



A New Paradigm for Sentencing in the United States

Vera INSTITUTE
OF JUSTICE

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From the President

The United States incarcerates nearly 2 million people, far more than any other country in the world. But the problem of mass incarceration in this country is not just a function of the number of people in prison—or the much larger number of people who cycle in and out of jails every year. Our system also incarcerates people for far too long, doling out excessively long sentences.

As of 2019, 57 percent of the U.S. prison population was serving sentences of 10 or more years. In fact, as of 2020, one in seven people in U.S. prisons was serving a life sentence—in numerical terms, that is more than the country's entire incarcerated population in 1970. This report will chart how we arrived at these dismal statistics. Retribution, deterrence, incapacitation, and rehabilitation are all concepts that have been central to sentencing theory, policy, and practice over the last two centuries. But these principles have been backed by paltry evidence of success—and more evidence of harm. They haven't been effective in delivering accountability, building public safety, or repairing harm, results we can ask sentencing to deliver. They have, however, disproportionately hurt Black and Latino communities.

From 1996 to 1997, I clerked for Federal Judge Jack Weinstein, who strongly, and publicly, opposed sentencing guidelines. But there was little he could do to deviate from those rigid directives. I saw hundreds of people cycle through his courtroom. A large percentage of them were people who, out of desperation, had agreed to carry cocaine into the country in exchange for a couple hundred dollars.

Judge Weinstein didn't sit at the bench. We would all sit around a table in the well of the courtroom—the judge, the Assistant United States Attorney, the convicted person, their family, their attorney, and me. He tried to humanize a process that is utterly dehumanizing. It was sometimes all he could do. In most cases, he had no option but to sentence them to mandatory minimums or make a “downward departure” from the guidelines, which would be subject to reversal if the prosecutors chose to appeal. Most, no matter the offense, would have to serve a sentence that can only be described as excessively and disproportionately punitive when compared with our pre-1970s history or what we currently see in other developed countries.

Their lives and their families' lives were devastated, and millions more continue to be, as states and the federal

government continue to use mandatory minimums, three-strikes laws, and the other sentencing enhancements. And yet evidence to support our retributive, punitive approach is limited. In fact, we know this approach doesn't make our communities safer in the way proponents claim and the public assumes, causes more damage than they are willing to admit, and does not repair harm. This report will offer solutions beyond our current criminal legal apparatus that can deliver real public safety and justice—ideals our current system fails to achieve.

We hope this report will catalyze deep reconsideration, challenge assumptions, and disrupt our system's proclivity for long, harsh sentences that are ultimately ineffective. We offer sentencing reforms that would dramatically reduce the number of people incarcerated in our prisons. And we call on legislators, prosecutors, and judges to help implement them—and put an end to our codified system of excessive punishment.

A handwritten signature in black ink, appearing to read 'N. Turner', with a stylized flourish at the end.

Nicholas Turner

President & Director, Vera Institute of Justice

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Executive Summary

One hundred years from now, we may look back at the United States's overreliance on punishment and its progeny—mass incarceration—with the kind of abhorrence that we now hold for internment camps for Japanese Americans and Jim Crow laws. Or, if we never curb our reliance on jails and prisons for public safety, we may be in the same place then as we are today.

We have an opportunity now to change course. Those events shined a devastating light on the impact that systematic dehumanization of Black people and other people of color, as well as people experiencing poverty, has had over generations. George Floyd's murder at the hands of police provided a stark example of the everyday use of state power against Black people.¹ At the same time, rural and marginalized communities were disproportionately affected by death, economic loss, and destabilization from the global coronavirus pandemic.² A leading theory places this confluence of stressors behind the increase in fatal gun violence in 2020.³ As a result, discussions are now taking place on the floors of Congress, in statehouses, and in countless households about the ubiquitous and often harmful presence of the U.S. criminal legal system in people's lives, and how that system does or does not deliver safety.⁴

This report posits that maintaining our system of mass incarceration will not bring people in the United States the safety and justice they deserve, while dismantling it in favor of a narrowly tailored sentencing response to unlawful behavior can produce more safety, repair harm, and reduce incarceration by close to 80 percent, according to modeling on the federal system. In this report, the Vera Institute of Justice (Vera) addresses a main driver of mass incarceration: our sentencing system, or what happens to people after they have gone through the criminal legal system and are convicted of a crime. The report

- › provides a review of the history of sentencing in this country;
- › summarizes the research and evidence surrounding sentencing's impact on individual and community safety;
- › offers new guiding principles that legislators should consider in place of the current primary reliance on deterrence, retribution, and excessive use of incapacitation;
- › outlines seven key sentencing reforms in line with these guiding principles;

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- › models the impact of these reforms on both public safety and mass incarceration; and
- › suggests a “North Star” for sentencing policy with a legal presumption toward community-based sentences except in limited circumstances.

Our current sentencing system defaults to putting most people convicted of crimes behind bars. In 2006 in the United States—the last year in which national sentencing data was gathered—70 percent of people convicted of state felonies ended up in prison; in the federal system, 90 percent of people convicted in 2019 did.⁵

The United States also sends people to prison for extraordinarily long periods of time. The Sentencing Project found that as of 2020, one in seven (203,865) people in U.S. prisons was serving a life sentence—more than the country’s entire incarcerated population in 1970.⁶ This growth in people serving life sentences within the prison population is the tip of the iceberg of the overall phenomenon of people with long sentences becoming the majority within state prisons. In 2022, the Council on Criminal Justice, examining National Corrections Reporting system data, found that from 2005 to 2019 the percentage of people serving sentences of 10 or more years in state prisons grew substantially, reaching 57 percent of the total population in 2019.⁷

The result of our overreliance on punishment is a huge jail and prison system and a devastating waste of human lives. On any given day, there are nearly 1.7 million people serving sentences in prison and jail, almost 500,000 more detained in jail pretrial, another 4.4 million under some

A note on language

In this report, you will not find words like “offender,” “criminal,” or “defendant.”^a People who have committed unlawful and/or harmful acts remain people, and policymakers considering how best to respond to such acts should keep that front of mind.^b Vera also uses the words “unlawful behavior,” “criminalized behavior,” “harm,” or “harmful behavior” instead of “criminal” to describe conduct that violates social norms and laws to avoid reinforcing stigmatizing language. Most people have experienced or delivered some form of harm in their lives. Labeling someone’s harmful behavior as “criminal” immediately creates punitive connotations or associations with guilt, regardless of the conduct’s severity. Using the word “harm” keeps the focus on which behavior is actually damaging—especially to a person’s physical safety and well-being—and requires readers to be thoughtful about the best way to address harm.

^a See Erica Bryant, “Words Matter: Don’t Call People Felons, Convicts, or Inmates,” Vera Institute of Justice, March 31, 2021, <https://perma.cc/GSX4-QSHS>.

^b Eddie Ellis, *An Open Letter to Our Friends on the Subject of Language* (New York: Center for NULeadership on Urban Solutions, 2007), <https://perma.cc/JQ67-UKHZ>.

form of probation or parole control, and between 70 and 100 million marked with a record of arrest or conviction.⁸ This level of incarceration reaches into more than 100 million U.S. households: half of all adults in the United States have had a family member detained at least overnight.⁹ Our runaway yet routine use of incarceration wastes human potential, prevents people from contributing to our families and communities, and targets already marginalized neighborhoods. We have lost millions of lives—both literally and metaphorically—to mass incarceration.

Those lost lives disproportionately belong to Black and Latino people and those experiencing poverty. Black and Latino people make up 58 percent of the U.S. prison population but just 31 percent of the nation's overall population.¹⁰ Among those serving life and “virtual life” sentences—sentences of 50 years or more—nearly half are Black, and another 16 percent are Latino.¹¹ One in five Black men in prison is serving a life sentence.¹² Black men receive harsher sentences and serve more time in prison compared to white men—in the federal system, for example, their sentences are 19.1 percent longer—even after controlling for factors like conviction history, education, and income.¹³ In the same system, Black people are also 21.2 percent less likely to receive a sentence shorter than advised by the sentencing guidelines than white people.¹⁴ In the last 20 years, however, racial disparities have dropped as the number of white people in prison continues to increase while the number of Black people drops.¹⁵ Although recent sentencing reforms like California's Proposition 47 or the modest federal First Step Act are rightfully pointed to as progress, with their narrow focus on nonviolent crimes, such legislation alone will not sufficiently move the needle on mass incarceration.¹⁶ Today, 55 percent of the more than 1.2 million people serving sentences in state prisons are convicted of offenses deemed violent.¹⁷ Twenty-nine percent of the people incarcerated in federal prison are serving sentences involving weapons.¹⁸

This default to incarceration does not build safety. A 2021 meta-analysis of 116 studies found that custodial sentences not only do not prevent reoffending, but they can also actually increase it.¹⁹ Explanations include that stripping neighborhoods of so many vital residents, including parents and breadwinners, can destabilize neighborhoods, and that the brutality of U.S. prisons, as well as the lack of opportunities after release, can negatively affect people's behavior toward others while incarcerated—and afterward.

So how do we significantly change course? As a starting place, we must move away from retribution, deterrence, heavy reliance on incapacitation, and rehabilitation as the cornerstones of sentencing theory, policy, and practice. These justifications for sentencing have been in currency for more than 200 years but are seldom scrutinized. It is time to do so.

- › **Retribution**, or “just deserts,” is the idea that punishment must restore the moral order that is upset by harmful behavior or conduct that violates the law—that the individual should be punished.

- › The **deterrence** theory posits that punishment will prevent future crime. Deterrence can be specific (deterring this person from committing any more crimes) or general (making an example of this person so that others will reconsider committing crimes).
- › **Incapacitation** holds that locking people up in prisons will keep them from committing new crimes in the community.
- › **Rehabilitation** is invoked to support the theory that a period of banishment from society through incarceration should serve as an opportunity for reflection, remorse, and growth. (For more on these theories, see “Origin and description of sentencing theories” on page 14.)

As old as these justifications are, the evidence does not support the assertion that they deliver safety and satisfaction as promised. In this report, Vera details how severe sentences do not deter crime, retribution often does not help survivors of crime heal, and that as a rule, we overestimate who presents a current danger to the community and when incarceration is needed for public safety. Vera also demonstrates that rehabilitation best occurs in the community, not in prisons.

Aside from the evidence, on a practical level, these theories conflict with each other and provide little meaningful guidance for a clear sentencing outcome. Consider the possible interior dialogue of a prosecutor, legislator, or judge wrestling with how to set a sentence to incarceration for, say, armed robbery:

In order for society’s rules to mean something, we need to mark transgressions for failing to comply [punishment and deterrence]. We want the people who have hurt others to feel some of that same pain [retribution], and to make sure they cannot hurt others [incapacitation], but we also want to ensure they are reformed so that when they are released from prison, fewer people will be hurt [rehabilitation], and more people will follow the law [general deterrence]. So—seven years?

These theories do not, by themselves, lead to any objectively clear action—like choosing an arbitrary term of years—in setting a sentence. Into that vacuum, the state has generally leaned on retribution, deterrence, or incapacitation to justify as much prison time as possible—particularly for Black people, who have been wrongly depicted as inherently more “criminal” and dangerous throughout the history of this country and continuing to this day.²⁰

A new sentencing paradigm is needed. This report sets out a path toward such a transformation in the way this country approaches sentencing.

- › **Chapter 1** chronicles the overlap between sentencing justifications, race, and the expansion of the U.S. prison system.

› **Chapter 2** discusses the facts behind how sentences do or do not deliver more public safety or achieve satisfaction for survivors of crime, two rationales behind the prevalence and length of prison sentences since the “tough-on-crime” era that began in the 1970s.

› **Chapter 3** proposes alternate guiding principles, or justifications, that must be considered in sentencing:

- ↳ privileging liberty, a constitutionally protected right;
- ↳ creating real safety; and
- ↳ repairing harm.

These principles would undergird statutory sentencing schemes and apply to all crimes, not just nonviolent ones, as concepts of safety and repair are particularly resonant when someone commits a violent act.²¹

› **Chapter 4** outlines seven recommended pieces of legislation that lead to decarceration and more public safety, satisfaction, and efficacy by centering safety, repair, and racial justice. These seven reforms, in order of decarcerative impact, include

- ↳ capping prison sentences at a maximum of 20 years for adults convicted of the most serious crimes and 15 years for young people up to age 25;
- ↳ significantly expanding “good-time” credit—opportunities to earn time off of sentences for behavior that demonstrates repair and growth;
- ↳ removing prior conviction sentencing enhancements;
- ↳ abolishing mandatory minimums;
- ↳ allowing any conviction, regardless of severity, to be eligible for a community-based sentence;
- ↳ creating second-look resentencing options for those currently behind bars; and
- ↳ mandating racial impact assessments for crime-related bills.

› **Chapter 5** demonstrates how these reforms would result in much smaller prison populations, using the federal system as an illustration. We model what the federal prison population would look like today had Congress passed and implemented 10 years ago some of the reforms discussed in Chapter 4. Remarkably, if five of these reforms had been

If five of these reforms had been enacted, the federal prison population would be approximately 20 percent of what it is today—or roughly 30,000 people instead of the 150,000 currently in Federal Bureau of Prisons custody.

enacted (excepting racial impact statements and second-look provisions, which could not be modeled with the data at hand), the federal prison population would be approximately 20 percent of what it is today—or roughly 30,000 people instead of the 150,000 currently in Federal Bureau of Prisons custody.

- › Finally, we cannot stop at these reforms. **Chapter 6** offers a new approach—a North Star—to sentencing, one in which incarceration is the limited exception rather than the rule, and grounds this approach in the principles of safety and repair. A strong presumption toward liberty is fundamental to this approach, because without it, judges, prosecutors, and legislators will continue to assume, intentionally or because of implicit biases, that many people of color must be incarcerated, particularly if they have been convicted of a violent felony. Vera’s North Star requires the court to consider whether the principles of safety or repair overcome that presumption of liberty by clear and convincing evidence. If a person is sentenced to incarceration, that sentence should then be evaluated every five years to assess whether the compelling interests of safety and repair justify further incarceration.

Beyond sentences: Other ways to reduce mass incarceration

This report focuses on sentencing reform, known as the “back end” of the criminal legal system. But ending mass incarceration will also require disrupting the “front door” to the system by ending overcriminalization, reducing arrests, leveraging prosecutorial discretion, enacting bail reform, and expanding the number of people eligible for diversion away from sentences to incarceration. This could all be done consistent with public safety. Law enforcement could dramatically reduce the 10.4 million arrests made each year, 80 percent of which are for common, nonserious behavior like cannabis and other recreational drug use, low-level traffic offenses, and other minor offenses like trespassing and disorderly conduct.^a Already, many jurisdictions are moving in this direction: the majority of states have either decriminalized or legalized possession of small amounts of cannabis for medical or personal use, and in 2020, Oregon decriminalized personal noncommercial possession of recreational drugs entirely.^b But the country is just starting to experiment with decriminalizing other low-level offenses that generate large numbers of arrests, like disorderly conduct, trespassing and loitering.^c

Doing so is critical to ending mass incarceration because reducing low-level arrests will decrease the resulting criminal convictions that subject people to longer sentences down the road based on prior conviction history. Reducing the number of cases entering the system will also relieve court congestion and free up limited prosecutorial and judicial resources to focus on more serious cases. Shrinking the country’s carceral footprint also requires legislatures to take on bail reform, prosecutorial overreach, criminal justice fines and fees, and the flawed systems of probation and parole that drive almost half of all admissions to jail and prison for technical violations of supervision that in and of themselves do not qualify as crimes or carry carceral sanctions.^d

To end mass incarceration, we must do both: enact these front-end reforms and reform sentencing and the back end of the system. Even though felony convictions and admissions to prison overall have declined in recent years, long lengths of stay per conviction, especially for convictions

for violent offenses and for people with prior criminal convictions, contribute to the continued large size of the prison population.^e

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- a Rebecca Neusteter and Megan O'Toole, *Every Three Seconds: Unlocking Police Data on Arrests* (New York: Vera Institute of Justice, 2019), 6, <https://perma.cc/2Q57-6AP2>.
 - b For a map of cannabis laws in the United States and its territories, see National Conference of State Legislatures, "Cannabis Overview," July 6, 2021, <https://perma.cc/U6WA-7NGD>. For the 2020 Oregon law, see Oregon Measure 110 (2020), <https://perma.cc/R6TU-YC55>.
 - c See for example Virginia HB 256 (2020) (removes school behavior from the definition of disorderly conduct), <https://perma.cc/Z8JW-XFM7>; and New York SB 1351 (2021) (repeals loitering for the purpose of prostitution), <https://perma.cc/UH9J-VPTW>.
 - d Forty-five percent of admissions to state prison are for violations of parole or probation. Technical violations—which involve failed drug tests or other rule violations such as missed appointments—make up more than half of these admissions. Council of State Governments Justice Center and Arnold Ventures, *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets* (New York: Council of State Governments Justice Center, 2019), 1, <https://perma.cc/7VRS-G4GC>.
 - e Fifty percent of people in prison have been convicted of violent offenses. There has been only a 5 percent drop in the prison population for these crimes since 2009, compared to a 31 percent drop in drug crimes and a 24 percent reduction for property crimes. Therefore, any meaningful reform must address charging and sentencing for violent crimes. Nazgol Ghandnoosh, *Can We Wait 60 Years to Cut the Prison Population in Half?* (Washington, DC: Sentencing Project, 2021), 3, <https://perma.cc/M96W-76QU>.

Chapter 1: A History of Sentencing in the United States

The United States leads the world in incarceration, locking up its residents at a rate more than six times that of the average of comparable countries worldwide.²² If the country used incarceration at the same rate as the rest of the world, instead of the current nearly 2 million people in prison and jail, we would have fewer than 350,000 people behind bars.²³

Those lives disproportionately belong to Black and Latino people and those experiencing poverty. Black and Latino people make up 58 percent of the U.S. prison population, but just 31 percent of the overall population.²⁴ Among those serving life and virtual life sentences—sentences of 50 years or more—nearly half are Black and another 16 percent are Latino.²⁵

How did we get here? To understand how the United States became the most incarcerated nation in the world, it is critical to understand the role that sentencing—and the use of various rationales underlying it (retribution, incapacitation, deterrence, and rehabilitation)—played in the onset not only in justifying the use of incarceration as a response to unlawful behavior over the years, but also in a two-tiered system of “justice” that has punished some people excessively while veering toward leniency and rehabilitation for others. Beginning in the 1970s, however, with the advent of the “War on Drugs” and “tough-on-crime” rhetoric, a more uniformly punitive rationale emerged and calls for retribution, broad application of incapacitation, and deterrence drove sentencing policy toward excessively long and punishing prison sentences across the board—although the repercussions for Black and Latino people were far greater in terms of loss of life, human capital, and impact on families and communities. A look at the history of how this pattern emerged is critical to understanding the policy and philosophical changes needed to forge a different path for anyone facing sentencing going forward.

Origin and description of sentencing theories

Traditionally, sentencing has had four purposes:

- › **retribution** treats the sentence as a punishment for wrongdoing in order to right the moral affront of the harmful action;
- › **incapacitation** removes people who have shown themselves capable of committing harm from the community to prevent future harm;
- › **deterrence** is the notion that the state can, in sentencing one person, set an example so that someone else chooses not to commit the same crime (“general deterrence”) or that the same person originally sentenced chooses to avoid further unlawful behavior (“specific deterrence”); and
- › **rehabilitation** sees the sentence as an opportunity for people to unlearn old behaviors and learn new ways of thinking and acting that make them less likely to cause further harm.^a

These purposes have philosophical roots at least as old as the practice of incarceration, but for the founders of the United States they would have been familiar as the work of 18th century political philosophers Immanuel Kant and Jeremy Bentham.

Kant and his followers, referred to in this context as retributivists or retributionists, focused on the punitive power of the state.^b This goal, focused solely on the person who committed the act, is also called retribution, or “just deserts.” It is fundamentally backward-focused, looking at the crime and seeking to “balance” it by punishment.^c In contrast, the theory of utilitarianism (also called consequentialism) advanced by competing philosopher Bentham drew on the earlier work of Cesare Beccaria to argue that the purpose of consequences ought to be the prevention of future crime.^d

Both retributionists and utilitarians acknowledge in theory, if not in practice, that sentences should be constrained by two principles:

- › **proportionality**—the notion that sentences should be set in proportion to the severity of the crime and the blameworthiness of the person sentenced,^e and
- › **parsimony**—the notion that sentences should err on the side of the smallest amount of constraint needed to effect the purposes of sentencing.^f

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- a See generally Nora Demleitner, Douglas Berman, Marc Miller, and Ronald Wright, *Sentencing Law and Policy: Cases, Statutes, and Guidelines* (4th ed.) (New York: Wolters Kluwer, 2018), 2, 13–18. See for example Mont. Code Ann. § 46-18-101 (2) “The correctional and sentencing policy of the state of Montana is to: (a) punish each offender commensurate with the nature and degree of harm caused by the offense and to hold an offender accountable; (b) protect the public, reduce crime, and increase the public sense of safety by incarcerating violent offenders and serious repeat offenders; (c) provide restitution, reparation, and restoration to the victim of the offense; and (d) encourage and provide opportunities for the offender’s self-improvement to provide rehabilitation and reintegration of offenders back into the community.”
 - b Kant advocated strongly for a retributive theory of punishment and held that the punishment should be, as closely as possible, matched to the victim’s loss, including the use of the death penalty for murder. For Kant, the only justification for punishment was the guilt for having committed a specific crime; deterrent effects are incidental at best for this philosophy and should never be the primary means for designing a punishment. Frederick Rauscher, “Kant’s Social and Political Philosophy,” in *Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta (Stanford, CA: Stanford University, 2017), <https://perma.cc/F6NX-FLNH>.
 - c So committed was Kant to this principle that he wrote, “Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in his public violation of justice.” *Metaphysics of Morals* (Der Metaphysik der Sitten) (1797).
 - d Jeremy Bentham, *An Introduction to Principles of Morals and Legislation* (London: Athlone, 1970 [1789]); and Demleitner, Berman, Miller, et al., *Sentencing Law and Policy*, 2018, 2. Cesare Beccaria, known as the “father of criminal justice,” introduced the idea of proportionality in punishment, which Jeremy Bentham later expanded on and developed more fully into a treatise on the utilitarian theory of punishment. Beccaria described the purpose for proportionality in *On Crimes and Punishments*: “The degree of the punishment, and the consequences of a crime, ought to be so contrived as to have the greatest possible effect on others, with the least possible pain to the delinquent. If there be any society in which this is not a fundamental principle, it is an unlawful society; for mankind, by their union, originally intended to subject themselves to the least evils possible. . . . It is, then, of the greatest importance that the punishment should succeed the crime as immediately as possible, if we intend that, in the rude minds of the multitude, the seducing picture of the advantage

arising from the crime should instantly awake the attendant idea of punishment” (emphasis in original). Cesare Beccaria, *Of Crimes and Punishments* (Indianapolis, IN: Hackett Pub. Co., 1986), <https://perma.cc/WQ58-97E5>.

