the most fundamental and challenging needs for released inmates.⁷¹ As noted above, many parolees return to live with their kin, but not all families are willing to take them back in. After release, living situations tend to be unstable, and homelessness rates are high. Although estimates vary, studies suggest that at least 10% of former inmates are homeless after release.⁷² Homelessness is associated both with increased crime and mental-health issues. In addition, sex offenders face a series of restrictions on where they can live upon their return to the community.⁷³ Before restrictions were eased in California in 2015,⁷⁴ nearly one-third of registered sex offenders were transient.⁷⁵

Moreover, released prisoners face challenges in terms of housing availability. Costs for private housing are often out of reach given the limited funds available to these individuals. Transitional housing (e.g., halfway houses) exists for short-term stays, but need far outstrips availability. Although emergency shelters can house individuals for a few days, these programs do not assist in arranging more-permanent housing. The Federal Choice Voucher Program, which provides low-income individuals with vouchers to use for housing, bans offenders convicted of felonies.⁷⁶ Other problems include the fact that drug-related activity by anyone in the household can lead to eviction, and, more generally, communities can be strongly opposed to having group homes for offenders in their neighborhoods.

5. Consequences for communities

When offenders are released from prison, they return to the communities from which they came—and just as prison admissions are not drawn equally from communities across the country, returning offenders do not return to all communities equally. Instead, there are often core areas within states that receive the bulk of offenders. For example, Travis reports that more than half of Maryland's returning individuals return to Baltimore, and more than half

71. MELINDA SCHLAGER, *RETHINKING THE REENTRY PARADIGM: A BLUEPRINT FOR ACTION* (2013).

72. *NRCC Facts & Trends*, COUNCIL OF ST. GOV'T JUST. CTR., <https://csgjusticecenter.org/nrrc/facts-and-trends/> (last visited Apr. 10, 2017).

73. See generally Wayne A. Logan, "Sex Offender Registration and Notification," in the present Volume.

74. Keegan Kyle et al., *Where are Sex Offenders? Jessica's Law Complicates Monitoring*, O.C. REG. (Apr. 27, 2014), <http://www.ocreger.com/articles/offenders-611517-sex-law.html>.

75. *Id.*

76. *About the Housing Choice Vouchers Program*, HUD, https://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about (last visited Apr. 10, 2017).

in Illinois come back to Chicago.⁷⁷ A RAND analysis of returning California parolees found clusters of parolees in 11 counties around the Bay Area and in the southern part of the state, mostly in urban sections of San Francisco, Oakland, Los Angeles, and San Diego.⁷⁸

These former inmates are not returning to communities marked by wealth and opportunity. Communities where returning individuals are concentrated tend to be disadvantaged in terms of low income and high crime, among other things. On any particular day, for instance, a large number of community members might be incarcerated. As a result, former inmates may return to so-called “million-dollar blocks,” where the price tag of incarcerating community members exceeds \$1 million a year.⁷⁹ The constant movement of offenders in and out of prison disrupts positive community functioning. As Schlager states, the “aggregate impact of incarceration and reentry serves to significantly destabilize neighborhoods. Specifically, human capital, social networks, social capital, collective efficacy, and informal social control are disrupted in ways that have deleterious effects on the offenders, the community and society at large.”⁸⁰

These concepts are all connected to how individuals relate to one another in a community. Human capital refers to the skills and personal resources individuals bring to their community. Higher levels of human capital are associated with reduced crime in a community. As noted above, returning offenders don’t bring high levels of human capital, given that many are poorly educated and have substance-abuse problems and poor economic prospects. Social networks refer to the links individuals have with friends, family, and co-workers. Offenders tend to have strong social ties to some close friends and family members, and relatively fewer and looser social ties with others. When they return to the community, offenders are unable to access the support and assistance looser ties may provide during reentry, and may face frayed ties with family as a result of incarceration.

Social capital, collective efficacy, and informal social control arise out of relationships people have with members of their communities. Social capital refers to the capacity of people in networks to provide assistance, and collective efficacy refers to the ability of the community to come together to work for the common good. In turn, informal social control refers to the ability of a

77. TRAVIS, *supra* note 26.

78. LOIS M. DAVIS ET AL., RAND, UNDERSTANDING THE PUBLIC HEALTH IMPLICATIONS OF PRISONER REENTRY IN CALIFORNIA 19 (2011).

79. Jennifer Gonnerman, *Million-Dollar Blocks*, VILLAGE VOICE (Nov. 9, 2014), <https://www.villagevoice.com/2004/11/09/million-dollar-blocks/>.

80. SCHLAGER, *supra* note 71, at 233.

community to maintain adherence to informal norms (as opposed to laws) to engage in pro-social behavior. Over the past 10 years, scholars have been taking a closer look at how spatial and community characteristics help explain crime, beyond the traditional offender-level characteristics, where, for instance, unstable informal norms are associated with disorder and crime. In general, recycling of offenders in and out of a community due to incarceration stresses all the positive components of community functioning.⁸¹ Not surprisingly, given the discussion above, research has shown that greater concentrations of parolees in neighborhoods are associated with higher crime levels.⁸²

B. POTENTIAL SOLUTIONS

Many observers have pointed out the challenges of reentry, and the field has responded with potential solutions for these issues. Some solutions are cast as general approaches to effective reentry, with guiding principles and goals. Others have developed specific intervention programs for individuals returning home. Current research suggests that there is no “silver bullet” that will solve every issue and thereby reduce recidivism of returning offenders—the reentry problem is multifaceted. More information is needed about offenders returning to the community, the impact of programs and policies, and the cost-effectiveness of different options for punishment. Several authors have called for efforts to gather such information—Mears and colleagues suggest a “science of punishment,”⁸³ for instance, while Jonson and Cullen suggest a “criminology of reentry.”⁸⁴

Several authors in the field have provided sets of principles or requirements for the reentry process that can guide reform. Travis proposes five principles of effective reentry: prepare for reentry; build bridges between prisons and communities; seize the moment of release; strengthen the concentric circles of support; and promote successful reintegration.⁸⁵ Petersilia has suggested four areas for reintegration that should be reformed: changing the prison experience; changing prison release and revocation practices; revising post-prison services and supervision; and fostering collaborations with the community.⁸⁶ More

81. SCHLAGER, *supra* note 71, at 233–38; Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 1 (2003).

82. John R. Hipp & Daniel K. Yates, *Do Returning Parolees Affect Neighborhood Crime? A Case Study of Sacramento*, 47 CRIMINOLOGY 3 (2009).

83. DANIEL P. MEARS & JOSHUA C. COCHRAN, PRISONER REENTRY IN THE ERA OF MASS INCARCERATION (2014).

84. Jonson & Cullen, *supra* note 6.

85. TRAVIS, *supra* note 26, at 324.

86. PETERSILIA, *supra* note 40.

recently, Mears and Cochran have developed five sets of guidelines: make successful reentry a policy priority; institutionalize effective reentry processes; rely on diverse policies, programs, and practices, as well as diverse change agents; prioritize quality supervision, assistance, treatment, and services; and institutionalize research into policy, program, and practice decisions.⁸⁷

These recommendations span an almost 10-year period from 2005 through 2014, yet they are surprisingly similar in what they cover. One can synthesize the authors' models as highlighting the importance of what happens during incarceration; focusing on the time of actual release; providing services during reentry; and focusing on post-release as a collaborative process with community services. In addition, the models recognize that successful reintegration requires the willingness for society to engage in the reentry movement—it cannot be done by the justice system alone. Successful reentry also requires well-tested and effective tools that can change behavior, starting from incarceration and continuing through a return to the community. More-specific programs and tools for this effort are discussed below.

1. Getting a job and education

Education remains key for successful prisoner reentry, and recent suggestions have called for the development of a reentry education model. With the support of the U.S. Department of Education, Tolbert outlined an education continuum that strengthens the connection between education services in the prison and community.⁸⁸ An important component of the continuum is to align prison education programs with those in the community by establishing statewide articulation agreements. Aligning prison education and career technical education programs with the labor market should help offenders secure employment. Other recommendations include the use of cognitive-based skills training in education and workforce training, as this approach has been shown to help reduce recidivism. In addition, programs that use evidence-based practices, such as real-world learning and mentoring, have been shown to increase student learning. Technology is an important issue in the context of prisons (many of which do not allow internet access for security reasons). Some states are able to provide simulated web-based applications to learners so they may have the required skills when they are released from prison.

87. MEARS & COCHRAN, *supra* note 83.

88. MICHELLE TOLBERT, U.S. DEP'T EDUC., A REENTRY EDUCATION MODEL: SUPPORTING EDUCATION AND CAREER ADVANCEMENT FOR LOW-SKILL INDIVIDUALS IN CORRECTIONS (2012), <https://www2.ed.gov/about/offices/list/ovae/pi/AdultEd/reentry-model.pdf>.

An increasing number of inmates are now participating in post-secondary programs, often through partnerships between community colleges and prisons. To be sure, collaboration between prisons and community colleges is complex, particularly with respect to outside teachers assimilating well to the prison infrastructure and prison staff being supportive of a program that some see as special treatment.⁸⁹ Nonetheless, these partnerships open up opportunities for many inmates to take college courses in an affordable manner.⁹⁰ Equally important is finding ways to ensure that inmates continue their education after release.

Employment efforts should start inside correctional institutions. Among other things, these efforts should seek to provide vocational training for positions that provide a living wage and for which a need exists in the labor market. Programs directed at the demand side of the equation include transitional employment, which can be accomplished through partnerships with local faith, business, justice, and social-service organizations.⁹¹ Transitional employment refers to subsidized jobs and support services for offenders as a way to provide legitimate income after release from prison. These programs can increase the initial employment rates, but other strategies are needed in order to achieve long-term gains in employment of former inmates.⁹²

One of the most popular approaches, the so-called “ban the box” policy, has sought to reduce the stigmatization of a criminal record for job applicants. Begun a number of years ago, this effort entails restricting employers from asking about criminal records in job applications. More than 100 cities in 23 states have adopted such a policy as a way of leveling the playing field for people with criminal records.⁹³ However, some research suggests that “ban the box” policies may contribute to “statistical discrimination,” where employers, in the absence of information about a criminal record, use an applicant’s race to screen out people of color from consideration. At this point, more evidence may be needed here, involving studies of actual job seekers—with more varied demographics on job seekers and information on actual hires—as opposed to data on “call backs” alone. Moreover, as Sugie points out, even if “ban the box”

89. Lois M. Davis, Michelle Tolbert & Robert Bozick, RAND Presentation, Evaluation of the Pathways from Prison to Postsecondary Education Project: Results of the Implementation Study (Apr. 28, 2015) (on file with author).

90. SCHLAGER, *supra* note 71, at 71-72.

91. *Id.* at 83.

92. *Building Knowledge About Successful Prisoner Reentry Strategies*, MDRC (Feb. 2013), http://www.mdrc.org/sites/default/files/Reentry_020113.pdf.

93. Mike Vuolo, Sarah Lageson & Christopher Uggen, *Criminal Record Questions in the Era of “Ban the Box,”* 16 CRIMINOLOGY & PUB. POL’Y 139 (2017).

results in statistical discrimination, perhaps a better way to address this is to look at policies that combat racial discrimination itself, rather than questioning the use of “ban the box” policies.⁹⁴

2. Physical and mental health

Collaboration between criminal justice and mental-health professionals can assist the mentally ill offender upon return. One such promising collaborative approach involves mental-health courts.⁹⁵ Based on the drug-court model, mental-health courts provide a balance of treatment and supervision, using a collaborative justice/mental-health team. In this model, the judge plays a central role in the supervision of the offender—using various incentives to promote positive behavior—with the participants appearing regularly in court to provide updates on an offender’s progress. In particular, a parole agent serves as a case manager with a more therapeutic approach to reentry than traditional forms of supervision.

In a similar fashion, reentry courts may provide a better way for offenders to return to society and reestablish their civic identity in a positive way.⁹⁶ A main goal of reentry courts is to keep former inmates from returning to prison by using problem-solving principles characteristic of specialty courts. These include a greater role for judges in overseeing offender progress; the use of treatment mandates, graduated sanctions, and incentives for success; and collaboration among all relevant justice system actors.⁹⁷ Reentry courts are a relatively new innovation in the reentry movement—the Office of Justice Programs funded early demonstrations of nine pilot programs in 2000⁹⁸—and, as a result, there is not a lot of evidence accumulated on their effectiveness. To succeed, however, reentry courts must address a series of challenges, such as pre-release planning to ensure a seamless transition from custody to the community, and providing the many services required by high-risk returning offenders.⁹⁹

94. Naomi F. Sugie, *Criminal Record Questions, Statistical Discrimination, and Equity in a “Ban the Box” Era*, 16 CRIMINOLOGY & PUB. POL’Y 167 (2017).

95. See generally Richard C. Boldt, “Problem-Solving Courts,” in Volume 3 of the present Report.

96. TRAVIS, *supra* note 26, at 275.

97. Christine H. Lindquist, Bryn Ann Herrschaft & Pamela K. Lattimore, *Reentry Courts*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 4351–60 (Gerben Bruinsma & David Weisburd eds., 2014).

98. SHANNON M. CAREY ET AL., THE NATIONAL INSTITUTE OF JUSTICE’S EVALUATION OF SECOND CHANCE ACT ADULT REENTRY COURTS: PROGRAM CHARACTERISTICS AND PRELIMINARY THEMES FROM YEAR 1 (Mar. 2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/241400.pdf>.

99. Lindquist et al., *supra* note 97.

Other reentry efforts seek to connect eligible people leaving prison and jail to mental-health care and substance-use treatment. Given recent Medicaid expansion and coverage available under the Affordable Care Act, the focus has been on getting health care to formerly incarcerated individuals with physical- and mental-health needs. Many jurisdictions have been establishing mechanisms for enrollment. For example, the California Department of Corrections and Rehabilitation has increased its efforts to enroll soon-to-be-released inmates in benefit programs. Many other jurisdictions do not have processes in place, however. In early 2017, the Council of State Governments released guidelines for assisting people leaving prison with health-care services.¹⁰⁰ The five steps in their discussion paper include identifying enrollment and eligibility status for people with health needs in prison and jail; maintaining enrollment and reactivating or reenrolling an individual for benefits upon release; assisting with the often difficult application process; examining Medicaid-reimbursable behavioral health services in the community and addressing any gaps; and tracking eligibility and enrollment activities.¹⁰¹ Despite the constantly changing landscape with respect to funding, these steps can still provide guidance for how to serve the streams of people reentering society each year.

3. Families and children

Scholars and practitioners are beginning to understand better the importance of the family to reentry. Family-based reentry programs can take many forms, encompassing a variety of interventions aimed at reducing family conflict, strengthening relationships, and fostering connections both during and after incarceration. The relationship between families, particularly children, and inmates is complicated—given the dynamics existing before and after incarceration—and research evidence on effective programs is still wanting. In particular, some research is not methodologically rigorous enough to lead to strong conclusions. Nonetheless, several studies on prison visitation showed positive impacts on recidivism, suggesting that maintaining family bonds while an offender is incarcerated may improve successful reentry.¹⁰²

Some promising efforts involve family participation in the reentry process as part of a formal intervention. For example, the La Bodega de la Familia program strengthened bonds between family members and showed positive

100. MARTHA R. PLOTKIN & ALEX BLANDFORD, *CRITICAL CONNECTIONS: GETTING PEOPLE LEAVING PRISON AND JAIL THE MENTAL HEALTH CARE AND SUBSTANCE USE TREATMENT THEY NEED* (2017).

101. *Id.* at 2.

102. *Family-Based Programs*, COUNCIL OF ST. GOV'T JUST. CTR. (2017), <https://whatworks.csgjusticecenter.org/focus-area/family-based-programs>.

results.¹⁰³ The program utilized a case manager who worked with the family to coordinate existing services in the community and identified sources of family support to construct an action plan to assist the offender in reducing drug use and recidivism. In addition, the case manager served as an advocate for families to obtain needed services and was available to provide crisis intervention.¹⁰⁴ Other promising approaches include one-on-one mentoring programs for high-risk youths, family group conferencing, and so-called “wraparound services” that address a wide range of needs.¹⁰⁵

A larger agenda may be forthcoming. For instance, a number of opportunities for families of incarcerated children were highlighted during a 2013 conference at the White House Executive Office Building. The event brought together leading researchers who had examined the topic of families and incarceration over the previous decade. Their recommendations included providing greater educational support for children who have incarcerated parents, and building on promising intervention points for children and parents, such as including visitation support, prison nurseries, and community alternatives to prison.¹⁰⁶ Other recommendations called for incorporating the needs and experiences of caregivers and taking into consideration the geographic distance between offenders and families in the sentencing process.¹⁰⁷

4. Housing

Most prisoners are released from incarceration to friends or families, but, as mentioned, some former inmates lack stable housing upon their return to a community. Although a major concern is the lack of affordable housing, the challenges can also relate to the offender’s criminality. Difficulties in finding housing can be particularly acute for sex offenders, who face very restrictive laws as to where they can live (e.g., certain distances from schools and where children play). A number of strategies have been suggested to reduce homelessness among the reentry population, including: changing the laws to increase access to public housing (where up to a quarter of prisoners

103. *Closing Family Lifeline that Won Drug Battles*, N.Y. TIMES (Nov. 25, 2008), <http://www.nytimes.com/2008/11/26/nyregion/26about.html>.

104. TRAVIS, *supra* note 26, at 145.

105. JESSICA MEYERSON & CHRISTA OTTESON, WILDER RESEARCH, STRENGTHENING FAMILIES IMPACTED BY INCARCERATION: A REVIEW OF CURRENT RESEARCH AND PRACTICE (May 2008), <https://www.wilder.org/Wilder-Research/Publications/Studies/Strengthening%20Families%20Impacted%20by%20Incarceration%20-%20Evaluation%20of%20Volunteers%20of%20America%20Programs/Strengthening%20Families%20Impacted%20By%20Incarceration%20-%20A%20Review%20of%20Current%20Research%20and%20Practice,%20Full%20Report.pdf>.

106. Uggem & McElrath, *supra* note 68, at 597.

107. *Id.*

lived prior to incarceration); providing supportive housing upon return to the community; and incorporating discharge planning that ensures that no prisoners are released homeless.

Transitional and supportive housing, often targeted for drug offenders or those with mental illness, provides an array of services to assist reentering individuals with their needs, such as education and vocational training, substance-abuse treatment, employment assistance, etc.¹⁰⁸ Of course, locating supportive housing in communities can spur negative, not-in-my-back-yard responses from community members. These types of reactions can be reduced, however, by working with communities in planning phases of programs to address their fears and concerns about offenders in their midst.¹⁰⁹

For instance, the Council of State Governments Justice Center outlines practices that can help returning citizens find affordable housing. The council suggests that access to housing can be increased by partnering with nonprofit agencies to assist in housing placement, rental assistance, and mediating for landlord-tenant disputes. Communities can build new properties or convert existing properties for the reentry population, perhaps developing them into supportive housing as described above. Another way to address the housing issue is to focus efforts on improving communities to which offenders return, many of which, as described earlier, lack adequate services and suffer from disorder and crime (which might be accomplished by “justice reinvestment,” discussed below).¹¹⁰ Each of these options comes with challenges of funding, partnerships, and willing communities, but they hold promise in assisting returning offenders to obtain stable housing and thereby reduce the risk of recidivism.

Still other opportunities involve public housing. In 2016, the U.S. Department of Housing and Urban Development (HUD) released guidelines that could potentially ease some of the barriers to public housing for formerly incarcerated individuals. Among other things, the HUD guidelines advise that public-housing authorities do have discretion to consider circumstances for people with criminal records. These authorities are not required to deny admission to anyone with a criminal record, for instance, or automatically evict someone for engaging in criminal activity. Instead, the guidelines suggest that owners can consider a number of circumstances, including the impact that

108. For an evaluation of supportive housing in Ohio, see Jocelyn Fontaine, *The Role of Supportive Housing in Successful Reentry Outcomes for Disabled Prisoners*, 15 CITYSCAPE 3 (2013).

109. SCHLAGER, *supra* note 71, at 59–60.

110. KATHERINE CORTES & SHAWN ROGERS, COUNCIL OF ST. GOV'T JUST. CTR., REENTRY HOUSING OPTIONS: THE POLICYMAKERS' GUIDE (2010), https://csgjusticecenter.org/wp-content/uploads/2012/12/Reentry_Housing_Options-1.pdf.

eviction might have on the entire household, the seriousness of the behavior, and whether an offender has successfully completed a drug-rehabilitation program. The guidelines outline best practices and provide examples for public-housing authorities and owners, such as limiting the “look back” period for criminal conduct, enumerating specific factors that will be considered, and working with reentry specialists who collaborate with parole agents, landlords, and treatment providers to assist in reentry.¹¹¹ Several of these examples limit the “look back” period for criminal-record screening to convictions and consider only the prior 12 months for drug-related activity and 24 months for more-serious criminal activity.

5. Communities

As noted earlier, communities in which a large number of people are incarcerated and return are often characterized by crime and social disorder. To address this issue, the concept of “justice reinvestment” has gathered considerable support in recent years. The basic notion is that money that would otherwise be spent on the justice system should be “reinvested” into strategies that can reduce crime in the first place. Over the past decade, more than 30 states have participated in data-driven efforts to trim incarceration and justice-system costs by investing savings into programs that work to reduce recidivism and increase public safety. Ideally, saved costs would be reinvested into high-incarceration communities themselves—through activities such as education, employment, community revitalization, affordable housing, etc.—though it seems that efforts and results have been more modest. The incarceration population has been trimmed at the margins, with policies oriented toward reclassifying or redefining lower-level offenses (e.g., certain drug and property crimes), expanding earned credits in prison, using graduated sanctions to respond to supervision violations, capping time spent for revocations of supervision, and so on.¹¹²

111. See generally U.S. DEP’T OF HOUSING & URBAN DEV., GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAs) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (2015).

112. JAMES AUSTIN ET AL., SENT’G PROJECT, ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Ending-Mass-Incarceration-Charting-a-New-Justice-Reinvestment.pdf>.

