

# LONG-TERM SENTENCES: TIME TO RECONSIDER THE SCALE OF PUNISHMENT

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In recent years, there has been a growing bipartisan consensus that the uniquely American policy of mass incarceration is both fiscally and morally unsustainable. Several decades of policy initiatives prioritizing the use of the criminal justice system as the primary means of addressing crime have vaulted the United States into the unenviable position of being a world leader in the use of imprisonment.<sup>1</sup> This phenomenon has produced a host of undesirable ripple effects—the collateral consequences of a felony conviction—that now greatly impair the life prospects of millions of individuals, with a particularly striking effect on low-income communities of color.

This article will describe the origins and contours of the growing movement for justice and sentencing reform and assess its impact on the scale of incarceration to date. There are good reasons to be encouraged about these developments. However, it is also clear that at the current pace of decarceration, the cumulative effect of this movement will fall far short of what is necessary to achieve a more rational, compassionate balance in the justice system.

A key issue in assessing the decarceration trend is American sentencing policy and practice related to the length of prison terms. Defendants convicted of felonies in the U.S. are more likely both to be sentenced to prison and to serve more time in prison than in comparable nations.<sup>2</sup> The excessive nature of punishment in the U.S. is not based on a rational analysis of incarceration and the fundamental objectives of sentencing policy. Moreover, unduly long prison terms are counterproductive for public safety and contribute to the dynamic of diminishing returns as the prison system has expanded.

## I. THE RISE OF MASS INCARCERATION

Incarceration in the United States rose at an unprecedented rate for nearly four decades beginning in 1973.<sup>3</sup> Research by the National Research Council reveals that, between 1980 and 2010, the 222% increase in the rate of incarceration in state prisons was a function of changes in policy, not changes in crime rates.<sup>4</sup>

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<sup>1</sup> See Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), [http://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm\\_term=.9375e417616d](http://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?utm_term=.9375e417616d).

<sup>2</sup> See AMANDA PETTERUTI, JUST. POL'Y INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 10-13 (2011), <http://perma.cc/7RAS-5MXG>.

<sup>3</sup> See NAT'L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (J. Travis et al. eds., 2014).

<sup>4</sup> *Id.* at 52-55.

Those initiatives, under the rubric of “tough on crime,” involved enacting a range of sentencing policies designed to increase admissions to prison and to lengthen the amount of time served on a felony sentence. Such policies were adopted by the federal government and every state to varying degrees.

As a result of these changes, the combined prison and jail population of about 330,000 in 1972 has mushroomed to 2.2 million today.<sup>5</sup> This growth has far outpaced the overall increase in the national population and is accompanied by a similar pace of growth in community supervision, with approximately 4.6 million people under probation or parole supervision in 2016.<sup>6</sup>

As articulated by the policymakers who enacted these measures, the goal of mass incarceration was to improve public safety outcomes.<sup>7</sup> Whether framed as “getting tough,” “sending a message,” “three strikes and you’re out,” or other slogans, the objective was to affect crime rates through a mix of deterrent and incapacitative measures imposed on people convicted of crimes.

There is a growing body of scholarship examining the relationship between incarceration and crime. While it is beyond the scope of this essay to review that work in full, we should note two primary findings of this research.

First, incarceration has an impact on crime, but the scale of that effect is much more modest than many policymakers or members of the public believe. At best, some studies conclude that the rise of incarceration may have produced about a quarter of the decline in crime that has occurred since the early 1990s.<sup>8</sup> Other studies have found this effect to be as low as five percent.<sup>9</sup> Even if one concludes that one quarter of the decline is the most defensible finding, that means that three quarters of the decline in crime was *not* due to increased incarceration. Possible factors offered to explain this substantial portion of the crime decline include strategic policing, decline of the crack cocaine drug markets, community-based anti-crime initiatives, and enhanced economic opportunity.

The second primary research finding on the effects of incarceration is that there are diminishing returns to public safety brought about by the prison expansion.<sup>10</sup> Two key factors underlying this conclusion are that expanded prison space encourages more substantial incarceration of less serious offenders and that lengthy prison terms keep individuals behind bars long after they present a significant risk to public safety.<sup>11</sup>

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<sup>5</sup> See DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ 251211, CORRECTIONAL POPULATIONS IN THE UNITED STATES 2016, at 2 (2018), <http://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> See BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 168 (2006).

<sup>8</sup> See WILLIAM SPELMAN, THE LIMITED IMPORTANCE OF PRISON EXPANSION 106 (Alfred Blumstein & Joel Waldman eds., 2006).

<sup>9</sup> WESTERN, *supra* note 7, at 169-171, 187.

<sup>10</sup> *See id.* at 187-188.

<sup>11</sup> *See id.*

## II. RISE OF THE MOVEMENT TO END MASS INCARCERATION

A popular framework to explain the growing movement for criminal justice reform is that it was occasioned by conservatives recognizing the high fiscal cost of incarceration, particularly following the financial crisis of 2008. Further, some observers trace the origins of the new reform movement to substance abuse treatment expansion policies adopted by Texas in 2008, leading to growing interest in justice reform in red states in particular. While these developments have enhanced support for reform, the origins of the reform movement are both broader and earlier in time.

Four developments are key in understanding this history. First, crime rates have been declining since the early 1990s<sup>12</sup>; both overall crime and violent crime rates have been cut almost in half. This is not to suggest that upticks in murder rates in some cities in recent years are not of concern, but overall, this two-decade trend has been significant. As a result, the “crime issue” has been less salient in political campaigns and voters now consistently rank economic security and other social issues as greater matters of concern.

Second, the growing critique of the “war on drugs” has greatly influenced beliefs about mass incarceration. A broad range of the public now recognizes that prioritizing punishment over treatment fails to recognize the supply and demand dynamics of the drug trade. Despite enormous resources being devoted to both domestic law enforcement and international interdiction, any impact on supply or pricing of illegal drugs has been minimal at best. Conversely, by failing to invest adequately in prevention and treatment programming, demand for drugs remains at disturbingly high levels.