- e Model Penal Code: Sentencing § 1.02(2)(2) (American Law Institute, 2017) (“The general purposes of the provisions on sentencing, applicable to all official actors in the sentencing system are, (a) in decisions affecting the sentencing of individual offenders: (i) to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders.”)
- f For an example of parsimony deployed in in the purpose section of a sentencing code, see 18 USC § 3553(a) “The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2). . . .” For an argument of how the principle of parsimony should be revived to act as a check against the excessive use of state power, including in sentencing, see Daryl Atkinson and Jeremy Travis, *The Power of Parsimony* (New York: Square One Project, 2021), <https://perma.cc/28CG-CC6A>.

The Colonial era: Developing theories of sentencing

Sentencing theories among the colonies were as varied as the settlers themselves and are still reflected in state laws, but besides flogging, corporal, and even capital punishment, incarceration was always an option.²⁶

Virginia was the first state to enact “slave code” legislation, the forerunner of what would become Jim Crow laws and Ferguson, Missouri’s “manner of walking in the roadway” ordinance that remained in place until 2016.²⁷ These laws created strict divisions of punishment along racial lines and were replicated throughout much of what would become the South.²⁸ The harsh punishments fell firmly into the deterrent and retributivist theories of sentencing, and even when laws were applied to all races, the punishments frequently differed depending on the race of both the person who committed the act and the person harmed.²⁹

The early 19th century: The Enlightenment and early reforms

As Enlightenment ideals about humanitarianism and justice changed the approach to punishment in the United States, the theory of rehabilitation in sentencing gained new focus. Enlightenment reformers advanced two theories: wrongful behavior was driven by social surroundings and instability, and overly harsh punishment as a response to crime undermined the perceived legitimacy of the law.³⁰ To these reformers, rehabilitation did not mean what we consider it to encompass today. A sentence to “rehabilitative” incarceration meant enforced solitude and discipline so that “deviants” could reflect and grow from their mistakes.³¹ This led to increased reliance on incarceration and decreased use of corporal punishment—at least as far as white people, those considered “nonwhite” in the era but not subject to chattel slavery, and free Black people were concerned.

In addition to imposed isolation, another core aspect of “rehabilitation” in this era was hard labor, military-like routine and regimentation, and corporal punishment.³² Through this combination of isolation and forced industry, incarcerated people were thought to have been given an opportunity to redeem themselves and return to society.

The Civil War, Reconstruction, and the rise of Jim Crow

As the nation struggled to reconstitute itself after four years of civil war, it began with a reckoning of the fundamental changes to the Constitution. Notably, the 13th Amendment ensured that slavery and involuntary servitude did not end with the war, but could continue as “a punishment for crime whereof the party shall have been duly convicted,” leading to the use of convict leasing and forced labor.³³ By 1870, the rate of imprisonment across all states had more than doubled, as the nation took some of its first deliberate steps to incarcerate Black people at rates disproportionate to their share of the population.³⁴

During this period, Northern states were reexamining crime and social disorder in light of the unfulfilled promises of the system of isolated incarceration as a means of rehabilitation.³⁵ Under this scrutiny, the rehabilitative methods shifted from isolation and discipline to “treatment.”³⁶ With this change came one of the lasting innovations in modern-day sentencing—indeterminate sentences, or prison terms without a definite duration in which release is determined by an observer such as a judge or parole board based on the person’s participation in treatment and resulting rehabilitation.³⁷ In theory, motivated people could earn their release more quickly than otherwise; in practice, the decision was largely at the whim of the parole board, and lengthy sentences could result.³⁸

Meanwhile, the South was building prisons and passing laws known as “Black Codes” harking back to Colonial-era laws—vague legislation that outlawed common behaviors and could be unevenly enforced against newly freed Black people.³⁹ The South was firmly in the retributive camp of sentencing rationales, at least when it came to punishing Black people. By the 1870s, 95 percent of people incarcerated in the South were Black.⁴⁰ By 1890, Black people—while making up 12 percent of the nation’s population—made up 30 percent of its incarcerated population, a statistic that has remained more or less stable to this day, when Black people make up 13 percent of the population but 33 percent of people in state and federal prisons.⁴¹

In the North, although legislatures did not pass Black Codes, deep-seated racism and a belief that Black people were inherently inferior or criminal produced their own version of racial disparity in sentencing, as evidenced in prison system statistics.⁴² From the 1890s through the 1950s, Black people received harsher and longer sentences than white people.⁴³ Although the data overall is scant, there are some telling examples. In 1923, a nationwide study found that Black children were more than twice as likely as white children to be sentenced to correctional facilities.⁴⁴

The 20th century, the Civil Rights era, and “tough-on-crime” politics

By the early 20th century, social constructions of race were shifting, and both sentencing policy and prison conditions made it starkly clear who was—and was not—included in the category of whiteness, with its access

to shorter sentences and more rehabilitative conditions of incarceration. As European immigrant groups such as the Irish, Italians, and Polish were absorbed into the white racial category, the white public became increasingly concerned about the conditions they endured in prison. A new era of reform emerged, and rehabilitation took on a more active meaning in practice. Prisons began to offer more recreation, visitation, and communication with the outside world, as well as education and vocational training.⁴⁵ But the new programs weren't intended to rehabilitate everyone in prison: in practice, they were reserved for people believed to be capable of redemption—by and large white people.⁴⁶

Despite a brief spike in crime in the 1920s, crime rates had remained largely stable through the first half of the century. That changed in 1961, when they began to rise and continued that trend for two decades, peaking in 1980.⁴⁷ Violent crime alone increased by 126 percent from 1960 to 1970, and by another 64 percent from 1970 to 1980.⁴⁸ Those numbers, compounded by increasingly salacious and race-baiting stories about crime on the nightly news, fueled fearmongering and calls for harsher and more swift punishment.⁴⁹

The nation had already flirted with replacing indeterminate with determinate sentencing in the 1950s through the federal Boggs Act, which set mandatory minimum sentences for certain drug convictions.⁵⁰ President Lyndon B. Johnson laid the foundation for the federal government's involvement in "tough-on-crime" policies when he presented the Law Enforcement Assistance Act to Congress on March 8, 1965.⁵¹ He also oversaw a massive increase in federal block grants to expand law enforcement agencies across the country as part of his Great Society program and the beginning of the "War on Crime."⁵²

Nixon won the presidential election in 1968 on a campaign rife with racially coded appeals to white voters—that greater investments in welfare and social programs did not reduce crime.⁵³ This fearmongering solidified consensus that there was only one way to tackle rising crime rates—to get "tough on crime." Nixon carefully crafted his messaging to implicate—although never explicitly—Black Americans in the rising crime rate.⁵⁴ But Nixon's presidency was a mixed bag of policies, and he had already repealed most mandatory minimum sentences in the Drug Abuse Prevention and Control Act of 1970.⁵⁵ Still, his speech declaring drugs as "public enemy number one" in 1971 is often credited with starting the War on Drugs, which would lead to the incarceration of thousands.⁵⁶

As the focus of policing and crime control turned from prevention and rehabilitation (at least rhetorically) to retribution and incapacitation, the call for determinate sentences to ensure that people were punished *enough* became louder. Sentencing from the 1960s through the mid-1990s took a sharp turn to the "tough-on-crime" rhetoric of retribution, deterrence, and overuse of incapacitation that still underscores our sentencing practices today.⁵⁷ Legislators passed "tough-on-crime" policies in a social and political moment when crime rates were rapidly increasing across the country.⁵⁸ Presidents Ronald Reagan and Bill Clinton presided over

the largest expansion of the carceral system via a series of “tough-on-crime” laws, from the Anti-Drug Abuse Act of 1986 to the now infamous 1994 Crime Bill.⁵⁹ These laws were race-neutral on their faces but racially coded and biased in effect. For example, the Anti-Drug Abuse Act of 1988 established a minimum five-year sentence without parole for possession of five grams of crack cocaine—or 500 grams of powder cocaine.⁶⁰ This arbitrary discrepancy was not rooted in science—the physiological and psychoactive effects of crack and powder cocaine are virtually identical—yet the intent was clearly to target Black people charged with drug crimes far more harshly than whites, given the misperception that crack cocaine was consumed primarily by Black users.⁶¹ These race-baiting tropes and dog whistle language were ubiquitous in the press and in political speeches, with phrases like “welfare queen,” “superpredator,” “inner city,” and “drug user” linked to Black and Latino people, criminality, and violence.⁶²

Homicides peaked at an average of 9.8 deaths per 100,000 residents nationwide in 1991, while the rate in some cities and states was much higher.⁶³ But by the mid-1990s, crime rates—especially for violent crimes—were in steady decline.⁶⁴ However, even as the country became safer overall, a strong majority of people believed crime was increasing—to this day, public perception about crime is out of sync with actual crime rates.⁶⁵ This incorrect perception has time and time again been leveraged to call for harsher punishment and more incarceration—to deliver more purported safety to a select subset of U.S. communities that are predominantly white and wealthy despite the fact that violence most severely impacts neighborhoods of color and those experiencing income instability.⁶⁶ It was in this political environment that Clinton signed the 1994 Violent Crime Control and Enforcement Act (the 1994 Crime Bill) into law, ushering in an array of overly punitive sentencing legislation in the federal system and spurring similar legislation in the states by incentivizing them with billions of dollars to expand policing and build prisons.⁶⁷ The U.S. incarceration rate more than *tripled* from 1971 to 1999—from 161 people incarcerated in jails and prisons per 100,000 population to 682 people incarcerated per 100,000.⁶⁸

As the end of the 20th century neared, states and the federal government rapidly passed sentencing laws and policies that fueled mass incarceration. (For a list of major sentencing legislation, see Appendix A on page 55.) They fell into four main categories—mandatory minimums, “truth in sentencing,” new and longer enhancements based on prior criminal convictions (such as “three-strikes” laws and other “habitual offender” laws), and laws that restricted parole release, such as life without parole (LWOP) sentences.⁶⁹

These four types of sentencing laws had an immediate and dramatic impact on the landscape of the criminal legal system. For one, mandatory minimums drastically influenced prosecutors’ charging decisions.⁷⁰ Suddenly they had much more power and could grant a stark choice to those being charged: take this plea deal (which is a longer sentence than what you would have faced had the mandatory minimums not existed) or risk the mandatory minimum of 15 years for a first offense of simple possession of marijuana if convicted after trial.⁷¹

More than 40 states passed “truth in sentencing” policies from 1984 to 1999, under which people convicted of offenses characterized as violent were required to serve at least 85 percent of their prison terms.⁷² In some states, this more than *doubled* people’s expected time in prison.⁷³ Eighty percent of states had a version of a three-strikes law, and 60 percent had a version of a two-strikes law, which required increasingly severe sentences—even life sentences—for repeat offenses; as with mandatory minimums, these laws could be used to drive harsher plea bargains.⁷⁴ But punitiveness reached its zenith in life without parole sentences. All states but Alaska now permit life-without-parole sentencing, and 37 of them permit it for crimes short of homicide, usually as part of enhanced sentencing for prior convictions.⁷⁵ Five states require *all* life sentences to be actual life—with no possibility of parole.⁷⁶ People serving LWOP sentences continue to grow as a percentage of people in prison, rising from 2 percent in 2008 to 4 percent in 2019, as the prison population dropped from its peak of 2008 while people sentenced to these draconian sentences remained in prison.⁷⁷ (For more information on these policies, see Appendix A on page 55.)

Mass incarceration, the caging of approximately 2 million people in U.S. jails and prisons today, is the direct result of these policy changes.⁷⁸ They led to bloated prison populations, longer sentences, and disproportionate numbers of Black people incarcerated.⁷⁹ Today, there are more people in prison serving life sentences (203,865 people) than there were people serving *any* prison sentence in 1970 (197,245 people).⁸⁰

The 21st century: An age of reforms?

There has been increasing recognition since the late 1990s that the “tough-on-crime” approach to crime prevention and public safety is at the very least fiscally—if not morally—troubling, and that the United States’s position as the world’s most incarcerated nation is an incongruous label for the so-called land of the free. There have been bipartisan efforts to address mass incarceration through sentencing reform; however, those attempts have been sporadic and piecemeal and lack a comprehensive and strategic vision. Some high-profile—but incomplete sentencing reforms in the past two decades have included:

- › **2003:** Michigan’s elimination of mandatory minimums for most drug convictions, following an earlier elimination of life without parole for possessing or distributing 650 grams of cocaine or heroin.⁸¹
- › **2009:** New York’s reform of its draconian Rockefeller Drug Laws (see “Case studies: Prison releases as a result of sentencing changes and administrative decisions that did not impact public safety” on page 27).⁸²

There have been bipartisan efforts to address mass incarceration through sentencing reform; however, those attempts have been sporadic and piecemeal and lack a comprehensive and strategic vision.

- › **2010:** The federal Fair Sentencing Act of 2010, which decreased the disparity in sentencing for crack cocaine and powdered cocaine from 100:1 to 18:1. However, this reform applied only *prospectively*, not retroactively.⁸³
- › **2011:** California’s Proposition 36, which adjusted the state’s three-strikes law to remove the possibility of a life sentence for a third felony conviction that is neither violent nor serious.⁸⁴
- › **2014:** California’s Proposition 47, which reclassified certain theft and drug possession offenses from felonies to misdemeanors and allowed for resentencing for people imprisoned under the old classifications.⁸⁵
- › **2018:** The federal First Step Act, which, among other things, changed mandatory minimum life sentences for third-strike drug offenses to mandatory minimums of 25 years and made the 2010 Fair Sentencing Act’s crack-to-powder cocaine sentencing disparity reduction retroactive.⁸⁶
- › **2020:** Washington, DC’s “Second Look Amendment Act,” which gave people who were convicted of serious offenses before the age of 25 and who have served at least 15 years in prison the opportunity to apply for resentencing.⁸⁷

Since 2010, the federal government has also funded the Justice Reinvestment Initiative (JRI), in which states examine the drivers of their prison populations to reduce prison incarceration and reinvest in solutions that lower recidivism rates.⁸⁸ Although JRI has led to at least 18 states adopting various sentencing reforms like reclassifying felonies to misdemeanors, giving judges discretion to apply “safety valves” if someone is faced with a mandatory minimum drug conviction, and creating or expanding alternatives to incarceration like presumptive probation for limited offenses, overall, its impact on reducing prison populations has been limited at best.⁸⁹ JRI’s consensus-driven model, under which reforms do not pass unless all parties—including bipartisan groups of legislators, court system actors, and others—are on board, means that the changes are tethered to which system actors deeply invested in existing sentencing paradigms are willing to make.⁹⁰

These reforms also have not significantly reduced racial disparities. Today, Black people are more than twice as likely to be arrested and 5.1 times as likely to be sentenced to prison than white people.⁹¹ Although this rate has decreased from its peak, when it was 8.3 times more likely, it has not decreased nearly enough.⁹² This disparate impact extends to other racial and ethnic groups—today, Latino people are 2.5 times more likely than white people to be sentenced to prison.⁹³ And this drop in disparity does not necessarily signal true reform: the proportional as well as actual number of white people in prison is climbing, but more incarceration, even if it reduces disparities, is not the answer to the inequities of the system.⁹⁴

Chapter 2: The Facts about Sentencing and Safety

To reduce our use of incarceration, we have to reexamine the foundational rationales for sentencing against the evidence and traditional assumptions about what sentencing should accomplish.⁹⁵ The history of sentencing shows that these rationales have at times been laced and applied with racism. They also do not stand up to the facts. Deterrence theory assumes that harsh sentences meted out to people convicted of a crime keep society safe overall by influencing them and others to think twice before engaging in unlawful behavior, whereas retribution, or “just deserts,” is premised on the notion that punishment supposedly restores the moral balance that is disrupted by a criminal act and delivers some semblance of satisfaction and resolution to the person harmed by that crime.⁹⁶ Using rehabilitation to justify incarceration assumes that treatment, personal growth, skill building, and the like cannot occur in the community. And incapacitation as currently practiced paints with a broad brush, assuming that many people, particularly those who are convicted for violent crimes, need to be in prison because they will commit similar crimes in short order. It is time to put these justifications to the proof. What does the evidence say when it comes to harsh punishment and long prison sentences? And what does it say about alternative forms of sentencing that take place in the community?

Who impacts sentencing? The roles of the legislature, prosecutor, sentencing commission, and court

A variety of state actors create sentencing regimes.

- › The **legislature** sets the type (restitution, community service, carceral, etc.) and lengths of possible sentences that follow a conviction for each charge, both carceral and community-based.^a
- › **Prosecutors** determine which charges to pursue against a person accused of unlawful behavior and thus control the parameters of the sentence a person will face if convicted.^b
- › Eighteen states plus the federal government set sentences based on sentencing guidelines created by a **sentencing commission** appointed by various state actors, including governors, legislative leaders, and the heads of the judiciary.^c Guidelines are supposed to create uniformity and rationality—tying sentence length closely to factors such as crime severity—and remove sentencing decision-making from “political” actors such as legislatures and judges.^d These commissions are legislatively created, however, so even in these states, the power to set sentences flows from state legislatures, and the decision to use or not use sentencing guidelines can be altered by legislative or judicial action.
- › Finally, **courts** impose the actual sentence on the person before them who has been convicted of a crime. Sometimes, courts have wide discretion on what sentences to set, even within the ranges established by a legislature. Other times, courts have little discretion and must apply rigid sentencing guidelines that factor in such characteristics as the person’s prior conviction history.^e

- a For an example of how legislative bodies weigh policy and practical decision-making in designing sentencing schemes, see Amanda Essex, *Reducing Spending, Preserving Public Safety in Criminal Justice Budgets* (Washington, DC: National Conference of State Legislatures, 2021), <https://perma.cc/V5BY-6Z9C>.
- b For prosecutorial decision points, see Jamila Hodge and Kelsey Reid, “7 Critical Decision Points,” in *Unlocking the Black Box of Prosecution* (New York: Vera Institute of Justice, 2021), <https://perma.cc/AZ29-G4EY>.
- c Robina Institute of Criminal Law at the University of Minnesota Law School, “What Are Sentencing Guidelines?” Sentencing Guidelines Resource Center, March 21, 2018, <https://perma.cc/M3JC-5DAT>.
- d Richard Frase, “Why Have U.S. State and Federal Jurisdictions Enacted Sentencing Guidelines?” Robina Institute of Criminal Law and Criminal Justice, March 25, 2015, <https://perma.cc/8KED-76BX>.
- e See for example U.S. Department of Justice, “Sentencing,” <https://perma.cc/QSE5-KAJ6>.

Fact 1: More severe sentences do not deter crime

The concept of deterrence seems intuitive: if punishments are more severe, people will stop committing crimes because the consequences are so dire. Deterrence theory was part of the rationale for lengthening and increasing the surety of sentences to incarceration through the expansion of mandatory minimums in the 1980s and 1990s.⁹⁷ Study after study, though, has shown that people do not order their unlawful behavior around the *harshness* of sentences they may face, but around their perceived likelihood of being caught and facing *any* sentence.⁹⁸ First, the general public’s knowledge of, or even an individual’s familiarity with, the specific criminal sanctions set by legislatures is often limited at best.⁹⁹ Second, most people are deterred from engaging in unlawful behavior not because they fear a particular sanction but simply because they know the behavior is prohibited.¹⁰⁰ A 2013 meta-analysis of studies on deterrence concluded that “it is clear that lengthy prison sentences cannot be justified on a deterrence-based, crime-prevention basis.”¹⁰¹

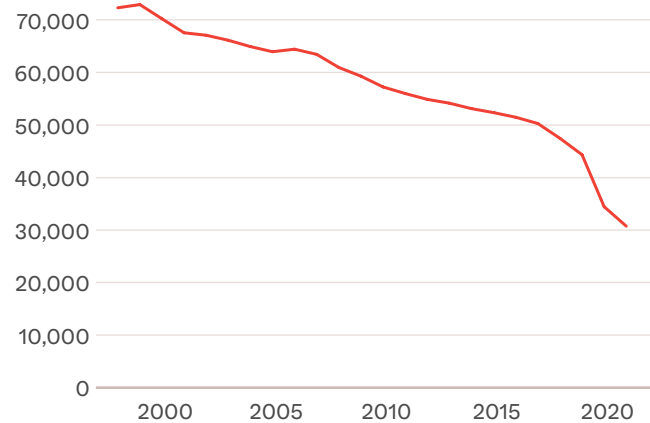
Fact 2: Rising incarceration from the 1970s to the 2000s was at best marginally responsible for the crime drop that began in the 1990s

Homicide rates have been falling across Australia, Canada, the United States, and the countries of western Europe for the last 50 years, without apparent correlation to their varying incarceration rates.¹⁰² (The United States, for example, leads in both the percentage of people who receive carceral sentences and the lengths of those sentences.¹⁰³) But if the type of sentencing scheme has no discernable effect on crime rates, what does? Some scholars have attributed the steady decline in lethal violence globally to increased self-control associated with industrialization, urbanization, modernization, and bureaucratization across the world.¹⁰⁴ Since the 1990s in the United States, rates for *all* violent crimes, including homicide and nonlethal violence, have dropped by about half—from 758 crimes per 100,000 in 1991 to 380 in 2019, with an uptick to 398.5 in 2020, corresponding in time to the COVID-19 pandemic and its fallout. (See “How should we interpret crime rates?” on page 25.¹⁰⁵)

In 2014, the National Research Council, in a seminal study, analyzed the large body of research on the connection between incarceration and crime in the United States from the 1970s through 2000 and concluded that although there was evidence that crime probably dropped somewhat due to the incapacitation of incarcerated people during this period, the “magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.”¹⁰⁶ A closer look at the data suggests that although increased incarceration likely had some effect on driving down property crime rates during the last decade of the 20th century, by the turn of this century, rising incarceration rates and longer sentences had failed to deliver any additional benefit to public safety. For example, researchers at the Brennan Center for Justice concluded that in the 1990s, increased incarceration may have resulted in bringing down property crime by anywhere from 0 to 12 percent, landing on a conservative estimate of 6 percent.¹⁰⁷ However, as crime rates continued to drop, by the 2000s, increased incarceration accounted for less than 1 percent of the decline in property crime.¹⁰⁸ Brennan Center researchers also found that increased incarceration was not the driving factor for the significant drop in violent crime that began in the 1990s and continued through the 2000s.¹⁰⁹

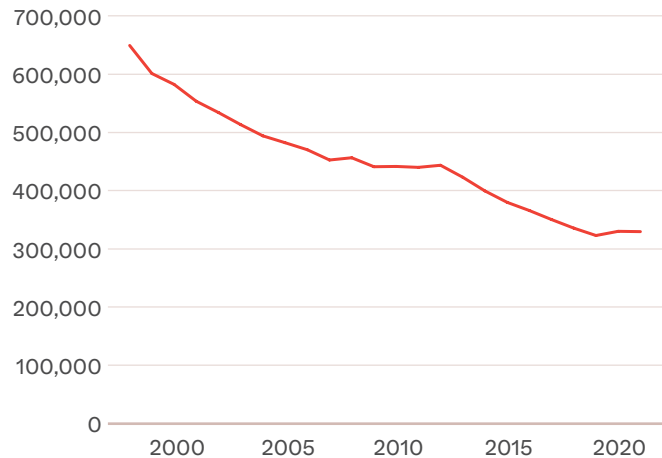
Why does incarceration have as little impact as it does on crime rates? There are two prevailing theories. One, already discussed, is that longer sentences do not necessarily work better than short ones to prevent people from engaging in unlawful behavior. The second is “replacement theory,” which posits that when people who commit relatively low-level crimes—such as drug use and sales, theft, and so-called quality-of-life offenses—are removed from the streets, others move in to take their place.¹¹⁰ We see evidence of these phenomena across the United States, where there is no discernable relationship between incarceration rates and crime rates: cities with high incarceration rates do not have lower crime rates than cities with low incarceration rates.¹¹¹

FIGURE 1A
New York prison population (1998–2021)



Source: Bureau of Justice Statistics, National Prisoner Statistics Program (1998–2002); and New York State Corrections and Community Supervision, *DOCCS Monthly Fact Sheet*, September 1, 2022 (2003–2021).