A recent review examined justice-reinvestment efforts made by 33 states since 2007.¹¹³ The most common reforms were directed at community corrections, rather than directly addressing sentencing changes that would affect prison admissions and length of stay. Among the most frequent policy changes chosen by states included graduated responses to supervision violations, required use of risk/needs assessment, and improved interventions for mental-health, substance-abuse and other needs.¹¹⁴ These policies have not had large impacts on the prison population nor have funds been reinvested back into communities, as initially planned, with community corrections and law enforcement often receiving modest reinvestment dollars.¹¹⁵ Nonetheless, justice reinvestment can be a viable strategy, as demonstrated in Kansas. That state's legislative leaders developed a plan to invest part of savings that would have gone to prison construction on redeveloping neighborhoods from which a disproportionate number of prison admissions came (and returned to). These efforts focused on housing, education, and other community development improvements.¹¹⁶

More generally, it can be argued that justice reinvestment needs to be revamped in order to substantially reduce the use of incarceration in the United States. For instance, Austin and his colleagues argue that states should clearly adopt the goal of reducing the prison populations by utilizing practices that directly address prison admissions as well as length of stay.¹¹⁷ Jurisdictions should also provide incentivizes for decarceration, which can include financial incentives. On these issues, it is critical to form coalitions with local officials in order to bring about change.

III. ANALYSIS AND ASSESSMENT

A. POLICIES TO AVOID

Although the last decade has elevated reentry to the level of a social movement, some observers note that the challenges individuals have faced upon return to

113. PEW CHARITABLE TRUSTS, 33 STATES REFORM CRIMINAL JUSTICE POLICIES THROUGH JUSTICE REINVESTMENT (Nov. 2016), http://www.pewtrusts.org/~media/assets/2016/12/33_states_reform_criminal_justice_policies_through_justice_reinvestment.pdf; *31 States Reform Criminal Justice Policies Through Justice Reinvestment*, PEW CHARITABLE TRUSTS (Jan. 20, 2016), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/01/31-states-reform-criminal-justice-policies-through-justice-reinvestment>.

114. See 33 STATES REFORM, *supra* note 113.

115. AUSTIN ET AL., *supra* note 112.

116. CORTES & ROGERS, *supra* note 110. However, at the time of publication of the report, the initiative was still developing the plan.

117. AUSTIN ET AL., *supra* note 112.

the community have existed as long as there have been prisons. When thinking of ways to approach the challenges, we can look at changing the use of incarceration as one means to address the problem. Reentry exists because we send people to prison. It may seem simplistic, but the clearest way to reduce the reentry burden is to drastically cut the number of people sent to prison.¹¹⁸

Given that there is no empirical evidence that prison deters crime¹¹⁹ or that longer sentences are more effective in terms of recidivism reduction,¹²⁰ we should avoid policies that cause prison buildup such as mandatory minimum sentences, three-strikes statutes, life-without-parole laws, and other “get tough” legislation.¹²¹ And since rehabilitative programming can reduce recidivism, it may be unwise to cut prison programs solely to save costs and balance budgets. Such programs also serve to maintain order inside prisons and provide incentives for prisoners to maintain positive behavior, particularly if credits can be earned that reduce length of stay. What is clear from the field is that prisons should avoid operating programs that have not been developed based on sound theoretical principles, that are not implemented with fidelity, or that are targeted to inappropriate individuals.

B. WHAT TO DO

Much of the discussion about reentry focuses on the efforts of individual programs to help prisoners return successfully to the community. Over the past 20 years, the Risk-Needs-Responsivity (RNR) model of correctional assessment and treatment has become pervasive in correctional practice. Based on psychological principles of criminal conduct, this approach holds that: correctional programs should be targeted to those at higher *risk*; efforts should focus on criminogenic *needs* (i.e., dynamic factors that, when addressed, can change the odds of recidivism); and treatment should be delivered based on *responsivity* (i.e., in a way that responds best to the learning styles of the offender).¹²² A recent analysis of the reentry literature makes the offered the following points to help guide program development from an RNR perspective:

1. Programs that provided a continuity of care, beginning in the prison and continuing once prisoners were released to the community, were found to be more effective.

118. TRAVIS, *supra* note 26.

119. Francis T. Cullen, Cheryl Leo Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 51S (2011).

120. PAUL GENDREAU, CLAIRE GOGGIN & FRANCIS T. CULLEN, THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM (1999), <https://www.prisonpolicy.org/scans/e199912.htm>.

121. Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 187 (2013).

122. D.A. ANDREWS & JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT 47–49 (6th ed. 2017).

2. Programs lacking treatment fidelity often showed no appreciable effects on recidivism.
3. Programs targeting high-risk offenders and their criminogenic needs were found to be more effective.
4. Programs that employed therapeutic communities were found to be effective.¹²³

What these principles highlight is that rehabilitative programs need to be based on sound knowledge of what causes crime. Too many ill-fated programs have been introduced based on someone's gut feeling about what works. Examples include DARE, military-style boot camps, and "scared straight" programs. Effective programming needs to be comprehensive and include both in-prison and community treatment. As for the latter, former inmates are less likely to succeed on the outside if they return to the community without some form of continuation in programs. This is especially true for drug-treatment programming.¹²⁴

As this chapter has highlighted, various reentry efforts recognize this aspect of successful return to the community. Programs need to be intensive and targeted to the right individuals. Research in the RNR framework has documented that the greatest reductions in recidivism through programming are made with offenders at the highest risk of recidivism—not with lower-risk offenders, who are often easier to supervise and more likeable than higher-risk offenders but who may actually be harmed by correctional interventions. Moreover, the programs must be intensive and target criminogenic needs in order to be effective. This means that programs with few hours of contact over a short period of time and that do not address the drivers of criminal behavior are unlikely to be successful. Finally, the actual implementation of evidence-based policies is crucial for success. Programs will fail if they are not implemented with fidelity to the model. Fidelity can involve many things—including adequate training in the program—but it also requires a change in culture among on-the-group correctional staff, from one of surveillance and control to a more supportive and therapeutic approach in aid of the reentry process.¹²⁵

123. Jonson & Cullen, *supra* note 6, at 552.

124. INSTITUTE OF MEDICINE, 2 TREATING DRUG PROBLEMS (Dean R. Gerstein & Henrick J. Harwood eds., 1992).

125. Danielle S. Rudes, Jennifer Lerch & Faye S. Taxman, *Implementing a Reentry Framework at a Correctional Facility: Challenges to the Culture*, 50 J. OFFENDER REHABILITATION 8 (2011).

At the sentencing level, changes in law and policy could improve the release and supervision functions. Tonry makes a number of recommendations on this front, such as allowing judges to make decisions on a case-by-case basis and establishing presumptive sentencing guidelines to help channel the process and any appellate review.¹²⁶ He also suggests reestablishing parole release systems or other administrative mechanisms to review the continued detention of offenders past some period of time.¹²⁷ Policies that bring back principles inherent in indeterminate sentencing may assist reentry by reducing the consequences of long-term incarceration and making sure that offenders are ready to return to their communities.

C. LEVERAGE POINTS FOR CHANGE

Partly due to the high costs of incarceration, many state legislatures are rethinking their corrections strategies to reduce the use of incarceration and thus potentially reduce problems associated with reentry. In recent years, “tough on crime” has not been at the forefront of political discussions as it was in the 1980s and 1990s, giving more opportunity for policies and practices that would have stalled decades ago (e.g., California’s repeal of the third-strike provision and reducing revocations to prison). Of course, historically low crime rates have facilitated this discussion, and interest may wane if crime rates start climbing. But the development and use of risk and need instruments have helped criminal justice decision-makers make the most informed decisions about potential alternatives to incarceration.

Given mounting support for reentry reform, the timing seemed right for efforts such as ban the box and housing changes. With support from the public as well as public leadership at the top federal levels (e.g., the Second Chance Act),¹²⁸ the nation appeared to be making progress in assisting returning individuals. Today, however, it is unclear whether support for reentry reform will continue. Moreover, few legislative changes to sentencing practices have had large impacts on reducing the prison population. Although some states have trimmed populations, many new policies have simply moved savings from one part of the justice system to benefit another sector. Researchers in the field need to continue their efforts to provide information about best practices to policymakers and practitioners in a usable fashion. Too often, the translation from research to policy lacks clarity and specificity, leading to frustration on the ground as practitioners try to implement effective programs.

126. Tonry, *supra* note 121, at 176.

127. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

128. Rudes et al., *supra* note 125.

Despite progress on understanding reentry, we need more and better information on how best to reduce the prison population, to assist those returning to their communities, and to contain costs of the \$80 billion justice system in the United States. This chapter has laid out a number of challenges and potential solutions, but it has not delved into what some see as deep structural barriers in the U.S. economy or the limits of approaches that stress individual change. As Gottschalk notes, “Many champions of reentry portray successful reentry largely as a matter of helping ex-offenders acquire the right individual skills to become employable. They ignore or downplay the enormous structural obstacles that stand between ex-offenders and full economic, political and social membership in the United States.”¹²⁹ Reentry efforts are only part of the solution to challenges faced by individuals returning to their communities.

RECOMMENDATIONS

Three recommendations that come from the analysis presented in this chapter are:

1. Recognizing reentry is a process, **make sure that reentry efforts are integrated between incarceration and community phases.**
2. Acknowledging that research has helped highlight effective program practices, **make sure that reentry programs are evidence-based, implemented with fidelity, and subject to rigorous evaluation.**
3. Knowing that the vast majority of prisoners will eventually leave prison, **continue to work to change the culture**, both within the prison and the community about their status—they, like us, are members of our communities.

129. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 80 (2016).

Collateral Consequences

Gabriel J. Chin*

For many people convicted of crime, the greatest effect will not be imprisonment, but being marked as a criminal and subjected to collateral consequences. Consequences can include loss of civil rights, public benefits, and ineligibility for employment, licenses, and permits. The United States, the 50 states, and their agencies and subdivisions impose collateral consequences—often applicable for life—based on convictions from any jurisdiction. Collateral consequences are so numerous and scattered as to be virtually uncountable. In recent years, the American Law Institute, American Bar Association, and Uniform Law Commission all have proposed reforms. Collateral consequences should be: (1) collected and published, so that defendants, lawyers, judges and policymakers can know what they are; (2) incorporated into counseling, plea bargaining, sentencing and other aspects of the criminal process; (3) subject to relief so that individuals can pursue law-abiding lives, and regain equal status; and (4) limited to those that evidence shows reasonably promote public safety.

INTRODUCTION

It is common knowledge that criminal conviction can lead to traditional forms of punishment: incarceration, monetary fine, and supervision following or in lieu of incarceration. Less well understood, however, is that people with criminal convictions face a network of additional legal effects, known as collateral consequences.

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Collateral consequences affect many areas of life. Some criminal convictions can lead to loss of civil status; a citizen may lose the right to vote, serve on a jury, or hold office; a non-citizen may be deported or become ineligible to naturalize. A conviction may make a person ineligible for public benefits, such as the ability to live in public housing or hold a driver's license. Criminal convictions affect employment; laws prohibit hiring of people with convictions as peace officers or in the health-care industry. A criminal conviction can also make a person ineligible for a license or permit necessary to be employed or to do business, or cause forfeiture of a pension. Criminal convictions can also affect family relations, such as the ability to have custody or visitation of one's child. While a criminal conviction can have serious non-legal effects, such as stigma or shame, the focus of this chapter is on legal mandates.¹

Collateral consequences are a growing problem. First, increasing numbers of Americans are subject to them. While about 2 million people are in U.S. prisons and jails, more than 70 million Americans have criminal records. Considerations of fairness and of protection of public safety make it essential to encourage people with convictions to be self-supporting, productive members of society.

Second, collateral consequences are increasing, yet invisible. Collateral consequences are imposed by federal, state, and local governments and their subsidiary agencies, sometimes transparently but often as a matter of informal policy that requires digging to discover. Collateral consequences should be collected and made available in every jurisdiction.

Third, collateral consequences, the most significant part of the criminal justice system for many people, have generally not been considered punishment, and therefore are not subject to provisions of the Constitution regulating criminal proceedings. For example, because they are "regulatory" and not punitive, new collateral consequences may be imposed on people convicted long before. Generally, clients are not entitled by the U.S. Constitution to know what collateral consequences will apply before deciding whether to plead guilty or go to trial; judges are not required to consider them in imposing sentence. Judges and prosecutors should consider collateral consequences in their charging and sentencing decisions, and defense attorneys should counsel their clients about them.

1. This is not to say that "informal" collateral consequences are unimportant. See generally Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

Fourth, criminal records have become more visible because of public and private databases available to anyone who cares to look. Accordingly, a criminal record is increasingly difficult to escape. At the same time, the legal effects of a conviction are hard to eliminate. Some collateral consequences, by their terms, apply only for a specified period, others are in effect for life. Although all jurisdictions have some method of eliminating the effects of the conviction, such as pardon,² sealing, or expungement, often relief is practically unavailable, or is restricted to a narrow class of convictions or offenders.

Jurisdictions, equipped with comprehensive collections of collateral consequences, should ensure they are structured to promote public safety both by protecting the public from harmful individuals, and by leaving room for people with convictions to lead law-abiding lives. Evaluation should be based on empirical analysis, not intuition. Where appropriate, they should be limited to particular crimes, applied on a case-by-case basis, or for a limited period of time, rather than across the board for life. Jurisdictions should clarify the application of ambiguous collateral consequences. In addition, jurisdictions should make available relief mechanisms, so that individuals may regain particular rights when consistent with public safety, and, on a showing of rehabilitation, may shed the effects of their convictions entirely.

I. EXISTING LAW AND POLICY

The United States is in an era of mass conviction. Many distinguished commentators use a different term: “mass incarceration.”³ Since 1970, and even more profoundly since 1980, the increase in the rate of imprisonment and the absolute number of people in prison has been called “unprecedented in the

2. See generally Mark Osler, “Clemency,” in the present Volume.

3. See, e.g., Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477 (2009); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration since 1950*, 2010 U. CHI. LEGAL F. 165; Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587 (2011); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010) (book review).

history of liberal democracy.”⁴ In 1980, more than 500,000 Americans were confined to prisons and jails; in 2015, there were over 2.1 million.⁵

Yet, the focus on “mass incarceration”⁶ obscures the reality that prison is not the default tool of the criminal justice system. There are approximately 1 million new state felony convictions in a typical year,⁷ and many more misdemeanor convictions.⁸ In addition, there are approximately 80,000 federal convictions annually.⁹ Most defendants convicted of felonies are not sentenced to state prison—about 60% receive probation only or probation with jail.¹⁰ Even more

4. Jude McCulloch & Phil Scraton, *Introduction* to *THE VIOLENCE OF INCARCERATION* 1, 14 (Phil Scraton & Jude McCulloch eds., 2009).

5. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 1 tbl.1 (2011); PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2010, at 2 tbl.1 (2011); DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 tbl.1 (2016); *see also* ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 1994, at 2 (1995).

6. While the phrase “mass incarceration” does not capture the full impact of collateral consequences, this observation is not meant to imply that scholars using the phrase are unaware of the collateral consequences of criminal conviction, or have not paid enough attention to them in their scholarship. The observation is about the limits of the term, not about the work of those who use it.

7. *E.g.*, SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009).

8. *See generally* Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report. Systematic misdemeanor statistics are not readily available, but it is clear that misdemeanor convictions are more common than felony convictions. *See* KAMALA D. HARRIS, CAL. DEP’T OF JUSTICE, CRIME IN CALIFORNIA 2015, at 16 (2016) (reporting 1.158 million arrests in California in 2015, of which 314,748 were for felonies and the remainder for misdemeanors or status offenses); NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012) (reporting that misdemeanors comprised a majority of the criminal caseload in a 2010 study of 17 states); LYNN LANGTON & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES 12 tbl.5a (2010) (reporting that public defenders surveyed were assigned a total of 378,400 felony and 575,770 misdemeanor cases in 2007); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 n.25 (2012) (estimating 10.5 million nontraffic misdemeanors annually (citing NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURT 11 (2009))).

9. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2008—STATISTICAL TABLES tbl.5.1 (2010) (reporting 82,823 federal convictions in the year ending September 30, 2008, of which 75,832 were felonies).

10. ROSENMERKEL ET AL., *supra* note 7, at 4 tbl.1.2.

misdemeanor convictions do not result in incarceration.¹¹ While sentence length has increased, the average term is less than five years.¹² Accordingly, it is likely that the vast majority even of those convicted of felonies and sentenced to prison will spend most of their lives in free society.

Those convicted but not incarcerated are typically on probation or parole.¹³ About 7 million people were on probation or parole at some point during 2015,¹⁴ more than three times the number in prison or jail.¹⁵ At the broadest level, approximately 75 million adults have a criminal record, although some records involve arrests not leading to conviction.¹⁶ Accordingly, the size of the offender population is not just the 2 million in custody; it also includes the more than 7 million in the control of the criminal justice system who are not in custody, plus the tens of millions with a record.

Not being incarcerated does not mean that a person with a conviction has escaped legal consequences.¹⁷ In the words of the Supreme Court, “[a] felon

11. However, even those not incarcerated can be caught up in the system because of the obligation to pay fines, costs, and assessments. *See generally* ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175 (2014).

12. State prison sentences averaged fifty-nine months. ROSENMERKEL ET AL., *supra* note 7, at 6 tbl.1.3. Federal sentences averaged just over five years. FEDERAL JUSTICE STATISTICS, 2008, *supra* note 9, tbl.5.2.

13. *See generally* Michael Tonry, “Community Punishments,” in the present Volume.

14. DANIELLE KAEBLE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2015, at 3 tbl.1, 4 fig.4, 5 fig.5 (2017). This figure includes 4.71 million on probation or parole at year-end 2014, plus 1.9 million probation entries, and 475,200 parole entries. *Id.*

15. *Id.*

16. MADELINE NEIGHLY & MAURICE Emsellem, *WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 2* (2013) (noting that the FBI “maintains criminal history records on more than 75 million individuals”); *see also* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T L. PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27 n.2 (2011).

17. *See* MARGARET COLGATE LOVE, JENNY ROBERTS, & CECILIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* (2016); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 70 (2006); *see also* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); CIVIL PENALTIES, SOCIAL CONSEQUENCES (Christopher Mele & Theresa A. Miller eds., 2005); NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME, A ROADMAP TO RESTORE RIGHTS AND STATUS AFTER ARREST OR CONVICTION* (May 2014); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999).

customarily suffers the loss of substantial rights.”¹⁸ Every conviction implies a permanent change, because these disabilities will “carry through life.”¹⁹ For citizens, a prominent collateral consequence is the loss of civil rights:²⁰ “A convicted criminal may be disenfranchised, lose the right to hold federal or state office, be barred from entering certain professions, be subject to impeachment when testifying as a witness, be disqualified from serving as a juror,”²¹ and lose the right to keep and bear arms.²² For non-citizens, conviction may result in deportation.²³

Collateral consequences are sometimes triggered by specific offenses; others apply to “felonies” or vague categories like crimes of moral turpitude. Some apply automatically, while others authorize a regulator to act on a case-by-case basis. Some apply for a specified term, others apply for life.

The effects of the loss of status are particularly profound given the many areas of life now subject to governmental regulation. Conviction potentially affects many aspects of family relations, including, for example, the ability to adopt, be a foster parent, or to retain custody of children.²⁴ Conviction can

18. *Estep v. United States*, 327 U.S. 114, 122 (1946); *see also Daniels v. United States*, 532 U.S. 374, 379 (2001) (“States impose a wide range of disabilities on those who have been convicted of crimes, even after their release.”).

19. *Fiswick v. United States*, 329 U.S. 211, 222 (1946); *see also Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting) (“Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”).

20. Margaret Love, *50-State Comparison, Loss and Restoration of Civil Rights & Firearm Privileges*, COLLATERAL CONSEQUENCES RESOURCE CTR. (May 2017), <http://ccresourcecenter.org/resources-2/restoration-of-rights/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/> (last visited June 13, 2017); *see generally* LEGAL ACTION CTR., *AFTER PRISON: ROADBLOCKS TO REENTRY* (2004) (discussing the legal barriers facing individuals following a criminal conviction).

21. *North Carolina v. Rice*, 404 U.S. 244, 247 n.1 (1971); *see also* PIPPA HOLLOWAY, *LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP* (2013); MANZA & UGGEN, *supra* note 17; Alec C. Ewald, “*Civil Death*”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045.

22. LOVE, *supra* note 17, §§ 2:29–37; *see also* *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons”). *See generally* Franklin E. Zimring, “Firearms and Violence,” in Volume 1 of the present Report.

23. LOVE, *supra* note 17, §§ 2:47–61; *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”). For discussions of the nature of deportation, *see* Jennifer M. Chacón, “Criminalizing Immigration,” in Volume 1 of the present Report; Christopher N. Lasch, “*Crimmigration*” and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131 (2014); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008).

24. Phillip M. Genty, *Family-Related Consequences*, in LOVE, *supra* note 17, §§ 2:25–28.

make one ineligible for public employment, such as in the military and law enforcement.²⁵ It can preclude private employment, including working in regulated industries,²⁶ with government contractors, or in fields requiring a security clearance.

Conviction can also restrict one's ability to hold a government contract, to obtain government licenses and permits,²⁷ to live in public housing²⁸ or receive other benefits, or to collect a vested public pension.²⁹ Those convicted of certain crimes may lose the right to drive a car.³⁰ Persons convicted of sex offenses often must register, may be excluded from living in particular areas, and are subject to post-incarceration civil commitment.³¹ Criminal records are increasingly available to all branches of the government and all segments of

25. See, e.g., 10 U.S.C. § 504 (2016) (restricting enlistment of people with convictions) (discussed in LOVE, *supra* note 17, § 2:7); FLA. STAT. ANN. § 943.13(4) (2017) (prohibiting employment as law enforcement officer of those convicted of felonies and certain misdemeanors).

26. For example, the court in *DiCola v. FDA* upheld lifetime debarment from the pharmaceutical industry based on a criminal conviction:

The permanence of the debarment can be understood, without reference to punitive intent, as reflecting a congressional judgment that the integrity of the drug industry, and with it public confidence in that industry, will suffer if those who manufacture drugs use the services of someone who has committed a felony subversive of FDA regulation. That judgment may proceed from a skeptical view of the malleability of individual men and women; or from a greater concern with the cost of an error visited upon the public than with the cost of an error felt only by the excluded felon; or more likely from the cumulative force of both sentiments.

77 F.3d 504, 507-08 (D.C. Cir. 1996).

27. LOVE, *supra* note 17, §§ 2:8–16. The Supreme Court upheld a prohibition on licensing people convicted of crime:

It is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience.

Hawker v. New York, 170 U.S. 189, 196 (1898).

28. LOVE, *supra* note 17, § 2:17; Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U.L. REV. 1123, 1126 (2016); Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the "War on Drugs,"* 5 U.C. IRVINE L. REV. 783 (2015).