Third, the reentry movement, which originated during the Clinton Administration in the late 1990s, came about at a moment when there was increasing receptivity to evidence-based and compassionate approaches to working with people convicted of crimes. The understanding that ninety-five percent of the people sentenced to prison would be coming home someday provided an opening for liberals and conservatives to come together to support the shared goals of skills development needed to improve prospects for reentry.

Fourth, a burgeoning grassroots movement focused on racial injustice has heightened the focus on the need for broad criminal justice reform to a broader constituency. Books such as Bryan Stevenson’s *Just Mercy* and Michelle Alexander’s *The New Jim Crow*, along with films such as Ava DuVernay’s *13th*, have elevated these issues in popular discourse. Further, ignited by the spate of police killings of black men, social justice leaders such as former NAACP president Ben Jealous have framed mass incarceration as the civil rights issue of the twenty-first century.<sup>13</sup>

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<sup>12</sup> See, e.g., John Gramlich, *Five Facts About Crime in the U.S.*, PEW RESEARCH CTR. (Jan. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/01/30/5-facts-about-crime-in-the-u-s/>.

<sup>13</sup> See Adam Serwer, *The Other Black President*, AMERICAN PROSPECT (Feb. 16, 2009), <http://prospect.org/article/other-black-president>.

These and other developments combined to create interest and opportunity among both policymakers and advocacy organizations to press for changes in law enforcement and sentencing policy. Various campaigns have shared the twin goals of making law enforcement agencies more accountable to the communities they serve and addressing the need for significant reductions in the scale of incarceration.

### III. THE IMPACT—AND LIMITATIONS—OF DECARCERATION STRATEGIES

Over the past two decades a handful of states have made significant inroads into reducing their prison populations. Seven states—New Jersey, Alaska, New York, Vermont, Connecticut, California, and Michigan—have achieved reductions of more than twenty percent since their peak population years.<sup>14</sup> These reductions are generally attributable to a mix of policy and practice initiatives aimed at reducing admissions to prison, reducing time served in prison, and/or reducing probation and parole revocations.

Notably, these reductions have come about without adverse effects on public safety. A 2014 analysis of the prison population reductions in California, New Jersey, and New York concluded that the 23% to 26% decline in those states was accompanied by a continuing decline in crime that outpaced national declines in most categories.<sup>15</sup>

At the federal level, the prison population continued its historic rise through 2011, but then declined 13% by 2016.<sup>16</sup> Several factors have been influential in this regard. Policy shifts by the U.S. Sentencing Commission (“the Commission”) have reduced sentence lengths for many individuals serving drug sentences. Most significant in this regard was the sentencing Guidelines reduction of “drugs minus two” in 2014 that lowered the offense severity level for drug crimes and was subsequently applied retroactively.<sup>17</sup> About 31,000 people qualified for sentence reductions averaging two years and have been released from prison on a rolling basis as their recalculated prison term makes them eligible for release.

A prior reduction in sentence length for crack cocaine offenses contributed to the population decline as well, as has the declining number of drug prosecutions since FY 2012. In addition, Attorney General Eric Holder’s 2013 charging

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<sup>14</sup> See Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?*, SENTENCING PROJECT (Mar. 8, 2018), <http://www.sentencingproject.org/publications/can-wait-75-years-cut-prison-population-half/>. States are listed in order of scale of decline.

<sup>15</sup> See MARC MAUER & NAZGOL GHANDNOOSH, SENTENCING PROJECT, *FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES* 5-7 (2014), <http://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf>.

<sup>16</sup> Ghandnoosh, *supra* note 14.

<sup>17</sup> See U.S. SENTENCING COMM’N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT 1 (2017).

memorandum,<sup>18</sup> which called on federal prosecutors to avoid seeking a mandatory minimum penalty in cases which met the criteria for a low-level drug offense, reduced the proportion of drug cases receiving a mandatory penalty from 60% in FY 2012 to 46% in FY 2015.<sup>19</sup> The impact of this shift has not yet been fully realized since most of these convictions have still resulted in a prison term, albeit shorter terms than in the past. Any future impact of this advance in policy was muted upon Attorney General Jeff Sessions's reversal<sup>20</sup> of the charging memo shortly after taking office in 2017.

While the political and practical shift toward reducing prison populations to a more rational level is encouraging, the overall scale of that change is still quite modest. As previously noted, a small number of states have achieved substantial reductions, but in most states the picture is one of stabilizing the growth of prison populations or only modest reductions. Additionally, eight states continue to increase their prison populations.<sup>21</sup>

Growing numbers of critics have called for a 50% reduction in the number of people in prison. Yet an assessment of the rate of population decline of recent years shows that it would take seventy-five years to cut the prison population in half.<sup>22</sup> Such projections suggest that current strategies for decarceration are far too limited to meet such an ambitious goal.

#### **IV. TIME SERVED IN PRISON: THE MISSING INGREDIENT IN THE DECARCERATION STRATEGY**

While analyzing the sources of prison growth or decline is a complicated undertaking, estimating the projected size of a prison system is relatively straightforward. The number of people in prison is simply a function of how many people are sent to prison and how long they are kept there.

Reducing prison admissions as a means of reducing prison populations has a lengthy history. In some respects, this approach goes back to the nineteenth century with the beginnings of a probation system. John Augustus, a Boston cobbler, began sitting in the city's courtrooms and offering his services to the court to have a defendant released to his care.<sup>23</sup> Augustus would work with the

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<sup>18</sup> Memorandum from U.S. Att'y Gen. Eric Holder Jr. on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013).

<sup>19</sup> See OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE DEPARTMENT'S IMPLEMENTATION OF PROSECUTION AND SENTENCING REFORM PRINCIPLES UNDER THE SMART ON CRIME INITIATIVE 21-22 (2017), <http://oig.justice.gov/reports/2017/e1704.pdf> [hereinafter SMART CRIME INITIATIVE REPORT].

<sup>20</sup> Memorandum from U.S. Att'y General Jeff Sessions on Department Charging and Sentencing Policy (May 10, 2017).

<sup>21</sup> See Ghandnoosh, *supra* note 7.