FIGURE 1B
New York State index crimes (1998–2021)



Source: New York State Division of Criminal Justice Services, *Index Crimes by County and Agency: Beginning 1990*, accessed via data.ny.gov.

How should we interpret crime rates?

Within the overall downward trend of violent and property crime, crime rates still varied from year to year from the 1990s to the 2000s. No one theory can definitively explain why. Some researchers have found significant correlations between crime rates and the declining numbers of adolescents and young adults, as people aged 15 to 30 more often engage in criminalized behavior than older adults.^a Others have attributed the decline in crime rates to decreased alcohol consumption and growth in average incomes across families.^b Other factors believed to influence the fluctuation in crime rates include demographic changes, economic changes, the introduction of new drugs (crack cocaine or opioids, for example), and the availability of guns.^c Although the social science research varies on this vast subject, the takeaway is that there is no one explanation or driver for what either causes or prevents crime, crime rates are often cyclical, and correlations are not the same as causation.^d

Indeed, best practice in interpreting variations in violent crime data posits that one or two annual upticks in crime does not make a new trend. It is normal for crime rates to fluctuate from year to year, and attention is warranted only when violent crime is persistently high or in places where short-term changes are statistically significant, large in absolute terms, and unusual in the context of historical trends and normal fluctuations.^e For example, a rise in gun violence and homicides across several cities in 2015 had many leaders in law enforcement and government loudly calling for more “law and order.”^f The upticks in shootings and homicides in 2015 receded by the next year—returning to the same low rate of the preceding years, and even lower.^g We have seen this same call in 2020 and into 2021, with criminal justice measures like bail reform and parole reform being blamed for an uptick in shootings and homicides—even though localities big and small that have not passed reforms are experiencing the same trend.^h

Although the causes for the uptick in shootings and homicides in the pandemic years of 2020 and 2021 are still being examined, the multi-year COVID-19 pandemic, with its resultant loss of life; trauma; and profound disruption of the social bonds of jobs, schools, and communities, together with the huge increase in guns purchased in 2020, are contenders.ⁱ Indeed, the early data from the first six months of 2022 shows that homicides and shootings are dropping slightly from their 2021 rates.^j The history of the 2015 crime rate fluctuation, plus what is known of the multifaceted nature of crime rates, strongly suggests that attempting to address the upswing through punitive criminal legal policies would be futile at best and more likely actively harmful.

^a Lauren-Brooke Eisen, Oliver Roeder, and Julia Bowling, *What Caused the Crime Decline?* (New York: Brennan Center for Justice, 2016), 57, <https://perma.cc/KJ4V-VNRK>.

^b *Ibid.*, 49–51, 55.

^c Maggie Koerth and Amelia Thomson-DeVeaux, “Trump Doesn’t Know why Crime Rises and Falls. Neither Does Biden. Or Any Other Politician,” *FiveThirtyEight*, October 8, 2020, <https://fivethirtyeight.com/features/trump-doesnt-know-why-crime-rises-or-falls-neither-does-biden-or-any-other-politician/>.

^d *Ibid.*

^e Bruce Frederick, *Measuring Public Safety: Responsibly Interpreting Statistics on Violent Crime* (New York: Vera Institute of Justice, 2017), 1, <https://perma.cc/VUD6-XCCU>.

^f Timothy Williams and Monica Davey, “U.S. Murders Surged in 2015, F.B.I. Finds,” *New York Times*, September 26, 2016, <https://www.nytimes.com/2016/09/27/us/murder-crime-fbi.html>.

^g John Gramlich, “What the Data Says (and Doesn’t Say) about Crime in the United States,” Pew Research Center, November 20, 2020, <https://perma.cc/JPB5-MFJZ>.

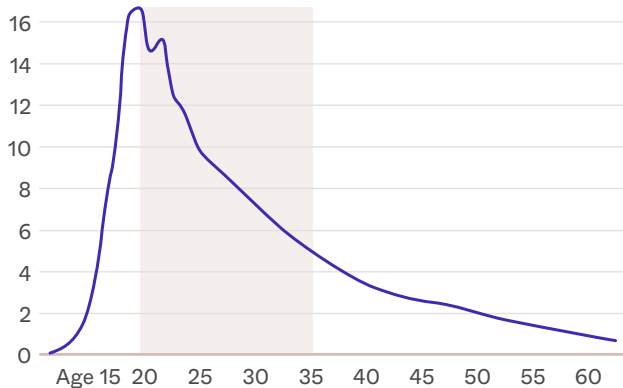
- h John Pfaff, “Can Criminal Justice Reform Survive a Wave of Violent Crime?,” *New Republic*, June 21, 2021, <https://newrepublic.com/article/162634/criminal-justice-reform-violent-crime>. For a detailed analysis contrasting the decline in robberies and burglaries in 2020 with the rise in murder and arguing that the pandemic is the causative factor for the difference, see John Roman, “The Spike in Homicide in 2020,” External Processing, September 27, 2021, <https://perma.cc/X53B-PRDQ>. For a comprehensive discussion of crime trends in 2020 to 2021 and comparison with higher rates in the 1990s, see Richard Rosenfeld and Ernesto Lopez, *Pandemic, Social Unrest, and Crime in U.S. Cities: June 2021 Update* (Washington, DC: Council on Criminal Justice, 2021), <https://perma.cc/W9JA-TGUU>. For a discussion about criminal legal reforms and the lack of relation to crime and crime and the pandemic, see Pfaff, “Can Criminal Justice Reform Survive a Wave of Violent Crime?,” 2021.
- i German Lopez, “2020’s Historic Surge in Murders, Explained,” *Vox*, March 25, 2021, <https://www.vox.com/22344713/murder-violent-crime-spike-surge-2020-covid-19-coronavirus>. See also Richard Rosenfeld, Thomas Abt, and Ernesto Lopez, *Pandemic, Social Unrest, and Crime in U.S. Cities: 2020 Year-End Update* (Washington, DC: Council on Criminal Justice, 2021), <https://perma.cc/4XMA-XKQF>; Julia P. Schleimer, Christopher D. McCort, Veronica A. Pear, et al., “Firearms Purchasing and Firearms Violence in the First Months of the Coronavirus Pandemic in the United States,” paper submitted to medRxiv July 10, 2020, <https://perma.cc/MJB6-7AN4>; and Champe Barton, “New Data Suggests a Connection between Pandemic Gun Sales and Increased Violence,” *The Trace*, December 8, 2021, <https://perma.cc/2KQ2-5Y9S>.
- j Richard Rosenfeld, Bobby Boxerman, and Ernesto Lopez, *Pandemic, Social Unrest and Crime in U.S. Cities: Midyear 2022 Update* (Washington, DC: Council on Criminal Justice, 2022), <https://perma.cc/STC3-8N9B>.

Fact 3: Young people “age out” of violent crime

Long prison sentences have been justified as an incapacitation strategy for people who have committed violent crimes based on the assumption that they are likely to continue to do so. But research shows that people “age out” of crime. Violent crime, measured by arrest rates, is much more prevalent among younger people from their late teens to early twenties.¹¹² The rate of arrest for such crimes begins to sharply decline after this point and is more than halved by the mid-thirties.¹¹³ This means that people who

FIGURE 2A
Murder arrest rate per 100K, by age (2010)

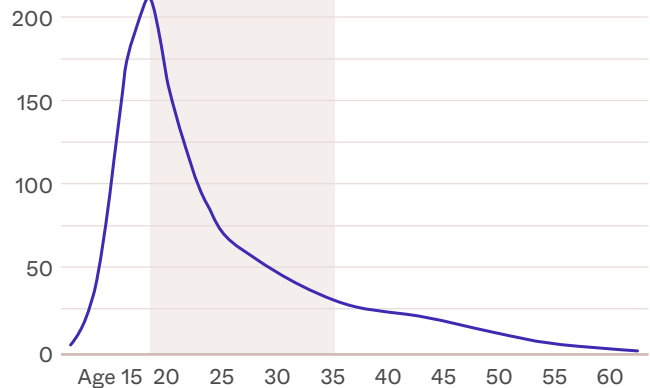
The rate of arrest for murder begins to sharply decline after the late teens and early twenties and is 65 percent lower by the mid-thirties.



Source: Howard N. Snyder, *Arrest in the United States, 1990–2010* (Washington, DC: Bureau of Justice Statistics, 2012), Figure 4, <https://perma.cc/54Y9-SF2W>.

FIGURE 2B
Robbery arrest rate per 100K, by age (2010)

The rate of arrest for robbery begins to sharply decline after the late teens and early twenties and is 80 percent lower by the mid-thirties.



Source: Howard N. Snyder, *Arrest in the United States, 1990–2010* (Washington, DC: Bureau of Justice Statistics, 2012), Figure 12, <https://perma.cc/54Y9-SF2W>.

commit crimes, even if they once presented a danger to others, may be safely released much before the end of the 20-, 30-, and 40-year or life sentences they are now serving and that these sentences should be made substantially shorter in the first instance. Additionally, a substantial body of research demonstrates that incarceration of any length is developmentally harmful for young people and contradicts safety, increasing the risk of future involvement with the criminal legal system rather than reducing crime.¹¹⁴

Case studies: Prison releases as a result of sentencing changes and administrative decisions that did not impact public safety

Several instances of declining prison populations and outright prison releases as a result of sentencing changes and administrative decisions show that making carceral sentences both rarer and shorter can be done commensurate with public safety. Although many of these examples are limited to drug and theft offenses—a reflection of limited political will to address sentencing reform for all convictions—they remain illustrative that reform predicated on less incarceration can in fact deliver more safety.

- › **California’s Proposition 47.** Due to its active adoption of “tough-on-crime” sentencing and parole violation policies, California’s prison population grew by 435 percent from 1983 to 2009, which led to severe overcrowding, unsanitary conditions, and inadequate in-prison programming, health care, and mental health treatment.^a After a series of federal lawsuits, the U.S. Supreme Court in 2011 ordered the state to reduce its prison population.^b The California legislature responded by passing “public safety realignment” laws, which shifted thousands of people convicted of low-level offenses from state prisons to local jails.^c

Despite realignment, the prison population did not drop to court-mandated levels until after voters passed Proposition 47 in 2014, which reclassified several property and drug offenses as misdemeanors and led to retroactively reduced sentences.^d Within three months, almost 9,000 people had been released from California jails and prisons; within one year, that became 13,000 people.^e The Black-to-white prison incarceration gap decreased as well, from about 4.5 percentage points to 2.8—a decrease of about 36 percent—from 2007 to 2017, and roughly half of this decline occurred after the state implemented Proposition 47.^f Evaluations of Proposition 47 have shown that it led to an immediate 15 percent decline in total drug arrests and a 20 percent decline in property crime arrests, as well as a reduction in racial disparities in arrest rates.^g Analyses of Proposition 47 and crime rates in California have found that the proposition’s passage was not associated with a change in violent crime rates, although larceny theft increased modestly following passage.^h Proposition 47 also reduced recidivism: two-year rearrest and reconviction rates were significantly lower for people released after serving sentences for Proposition 47 offenses compared to their pre-reform counterparts.ⁱ

- › **Federal releases due to changes in crack cocaine sentencing.** In 2011, more than 7,000 people serving federal prison sentences for manufacturing or trafficking in crack cocaine were released 30 months “early”—after serving an average of 10.25 years—when Congress changed mandatory minimums for these offenses, and the Federal Sentencing Commission made these changes retroactive.^j In 2018, researchers studied more than 7,800 people and compared recidivism rates of those who had been released under the new guidelines to those who had served their full sentences—12.75 years on average—before the change in law.^k They found no

meaningful difference in recidivism between the two groups after three years; the groups had an identical 37 percent recidivism rate measured by conviction for a new offense, a supervision violation, or an arrest that hadn't yet been resolved.^l

- › **New York's Rockefeller Drug Law Reform.** New York State passed the Rockefeller Drug Laws in 1973, which mandated extremely long carceral sentences for a wide range of drug offenses, such as 15 years to life for possession of four ounces of narcotics—or “about the same as a sentence for second-degree murder.”^m In 2009, the New York State Legislature passed full repeal of the law and replaced it with a different statutory structure.ⁿ This sentencing reform permitted drug treatment and alternative-to-prison programs instead of prison sentences and set shorter sentence lengths for those still permitted to be imprisoned for felony drug convictions.^o An impact study of these reforms found that in the nine months prior to Rockefeller Drug Law repeal, Black and Latino people were three times more likely than white people to receive a prison sentence following a felony drug arrest.^p After the drug law reforms, they were twice as likely as white people to go to prison—a 33 percent reduction in a disparity that researchers concluded could not be explained by factors other than race.^q Diversion increased from 15 percent to 21 percent of cases, and the use of prison sentences decreased from 29 percent to 19 percent of cases.^r A follow-up on both sample groups showed that those sentenced to diversion after the reforms had 43 percent fewer rearrests than those sentenced to incarceration.^s
- › **Illinois releases due to overcrowding.** From 1980 to 1983, Illinois corrections officials released 21,000 incarcerated people—or 10 percent of the prison population—to alleviate the state's severe prison overcrowding, brought about in part by a huge increase in prosecutorial staffing and the state's move from indeterminate to determinate sentencing.^t The people released were convicted of a wide range of crimes, from theft to murder; the biggest categories were burglary (26 percent) and armed robbery (15 percent).^u The average sentence reduction per person was about 105 days, or 12 percent.^v Researchers found that people released early did not have a higher probability of being arrested or returned to prison compared to people released after serving their full terms.^w For the people released early who did go on to commit crimes, these accounted for less than 1 percent (4,500 arrests) of all recorded arrests for the three-year period covering their releases.^x

* Box notes at end of report.

Fact 4: Incarceration breeds disruption and trauma that make communities less safe

Removing large numbers of people, mostly men, from their communities and warehousing them in prison for years at a time creates more harm than good. First, the loss of so many men in the prime of their lives destabilizes the neighborhoods they leave behind.¹¹⁵ Families lose providers, children lose parents, and people lose current and potential intimate partners.¹¹⁶ Not only does the loss of these primary relationships cause trauma, but employers also lose employees, churches lose members, and neighborhood groups lose contributors. After a critical mass of people are removed, crime may go up as a result of frayed community ties and the loss of informal social control that parents, siblings, grandparents, and loved ones provide.¹¹⁷

Second, prison itself can be a crime-creating environment. A 2021 meta-analysis of 116 studies found that custodial sentences not only do not prevent reoffending, but they can also actually increase it.¹¹⁸ In order to have the closest possible comparison between people sentenced to incarceration and those given alternative sentences, these types of studies use statistical modeling to control for factors such as age, gender, type and severity of charge for the current conviction, and prior conviction history.¹¹⁹ As data from the fallout of mass incarceration has accumulated, researchers have increasingly concluded that incarceration itself can be “criminogenic”—that the prison environment, separation from community, or even the process of returning to the community is so destabilizing that it increases the likelihood of continued encounters with the criminal legal system.¹²⁰

Fact 5: States overincarcerate people convicted of violent offenses with no measurable returns on public safety

Increases in the number and length of prison and jail sentences have not produced more public safety, simply because most incarcerated people are not a danger to the community. A tiny fraction of people commit the majority of violent crimes in the United States—according to the data, 1 to 5 percent of people engaged in unlawful behavior commit 50 to 75 percent of all violent crimes.¹²¹ Sentences to jail and prison for incapacitation should be reserved for that small sliver of people who have repeatedly seriously harmed others. (Chapter 6 on page 49 suggests legislative options for burden of proof and fact finding around this question at the time of sentencing.¹²²) Aside from this small group, there is little evidence that people who are convicted of a violent crime actually “specialize” in violence.¹²³ For most violent acts, although the violence creates real harm and needs to be repaired, it does not create an ongoing safety crisis that must be addressed with ever-increasing amounts of incarceration. Indeed, people age out of engaging in violent crime at earlier ages—with peak arrests occurring from ages 18 to 20 and falling steeply thereafter—than they do with drug and property crimes, for which people are much more likely to engage in repeat behavior.¹²⁴ Sentencing a person who engages in an act of violence compelled by moments of conflict or a specific circumstance to a lengthy term of incarceration does not further public safety because such behavior is not endemic to that person, it is a result of that circumstance and is unlikely to recur.¹²⁵

A tiny fraction of people commit the majority of violent crimes in the United States—according to the data, 1 to 5 percent of people engaged in unlawful behavior commit 50 to 75 percent of all violent crimes.

Fact 6: Community-based sentences increase public safety, even for offenses involving violence

Community-based sentences have a track record of delivering behavioral change and more community safety, even though they have been sorely underutilized in this country.¹²⁶ Many rehabilitative programming innovations of the last 30 years, including cognitive behavioral programming and restorative justice, were pioneered in the community.¹²⁷

These include well-known restorative justice programs—those that are explicitly concerned with repairing harm and restoring social relationships—like Common Justice in New York City and Impact Justice’s youth-based interventions in several cities in California, as well as smaller community-based programs like S.O.U.L. Sisters in New York City and Miami and Collective Justice in Washington State that developed organically in response to a particular community’s need for alternatives to the traditional criminal legal system.¹²⁸

A 2019 meta-analysis of 35 U.S. community-based restorative justice programs using a variety of processes found that restorative program participants were 41.5 percent less likely to be rearrested than people who had been prosecuted and sentenced in the traditional criminal legal system.¹²⁹ (See “Community-based and correctional programming that helps to repair harm” in the text box below.) A 2013 meta-analysis of 10 programs from three countries (Australia, the United Kingdom, and one program in the United States) using face-to-face restorative justice conferencing as an alternative to regular court processing found that people who took part in the conferences reduced their frequency of new contact with the criminal legal system compared to the control group.¹³⁰ These harm-reducing effects from restorative practices held in the community were, contrary to the practice of reserving restorative justice for lesser offenses, more consistent when people had committed serious or repeat offenses.¹³¹

Engaging in this kind of transformation and repair in the community is central to the program’s impact on both the person who committed harm and the person harmed. After all, the community is where the transgression, violence, or harm took place. The point of repair is to acknowledge harm and visibly give back to the harmed party and the community and restore a sense of fairness and safety.¹³² A person may feel sorry for or ashamed of what they have done and reorder their behavior with the help of programming and interventions, but if this transformation is not visible to the harmed people, they miss out on the benefit of seeing those efforts as part of their own healing.¹³³

Community-based and correctional programming that helps to repair harm

- › **Restorative justice programs** focus on repairing harm and restoring social relationships by participants acknowledging their actions and making amends in some way, even when direct contact with the crime survivor and/or their family may not be possible.^a Types of restorative justice include mediation; peacemaking or sentencing circles in which the harmed and responsible parties meet together with other members of the community to develop a response to harm that restores relationships; and restorative conferencing in which stakeholders, including the harmed party, the responsible party, family members, and a facilitator, negotiate the responsible party’s obligations to repair the harm done.^b
- › **Community service sentences** require the person to engage in repair by giving back or doing something that contributes to community improvement. The community service itself—whether

cleaning up a park, working at a community center, or some other act of public service—is done openly so that the community sees the person’s efforts. Jurisdictions in the United States tend to use this option for low-level offenses only, such as violations (offenses such as disorderly conduct that are categorized beneath misdemeanors in severity) and some misdemeanors.^c Other countries with lower incarceration rates use community service at a much higher rate and for more serious offenses.^d The United States’s lesser use of community service is a missed opportunity for public accountability in a greater range of cases. Community service could be reconceived in this country to move beyond picking up trash or painting walls to include actions tied much more closely to the needs of the community—as determined by the community—and linked to the skills and strengths of the person doing the service so that the work creates meaningful opportunities for growth. As so conceived, community service should be required for people of all income levels—so that it cannot be skipped by people who could pay a fine instead—and be flexible enough so that it can be completed around people’s work, childcare, and other obligations, so that missing community service doesn’t become a back door to a jail or prison sentence if a person misses an inflexible obligation.^e

- › **Treatment programs** are used to address underlying issues when violent or harmful actions are a result of trauma, harmful thinking patterns, unmanaged anger, and underdeveloped problem-solving skills. Examples of such programming include group-based cognitive behavioral therapy, which emphasizes changing decision-making, problem-solving, and unrealistic or problematic thinking; as well as alternatives-to-violence programming, which teaches ways to handle stress and potentially dangerous situations through a combination of personal regulation techniques, problem-solving, empathy, and connection.^f People whose crimes are related to substance use benefit from treatment, including medication-assisted therapy where indicated, which includes the use of anti-craving drugs such as buprenorphine along with counseling and behavioral therapies, especially for opiate dependency.^g

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- a Restorative justice programs, which are explicitly concerned with repairing harm and restoring social relationships, are one way of centering the survivor’s harm and requiring the responsible party to address it. sujatha baliga, “A Different Path for Confronting Sexual Assault,” *Vox*, October 10, 2018, <https://perma.cc/ZEL7-8QWN>.
 - b For an example of how this process can work in the context of the community and criminal legal system, see Impact Justice, “Diversion,” <https://perma.cc/QN7U-75E3>.
 - c NY Penal Code § 240.20 (disorderly conduct classified as a violation); and Sarah Picard, Jennifer A. Tallon, Michela Lowry, and Dana Kralstein, *Court-Ordered Community Service: A National Perspective* (New York: Center for Court Innovation, 2019), 10, <https://perma.cc/TFV4-AKPK>.
 - d Community service is required in 41 percent of community-based sentences in European countries and in 35 percent of suspended sentences. Marcelo F. Aebi, Galma Akdeniz, Gordon Barclay, et al., *European Sourcebook of Crime and Criminal Justice Statistics 2014 (5th ed.)* (Helsinki, Finland: European Institute for Crime Prevention and Control, 2017), 196, Table 3.2.3.1, <https://perma.cc/CN5X-KWX9>.
 - e Lucero Herrera, Tia Koonse, Melanie Sonsteng-Person, et al., *Work, Pay, or Go to Jail: Court-Ordered Community Service in Los Angeles* (Los Angeles: UCLA Labor Center and UCLA School of Law, 2019), <https://perma.cc/L5TQ-7SU4>.
 - f For cognitive behavioral therapy, see Development Services Group, Inc., *Cognitive-Behavioral Treatment* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2010), <https://perma.cc/F8Y3-R5XS>. A cost-based meta-analysis of correctional interventions and crime prepared in 2013 by the Washington State Institute for Public Policy (WSIPP) demonstrated that cognitive behavioral treatments have significant benefits and potential. Steve Aos and Elizabeth Drake, *Prison, Police, and Programs: Evidence-Based Options that Reduce Crime and Save Money* (Olympia, WA: WSIPP, 2013), 5, <https://perma.cc/9GQX-44X9>.