29. LOVE, *supra* note 17, §§ 2:19–21; see, e.g., *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012).

30. LOVE, *supra* note 17, § 2:23; 23 U.S.C. § 159 (requiring states to suspend driver's licenses of people convicted of drug crimes, or else lose federal highway funds).

31. LOVE, *supra* note 17, §§ 2:38–46; see also Wayne A. Logan, "Sex Offender Registration and Notification," in the present Volume; WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* (2009).

the public through computer databases, thus making collateral consequences susceptible to ready enforcement,³² although some states provide for limiting access to conviction records.³³

In spite of the prevalence of collateral consequences—or perhaps because of it—federal constitutional law regulates them minimally. The Supreme Court has held that occupational ineligibility,³⁴ deportation,³⁵ and sex-offender registration,³⁶ and civil commitment,³⁷ are not subject to the prohibitions on ex post facto laws, although some specific registration regimes have been held so restrictive as to constitute punishment,³⁸ or to require individualized determinations.³⁹ The Court has also said that people with convictions may be disenfranchised⁴⁰ and denied the right to possess firearms.⁴¹ Many courts have held that collateral consequences are not punishment, and thus are not covered by the Eighth Amendment prohibition on cruel and unusual punishments⁴² or the Fifth Amendment prohibition against double jeopardy.⁴³

32. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 179–80 (2007). For a discussion of law enforcement use of databases, see Christopher Slobogin, “Policing, Databases, and Surveillance,” in Volume 2 of the present Report.

33. Margaret Colgate Love, *Restrictions on Access to Criminal Records: A National Survey*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Mar. 9, 2017), <http://ccresourcecenter.org/2017/03/09/restrictions-on-access-to-criminal-records-a-national-survey/#more-11938> (last visited June 13, 2017).

34. *Hawker v. New York*, 170 U.S. 189, 190 (1898).

35. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“[W]hatever might have been said at an earlier date for applying the ex post facto Clause, it has been the unbroken rule of this Court that it has no application to deportation.”)

36. *Smith v. Doe*, 538 U.S. 84 (2003).

37. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

38. LOVE, *supra* note 17, § 2:43.

39. *In re J.B.*, 107 A.3d 1 (Pa. 2014).

40. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

41. *See supra* note 22.

42. *See, e.g., Byrne v. Sec’y U.S. Dep’t of Homeland Sec.*, 618 F. App’x 143, 146–47 (3d Cir. 2015); *People v. Rizzo*, 61 N.E.3d 92, 104 (Ill. 2016); *State v. Meadows*, No. A13-1023, 2014 WL 3396238, at *5 (Minn. Ct. App. July 14, 2014).

43. *See, e.g., Crook v. Galaviz*, No. EP-14-CV-193-KC, 2015 WL 502305, at *9 (W.D. Tex. Feb. 5, 2015), *aff’d*, 616 F. App’x 747 (5th Cir. 2015); *Roberson v. Dir., TDCJ-CID*, No. 6:08CV324, 2008 WL 5412383, at *4 (E.D. Tex. Dec. 29, 2008); *Urciuolo v. Commonwealth*, 684 A.2d 1094, 1096 (Pa. Commw. Ct. 1996).

While scholars have criticized collateral consequences as disproportionately falling on people of color,⁴⁴ courts hold that people with convictions are not a suspect class under equal protection doctrine, so legislation disadvantaging them is permissible if it passes lenient rational-basis review.⁴⁵ Lower courts occasionally find particular restrictions irrational,⁴⁶ and Sandra Mayson, among other scholars, has argued that a more searching standard should apply.⁴⁷ However, under the approach of most courts, saving money will almost always be a satisfactory reason for denying benefits;⁴⁸ denial of licensure or employment is justified to protect public safety,⁴⁹ or to promote public confidence in government⁵⁰ or a regulated industry.⁵¹

44. See, e.g., Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2003); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898 (1999); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010). Other chapters in this Report discuss at length the problems of race in the criminal justice system. See, e.g., David A. Harris, “Racial Profiling,” in the Volume 2 of present Report; Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report; Paul Butler, “Race and Adjudication,” in Volume 3 of the present Report; Cassia Spohn, “Race and Sentencing Disparity,” in the present Volume.

45. *Talley v. Lane*, 13 F.3d 1031, 1034–35 (7th Cir. 1994).

46. *Barletta v. Rilling*, 973 F. Supp. 2d 132, 135 (D. Conn. 2013) (finding “categorical disqualification of all persons who have ever been convicted of a felony” for precious metals trading license “is unconstitutional”).

47. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 352 (2015) (“Legislatures have deemed [people with convictions] appropriate subjects for restrictive regulation, and courts, exercising rational basis review, have deferred. This is not the inevitable state of the law.”) (emphasis in original); see also Miriam J. Aukerman, *The Somewhat Suspect Class: Towards A Constitutional Framework For Evaluating Occupational Restrictions Affecting People With Criminal Records*, 7 J.L. SOCIETY 18 (2005).

48. *Houston v. Williams*, 547 F.3d 1357, 1363–64 (11th Cir. 2008) (“[T]he conservation of funds constitutes a rational basis on which to deny assistance to convicted felons and sex offenders.”).

49. *Rinehart v. Louisiana Dep’t of Corr.*, 29 F.3d 624 (5th Cir. 1994) (employment prohibition “rationally relates to maintaining security and safety”).

50. *Parker v. Lyons*, 757 F.3d 701, 707 (7th Cir. 2014) (“Illinois’s stated interest in barring felons from elective office is to ensure ‘public confidence in the honesty and integrity of those serving in state and local offices.’ Parker does not dispute the legitimacy of this interest, nor has he argued that the statute does not rationally further it.”) (quoting *People v. Hofer*, 843 N.E.2d 460, 464 (Ill. Ct. App. 2006)).

51. See *supra* note 26.

In the criminal context, most courts hold that a judge accepting a guilty plea must warn of the direct consequences, but not of collateral consequences.⁵² Similarly, while the Sixth Amendment requires defense counsel to offer competent representation, most courts hold that counsel need not advise of collateral consequences.⁵³

There are two exceptions. First, affirmative misadvice, even about a collateral consequence, may be incompetent even if there was no obligation to offer correct advice.⁵⁴ The second major exception is the collateral consequence of deportation. By statute or court rule, many jurisdictions required advice of the possibility of deportation. In *Padilla v. Kentucky*,⁵⁵ the Supreme Court held that effective assistance of counsel entitled clients pleading guilty to a warning of the possibility of deportation. Lower courts are now working out the question of whether defense counsel must advise of other serious collateral consequences, such as sex-offender registration or incarceration.⁵⁶

52. *State v. Fisher*, 877 N.W.2d 676, 682–83 (Iowa 2016) (“To adhere to the requirements of the Fourteenth Amendment a sentencing court must insure the defendant understands the direct consequences of the plea including the possible maximum sentence, as well as any mandatory minimum punishment. However, the court is not required to inform the defendant of all indirect and collateral consequences of a guilty plea.”) (quoting *State v. Carney*, 584 N.W.2d 907, 908 (Iowa 1998) (per curiam)); *People v. Washington*, 37 N.Y.S.3d 867, 870 (Sup. Ct. 2016) (“[C]riminal courts are in no position to advise defendants of all of the ramifications of a guilty plea that are personal to each defendant. ‘Accordingly, the courts have drawn a distinction between consequences of which the defendant must be advised, those which are direct,’ and those of which the defendant need not be advised, collateral consequences.”) (quoting *People v. Ford*, 657 N.E.2d 265 (N.Y. 1995)). See generally Jenia I. Turner, “Plea Bargaining,” in Volume 3 of the present Report.

53. *State v. LeMere*, 879 N.W.2d 580, 598 (Wis. 2016); see generally Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139 (2015). For a discussion of the problems of indigent representation, see Eve Brensike Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report.

54. *People v. Dodds*, 7 N.E.3d 83, 98 (Ill. App. Ct. 2014); see also *United States v. Castro-Taveras*, 841 F.3d 34, 51 (1st Cir. 2016).

55. 559 U.S. 356 (2010). The Supreme Court has recognized the significance of collateral consequences in the context of habeas corpus petitions; the existence of collateral consequences can prevent mootness where a defendant has been released from custody. *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985).

56. LOVE, *supra* note 17, § 4.7. See generally Wayne A. Logan, “Sex Offender Registration and Notification,” in the present Volume.

While collateral consequences can be mitigated through pardon and other forms of legal relief,⁵⁷ pardon was a much more realistic hope for convicted persons in the past than it is now.⁵⁸ Finally, while historically disabilities applied only in the jurisdiction of conviction,⁵⁹ a conviction in one jurisdiction now often has effects nationwide.⁶⁰ Often a jurisdiction will impose a disability without regard to whether the jurisdiction of conviction does so.⁶¹

II. ANALYSIS AND ASSESSMENT

Historically, collateral consequences of criminal conviction were not particularly important to the legal system because the penalty for felony was

57. See LOVE, *supra* note 17, Ch. 7 & App'x A-10 to A-63; Margaret Love, *50-State Comparison Characteristics of Pardon Authorities*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Mar. 2016), <http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisoncharacteristics-of-pardon-authorities/> (last visited June 13, 2017). The Collateral Consequences Resource Center maintains a comprehensive, updated list of all legal mechanisms for relief of collateral consequences. *State-Specific Resources*, COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/resources-2/state-specific-resources/> (last visited June 13, 2017).

58. See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1181–82 (2010) (“[I]n most years between 1900 and 1936, more than half of the thousands of petitions filed were sent forward to the White House with a favorable official recommendation. At the White House, the president usually approved cases recommended favorably ... and sometimes was more inclined to leniency.”); *id.* at 1195 (noting that during the administrations of Presidents Kennedy through Carter, pardon grant rates ranged from 30–40%); see also LOVE, *supra* note 17, at App'x A-6 (discussing pardon practices in the states). See generally Mark Osler, “Clemency,” in the present Volume.

59. See *Huntington v. Attrill*, 146 U.S. 657, 673 (1892) (“And personal disabilities imposed by the law of a State, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person ... are doubtless strictly penal, and therefore have no extraterritorial operation.”)

60. See, e.g., FLA. STAT. ANN. § 790.23(1)(e) (2009) (denying firearms rights to those convicted in other states).

61. In *Logan v. United States*, 552 U.S. 23 (2007), for example, a defendant with three state battery convictions was prohibited from possessing firearms under federal law; the law in the state of conviction imposed no such prohibition. See also HAW. REV. STAT. § 846E-1 (2016) (defining “sexual offense” to include “any federal, military, or out-of-state conviction for any offense that under the laws of this State would be a sexual offense”); Jeffrey B. Kuck, Annotation, *Elections: Effect of Conviction under Federal Law, or Law of Another State or Country, on Right to Vote or hold Public Office*, 39 A.L.R.3d 303 (1971).

death.⁶² Conviction of felony resulted in a single major collateral consequence, civil death, which wrapped up an individual's legal life as the state prepared to end his natural life.⁶³ As prison terms replaced automatic capital punishment, and therefore most people convicted of crimes ultimately reentered free society, civil death came to be regarded as too harsh. In the mid-20th century, it appeared that collateral consequences might fade away as civil death had. But the rise of mass conviction, along with the general increase of government regulation in society, created a system of collateral consequences.

Congress and state legislatures have made imposing collateral consequences a central function of the criminal justice system. The criminal justice system has its own special punishments—prisons and jails—but then links the status of convicted persons to the full, general apparatus of the regulatory state. It is as if there is a title of the U.S. Code, and the code of every state, regulating “convicted persons” in the same way as states and the federal government regulate “environmental law” or “securities.”

The law governing convicted persons is of inferior quality for several structural reasons. Anyone can go to the code of any state and find the title “Securities Law,” but laws governing convicted persons are scattered throughout codes and regulations. If for some reason securities law were scattered in the same way as are collateral consequences—if some provisions of securities law were in the “Contracts” title, other parts in the “Criminal Code,” and some under “Corporations”—market forces would likely lead to some trade association or publishing house hiring capable lawyers to comb the laws and produce a compendium containing all relevant provisions.⁶⁴

Collection of laws is valuable for several reasons. First, with every piece of law related to securities at hand, it becomes possible to consider the merits of the system of securities regulation as a whole, and possible improvements. Second, individual clients will have a reasonable expectation that their lawyers will be able to give advice with knowledge of the relevant law.

62. Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347 (1968); Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2)*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 542 (1968); Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705 (2003). For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in the present Volume.

63. See generally Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

64. Alternatively, perhaps securities law was scattered in the past, and political forces resulted in creation of securities codes.

However, “as Robert F. Kennedy said long ago, the poor person accused of a crime has no lobby.”⁶⁵ Nor, of course, can the poor person hire lawyers to do extensive research. Without understanding the legal landscape, it is much more difficult to evaluate whether collateral consequences as a whole are fair and promote public safety both by keeping convicted persons from situations where they might present special dangers, or whether they frustrate public safety by denying some of them a reasonable opportunity to lead law-abiding lives and not recidivate.⁶⁶ In addition, it is unreasonable to expect individual lawyers and judges to perform Herculean research tasks in individual cases.

Another problem results from collateral consequences’ lack of transparency. Laws are normally passed to be obeyed. If collateral consequences are not actually made known to convicted persons, and to the people in the legal system who advise and supervise them, it is less likely that they will be carried out. The invisible, sometimes nearly secret, nature of collateral consequences has resulted in a criminal justice system that is arbitrary, unpredictable, costly, unfair, and in some ways counterproductive.

The ABA Criminal Justice Standards,⁶⁷ Uniform Law Commission’s Uniform Collateral Consequences of Conviction Act,⁶⁸ and the American Law Institute’s revised sentencing provisions⁶⁹ agree that the critical first step in managing collateral consequences is collecting, publishing and updating

65. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1877 (1994).

66. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871 (2015) (arguing that the proliferation of collateral consequences interferes with rehabilitation); see also Danielle R. Jones, *When the Fallout of A Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237 (2015).

67. ABA STANDARDS FOR CRIMINAL JUSTICE ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (2004) [hereinafter ABA CRIMINAL JUSTICE STANDARD], http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_toc.html (last visited June 13, 2017).

68. See UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010) [hereinafter UCCCA], <http://www.uniformlaws.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act> (last visited June 13, 2017); Margaret Colgate Love, *Paying their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753 (2011).

69. In 2017, the American Law Institute approved revisions of the sentencing articles of the Model Penal Code that make imposition of collateral consequences, and relief from them, part of the sentencing process. See MODEL PENAL CODE: SENTENCING § 6X (Am. Law Inst., Proposed Final Draft, approved May 24, 2017) [hereinafter MPC]; see also Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247 (2015).

a compendium.⁷⁰ The National Inventory of Collateral Consequences of Conviction,⁷¹ initially compiled by the ABA and now maintained by the Council of State Governments, is an important development, although it is not complete or completely accurate.

In some jurisdictions, public defenders or others have created state guides to collateral consequences.⁷² Often, these guides do not list all collateral consequences applicable to every crime. Instead, they selectively identify the most serious and common collateral consequences, collateral consequences applicable to the most common offenses, and collateral consequences most important to the population typically in the criminal justice system, that is, those who are relatively less affluent. There should be such guides in every state; again, they should be regularly updated and made available to all lawyers and judges.⁷³

A. IMPLICATIONS FOR INDIVIDUAL CRIMINAL CASES

In spite of the importance of collateral consequences to individuals, before *Padilla v. Kentucky*,⁷⁴ most courts held that counsel and the court had no duty to advise the client about the collateral consequences resulting from the conviction.⁷⁵ *Padilla's* holding that counsel did have a duty to advise about the possibility of deportation was important, and may portend extensions to other collateral consequences, perhaps under state constitutional interpretations. Nevertheless, some courts continue to hold that counsel's responsibility does not extend to collateral consequences beyond deportation.⁷⁶

The UCCCA,⁷⁷ ABA Standards⁷⁸ and Model Penal Code⁷⁹ all recognize the importance of counselling clients about collateral consequences generally. This

70. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.1; UCCCA, *supra* note 68, § 4; MPC, *supra* note 69, § 6x.02(1).

71. *National Inventory of the Collateral Consequences of Conviction*, COUNCIL OF ST. GOV'T JUST. CTR., <https://niccc.csjusticecenter.org> (last visited June 13, 2017).

72. See *Compilations and Inventories*, COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/compilations-inventories-of-collateral-consequences/> (last visited June 13, 2017).

73. See Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 47 HOWARD L.J. 675 (2011).

74. 559 U.S. 356 (2010).

75. Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

76. See *supra* note 53.

77. UCCCA, *supra* note 68, § 5 (requiring notice before guilty plea); *id.* § 6 (requiring notice at sentencing and upon release).

78. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.3(a) (requiring notice before a plea of guilty); *id.* § 19-2.4(b) (notice at sentencing).

79. MPC, *supra* note 69, § 6x.04(1) (requiring notice at sentencing).

section explains why the client's interests cannot be served without attention to collateral consequences.

1. Plea bargaining and charging negotiations

Counsel can help the client in plea bargaining through knowledge of collateral consequences. In *Padilla*, the Supreme Court noted that:

informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.⁸⁰

While *Padilla* addressed deportation, other significant consequences, such as loss of professional licenses,⁸¹ forfeitures,⁸² and even loss of civil rights,⁸³ can also be bargained over.

Because the subjects of plea agreements are not limited to traditional criminal punishment, it would be arbitrary to minimize defense counsel's responsibilities. An effective lawyer can use collateral consequences to mitigate

80. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

81. *Ex parte Reed*, 2009 WL 97260 (Tex. Crim. App. 2009) (discussing plea bargain involving surrender of peace officer's license); *Matter of Meyers*, 562 N.Y.S.2d 502 (App. Div. 1990) (resignation from bar as part of plea bargain).

82. *Libretti v. Wyoming Att'y Gen.*, 60 F. App'x 194 (10th Cir. 2003) (forfeiture of property as part of plea agreement).

83. *City of Baldwin v. Barrett*, 458 S.E.2d 619 (Ga. 1995) (right to hold public office).

other aspects of the sentence, or as the Court suggested in *Padilla*, bargain toward a conviction with less onerous collateral consequences. Prosecutors' offices often consider collateral consequences in their decisions.⁸⁴

Competent private criminal practitioners, and public defenders in offices recognizing the impact of collateral consequences, use collateral consequences in their negotiations. This may mean obtaining diversion or pleading to a crime that avoids a serious collateral consequence, agreeing to a penalty that is reduced in light of a serious collateral consequence, or of course, obtaining nothing at all from a prosecutor who considers a plea offer and charge fair and just as is. But there is no reason that large numbers of clients should act in ignorance of the legal consequences of their decisions, or that their attorneys should categorically forgo a consideration which, in some cases, would have led to a better plea agreement.

2. Pre-sentence reports

Collateral consequences should be brought into the sentencing process because of their impact on a defendant's potential sentence and ability to successfully complete supervised release or probation.⁸⁵ The pre-sentence report (PSR), the critical document in developing facts for the judge to use in sentencing, does not ordinarily list collateral consequences to which a defendant will be subject. There is some overlap between collateral consequences and information generated as part of the sentencing process—for example, the collateral consequence of firearms ineligibility⁸⁶ is also a probation and supervised-release condition,⁸⁷ and defendants generally are informed of these conditions. But there is typically no systematic effort to canvass the restrictions to which a convicted person is subject as part of the sentencing process.

The defendant's future financial and employment prospects are important to know before sentencing. In the federal system, Federal Rule of Criminal Procedure 32 requires a PSR to contain information about "the defendant's financial condition."⁸⁸ Financial condition is important because of the

84. Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016); see also Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016); Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C.L. 213 (2016).

85. Gabriel J. Chin, *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports after Padilla v. Kentucky*, 31 ST. LOUIS U. PUB. L. REV. 61 (2011).

86. 18 U.S.C. § 922(g).

87. 18 U.S.C. § 3563(b)(8).

88. FED. R. CRIM. P. 32(D)(2)(A)(ii).

sentencing goal of “the need to provide restitution to any victims of the offense”⁸⁹ and because the amount of a fine depends on “the defendant’s income, earning capacity and financial resources.”⁹⁰ A conviction may dramatically change the kinds of employment that are lawfully available. It makes little sense to calculate earning potential based on employment settings which are legally prohibited, or based on the retention or acquisition of licenses or permits for which a client is no longer eligible.

The importance of the client’s financial status does not end at sentencing. In addition to, or in lieu of, incarceration, most people convicted of felonies will be under the supervision of the criminal justice system in some form: Most people convicted in federal court serve either probation instead of prison or supervised release after prison. Standard conditions of probation and supervised release include that a person pay restitution,⁹¹ “work regularly at a lawful occupation,”⁹² and “support the defendant’s dependents and meet other family responsibilities.”⁹³ Non-compliance is a ground for a return to prison. Thus, even if the client can pay any restitution and fine in full at sentencing, the client will ordinarily be subject to ongoing financial responsibilities; this also suggests that prosecutors and judges must understand defendants’ future occupational situation at the time of sentencing.

In addition to payment of financial obligations, probation and supervised release require the defendant to be generally law-abiding. It is a condition of both that “[t]he defendant shall not commit another federal, state or local offense.”⁹⁴ When the violations are of *malum in se* (inherently wrong) criminal prohibitions, a person should not be heard to complain that she did not know, for example, that it was illegal to rob banks.⁹⁵ But the legal restrictions on those convicted of crime are often little-known even to lawyers and judges. It is in everyone’s interests for the collateral consequences imposed by law to be known to all parties.

89. 18 U.S.C. § 3553(a)(7).

90. 18 U.S.C. § 3572(a)(1); *see also* 18 U.S.C. § 3572(b) (providing that “a fine or other monetary penalty” should be imposed “only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.”). *See generally* Beth A. Colgan, “Fines, Fees, and Forfeitures,” in the present Volume.

91. U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(a)(6) (U.S. SENTENCING COMM’N 2016); *Id.* § 5D1.3(a)(6).

92. *Id.* § 5B1.3(c)(5); *Id.* § 5D1.3(c)(5).

93. *Id.* § 5B1.3(c)(4); *Id.* § 5D1.3(c)(4).

94. *Id.* § 5B1.3(a)(1); *Id.* § 5D1.3(a)(1).

95. *United States v. Ortuno-Higareda*, 450 F.3d 406 (9th Cir. 2006) (citing several cases), *vacated en banc*, 479 F.3d 1153 (9th Cir. 2007).