<sup>22</sup> *Id.*

<sup>23</sup> For a generalized account of John Augustus and the origins of the American probation system, see Robert Panzarella, *Theory and Practice of Probation on Bail in the Report of John Augustus*, 66 FED. PROBATION 38, 38-42 (2002), [http://www.uscourts.gov/sites/default/files/66\\_3\\_6\\_0.pdf](http://www.uscourts.gov/sites/default/files/66_3_6_0.pdf).

individual to provide guidance and structure in his life with a compassionate approach that functioned as an alternative to keeping him behind bars.<sup>24</sup>

In more recent times, the spread of alternative sentencing gained significant traction in the 1980s. Due in part to a perceived need to offset escalating rates of incarceration and the desire for a system that could aid individuals in the community while avoiding the negative consequences of prison, a broad alternatives-to-incarceration movement has emerged and thrived. This initiative encompasses various approaches, including community service, restitution to victims, halfway houses, restorative justice, and drug and other specialty courts.<sup>25</sup>

The success of these varied approaches is difficult to gauge overall and is largely dependent on how one defines success. A key consideration is whether the sentencing options truly serve as an “alternative” to incarceration or function as an enhanced form of probation instead.<sup>26</sup> The “net-widening” outcome of many such programs is well-documented, though certain drug treatment diversion and other similar programs demonstrate that focused attention on decarceration can produce fewer admissions to prison.

In the federal courts the alternatives movement has far less history and traction than at the state level. Since 1987, this has been primarily due to the adoption of the federal sentencing Guidelines, which are premised on the idea that a term of imprisonment is the default option in the vast majority of cases. There has been some movement at the U.S. Sentencing Commission to address this gap.<sup>27</sup> A major symposium on the potential for expanded use of alternatives was held by the Commission in 2008,<sup>28</sup> although there were few concrete outcomes from the event. More recently, in 2017 the Commission identified expanding the use of alternatives as a priority issue.<sup>29</sup>

In contrast to the alternatives movement, policymaker attention to the length of prison terms has lagged considerably. This is problematic for efforts to scale back mass incarceration because longer prison terms have been a major contributor to the expanded prison population. There is also strong criminological evidence that lengthy prison terms are counterproductive for public safety as they result in incarceration of individuals long past the time that they have “aged out”

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<sup>24</sup> *Id.*

<sup>25</sup> *See generally* U.S. SENTENCING COMM’N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 5-7 (2017), <http://perma.cc/S6RJ-SU9E>.

<sup>26</sup> *See id.*

<sup>27</sup> *See id.* at 1-3.

<sup>28</sup> *See generally* Symposium, *Alternative Sentencing: Rehabilitative and Punitive Models and Evidence-Based Policy*, in U.S. SENTENCING COMM’N SYMPOSIUM ON ALTERNATIVES TO INCARCERATION 31 (2008) (transcript available at <http://perma.cc/XN6U-J9ZF>). For a complete summary of the symposium and its proceedings, see *Proceedings from the Symposium on Alternatives to Incarceration (July 14-15, 2008)*, U.S. SENTENCING COMM’N, <http://perma.cc/QSX5-UPET> (last visited July 31, 2018).

<sup>29</sup> *See* FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS, *supra* note 25.

of the high crime years, thereby diverting resources from more promising crime reduction initiatives.<sup>30</sup>

Before exploring these issues in greater detail, we should note that there have been some efforts to address the length of prison terms in both the federal and state systems. At the federal level, the most impactful shift has been the decisions by the U.S. Sentencing Commission to revise drug offense guidelines downward, initially for crack cocaine offenses and subsequently for all drug offenses, and then to apply those revisions retroactively.<sup>31</sup> While these changes are praiseworthy, the revised prison terms are still quite harsh. For example, the shift in guidelines for “drugs minus two” circumstances lowered the average prison term from twelve years to ten years.<sup>32</sup>

Despite the policy shifts enacted by the Commission, it is quite clear that the widespread adoption of a new generation of mandatory sentencing laws by Congress in the heyday of the 1980s “war on drugs” continues to impose substantial constraints on federal judges. In cases governed by a mandatory penalty, judges no longer have the ability to consider a rational sentence that incorporates an assessment of both the individual offender and the circumstances of his offense.

In state corrections systems, approaches to rein in sentence lengths have been relatively modest. While twenty-nine states have adopted reforms to mandatory sentencing procedures since 2000, many of these have been narrow in scope, leading researchers to suggest that “the impact of reform may be limited.”<sup>33</sup> Half of the states still maintain life sentencing policies of “three strikes and you’re out” habitual offender laws,<sup>34</sup> and more than half limit parole consideration (generally until eighty-five percent of a sentence has been served) due to the adoption of “truth in sentencing” laws that apply to many convictions.<sup>35</sup>

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<sup>30</sup> See Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences*, SENTENCING PROJECT (May 3, 2017), <http://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>.

<sup>31</sup> See generally 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATE REPORT, *supra* note 17.

<sup>32</sup> See *id.*

<sup>33</sup> RAM SUBRAMANIAN & RUTH DELANEY, VERA INST. JUST., PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES 12 (2014), <http://perma.cc/WXE8-7257>.

<sup>34</sup> See generally Nicole Schoener, *Three Strikes Laws in Different States*, LEGALMATCH.COM (last modified Apr. 30, 2018), <http://www.legalmatch.com/law-library/article/three-strikes-laws-in-different-states.html> (noting twenty eight states have harsher sentences for repeat offenders).

<sup>35</sup> See Richard S. Frase, *Why Have U.S. State and Federal Jurisdictions Enacted Sentencing Guidelines?*, U. MINN. SENTENCING GUIDELINES RESOURCE CTR. (Mar. 25, 2015), <http://sentencing.umn.edu/content/why-have-us-state-and-federal-jurisdictions-enacted-sentencing-guidelines>.