Regarding alternatives-to-violence programs, see Marsha L. Miller and John A. Shuford, *The Alternatives to Violence Project in Delaware: A Three-Year Cumulative Recidivism Study* (Wilmington, DE: New Hampshire Charitable Foundation, 2005), <https://perma.cc/C7H6-LVGH>; and James McGuire, “A Review of Effective Interventions for Reducing Aggression and Violence,” *Philosophical Transactions of the Royal Society B* 363, no. 1503 (2008), 2577–2597 (focusing on interventions for justice-involved participants and finding, after reviewing 11 meta-analyses for system-involved people who had been convicted of violent acts, “there are numerous positive outcomes. These permit reasonable confidence in the broad conclusion that it is possible to reduce violent recidivism by systematic and carefully designed intervention.”), <https://perma.cc/PG3H-H858>.

g For programs targeting substance use disorders generally, see National Institute on Drug Abuse, *Principles of Drug Abuse Treatment for Criminal Justice Populations: A Research-Based Guide* (Washington, DC: U.S. Department of Health and Human Services, 2012), 17, <https://perma.cc/3TSR-XAMB>. For medication-assisted treatment specifically, see Kelly E. Moore, Walter Roberts, Holly H. Reid, et al., “Effectiveness of Medication Assisted Treatment for Opioid Use in Prison and Jail Settings: A Meta-Analysis and Systematic Review,” *Journal of Substance Abuse Treatment* 99 (2019), 32–43, <https://perma.cc/F8KF-SXDE>.

Fact 7: Survivors of crime prefer prevention, healing, and repair to harsh punishments

The criminal legal system often predicates its harsh responses to a finding of wrongdoing by saying that this is what survivors of crime want. But most crime isn’t processed through the criminal legal system—60 percent of violent crimes and 66 percent of property crimes are not reported to police—and lawmakers and other public servants who represent communities need to look at other sources, such as surveys of survivors of crime, to understand what they experience and what they want.¹³⁴ And in fact, by a margin of nearly 2:1, crime survivors surveyed in 2022 preferred that the criminal legal system focus more on rehabilitation than punishment.¹³⁵

The Bureau of Justice Statistics has collected information annually since 1973 through its National Crime Victimization Survey to better understand the patterns of victimization even when a crime is not reported to police, and in 2016 and 2022, the Alliance for Safety and Justice commissioned two national surveys of victims’ views.¹³⁶ More than three-quarters of people surveyed by the Alliance in 2022 received no outside help such as counseling, economic assistance, or victim compensation after the incident, and only 20 percent received assistance from the criminal legal system.¹³⁷ Although victim services are more readily available for certain categories of crime, such as intimate partner violence—one of the most common forms of violent crime—even for intimate partner violence, only 26 percent of people in 2019 received services.¹³⁸ Research also shows that crime survivors—regardless of race and age—suffer trauma.¹³⁹ In fact, more than two-thirds of survivors of “serious violence” experience socio-emotional problems.¹⁴⁰ This trauma is often used to justify harsh, punitive sentences, but by a nearly 2:1 margin, the survivors surveyed preferred rehabilitative sentencing, 6 in 10 preferred shorter sentences to long ones, and by a 3:1 margin, they preferred holding people accountable through options beyond just prison, such as drug and mental health treatment and restorative justice.¹⁴¹ These numbers reflect a serious disconnect between the desires of many crime survivors and the goals of the

traditional criminal legal process.

In contrast, crime survivors who engage in a reparative experience, such as face-to-face facilitated conferencing as part of a restorative justice process with the person who harmed them, report a greater sense of safety for themselves as well as for others.¹⁴² Restorative conference participants, including those who survived violence, report feeling more satisfied at the end of that process than people who participate in traditional court processing and sentencing.¹⁴³

Fines as a community-based sentencing option

In Europe and Latin America, fines are a very common, stand-alone sanction, unlike in the United States, where they often accompany a custodial sentence (except for very low-level offenses like traffic violations).^a Fines enable the state to issue a sanction for unlawful behavior without the expense of community programming or supervision and, in the United States, often serve as a source of revenue for the criminal legal system and the government's general coffers.^b Although this provides an incentive for legislators and judges to set fines, it also encourages the fines set to be significant.^c If the United States were to center fines as an alternative sentencing option, it must look to the ways other countries have attempted to make these fines equitable.

To address the burden that fines present for people with low incomes, so-called day fines are calibrated to both the seriousness of the offense and a person's ability to pay.^d To follow through on the promise of day fines, judges must be given clear standards about what constitutes indigence. Otherwise, as has happened in Germany, judges may not be able to conceive of just how difficult it is for people to pay even very low fees and continue to set fines that are unfairly burdensome.^e

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- a Ram Subramanian and Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States* (New York: Vera Institute of Justice, 2013), 8, <https://perma.cc/C224-YVDD>; Tapio Lappi-Seppälä, "Nordic Sentencing," *Crime and Justice* 45, no. 1 (2016), 17–82, 41; and Edwin Zedlewski, *Alternatives to Custodial Supervision: The Day Fine* (Washington, DC: National Institute of Justice, 2010), <https://perma.cc/N8CW-5KTA>.
 - b Alexes Harris, Beth Huebner, Karin Martin, et al., *Monetary Sanctions in the Criminal Justice System* (New York: Laura and John Arnold Foundation, 2017), 5, <https://perma.cc/B545-4EYD>.
 - c See for example Mike Maciag, "Addicted to Fines," *Governing*, August 19, 2019, <https://www.governing.com/archive/gov-addicted-to-fines.html>.
 - d Zedlewski, *Alternatives to Custodial Supervision*, 2010.
 - e Mitali Nagrecha, *The Limits of Fairer Fines: Lessons from Germany* (Cambridge, MA: Harvard Law School, 2020), 8–9, <https://perma.cc/9RAK-RCJV>.

Chapter 3: How Do We Change Course? Guiding Principles for Sentencing

The crisis of mass incarceration is the result of a series of choices made over decades. To make new choices, we need new guiding principles, backed by evidence, that tie into foundational, though ignored, principles of liberty; lead us to more public safety; and tap into common experiences of seeking productive responses to harm. These principles must be built on the lived experiences of people who have served sentences and crime survivors. They must also resonate with constituents and decision-makers in statehouses throughout the country because they will be tested in the crucible of electoral politics, where the battle between new guiding principles and old rationales will be fought.

We propose three new guiding principles that should undergird discussions and policy change on sentencing reform.

- 1 Privilege **liberty over incarceration** as much as possible, building on the Constitution’s protections of this right.
- 2 Deliver more **public safety based on evidence** as to what actually creates strong, healthy, and thriving communities.
- 3 **Repair harm to survivors of crime** so that their needs, and not rhetoric about retribution, are centered in our solutions.

Guiding principle 1: Sentencing policy should privilege liberty over incarceration and thereby build racial justice

The Constitution, despite its drafters’ originally limited conception of whom it was meant to benefit, provides strict parameters for when and how freedom—a fundamental right—may be abridged. Freedom shows up as its synonym “liberty” in the Preamble, as well as in the texts of the Fifth and 14th Amendments, and in the Declaration of Independence as an inalienable right to life, liberty, and the pursuit of happiness.¹⁴⁴ Constitutional law mandates that the government may not limit fundamental rights such as liberty without a “compelling purpose” and must use the least restrictive means to do so.¹⁴⁵

Yet legislatures and courts have frequently departed from these precepts when establishing and interpreting carceral sentences in the past, and Black people have disproportionately borne the trauma of these decisions. But to seek racial justice in the criminal legal system must mean more than reaching racial equality—after all, states could achieve strict race equality by simply locking up as many more white people as is necessary to achieve proportional parity with Black people. Justice requires a sentencing structure that is not focused on how many people can be incarcerated and why, but is based on a presumption that all people have a fundamental right to liberty that should be infringed only narrowly and for the most compelling reasons.

Racial biases infect every step of the criminal legal system, and there has been a consistent push, implicit or overt, to overpunish Black people—from the choice of what behavior is criminalized to decisions to arrest and charge, seek or grant bail, or offer leniency instead of punishment.¹⁴⁶ A criminal conviction should not extinguish that presumption of freedom.¹⁴⁷ Legislatures can choose to privilege liberty at the sentencing stage to serve as a backstop and safeguard. Using incarceration as a very last resort in the system and putting freedom on a pedestal—not to be knocked down except in the narrowest of circumstances—is an assertion of Constitutional principles to uphold fundamental rights for everyone and a step toward achieving racial equity.¹⁴⁸

Guiding principle 2: Sentencing must deliver actual, not performative, safety

State actors rightly see delivering public safety as one of their most important roles. Yet, as demonstrated in Chapter 2, harsh sentencing does not deliver safety. Instead, state actors who privilege liberty in sentencing and design community-based sentencing as the default are delivering more public safety, not the expensive and harmful performance of safety that our current system of mass incarceration plays.

Sentences to incarceration should be reserved for limited instances in which they actually deliver more public safety through a narrowly tailored use of time-bound restrictions of freedom for people who have demonstrated that if left in the community, they are likely to cause serious harm. (Chapter 6 on page 49 suggests legislative options for burden of proof and fact finding around this question at the time of sentencing.) But as discussed in Chapter 2, our current system goes far beyond this, with long and harsh sentences for all types of offenses—regardless of the public safety impact. This remains true in 2022, when some states are doubling down on lengthy sentences to address a multi-year rise in gun violence in many parts of the country co-occurring with the COVID-19 pandemic.¹⁴⁹ Yet increasing jail and prison sentences is a poor crime deterrence strategy, as noted in Chapter 2. Instead, jurisdictions should invest in violence prevention strategies, among them promising community-based violence interventions such as violence interruption, hospital-based interventions, and group violence interventions, which are collaborations among community leaders, service providers, and law enforcement.¹⁵⁰ And the best crime prevention solution of all? To invest in the services, resources, and supports that help communities to flourish and thrive, especially after the devastation of the pandemic.¹⁵¹

Sentences to incarceration should be reserved for limited instances in which they actually deliver more public safety through a narrowly tailored use of time-bound restrictions of freedom for people who have demonstrated that if left in the community, they are likely to cause serious harm.

Guiding principle 3: Sentencing should repair harm to victims

For decades, policymakers have justified long carceral sentences as the retribution or “just deserts” wanted by crime survivors.¹⁵² Pushing for long sentences as “justice” for a crime survivor presupposes a zero-sum game: that the survivor’s pain cannot be answered unless the responsible party is severely punished by losing their freedom. But survivors tell a different story. By a margin of 3:1, survivors of crime prefer holding people accountable through more proactive measures like rehabilitative programming, mental health treatment, drug treatment, community supervision, or community service, rather than prison sentences.¹⁵³ Many survivors of crime come from communities that have borne the brunt of violence and disinvestment and know the criminal legal system—including jails and prisons—well.¹⁵⁴ Prison sentences are reactive, not proactive, and they don’t do anything to help the person harmed other than to remove the person who did the harm from society.¹⁵⁵ Moreover, the experience of incarceration can be violent and damaging, and jails and prisons have failed miserably to keep survivors of crime and other people safe.¹⁵⁶

There is another way: when a person violates the law or harms another person, they should follow it with repair—actions by that person to acknowledge and address the harm. Repair protects against the risk of future harm by creating a process that is mutually beneficial to the party who inflicted the harm and the party who was harmed, who agree on a set of actions the responsible party must take to repair the harm and restore trust.¹⁵⁷ Repair and reconciliation processes such as restorative justice aren’t limited to small grudges and slights—they can be deployed for major breaches of trust and serious harm, with the expectation that more reparative and rehabilitative work must be done depending on the seriousness of the harm.¹⁵⁸

Sentencing laws can be changed to make repair and safety the operative principles for both setting the range of sentencing options at the legislative level and the specific sentence at the individual level. The question at sentencing would not be how many months or years of incarceration are needed to restore the moral balance, but what process and actions—such as listening, apology, restitution, and service—are needed to help repair the harm to the specific survivor of crime (if there is one) or to society and to help the person grow and change so that they are less likely to harm others.¹⁵⁹ This process of restoration and reinvention is hard work—requiring more action and effort from the person sentenced than enduring punishment or retribution and with better long-term outcomes for safety and overall community well-being.¹⁶⁰

Repair protects against the risk of future harm by creating a process that is mutually beneficial to the party who inflicted the harm and the party who was harmed, who agree on a set of actions the responsible party must take to repair the harm and restore trust.

Chapter 4: Seven Sentencing Proposals to Help End Mass Incarceration

Congress and state legislatures can take steps immediately to advance sentencing reform that privileges liberty to deliver racial equity, more public safety, and restorative justice. This chapter outlines seven legislative changes elected officials can adopt that represent a paradigm shift from the sentencing status quo, most certainly, but are already in the political discourse. They are the place to start to significantly reduce our prison population and demonstrate how foregrounding liberty, evidence-based safety, and repair can work in practice. If enacted, these reforms will significantly reduce racial disparities by promoting more freedom over confinement. They will advance safety by moving people out of prison who pose little danger or threat to any person or the community and will build the statutory framework currently lacking to make community-based sentencing the norm. Finally, these reforms promote repair over retribution by scaling back on punishment for punishment's sake and providing opportunities for the person sentenced to demonstrate repair for the harm they have caused. In order of their decarcerative impact (see Chapter 5), the reforms are

- › set a maximum prison sentence of 20 years for adults and 15 years for young people up to age 25;
- › allow people to earn one day off their sentences per day of positive behavior;
- › remove prior conviction enhancements;
- › abolish mandatory minimums;
- › allow any crime, regardless of severity, to be considered for a community-based sentence;
- › create a second-look sentencing review; and
- › mandate racial impact statements for crime-related bills.

We provide more depth on each of the seven proposals below, with proposed language for legislation where possible.

1. Set a maximum prison sentence of 20 years for adults and 15 years for young people up to age 25

The Sentencing Project, which has studied the issue of excessive sentencing for more than 30 years, proposes a maximum of 20 years of incarceration for the most serious of crimes—those that currently carry life or life without parole sentences, such as murder.¹⁶¹ The rationale is that at 20 years, these prison sentences have served whatever safety, retributive, or incapacitation purpose they may once have had. In the

rare instance of an ongoing safety threat, an expert review board can assess the case and order continued incarceration under civil commitment if such a threat is confirmed.¹⁶² This is similar to Norway’s sentencing scheme, where the maximum sentence for the most serious crimes is 21 years; however, the state may extend that term of detention in increments of five years based on a showing by the prosecutor that the person continues to pose an ongoing safety threat and that the sentence is insufficient to protect society.¹⁶³

Vera supports the Sentencing Project’s evidence-based proposal and suggests a refinement that people who are tried as adults but whose crime of conviction occurred before they turned 26 have their maximum term capped at 15 years. This reduced maximum recognizes that this age group had a reduced level of culpability due to greater impulsivity and receptivity to peer influence at the time of the unlawful behavior and a high likelihood of marked development, growth, and change as they exit their late teens and early 20s.¹⁶⁴

We propose that states adopt the following draft language for capping maximum sentences at 20 years (15 for people under 26) for the most serious felonies, such as Class A felonies, and create descending maximums for each class of less serious offenses, such as Class B, C, D, and E felonies.¹⁶⁵ Capping maximums for these less serious offenses is necessary because without such intermediate limits, sentences for a wide range of less serious behavior could nonetheless cluster at the absolute maximum sentence due to the United States’s traditional heavy-handedness in sentencing. The following proposed language draws from the American Law Institute’s Model Penal Code for sentencing Section 6.06 (see sidebar), which likewise calls for increasingly lower caps for each class of felony, but doesn’t express a firm opinion about what those caps should be.¹⁶⁶ We chose relatively low maximums in line with our guiding principle that privileges freedom as much as possible.

2. Allow people to earn one day off their sentences per day of positive behavior

The vast majority of states and, to a lesser extent, the federal government, have long recognized the power of giving incarcerated people the ability to earn time off their sentences for positive behavior while incarcerated, a practice known as “good time.”¹⁶⁷ The scheme offers people some agency, however limited, in determining when they will go home by rewarding their efforts to follow institutional rules and participate in required programming. Even more powerfully, “earned” or “merit” time facilitates one of sentencing’s most important goals—repairing

Sentence of Incarceration

(6) A person who has been convicted of a felony may be sentenced by the court, subject to the appropriateness of a carceral sentence of any length in the person’s case, to a term of incarceration within the following maximum terms:

- (a) in the case of a felony of the first degree, the term shall not exceed 20 years, except if the felony of which they were convicted occurred when they were under 26, in which case it shall not exceed 15 years;
- (b) in the case of a felony of the second degree, the term shall not exceed 10 years;
- (c) in the case of a felony of the third degree, the term shall not exceed five years;
- (d) in the case of a felony of the fourth degree, the term shall not exceed three years;
- (e) in the case of a felony of the fifth degree, the term shall not exceed one year.

harm—by incentivizing extra efforts such as volunteering; participating in education, voluntary treatment, and therapy offerings; and providing mentorship while behind bars.¹⁶⁸

States take a variety of approaches to such earned time credits, some offering as much as 70 percent off a sentence, others no more than 8 percent, and a few none at all.¹⁶⁹ One constant is that good time is consistently limited for people convicted of violent offenses, playing into tired and harmful narratives that long sentences produce safety and that retribution takes priority over repair. Recent good-time reform efforts—like Louisiana’s 2017 Public Act 280, which created good-time earning rates of 65 percent off of one’s sentence for nonviolent offenses and 30 percent off for first-time violent offenses, and Illinois’s 2019 SB 1971, which didn’t pass but sought to increase good-time sentencing reductions from 0 percent to 25 to 28 percent for the most serious offenses and from 25 to 35 percent for other serious offenses—fall short in reaching the goal of repair.¹⁷⁰

We propose that states consider an earned time provision of a day for a day—that for each day a person maintains a positive disciplinary and programming record, they earn a day toward freedom. States must guard against documented racial disparities in issuing disciplinary tickets to equitably implement this reform.¹⁷¹ An example of how to draft a day-for-day good-time earning comes from Illinois’s existing law, which already permits such an earning rate for many convictions, but carves out all serious offenses as well as several drug offenses. Without these carveouts, the bill would read as follows:

The Department of Corrections shall prescribe rules and regulations for awarding and revoking sentence credit for persons committed to the Department. Sentence credit shall be awarded for the following:

- (a) Successful completion of programming while in the custody of the Department;
- (b) Compliance with the rules and regulations of the Department; or
- (c) Service to the institution, service to the community, or service to the State.

For all offenses, the rules and regulations shall provide that a person who is serving a term of imprisonment shall receive one day of sentence credit for each day of their sentence of imprisonment or recommitment. Each day of sentence credit shall reduce by one day the person’s period of imprisonment or recommitment.¹⁷²

3. Remove extensions of sentences based on prior convictions

Most states have prior conviction enhancements, which increase the probability and length of prison sentences for each felony conviction a

person has on their record.¹⁷³ Their use is so common that we fail to even question their value, justification, or utility. Yet sentence enhancements based on prior conviction history are deeply problematic on at least three grounds: they do not promote safety, they are one of the major drivers of racial disparities in sentencing, and they punish people disproportionately for their behavior.