3. Sentencing

Under most systems, judges can impose a range of sentences. Sometimes discretion is limited by guidelines, or mandatory minimum sentence provisions,⁹⁶ but it is rare that conviction inexorably leads to a single lawful penalty. Judges choose among lawful sentences by examining statutory factors,⁹⁷ and general principles of sentencing, which are broad.⁹⁸ Because courts can consider almost everything when exercising their sentencing discretion, they have always had the power to take into consideration that the defendant would be subject to collateral consequences.

There is some evidence that collateral consequences are moving toward becoming a more formal sentencing factor.⁹⁹ The ABA Standards for Criminal Justice provide: “The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence.”¹⁰⁰ The commentary explains that “the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.” The Model Penal Code also brings collateral consequences into the sentencing process.¹⁰¹

In a highly publicized 2016 decision, *United States v. Nesbeth*, Senior U.S. District Judge Frederic Block considered collateral consequences in imposing a sentence:

I have imposed a one-year term of probation. In fixing this term, I have also considered the collateral consequences Ms. Nesbeth would have faced with a longer term of probation, such as the curtailment of her right to vote and the inability to visit her father and grandmother in Jamaica because of the loss of her passport during her probationary term.¹⁰²

96. See, e.g., Douglas A. Berman, “Sentencing Guidelines,” in the present Volume; Erik Luna, “Mandatory Minimums,” in the present Volume.

97. See, e.g., ARIZ. REV. STAT. § 13-701(D).

98. *Williams v. New York*, 337 U.S. 241 (1949); see also Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U.L. REV. 161 (2016).

99. For state and federal drug distribution offenses, collateral consequences are at issue in every sentencing. A little-known federal statute, 21 U.S.C. § 862, allows sentencing judges to deny federal benefits to those convicted of possession or distribution offenses.

100. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.4(a).

101. MPC, *supra* note 69, §§ 6x.02(2), 6x.04.

102. *United States v. Nesbeth*, 188 F. Supp. 3d 179, 194–95 (E.D.N.Y. 2016).

Because courts consider other personal circumstances when imposing a sentence, it is hard to see why they should categorically ignore collateral consequences provided by law.

B. ELIMINATING UNNECESSARY COLLATERAL CONSEQUENCES

Jurisdictions should refine collateral consequences, and eliminate ones that are unnecessary. The Model Penal Code proposes that disenfranchisement be prohibited, or limited to the period of imprisonment, and that jury disqualification be limited to periods of correctional control.¹⁰³ The ABA proposes that convicted persons not be disenfranchised, except during confinement,¹⁰⁴ should not be ineligible “to participate in government programs providing necessities of life,”¹⁰⁵ or for “governmental benefits relevant to successful reentry into society, such as educational and job training programs.”¹⁰⁶

Collateral consequences have developed piecemeal. Because of the limited judicial review, legislatures have not had to articulate the reasons for their enactment or evaluate their effectiveness or costs. It seems that collateral consequences are sometimes imposed casually, without full consideration of how they fit into a system of punishment, reentry, and employment.

Legislatures impose collateral consequences to promote public safety and reduce risk, to deprive a perceived wrongdoer of a no-longer-deserved benefit, or both. Although they are not supposed to be imposed for purposes of punishment, one suspects that retribution is in the mind of some supporters.¹⁰⁷ The connection between the consequence and the reduction of the risk has often not been based on evidence, but, rather, on intuition or assumptions based on perceived logic.¹⁰⁸ To the extent that the issue is framed as a matter of

103. MPC, *supra* note 69, § 6x.03.

104. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.6(a).

105. *Id.* § 19-2.6(e).

106. *Id.* § 19-2.6(f).

107. See generally Jeffrie G. Murphy, “Retribution,” in the present Volume.

108. See, e.g., Ira Mark Ellman & Tara Ellman, “Frightening and High”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 499 (2015) (discussing *McKune v. Lile*, 536 U.S. 24, 34 (2002), which held that risk of recidivism is “frightening and high”; “the evidence for [Justice Kennedy’s influential] claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons”).

personal opinion or plausible speculation, one person's judgment that there are too many collateral consequences is entitled to no more weight than another's opinion that there are too few.

Increasingly, however, risk can be measured and evaluated.¹⁰⁹ A number of studies show that the risk of reoffending diminishes with time since criminal involvement.¹¹⁰ There is also evidence that a provisionally hired employee who clears a state-mandated criminal background check has a reduced likelihood of future arrest; that is, not imposing the collateral consequence has a positive public-safety effect.¹¹¹ In addition, a recent study suggests that the disqualifications imposed by statutes do not match up to the decisions that would be reached based on use of empirical data about criminal records and reoffending.¹¹² It may well be that individuals can get a fairer shake, and public safety can be better protected, if decision-makers consider empirically reliable factors such as the time since criminal involvement, and evidence of law-abiding behavior, rather than using categorical bars based on conviction of particular crimes.

Jurisdictions should restrict triggering offenses to those that evidence shows present the particular danger to be avoided, rather than applying collateral consequences to "all felonies" or "all crimes." Where it appears that the risk diminishes with time, collateral consequences should apply for specified terms, not permanently. In many cases it will be appropriate to disqualify on a case-by-case basis, looking at the relevant facts and circumstances, not across the board. Again, jurisdictions should identify the cases presenting unreasonably elevated risks to public safety, but without undermining public safety by excluding lower-risk individuals from lawful employment.

109. See generally John Monahan, "Risk Assessment in Sentencing," in the present Volume.

110. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 328 (2009); Shawn D. Bushway, Paul Nieuwebeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27 (2011); Megan C. Kurlychek, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistence and Recidivism Patterns—Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71 (2012).

111. Megan Denver, Garima Siwach & Shawn D. Bushway, *A New Look at the Employment and Recidivism Relationship through the Lens of a Criminal Background Check*, 55 CRIMINOLOGY 174 (2017); Megan Denver, *Evaluating the Impact of "Old" Criminal Conviction Decision Guidelines on Subsequent Employment and Arrest Outcomes*, 54 J. RES. CRIME & DELINQUENCY 379 (2016).

112. Garima Siwach, Shawn D. Bushway & Megan Kurlychek, *Legal Mandates in Criminal Background Checks: An Evaluation of Disparate Impact in New York State* (June 14, 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2986384 (last visited June 14, 2017).

C. RELIEF

Most jurisdictions provide for executive, legislative or judicial relief.¹¹³ There is evidence that relief improves employment outcomes.¹¹⁴ The federal system has no established relief measure other than a presidential pardon, a matter that has proved frustrating for some federal courts.¹¹⁵

There are several technical problems. One is the effect of out-of-state convictions in a highly mobile country. Jurisdictions commonly impose collateral consequences based on convictions from other states. However, it is not always clear what effect jurisdictions give to out-of-jurisdiction relief.¹¹⁶ Therefore, a person convicted in one state who never loses, or has regained, civil rights may lose them upon relocation to another state. In addition to making clear whether out-of-state convictions trigger particular consequences, state law should specify the effect of out-of-state expungement, sealing, or other relief.¹¹⁷ Also, states should make existing in-state relief mechanisms available to residents with out-of-state convictions.¹¹⁸

The ABA,¹¹⁹ Model Penal Code,¹²⁰ and UCCCA¹²¹ all contemplate means of relieving individual collateral consequences to facilitate rehabilitation, reentry, and self-support. For example, if all people convicted of felonies may be excluded from public housing, some mechanism should be available for a nonviolent offender to live in public housing if there is a realistic basis to believe that it will facilitate self-support and presents no unreasonable risk to public safety.

113. *Restoration of Rights*, COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/resources-2/restoration-of-rights/> (last visited June 13, 2017).

114. Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief As Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL'Y REV. INTER ALIA 11 (2016); see also Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM L. & CRIMINOLOGY (forthcoming 2017) (suggesting that relief mechanisms improve employment outcomes).

115. For example, in the Eastern District of New York, then-Judge John Gleason concluded that there was no available mechanism to help these worthy applicants. He expunged the conviction of one applicant and issued a certificate of rehabilitation to another. *Doe v. United States*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015), *vacated*, 833 F.3d 192 (2d Cir. 2016); see also *Doe v. United States*, 168 F. Supp. 3d 427 (E.D.N.Y. 2016).

116. Wayne A. Logan, "When Mercy Seasons Justice": *Interstate Recognition of Ex-Offender Rights*, 49 U.C. DAVIS L. REV. 1 (2015).

117. UCCCA, *supra* note 68, § 9 sets out some alternatives.

118. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.5(b); MPC, *supra* note 69, § 6x.05.

119. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.5(a) (waiver of individual consequence); *id.* § 19-2.5(c) (relieving all collateral consequences).

120. MPC, *supra* note 69, § 6x.04(2) ("Order of Relief"); *id.* § 6x.06 ("Certificate of Restoration of Rights").

121. UCCCA, *supra* note 68, §10 ("Order of Limited Relief").

In addition, they all contemplate broader relief if rehabilitation is indicated by the passage of time, completion of the sentence, and the individual's record.¹²²

There is a debate between relief involving "forgiving or forgetting,"¹²³ that is, between relief that evidences rehabilitation, such as a Certificate of Rehabilitation, or Good Conduct, and relief designed to conceal the fact that the conviction ever occurred, such as expungement. There is some question as to whether public convictions can ever successfully be expunged.¹²⁴ If criminal-record information remains publicly available, states should consider making the obtaining of relief, whatever it is, admissible as evidence of due care by employers who hire the beneficiary.¹²⁵

D. OTHER STRUCTURAL REFORMS

Collection of collateral consequences will make it possible to evaluate them as a whole to determine whether they might be reformed to better serve their purposes. One useful project would be technical clarification. Many collateral-consequence statutes are loosely drafted or otherwise ambiguous. Among ambiguities appearing in codes are:

1. Whether a statute creates a mandatory bar or authorizes case-by-case evaluation.
2. What the triggering offenses are.
3. Whether the disability applies to out-of-state convictions.
4. Whether the disability is permanent.

Ideally, triggering offenses would be described precisely by citation to specific statutes rather than in vague terms like "moral turpitude."¹²⁶ Section 7(b) of the UCCCA provides that if a provision is ambiguous, it is construed as discretionary not mandatory.

122. ABA CRIMINAL JUSTICE STANDARD 19-2.5(c) (relieving all collateral consequences); MPC, *supra* note 69, § 6x.06 ("Certificate of Restoration of Rights"); UCCCA, *supra* note 68, § 11 ("Certificate of Restoration of Rights"); see also Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219.

123. Eli Hager, *Forgiving v. Forgetting*, MARSHALL PROJECT (Mar. 17, 2015), <https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting#.c3xb62HZP> (last visited June 13, 2017).

124. See, e.g., Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253 (2012).

125. UCCCA, *supra* note 68, § 14 provides that issuance of a certificate is admissible to show due care. MPC, *supra* note 69, § 6x.06(5) provides that prior convictions are inadmissible if they have been the subject of a Certificate of Restoration of Rights.

126. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001.

Another issue is which governmental actors have authority to create collateral consequences. Local entities create collateral consequences;¹²⁷ states might conclude that collateral consequences are important enough that they should be created only by the state legislature.¹²⁸ Given the difficulty of finding collateral consequences in local ordinances or unpublished agency rules, lower levels of government could be denied the power to create them, or required to file them in a central public depository as a prerequisite to validity. Alternatively, lower levels of government could be restricted to discretionary collateral consequences, the application of which would be evaluated on a case-by-case basis, rather than across the board.

Jurisdictions could consider restricting collateral consequences to felony convictions. The Supreme Court has recognized that “[a] wide range of civil disabilities may result from misdemeanor convictions.”¹²⁹ As the work of Jenny Roberts,¹³⁰ J.D. King,¹³¹ and Alexandra Natapoff¹³² has shown, even misdemeanor convictions can subject a defendant to a wide range of consequences. Yet, some of the protections of the system are relaxed for misdemeanors on the mistaken belief that they are categorically less serious than felonies.¹³³

This leads to something of an irony: Collateral consequences are more important for relatively less serious crimes. If a person is sentenced to 25 years imprisonment at hard labor, it likely matters little that she will be ineligible to get a license as a chiropractor when she is released. Someone convicted of securities fraud cannot expect to remain in or return to work in a financial institution whether or not he goes to prison. But a person sentenced to unsupervised

127. Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1 (2014).

128. UCCCA, *supra* note 68, § 7(a) restricts creation of collateral consequences to statutes, ordinances, and agency rules published in the state’s administrative code.

129. *Argersinger v. Hamlin*, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring) (listing such civil disabilities as forfeiture of public office, disqualification from licensed professions, and loss of pension rights); *see also* *Hopper v. State*, 957 N.E.2d 613, 625 (Ind. 2011) (Rucker, J., dissenting) (“Uncounseled pro se defendants may very well plead guilty even to certain misdemeanor offenses that carry devastating collateral consequences ranging from deportation, to eviction from public housing, to barriers in employment.”).

130. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in Lower Courts*, 45 U.C. DAVIS L. REV. 277 (2012).

131. John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013).

132. Natapoff, *supra* note 8.

133. *State v. Young*, 863 N.W.2d 249, 253 (Iowa 2015).

probation and a \$250 fine for a minor offense, suffers a catastrophic loss if she loses her job or is unable to teach, care for the elderly, live in public housing, or be a foster parent to a relative.

Fairness warrants more time and attention being paid to the defense and disposition of misdemeanor offenses. However, those considerations would diminish if the collateral consequences did as well.

RECOMMENDATIONS

1. **Collateral consequences should be rationalized and reformed to promote public safety, fairness in individual cases, and a more effective overall criminal justice system.** Collateral consequences should be integrated into the criminal justice policy process in general, and into the process of disposition of each case.
2. **An agency should collect and publish the collateral consequences applicable in each jurisdiction** so legislators, judges, lawyers, and other individuals can learn the legal implications of a conviction under the law of that jurisdiction. The National Inventory of Collateral Consequences of Conviction will be a useful foundation.
3. **Public defenders, state bar associations or probation departments should identify collateral consequences of the most common crimes of conviction, and other common or significant consequences,** and use that information to create a document which lawyers and probation officers can use to counsel clients.
4. **Defense attorneys should inform clients of collateral consequences and consider them in advising clients about possible courses of action.** Judges should inform defendants of applicable collateral consequences at plea and sentencing.
5. **Prosecutors should take collateral consequences into account in charging and plea bargaining.** Pre-sentence reports should contain collateral consequences, and judges should consider them in sentencing.
6. **The U.S. Supreme Court and state supreme courts should consider or reconsider whether collateral consequences are subject to constitutional restraints on punishment,** and, alternatively, they must be reasonably and not excessive in light of their regulatory purposes.
7. **Congress and state legislatures should develop mechanisms to relieve individual collateral consequences to facilitate an individual's employment and rehabilitation.** Congress and state legislatures should

also allow, upon a showing of rehabilitation and law-abiding behavior, an individual to have a conviction vacated or set aside to reflect that they have repaid their debt to society and regained equal status.

8. **In addition, Congress and state legislatures should consider, based on empirical evidence of risk and of the public-safety benefits of employment, whether particular collateral consequences are unnecessary,** should be restricted to specific offenses, imposed only for determinate periods of time, or only on a case-by-case basis.

Sex Offender Registration and Notification

Wayne A. Logan*

Since the 1990s, U.S. jurisdictions have had laws in place requiring that convicted sex offenders, after their release from confinement, provide identifying information to authorities, which is then made available to community residents in the dual hope that they will undertake safety measures and that registrants will be deterred from reoffending. The laws remain popular with the public and political actors alike, but have long been criticized for being predicated on empirical misunderstandings, most notably that sex offenders as a group recidivate at higher rates than other offenders and that most sexual offending involves strangers. Today, moreover, a considerable body of social-science research calls into question whether registration and notification achieve their avowed public-safety goals. This chapter summarizes the research undertaken to date regarding registration and notification and, presuming the laws' continued existence, offers several concrete suggestions for ways in which they might be improved.

INTRODUCTION

Without question, sex offender registration and notification (“SORN”) laws number among the most important criminal justice policy innovations undertaken in the last quarter-century. In a nutshell, SORN laws require that convicted sex offenders provide government authorities a variety of identifying information (e.g., photos, home and work addresses, vehicle descriptions, e-mail or Internet identifiers, and descriptions of identifying body marks, such as scars and tattoos). Individuals must thereafter verify the accuracy of the information on at least an annual basis, for a minimum of 10 years and perhaps their lifetimes, and update it in the event of any changes, facing felony prosecution if they fail to do so.¹ State (and sometimes local) governments

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1. In addition, federal law makes it a crime punishable for up to ten years for state registrants to move out of state or engage in international travel without updating their registry information. 18 U.S.C. § 2250 (2012). The federal International Megan’s Law, moreover, requires that the passports of registrants be stamped in a conspicuous manner with the phrase “sex offender.” International Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (codified at 42 U.S.C. § 16935-16935i and 22 U.S.C. § 212b (2016)).

then provide this information to the public by means of community meetings, informational flyers, newspaper notices, and most commonly today, by public websites, with software often pinpointing the location of registrants. To facilitate access to registry information, the U.S. Department of Justice maintains a National Sex Offender Registry containing registry information from all 50 states and the District of Columbia.²

The primary purpose of SORN laws is straightforward and laudable: the reduction of sex offender recidivism. Proponents claim that registration helps police both monitor convicted sex offenders and facilitate apprehension in the event of re-offense, and instill in them the sense that they are being watched, thereby deterring sexual reoffending. Notification, in turn, provides registry information to community members, allowing them to undertake precautionary measures to avoid victimization by registrants and serve as “co-producers” of public safety.

Critics argue that research has failed to show that SORN achieves its intended public safety purpose and that it actually exacerbates known recidivism risk factors by impeding the ability of registrants to maintain stable social relationships and secure employment and adequate housing. Critics also question the basic empirical underpinnings of the laws, noting that contrary to the understanding of legislatures and courts (including the U.S. Supreme Court),³ sex offenders do not recidivate at higher rates than offender subgroups,⁴ and that the “one size fits all” approach to SORN is at odds with known variations among sex offender population recidivism rates,⁵ especially juveniles.⁶ Critics also assert that SORN fosters a false sense of security because

2. See *Public Registry Sites*, U.S. DEP’T JUSTICE, <https://www.nsopw.gov/en/Registry> (last visited Mar. 21, 2017).

3. See Ira M. Ellman & Tara Ellman, “Frightening and High”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 508 (2015).

4. See, e.g., PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, at 1 (2003) (within 3 years of release from prison 5.3% of sex offenders were rearrested for a sex crime and 3.3% of child molesters were rearrested for another sex crime against a child). Public understanding of the sexual re-offense rates among juveniles is likewise mistaken. See Michael Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 197 (2010).

5. Patrick Lussier & Jesse Cale, *Beyond Sexual Recidivism: A Review of Sexual Criminal Career Parameters of Adult Sex Offenders*, 18 AGGRESSION & VIOLENT BEHAV. 445, 455 (2013); Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL’Y REV. 83, 97–98 (2006).

6. For discussion of this distinctiveness, which includes lower rates of sexual re-offense than adults and increased responsiveness to treatment intervention, see Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 11–15 (2013).

among other things, contrary to the “stranger danger” premise of the laws, the overwhelming percentage of sexual offenses involve victims and offenders known to one another,⁷ and most sex offenses are committed by first-time offenders (not registrants).⁸

SORN laws have been in effect nationwide for over 20 years, and registries today contain identifying information on almost 900,000 individuals.⁹ Registry populations expand by the day as individuals leave prisons and jails,¹⁰ facing registration periods of at least 10 years and often lifetimes.¹¹ These new registrants augment registry rolls already swollen as a result of the retroactive scope of many laws (often dating back decades), with old and new registrants alike enjoying very little opportunity for early exit.¹²

Over time, governments have spent many hundreds of millions of dollars and a great deal of time and effort to create and maintain registries and enforce

7. See MICHAL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010 (2013). Familiarity is especially common with sexual offenses against children: an estimated 93% of minors know their offender. HOWARD SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000). With respect to child abductions in particular, “only one-hundredth of 1 percent of all missing children” are abducted by strangers or “slight acquaintances.” David Finkelhor, *Five Myths About Missing Children*, WASH. POST (May 10, 2013), https://www.washingtonpost.com/opinions/five-myths-about-missing-children/2013/05/10/efee398c-b8b4-11e2-aa9e-a02b765ff0ea_story.html?utm_term=.4650089f24ed.

8. See, e.g., Jeffrey Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York’s Sex Offender and Notification Law*, 14 PSYCHOL. PUB. POL’Y & L. 284, 296 (2008) (noting that in New York 96% of arrests for sex crimes occurred among those without previous sex crime convictions). See generally Lisa L. Sample & Colleen Kadleck, *Sex Offender Laws: Legislators’ Accounts of the Need for Policy*, 19 CRIM. JUST. POL’Y REV. 40 (2008).

9. See *Map of Registered Sex Offenders in the United States*, NAT’L CTR. MISSING & EXPLOITED CHILDREN (2016), http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf. It warrants mention that a significant number of registrants (approximately 12%) do not reside in communities but rather are incarcerated or involuntarily civilly committed. Alissa Ackerman et al., *How Many Sex Offenders Actually Live Among Us? Adjusted Counts and Population Rates in Five U.S. States*, 35 J. CRIME & JUST. 464, 466 (2012).

10. In Texas, for instance, the registry grew over 35% in size over a five-year period (as of June 1, 2016 numbering almost 88,000 individuals). Eric Dexheimer, *Program to Corral Ballooning Sex Offender Registry Failing*, AUSTIN AMERICAN-STATESMAN (July 14, 2016), <http://www.mystatesman.com/news/state--regional/program-corral-ballooning-sex-offender-registry-failing/z4ltoUh7g2A8KSxI64vv5I/>.

11. See *id.* (“[T]he [Texas] registry is like a cemetery: Because many offenders are placed on it for a lifetime, or at least decades, it only expands in size. Over the past five years, Texas has added new names to the list at a rate of nearly a dozen every day.”).

12. Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 227.