## V. THE IMPACT OF TIME SERVED ON PRISON POPULATIONS AND PUBLIC SAFETY

Lengthy prison terms, particularly at the state level, have been a major source of prison growth since the 1980s. As previously noted, the National Research Council's analysis of the rise in the state prison population between 1980 and 2010 attributed the increase entirely to changes in sentencing policy. Half of this growth was due to an increased number of admissions to prison and half was a function of greater time served in prison.<sup>36</sup>

Corrections data analyzed by the Urban Institute support these findings and demonstrate the significance of long-term sentences on the growing prison population.<sup>37</sup> Of the forty-four states with complete data for the time period 2000-2014, all experienced an increase in time served by their prison populations, with those serving a sentence for a violent offense experiencing the greatest increase.<sup>38</sup>

At the federal level, the prison population expanded from 20,000 in 1980 to 189,000 by 2016.<sup>39</sup> The combined effect of the surge in drug prosecutions and the expansion of mandatory minimum sentences was a key factor in this growth. As of 2016, 55% of the federal prison population had been sentenced under a mandatory provision.<sup>40</sup>

One measure of the impact of mandatory minimum sentencing can be seen in the range of cases in which President Obama issued sentence commutations, particularly during his last years in office. A total of 1,715 individuals convicted of a drug offense received such commutations, almost all of whom had been sentenced under mandatory provisions of drug law generally requiring decades of incarceration.<sup>41</sup> Nearly a third were sentenced to life without parole for a repeat drug offense. These cases were subject to review by the White House and Department of Justice, and most were not the "low level, non-violent offenders" who are generally the focus of policymaker attention. A quarter of this group had a prior conviction for a violent offense, and eighty-six percent had a "significant" criminal history.<sup>42</sup> These individuals were released despite their "significant"

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<sup>36</sup> NAT'L RES. COUNCIL, *supra* note 3, at 52-55.

<sup>37</sup> See generally LEIGH COURTNEY ET AL., URBAN INST., A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA'S PRISONS 1 (2017), [http://apps.urban.org/features/long-prison-terms/a\\_matter\\_of\\_time.pdf](http://apps.urban.org/features/long-prison-terms/a_matter_of_time.pdf).

<sup>38</sup> *Id.*

<sup>39</sup> BUREAU JUST. STATISTICS, PRISONERS UNDER STATE AND FEDERAL JURISDICTION 1980-2016, <http://www.bjs.gov/index.cfm?ty=kfdetail&iid=488> (last visited May 19, 2018).

<sup>40</sup> U. S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 49 (2017), <http://perma.cc/YP2Q-BMLG>.

<sup>41</sup> See Gregory Korte, *Obama Grants 330 More Commutations, Bringing Total to a Record 1,715*, U.S.A. TODAY, Jan. 19, 2017, <http://www.usatoday.com/story/news/politics/2017/01/19/obama-grants-330-more-commutations-bringing-total-record-1715/96791186/>.

<sup>42</sup> GLENN SCHMITT ET AL., U.S. SENTENCING COMM'N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 29 (2017), <http://perma.cc/M258-7N3Z> (1,434 of the 1,696 offenders



criminal history, a gesture which recognizes the transformation that many individuals undergo in prison but also demonstrates that a substantial number of inmates do not pose an unreasonable public safety risk upon release.

While mandatory sentencing policies are a key driving force in producing lengthy federal prison terms, the establishment of the federal sentencing guidelines since the 1980s has contributed to these developments as well. When the original Commission members established the Guidelines structure, they overrode several key elements of the statutory directive creating the Commission, including the directive to ensure that nonviolent, first-time offenders should ordinarily receive non-prison sentences. While 37% of the offenders sentenced in 1985 received probation alone,<sup>43</sup> by 2013 that figure had declined to 7.1%.<sup>44</sup> The Commission also ignored the statutory requirement that it take into account available bed space in federal prisons to reduce overcrowding. Finally, in establishing lengths of prison terms, the Commission relied on then-current sentencing practices data when developing the Guidelines grid. But since the Commission members only used data on prison sentences and not probation, this had the effect of increasing average prison terms since such a smaller proportion of offenders were deemed probation-eligible under the Guidelines.<sup>45</sup>

By developing the Guidelines in this manner, the Commission missed an opportunity to take a fresh look at the utility of the sentencing practices of the time. To what extent did length of sentence affect potential deterrent or rehabilitative goals? Did long prison terms provide increasing incapacitation benefits or did they have a “criminogenic” effect on future behavior? These and other concerns could have shaped the development of an objective examination of the efficiency of federal sentencing policy, instead of recreating a version of prevailing practices.

## VI. LONG SENTENCES ARE COUNTERPRODUCTIVE FOR PUBLIC SAFETY

Increasingly lengthy prison terms for federal offenses have become counterproductive for promoting public safety. There are several reasons for this: long-term sentences produce diminishing returns for public safety as individuals “age out” of the high-crime years; such sentences are particularly ineffective for drug crimes as drug sellers are easily replaced in the community; increasingly punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy initiatives that hold the potential for greater impact on public safety.

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receiving a sentence commutation had a criminal history score of three or more criminal history points).

<sup>43</sup> See BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ 123560, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 1985, at 43 tbl. 4.1 (1990).

<sup>44</sup> U.S. SENTENCING COMM’N, 2013 ANNUAL REPORT, CHAPTER 5: RESEARCH, at A-38 (2013), <http://perma.cc/VM89-R8BM>.

<sup>45</sup> See MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA 132-134 (2016).

### A. “Aging Out” of Crime

A longstanding finding in the criminology literature is that involvement in criminal activity is strongly dependent on age, an outcome that cuts across race and class lines. Increased involvement in crime begins in the mid-teen years and rises sharply, but for a relatively short period of time.<sup>46</sup> For most crimes, these rates of involvement begin declining by a person’s early to mid-twenties and continue on a downward trajectory. Looking at rates of robbery, for example, these peak at age nineteen and, by their late twenties, have declined by more than half.<sup>47</sup>

These dynamics have significant meaning for the length and effectiveness of prison terms. In the federal prison system, the median age range in prison is 36 to 40 years old,<sup>48</sup> well past the peak age of criminal involvement. Further, the length of stay for released federal prisoners doubled between 1988 and 2012, from an average of 17.9 months to 37.5 months.<sup>49</sup> This rise is largely attributed to policy changes, including the implementation of the sentencing Guidelines, elimination of parole, and advent of a new generation of mandatory sentencing laws.