› **Safety.** Policymakers often support prior record enhancements by using a deterrence argument: they claim that people will be deterred by knowing that if they commit a crime again, they will be punished more severely.¹⁷⁴ But increasing the severity of punishment based on a person's previous convictions does not effectively deter future criminal behavior.¹⁷⁵ (See Chapter 2, Fact 1, on page 23.) Some argue for enhancements on incapacitation grounds because people have “proven” themselves incapable of living safely in the world. But such wholesale warehousing of people based on a wide range of prior convictions—ranging from theft, drug, motor vehicle, and violent offenses—is an extravagantly wasteful and traumatic way of attempting to achieve safety.¹⁷⁶ People who engage in repeated acts of serious harm—the 1 to 5 percent subset of the people who have committed violence (see Chapter 2, Fact 5, on page 29)—are perhaps the intended focus for proposed incapacitation, but there are far more targeted ways to address these people, such as requiring specific findings of patterned harm at sentencing to extend sentences, as opposed to indiscriminately doing so for everyone based on prior records. (For a discussion of a proposed sentencing structure that considers such a pattern of harm in setting incapacitative sentences, see Chapter 6 on page 49.) Prior convictions play a very limited, if any, role in most European countries.¹⁷⁷ In the United Kingdom, for example, which allows for some consideration of prior convictions, they play a role only to the extent that they are “recent” and “relevant” to current conduct.¹⁷⁸

› **Racial disparities.** Because of racist arrest and conviction practices, Black people are more likely to have conviction histories, which in turn results in sentences to more time in prison than white people.¹⁷⁹ In Minnesota, for example, data gathered over a decade in the early 21st century showed that Black people were almost 50 percent more likely to receive a prison sentence, and “well over half of this racial difference is due to [B]lack individuals having higher criminal history scores” that affect their potential sentences under the state's sentencing guidelines.¹⁸⁰ In a separate study of 2012 sentencing data from four states, roughly half of the racial disparity in sentencing Black people to incarceration was directly attributable to their higher conviction history scores.¹⁸¹ Besides being more likely to receive a sentence at all, they then served sentences that were 10 percent longer than those of similarly situated white people.¹⁸²

Enhancements based on prior conviction history are deeply problematic on at least three grounds: they do not promote safety, they are one of the major drivers of racial disparities in sentencing, and they punish people disproportionately for their behavior.

- › **Disproportionate punishment.** Enhancing a new sentence because of a person’s past conviction causes a person to pay again for the past crime.¹⁸³ Moreover, if a sentence is supposed to repair the harm caused, that harm is no greater by virtue of the fact that the person has prior convictions; the cost to the person harmed no higher.¹⁸⁴

The only just solution is to simply delete prior record enhancements from each state’s criminal code and put in prophylactic language that would forbid them from being added, such as this language adapted from the Western Australia criminal code: “A sentence may not be aggravated by the fact that [a person] has a [conviction history].”¹⁸⁵

4. Abolish mandatory minimums

All 50 states, the District of Columbia, and the federal government require a judge to order a set minimum period of incarceration if a person is convicted of certain crimes.¹⁸⁶ But mandatory minimums, as discussed earlier, rely on ineffective deterrence theory or are purely punitive, rather than delivering true public safety. As such, mandatory minimums send a political message of being “tough on crime” without actually affecting crime rates, and—practically speaking—give prosecutors tremendous power in plea bargaining.¹⁸⁷ They also limit judges’ discretion to consider a person’s individual circumstances and promote repair. As such, there is growing discourse about abolishing mandatory minimums and requiring prosecutors and judges to wrestle with the appropriateness of incarceration in each case, as well as the length of any carceral sentence.¹⁸⁸

States can remove all mandatory minimums by simply adding a blanket statement to their penal codes. The language in the Model Penal Code is one example:

6.11 “Sentence of Incarceration”

- (1) A person convicted of a crime may be sentenced to incarceration as authorized in this Section [] . . .
- (8) The court is not required to impose a minimum term of incarceration for any offense under this Code. This provision supersedes any contrary provision in the Code.¹⁸⁹

Another approach is to review existing statutes and delete each reference to a set minimum period of incarceration per crime or class of crime (Class A felony, Class B felony, Class C felony, drugs, etc.) and replace it with a more general statement that a judge may sentence someone to incarceration up to the maximum period of incarceration. In 2021, after similar legislation had failed in previous legislative sessions, California passed SB 73, eliminating mandatory minimum sentences for most convictions

for drug sales.¹⁹⁰ New Jersey's legislature attempted to pass a similar bill in the 2020 and 2021 legislative sessions, but the governor ultimately vetoed both attempts.¹⁹¹ In 2017, federal legislation was introduced that would have repealed mandatory minimums for federal drug crimes, but the bill did not pass.¹⁹²

5. Allow any conviction, regardless of severity, to be considered for a community-based sentence, including restorative justice

Alternative to incarceration programs—known as ATI—are community-based programs, often accompanied by a term of probation, that a person must participate in instead of being sentenced to incarceration.¹⁹³ ATI programs can, and do, serve people charged with violent offenses, providing support so that they can safely engage in treatment and reparative programming in the community.¹⁹⁴ An example of such a program is New York's Common Justice, which enrolls young people facing assault and robbery charges in a restorative justice alternative to incarceration program.¹⁹⁵ However, many states do not give judges the discretion to send people to ATI programs if it is their second offense or if they are facing charges involving violence.¹⁹⁶ These limits are not grounded in the data, evidence, or research and are simply a result of the same political forces that drive much of sentencing and criminal justice policy. To be sure, community sentences for the most serious crimes, such as homicides, will likely be the exception rather than the rule, but it is possible to imagine a fact-specific scenario in which all three guiding principles of liberty, safety, and repair can be satisfied by such an outcome. To make the change, a jurisdiction would simply remove the excluded crimes from statutes that prescribe alternatives to incarceration. Model legislation could read as follows:

If the court determines that an alternative sentence is appropriate, it shall waive imposition of a carceral sentence within the standard sentence range and impose an alternative community-based sentence with or without conditions. The sentencing court may consider any person for an alternative sentence, regardless of the crime of conviction. In determining whether an alternative sentence is appropriate, the court may consider factors such as whether the person and the community will benefit from the use of the alternative, and whether the person can safely remain in the community for the duration of the community-based sentence.

When designing and implementing ATI programs, state actors should recognize that community sentences burdened with requirements of reporting, drug testing, curfews, and restrictive movements also deprive people of liberty and that sanctions for violations of these conditions are an increasing driver of state prison incarceration—almost half of all admissions to jail and prison are for technical violations of probation and parole.¹⁹⁷ Jurisdictions that have undergone probation reform to shift

toward a light-touch approach have seen promising results: for example, beginning in 1996, New York City shifted supervision of all low-risk probation clients to an electronic kiosk system, only requiring in-person supervision under specific circumstances.¹⁹⁸ Rearrest rates among both high- and low-risk clients declined after the city expanded the kiosk program.¹⁹⁹

6. Create a “second-look” sentencing review

Second-look laws allow courts to reexamine a sentence after a person has served a period of time—10 to 15 years in most iterations—to determine if the sentence still serves its original purpose.²⁰⁰ Ever since the American Law Institute proposed the second-look concept in the 2009 Model Penal Code, such laws have increasingly become a viable way to reexamine needlessly long sentences and send people home from prison who can safely return to the community.²⁰¹

In the 2021 legislative session, second-look bills were introduced in 14 states; three, in Illinois, Maryland, and Oregon, passed.²⁰² The less restrictive versions of these bills allow incarcerated people to petition for relief; more restrictive versions reserve the petition power to district attorneys or the courts.²⁰³ For example, in 2017, the District of Columbia passed the first petitioner-initiated second-look law for incarcerated people who committed the unlawful behavior before the age of 18; Maryland’s 2021 law follows a similar path.²⁰⁴ In 2019, U.S. Senator Cory Booker introduced a federal second-look bill that would allow a person serving a lengthy federal prison sentence to petition for resentencing after 10 years if the person does not present a danger to the safety of any person or the community and resentencing is in “the interest of justice.”²⁰⁵ California’s prosecutor-led second-look law in 2018 follows the more restrictive path, and Washington’s 2020 and Oregon’s 2021 legislation are similar.²⁰⁶ Second-look resentencing can also be instituted judicially, as evidenced by the 2022 New Jersey Supreme Court decision that the state constitution’s prohibition on cruel and unusual punishment prohibits people under the age of 18 from being held more than 20 years without the opportunity to seek resentencing.²⁰⁷

Although second-look bills are a critical step toward reducing the number of people currently incarcerated, they can suffer from the same political pitfalls as parole boards and other entities that exercise discretion. For example, the California prosecutor-led second-look law that passed in 2019 has thus far resulted in about 100 releases in a state with a daily prison population of nearly 100,000 people.²⁰⁸ The District of Columbia bill, along with its later expansion to encompass people who were convicted of offenses that occurred up to age 26, has a better track record, with 67 people released in five years in a jurisdiction that has a daily incarcerated population of around 1,400.²⁰⁹ District of Columbia judges are

Although second-look bills are a critical step toward reducing the number of people currently incarcerated, they can suffer from the same political pitfalls as parole boards and other entities that exercise discretion.

appointed, not elected, and thus may feel more freedom from the political ramifications of granting resentencing petitions.²¹⁰

A model second-look bill, drawing on the District of Columbia's second-look act, but setting the look-back period at 10 years instead of 15 and removing the age-limited consideration, is contained in note 213.²¹¹

7. Mandate racial impact assessments for crime-related bills

Racial impact assessments (also called racial impact statements) evaluate the cost in racial disparities of proposed criminal justice legislation, just as fiscal impact assessments measure their cost in dollars.²¹² Requiring these statements acknowledges that most legislation that creates new crimes or makes sentences harsher likely exacerbates racial disparities and forces legislatures to see this data and determine whether to change course in light of it.²¹³ Otherwise, once behavior is criminalized or sentences are made more severe, these actions are exceedingly difficult to reverse.²¹⁴

Racial impact assessments vary in breadth and depth and are currently used in just nine states.²¹⁵ In 2008, Iowa passed the first and most expansive list of what actions must be modeled: a racial impact statement must be attached to “any bill, joint resolution, or amendment which proposes a change in the law which creates a public offense, significantly changes an existing public offense or the penalty for an existing offense, or changes existing sentencing, parole, or probation procedures.”²¹⁶ While Iowa's racial impact statements attach by mandate, other states use different mechanisms, and the process for requests differs widely between the states.²¹⁷ States also differ in the data they collect and report. In New Jersey, racial impact statements must report a proposed bill's estimated impact on “racial and ethnic minorities” and juvenile jail and prison populations as well as the “anticipated effect . . . on public safety in racial and ethnic communities in the State and for victims and potential victims in those communities.”²¹⁸ In Oregon, racial impact assessments must include an “estimate of how the proposed legislation would change the racial and ethnic composition of those likely to be convicted of a criminal offense created or modified by the proposed legislation.”²¹⁹ And in Minnesota, the Sentencing Guidelines Commission conducts racial impact statements only on bills that will impact felony prison populations.²²⁰ However, no state requires legislators to take any action even if racial disparities are predicted.²²¹

States should adopt more proactive requirements for racial impact statements that (1) automatically attach to all new or existing legislation that has an impact on prison, jail, and community supervision populations; (2) collect rigorous data on racial disparities through clear definitions and standards; and (3) require legislators to amend or withdraw proposed legislation that would result in racial disparities.²²² Legislators in Arkansas introduced a bill in 2013 that would have done all three, had it passed.²²³

Chapter 5: Modeling Sentencing Reform Impact: How Five Recommendations Would Reduce the Federal Prison Population

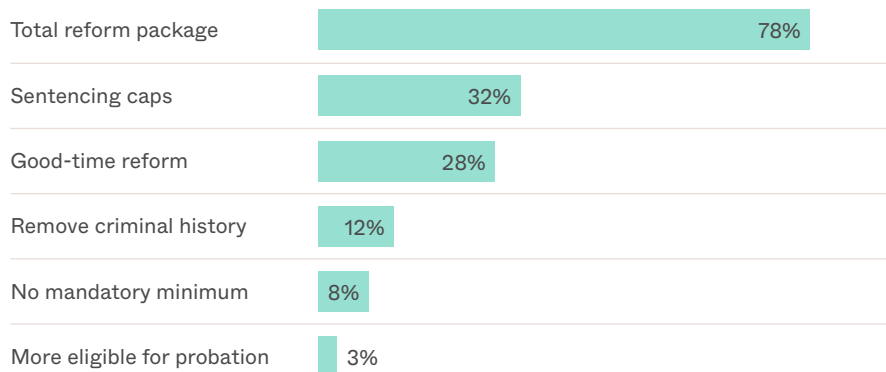
To illustrate the decarcerative effect of Vera’s proposed reforms, Vera modeled the estimated impact on the only publicly available dataset that contained individual-level sentencing data for analysis: that of the federal prison system. We modeled what the federal prison population would have been in 2016 had these reforms been in effect 10 years earlier. Vera did not attempt to analyze future prison sizes because that would require us to estimate unknown events, such as prison admissions over the next 10 years. Instead, Vera analyzed publicly available data from the U.S. Sentencing Commission and created an estimated baseline of who was in federal prison from 2006 to 2016. Researchers then modeled the effect of each proposed reform, singly and combined. The researchers compared these results to the baseline number of people in prison to estimate the reforms’ decarcerative effects. Based on available data, Vera was able to model five of the seven proposals; we did not model second-look bills or racial impact requirements. If state-level data should become available, we will model these reforms on states across the political spectrum as well, especially since they constitute 84 percent of the national prison population, including the majority of people incarcerated for violent charges.²²⁴

Taken together, Vera found that these five reforms, if implemented in 2006, would have reduced the 2016 federal prison population from 176,707 people to an estimated 38,122. Two specific reforms together would have reduced the prison population by 55 percent (individually accounting for approximately 30 percent each): (1) capping sentences at 20 years for the most serious crimes and lowering lesser offense maximums proportionately and (2) allowing incarcerated people to earn good time at a day for a day.

The overall impact of the reforms, taken together, was a decarcerative impact of 78 percent. In short, had these reforms been in place for the prior 10 years, the U.S. federal prison population would be just 22 percent of what it is today.

FIGURE 3

Federal prison population reduction, 10 years after implementation



Note: U.S. Sentencing Guidelines Manual pt. A §1.4(h) (“The Commission has established a sentencing table that for technical and practical reasons contains 43 levels”).

Source: Vera Institute of Justice analysis.

Sentencing caps could reduce the federal prison population by 32 percent

Capping sentences in the manner Vera proposes would substantially reduce median sentence lengths. If such a policy had been applied in 2006, the reduced sentence lengths would have led to a 32 percent reduction in the federal prison population over 10 years. This is illustrated in Figure 4. The first two columns show the percentage of cases in Vera's sample that fall into six groupings of crime severity (with one being the lowest level of severity).²²⁵ The next column shows the median sentence, in months, in the historic sample for cases within each group. The final column shows the much smaller sentence that would be given to those cases under Vera's proposed reform.

FIGURE 4
Comparative sentencing by severity of crime

Crime severity, from low to high, from the U.S. Sentencing Guidelines	Percentage of cases	2006–2016 historical median sentence (in months)	Reform median sentences
1–11	34%	4	0
12–25	55.6%	23	8
26–32	8.1%	63	22
33–36	1.4%	94	36
37 and higher	.8%	157	60
Murder	.1%	164	120

Good-time reforms could reduce the federal prison population by 28 percent

The maximum good-time reduction available from 2006 to 2016 (and, essentially, today) was 13 percent. For the proposed reform, Vera assumed a 41 percent reduction off of a sentence.²²⁶ This difference led to a 28 percent reduction in the federal prison population in Vera's sample.

Eliminating sentencing enhancements for conviction histories and mandatory minimums could reduce the federal prison population by 12 percent and 9 percent, respectively

Eliminating sentencing enhancements based on prior conviction histories and mandatory minimums, by contrast, did not have as large of a decarcerative effect as the prior reforms. A policy to remove sentence enhancements based on conviction history would have led to a 12 percent reduction in the federal prison population over 10 years, and ending mandatory minimums would have produced a 9 percent reduction.

The relatively modest decarcerative effect of removing conviction history enhancements reflects the fact that some prior convictions are already removed from consideration when federal sentencing guidelines are used to calculate conviction history scores. The guidelines screen out prior convictions beyond 10 to 15 years, depending on the offense, as well as prior convictions for enumerated petty offenses such as disorderly conduct and trespassing. Even though about three-quarters of people in Vera’s data set sentenced under the federal system had at least one prior conviction, a plurality of Vera’s sample fit into the lowest conviction history category and thus did not experience enhancements based on prior convictions.²²⁷ For a fuller breakdown of conviction history scores used by Vera in its calculations, see Appendix B on page 57.

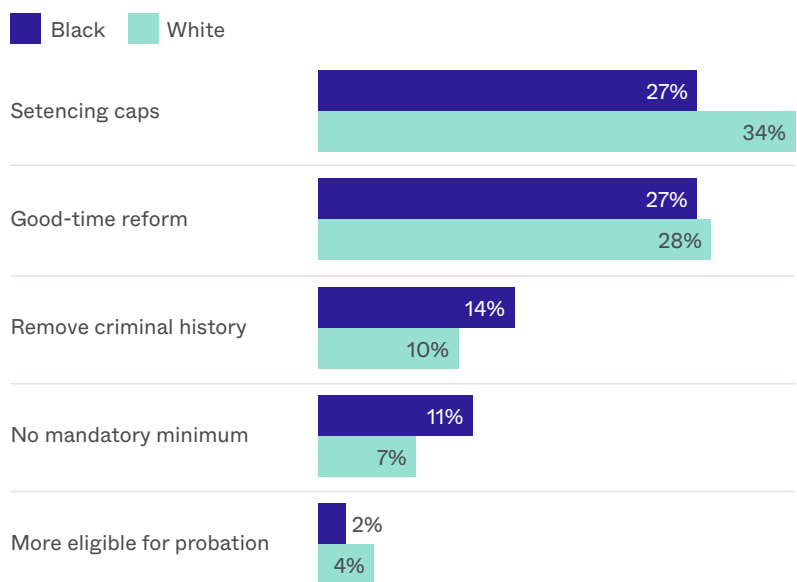
As for mandatory minimums, eliminating them in this federal sample had a relatively small decarcerative impact for two reasons. First, most people in the federal system in the research sample (72 percent over the 10-year period of the sample) were not sentenced to a mandatory minimum. Second, the U.S. Sentencing Commission has set the recommended sentencing ranges slightly above the mandatory minimum for offenses for which mandatory minimums apply, so that if the guidelines sentence were adjusted downward for cooperation with the authorities or other reasons, the resulting sentence would not be lower than the mandatory minimum.²²⁸ This means that if mandatory minimums were eliminated in a sentencing guidelines jurisdiction like the federal system, the legislature would need to instruct the sentencing commission to likewise lower the guideline ranges for recommended sentences because sentences are set off of that range.²²⁹

Two reforms—eliminating mandatory minimums and eliminating prior convictions from sentencing consideration—have the biggest impact on reducing racial disparities

Two reforms described previously that had a relatively smaller decarcerative effect had, nevertheless, the greatest impact on racial disparities: removing prior conviction enhancements (the impact was 40 percent greater for the Black population, which declined by 14 percent, compared to the white population, which declined by 10 percent) and removing mandatory minimums (the impact was 57 percent greater for the Black population, which declined by 11 percent, compared to the white population, which declined by 7 percent).²³⁰

Removing conviction history as a basis for enhanced sentencing and punishment had a substantial racial impact because,

FIGURE 5
Federal prison population reduction 10 years after implementation, by race



Source: Vera Institute of Justice analysis.

as noted before, people from marginalized communities are more likely to have had previous arrests and convictions as a result of overpolicing and overenforcement. These conviction histories are also more likely to result in prior incarceration, which is the driving force for calculating sentencing enhancements based on conviction history under the federal sentencing guidelines.²³¹ The finding that eliminating mandatory minimum requirements would have a significant racial impact is consistent with research that shows that Black people are more likely to be charged with mandatory minimum-bearing crimes than white people.²³²

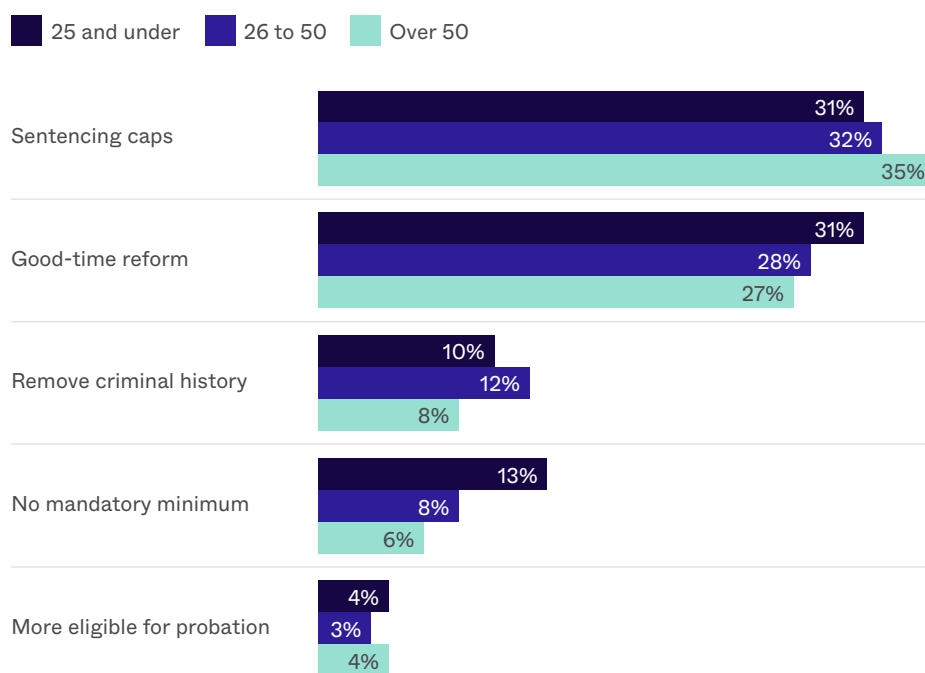
Good-time reforms and reducing mandatory minimums have a greater impact on younger people than older people

Finally, reducing mandatory minimums and reforming good-time calculations have a greater impact on reducing the number of people ages 18 to 25 serving time in federal prisons than any other age group.

This is because people ages 25 and under received shorter sentences overall than people who were older; thus, the effect of significantly reducing sentences due to good-time earning was more fully realized in the 10-year period examined for younger people than for older groups that had longer sentences. As for the mandatory minimum effect, young people with mandatory minimum sentences had longer sentences than what the guidelines would have recommended in 51 percent of cases versus in 31 percent for other age groups. Thus, removing mandatory minimums resulted in shorter sentences for this group more than it did for the older age groups.

In conclusion, Vera’s modeling illustrates how reducing the amount of time that a person is required to serve—by lowering maximums and increasing opportunities to earn time off, among other strategies—can significantly reduce a jurisdiction’s prison population, dropping it to 20 percent of its recent levels. How this much smaller system might be used to produce more safety and facilitate repair is the subject of the next chapter.

FIGURE 6
Federal prison population reduction 10 years after implementation, by age



Source: Vera Institute of Justice analysis.