SORN laws. Remarkably, however, SORN has been largely immune to critical re-examination. Unlike other penal policies also originating in the “punitive 1990s,” which have experienced a wind down of late—such as “three strikes” laws,¹³ mandatory minimum sentences,¹⁴ and other collateral consequences of conviction (e.g., loss of the right to vote)¹⁵—SORN has not only endured, it has flourished. Indeed, registration is often combined with other social-control strategies such as laws denying registrants the ability to live, work, or visit areas near places where minors congregate, such as schools and playgrounds (sometimes even when their crime of conviction did not involve a minor).¹⁶

A variety of reasons account for the laws’ staying power and growth. Perhaps foremost, few political leaders relish being seen as “soft” on criminal offenders, especially sex offenders, arguably the most feared and disdained criminal subpopulation.¹⁷ At the same time, it is often the case that SORN laws are explicitly named after particular victims, typically children, naturally militating against political challenge. Nor can it be ignored that the laws help satisfy a widespread visceral desire to publicly shame convicted sex offenders.¹⁸

Although perhaps understandable, the lack of critical scrutiny of SORN laws is curious. One would be hard-pressed to identify a governmental undertaking of similar cost and magnitude, especially one so explicitly predicated on empirical understandings, that has similarly eluded scrutiny.¹⁹

13. See, e.g., *California’s Three Strikes Sentencing Law*, CALIFORNIA COURTS, <http://www.courts.ca.gov/20142.htm> (last visited Mar. 21, 2017).

14. See *Recent State-Level Reforms to Mandatory Minimum Laws*, FAMM (June 1, 2016), <http://famm.org/wp-content/uploads/2013/08/Recent-State-Reforms-June-2016.pdf>. See generally Erik Luna, “Mandatory Minimums,” in the present Volume.

15. See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013). For further discussion of collateral consequences, see Gabriel J. Chin, “Collateral Consequences,” in the present Volume.

16. See Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6–8 (2006).

17. Andrew J. Harris & Kelly M. Socia, *What’s in a Name? Evaluating the Effects of the “Sex Offender” Label on Public Opinions and Beliefs*, 28 SEXUAL ABUSE: J. RES. & TREATMENT 660, 673, 675 (2016).

18. For more on the social and political forces behind this staying power, see WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 85–108 (2009).

19. Indeed, not until 2006, twelve years after requiring states enact registration laws and a decade after requiring them to enact notification did Congress direct the Department of Justice to assess the “efficiency,” “effectiveness,” and resource consequences of SORN. See Wayne A. Logan, *Megan’s Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 401 (2011).

Of late, however, there have been some signs of change. Courts, long averse to questioning the constitutionality of SORN laws,²⁰ are showing receptivity to challenges to more recent laws marked by increasing severity.²¹ Moreover, while states since the 1990s have usually submitted to federal pressure to expand the onerousness and reach of their SORN laws, several have refused to comply with the most recent, more expansive requirements contained in the 2006 Adam Walsh Act and thereby forfeited federal funds, citing policy disagreements (e.g., subjecting juveniles to registration) and the significant costs associated with compliance.²² A few states have even taken modest steps to limit their SORN laws (e.g., discontinuing registration of “Romeo and Juliet” underage offenders).²³ Finally, governmental bodies have recently urged changes to

20. Most notably, in 2003 the U.S. Supreme Court rejected two challenges to SORN laws. See *Smith v. Doe*, 538 U.S. 84, 84 (2003) (rejecting Ex Post Facto Clause challenge asserting that Alaska’s law constituted retroactive punishment); *Conn. Dep’t Pub. Safety v. Doe*, 538 U.S. 1 (2003) (denying procedural due process challenge to Connecticut’s SORN law that subjected individuals to SORN on the basis of conviction alone, without individualized risk assessment).

21. See, e.g., *Does #1-5 v. Snyder*, 834 F.3d 696, 706 (6th Cir. 2016) (invalidating Michigan’s SORN law, which also imposed geographic limits on where registrants can work, “loiter,” and live, on federal ex post facto grounds), *cert. denied*, 2017 WL 4339925 (Oct. 2, 2017); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (invalidating state law on ex post facto grounds); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (same); *In re C.P.*, 967 N.E.2d 729, 749 (Ohio 2012) (holding that lifetime registration of juveniles constituted cruel and unusual punishment); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (same); *In re J.B.*, 107 A.3d 1, 20 (Pa. 2014) (finding that irrebuttable presumption that specified juveniles pose a high risk of reoffending, resulting in registration for 25 years, violated due process).

22. See Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 1009 n.96 (2010). As of late January 2017, nineteen states have “substantially implemented” AWA requirements. *SORNA Implementation Status*, U.S. DEP’T JUSTICE, <https://www.smart.gov/sorna-map.htm> (last visited Mar. 21, 2017).

23. Also warranting mention, in a few states legislatures tried unsuccessfully to trim back SORN laws but were stymied by gubernatorial vetoes. Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underling Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 290–91 (2016) (noting experience in Missouri where legislature sought to discontinue registration of juveniles and in Nevada where legislature sought to repeal use of conviction-based registrant classification system).

SORN,²⁴ as have entities such as the Council of State Governments,²⁵ the Center for Sex Offender Management,²⁶ and even the American Law Institute.²⁷ Recently as well, Patty Wetterling, mother of Jacob Wetterling and long a major advocate of SORN laws, has publicly urged their re-examination.²⁸

These developments highlight a modest yet important shift, providing a potential window of opportunity for re-evaluation of SORN laws. SORN will not likely disappear anytime soon. It is hard to imagine a scenario where the political will would exist for such a major change; moreover, SORN's relative low cost compared to brick-and-mortar incapacitation and capacity to complement other community-based social-control strategies (such as GPS monitoring) make it unlikely that cost-conscious reform groups such as "Right on Crime" will advocate its demise.

A now substantial body of social-science research, however, raises serious question over the utility of SORN. This chapter surveys the work conducted to date, highlighting the ways in which SORN laws can be modified to better secure public safety.

24. See, e.g., CAL. SEX OFFENDER MGMT. BD., *A BETTER PATH TO COMMUNITY SAFETY: SEX OFFENDER REGISTRATION IN CALIFORNIA* 5 (2014), <http://www.casomb.org/docs/Tiering%20Background%20Paper%20FINAL%20FINAL%204-2-14.pdf> (concluding that "the registry has, in some ways, become counterproductive to improving public safety" and urging an "overhaul" of the system designed to differentiate individuals based on recidivism risk); TEX. SENATE CRIMINAL JUSTICE COMM., *INTERIM REPORT* 4 (Dec. 15, 2010), <http://www.senate.state.tx.us/cmtes/81/c590/c590.InterimReport81.pdf> (concluding that "it is clear registries do not provide the public safety" and urging that "all registered sex offenders have risk assessments done").

25. COUNCIL STATE GOV'TS, *SEX OFFENDER MANAGEMENT POLICY IN THE STATES: STRENGTHENING POLICY & PRACTICE*, FINAL REPORT 6 (2010), <http://www.csg.org/policy/documents/SOMFinalReport-FINAL.pdf> (noting that "common myths about sex offenders continue to influence laws" and concluding that "there is little empirical proof that sex offender registries and notification make communities safer").

26. CTR. SEX OFFENDER MGMT., U.S. DEP'T JUSTICE, *THE COMPREHENSIVE APPROACH TO SEX OFFENDER MANAGEMENT* 4–5 (2008) (advocating shift away from expansive SORN policies toward schemes that focus instead on individuals posing the greatest risk to the public).

27. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.11 (Prelim. Draft No. 5, Sept. 8, 2015), <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (urging in preliminary draft significantly less expansive registration approach and eschewal of notification).

28. Jennifer Blyer, *Patty Wetterling Questions Sex Offender Laws*, CITY PAGES (Mar. 20, 2013), <http://www.citypages.com/news/patty-wetterling-questions-sex-offender-laws-6766534>.

I. SORN LAWS: THEIR ORIGINS AND EVOLUTION

Requiring convicted criminal offenders to register with government authorities first took root in the U.S. in the 1930s.²⁹ Initially, registration laws were enacted by municipalities and typically targeted felons as a class.³⁰ In ensuing decades, a handful of states enacted laws but registration attracted little legislative attention in general.³¹

So things stood until the late 1980s and early 1990s when, after a series of widely reported child victimizations, registration caught the attention of state legislators. The abduction and disappearance of 11-year-old Jacob Wetterling in Minnesota (October 1989), and the abduction, sexual assault, and murder of 7-year-old Megan Kanka in New Jersey (July 1994) by a convicted sex offender living nearby, in particular, catalyzed legislative action. In rapid-fire succession and often without much debate, legislatures enacted new-era registration laws, this time targeting sex offenders and a cluster of offenses thought often tied to sexual victimization (e.g., kidnapping).

The new laws differed, moreover, in another important respect: registry information was no longer monopolized by law enforcement. Following a law enacted by Washington state in 1990, prompted by the sexual abuse of a boy by a recently released sex offender, registrants' information was made available to community members. Voicing a sentiment that would come to define modern SORN laws, the mother of Megan Kanka asserted that "if [we] had known there was a pedophile living on our street, [Megan] would be alive today."³²

In 1994, Congress, concerned that states were slow in embracing registration and wishing greater uniformity in registration laws, passed the Jacob Wetterling Act, which threatened to withhold from states 10% of their allocated federal crime-fighting funds if they did not adopt registration laws satisfying the federal "floor" of requirements. Two years later, in 1996, Congress passed Megan's Law, which threatened similar loss of federal funds if states did not

29. For discussion of targeted concern over sex offenders in particular, dating back to the early twentieth century, and the complex constellation of social and political catalysts driving such concern, see generally Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 Nw. U. L. REV. 1317 (1998).

30. LOGAN, *supra* note 18, at 22–28.

31. *Id.* In 1947, California enacted the first-state wide registry focusing exclusively on sex offenders. *Id.* at 30.

32. Michelle Reuss, *A Mother's Plea: Pass Megan's Bill—Panel Oks Compromise*, RECORD (N.J.), Sept. 27, 1994, at A1.

require that registry information be disseminated to community members. By 1999, SORN laws were in place in all 50 states and the District of Columbia, as well as U.S. territories and many tribal jurisdictions.

Today, registration is triggered by a broad array of sex-related offenses, including serious felonious misconduct such as aggravated sexual assault and child sexual assault, but also less serious offenses (e.g., peeping, voyeurism, and indecent exposure), possession of child pornography, and misconduct that might not involve a sexual purpose (e.g., kidnapping and false imprisonment). In addition to enumerated offenses, several jurisdictions allow courts to require registration if an offense was “sexually motivated.” The scope of conviction coverage can date back many years, at a minimum encompassing those occurring after the enactment of a state’s SORN laws (the early to mid-1990s) but often decades before.

Registration periods vary, ranging from 10 years to several decades to life, with at least three states (Alabama, Florida, and South Carolina) requiring lifetime registration of all registrants. Registrants must verify their information at least once a year (sometimes every three months), and must notify authorities when their identification information changes (e.g., they move, change jobs, or grow a beard). As a rule, state laws afford very little opportunity for individuals to exit registries before their registration period ends.³³

In most states, all registrants are subject to notification, based solely on offense of conviction, with registry websites only occasionally stating that individuals have not been evaluated for risk of re-offense. In South Carolina, for instance, all registrants convicted of specified offenses must register for their lifetimes and appear on the state’s community notification website. In a few states, such as Massachusetts and New York, notification is limited: only information on registrants determined to pose medium or high risk is made publicly available. In Minnesota, only registrants assessed as having a high likelihood of re-offense are subject to notification.

Juveniles, who have been adjudicated delinquent by a court on the basis of a registration-eligible offense,³⁴ increasingly have been subject to SORN. This is especially so after the federal Adam Walsh Act (AWA) threatened states with loss of federal funds if they did not (among other things) require certain adjudicated juveniles to register. Today, 38 states require at least some adjudicated juveniles

33. Logan, *Database Infamia*, *supra* note 12, at 225–29.

34. This population is distinct from juveniles who have been transferred to the adult criminal justice system, convicted and sentenced; they have been subject to SORN from the outset.

to register (in North Carolina, the minimum age is 11).³⁵ States vary in how they determine eligibility, with many (especially those compliant with the AWA) mandating registration of juveniles adjudicated of specified offenses, and others allowing judges latitude to determine whether registration is warranted. Jurisdictions also differ in the duration of registration: in some states the duty terminates at a particular age (e.g., 21), while in others it is a term of years or lifetime. In several states, juveniles enjoy a broadened opportunity to petition for removal. Finally, of the 38 states registering juveniles, 23 limit access to juvenile registrants' information, for instance to law enforcement and school authorities. The remaining 15 jurisdictions make information on adjudicated juvenile registrants freely available to the public, via websites, alongside adult registrants.

II. EMPIRICAL WORK REGARDING SORN

Today, extensive social-science research exists regarding SORN. As noted earlier, it has long been known that many of the empirical premises of the laws, such as that sex offenders as a group are especially prone to recidivism and that most sexual offenses are committed by strangers, lack empirical support. This section summarizes other key areas of empirical work done to date.

A. REDUCING SEXUAL OFFENDING

Little research supports the conclusion that SORN reduces sexual offending.³⁶ In perhaps the most rigorous study conducted to date, researchers utilizing a multistate longitudinal dataset, numbering over 300,000 offenses, found that registration had a positive impact of reducing sexual reoffending (at least against victims known to the offender, such as neighbors), a result believed to stem from law enforcement's awareness of registrants.³⁷ The impact of notification, however, was decidedly more mixed: it had an apparent deterrent effect among *non-registrants*, but seemed to foster recidivism among

35. Rebecca Beitsch, *States Slowly Scale Back Juvenile Sex Offender Registries*, HUFFINGTON POST (Nov. 19, 2015), http://www.huffingtonpost.com/entry/juvenile-sex-offender-registries_us_564de825e4b031745cf0015f. As of July 2011, Delaware had an individual who was 9-years-old when placed on the registry. NICOLE PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 12 (2011).

36. It is worth noting that recidivism assessments must be interpreted in light of the reality that sex offenses often go unreported. MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2007 (2008). Moreover, work must be interpreted mindful of at least two other considerations: first, that studies comparing pre-and-post SORN implementation can present difficulty in parsing causality due to the possible impact of other factors (e.g., an overall change in sexual offending rates); second, significant variations in state approaches to SORN, which can limit generalizability.

37. See generally J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Community Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161 (2011).

registrants.³⁸ Interpreting the results, the study's authors concluded that "states should employ narrow notification regimes in which all or most sex offenders are required to register but only a small subset are subjected to notification."³⁹

Over time, the overwhelming number of studies conducted have failed to find a crime-reduction effect of SORN.⁴⁰ A few, however, show some positive effect. It is important to note, however, that two of the studies concerned jurisdictions employing a comparatively circumscribed, tier-based system in which only higher-risk registrants were subject to notification.⁴¹ A third study, examining South Carolina's offense-based classification system, found a reduction in sexual offending among first-time offenders (i.e., non-registrants), but this positive effect was not evident in the years following the state's implementation of website notification.⁴²

Research, moreover, raises concern that, instead of reducing sexual victimization, the consequences of notification in particular for registrants might foster recidivism. Studies highlight the many significant negative personal consequences of notification for registrants, ranging from personal or property harm as a result of vigilantism, loss of employment and housing, as well as stress, hopelessness, and loss of social and familial support.⁴³ Consequences

38. *Id.* at 181.

39. *Id.* at 182.

40. See, e.g., Alissa Ackerman et al., *Legislation Targeting Sex Offenders: Are Recent Policies Effective in Reducing Rape?*, 29 JUST. Q. 858, 878 (2012); Amanda Agan, *Sex Offender Registries: Fear without Function?*, 54 J. L. & ECON. 207, 207 (2011); Richard Tewksbury & Wesley G. Jennings, *A Longitudinal Examination of Sex Offender Recidivism Prior to and Following the Implementation of SORN*, 30 BEHAV. SCI. & L. 308, 308 (2012); Bob Edward Vásquez et al., *The Influence of Sex Offender and Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQ. 175, 175 (2008); Kristen M. Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 SEXUAL ABUSE: J. OF RES. & TREATMENT 722, 722 (2015); Kristen Zgoba et al., *An Analysis of the Effectiveness of Community Notification and Registration: Do the Best Intentions Predict the Best Practices?*, 27 JUST. Q. 667, 688–89 (2010).

41. See ROBERT BARNOSKI, WASH. STATE INST. PUB. POLICY, SEX OFFENDER SENTENCING IN WASHINGTON STATE: NOTIFICATION LEVELS AND RECIDIVISM (2005); Grant Duwe & William Donnay, *The Impact of Megan's Law on Sex Offender Recidivism: The Minnesota Experience*, 46 CRIMINOLOGY 411 (2008).

42. Elizabeth Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes*, 37 CRIM. JUST. & BEHAV. 537, 550 (2010).

43. See, e.g., Keri B. Burchfield & William Mingus, *Not in My Neighborhood: Assessing Registered Sex Offenders' Experiences with Local Social Capital and Social Control*, 35 CRIM. JUST. & BEHAV. 356, 364 (2008); Jill S. Levenson et al., *Megan's Law and Its Impact on Community Re-entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 587 (2007); Richard Tewksbury & Matthew B. Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309, 334 (2006); Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 67 (2005).

such as these are known to impede social and economic reintegration and aggravate the risk of reoffending.⁴⁴

Registrants' family members also experience negative effects, with children experiencing ridicule, teasing, depression, anxiety, and fear.⁴⁵ In one survey of 589 registrant family members,⁴⁶ 82% reported experiencing financial hardship, 44% harassment, and 7% being physically injured as the result of their association with a registrant. Among children, 80% experienced anger, 77% suffered from depression, 65% experienced social isolation from their peers, and 47% experienced harassment.⁴⁷

It warrants mention that surveys of registrants indicate that many find registration to be of some public-safety benefit,⁴⁸ but object to notification (the posting on websites of photos and addresses in particular) because they find it counterproductive and "unfair."⁴⁹ A survey of Virginia registrants found that less than 3% believed that being publicly labeled as a sex offender motivated them to remain law-abiding.⁵⁰ While of course registrants should not be expected

44. Jennifer Schulenberg, *Predicting Noncompliant Behavior: Disparities in the Social Locations of Male and Female Probationers*, 9 JUST. RES. & POL'Y 25 (2007); Gwenda M. Willis & Randolph C. Grace, *Assessment of Community Reintegration Planning for Convicted Sex Offenders: Poor Planning Predicts Recidivism*, 36 CRIM. JUST. & BEHAV. 494, 510 (2009).

45. See, e.g., Mary Ann Farkas & Gale Miller, *Reentry and Reintegration: Challenges Faced by the Families of Convicted Sex Offenders*, 20 FED. SENT'G REP. 88, 89 (2007); Erika Frenzel, *Understanding Collateral Consequences of Registry Laws*, 11 JUST. POL'Y J. 1 (2014); Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54 (2009).

46. Richard Tewksbury & Jill Levenson, *Stress Experiences of Family Members of Registered Sex Offenders*, 27 BEHAV. SCI. & L. 611 (2009).

47. See generally Michael Lasher & Robert J. McGrath, *The Impact of Community Notification on Sex Offender Reintegration: A Quantitative Review of the Research Literature*, 56 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 6 (2012).

48. Yolanda Brannon et al., *Attitudes About Community Notification: A Comparison of Sexual Offenders and the Non-offending Public*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 369, 376 (2007); Richard Tewksbury & Matthew B. Lees, *Perceptions of Punishment: How Registered Sex Offenders View Registries*, 53 CRIME & DELINQ. 380, 380 (2007).

49. Jill S. Levenson & Leo P. Cotter, *The Effects of Megan's Laws on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 59 (2005); VT. CTR. PREVENTION & TREATMENT OF SEXUAL ABUSE, *IMPACT OF COMMUNITY NOTIFICATION ON SEX OFFENDER REINTEGRATION BEFORE AND AFTER PASSAGE OF A MEGAN'S LAW* (2009); Cynthia Calkins Mercado et al., *The Impact of Specialized Sex Offender Legislation on Community Reentry*, 20 SEXUAL ABUSE: J. RES. & TREATMENT 188, 188 (2008).

50. Monica L. Robbers, *Lifers on the Outside: Sex Offenders and Disintegrative Shaming*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 5, 5 (2009); see also Richard Tewksbury & Matthew B. Lees, *Perceptions of Punishment: How Registered Sex Offenders View Registries*, 53 CRIME & DELINQ. 380 (2007); Richard Tewksbury & Matthew B. Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309 (2006).

to embrace SORN with open arms, such findings are significant in light of the extensive procedural justice literature suggesting that individuals persuaded of the fairness of laws and procedures are more likely to follow them.⁵¹

Reflecting on work conducted to date, University of Michigan Law School Professor J.J. Prescott, one of the authors of the study noted at the outset, recently wrote that “the idea that notification regimes may make registered offenders more dangerous is consistent with the fact that notification causes these individuals significant financial, social, and psychological harm.”⁵² According to Professor Prescott:

[T]he greater the number of released offenders that states actually subject to notification, the higher the relative frequency of sex offenses. In other words, the punitive aspects of notification may have unintended perverse consequences. ... Notification laws appear most attractive when they apply only to small numbers of offenders, presumably the worst of the worst.⁵³

Viewed in this light, legislative efforts to expand the range of coverage of SORN, such as by the AWA's conviction-based regime,⁵⁴ would appear ill-advised.

Finally, a growing body of research on sexual re-offending sheds important light on the duration of registration. In one study, researchers conducted a meta-analysis of 21 samples of convicted sex offenders, assigning risk levels to the almost 8,000 subjects evaluated.⁵⁵ Using a well-established actuarial risk-measurement tool, individuals were classified by risk level. The impact of the passage of time on desistance from sexual reoffending was most notable among high-risk subjects: 22% committed (defined as charged or convicted) a new sex offense within five years of release. Over the next five years (i.e., the 6- to 10-year monitoring period), the recidivism rate decreased to 7%, and no high-

51. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003).

52. J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?*, 35 REG. 48, 50 (2012).

53. *Id.* at 54.

54. See Andrew J. Harris & Christopher Lobanov-Rostovsky, *Implementing the Adam Walsh Act's Sex Offender Registration and Notification Provisions: A Survey of the States*, 21 CRIM. JUST. POL'Y REV. 202, 202 (2010); Andrew J. Harris et al., *Widening the Net: The Effects of Transitioning to the Adam Walsh Act's Federally Mandated Sex Offender Classification System*, 37 CRIM. JUST. & BEHAV. 503, 503 (2010). In Wyoming, for instance, the state's initial risk-based registry grew from 125 to 1,450 registrants following conversion to the AWA's conviction-based approach. Emanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN (July 28, 2011), <http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/>.