To be clear, just because the risk an individual may pose to public safety declines with age does not mean that incarceration is an inappropriate sentencing option. Long periods of incarceration can satisfy other sentencing goals, such as recognizing the seriousness of an offense. But to the extent that incarceration is imposed primarily for incapacitation, judges and policymakers should be cognizant that each successive year of incarceration is likely to produce diminishing returns for public safety.

Another key element of the declining effectiveness of incapacitation is that the aging process leads to higher costs of incarceration, primarily due to increased health care needs.<sup>50</sup> In this regard, prisoners are no different than the general population; they require more health resources as they age. But a key distinction is that a person’s health generally declines more rapidly in prison.<sup>51</sup> This is partly a function of the relatively inadequate access to health care services of many individuals before they came to prison, and partly related to the stressful environment of a correctional institution. As a consequence, the annual cost of

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<sup>46</sup> See Nellis, *supra* note 30.

<sup>47</sup> HOWARD N. SNYDER, BUREAU JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ 239423, ARREST IN THE UNITED STATES: 1990-2010, at 5 fig. 9 (2017), <http://www.bjs.gov/content/pub/pdf/aus9010.pdf>.

<sup>48</sup> See *Statistics on Inmate Age*, FED. BUREAU PRISONS, [http://www.bop.gov/about/statistics/statistics\\_inmate\\_age.jsp](http://www.bop.gov/about/statistics/statistics_inmate_age.jsp) (last visited July 18, 2018). Note that these figures only apply to released prisoners and not to those sentenced to life without parole.

<sup>49</sup> See *Prison Time Surges for Federal Inmates*, PEW CHARITABLE TRUSTS (Nov. 18, 2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates>.

<sup>50</sup> See Matt McKillop & Alex Boucher, *Aging Prison Populations Drive Up Costs*, PEW CHARITABLE TRUSTS (Feb. 20, 2018), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2018/02/20/aging-prison-populations-drive-up-costs>.

<sup>51</sup> *Id.*

incarceration—generally estimated at about \$30,000 per prisoner—can easily double for elderly prisoners.

### B. Limited Deterrent Effects

On the day of sentencing, judges frequently tell a convicted defendant that they are being sentenced to prison to “send a message” that their criminal behavior will not be tolerated. The human instinct to do so is understandable, but unfortunately, the value of this message is often insignificant.

The deterrent effect of the criminal justice system has been studied for hundreds of years, with increasing sophistication in recent decades. In regard to the impact of punishment on potential offenders, a key finding is that deterrence is primarily a function of the *certainty* of punishment, not its *severity*.<sup>52</sup> Daniel Nagin, a leading deterrence scholar in the United States, concluded that “[t]he evidence in support of the deterrent effect of the certainty of punishment is far more consistent and convincing than for the severity of punishment” and that “the effect of certainty rather than severity of punishment reflect[s] a response to the certainty of apprehension.”<sup>53</sup>

This finding makes intuitive sense. Consider a person who is thinking about stealing a car or burglarizing a local business. If he is thinking rationally, he will take into account a variety of factors when considering how to commit the crime, including time of day, ease of entry, presence of security personnel or technology, or his ability to leave the crime scene. He does this to avoid being caught in the act because being arrested and prosecuted will impose significant burdens on him. Additionally, because he is not planning on being apprehended, he is unlikely to be thinking about how much time he might spend in prison and whether his sentence will be three, five, or seven years.

Notably, this example looks at the behavior of a rational person, which rarely fits the picture of a substantial portion of those who actually commit a crime. Many are teenagers seeking peer approval for their illegal behavior, individuals under the influence of alcohol or drugs at the time of the offense,<sup>54</sup> or are motivated by economic challenges. Many of these individuals are not even thinking about the risk of being caught, let alone know how much prison time they may face.

The limited impact of extending sentence length becomes even more attenuated for long-term incarceration. If the penalty for a second robbery conviction is twenty years and a legislative body increases that penalty to twenty-five, few would-be robbers undeterred by the prospect of “only” a twenty year sentence would balk at an additional five years.

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<sup>52</sup> See Daniel S. Nagin, *Deterrence in the Twenty-First Century: A Review of the Evidence*, 42 CRIME & JUST. 199, 207 (2013).

<sup>53</sup> *Id.*

<sup>54</sup> See JENNIFER BROWNSON ET AL., BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ 250546, DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES 2007-2009, at 6 tbl. 6 (2017) (between 2007 and 2009, nearly 42% of state prisoners were under the influence of some type of drug at the time of offense).

Again, there are multiple possible reasons for imposing a given prison term, depending on the circumstances of the crime. But policymakers and judges should be cognizant of the evidence to support any particular goal of sentencing. If the length of a prison term has little deterrent value, it may be time to forego the rationale of “sending a message.”

### C. Diversion of Resources

Excessive incarceration brought about by lengthy prison terms that produce diminishing returns has negative consequences for public safety. This is primarily due to the fact that public safety resources are finite. Spending \$1 million to construct a prison means that money will not be available for policing, drug treatment, preschool programs, or other interventions that might produce crime-reducing benefits.

A frequent debate in criminal justice policy discussions concerns the impact of increased incarceration on crime control. Attorney General Jeff Sessions, with little evidence, stated that the adoption of mandatory sentencing, truth in sentencing, and the elimination of parole in the federal system in the 1980s effectively reduced crime rates: “It’s clear to me that it worked. We saw crime rates cut in half, neighborhoods revitalized, and general law and order restored on our streets.”<sup>55</sup> But this view is contradicted by the National Research Council’s multi-year study of these issues, which concluded that “the growth in incarceration rates reduced crime, but the magnitude of the crime reduction remains highly uncertain and the evidence suggests that it was unlikely to have been large.”<sup>56</sup>

It is not unreasonable to explore the impact of incarceration on crime, but this undertaking is far less helpful than an inquiry into the most effective ways to reduce crime. A better approach is to examine the effect of incarceration parallel to other forms of intervention and their relative costs. Accordingly, we should be comparing how crime reduction outcomes vary between equal investments in incarceration, community policing, substance abuse programs, prenatal services, and other initiatives. In fact, a good deal of research concludes that many social interventions produce greater public safety benefits than expanding incarceration.