Chapter 6: An Aspirational Sentencing Scheme

Our overreliance on incarceration after conviction is a choice, not a necessity. Its consequences are self-evident—from fueling mass incarceration to perpetuating racism in the criminal legal system. Moreover, as discussed in Chapter 3 on page 34, excessive incarceration does not yield more safety or repair.

Although Vera’s seven recommendations for sentencing reform can counter the excesses of current sentencing policies and practices, the United States can and should do more. We need a holistic, prophylactic approach to sentencing that presumes sentences will be served in the community except in very limited circumstances. This reorientation is necessary in order to undo the push in this country to overpunish our residents, particularly people of color. Vera calls this the “North Star” of sentencing reform, recognizing that it is ambitious and beyond what any jurisdiction in this country has done so far. A North Star sentencing system requires legislatures to do the difficult work of wrestling with whether incarceration, which constrains the fundamental right of liberty, serves any compelling state purposes. If the state does identify such purposes, it must ensure that carceral sentences are narrowly tailored to serve these goals.

What are the hallmarks of the North Star approach? There are four tenets that, ideally, will be enacted in tandem to ensure that when a fundamental right like liberty is constrained, these constraints are narrowly tailored to serve the compelling state purposes of safety and repair. Legislatures can further ensure that the application of a state’s compelling state purposes are narrowly tailored to certain factual situations and offenses and setting limits on how long people can be incarcerated.

1. Determine what compelling state purposes can constrain the fundamental right of liberty

Compelling purposes haven’t been universally defined by the U.S. Supreme Court, but observers have noted that they must be more than “merely legitimate;” they must be “important enough to warrant use of a highly suspect tool”—that of restricting a fundamental right.²³³ In line with Vera’s proposed guiding principles for sentencing, the only time when a sentence of incarceration—one that restricts the fundamental right to personal liberty—should be permissible is if it is narrowly tailored to serve the compelling interests of safety or repair—that is, if it is no longer nor more restrictive than necessary to achieve those goals.²³⁴

As discussed in Chapter 2, incarceration is rarely necessary to deliver safety, and thus current sentencing law and practice that rely on incarceration in the majority of instances are not narrowly tailored to meet that

We need a holistic, prophylactic approach to sentencing that presumes sentences will be served in the community except in very limited circumstances.

interest. A properly focused approach would limit incarceration for safety purposes to the few people who are unable to live in the community without causing additional serious physical harm to others. An evidentiary standard for what this inquiry might look like follows in the next section.

Repair, the other compelling interest, should occur in the community as much as possible, where the person who caused harm can give back to the person or people harmed, if practicable, and to the community. In a narrow band of cases involving some survivors, though—such as homicide victims’ families and people injured by sexual violence—the harm may be so severe that in order for repair to happen there needs to be an initial period of separation from the community. In pre-modern times, exile or banishment served the function of enabling the community to reconstitute itself without the trigger of anger caused by the ongoing presence of the wrongdoer in the community.²³⁵ These options do not exist today. Instead, a period of incarceration can provide survivors and their families an opportunity to absorb the shock of the harm and create some space for grief and anger and, for the person who engaged in harm, to reflect and develop a plan to demonstrate repair.²³⁶ This period of time should be limited. The point of such incarceration is not to punish, but to separate while the community heals, and therefore the conditions of incarceration should not be a punishment and should center human dignity.

2. Enact an evidentiary standard to support sentences to incarceration

Although there is a standard of proof that must be met to convict—beyond a reasonable doubt—there is no such corollary for issuing sentences to incarceration.²³⁷ Vera recommends that the standard of proof be clear and convincing evidence and that the prosecutor be required to show:

- a.** In a case in which safety is the proposed compelling purpose, that the current conviction is for a crime that has
 - ↳ caused death or serious bodily injury; or
 - ↳ created a substantial risk of death or serious bodily injury; or
 - ↳ consisted of sexual assault or abuse of high degrees of severity as defined by a jurisdiction; and
 - ↳ no combination of community supervision or community-based programming or treatment can reasonably keep the person from causing additional injury of the same or similar nature.
- b.** In a case in which repair is the proposed compelling purpose, that the person has been convicted of an offense that causes the highest level of harm to others and that an initial period of separation through incarceration is required in the specific case to facilitate repair of that harm.

3. Require a probative fact-finding hearing before imposing a sentence to incarceration

As discussed in Chapter 3 on page 34, most people who have committed a violent act do not necessarily present a danger of ongoing violence. Therefore, before incarcerating (incapacitating) them for community safety, the inquiry should proceed much further than whether the person has been convicted of a violent crime. Before any carceral sentence is considered, a probative fact-finding hearing should occur that considers limiting factors such as the nature and seriousness of the specific threat the person would pose if serving a community sentence and prior recent instances of causing serious physical injury or serious sexual assault or abuse in the community. These factors help the court identify people who cannot be safely managed in the community. As for repair, the hearing might consider the input of the person harmed or their family members; people from the sentenced person's and survivor's communities, including family members; restorative justice organizations that are willing to work with the person being sentenced; and the person being sentenced, including regarding their current readiness to be held accountable for their actions and their willingness to make amends.

4. Institute a look-back period at the five-year mark into a carceral sentence and every three years thereafter

Legislators must heed evidence about community-based interventions that reduce violent behavior, aging out of crime, and the detrimental impact that prison can have on personal growth and transformation. They should note international standards of prison sentence length; the Nordic countries, for example, use incarceration for safety and separation for repair, but the average time served, even for murder, is less than 20 years.²³⁸ In addition to setting much lower maximum sentences, narrow tailoring for carceral sentences requires opportunities for review of current threats to public safety and/or progress toward repair. Legislators and judges cannot predict when exactly this will happen, so they should build in periodic opportunities for a person serving time to be assessed for release—through either parole review, judicial review narrowly focused on these areas, or some other administrative method of review. The five-year mark is a substantial enough period of time for a person to demonstrate their character and efforts toward repair and rehabilitation, and increasing the frequency of subsequent reviews will help ensure that no one remains incarcerated longer than is absolutely necessary to fulfill the purpose of their sentence.

Investing in community sentencing options

The North Star conversation may seem like a long way off for some jurisdictions, while for others, some version of the question of who, if anyone, really “needs” to be incarcerated post-conviction is already being interrogated.^a Regardless of where a state ends up on incarceration’s role as a response to unlawful behavior, most jurisdictions agree on the need to have more options than just prison to respond to the variety of cases and circumstances presented during sentencing.^b Jurisdictions need to build this world by paying for it, funding a variety of reparative programs to serve as alternatives to incarceration. Those who favor these alternatives, outside and inside of government, can contribute by building widespread awareness of a different approach to sentencing, one that promotes safety and builds up communities instead of putting so many of their members behind bars. These requirements intersect, of course; building and funding programs does not happen without advocacy, and advocacy uses successful examples of funded programs that deliver more safety and repair without incarceration to call for building and expanding them. To assist state actors and advocates in these interlocking efforts, Vera offers a final point: brief examples of budget strategies that have been used to build funding for community alternatives to incarceration.

Budget strategies

- › **Legislative budget enactments.** In August 2021, the Los Angeles County Board of Supervisors voted to direct 10 percent of all locally controlled revenue to community development, including alternatives to incarceration.^c The board vote followed a 2020 voter referendum that called for the set-asides and detailed spending possibilities such as noncustodial diversion and restorative justice programs.^d A coalition of more than 130 community organizations led an organizing campaign for the referendum’s passage, arguing that public safety, a common goal, is best served through community-based services.^e On a smaller scale, cities such as Washington, DC, have recently increased spending on restorative justice.^f
- › **Executive-level decision-making.** Another way to increase money for community-based responses to unlawful behavior is by putting it in the executive budget and increasing it year by year. New York City has modeled this approach. Since the 1980s, the city has developed increasingly robust alternative to incarceration options relative to other parts of the country and has added significantly to this budget over time—from \$265 million in 2001 to more than \$750 million in the 2020 budget, which, even adjusted for inflation, constitutes an 85 percent increase.^g More work needs to be done, however, as spending on these programs grew from only 5.6 percent of the city’s overall spending on public safety in 2001 to 8.1 percent in 2020.^h

^a Liza Weisstuch, “Does Building Better Jails Go Far Enough?” *New York Times*, September 24, 2021, <https://www.nytimes.com/2021/09/24/nyregion/rikers-nyc-prison-design.html>.

^b Matt Clarke, “Polls Show People Favor Rehabilitation over Incarceration,” *Prison Legal News*, November 6, 2018, <https://perma.cc/TN9F-TV6C>.

^c Staff, “LA County Sets Policy to Match Invalidated Measure J,” *Antelope Valley Times*, August 11, 2021, <https://perma.cc/UMQ6-BZKL>.

^d The measure itself was ruled unconstitutional based on its methodology, not content, which left the door open for the county supervisors to independently enact the voter-approved provisions. Megan Nguyen, “Judge Strikes Down

Measure J, Seen as a Blow to the Criminal Justice Reform Movement,” LAist, June 18, 2021, <https://perma.cc/HZV9-FS3U>; Los Angeles County, California, Measure J (2020), <https://perma.cc/ABT8-HBZ4>; and Chief Executive Office, County of Los Angeles, “Alternatives to Incarceration Initiative,” archived December 2, 2021, <https://perma.cc/MYS8-EB74>.

- e Reimagine Los Angeles, “Measure J,” archived December 2, 2021, <https://perma.cc/NQ2U-UAE5>.
- f Eliana Golding, “What’s in the FY 2021 Police and Public Safety Budget?” DC Fiscal Policy Institute, October 8, 2020, <https://perma.cc/44MB-WFR9>; and DC Office of Neighborhood Safety and Engagement, *FY 2021 Approved Budget* (Washington, DC: DC Office of Neighborhood Safety and Engagement, 2020), Table NSO-4, <https://perma.cc/YL3J-Z8RD>.
- g For a history of alternative to incarceration programs in New York from their inception in the 1980s through restricting and assignment of dedicated funding sources in 1997, see Rachel Porter, Sophia Lee, and Mary Lutz, *Balancing Punishment and Treatment: Alternatives to Incarceration in New York City* (New York: Vera Institute of Justice, 2002), <https://perma.cc/L3FP-SGGX>. This report evaluated the effectiveness of such programs in diverting people who would otherwise have been sentenced to prison and found that the programs were serving mostly people facing B level felony charges such as robbery or drug sales. Those who attended the programs had the same level of reoffending as people who were sent to prison, demonstrating that prison was not necessary as a crime reduction strategy. For spending on alternatives to incarceration programming from 2001 to 2020, see New York City Independent Budget Office, *A Full Accounting: How Much Does New York City Spend on Its Criminal Justice System?* (New York: New York City Independent Budget Office, 2021), 6, <https://perma.cc/JGC9-HHXH>. To calculate the budget increase, authors adjusted \$265 million for inflation to get \$405,460,724 in 2021 dollars. Ian Webster, “CPI Inflation Calculator,” database (San Mateo, CA: Alioth, LLC) (search: Value of \$265,000,000 from 2001 to 2021), <https://perma.cc/RKE6-UUQN>.
- h New York City Independent Budget Office, *A Full Accounting*, 2021, 6.

Conclusion

The sentence that follows a conviction is seen by people involved in a particular case and by the public at large as a verdict on the criminal legal system: Does it work? Does it impart justice? Does it make communities safer? Historically, “working” has fit into four rationales: providing retribution, or satisfaction; deterring new crime through the fear of punishment; incapacitating people so that they don’t have the opportunity to commit additional crimes; and rehabilitating people who engage in unlawful behavior. These rationales have played out with various emphases over more than 200 years of sentencing history, but in each case resulting in a sentence to incarceration, they turn, by no coherent process, into a declaration of how many months or years a person must serve behind bars. Those months or years are for the most part lengthy, as these theories, as applied in the United States, have been used to ratchet up sentences to fit the perceived need, without thought to accompanying harms. But there are harms: our additions to carceral sentences take away people’s freedom, reduce safety through weakening communities, and disproportionately target Black people because our nation’s conceptions of who needs to be punished, deterred, or locked away are so tied to anti-Blackness.

There is a better way. This paper puts forth new guidance about what it means for sentencing to “work,” freed from the weight of these previous rationales, which as practiced are unsupported by evidence and capable of such harm. The new guidance asks legislators devising sentences, prosecutors requesting them, judges setting them, and the public to whom these actors all answer to measure how well sentencing works by three measures:

- › Does it privilege liberty?
- › Does it make individuals and communities safer, according to rigorous, ongoing research about the nexus between carceral sentences and safety?
- › Does it repair the harm caused by unlawful behavior, informed by what crime survivors need?

The evidence presented here shows that it is possible to answer all three questions “yes” with mostly community-based sentences that closely manage any demonstrated ongoing safety issues a person may present and facilitate reparative actions. Following these guiding principles in sentencing builds more safety and satisfaction in response to unlawful behavior, both on an individual level and within communities. If we truly want to end mass incarceration and provide a safer present and future, we can and must address sentencing.

If we truly want to end mass incarceration and provide a safer present and future, we can and must address sentencing.

FIGURE A1
Timeline of major sentencing legislation in the “tough-on-crime” era

Sentencing policy category	Specific legislation	Policy description
Determinate sentences	Maine and California determinate sentencing legislation ²³⁹ (1975 & 1976)	In 1975 and 1976, Maine and California became the first states to adopt determinate sentences—by 2002, 17 other states had adopted these sentences for most offenses. ²⁴⁰ Determinate sentences essentially eliminated the opportunity for discretionary release via parole and became popular during the mid-1970s in part due to a rejection of the era of indeterminate sentences (late 1800s to 1975). ²⁴¹ Indeterminate sentences were critiqued by both liberals and conservatives: liberals argued that racial bias in judges’ decision-making meant Black people served longer prison sentences and received parole at lower rates than their white counterparts, and conservatives lamented that indeterminate sentences were too lenient and equivalent to a “get out of jail free card.” ²⁴² Determinate sentences were meant to correct for indeterminate sentencing’s faults by regulating sentence length, with the goal of increasing the transparency and predictability of punishment. ²⁴³ These policies paved the way for structured sentencing policies and presumptive sentencing guidelines. ²⁴⁴
Life without parole sentences	Multiple	Life without parole (LWOP) sentences are emblematic of the “tough-on-crime” ethos: retribution, punishment, and excessive incapacitation. ²⁴⁵ These sentences fundamentally reject the notion that people can grow, change, and express remorse. ²⁴⁶ LWOP sentences gained popularity starting with the ban on the death penalty that was in place from 1972 to 1976. ²⁴⁷ Only seven states had LWOP laws on the books before 1972, then between 1972 and 1990, 26 more states codified LWOP provisions. ²⁴⁸
Mandatory minimums (drugs)	The federal Comprehensive Drug Abuse Prevention and Control Act of 1970 ²⁴⁹ (also known as the Controlled Substances Act)	This legislation <ol style="list-style-type: none"> (1) categorized drugs by potential level of abuse using “schedules” (marijuana was labeled a Schedule 1 drug along with heroin, LSD, and ecstasy); (2) created strict rules about the importation and exportation of controlled substances; (3) established limited treatment programs for those who struggled with drug abuse; and (4) instituted severe penalties for drug offenses (for example, someone convicted of possessing any amount of a Schedule 1 drug like marijuana could be imprisoned for 15 years).

Sentencing policy category	Specific legislation	Policy description
	Rockefeller Drug Laws (New York 1973) ²⁵⁰	<p>The law, among other things, implemented extremely harsh sentences for a range of drug offenses.²⁵¹ For example, someone charged with, small amounts of marijuana, cocaine, or heroin possessing faced 15-year mandatory minimum sentences.²⁵² At their height, these laws led to the incarceration of more than 23,000 people—66 percent of whom had never been to prison before.²⁵³ Additionally, these laws led to stark racial disparities in imprisonment: by 2001, for every white man between the ages of 21 and 44 incarcerated for a drug offense, there were 40 Black men in that age range behind bars for the same reason.²⁵⁴ Other states adopted the Rockefeller Drug Laws and established similarly harsh punishments for drug offenses.²⁵⁵</p>
	Anti-Drug Abuse Acts of 1986 ²⁵⁶ & 1988 ²⁵⁷	<p>The 1986 federal law instituted harsh penalties for a wide range of drug crimes. The legislation is perhaps most known for establishing the 100:1 sentencing disparity for those convicted of possessing crack versus powder cocaine—meaning that someone convicted of possessing 5 grams of crack cocaine would receive the same sentence as someone convicted of possessing 500 grams of powder cocaine. Crack cocaine’s use was extremely racialized in the media as a “Black” drug, while powder cocaine was associated with wealth, prestige, and whiteness.²⁵⁸ There are few discernible pharmacological differences between cocaine’s forms.²⁵⁹</p> <p>The 1988 legislation “increased prison sentences for drug possession, enhanced penalties for transporting drugs, and established the Office of National Drug Control Policy, which coordinates and leads federal anti-drug efforts.”²⁶⁰ Crack cocaine also became the only drug with a five-year mandatory <i>minimum</i> for simple possession (a misdemeanor) on a first offense.²⁶¹</p>
Three-strikes laws	California’s AB 971 “Three Strikes and You’re Out” (1994) ²⁶²	<p>California’s legislation mandated a tiered sentencing system for people with prior felony convictions: If a person had one “strike,” or conviction for a serious or violent felony in the past, on their record, the sentence for <i>any</i> new felony conviction was doubled. If they had two strikes, then any new felony conviction carried a 25-years-to-life sentence—no matter what it was for. And the sentences for “strikers” convicted of more than one offense had to be served consecutively, not concurrently.</p> <p>By 10 years after the law’s enactment, more than 80,000 “second strikers” and 7,500 “third strikers” had been sent to state prison.²⁶³</p> <p>From 1994 to 1996, 24 states adopted three-strikes laws “aimed at imposing substantially more severe mandatory prison sentences” for those with prior records.²⁶⁴</p>

Sentencing policy category	Specific legislation	Policy description
	1994 Violent Crime Control and Law Enforcement Act (1994 Crime Bill) ²⁶⁵	The 1994 Crime Bill “authorized the death penalty for dozens of existing and new federal crimes, and mandated life imprisonment for a third violent felony,” otherwise known as “three strikes and you’re out.” ²⁶⁶
“Truth in sentencing”	1994 Violent Crime Control and Law Enforcement Act (1994 Crime Bill) ²⁶⁷	“Truth in sentencing” (TIS) policies ensured that those in prison served anywhere from 85 percent to 100 percent of their sentences before being considered for parole. ²⁶⁸ The 1994 Crime Bill played an outsize role in expanding TIS requirements—and incarceration—across the country. The legislation created the Violent Offender Incarceration and Truth-in-Sentencing federal grants, which allocated billions of dollars for states to expand law enforcement agencies and build prisons. ²⁶⁹ The only major requirement to access these funds was that states had to keep those convicted of violent offenses incarcerated for at least 85 percent of their sentences. ²⁷⁰ By 2002, 28 states had adopted TIS laws. ²⁷¹

Appendix B

FIGURE A2

Conviction histories by category

Conviction history score severity category	N	%
1	26,045	42.90%
2	8,424	13.88%
3	10,176	16.76%
4	6,065	9.99%
5	3,476	5.73%
6	5,961	9.82%
Unknown	561	0.92%
Total	60,708	100%

Note: Vera compressed the 43 federal crime severity levels into six categories for practicality of analysis and so that the six categories would be translatable to a state felony classification of five to six levels of severity. U.S. Sentencing Commission, *U.S. Sentencing Guidelines Manual* (Washington, DC: U.S. Sentencing Commission, 2018), ch. 5, pt. A., <https://perma.cc/6P9K-R6CL>. States can and do use a variety of alphanumeric schemes to categorize crimes by severity. For example, Illinois has six degrees of felony: first-degree murder (as its own class), Class X felonies, and then Class 1-4 felonies, in decreasing order of severity; the state also has Class A-C misdemeanors. 730 Ill. Comp. Stat. § 5-4.5-10. On the other hand, the state of Washington has only three felony classifications, A–C, and two descriptive classifications for misdemeanors. Wash. Rev. Code § 9A.20.020. For simplicity’s sake, Vera used a six-level division with numerical indicators from one (least severe) to six (most severe).

Appendix C: Methodology for Estimating the Impact of Proposed Sentencing Reforms on the Federal Prison Population in 2016

Vera partnered with an external researcher, Michael Wilson, to prepare and analyze data for this report.²⁷² Prison projections often use historical data to project the future prison population by estimating admission growth rates, length of stay growth rates, and the timing of releases for people currently incarcerated. For this analysis, Vera did not attempt to estimate the future prison population but instead estimated the historical impact of admissions from 2006 through 2016. Vera then modeled various policy changes and estimated the impact over this time period if those policy changes had been in place starting in 2006.

Researchers based the prison projections for this analysis on historical data from the U.S. Sentencing Commission. Vera relied on 11 years of sentencing data for those sentenced between 2006 and 2016.²⁷³

Calculating a baseline incarcerated population

The basic formula for projecting the number of people in prison is the number of annual admissions multiplied by the expected length of stay in years. It is not possible to link Bureau of Prison data with the U.S. Sentencing Commission's data, so Vera relied on a field in the U.S. Sentencing Commission's data set—"total prison sentence calculation," which is the number of ordered months of imprisonment—as the base for the expected length of stay for incarcerated people.²⁷⁴ Because federal sentences are subject to good time, estimated at 13 percent off of a sentence, Vera assumed people would serve 87 percent of their sentence.²⁷⁵ Additionally, researchers subtracted time served credits for those who had them. Finally, the researchers assumed that incarcerated people would not serve sentences past the age of 75.²⁷⁶ The total prison sentence with these adjustments determined the baseline estimated length of stay.

Estimating impacts

To estimate annual impacts, researchers created a model that moves individual people in and out of prison based on a length of stay distribution. The model used the number of monthly prison admissions based on U.S. Sentencing Commission data and the monthly length of stay distribution to flow people into prison based on admissions and out of prison based on how long they were expected to stay.²⁷⁷ Researchers used the same approach to create a baseline prospective prison bed impact for those sentenced between January 1, 2006, and December 31, 2016. Researchers used this same method for various policy options, subtracting the prison bed population under these policy changes from the baseline prison population to estimate the annual prison bed reduction.