55. R. Karl Hanson et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERSONAL VIOLENCE 2792, 2792 (2014).

risk offender recidivated after 16 years. With low-risk offenders, 97.5% were offense-free after five years, and approximately 95% were offense-free after 15 years. Summarizing their results, the authors concluded that “intervention and monitoring resources should be concentrated in the first few years after release, with diminishing attention and concern for individuals who remain offense-free for substantial periods of time.”⁵⁶

B. TARGETING JUVENILES

Research on the lack of positive effects of SORN is even more apparent among juveniles. Studies show that registered juveniles have the same likelihood of sexual offending as their non-registered offender peers.⁵⁷ Focusing on the AWA's regime in particular, which requires that juveniles age 14 and over who have been adjudicated of an “aggravated sexual assault” (which includes engaging in a sexual act with a person under age 12) register for 25 years to life, without regard for individual risk, researchers concluded juveniles subject to the AWA did not reoffend (sexually or non-sexually) at a significantly higher rate than those not meeting AWA criteria.⁵⁸

Research suggests that notification has an especially negative impact on juveniles.⁵⁹ As one study reported, “[t]o the degree that the release of juvenile information further isolates youthful sex offenders, prevents them from

56. *Id.* at 2807–08.

57. Michael F. Caldwell & Casey Dickinson, *Sex Offender Registration and Recidivism Risk in Juvenile Sexual Offenders*, 27 BEHAV. SCI. & L. 941, 941 (2009); Elizabeth Letourneau et al., *The Influence of Sex Offender on Juvenile Sexual Recidivism*, 20 CRIM. JUST. 136 (2009); Elizabeth Letourneau & Kevin Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 SEXUAL ABUSE: J. RES. & TREATMENT 393 (2008). For a discussion of juvenile offenders, see Barry C. Feld, “Juvenile Justice,” in Volume 1 of the present Report.

58. Ashley Batastini et al., *Federal Standards for Community Registration of Juvenile Sex Offenders: An Evaluation of Risk Prediction and Future Implications*, 17 PSYCHOL. PUB. POL'Y & L. 451 (2011). See also Michael Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL. PUB. POL'Y. & L. 89, 104 (2008).

59. Elizabeth J. Letourneau & Kevin Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, 20 SEXUAL ABUSE: J. RES. & TREATMENT 393 (2008); Elizabeth Letourneau & Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 293 (2005). See generally HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE U.S. 50–72 (2013) (providing extensive anecdotal evidence of negative effects of notification).

creating positive social networks, inhibits their ability to receive an education, or prevents them from maintaining contact with family and friends,” notification can exacerbate juveniles’ propensity for future offending.⁶⁰

Juvenile SORN can also have other unintended, negative consequences. One is that the prospect of subjecting juveniles to SORN can affect judicial outcomes. In South Carolina, for instance, where juveniles are registered on the basis of offense alone, requiring lifetime registration (with twice-per-year verification) and notification on a website registry, local prosecutors at times either dismissed juvenile sex cases outright or reduced initial charges to facilitate pleas to non-registration eligible charges.⁶¹ As a consequence, the study’s authors concluded, “[j]uveniles who have actually committed sexual offenses ... might not receive appropriate clinical services or supervision.”⁶² Equally problematic, concern exists that subjecting juveniles to the hardships of SORN might discourage intra-familial reporting of sexual abuse.⁶³

C. COMMUNITY USE OF REGISTRIES

A chief posited benefit of SORN is that public safety will be enhanced because community members will (1) avail themselves of publicly available registrant information and (2) use it to take protective measures regarding themselves and/or others. Research, however, does not afford much basis to conclude that these goals are being met. While community members might be aware, in the abstract, of the existence of website registries, relatively few actually consult them.⁶⁴ In one study, for example, roughly a third of respondents said they were aware of their state registry, yet of those only 39% reported that they had even

60. Mary Evans et al., *Sex Offender Registration and Community Notification*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* 149–50 (Richard G. Wright ed., 2009).

61. Elizabeth J. Letourneau et al., *Sex Offender Registration and Notification Policy Increases Juvenile Plea Bargains*, 25 *SEXUAL ABUSE: J. RES. & TREATMENT* 189, 203 (2012).

62. *Id.* at 203. A similar effect has been observed among adult defendants. Naomi Freeman et al., *A Time-Series Analysis on the Impact of Sex Offender Registration and Community Notification on Plea Bargaining Rates*, 22 *CRIM. JUST. STUD.* 153 (2009).

63. See LOGAN, *supra* note 18, at 132.

64. See, e.g., Keri B. Burchfield, *Assessing Community Residents’ Perceptions of Local Registered Sex Offenders: Result from a Pilot Study*, 33 *DEVIANT BEHAV.* 241, 244 (2012) (Illinois survey indicating that 60% of survey respondents were aware of website registry but 61% were unaware of registrants residing in their neighborhood). The knowledge deficit, it should be emphasized, can be aggravated among “tech have nots,” who often reside in poorer neighborhoods. See, e.g., Lynette Kvansy & Mark Keil, *The Challenges of Redressing the Digital Divide: A Tale of Two U.S. Cities*, 16 *INFO. SYS. J.* 23 (2006).

viewed it.⁶⁵ Most research, moreover, has failed to show a statistically significant relationship between community members' awareness of registrants residing in their neighborhoods and undertaking precautionary measures.⁶⁶ Finally, research suggests that proactive notification methods (e.g., meetings and flyers) can result in greater awareness compared to passive methods (website registries in particular).⁶⁷

For notification to be effective, however, the information contained in registries must be up-to-date and accurate. Here again, however, the logic of SORN does not always align with empirical reality. Research consistently shows the existence of widespread inaccuracies in registries, regarding key matters such as registrants' home addresses.⁶⁸ This perhaps should not come as a surprise inasmuch as SORN is essentially an honor-based system (backed by threat of felony prosecution for failure to comply), with compliance

65. Lydia Saad, *Sex Offender Registries Are Underutilized by the Public*, GALLUP (June 5, 2005), <http://www.gallup.com/poll/16705/sex-offender-registries-underutilized-public.aspx>. 2005). See, e.g., Amy Anderson & Lisa Sample, *Public Awareness and Action Resulting from Sex Offender Community Notification Laws*, 19 CRIM. JUST. POL'Y REV. 371 (2008); Douglas Boyle et al., *Public Knowledge and Use of Sexual Offender Internet Registries: Results from a Random Digit Dialing Telephone Survey*, 29 J. INTERPERSONAL VIOLENCE 1914 (2014); Andrew J. Harris & Rebecca Cudmore, *Community Experience with Public Sex Offender Registries in the United States: A National Survey*, CRIM. JUST. POL'Y REV. 1 (2016); Poco Kernsmith et al., *The Relationship Between Sex Offender Registry Utilization and Awareness*, 21 SEXUAL ABUSE 181 (2009).

66. Two studies, however, which focused on community samples subject to "active" notification (e.g., written notification from police, community meetings with police), found that while awareness of the presence of a registrant's presence did not result in *self-protection*, it did result in protective measures being undertaken by parents vis-à-vis their children. Rachel Bandy, *Measuring the Impact of Sex Offender Notification on Community Adoption of Protective Behaviors*, 10 CRIMINOLOGY & PUB. POL'Y 237 (2011); Victoria Beck et al., *Community Response to Sex Offenders*, 32 J. PSYCHIATRY & L. 141 (2004).

67. See Harris & Cudmore, *supra* note 65, at 20 (concluding that "systems relying on citizens proactively seeking out sex offender information (i.e., 'passive notification'), may be far less efficacious than targeted communication strategies, perhaps emanating from law enforcement, that focus on the selective dissemination of information about particularly high-risk individuals living in the community."). See Victoria Simpson Beck & Lawrence F. Travis III, *Sex Offender Notification: An Exploratory Assessment of State Variation in Notification Processes*, 34 J. CRIM. JUST. 51 (2006).

68. See, e.g., THOMAS M. SALMON, SEX OFFENDER REGISTRY: REPORT OF THE VERMONT STATE AUDITOR 3 (2010) (finding significant data errors in three-quarters of Vermont registry sample); Richard Tewksbury, *Validity and Reliability of the Kentucky Sex Offender Registry*, 66 FED. PROB. 21, 25 (2002) (approximately 25% of Kentucky registrant addresses invalid); ERICA TURLEY & LAURA HUTZEL, W. VA. CRIM. JUST. STATISTICAL ANALYSIS CTR., WEST VIRGINIA SEX OFFENDER STUDY (2001) (almost 40% of registrant addresses invalid in West Virginia).

triggering hardships such as public scorn, homelessness, and harassment.⁶⁹ Nevertheless, the data deficiencies, along with the reality that most sexual offending is not perpetrated by strangers (but rather friends, family members and acquaintances), fuels concern that SORN promotes a false sense of security among community members.

Finally, research has highlighted another, more structural way in which SORN might foster a false sense of community safety. The concern is most evident with offense-based classification regimes, used in most states and urged by the federal government in the Adam Walsh Act (2006). In a recent study, registrants in New York, which classifies registrants in terms of individual risk, were instead classified under the AWA's offense-based approach. Researchers discovered that registrants classified as low-risk under the AWA actually sexually offended at higher rates than those classified as moderate- or high-risk under New York's regime.⁷⁰ Summarizing their results, the authors stated that the offense-based approach:

may give community members a false sense of security. That is, community members may believe they are safe if no Tier 3 offenders are residing in their neighborhood when, in fact, Tier 3 offenders are not at increased risk to reoffend. As such, [the AWA] appears unable to accurately identify high-risk offenders and, therefore, increase public safety.⁷¹

D. COSTS

While less expensive than prison or jail, SORN is not cost-free. Governments must pay for maintenance of the registries (often contracted out to private software vendors), and employ staff to collect and verify registrants' information,

69. Cf. *Ontario Sex Offender Registry*, ONT. MINISTRY COMMUNITY SAFETY & CORRECTIONAL SERVS., http://www.mcscs.jus.gov.on.ca/english/police_serv/sor/sor.html (last updated Feb. 8, 2016) ("The public does not have access to the [registry]. This contributes to a consistently high offender compliance rate resulting in increased accuracy and integrity of the data on the [registry]. This enhances public safety for Ontarians by providing police with the ability to have more accurate information about registered offenders.").

70. Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Policy Initiative?*, 21 CRIM. JUST. POL'Y REV. 31, 43 (2010).

71. *Id.* at 43; see also *id.* at 45 ("the use of any empirically based risk factor would yield more accurate predictions than the [AWA] tier level, which is based solely on crime of conviction.... [T]he results of the current study indicate that [the AWA's approach] is almost completely ineffective at categorizing sex offenders based on risk of sexual recidivism."). For studies reporting similar results see Sandler et al., *supra* note 8; Zgoba et al., *Adam Walsh Act*, *supra* note 40.

which requires considerable resources and distracts from other duties.⁷² The cost associated with maintaining registries can be such that it results in system breakdown. In Oregon, for instance, budget cuts and insufficient staff for data entry and verification caused a two-year backlog, resulting in the registry being disregarded by law enforcement.⁷³ SORN has also been shown to have a subtle but important fiscal effect: it can negatively affect housing values, which decreases tax revenue.⁷⁴

RECOMMENDATIONS

SORN laws have expanded dramatically over time, with research showing strong support among members of the public⁷⁵ and policymakers alike,⁷⁶ independent of their public-safety utility. In contrast to other government policies, where a high-profile failure might prompt calls for change, SORN has avoided critical re-examination, with instances such as the 18-year-long captivity and sexual abuse of Jaycee Dugard by registrant Phillip Garrido (who was fully compliant with California law) being met with disinterest by policymakers.⁷⁷

As noted at the outset, however, of late there have been calls for reforms to SORN, a shift coinciding with increasing interest in evidenced-based policy

72. JUSTICE POLICY INST., REGISTERING HARM: A BRIEFING BOOK ON THE ADAM WALSH ACT (2009) (estimating cost associated with a state becoming compliant with Adam Walsh Act to be \$18 million up front and slightly lower amount for maintenance in later years); CAL. SEX OFFENDER MGMT. BD., *supra* note 24, at 6 (estimating that “the statewide costs of registration by local agencies alone is about \$24,000,000 per year. This estimate did not include the cost of enforcement and compliance efforts by law enforcement agencies.”).

73. Maxine Bernstein, *Sex Offenders in Oregon: State Fails to Track Hundreds*, OREGONIAN (Oct. 2, 2013), <http://www.oregonlive.com/sexoffenders/special-presentation/>.

74. Leigh Linden & Jonah E. Rockoff, *Estimates of the Impact of Crime Risk on Property Values from Megan's Law*, 98 AM. ECON. REV. 1103, 1121 (2008).

75. Jill S. Levenson et al., *Public Perceptions and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL’Y 137 (2007); Stacey Katz Schiavone & Elizabeth L. Jeglic, *Public Perception of Sex Offender Social Policies and the Impact on Sex Offenders*, 53 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 679 (2009).

76. Vásquez et al., *supra* note 40, at 76 (noting that in a survey of 35 Illinois legislators only 4 were confident that SORN promoted public safety yet almost all agreed that SORN satisfied a public demand for action).

77. Marisol Bello, *Questions Arise on Monitoring of Sex Offenders*, USA TODAY, Sept. 2, 2009, at A3.

in general and vis-à-vis sexual offending in particular.⁷⁸ Simply because a criminal justice policy “feels right” or is supported by “common sense” does not mean that it actually delivers its sought-after benefits.⁷⁹ On the basis of empirical work done to date, several important changes can and should be made to SORN law and practice.

1. **Limit the scope of SORN laws.** With respect to registration, rather than a purely offense-based system, jurisdictions should adopt policies that better reflect the recidivism risk of individuals. Conviction for an enumerated registration-eligible offense should be an important but not exclusive factor in determining the duration and requirements of registration. A tiered approach should be taken, turning on the seriousness of offense and individuals’ assessed risk level of sexual-offense recidivism,⁸⁰ based on empirically validated actuarial risk-assessment tools employing static and dynamic risk factors.⁸¹ Tier 1 (lowest risk) would require a 10-year registration period, and Tier 2 (medium risk) and Tier 3 (highest risk) would each be subject to registration for 20 years. In addition:
 - Tier 1 registrants would be required to verify their registration information annually in person and update it in the event of any

78. See, e.g., CTR. SEX OFFENDER MGMT., TWENTY STRATEGIES FOR ADVANCING SEX OFFENDER MANAGEMENT IN YOUR JURISDICTION 44 (Dec. 2008), http://csom.org/pubs/twenty_strategies.pdf (listing among its suggestions “Engage Legislators to Promote Informed Policies”); COUNCIL STATE GOV’TS, *supra* note 25, at 17 (“Sex offender management ... continues to pose enormous challenges for state policymakers, who struggle to identify and implement effective and evidence based policies and programs that are not merely reactions to individual tragic events.”); *Sex Offender Management Assessment and Planning Initiative Management and Planning*, U.S. DEP’T JUSTICE, https://www.smart.gov/SOMAPI/sec1/ch8_strategies.html (last visited Mar. 8, 2017) (“[T]here is little question that both public safety and the efficient use of public resources would be enhanced if sex offender management strategies were based on evidence of effectiveness rather than other factors.”).

79. See FRANKLIN ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA 221 (2001); see also DANIEL P. MEARS, AMERICAN CRIMINAL JUSTICE POLICY: AN EVALUATION APPROACH TO INCREASING ACCOUNTABILITY AND EFFECTIVENESS 33–34 (2010).

80. A jurisdiction could of course elect to subject all statutorily eligible individuals to risk assessment, resulting in the exemption of some individuals from registration altogether, an approach now sometimes taken with juveniles. In addition to securing broader benefits associated with reducing the overall size of registries, such an approach would mitigate the specter noted earlier of SORN affecting guilty pleas and convictions. Thanks to Professors Michael O’Hear and Gary Wells for making this point.

81. On the superiority of one such approach, known as the Static-99R, see Zgoba et al., *Adam Walsh Act*, *supra* note 40.

change. Their registry information would be made available only to law enforcement and victims and witnesses connected to the registration-triggering offense.

- Tier 2 registrants would be required to verify their registration information twice a year in person, and update it in the event of any change. Their registry information would be made available to law enforcement, victims and witnesses, and any entities near the registrant's home that might serve a population likely at risk of victimization (e.g., if the registrant assaulted a child, day-care centers would be notified).
- Tier 3 registrants would be required to verify their registration information in person three times a year and update it in the event of any change. Their information would be made available in like manner to Tier 2 registrants but their registry information would also be available to the public at-large. Notification methods should include a publicly accessible website as well as more "active" methods such as community meetings with law-enforcement officials, which will help ensure that high-risk registrants' information is actually received by community members.

Importantly, moreover, with Tier 2 and Tier 3 registrant populations especially, resources should be dedicated to providing specialized treatment, which has been shown to reduce the propensity of sex offenders to recidivate.⁸²

Adopting such a scheme will serve several important goals. First, it will draw upon the apparent benefits of registration as a tool to reduce recidivism risk, tying duration and the extent of registration requirements to research showing the significantly diminished likelihood of recidivism risk over time. Second, it will reflect what the California Sex Offender Management Board terms the "risk principle": "that the most effective approach is to identify each offender's level of risk and then devote the greatest amount of resources to managing those who are at higher risk to commit a repeat offense."⁸³ Finally, by significantly narrowing the class of registrants subject to notification, the scope of those experiencing its possibly criminogenic consequences will be lessened, and cost savings will accrue, freeing up

82. See, e.g., Frederick Losel & Martin Schmucker, *The Effects of Sexual Offender Treatment on Recidivism: An International Meta-Analysis of Sound Quality Evaluations*, *Sexual Offenders: A Comprehensive Meta-Analysis*, 11 J. EXPERIMENTAL CRIMINOLOGY 597, 617 (2015).

83. CAL. SEX OFFENDER MGMT. BD., YEAR END REPORT 2015, at 10 (2016).

resources for police monitoring of riskier registrants. Even more important, public attention will be focused on individuals posing greatest risk.⁸⁴ As Supreme Court Justice Potter Stewart observed in another context, “when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless.”⁸⁵

2. **Provide registrants a way to exit registries.** To date, jurisdictions have allowed only very limited opportunity for registrants to be relieved of SORN; they typically are subject to decades or lifelong SORN regardless of their law-abidingness and risk of sexual re-offense. Providing registrants a way to exit registries, after a prescribed period of time and satisfaction of specified criteria, can avoid the many negative unintended consequences of SORN and provide incentive for successful reintegration into law-abiding society.⁸⁶ Doing so will also winnow the population of registries, which absent reductions (sometimes not even when registrants die—as in Florida) grow exponentially by the year, which distracts from needed focus on risky individuals and misallocates scarce resources.
3. **Limit registration of juveniles.** Knowledge of the distinctiveness of juvenile sexual offending, and research showing the lack of efficacy of SORN in reducing juvenile sexual reoffending, counsel for a very restrained approach regarding juveniles.⁸⁷ Registration should be limited to those 14 years of age and over and depend on individual risk determinations of judges (or other system actors) based on empirically validated actuarial assessment tools, not the single fact of an adjudication for a particular offense.⁸⁸ Registration of juveniles as a rule should be limited in duration, for instance to age 18 or 21, and information regarding registered juveniles

84. CAL. SEX OFFENDER MGMT. BD., *supra* note 24, at 6 (concluding that “[t]he public would be better served if a good portion of [the] cost was used to monitor higher risk offenders, instead of simply doing paperwork for all levels of offenders without having the resources to check on the accuracy of their registered addresses.”).

85. *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring); *see also* CAL. SEX OFFENDER MGMT. BD., *supra* note 24, at 6 (“When everyone is viewed as posing a significant risk, the ability for law enforcement and the community to differentiate between who is truly high risk and more likely to reoffend becomes impossible.”).

86. *See Smith v. Doe*, 538 U.S. 84, 117 (2003) (Ginsburg, J., dissenting) (expressing concern that law challenged made “no provision whatsoever for the possibility of rehabilitation. Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.”).

87. For discussion of the adverse impact of SORN on juveniles in particular, in light of their developmental stage in life, *see In re C.P.*, 967 N.E.2d 729, 740–42 (Ohio 2012).

88. *See* Elizabeth J. Letourneau et al., *The Influence of Sex Offender Registration on Juvenile Sexual Recidivism*, 20 CRIM. JUST. POL’Y REV. 136, 150 (2009).

should be made available only to law enforcement. Despite the shortened duration of registration for juveniles, consideration should be given to affording a basis for exit, after a prescribed period of years of lawfulness and fulfillment of any eligibility criteria, for reasons similar to those outlined above regarding adult registrants.

CONCLUSION

The political resolve needed to modify SORN laws should not be underestimated. As the Council of State Governments has observed, lawmakers seeking a more effective, evidence-based approach “face an arduous task.”⁸⁹ In the past, the very idea of requiring that individuals register with government authorities prompted concern, with the Supreme Court in 1941 emphasizing that “champions of freedom for the individual have always vigorously opposed burdensome registration systems.”⁹⁰ In 1947, when California was contemplating creating the nation’s first state sex offender registry, the director of the Department of Corrections wrote to Gov. Earl Warren that while sexual offending was “revolting,” there was a “principle involved which should not be disregarded. It has never been the practice in America to require citizens to register with the police, except while actually serving a sentence under the Probation or Parole laws.”⁹¹

Times have certainly changed, however. Since the 1990s, registration, combined with the far more consequential impact of notification, has enjoyed enormous public and political support. While a handful of other countries have gravitated to registration in some shape or form, the U.S. stands alone with regard to its ambitious use of notification.⁹² Going forward, policymakers need to ask whether subjecting broad swaths of individuals to lifelong or decades-long registration and notification, without the possibility of relief, is actually promoting public safety in a cost-effective manner. While crafting more-effective SORN laws will not be easy, more than 20 years after SORN first began to sweep the nation, it is past time for the work to begin.

89. COUNCIL STATE GOV'TS, *supra* note 25, at 14.

90. *Hines v. Davidowitz*, 312 U.S. 52, 70 (1941).

91. LOGAN, *supra* note 18, at 38–39.

92. See U.S. DEP'T OF JUSTICE, SMART SUMMARY: GLOBAL SURVEY OF SEX OFFENDER REGISTRATION AND NOTIFICATION SYSTEMS (2016), <https://smart.gov/pdfs/global-survey-2016-final.pdf>.

Clemency

Mark Osler*

American clemency systems are as varied as the jurisdictions themselves. While the contemporary federal system is a poor exemplar, there are worthwhile examples to be found in the states and in a federal experiment in the wake of the Vietnam War. Commonalities exist between the higher-functioning processes, including the use of a horizontal and deliberative process rather than one that is vertical and rooted in sequential review. Here, those better systems are described with an eye to the improvement of the others and the continuing vitality of a tool that is deeply rooted in the history of Western Civilization.