One such program is the Nurse Family Partnership, a program that trains and supervises nurses as home visitors and is now operating in more than 200 communities.<sup>57</sup> Targeting young first-time mothers early in their pregnancy, nurses perform home visits on a regular basis until the child reaches age two and then decline in frequency over time. Research has demonstrated that the program

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<sup>55</sup> U.S. Attorney General Jeff Sessions, Remarks to the Oklahoma Sheriffs’ Association (Oct. 19, 2017), in DEP’T JUST. NEWS, <http://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-oklahoma-sheriffs-association> (last updated March 30, 2018).

<sup>56</sup> NAT’L RES. COUNCIL, *supra* note 3, at 155.

<sup>57</sup> See generally NURSE-FAMILY PARTNERSHIP, <http://www.nursefamilypartnership.org/about/> (last visited July 31, 2018).

reduces rates of abuse and neglect and yields reduced arrest rates as the children grow up.<sup>58</sup>

## VII. TIME SERVED IN PRISON CAN BE REDUCED WITHOUT HARMING PUBLIC SAFETY

There are two primary reasons that explain why time served in prison has increased so exponentially in recent decades. The first relates to the political environment which led to the “tough on crime” policies of the 1980s and 1990s. With only a handful of notable exceptions, politicians across the board and at every level of government embraced the movement to impose ever harsher penalties on people convicted of crime. Bidding wars erupted in proposing ever more punitive measures for both serious and lower-level offenses. Federal financial incentives to encourage states to adopt “truth in sentencing” policies, whereby parole consideration would not be possible until a prisoner incarcerated for a violent offense had served eighty-five percent of his sentence, contributed to more than half the states endorsing such legislation in the 1990s.<sup>59</sup> Legislators in Mississippi went one step further, passing a truth in sentencing statute that required eighty-five percent time served for *all* offenses.<sup>60</sup> Within just a few years, Mississippi’s prison population and associated costs had ballooned so much that policymakers were forced to scale back the initiative substantially.

The second key factor in understanding the expansion of long sentences is that they make intuitive sense to most people as a crime control mechanism. If for no other reason, keeping known offenders behind bars for a period of time ensures they will not harm anyone on the outside during their sentence. As we have seen, this “intuitive” understanding substantially overestimates the actual impact on crime in the era of mass incarceration.

Believing that incarceration inherently improves public safety naturally correlates with a belief that reducing time served in prison would have negative consequences since the affected individuals would no longer be incapacitated. Here, too, the common-sense observation turns out to be incorrect but remains as a significant obstacle to decarceration.

A number of real world case studies, at both state and federal levels, demonstrate that prison populations can be reduced substantially without adverse effects on public safety. Trends in California have been the subject of a good deal of analysis following several initiatives designed to substantially reduce the prison population. One of these, Proposition 47, reclassified a half-dozen property and

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<sup>58</sup> See Peter W. Greenwood & Susan Turner, *Probation and other Non-Institutional Treatment: The Evidence Is In*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 723, 726-28 (Barry Feld & Donna Bishop, eds., 2012).

<sup>59</sup> See generally PAULA M. DITTON & DORIS J. WILSON, BUREAU JUSTICE STAT., U.S. DEP’T OF JUST., NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS, at 1 (1999), <http://bjs.gov/content/pub/pdf/tssp.pdf>.

<sup>60</sup> *Id.* at 3.

drug offenses as misdemeanors rather than felonies and required that convictions result in local supervision rather than state incarceration.<sup>61</sup> The initiative was also applied retroactively, and as of 2017 nearly 4,700 people have been released from prison.<sup>62</sup> A comprehensive analysis by researchers at the University of California-Irvine found the shift had no impact on overall crime rates or violent crime.<sup>63</sup>

Policy decisions of the U.S. Sentencing Commission over the past decade have also demonstrated that federal sentences can be reduced without adversely affecting crime control goals. The first instance occurred from the Commission's Guidelines amendment change for crack cocaine convictions in 2007, which was made retroactive as of 2008. More than 16,000 individuals had their sentences reduced by about two years (from 107 months to 85 months).<sup>64</sup> A follow-up study compared recidivism rates for similar offenders released before and after the amendment took effect and found no statistically significant difference between the two groups.<sup>65</sup> A second study explored recidivism rates for prisoners affected by the retroactive application of the Fair Sentencing Act, lowering time served in prison by twenty percent (thirty months), and found virtually identical recidivism rates for this group and a comparison group who had served their full sentence prior to the adoption of the Act.<sup>66</sup>

As previously noted, the most substantial sentencing reduction initiative of the Commission was its "drugs minus two" decision in 2014 that reduced sentencing guideline levels for all drug offenses by two levels and was subsequently made retroactive in 2015.<sup>67</sup> This initiative decreased the average time served for those granted a reduction from twelve years to ten years.

The Commission established a review process for these cases, requiring judicial approval for any sentence reduction. In most federal jurisdictions, the U.S. Attorney's office and the Federal Public Defender reviewed cases and made a joint recommendation for sentence reduction in a substantial number of cases. For those cases where there was a disagreement, a hearing was held in court and a judicial determination was made. Overall, about two-thirds of the eligible population, or 31,000 individuals, were approved for a sentence reduction, to be applied over many years as these cases neared their end term.<sup>68</sup>

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<sup>61</sup> See Jasmine Ulloa, *Prop. 47 Got Thousands Out of Prison. Now, \$103 Million in Savings Will Go Towards Keeping Them Out*, L.A. TIMES, Mar. 29, 2017, <http://www.latimes.com/politics/la-pol-sac-prop-47-grant-awards-20170329-htlmlstory.html>.

<sup>62</sup> *Id.*

<sup>63</sup> *Proposition 47 Not Responsible for Recent Upticks in Crime Across California, UCI Study Says*, U. CAL.-IRVINE NEWS (Mar. 7, 2018), <http://perma.cc/6F7L-Q2YX>.

<sup>64</sup> *New Law on Crack Cocaine Penalties Should Be Made Retroactive*, WASH. POST (Feb. 18, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021806422.html>.