Using these methods resulted in a projected 2016 prison population that was higher than the published federal prison population. This is likely to due to Vera's length of stay estimate being longer than people's actual

length of stay. However, without detailed prison data, it is not possible to adjust the length of stay calculation for each sentenced person. Instead, researchers made a downward adjustment of the baseline prison estimates and all of the policy estimates of 17 percent. This factor was calculated by comparing the predicted prison population on September 30, 2016, to the published total prison population on the same date.²⁷⁸

Policy modeling

Vera used the projections methodology detailed above for each of the policy areas described below. For each policy, Vera made a number of assumptions that impacted either the estimated length of stay or the estimated number of admissions. Vera then ran those changes through the flow model to estimate the annual prison bed reduction from each policy.

Policy 1—Sentencing caps: This policy caps sentences at 20 years for the most serious offenses and caps lower-level offenses into five additional categories based on crime severity. Additionally, those who are 25 years of age or younger have lower caps than those who are over 25.

To estimate new lengths of stay based on this policy, Vera created six sentencing buckets for those over 25 and six sentencing buckets for those who were 25 and younger. The researchers took the structure of felony and misdemeanor classifications based on severity (A–E or 1–6) that is common in state systems and transferred it to the federal system.²⁷⁹ The researchers then compressed the many offense severity levels from the federal sentencing guidelines (43) into the six categories of severity.²⁸⁰ The compression simplifies the analysis and makes the analysis comparable to a state system, so that a similar analysis could be done on state data in the future, given availability of sentencing data. To look at the impact of this policy change by itself, isolated from other changes, Vera removed anyone with a mandatory minimum from the calculation, as mandatory minimums can exceed guideline maximums and to reduce these sentences would require changing mandatory minimums. (Changing mandatory minimums is its own separate reform; see Policy 4 on page 62.)

From the original sentencing data, Vera compared each person's actual sentence to the maximum guidelines sentence and expressed this as a fraction. For example, if the maximum potential sentence under the existing guidelines is 48 months, and the person's actual sentence was 36 months, the fraction would be 36/48—or 75 percent of the maximum sentence in their grid block. Vera multiplied this percentage by the new sentencing cap to get an estimated new sentence. If the new sentence was below the new minimum range, Vera assumed the person would receive the minimum sentence in the new range. Vera also assumed that if the policy resulted in a longer sentence, the person's sentence would remain the same as it was before the policy change. Finally, since the researchers were estimating the impact of this policy in isolation, they assumed the person would not receive any good-time reductions.

Policy 2—Increases in good-time

earning: This policy would increase the amount of good time incarcerated people could receive to 50 percent of their sentence from the 13 percent estimate of current practice. Vera assumed that most people (82 percent) would earn the new good-time credit through their disciplinary records. Vera based this estimate on the rate at which good time is earned in state systems, where good-time accumulation is a much more common occurrence and data exists about the percentage of eligible people who earn all of their good time.²⁸¹ Vera assumed that this would apply to all sentences except for the last six months of each person's prison time. This was because Vera assumed that time accrued in intervals, assigned a six-month interval, and reasoned that after serving the last six months of a sentence, one could not earn three months off because one would already be done with the sentence.

To estimate the new length of stay, Vera used the same calculations as the baseline length of stay (described above) and changed the 13 percent good-time reduction to 41 percent (82 percent receiving good time multiplied by a 50 percent reduction).

Policy 3—Removes criminal history from sentencing: This policy is designed to remove prior record enhancements from inclusion in the sentencing decision. The federal sentencing system uses a matrix based on crime severity and criminal history to determine the sentencing range for each person. Vera assumed that, under this policy change, each person would be sentenced based on the first column of the sentencing matrix, which is the lowest level of criminal history—a category reserved for people with either no prior convictions or ones that resulted in no more than six months of jail time.

FIGURE A3

New maximum sentence lengths for each crime severity group under proposed reform

Crime severity	Maximum sentence (over 25 years)	Maximum sentence (25 years and younger)
1–11	No prison	No prison
12–25	0–12 months	0–12 months
26–32	12–36 months	12–24 months
33–36	36–60 months	24–36 months
37 and higher	60–120 months	36–90 months
Murder	120–240 months	90–180 months

FIGURE A4

Sentencing Table (in months of imprisonment)

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
Zone A	1	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8
	4	0-6	0-6	0-6	2-8	4-10
	5	0-6	0-6	1-7	4-10	6-12
	6	0-6	1-7	2-8	6-12	9-15
	7	0-6	2-8	4-10	8-14	12-18
	8	0-6	4-10	6-12	10-16	15-21
Zone B	9	4-10	6-12	8-14	12-18	18-24
	10	6-12	8-14	10-16	15-21	21-27
	11	8-14	10-16	12-18	18-24	24-30
Zone C	12	10-16	12-18	15-21	21-27	27-33
	13	12-18	15-21	18-24	24-30	30-37
Zone D	14	15-21	18-24	21-27	27-33	33-41
	15	18-24	21-27	24-30	30-37	37-46
	16	21-27	24-30	27-33	33-41	41-51
	17	24-30	27-33	30-37	37-46	46-57
	18	27-33	30-37	33-41	41-51	51-63
	19	30-37	33-41	37-46	46-57	57-71
	20	33-41	37-46	41-51	51-63	63-78
	21	37-46	41-51	46-57	57-71	70-87
	22	41-51	46-57	51-63	63-78	77-96
	23	46-57	51-63	57-71	70-87	84-105
	24	51-63	57-71	63-78	77-96	92-115
	25	57-71	63-78	70-87	84-105	100-125
	26	63-78	70-87	78-97	92-115	110-137
	27	70-87	78-97	87-108	100-125	120-150
	28	78-97	87-108	97-121	110-137	130-162
	29	87-108	97-121	108-135	121-151	140-175
	30	97-121	108-135	121-151	135-168	151-188
	31	108-135	121-151	135-168	151-188	168-210
	32	121-151	135-168	151-188	168-210	188-235
	33	135-168	151-188	168-210	188-235	210-262
	34	151-188	168-210	188-235	210-262	235-293
	35	168-210	188-235	210-262	235-293	262-327
	36	188-235	210-262	235-293	262-327	292-365
	37	210-262	235-293	262-327	292-365	324-405
	38	235-293	262-327	292-365	324-405	360-life
	39	262-327	292-365	324-405	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life

Source: U.S. Sentencing Commission, November 1, 2016, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing_Table.svg.

Once the sentencing range was determined based solely on the crime severity row of the current sentencing matrix, not the criminal history column, Vera used a similar method as was used for Policy 1. Vera calculated the fraction of the actual sentence to the maximum sentence within the existing guidelines, and then used this as a multiplier for the new maximum sentence based on the removal of criminal history. The researchers assumed that the new sentence could not go below the bottom of the new range unless the baseline sentence was already below that range. Finally, Vera assumed that the new sentence could not be higher than the baseline sentence.

Policy 4—Eliminate mandatory minimum sentences: The federal sentencing system includes several mandatory minimum sentences. Vera examined the impact of removing all mandatory minimum sentences and separately examined the impact of removing only drug mandatory minimum sentences. People convicted of these offenses must serve a mandatory sentence, with a few limited exceptions. However, the mandatory minimum sentence length is often within or even below the guidelines sentence. In these cases, removing the mandatory minimum sentence may not actually reduce the person's time in prison.

To estimate the new length of stay under this policy change, Vera included all people with a mandatory minimum sentence. Vera placed people into three categories:

- 1 For those where the mandatory minimum sentence was above the guidelines sentencing range, Vera assumed that the new sentence would be halfway between the upper and lower guidelines range.
- 2 For those where the mandatory minimum sentence was already within or below the guidelines range, Vera assumed they would receive a similar percentage of the guidelines sentence as current people whose sentence is governed by the guidelines. Vera examined the sentencing data for those with a guidelines sentence and found that the average sentence that was below the guidelines was 37 percent lower than the bottom of the guidelines sentence. Vera assumed this same percentage would apply once the mandatory minimum was removed.
- 3 If the mandatory minimum sentence was more than 37 percent lower than the bottom of the guidelines, Vera assumed this policy would have no impact on the person's length of stay.

Policy 5—Increase the use of probation: Under the federal sentencing guidelines grid above, there are four sentencing zones, A to D, with D including the more serious offenses and more extensive criminal histories. Within this system, anyone can receive a probation sentence. However, the presumption is that people sentenced in zones C and D will go to prison unless there is a compelling reason for a dispositional departure.

For this policy, Vera assumed that a portion of the people in these two zones would now be eligible to receive a probation sentence instead of a prison sentence. Vera assumed those with the longest sentences would not receive probation and instead focused on those within these newly eligible categories who already had relatively short sentence lengths. For those in Zone C, Vera assumed that 40 percent of the bottom 45th percentile of the sentencing distribution would now receive probation. For those in Zone D, Vera assumed that 20 percent of the bottom 45th percentile of the sentencing distribution would now receive probation.

Combining all policies: The combination of all policies into one estimate is more complicated than just adding the individual policies together. There is some overlap, or double-counting, between certain policies that needs to be accounted for. To combine the policies, Vera started with the Policy 1 assumptions (lowering sentencing maximums throughout six classes of sentences), included the Policy 4 assumptions (eliminating mandatory minimums) for those with a mandatory minimum, then applied Policy 2 (earning good time at 41 percent of a sentence), and finally removed those from prison who were flagged as receiving probation under Policy 5. Policy 3 impacts (removing criminal history enhancements) were not included, as Policy 1 and Policy 4 would impact the same people but with a larger sentence reduction.

Endnotes

- 1 Emma Bowman, “Minneapolis Reacts to Chauvin Sentence with Fury and Hope,” NPR, June 25, 2001, <https://perma.cc/D9VT-RD5E>.
- 2 Sebastian D. Romano, Anna J. Blackstock, Ethel V. Taylor, et al., “Trends in Racial and Ethnic Disparities in COVID-19 Hospitalizations by Region: United States, March–December 2020,” *Morbidity and Mortality Weekly Report* 70, no. 15 (2021), 560–565, <https://perma.cc/28SM-5CN7>; Pamela Wilson, *COVID-19 and Economic Opportunity: Unequal Effects on Economic Need and Program Response* (Washington, DC: U.S. Department of Health and Human Services, 2021), <https://perma.cc/G998-JT69>; and Fred Ullrich and Keith Muller, *COVID-19 Cases and Deaths, Metropolitan and NonMetropolitan Cases Over Time (update)* (Iowa City, IA: RUPRI Center for Rural Health Policy Analysis, 2022), <https://perma.cc/XEC3-R53T>.
- 3 German Lopez, “2020’s Historic Surge in Murders, Explained,” Vox, March 25, 2021, <https://perma.cc/8F7U-X46Z>. See also Rosenfeld, Abt, and Lopez, *Pandemic, Social Unrest, and Crime in U.S. Cities: 2020 Year-End Update*, 2021.
- 4 See for example Council on Criminal Justice, “Public Perceptions of the Police,” webinar, October 7, 2020, <https://perma.cc/SN4B-3XT3>.
- 5 For state court felony sentences, see Sean Rosenmerkel, Matthew Durose, and Donald Farole Jr., *Felony Sentences in State Courts, 2006—Statistical Tables* (Washington, DC: Bureau of Justice Statistics [BJS], 2009 [rev. 2010]), 2, <https://perma.cc/FW4Q-BTUT>. For federal sentencing figures, see USSC, *2019 Annual Report and Sourcebook of Federal Sentencing Statistics* (Washington, DC: USSC, 2019), Figure 6, <https://perma.cc/4QNC-XEV5>.
- 6 Ashley Nellis, *No End in Sight: America’s Enduring Reliance on Life Imprisonment* (Washington, DC: Sentencing Project, 2021), 4, <https://perma.cc/PB2R-8F9U>.
- 7 Council on Criminal Justice, “Long Sentences by the Numbers,” 2022, <https://counciloncj.foleon.com/tfls/long-sentences-by-the-numbers/#Long-Sentences-Behind-Bars>.
- 8 For total incarceration numbers and community supervision, see Todd Minton, Lauren Beatty, and Zhen Zheng, *Correctional Populations in the United States, 2019—Statistical Tables* (Washington, DC: BJS, 2021), 5, <https://perma.cc/3UZS-Q6WL>. For the number of people in jail serving a sentence, see Zhen Zheng and Todd Minton, *Jail Inmates in 2019* (Washington, DC: BJS, 2021), 5, <https://perma.cc/YYM4-KPA3>. For arrest and conviction data, see Matthew Friedman, “Just Facts: As Many Americans Have Criminal Records as College Diplomas,” Brennan Center for Justice, November 17, 2015, <https://perma.cc/JSW2-3C7N>.
- 9 Brian Elderbroom, Laura Bennett, Shanna Gong, et al., *Every Second: The Impact of the Incarceration Crisis on American Families* (Washington, DC: FWD.us, 2018), 10, <https://perma.cc/2CPF-PGD9>.
- 10 For percentages of people incarcerated in state and federal prison by race, see Laura M. Maruschak and Emily D. Buehler, *Census of State and Federal Adult Correctional Facilities, 2019—Statistical Tables* (Washington, DC: BJS, 2021), 2, <https://perma.cc/M8GZ-BY9E>. The percentage of U.S. population by race was calculated by using census percentages for Black and Latino “alone.” Some share of the 2.8 percent of the population that identifies as being of two or more races likely identifies as being both Black and Latino. U.S. Census Bureau, “QuickFacts: United States,” archived November 12, 2021, <https://perma.cc/B32H-B6TC>.
- 11 The Sentencing Project developed the term “virtual life” to describe sentences of at least 50 years to highlight the prevalence of this statutory scheme that doesn’t, on its face, look as punitive as life, but frequently ends up having the same effect, especially if these sentences are not eligible for good time or release on discretionary parole. More than 44,000 people were serving such virtual life sentences in 2016. Sentencing Project, *Virtual Life Sentences* (Washington, DC: Sentencing Project, 2019), 1, <https://perma.cc/QPS6-PQK5>. For updated statistics by race and ethnicity, see Ashley Nellis, *Still Life: America’s Increasing Use of Life and Long-Term Sentences* (Washington, DC: Sentencing Project, 2017), 15, <https://perma.cc/U6VC-84WK>.
- 12 Nellis, *Still Life*, 2017, 5.
- 13 Glenn R. Schmitt, Louis Reedt, and Kevin Blackwell, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report* (Washington, DC: USSC, 2017), 2, <https://perma.cc/GQJ2-RM4N>.
- 14 Ibid.
- 15 Collectively, from 2000 to 2016, the number of Black men in state prisons declined by more than 48,000, while the number of white men increased by more than 59,000, and the number of Black women in state prison fell by more than 12,000 as the number of white women increased by around 25,000. William J. Sabol, Thaddeus L. Johnson, and Alexander Caccavale, *Trends in Correctional Control by Race and Sex* (Washington, DC: Council on Criminal Justice, 2019), 3, <https://perma.cc/3A9R-9U97>.
- 16 CA Proposition 47 (The Safe Neighborhoods and Schools Act) (2014); and S756 (First Step Act of 2018) (115th Congress), Pub. Law 115–391 (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/756>. Michelle Alexander’s seminal book, *The New Jim Crow: Mass Incarceration in the Age of Color-Blindness* (New York: The New Press, 2012), names mass incarceration as the direct descendant of slavery and Jim Crow laws, but its spotlight on the War on Drugs leaves out the role of extreme sentences for violent offenses and repeat offenses (often also racially biased in effect) that has led to the current size of the system. See also John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (New York: Basic Books 2017), 185–190.

- 17 E. Ann Carson, *Prisoners in 2019* (Washington, DC: BJS, 2020), 20, Table 13, <https://perma.cc/K9A4-Y5UC>.
- 18 USSC, *Quick Facts: Federal Offenders in Prison—March 2021* (Washington, DC: USSC, 2021), 1, <https://perma.cc/U5W5-2NJV>.
- 19 Damon M. Petrich, Travis C. Pratt, Cheryl Lero Jonson, and Francis Cullen, “Custodial Sanctions and Reoffending: A Meta-Analytic Review,” *Crime and Justice* 50 (2021), <https://perma.cc/4ATJ-KY7Y>.
- 20 See generally Khalil Gibran Muhammad, *The Condemnation of Blackness* (Cambridge, MA: Harvard University Press, 2019).
- 21 Danielle Sered, *Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration* (New York: Vera Institute of Justice, 2017), 12–13, <https://perma.cc/XG7J-AW9H>.
- 22 Vera researchers reviewed incarceration data from 17 other countries on or around 2019—Argentina, Australia, Brazil, Canada, England and Wales, France, Germany, India, Italy, Japan, Mexico, Nigeria, Portugal, Russia, South Africa, South Korea, and Spain). World Prison Brief, “Highest to Lowest—Prison Population Rate,” database (London: Institute for Crime and Justice Policy Research), https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All. The average rate of incarceration for those countries was 104 per 100,000, compared to the United States’s rate of 685 per 100,000.
- 23 The current United States population is 332,488,962. U.S. Census Bureau, “U.S. and World Population Clock,” database (Washington, DC: U.S. Census Bureau, sampled February 8, 2022), <https://www.census.gov/popclock/>. Applying a rate of 104 per 100,000 to that number (see previous note) yields an incarcerated population of 345,788.
- 24 For population calculations, see note 24.
- 25 Sentencing Project, *Virtual Life Sentences*, 2019, 1. For updated statistics by race and ethnicity, see Nellis, *Still Life*, 2017, 15.
- 26 For example, Boston, Massachusetts, opened its first house of incarceration in 1635; by 1776, each county in Massachusetts was required to maintain its own jail. Adam J. Hirsch, “From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts,” *Michigan Law Review* 80 (1982), 1179–1269, 1182, <https://perma.cc/E3N6-EWAX>.
- 27 Russell, *The Color of Crime*, 1998, 35. Ferguson’s “manner of walking” ordinance, Ferguson, Mo., Mun. Code § 44–344, was repealed by unanimous vote. Ferguson, Mo., Ordinance No. 2016–3617 (April 26, 2016).
- 28 Russell, *The Color of Crime*, 1998, 36–38.
- 29 *Ibid.*
- 30 Julilly Kohler-Hausmann, *Getting Tough: Welfare and Imprisonment in 1970s America* (Princeton, NJ: Princeton University Press, 2017), 213–214).
- 31 *Ibid.*
- 32 Hirsch, “From Pillory to Penitentiary,” 1982, 1212–1220.
- 33 U.S. Constitution, amendment XIII.
- 34 Christopher R. Adamson, “Punishment after Slavery: Southern State Penal Systems, 1865–1890,” *Social Problems* 30, no. 5 (1983), 555–569; Khalil Gibran Muhammad, “Where Did All the White Criminals Go? Reconfiguring Race and Crime on the Road to Mass Incarceration,” *Souls* 13, no. 1 (2011), 72–90; and Bruce Western, “The Prison Boom and the Decline of American Citizenship,” *Society* 44, no. 5 (2007), 30–36.
- 35 Kohler-Hausmann, *Getting Tough*, 2017, 214.
- 36 *Ibid.*, 213–215.
- 37 Delegates at the National Congress on Penitentiary and Reformatory Discipline in 1870 developed a set of principles intended to guide the next century of penal practices. These principles focused on the “moral regeneration” of incarcerated people rather than on their punishment, “as hope is a more potent agent than fear. . . .” A top priority was to replace determinate sentences, which established fixed release dates, with indeterminate sentences that were “limited only by satisfactory proof of [an individual’s] reformation.” *Declaration of Principles Adopted and Promulgated by the 1870 Congress of the National Prison Association* (Washington, DC: American Correctional Association, reprinted 2015).
- 38 See for example Kohler-Hausmann, *Getting Tough*, 2017, 217, 234–236.
- 39 Ruth Delaney, Ram Subramanian, Alison Shames, et al., *Reimagining Prison* (New York: Vera Institute of Justice, 2018), 38. These laws also stripped formerly incarcerated people of their citizenship rights long after their sentences were completed. Among the most well-known examples are laws that temporarily or permanently suspended the right to vote of people convicted of felonies. Adamson, “Punishment after Slavery,” 1983, 558–559; A. E. Raza, “Legacies of the Racialization of Incarceration: From Convict-Lease to the Prison Industrial Complex,” *Journal of the Institute of Justice and International Studies* 11 (2011), 159–170, 162–165; Christopher Uggen, Jeff Manza, and Melissa Thompson, “Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders,” *ANNALS of the American Academy of Political and Social Sciences* 605, no. 1 (2006), 281–310; and Elizabeth Hull, *The Disenfranchisement of Ex-Felons* (Philadelphia, PA: Temple University Press, 2006), 17–22.
- 40 This ratio did not change much in the following decades. In 1908 in Georgia, 90 percent of people in state custody during an investigation of the convict leasing system were Black. For 1870, see Adamson, “Punishment after Slavery,” 1983, 558–561. For 1908, see Alex Lichtenstein, “Good Roads and Chain Gangs in the Progressive South: ‘The Negro Convict is a Slave,’” *Journal of Southern History* 59, no. 1 (1993), 85–110, 90.
- 41 Muhammad, *The Condemnation of Blackness*, 2010, 4. For a breakdown of the racial makeup of prisons by year, see Calahan, *Historical Corrections Populations in the United States*, 1850–1984, 1986, 168, Table 6–22. For a current breakdown, see E. Ann Carson, *Prisoners in 2020—Statistical Tables* (Washington, DC: BJS, 2021), 10, <https://perma.cc/GF2D-ULCB>. For the racial