INTRODUCTION

Clemency is a deep and abiding American tradition, rooted in the Judeo-Christian ethics of our society—a manifestation of the traditional virtue of mercy found in every state and the federal system of criminal law. That virtue is not only widely held but ancient: Christ was considered for pardon before Pilate in keeping with a Passover tradition,¹ and the Romans even had a goddess representing societal mercy, Clementia.²

What makes a clemency process “good” is a matter of perspective. Some might prefer a process that allows for many grants of commutations (the shortening of a sentence) and pardons (which eliminate the effects of a conviction, usually after a sentence has been served). Others might object to a large number of grants, seeing it as an undue intrusion on the work of juries and judges by the executive. However, no criminal system is perfect and unchanging. Thus, the mark of a good process is going to be that it allows for the fair consideration of all petitions and the grant of those petitions where mercy is warranted by a guiding principle or principles. A system that inconsistently or infrequently grants clemency is unlikely to meet this standard.

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1. Mark 15:6-15.

2. Mark Osler, *Obama's Clemency Problem*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/01/opinion/obamas-clemency-problem.html>.

By that measure, it is fair to say that the uneven and inconsistent³ clemency system currently employed by the federal government—a bureaucratic disaster coursing through four federal buildings and at least seven sets of hands—is the worst clemency evaluation system in the history of the United States (with the possible exception of Rhode Island’s process, which sends clemency consideration through the state Senate for “advice and consent”).⁴ No state system includes the federal process’s toxic combination of endless review and a central role for prosecutors.⁵

In this chapter, we will look at a few high-functioning state systems and a previous federal experiment as exemplars before turning to the problems found at the federal level. Based on a review of the high-functioning systems, three attributes stand out: They rely on boards rather than a vertical decision structure or single political actor, those boards have significant independence of action, and the boards display a diversity of viewpoints rather than a uniformity of background.

I. SYSTEMS THAT WORK⁶

A. STATE SYSTEMS

1. A diversity of systems

Even a cursory examination of state systems reveals a fascinating truth: There seems to be no correlation between liberalism and broad grants of clemency or political conservatism and stinginess. In fact, we find some of the most functional and effective systems in states like South Carolina, while my own famously progressive state (Minnesota) issues pardons sparingly.⁷ Many of the state systems (including those described below) offer benefits that are lacking in the current federal system, including transparency of process and an opportunity for victims or victims’ family members to have a voice in the process.⁸

3. P.S. Ruckman, Jr., *The Obama Administration: Breaking Records in a Broken Clemency System*, 29 FED. SENT’G REP. 87 (2017).

4. R.I. CONST. art. IX, § 13.

5. The Criminal Justice Policy Foundation maintains an on-line database for state clemency procedures (available at <http://www.cjpf.org/state-clemency/>), and Margaret Colgate Love has created a similar site for state pardon procedures in conjunction with the National Association of Criminal Defense Lawyers (available at <https://www.nacdl.org/rightsrestoration/>).

6. Much of this section is drawn from Mark Osler, *Fewer Hands, More Mercy: A Plea for a Better Federal Clemency System*, 41 VT. L. REV. 1 (2017).

7. *Id.*

8. See *supra* note 5. For a discussion of victims in the criminal process, see Paul G. Cassell, “Crime Victims’ Rights,” in Volume 3 of the present Report.

Perhaps the most striking indictment of the federal clemency system is the bare fact that not a single state has adopted the federal system of multiple, redundant, secretive reviews, or anything remotely like it.⁹ Instead, as Margaret Colgate Love described it after a thorough survey, the states¹⁰ fall into three general categories.¹¹ The first includes six states that leave pardoning almost entirely to an independent board,¹² the second describes the 21 states where the governor shares the pardon power with a board or (in Rhode Island) the legislature,¹³ and the third is comprised of 23 states where the governor has the sole power to pardon, though in 18 of these states there is an advisory consultation with a board who investigates the cases.¹⁴

The state systems are varied not only in their construction, but in their effectiveness and fairness. They certainly are not immune from scandal, either. For example, outgoing Mississippi governor Haley Barbour granted full pardons to 193 felons on his last day in office, including a man who had shot and killed his wife while she held their infant.¹⁵ Still, there is much to learn from the higher-functioning systems.¹⁶

In her 2012 survey of state practices, Margaret Colgate Love identified 14 states that demonstrate well-functioning systems that provided “frequent and regular” pardon grants: Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, and South Dakota.¹⁷ That list is striking for its deviation from the red/blue political divide we are used to, further establishing that fair and efficient administration of clemency can be and is accomplished by either party. It is not politics that matters, it is process.

9. Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. ST. THOMAS L.J. 730, 754 (2012). Updated data is available at <http://ccresourcecenter.org>.

10. Washington D.C. does not have an executive with clemency powers.

11. Love, *supra* note 9, at 743-44.

12. *Id.* at 744-45.

13. *Id.* at 745-46.

14. *Id.* at 747-49.

15. Campbell Robertson, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, N.Y. TIMES (Jan. 10, 2012), http://www.nytimes.com/2012/01/11/us/gov-haley-barbour-of-mississippi-is-criticized-on-wave-of-pardons.html?_r=0.

16. Some state systems are distinct from the federal clemency system because of the effects of parole. The federal system does not have parole, but for states that retain that mechanism parole will largely serve the function of commutations—that is, shortening existing sentences—while the clemency system will largely address pardons (which generally restore rights to those who have fulfilled a term of imprisonment).

17. Love, *supra* note 9, at 755-66.

So, what kind of process do we see in those states? First, five of the six states where pardon decisions are made by highly independent boards—Alabama, Connecticut, Georgia, Idaho, and South Carolina—are also among the 14 members of the “frequent and regular” list, while the sixth such jurisdiction, Utah, misses the cut largely because the board in that state gets only three to five requests for pardon a year.¹⁸ There is a remarkable correlation between high-functioning clemency systems and the use of an independent board as primary arbiter.

Moreover, in each of the other states with high-functioning systems, we see a board playing some kind of a significant role in decision-making.¹⁹ Thus, one common thread is clear: While other factors (local tradition or culture, for example) may influence outcomes, high-functioning state systems are consistently those that use clemency boards.

Why does this correlation exist? Notably, the clemency-board system used in high-functioning states is just as horizontal as the federal system is vertical. While the reviewers in the federal system are stacked one atop the other in a distinct hierarchy of power and perform reviews separately in ascending sequence—pardon attorney/deputy attorney general/White House counsel/president²⁰—the members of a board are relative equals and make decisions together. A strength of that construct is that it allows for deliberation and consensus in a way that a vertical hierarchy does not. In other words, in a horizontal system, deciders with different filters must harmonize their views in direct consultation with one another, while the horizontal federal system allows different filters to be applied consecutively, in a way that allows nearly everything to be strained out.²¹

2. Delaware

We see the dynamic of a horizontal system at work if we look more closely at a high-functioning state, Delaware. There, the governor has the pardon power, but the state Constitution sets out that “no pardon, or reprieve for more than six months, shall be granted, nor sentence commuted, except upon the

18. *Id.* at 767.

19. *Id.* at 756-66.

20. *See supra* Part III.

21. The horizontal system also avoids the multiplication of negative decision bias, *see supra* Section II(C), because the group makes one decision collectively.

recommendation in writing of a majority of the Board of Pardons after full hearing; and such recommendation, with the reasons therefor at length, shall be filed and recorded in the office of the Secretary of State.”²²

That short bit of constitutional text establishes three things, all of which differentiate Delaware from the federal system. First, a board of pardons is the gatekeeper rather than a hierarchy of officials. Second, hearings are conducted. Third, the reasons for recommending a grant are to be described “at length.” The latter two features allow for a transparency that the federal system utterly lacks.

The board itself is chaired by the lieutenant governor and includes Delaware’s chancellor, secretary of state, treasurer, and auditor.²³ The board does not include the attorney general, but the Delaware Constitution allows that the attorney general may receive requests for information from the board.²⁴ It seems to be an efficient and effective system, granting over 200 pardons annually in a small state.²⁵ In contrast, President Obama granted only 70 pardons in his first seven-and-a-half years in office.²⁶

Delaware Lieutenant Gov. Matthew Denn²⁷ helpfully described the workings of that state’s Board of Pardons in an article for the *Delaware Law Review*.²⁸ Since neither Delaware’s Constitution nor statute provide guidance on board procedures (other than notification to victims and their families),²⁹ this insight is particularly important. Denn carefully notes the differing views of the board members; for example, members were divided on whether or not an applicant’s practical need for clemency (i.e., to pursue employment) deserved significant weight and on the weight to be accorded to acceptance of responsibility.³⁰ This is precisely the sort of diversity of viewpoint one would expect to find in any clemency process, whether vertical or horizontal. The difference is that in a horizontal system, the board members are at the same level and are able to actively discuss and resolve those conflicts as they address discrete, real cases.

22. DEL. CONST. art. VII, § 1.

23. *Id.* art. VII, § 2.

24. *Id.* art. VII, § 3.

25. Love, *supra* note 9, at 758.

26. Office of the Pardon Attorney, *Clemency Statistics*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/pardon/clemency-statistics>.

27. Denn served two terms as Lieutenant Governor before being elected Delaware Attorney General in 2014 (replacing Beau Biden). Esteban Parra, *Denn Takes Race for Attorney General*, THE NEWS JOURNAL (Nov. 5, 2014), <http://www.delawareonline.com/story/news/politics/2014/11/04/denn-takes-race-attorney-general/18508679/>.

28. Matthew Denn, *Clemency in the State of Delaware: History and Proposals for Change*, 13 DEL. L. REV. 55 (2012).

29. *Id.* at 60-61.

30. *Id.* at 61.

As Denn puts it, “the Board’s decisions are often the result of five individuals employing multiple methods of analysis.”³¹ The distinction from the federal process is that they do this in concert rather than successively.³² The difference is clear: Even when the deciders are political actors, a flat system can produce results unlikely to come from a vertical hierarchy.

3. South Carolina

According to Margaret Colgate Love, South Carolina is also among the elite group of states where pardoning is “frequent and regular,” issuing about 300 grants per year.³³ Like Delaware, South Carolina relies primarily on a board, but South Carolina’s is even more powerful as the governor has the power to grant clemency only in capital cases. In all others, the board acts on its own.³⁴ The board also has broader jurisdiction than the Delaware commission, and is formally known as the Board of Probation, Parole, and Pardon Services.³⁵

While Delaware’s board is comprised of state officials with substantial other duties, the South Carolina Board is made up of seven members who are appointed by the governor.³⁶ The statute is quite specific as to qualifications: The director “must have at least ten years of training and experience in one or more of the following fields: parole, probation, corrections, criminal justice, law, law enforcement, psychology, psychiatry, sociology, or social work,”³⁷ and at least one of the other members must have at least five years of similar experience.³⁸ Geographical diversity is assured, as one member is appointed from each of South Carolina’s congressional districts.³⁹

South Carolina’s system provides an unusual amount of transparency and engagement. Hearings, as in Delaware, are a regular part of the clemency process,⁴⁰ and in 2016, pardon hearings were scheduled for every month except

31. *Id.*

32. Denn does recommend some changes; he suggests that for easy cases the Board be given the ability to decide cases without the Governor’s review, and limit multiple petitions by violent felons. *Id.* at 68-69. He concludes, however, that “[i]n general, Delaware’s unique clemency process works well and results in thoughtful, just outcomes from a Board of Pardons that has an unusually high level of public accountability.” *Id.* at 69.

33. Love, *supra* note 9, at 766.

34. S.C. CONST. art. IV, § 14, S.C. CODE ANN. § 24-21-920 (2016).

35. S.C. CODE ANN. § 24-21-10 (2016).

36. *Id.* § 24-21-10(A) & (B).

37. *Id.* § 24-21-10(A).

38. *Id.* § 24-21-10(B).

39. *Id.*

40. *Id.* § 24-21-50.

January and February.⁴¹ Victims are invited to participate in pardon hearings,⁴² and a record of these hearings is kept and maintained.⁴³ The board itself is strikingly diverse both racially and in vocational background. As of July 2016, the members of the board included a nurse, a phone-company supervisor, an MIT-trained engineer, a retired pharmaceutical manager, a social-studies teacher, a car broker and fitness trainer, and a Methodist minister.⁴⁴

Why does South Carolina's system provide regular grants, even within a deeply conservative⁴⁵ political culture? At least part of the answer lies in the diversity of that Board, combined with a flat structure that requires them to work together regularly over a long period of time.⁴⁶

B. GERALD FORD'S PRESIDENTIAL CLEMENCY COMMISSION

The modern era of dysfunctional federal clemency contains a striking anomaly: President Ford's Presidential Clemency Board, which lasted just one year and led to the pardon of over 13,000 people who had been convicted or court-martialed in relation to the Vietnam War.⁴⁷ This shockingly brief period of competence was a creature of a dark time in our nation's history, coming in the wake of that war and Watergate. Both of those debacles played a role in Ford's successful experiment.

While Ford's use of the pardon power is most often considered in relation to his controversial pardon of Richard Nixon,⁴⁸ his more relevant action was

41. South Carolina Board of Probation, Parole and Pardon Services, *2016 Parole and Pardon Hearings*, <http://www.dppps.sc.gov/content/download/75599/1739954/file/parolepardonhearings2016+.+REVSD.12.16.2015+email+from+pete.pdf>.

42. South Carolina Board of Probation, Parole and Pardon Services, *Pardon Hearing Explanation*, <http://www.dppps.sc.gov/Victim-Services/Pardon-Hearing-Explanation>.

43. S.C. CODE ANN. § 24-21-40 (2016).

44. South Carolina Board of Probation, Parole and Pardon Services, *Parole Board*, <http://www.dppps.sc.gov/Parole-Pardon-Hearings/Parole-Board>.

45. A 2010 Gallup poll found South Carolina to be one of the ten most conservative states in the country. Brian Montopoli, *And the Most Conservative State in the Union is...*, CBS NEWS (Aug. 2, 2010), <http://www.cbsnews.com/news/and-the-most-conservative-state-in-the-union-is/>.

46. Terms for the Board members are six years. S.C. CODE ANN. § 24-21-10(B) (2016).

47. Clemency expert P.S. Ruckman has evaluated the Ford project results, and concluded that 13,603 clemency grants resulted. P.S. Ruckman, *Ford's Clemency Board Revisited (2)*, PARDON POWER BLOG (Aug. 16, 2016), <http://www.pardonpower.com/2016/08/fords-clemency-board-revisited-2.html>.

48. Ford's proclamation of the pardon and accompanying remarks reflected a desire to end a potentially prolonged debate over Nixon's criminal liability. Gerald R. Ford, *President Gerald Ford's Pardon of Richard Nixon*, 13 FED. SENT'G REP. 207 (2001).

the creation of the Presidential Clemency Board.⁴⁹ That board left behind two lasting legacies, both of which have been largely ignored by history: the uncontroversial pardon of thousands, and a comprehensive report about how this was accomplished.⁵⁰

The board was meant to be temporary,⁵¹ and was given precisely one year to complete its work,⁵² finishing on September 15, 1975.⁵³ The goal was to create a “program of conditional clemency for roughly 13,000 civilians and 100,000 servicemen who had committed draft or military absence offences” during the Vietnam War.⁵⁴ In all, 21,729 eligible persons applied for this clemency,⁵⁵ and the Clemency Board recommended relief for 14,514 of them.⁵⁶ It was an ambitious and successful effort.

Like South Carolina’s Board of Probation, Parole and Pardon Services, Ford’s Clemency Board was diverse in terms of background and race. It was chaired by former Sen. Charles Goodell, a Republican from New York.⁵⁷ Other members included prominent African-American attorney Vernon Jordan, Notre Dame President Father Theodore Hesburgh, Troy State University (AL) President Dr. Ralph Adams, Paralyzed Veterans of America Executive James

49. Oddly, Ford chose to announce his clemency project for draft dodgers at a VFW Convention, where it was poorly received. He may have chosen that date in an attempt to “hide” it behind another national news event: Evel Knievel’s attempt to jump the Snake River Canyon on a motorcycle. Laura Kalman, *Gerald Ford, the Nixon Pardon, and the Rise of the Right*, 58 CLEV. ST. L. REV. 349, 360 (2010).

50. PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT (1975), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015012272848;view=1up;seq=7>.

51. A post-war temporary clemency program was not a new innovation. Such efforts were undertaken by George Washington after the Whiskey Rebellion; Lincoln and Johnson used clemency to heal wounds of the Civil War; Theodore Roosevelt employed it after the Spanish American War; Coolidge pardoned those convicted under the Espionage Act in World War I; and Truman issued four broad clemency proclamations after World War II. *Id.* at 355-79.

52. The Board’s report notes that Ford announced his clemency six weeks after taking office, the precise interval between Andrew Johnson’s taking office after the death of Lincoln and the clemency program he announced in the wake of the civil war. *Id.* at 1 & 178.

53. Executive Order 11803 (Sept. 16, 1974), THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=23895>; PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT, *supra* note 50, at 165.

54. PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT, *supra* note 50, at xi.

55. *Id.* at xii.

56. *Id.* at xxiii.

57. Executive Order 11803, *supra* note 53. Goodell was a war critic and liberal Republican, and also the father of NFL Commissioner Roger Goodell. Patrick Hruby, *Roger Goodell’s Tragic Sanctimony*, THE ATLANTIC (Sept. 12, 2014), <http://www.theatlantic.com/entertainment/archive/2014/09/roger-goodells-the-nfls-nixon-on-the-ray-rice-scandal/380112/>.

Maye, General Lewis Walt, and Aida Casanas O'Connor,⁵⁸ who was described in the executive order as “a woman lawyer.”⁵⁹

The board itself (which began with nine members, then doubled in size to 18 as applications increased)⁶⁰ relied on a staff of attorneys detailed from other departments and 125 summer interns.⁶¹ The process they used was relatively simple. It began with a letter or phone call from a prospective applicant; the board considered “any affirmative expression of interest” as a provisional application.⁶² The applicant then received a set of instructions to fill out forms setting out “only the minimum amount of information necessary for us to order pertinent government records,” according to the board, in an effort to make the application as easy as possible.⁶³ A staff member then gathered documents and prepared a case summary, which would be reviewed by a supervisor. That summary was mailed to the applicant for review and comment. Once those were received, the staff member who prepared the case summary would meet with a panel of three or four board members, and a decision would be made.⁶⁴

The board exhibited a remarkable focus on consistency, and was innovative in pursuing that goal. One tool was the “Clemency Law Reporter,” an internal publication that addressed recurring issues and provided staff with direction.⁶⁵ Remarkably for their time, the board also used cutting-edge technology (for 1975) and employed “a computer-aided review of case dispositions for consistency with Board precedent.”⁶⁶ The system itself, which identified outlier decisions that could be referred to the entire board for review, was developed by and implemented by NASA especially for the project, at a cost of \$5 per case.⁶⁷ Oddly, some four decades later, such a system is not used now to assess clemency outcomes.

The Ford Clemency Board worked. It is telling that few remember it; after all, we remember disasters, not quiet successes.

58. PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT, *supra* note 50, at Appendix A.

59. Executive Order 11803, *supra* note 53.

60. PRESIDENTIAL CLEMENCY BOARD REPORT TO THE PRESIDENT, *supra* note 50, at xvii.

61. *Id.* at 164.

62. *Id.* at 24.

63. *Id.*

64. *Id.* at 26.

65. *Id.* at 283-89.

66. *Id.* at 327.

67. *Id.*

C. LESSONS FROM THE STATES AND THE FORD CLEMENCY BOARD

The examples of the Ford Clemency Board and the high-functioning states set out a few simple commonalities and promise the possibility of features our federal system now lacks.

There are three strong commonalities among systems that work. High-functioning systems rely on boards, which serve to flatten out the process and force consensus among diverse voices. Because they consider petitions as a group rather than consecutively, they avoid redundancies and can maintain consistency.

Second, the more independence the board has, the more likely it is that the system will be efficient and offer frequent and regular grants of clemency.⁶⁸ This should not surprise us. An independent board gives a political actor such as a governor or president some “cover” on tough decisions and offers a political buffer.

Third, diverse views on a board seem only to enhance the success of the larger project. President Ford intentionally sought out diverse voices (even on the subject of the Vietnam War itself), while the structure of the Delaware and South Carolina systems ensures that the boards avoid monoculture.

The recipe for a working clemency system is short and sweet: It requires a horizontal structure centered on a well-chosen board that is both diverse and independent.

II. THE CONTEMPORARY FEDERAL CLEMENCY PROCESS

A. HISTORY

The current federal clemency system bears none of the markers of high-functioning systems described above. In contrast to state systems, the current federal clemency process courses through seven levels of review in succession. It is inefficient, bureaucratic, and would be rejected if it were part of any successful business. Each of the past three presidents have complained about the process, despite their differing views on the use of the pardon power.⁶⁹ Reform could and should streamline the process through use of a commission that reports directly to the president and allows the new commission to gather and analyze data to guide decision-making. However the chief executive chooses to employ the pardon power, he or she will be better served by a shorter, sharper process that delivers consistent, timely, and straightforward recommendations.

68. See *supra* Section II(A)(1).

69. Margaret Colgate Love, *Justice Department Administration of the President's Pardon Power: A Case Study in Institutional Conflict of Interest*, 47 U. Tol. L. Rev. 89, 101 (2015).

To understand the shape of the beast that is the current clemency review system, it is helpful to understand how it evolved. The process grew up organically in response to workload issues and the protection of power within the executive branch, rather than through an intentional scheme to produce efficiency or regularity.

In the early years of the republic, there was no formalized process for consideration of clemency. No systemic rules were developed until 1898, when President McKinley directed that all applications for clemency had to be submitted to the pardon attorney, an officer within the Department of Justice⁷⁰ (established in 1870) and then to the attorney general.⁷¹ This system was relatively effective.

So how did things go wrong? It appears that at exactly the same time that clemency grants dropped—the 1980s—the clemency process became much more complex.⁷² The drop-off is well-defined in the pardon attorney's published statistics, which extend back to 1900.⁷³ Considering both commutations of sentence and pardons, granted petitions almost always exceeded a hundred per year until the Reagan administration, when they dipped under that level, then crashed under George H.W. Bush, who granted less than 100 over his entire four-year administration.⁷⁴ This trend is particularly notable given that incarceration rates (and thus the number of people who might seek clemency) were rising at the same time the number of clemency grants was falling, meaning that the change in clemency grant *rates* was even more severe, with a sharp breaking point in the Carter/Reagan period. In order, President Kennedy granted 36% of the pardon and commutation petitions filed, Johnson 31%, Nixon 36%, Ford 27%,⁷⁵ Carter 21%, Reagan 12%, George H.W. Bush 5%, Clinton 6%, and George W. Bush 2%.⁷⁶

70. Margaret Colgate Love, *Reinventing the President's Pardon Power*, 20 FED. SENT'G REP. 5, 6 (2007).

71. *About DOJ*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/about>.