<sup>65</sup> U. S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 15 (2014).

<sup>66</sup> U.S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 18-19 (2018).

<sup>67</sup> 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT, *supra* note 17.

<sup>68</sup> Jason Vitullo & Harry Sandick, *Circuit Clarifies Guidelines Provision Allowing Post-Conviction Reduction of Drug Sentences*, PATTERSON BELKNAP SECOND CIRCUIT LAW BLOG (Feb. 23, 2018), <http://perma.cc/E4SN-23WH>.

A telling moment in this process illustrates the public environment in which criminal justice policymaking takes place. The retroactive drug guideline reduction went into effect on November 1, 2015, and because of the delay in implementation, there was a backlog of cases that became eligible for release on that day. Newspaper headlines across the country noted that 6,000 individuals would be released during that first week.

Because I am the executive director of a national organization engaged in public policy discussions on sentencing, I received a slew of interview requests from media outlets that week, generally seeking to discuss what preparations were being made to aid these people in their transition to the community. The question is an appropriate one, though painfully naïve in the context of mass incarceration. Of course we should be addressing the needs of these 6,000 people coming home from prison. But many overlooked the fact that these 6,000 releases represented less than one percent of the more than 600,000 people returning home from prison that year—and the previous year, and the year before that. Even with growing attention on reentry, the scale of resources devoted to such services is quite modest given the challenges in this area.

The Commission's policy shift should certainly be commended as a significant step toward curbing excessive punishments. But it is telling that, when we do "business as usual" with millions of people flowing in and out of prisons and jails each year, there is ordinarily little public consideration of our policy approaches to enhancing public safety.

### VIII. INTERNATIONAL COMPARISONS

The vast use of long-term sentences in the U.S. is an anomaly by international standards,<sup>69</sup> and in line with the position of the United States broadly as a world leader in its use of incarceration. Sentence lengths in most European nations, either by law or practice, rarely exceed twenty years.<sup>70</sup> Perhaps the most compelling evidence in this regard is the prison term of twenty-one years imposed on Norwegian Anders Breivik, the ultra-right terrorist who killed seventy-seven people one day in 2011—mostly youths attending a political camp.<sup>71</sup> Under Norwegian law, the maximum prison term is twenty-one years, which can be extended for five-year terms if the prisoner is deemed to still pose a risk to public safety.<sup>72</sup> Contrast this policy with sentencing laws in the U.S., where it is not

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<sup>69</sup> See Lee, *supra* note 1.

<sup>70</sup> See JUSTICE POL'Y INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER COUNTRIES 2-3 (2011); see also MARC MAUER & ASHLEY NELLIS, THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES (The New Press, forthcoming 2018).

<sup>71</sup> Catherine Appleton, *Lone Wolf Terrorism in Norway*, 18 INT'L J. HUMAN RIGHTS 127, 127-142 (2014).

<sup>72</sup> See Mark Lewis & Sarah Lyall, *Norway Killer Gets the Maximum: 21 Years*, N.Y. TIMES, Aug. 25, 2012, at A3.

unusual for a repeat drug seller who has not engaged in violence to receive a comparable prison term.

The most substantial sentencing contrast between the U.S. and other nations (in addition to our use of the death penalty) concerns life imprisonment. While 161,000 individuals are serving life with or without parole in the U.S., such sentences are an aberration in many nations. Norway abolished life sentences in 1981<sup>73</sup>; in Denmark and Sweden, lifers can be released after twelve years and eighteen years of imprisonment, respectively.<sup>74</sup>

It is not only European nations that reject the imposition of life sentences. In Latin America, only six of nineteen nations maintain statutes that permit life imprisonment, though in many jurisdictions prison terms can be so lengthy that they constitute *de facto* life terms.<sup>75</sup> There is also the practice of the International Criminal Court, which tries cases of war crimes, genocide, and crimes against humanity. The Court has no provision for sentences of life without parole and, for those cases in which a life sentence is imposed, there is a requirement for review after twenty-five years.<sup>76</sup>

Within the U.S., the American Law Institute (“ALI”) adopted its revised Model Penal Code in 2017. The Code’s standards line up with the American Bar Association in calling for a length of incarceration that is “no longer than needed to serve the purposes for which it is imposed.”<sup>77</sup> Regarding long sentences, the ALI concludes that “terms for single offenses in excess of twenty years are rarely justified on proportionality grounds, and are too long to serve most utilitarian purposes.”<sup>78</sup>

## IX. A REFORM AGENDA

Of the record number of people serving life prison terms in the United States, 6,720 are serving a federal life sentence, with more than half of those (3,861) serving life without parole.<sup>79</sup> These sentences produce diminishing returns for public safety, are far out of line with practices of comparable nations and divert resources from more constructive interventions for public safety.

Challenging the status quo and reducing the scale of these policies is a substantial undertaking, but as the previously described history suggests, there is reason to believe that such shifts are politically viable and can be accomplished without compromising public safety. There are four primary actors who have the

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<sup>73</sup> Tapio Lappi-Seppälä, *Life Imprisonments and Related Institutions in the Nordic Countries*, in LIFE IMPRISONMENT AND HUMAN RIGHTS 461, 472 (Dirk van Zyl Smit & Catherine Appleton eds., 2016).

<sup>74</sup> *Id.* at 467.

<sup>75</sup> See Beatriz López Lorca, *Life Imprisonment in Latin America*, in LIFE IMPRISONMENT AND HUMAN RIGHTS 43, 43 (Dirk van Zyl Smit & Catherine Appleton eds., 2016).

<sup>76</sup> See Marie Gottschalk, *No Way Out? Life Sentences and the Politics of Penal Reform*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 227, 251 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

<sup>77</sup> MODEL PENAL CODE § 6.06 (AM. LAW INST., Proposed Final Draft 2017).

<sup>78</sup> *Id.* at § 6.06 note on penultimate maximum penalties.

<sup>79</sup> See Nellis, *supra* note 30.



authority to change current policy and practice in this area: members of Congress, the United States Sentencing Commission, federal prosecutors, and federal judges.

Much of the opportunity to address harsh prison terms clearly lies with Congress. The mandatory sentencing laws enacted in 1986 and 1988, along with other provisions added since that time, have led to the large-scale problem of life- and long-term imprisonment imposed on federal offenders, with drug offenders getting particularly harsh sentences. Scores of federal judges have spoken out about the injustices produced by these policies, and criminological research makes clear that there are diminishing returns for public safety of these policies.

While there is a strong argument for across the board repeal of all mandatory sentencing provisions, there is also much that the Congress can accomplish short of that goal. In 2018, for example, the Senate Judiciary Committee approved the Sentencing Reform and Corrections Act on a bipartisan vote.<sup>80</sup> The bill was championed by Committee Chair and long-time conservative Sen. Chuck Grassley (R-IA) and long-time liberal member Sen. Dick Durbin (D-IL). The bill's provisions would have lowered mandatory penalties in certain cases, granted federal judges greater latitude in approving "safety valve" sentencing provisions, and applied retroactive changes to crack cocaine and other penalty shifts.

Although this legislation has to date not been endorsed by both chambers of Congress, it is illustrative of the evolving political environment on criminal justice policy. Unlike in the decades of the 1980s and 1990s, most states do not have ambitious plans to construct new prisons; in fact, many are enacting measures to reduce unnecessary incarceration. Voices of reform are increasingly heard across the political spectrum, with newfound attention being devoted to pretrial incarceration, solitary confinement, and the collateral consequences of conviction. Encouraging as these developments are, we should not lose sight of the fact that the pace of change in most jurisdictions is still quite modest and falls far short of what will be necessary to reverse mass incarceration.

The second area of attention to federal sentencing can come from the ongoing consideration of policy change by the U.S. Sentencing Commission. As previously noted, the Commission has adopted a number of significant changes to the Guidelines structure over the past decade which have contributed to a substantially reduced federal prison population. The Commission is also undertaking a deeper examination of the scale and potential for expanding alternatives to incarceration, a long overdue but welcome development. But as this essay has documented, we would also be well served by a Commission review of not only the utility of imprisonment, but an examination of the length of imprisonment in terms of the goals of sentencing and public safety. Such an undertaking could incorporate analysis of both mandatory penalties and the Guidelines structure, with a particular focus on assessing the points at which diminishing returns for public safety develop for varying combinations of offense and offender characteristics.

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<sup>80</sup> See generally S. 1917, 115th Cong. § 1 (2017).

The third set of actors capable of producing significant change in sentencing outcomes are the U.S. Attorneys. Particularly in an era characterized by broad determinate and mandatory sentencing, the power of federal prosecutors to influence the scale of punishment is quite substantial. Through charging practices, plea negotiations, and sentencing recommendations, prosecutors often exert a more significant effect on sentencing outcomes than do judges. As previously noted, the impact of Attorney General Holder's charging memorandum to federal prosecutors produced a significant reduction in the number of federal defendants charged with an offense requiring a mandatory penalty.<sup>81</sup> Conversely, Attorney General Sessions's reversal of that policy is likely to produce an expansion of the federal prison population, though it is too early to assess that impact yet.

The fourth area of change can arise through federal judges themselves as they consider how to impose sentences in the post-*Booker*<sup>82</sup> era that now grants federal judges greater discretion in sentencing. While there has been much discussion about the problems brought about by mandatory sentencing, in fact most federal defendants are sentenced under a mandatory statute. Therefore, the appropriate use of judicial discretion can be quite critical in most cases.

One proposal for a reexamination comes from U.S. District Judge Mark Bennett, who notes that "the length and severity of federal sentences, for the most part, has not changed" in the post-*Booker* period.<sup>83</sup> Judge Bennett attributes this in part to the psychological concept of the "anchoring effect," the human tendency to rely too heavily on the first piece of information offered (the "anchor") when making decisions.<sup>84</sup> Research indicates that sentencing judges are influenced by anchors, even irrelevant anchors, to the same extent as lay people and that the effects of the anchors are not reduced by the judges' actual experience. Judge Bennett argues that the anchoring effect in federal sentencing comes into play through the presentence report.<sup>85</sup> The reports first calculate how the elements of the crime and criminal history translate into a sentencing cell on the Guidelines chart, and subsequently present more detailed information about the offender's history and circumstances. Even though the Guidelines are now advisory, their effect is to create a marker for the sentence to be imposed.

Judge Bennett's modest suggestion is to reverse the order of how information is presented.<sup>86</sup> That is, judges should first review the circumstances of the offense and offender, make an initial determination of sentence, and then consult the guidelines. If the initial sentence is substantially above or below the

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<sup>81</sup> See SMART CRIME INITIATIVE REPORT, *supra* note 19.

<sup>82</sup> *United States v. Booker*, 543 U.S. 220 (2005).

<sup>83</sup> Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. LAW & CRIMINOLOGY 489, 489 (2014).

<sup>84</sup> *Id.* at 495.

<sup>85</sup> See *id.* at 490-492.

<sup>86</sup> *Id.*

guideline range, judges can review the reasoning behind their decision and make adjustments if they think they are warranted.

## **X. THE WAY FORWARD**

Mass incarceration did not develop overnight, nor will it end suddenly. The unprecedented rise of the prison population in the United States was the result of complex decision making and policy implementation by political leaders and criminal justice practitioners, playing out in a public environment characterized by fear and scapegoating. Thus, no single piece of legislation or change in leadership will be sufficient to reverse these decades-long trends.

Acknowledging this reality should not be cause for despair. As we have seen over the past decade, criminal justice leaders and their political allies in many states have embraced new ways of thinking about problem-solving within the justice system, and they have generally received public support in doing so. As more jurisdictions embrace a reform strategy, we will have more models of change to choose from, along with increasing evidence of what works and what does not work to produce public safety.

As this essay suggests, there are many ways in which sentencing policy and practice can be changed in order to produce more rational outcomes for both the individual and society. A key element of that change should be a reconsideration of the scale of punishment in the United States, one of the driving forces that makes the American court system an outlier among democratic nations. Taking on this challenge has the potential to contribute to a broader dialogue about the role of the justice system in our society today.