72. This was a time of great flux in federal criminal law, as parole was eliminated and mandatory sentencing guidelines imposed. Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 12 U.S.C. § 3551 (2016)).

73. Office of the Pardon Attorney, *supra* note 26.

74. *Id.*

75. This figure does not include the over 14,000 pardons Ford issued outside of the regular clemency process to draft evaders and Army deserters. *See supra* Section III(B). Presumably, the Pardon Attorney's statistics only include cases that went through that office, and the Ford grants came through an alternative process.

76. Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 816-17 (2015).

A crucial shift in procedure seems to have happened almost imperceptibly. At the end of the Carter administration, Attorney General Griffin Bell delegated responsibility for approving and transmitting clemency recommendations to his subordinates.⁷⁷ This was formalized in the Reagan administration under Attorney General William French Smith, and the review and recommendation function of the attorney general passed to the deputy attorney general.⁷⁸

A societal antagonism to rehabilitation does not explain the early clemency record of Barack Obama,⁷⁹ who failed to reverse the clemency slide during the first six years of his presidency.⁸⁰ In fact, the same week in 2016 that Obama took a group of clemency recipients to lunch in Washington with less than a year to go in his presidency, clemency experts George Lardner Jr. and P.S. Ruckman Jr. published an analysis in *The Washington Post* under the headline “On Pardons, Obama Could Go Down as One of the Most Merciless Presidents in History.”⁸¹

Neither theory nor politics alone created the failure of clemency we have seen over the past three decades. A primary culprit is, in fact, the clemency review process that emerged in the 1980s. It is the *process* that has failed, rather than simply the will of the presidents we have elected recently. This is reflected in the bare fact that the last three presidents have each complained that they did not see good clemency applications,⁸² even as the system was bloated with over-sentenced drug defendants. Good cases were there; they just got beat up and run off as they ran through the defensive line that the clemency process had become.

77. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1197 (2010).

78. Love, *supra* note 69, at 98 (citing 28 C.F.R. §§ 0.35, 0.36 (2017)). It is section 0.36 that specifically makes this delegation: “The Pardon Attorney shall submit all recommendations in clemency cases through the Deputy Attorney General and the Deputy Attorney General shall exercise such discretion and authority as is appropriate and necessary for the handling and transmittal of such recommendations to the President.”

79. Indeed, President Obama not only pressed for changes in policy and law, but also took a personal interest in the lives of those convicted. Sari Horwitz & Ann E. Marimow, *President Obama Grants Early Release to 61 More Federal Drug Offenders*, WASH. POST (Mar. 30, 2016), https://www.washingtonpost.com/world/national-security/president-obama-grants-early-release-to-61-more-federal-drug-offenders/2016/03/30/7256bb60-f683-11e5-8b23-538270a1ca31_story.html.

80. See Office of the Pardon Attorney, *supra* note 26.

81. George Lardner, Jr. & P.S. Ruckman, Jr., *On Pardons, Obama Could Go Down as One of the Most Merciless Presidents in History*, WASH. POST (Mar. 25, 2016), https://www.washingtonpost.com/opinions/obamas-unpardonable-inaction-on-pardons/2016/03/25/dfe670a8-f07a-11e5-a61f-e9c95c06edca_story.html?utm_term=.07f3f8bebf79.

82. Love, *supra* note 69, at 101.

Even before the implementation of President Obama's Clemency Project 2014 (which added bureaucracy),⁸³ the clemency review process in recent administrations has involved seven sequential levels of review traversing four different buildings in the Washington, D.C., clemency maze: from the pardon attorney's staff, to the pardon attorney, then to the deputy attorney general's staff, then to the DAG, to the White House counsel's staff, then to the WHC, and finally to the president. Below, I will walk through the existing process, and then describe the layers of bureaucracy that Clemency Project 2014 added on top of that inherited disaster; then I will discuss the problems with the current federal system and the effects of negative decision bias.

B. THE FEDERAL PROCESS WITHIN THE ADMINISTRATION

1. The pardon attorney's staff

When a prisoner or other convicted felon (with or without a lawyer) petitions for commutation of sentence or a pardon, they are required to submit a fairly simple form created by the pardon attorney⁸⁴ and made available to prisoners by wardens of federal prisons.⁸⁵ That form requests straightforward information about the defendant's conviction, sentence, appeals and other legal actions,⁸⁶ and criminal history.⁸⁷ Two questions require a narrative response. Question 5 requests a "complete and detailed account of the offense,"⁸⁸ and Question 7 simply asks that petitioners lay out their "reasons for seeking commutation of sentence."⁸⁹

Unless an attorney or someone else has compiled letters of support or other documents for the petitioner, it is generally this bare-bones form that will arrive at the pardon attorney's office and be assigned to a staff member. An initial screening is performed, looking to whether the form is complete and basic eligibility is met⁹⁰ (for example, that the defendant is a federal convict, rather than one who was convicted in a state court).⁹¹ If a commutation

83. See *supra* Section III(B).

84. The form is publicly available at the Pardon Attorney's website, with separate forms available for pardons and commutations. Office of the Pardon Attorney, *Application Forms*, U.S. DEPT OF JUSTICE, <https://www.justice.gov/pardon/application-forms>.

85. 28 C.E.R. § 1.1 (2017).

86. Federal regulations bar a petition for clemency from being filed while other forms of relief are available. 28 C.E.R. § 1.3 (2017).

87. Office of the Pardon Attorney, *supra* note 84, at 1-4 (Petition for Commutation of Sentence).

88. *Id.* at 3.

89. *Id.* at 5.

90. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 36 (2005).

91. 28 C.E.R. § 1.4 (2017).

petition⁹² passes that preliminary screening, the staffer begins an investigation by contacting the warden of the prison to request three key documents: the judgment of conviction, the presentence investigation report, and the most recent prison progress report for that inmate.⁹³ With these documents in hand, the staffer can independently evaluate the defendant's criminal history, crime of conviction, and conduct and achievement in prison.

The role of the pardon attorney staff in conducting these investigations and drafting recommendations is important in the same way an FBI investigation is important in a criminal case—it is foundational and shapes all that follows. There is a fair amount of discretion built into this role, as well, and it is to be expected that some staffers will pursue and support a good case more than others. Historically, some staffers have been clearly antagonistic to the project: One former deputy actually arrived in the pardons office with a duplicate of a Monopoly “Get Out of Jail” card with a red-circle-and-slash “no” symbol over it,⁹⁴ while others were presumably more open-minded.

2. The pardon attorney

The pardon attorney is ultimately responsible for the recommendation that is sent up the chain through the remaining levels of review.⁹⁵ Certainly, as with any administrative job, the pardon attorney's viewpoint will vary depending on who holds the job. Intriguingly, and importantly, the pardon attorney is not subject to appointment and confirmation, and thus his or her tenure extends from one administration to the next: Margaret Colgate Love (1990-1997) served both George H.W. Bush and Bill Clinton,⁹⁶ Roger Adams (1998-2008) spanned the Clinton and George W. Bush regimes,⁹⁷ and Ronald Rogers (2008-2014) served the end of the George W. Bush administration and most of Barack

92. The process for a pardon petition is distinct but substantially similar. Morison, *supra* note 90, at 38-39.

93. The staffer may also seek out a variety of other documents if needed, such as published judicial opinions, trial and sentencing transcripts, newspaper accounts, or even grand jury transcripts. *Id.*

94. George Lardner, Jr., *Begging Bush's Pardon*, N.Y. TIMES (Feb. 4, 2008), <http://www.nytimes.com/2008/02/04/opinion/04lardner.html>.

95. Morison, *supra* note 90, at 39.

96. Margaret Colgate Love, *Time to Pardon People as Well as Turkeys, Mr. President*, WASH. POST (Nov. 12, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/11/AR2010111106093.html>.

97. Adams was fired after a recommendation surfaced in which he said that “[t]his might sound racist, but [the applicant] is about as honest as you could expect for a Nigerian. Unfortunately, that’s not very honest.” Alison Gendar, *Furor Over Bush Lawyer’s Racism in Deportation Case of Nigerian Minister*, N.Y. DAILY NEWS (July 14, 2008), <http://www.nydailynews.com/news/world/furor-bush-lawyer-racism-deportation-case-nigerian-minister-article-1.349796>.

Obama's two terms.⁹⁸ This means that the pardon attorney may not match the policy interests of the president, having been appointed by a predecessor with a different outlook.

3. The deputy attorney general (DAG) and staff

Since the 1980s, the deputy attorney general has had the responsibility of reviewing clemency cases and transmitting them to the White House.⁹⁹ The DAG, of course, has a broad set of responsibilities, which include "providing overall supervision and direction to all organizational units of the Department."¹⁰⁰ This means that the DAG is the direct supervisor of the U.S. Attorneys and their assistants—the very people who prosecute cases, and who have the least to gain by clemency, which necessarily undoes the outcomes they have pursued. DAGs in the Obama administration have also had their staff review clemency cases before it reaches the DAG's desk.

The DAG is no simple pass-through, though. Pardon Attorney Deborah Leff resigned in January 2016, and writer Gregory Korte of *USA Today* was later able to obtain her letter of resignation.¹⁰¹ In that letter to Deputy Attorney General Yates, Leff laid bare a few of the ghosts in the machine: "I have been deeply troubled by the decision to deny the Pardon Attorney all access to the Office of White House Counsel, even to share the reasons for our determinations in the increasing number of cases where you have reversed our recommendations."¹⁰² In terms of process, Leff revealed something important: The DAG often reversed her recommendations, and the DAG apparently forwarded to the White House only her own view and recommendation without including the contrary view of the pardon attorney. Given this power, the importance of the DAG's role can no longer be doubted.

98. Emily Bazelon, *Power of the Pardon*, SLATE.COM (Apr. 25, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/04/mass_pardon_obama_may_grant_clemency_to_thousands_of_drug_offenders_that.html.

99. See *supra* Section III(A).

100. Office of the Deputy Attorney General, *About the Office*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/dag/about-office>. The Department of Justice's organizational chart illustrates the breadth of the job, as literally everything courses through this one position. *Agencies*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/agencies/chart>.

101. Gregory Korte, *Former Administration Pardon Attorney Suggests Broken System in Resignation Letter*, USA TODAY (Mar. 28, 2016), <http://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254/>.

102. Deborah Leff, *Letter of Resignation*, 28 FED. SENT'G REP. 312 (2016).

4. The White House counsel and staff and the president

The case now moves to a third physical location, as the staff of the White House counsel is lodged in the Eisenhower Executive Office Building within the White House complex. They review the cases, then pass them along to the White House counsel. The office of the White House Counsel has a particularly political inflection, since the counsel must advise the president on the legal issues that governing and politics so often create.¹⁰³ At times, clemency cases must seem a necessary but distracting task.

The ultimate generalist, it is the president who finally makes the decision and signs the warrant for clemency. Barrack Obama clearly cared about the project of clemency, a fact that was reflected in the letter he sent to each clemency recipient.¹⁰⁴ Given that interest, one wonders why his administration was so slow to take up a significant number of clemency cases. The answer, very likely, lies in the layers of redundant bureaucracy described in the preceding paragraphs.

C. CLEMENCY PROJECT 2014

From the very day of his first inauguration, President Obama was urged to address clemency proactively. That urging came from someone who would know: his predecessor, George W. Bush. As the two rode together in a limousine to the inauguration ceremony, Bush advised Obama to “announce a pardon policy early on, and stick to it.”¹⁰⁵ Bush had good reason to give this advice; his own administration was plagued by the dysfunction of the existing clemency process. Two of Bush’s White House counsels, Harriet Miers and Fred Fielding, grew frustrated as they struggled to make it work.¹⁰⁶ Miers implored the pardon attorney and deputy attorney general for more favorable recommendations at a personal meeting, but to no avail.¹⁰⁷

103. For example, Kathryn Ruemmler, who was Obama’s White House Counsel from 2011 through 2014, advised the President on a military strike in Syria, dealing with Senate filibusters, and keeping documents secret, as well as judicial appointments. Charlie Savage, *Departing White House Counsel Held Powerful Sway*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/politics/departing-white-house-counsel-held-powerful-sway.html?_r=0.

104. Alan Schwarz, *With Clemency From Obama, Drug Offender Embraces Second Chance*, N.Y. TIMES (Aug. 14, 2015), http://www.nytimes.com/2015/08/15/us/with-clemency-from-obama-drug-offender-embraces-second-chance.html?_r=0.

105. GEORGE W. BUSH, DECISION POINTS 104 (2010).

106. Dafna Linzer & Jennifer LaFleur, *Propublica Review of Pardons in Past Decade Shows Process Heavily Favored Whites*, WASH. POST (Dec. 3, 2011), https://www.washingtonpost.com/investigations/propublica-review-of-pardons-in-past-decade-shows-process-heavily-favored-whites/2011/11/23/gIQAElNvQO_story.html.

107. *Id.*

In 2014, the Obama administration decided to take action. Clemency Project 2014 was to receive statements of interest from prisoners, screen them for eligibility under defined criteria, then assign the cases to attorneys who had volunteered to work on these cases pro bono. Organization of this effort was outsourced to five groups: the American Bar Association, the National Association of Criminal Defense Lawyers, Families Against Mandatory Minimums, the American Civil Liberties Union, and the Federal Defenders.¹⁰⁸

Two things together led to the new system being overwhelmed. The first was sheer numbers: over 35,000 federal inmates put in for the project.¹⁰⁹ The second event was the development of a complicated review system by the five supervising groups, which the Marshall Project outlined as requiring 10 distinct steps.¹¹⁰ The result of such a combination of huge numbers and an unwieldy process is that by April 1, 2015, nearly a year later, the Clemency Project 2014 had submitted only 14 petitions to the pardon office.¹¹¹ This problem was compounded when those with the most experience in that area—the federal defenders—were largely pushed out of the process by the ruling of an administrative law judge.¹¹²

The Clemency Project constructed its own wobbly structure comprising redundant reviews and part-time experts. Those 35,000-plus cases from prisoners were first sent to the Clemency Project, which did a minimal screen for basic disqualifying factors.¹¹³ From there, four more principal points of review were established (for a total of five, including the initial screen): a pro

108. Lorelei Laird, *Clemency Project 2014 is Out to Help Prisoners Doing Excessive Time Due to Inflexible Sentencing*, ABA J. (July 1, 2015), http://www.abajournal.com/magazine/article/clemency_project_2014_is_out_to_help_prisoners_doing_excessive_time.

109. Liz Goodwin, *Behind Obama's Commutations: 'Clemency Project' Off to a Slow Start*, YAHOO NEWS (Apr. 1, 2015), <https://www.yahoo.com/news/behind-obamas-commutations-clemency-project-off-115227232071.html>.

110. Bill Keller, *The Bureaucracy of Mercy*, MARSHALL PROJECT (Dec. 14, 2015), <https://www.themarshallproject.org/2015/12/13/the-bureaucracy-of-mercy#.MAfzbjB1t>.

111. Goodwin, *supra* note 109.

112. *Id.*

113. For example, cases where a prisoner had been held for fewer than ten years were weeded out at this point. The factors for consideration established by James Cole at the onset of the project targeted inmates who: (1) are currently serving a federal sentence in prison and, by operation of law, likely would have received a substantially lower sentence if convicted of the same offense today; (2) are non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels; (3) have served at least 10 years of their sentence; (4) do not have a significant criminal history; (5) have demonstrated good conduct in prison; and (6) have no history of violence prior to or during their current term of imprisonment. Ryan J. Reilly, *DOJ Gears Up for Massive Obama Clemency Push*, HUFFINGTON POST (Apr. 23, 2014), http://www.huffingtonpost.com/2014/04/23/obama-clemency-doj_n_5196110.html.

bono attorney assessed the case, then a “screening committee” reviewed a summary prepared by the attorney, followed by a similar, redundant review by a “steering committee”—all before a petition was even written up—and finally the petition was reviewed again by the project,¹¹⁴ before being submitted to the pardon attorney to run through the entire previously described gauntlet within the administration. In all, a clemency case traversing the Clemency Project and then the administration would face 12 different reviews; no less than a dozen chokepoints with different personnel and filters.

In the end, President Obama’s clemency initiative resulted in 1,715 commutations of sentence.¹¹⁵ While President Obama’s grants were historically significant, his efforts largely failed if the goal was to (as he put it) “address particularly unjust sentences in individual cases” because so many deserving people were denied or never received an answer.¹¹⁶ While the process was cranked hard enough to produce results, there is significant evidence that those results were both incomplete and inconsistent. *USA Today* reporter Gregory Korte highlighted the puzzling case of Harold and DeWayne Dampier, two brothers from Mississippi who “were indicted together, tried together, given the same sentence and, until recently, served their sentences at the same minimum-security prison.”¹¹⁷ DeWayne had the more serious criminal record (two prior felony convictions as opposed to Harold’s one), yet it was DeWayne who got clemency and Harold who was denied.¹¹⁸

III. THE STRUCTURE OF A REFORMED FEDERAL PROCESS

A. THE USE OF A CLEMENCY BOARD

Obviously, a central feature of a new federal clemency system should be the replacement of the vertical hierarchy we have now with a horizontal model built around a clemency board. The general idea of a federal clemency commission is not a new one; one variation or another was suggested by Charles Shanor and

114. Keller, *supra* note 110; Mark Osler, *Clementia, Obama, and Deborah Leff*, 28 FED. SENT’G REP. 309, 309-10 (2016).

115. Office of the Pardon Attorney, *supra* note 26.

116. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 836 (2017).

117. Gregory Korte, *Two Brothers, Two Petitions for Clemency, Two Different Outcomes*, USA TODAY (Jan. 9, 2017), <http://www.usatoday.com/story/news/politics/2017/01/09/two-brothers-two-petitions-clemency-two-different-outcomes/96297020/>.

118. *Id.*

Marc Miller in 2001,¹¹⁹ Rachel Barkow in 2008,¹²⁰ and Jonathan Menitove in 2009.¹²¹ In fact, White House Counsel Gregory Craig even pressed for one from within the administration in 2009.¹²² We now have tried a vertical hierarchy for the review of clemency through many administrations, Republican and Democratic, hostile to clemency and seemingly embracing of it. The experiment has failed. Most strikingly, the system has failed even President Obama, a leader who by all accounts wanted clemency to work. In looking to what we need to do next, we have a solid foundation in the experience of the states and the Ford Clemency Board.

Simplifying and flattening the process will benefit presidents regardless of their approach to clemency, because they will be able to communicate their imperatives clearly to one level of a system rather than to several. If you are a president who cares most about releasing those over-sentenced for gun crimes, for example, that can be easily messaged to a board. Right now, sending a message that will be equally received by the pardon attorney, the deputy attorney general, and the White House counsel is a challenge, given that each has different interests.

B. DIVERSITY AND INDEPENDENCE

A federal clemency board should be diverse in background and ideology, and have a relative level of independence, particularly from the Department of Justice.¹²³ The models of Delaware, South Carolina, and the Ford Clemency Board offer three different paths to diversity. Delaware uses a variety of elected officials, which will usually ensure at least that both major parties are represented, provided that those officials either serve through several administrations or are elected independently.

119. Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139 (2001).

120. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1365 (2008) (arguing that “agencies might be employed to supplement—not replace—executive power over clemency by providing an additional check on overbroad criminal laws”). Barkow renewed and refined that idea in a later article co-authored by this writer. Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1 (2015).

121. Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 457-58 (2009).

122. Bill Keller, *On Pardons, Obama's the Stingiest President Since John Adams*, POLITICO (Dec. 13, 2015), <http://www.politico.com/magazine/story/2015/12/barack-obama-criminal-justice-pardons-213435>.

123. Because of the constitutional directive that clemency rest with the executive, independence from the president is not a relevant goal.

South Carolina's system, with one representative from each congressional district, offers at least geographic diversity and in practice seems to have allowed for racial and vocational diversity. In the federal system, it would be possible to replicate such a system by appointing one commissioner from each Court of Appeals circuit, but that would do little to encourage racial and ideological diversity. Similarly, the diversity of the Ford Board was achieved through the intentional actions of the executive, and President Ford lived at a time when bipartisan cooperation was common. It is unlikely that executive restraint would be enough to ensure ideological diversity in today's political environment.

Previously, Rachel Barkow and I suggested a clemency board where slots are filled by people of certain expertise; for example, we might require a commission to include a former federal prosecutor, a former federal defender, a former federal judge, a former federal probation officer, and a former police officer, among others.¹²⁴ Such a structure would ensure a variety of experiential knowledge and background, allowing for a fuller discussion of cases. Our inclusion of "former" in those descriptions was intentional; a board with the charge of running federal clemency would benefit from being staffed with full-time rather than part-time commissioners. A clemency commission could include a DOJ representative and input from the department on individual cases could be a part of the investigative process. As in the states, a greater degree of transparency could be achieved, as the system would be less complex and less hindered by the rules of multiple agencies.

C. WHAT MAY BE GAINED

Above all, a functioning clemency process in the federal system would serve as what should be a crucial constitutional tool. The Framers did not insert the pardon power into the Constitution by accident; they intended it to be used for the purposes favored by the president. Given that truth, we need to craft a better machine to power this tool. The problem is clear, and so is the solution: Our inefficient vertical hierarchy of decision-making must be replaced with a modern horizontal process that can provide us with efficiency in the service of wisdom.

124. Barkow & Osler, *supra* note 120, at 21.

RECOMMENDATIONS

Given the commonalities among high-functioning systems, other jurisdictions (including the federal government) should consider adopting the core characteristics of those better processes of clemency.

1. **A horizontal system, where members of a board deliberate with one another, seems to function more consistently and productively than one where officials review cases sequentially in a hierarchy.** A flatter, horizontal system allows for consistency through consensus in a way that is not possible in a hierarchical process.
2. **Those evaluating clemency—either in making recommendations to an executive or determining outcomes—should be diverse in background and ideology.** Bipartisanship isn't just a political hedge, but seems to lead to better outcomes.
3. **Inaction should be viewed as failure.** Every jurisdiction presents good opportunities for mercy that don't imperil public safety. Clemency has been included in every American jurisdiction's process for a reason: Our society has historically recognized the role that well-considered mercy can play in even a retributive criminal justice system.¹²⁵ The tool of clemency is there for a reason, and should not be ignored.

125. Cf. Jeffrie G. Murphy, "Retribution," in the present Volume.

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