- makeup of the United States as of this publication, see U.S. Census Bureau, “QuickFacts: United States,” database (Washington, DC: U.S. Census Bureau, archived May 26, 2022), <https://perma.cc/ETG8-58P4>.
- 42 See Muhammad, *The Condemnation of Blackness*, 2010, 79, 243.
- 43 For example, a Detroit survey in the late 1920s established that Black people faced more severe sentences than similarly situated white people. Muhammad, *The Condemnation of Blackness*, 2010, 243.
- 44 “Overall, a [B]lack child was five times as likely as a white to receive the most lenient judgment of a suspended sentence. But a far higher percentage of [B]lack [people] than white [people] were placed in institutions, and they were generally sentenced for longer terms. Almost twice as many [B]lack delinquents as white served a sentence of over five years. White [people] received probation five times as often as [B]lack [people]. . . .” Cheryl Greenberg, “*Or Does It Explode?*”: *Black Harlem in the Great Depression* (New York: Oxford University Press, 1997), 37.
- 45 Robert Johnson, Ania Dobrzanska, and Seri Palla, “The American Prison in Historical Perspective: Race, Gender, and Adjustment,” in *Prisons Today and Tomorrow*, edited by Ashley G. Blackburn, Shannon K. Fowler, and Joycelyn M. Pollock (Burlington, MA: Jones & Bartlett Learning, 2005), 33–35; and Muhammad, “Where Did All the White Criminals Go?,” 2011, 85–87.
- 46 As with other social benefits implemented at the time, Black people were not offered these privileges. Muhammad, “Where Did All the White Criminals Go?,” 2011, 74, 86–88.
- 47 “Historical Data” in *Crime and Justice Atlas 2000* (Washington, DC: Justice Research and Statistics Association, 2000), 34–47, 36–39, <https://perma.cc/Z937-TSU7>.
- 48 For more information, see Lauren-Brooke Eisen and Oliver Roeder, “America’s Faulty Perception of Crime Rates,” Brennan Center for Justice, March 16, 2015, <https://perma.cc/5T2Z-N8UM>.
- 49 “Law-and-order” advocates—including district attorneys’ associations, police unions, and victim safety organizations—lobbied for determinate sentencing. They believed the rehabilitation ideology coddled incarcerated people and was ineffective in reducing crime. Kohler-Hausmann, *Getting Tough*, 2017, 4–5, 207–208.
- 50 Boggs Act of 1951, Public Law 82–255, 65 Stat. 767 (82nd Congress).
- 51 Law Enforcement Assistance Act of 1965, Public Law 89–197, 79 Stat. 828 (89th Congress). Johnson reinforced the foundations laid in the Law Enforcement Assistance Act with the Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90–351, 82 Stat. 197 (90th Congress) (codified at 34 USC § 10101 et seq.).
- 52 Elizabeth Kai Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2017), 14–16, 354.
- 53 Jeremy Travis, Bruce Western, and Steve Redburn, eds., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Washington, DC: The National Academies Press, 2014), 115–116. See also Angie Maxwell, “What We Get Wrong about the Southern Strategy,” *Washington Post*, July 26, 2019, <https://www.washingtonpost.com/outlook/2019/07/26/what-we-get-wrong-about-southern-strategy/>.
- 54 Rick Perlstein, “Exclusive: Lee Atwater’s Infamous 1981 Interview on the Southern Strategy,” *The Nation*, November 13, 2012, <https://www.thenation.com/article/archive/exclusive-lee-atwaters-infamous-1981-interview-southern-strategy/>.
- 55 Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91–513, 84 Stat. 1236 (91st Congress) (codified at 21 U.S.C. §§ 801 et seq. & 951 et seq.).
- 56 Hinton, *From the War on Poverty to the War on Crime*, 2017, 134.
- 57 See for example Arit John, “A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing,” *The Atlantic*, April 22, 2014, <https://perma.cc/WK8X-G7DP>.
- 58 From 1964 to 1974, the U.S. homicide rate nearly doubled—going from 4.9 to 9.8 per 100,000—and rates of other serious crimes also rose. Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 111–113. And throughout the 20th century, crime was geographically and demographically concentrated, with Black and Latino homicide rates ranging from three to 10 times that of whites, especially in cities. Significant debate arose about crime’s root causes because it was (and still is) uncertain. For more on why crime rates are difficult to interpret, see Koerth and Thomson-DeVeaux, “Trump Doesn’t Know Why Crime Rises or Falls,” 2020. Whatever the reason for the rising crime rates, law-and-order conservatives were strategically placed to capitalize on white people’s fears and anxieties to make crime—and immigration, border control, and desegregation—a central political and electoral issue. Meanwhile, liberals argued that poverty and a legacy of unequal social conditions were to blame, but “often failed to challenge conservatives when they conflated riots, street crime, and political activism, especially on the part of African Americans and their supporters, and when they attributed the crime increase to . . . the demise of segregation.” Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 114.
- 59 David Musto and Pamela Korsmeyer, *The Quest for Drug Control: Politics and Federal Policy in a Period of Increasing Substance Abuse, 1963–1981* (New Haven, CT: Yale University Press, 2002), 38–71; and Hinton, *From the War on Poverty to the War on Crime*, 2017, 316–321. Anti-Drug Abuse Act of 1986, Public Law 99–570, 100 Stat. 3207 (99th Congress); and Violent Crime Control and Law Enforcement Act, Public Law 103–322, 108 Stat. 1796 (103rd Congress).
- 60 21 U.S.C. § 841(b) (2000).
- 61 Deborah J. Vagins and Jesselyn McCurdy, *Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law* (New York: American Civil Liberties Union, 2006), 1, 4, <https://perma.cc/4LKS-RCSW>.
- 62 Franklin D. Gilliam Jr., “The ‘Welfare Queen’ Experiment: How Viewers React to Images of African-American Mothers on Welfare,”

- Nieman Reports* 53, no. 2 (1999), <https://perma.cc/6Q2X-KS8R>; and Carroll Bogert and Lynnell Hancock, “Superpredator: The Media Myth That Demonized a Generation of Black Youth,” The Marshall Project, November 20, 2020, <https://perma.cc/7M3V-F4H6>.
- 63 In New York, for example, the rate was 14.5 per 100,000 in 1992. Federal Bureau of Investigation (FBI), “Crime Data Explorer,” database (Washington, DC: FBI), <https://crime-data-explorer.fr.cloud.gov/explorer/national/united-states/crime>.
- 64 “Historical Data” in *Crime and Justice Atlas 2000*, 2000, 34–47, 36–39.
- 65 In 20 of 24 Gallup surveys conducted since 1993, at least 60 percent of U.S. adults have said there is more crime nationally than there was the year before, despite the generally downward trend in national violent and property crime rates during most of that period. Gallup Reports, “Crime,” archived November 15, 2021, <https://perma.cc/4H8J-TTWX>. For trends in crime rates, see *Ibid*.
- 66 For a discussion of the call for harsher penalties in the 1980s and 1990s and how they did not follow patterns of victimization, see Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (New York: Oxford University Press, 1997), 25–26.
- 67 Violent Crime Control and Law Enforcement Act, Public Law 103–322, 108 Stat. 1796 (103rd Congress). See also Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, Chapter 3.
- 68 For 1971, see Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 13. For 1999, see Allen J. Beck, *Prison and Jail Inmates at Midyear 1999* (Washington, DC: BJS, 2000), 1, <https://perma.cc/PD59-6EBH>.
- 69 Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 73.
- 70 Pfaff, *Locked In*, 2017, 83–85.
- 71 For examples of these draconian sentencing options, see Brian Mann, “The Drug Laws That Changed How We Punish,” NPR, February 14, 2013, <https://perma.cc/M8N5-N6TM>.
- 72 Paula Ditton and Doris James Wilson, *Truth in Sentencing in State Prisons* (Washington, DC: BJS, 1999), 2, <https://perma.cc/7ZE8-4R38>.
- 73 Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 81. By 2002, no state permitted an incarcerated person to serve less than 50 percent of the minimum sentence. Don Stemen, Andres Rengifo, and James Wilson, *Of Fragmentation and Ferment* (New York: Vera Institute of Justice, 2005), 83, <https://perma.cc/4R4Q-D222>.
- 74 Stemen, Rengifo, and Wilson, *Of Fragmentation and Ferment*, 2005, 109–111; and Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 83–85.
- 75 Ashley Nellis, “Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States,” *Federal Sentencing Reporter* 23, no. 1 (2010), 27–32, 27, <https://perma.cc/ZPJ7-NQZ5>.
- 76 The states are Illinois, Iowa, Maine (which does not permit parole at all, except for people sentenced before 1976), Pennsylvania, and South Dakota. 730 Ill. Comp. Stat. § 5/5-4.5-15(c); Iowa Code § 902.1(2)a(1); Maine Crim. Code § 2314.2; Penn. Consol. Stat. § 6137(a)(1); and S.D. Cod. Laws § 24-15-4.
- 77 In 2008, 41,095 people were serving LWOP sentences, and the prison population was 1.6 million. See Nellis, “Throwing Away the Key,” 2010, 27; and William J. Sabol, Heather C. West, and Matthew Cooper, *Prisoners in 2008* (Washington, DC: BJS, 2009 [revised 2010]), 1, <https://perma.cc/83V4-RRCS>. In 2020, just more than 55,000 people were serving LWOP sentences, and the prison population was just more than 1.4 million. Nellis, *No End in Sight*, 2021, 16; and Carson, *Prisoners in 2019, 2020*, Table 1.
- 78 Jacob Kang-Brown, Chase Montagnet, and Jasmine Heiss, *People in Jail and Prison in Spring 2021* (New York: Vera Institute of Justice, 2021), 1, <https://perma.cc/U44W-2RNJ>.
- 79 Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 79–83.
- 80 Nellis, *No End in Sight*, 2021, 4, 13.
- 81 See 2002 Mich. Pub. Acts 2455 (codified as amended at Mich. Comp. Laws § 333.7401); and 2002 Mich. Pub. Acts 2641, 2643–2644 (codified as amended at Mich. Comp. Laws § 333.7403). See also FAMM, “Happy Anniversary, Michigan Reforms: Ten Years After Major Sentencing Reform Victory, Michigan Residents Safer,” FAMM News, March 1, 2013, <https://perma.cc/U82T-GCRA>.
- 82 See Jim Parsons, Qing Wei, Joshua Rinaldi, et al., *A Natural Experiment in Reform: Analyzing Drug Policy Change in New York City* (New York: Vera Institute of Justice, 2015), 13–15, <https://perma.cc/MY55-ES9C>.
- 83 Fair Sentencing Act of 2010, Public Law 111–220, 124 Stat. 2372 (111th Congress), <https://www.congress.gov/111/plaws/publ220/PLAW-111publ220.pdf>.
- 84 CA Proposition 36: Three Strikes Reform Act of 2012 (2012); and J. Richard Couzens and Tricia E. Bigelow, *The Amendment of the Three Strikes Sentencing Law* (Sacramento, CA: Barrister Press, 2017), <https://perma.cc/N6PL-89XA>.
- 85 CA Proposition 47: The Safe Neighborhoods and Schools Act (2014); and California Courts, “Proposition 47: The Safe Neighborhoods and Schools Act,” archived December 2, 2021, <https://perma.cc/JGZ9-KPJN>.
- 86 Nathan James, *The First Step Act of 2018: An Overview* (Washington, DC: Congressional Research Service, 2019), 8–9, <https://perma.cc/5N72-F8TG>.
- 87 DC B23-017, Second Look Amendment Act of 2019 (now “Omnibus Public Safety and Justice Amendment Act of 2020”) (2019), <https://perma.cc/8LU2-B7BH>.
- 88 Bureau of Justice Assistance, “Justice Reinvestment Initiative (JRI),” <https://perma.cc/93K2-XEUS>.

- 89 See Samantha Harvell, Jeremy Welsh-Loveman, Hanna Love, et al., *Reforming Sentencing and Corrections Policy: The Experience of Justice Reinvestment Initiative States* (Washington, DC: Urban Institute, 2017), 8–12, <https://perma.cc/N3NQ-XSEA>. JRI was supposed to reinvest prison savings in community safety, but the savings are often reinvested in other elements of the criminal legal system, such as more police, prosecutors, and probation. A 2013 evaluation of the initiative criticizes the drift of the justice reinvestment strategy from reinvestment to reallocation of funds within the criminal legal system and for a timid approach to addressing criminal justice stakeholders. At the time, JRI was the biggest and most sustained nationwide effort at sentencing reform, and yet overall the wins delivered were at best small and inadequate to the task of ending mass incarceration. James Austin, Eric Cadora, Todd R. Clear, et al., *Ending Mass Incarceration: Charting a New Justice Reinvestment* (Washington, DC: Sentencing Project, 2013), <https://perma.cc/U2MQ-CYZQ>. (The paper’s co-authors include Susan Tucker and Eric Cadora, formerly of the Open Society Foundations, who first argued for justice reinvestment as a way to move money to communities directly impacted by mass incarceration.) Vera provided technical assistance to states under JRI until 2015. Alison Shames, “JRI Takes a Bite,” Vera Institute of Justice, August 9, 2015, <https://perma.cc/QSH7-YTZS>.
- 90 Austin, Cadora, Clear, et al., *Ending Mass Incarceration*, 2013.
- 91 U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (OJJDP), “Statistical Briefing Book,” database (Washington, DC: OJJDP), data retrieved for 2019, <https://perma.cc/55MQ-ZFVU>; and Carson, *Prisoners in 2019, 2020*, Table 5.
- 92 Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974–2001* (Washington, DC: BJS, 2003), <https://perma.cc/4J5S-V7JM>.
- 93 Carson, *Prisoners in 2019, 2020*, Table 5.
- 94 For example, from 2000 to 2016, the number of Black men in state prisons declined by more than 48,000, while the number of white men increased by more than 59,000. Sabol, Johnson, and Caccavale, *Trends in Correctional Control by Race and Sex*, 2019, 3.
- 95 For the rationales behind federal sentencing, see for example 18 U.S.C. § 3553(a)(2).
- 96 Demleitner, Berman, Miller, and Wright, *Sentencing Law and Policy*, 2018, 2.
- 97 For example, in 1994, California Governor Pete Wilson said about the state’s new three strikes law: “I’m convinced that if we are sending clear messages to career criminals, we will begin to see them reform their conduct.” Daniel Weintraub, “3 Strikes Law Goes into Effect,” *Los Angeles Times*, March 8, 1994, <https://perma.cc/WU2F-EW6L>.
- 98 See generally Daniel Nagin, “Deterrence in the Twenty-First Century: A Review of the Evidence,” *Crime and Justice* 42 (2013), 199–263.
- 99 Michel Cholbi, “Harsh Justice: Why Doesn’t Increasing the Severity of Punishment Lead to Less Crime?,” *Psychology Today*, September 13, 2015, <https://perma.cc/W5CQ-2S4C>.
- 100 National Institute of Justice, *Five Things About Deterrence* (Washington, DC: DOJ, 2016), <https://perma.cc/2KJL-SAE8>.
- 101 Nagin, “Deterrence in the Twenty-First Century,” 2013, 202.
- 102 Michael Tonry, “Why Crime Rates Are Falling throughout the Western World,” *Crime and Justice* 43, no. 1 (2014), 53, Figure 1, <https://perma.cc/TKT2-TVDJ>. See also Michael Tonry, “Determinants of Penal Policies,” *Crime and Justice* 36 (2007), 1–48, <https://perma.cc/UH6Y-E44E>.
- 103 Tonry, “Why Crime Rates Are Falling throughout the Western World,” 2014, 4.
- 104 Tonry, “Why Crime Rates Are Falling throughout the Western World,” 2014, 50–51 (citing Ted Gurr, “Historical Trends in Violent Crime: A Review of the Evidence,” *Crime and Justice* 3 [1981]); Roger Lane, “Urban Police and Crime in Nineteenth-Century America,” *Crime and Justice* 2 (1980); and James Q. Wilson and Richard J. Herrnstein, *Crime & Human Nature: The Definitive Study of the Causes of Crime* (New York: Simon and Schuster, 1985).
- 105 FBI, “Crime Data Explorer.”
- 106 Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 155.
- 107 Lauren-Brooke Eisen, Oliver Roeder, and Julia Bowling, *What Caused the Crime Decline?* (New York: Brennan Center for Justice, 2016), 17–26, 23, <https://perma.cc/KJ4V-VNRK>.
- 108 Ibid.
- 109 Ibid., 79.
- 110 Michael Tonry cites multiple studies on the replacement effect for drug crimes in his 2015 book *Sentencing Fragments: Penal Reform in America, 1975–2025* (New York: Oxford University Press, 2015). He also asserts that this effect applies as well to participation in “deviant youth groups and gangs,” stating that “[a]s gang members and leaders are arrested and taken out of circulation, successors are ready, willing and available to step into their shoes.” Ibid., 216–217.
- 111 Tiana Herring, “Jail Incarceration Rates Vary Widely, but Inexplicably, across U.S. Cities,” Prison Policy Initiative, May 4, 2021, <https://perma.cc/3XYL-JP79>.
- 112 Howard Snyder, *Arrest in the United States, 1990–2010* (Washington, DC: BJS, 2012), 3, <https://perma.cc/SA4A-4WGS>. Although arrest rates are an imperfect measure of crime, in terms of both how much is being committed and by whom, they are a readily available metric that can give a general picture of how much criminalized behavior is identified, even if they are not necessarily accurate in other regards. See Alexi Jones and Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social Problems* (Northampton, MA: Prison Policy Initiative, 2019), <https://perma.cc/3JQT-E3CN>.
- 113 Snyder, *Arrest in the United States, 1990–2010*, 2012, Figures 4 (murder), 7 (forcible rape), 11 (robbery), and 24 (burglary). Unlike the preceding crimes, the arrest rate for aggravated assault is halved somewhat later, around age 40. Ibid., Figure 16.

- 114 Ian Lambie and Isabel Randell, "The Impact of Incarceration on Juvenile Offenders," *Clinical Psychology Review* 33, no. 3 (2013), 448–459.
- 115 Todd Clear, Natasha Frost, Michael Carr, et al., *Predicting Crime through Incarceration: The Impact of Rates of Prison Cycling on Rates of Crime in Communities* (Washington, DC: NCJRS, 2014), 111, <https://perma.cc/T78A-YQ6F>; and Todd R. Clear, "The Effects of High Imprisonment Rates on Communities," *Crime and Justice* 37, no. 1 (2008), 97–132, <https://perma.cc/5L73-2DGT>.
- 116 Research on the community-level impacts of incarceration shows that its harms extend far beyond direct consequences for incarcerated people. Incarceration strains ties between incarcerated people and their families and communities. If an incarcerated parent is a primary caregiver, childcare needs go unmet and children can enter the foster system. Communities under financial and personal strain are unable to form and sustain bonds that prevent people from falling through the cracks. And the disenfranchisement and exclusion of formerly incarcerated people from voting and job opportunities means they can have significant difficulty reintegrating into their communities after their return. Dorothy Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," *Stanford Law Review* 56, no. 5 (2004), 1271–1305, 1281–1296, <https://perma.cc/6YM5-XV4B>. See also Dina Rose and Todd Clear, "Who Doesn't Know Someone in Jail? The Impact of Exposure to Prison on Attitudes toward Formal and Informal Controls," *Prison Journal* 84, no. 2 (2004), 228–247; and Todd Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford Press, 2007).
- 117 Clear, "The Effects of High Imprisonment Rates on Communities," 2008, 97–132.
- 118 Petrich, Pratt, Jonson, et al., "Custodial Sanctions and Reoffending," 2021. See also James Byrne, "After the Fall: Assessing the Impact of the Great Prison Experiment on Future Crime Control Policy," *Federal Probation Journal* 77, no. 3 (2013), 6–7, Table 1 (listing 26 studies), <https://perma.cc/AP8B-E5UY>.
- 119 See for example Josep Cid Moline, "Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanction," *European Journal of Criminology* 6, no. 6 (2009), 459–480, (Spanish study of 483 people sentenced in Barcelona in 1998; those sentenced to prison had a higher rate of reconviction); and William Bales and Alex Piquero, "Assessing the Impact of Prison on Recidivism," *Journal of Experimental Criminology* 8, no. 1 (2012), 71–101, 98 (study of more than 79,000 people sentenced to prison and 65,000 sentenced to community control from 1994 to 2002 in Florida. The closer the two samples matched on multiple axes, the smaller the differences in recidivism became; nonetheless, differences in recidivism remained statistically significant, with those sentenced to prison recidivating at a higher rate.)
- 120 See for example M. Keith Chen and Jesse M. Shapiro, "Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach," *American Law and Economics Review* 9, no. 1 (2007), 1–29; Gerald G. Gaes and Scott D. Camp, "Unintended Consequences: Experimental Evidence for the Criminogenic Effect of Prison Security Level Placement on Post-Release Recidivism," *Journal of Experimental Criminology* 5 (2009), 139–162; and Francis T. Cullen, Cheryl Lero Jonson, and Daniel S. Nagin, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science," *Prison Journal* 91, no. 3 (supp.) (2011), 48S–65S.
- 121 James Austin, Vincent Schiraldi, Bruce Western, et al., *Reconsidering the "Violent Offender"* (New York: Square One Project, 2019), 24, <https://perma.cc/ST3C-ZBSS>. Examining homicides in 19 cities from 2014 to 2018, researchers found that less than 1 percent of people were responsible for 50 percent of the homicides. Stephen Lurie, Alexis Acevedo, and Kyle Ott, "The Less than 1%: Groups and the Extreme Concentration of Urban Violence" (paper presented to the American Society of Criminology, John Jay College of Criminal Justice, New York, November 13, 2018), 15, <https://perma.cc/ENU8-6LYF>.
- 122 For the challenge of this task, see Thomas Ward Frampton, "The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics," *Harvard Law Review* 135, no. 8 (2022), 2013, <https://perma.cc/Z9LP-GKH3> (noting that making an assessment, both philosophical and empirical, on who constitutes the dangerous few is challenging and that attempts to do so often result in determinations that Black men and boys present such danger). Frampton also notes, however, that a failure to engage in this debate can be understood as downplaying or dismissing those most at risk from interpersonal violence.
- 123 "[A]mong those persons who have a violent offense (according to official records) in their criminal careers, the majority are only one-time violent offenders. . . ." Alex R. Piquero, Wesley G. Jennings, and J.C. Barnes, "Violence in Criminal Careers: A Review of the Literature from a Developmental Life-Course Perspective," *Aggression and Violent Behavior* 17, no. 3 (2012), 171–179, 177. See also Austin, Schiraldi, Western, et al., *Reconsidering the "Violent Offender,"* 2019, 23–25.
- 124 Compare Snyder, *Arrest in the United States, 1990-2010*, 2012, Figures 4, 11, 24, 28, 40, 44.
- 125 See David Alan Sklansky, *A Pattern of Violence: How the Law Classifies Crime and What It Means for Justice* (Cambridge, MA: Harvard University Press, 2021), 233–237 (arguing that the law must return to the viewpoint that violence is fixed in some people but not others—a concept that has historically reinforced racist constructions of criminality—but understood as a response that can arise out of conflict or particular stressful situations). For example, Cyntoia Brown-Long, who killed a man who trafficked her for sex when she was 16 years old, was sentenced to life in prison, a term she served 15 years of before successfully petitioning for clemency, even though outside of that specific circumstance there was no indication that she was dangerous to anyone. In fact, while incarcerated, she earned her GED and two degrees, and she and her husband work with grassroots projects benefiting youth who have been trafficked or who are at risk for system involvement. Brown-Long's sentence

was commuted in 2019, and she is currently serving a 10-year parole term. Angela Dennis, “Here’s What Cyntoia Brown-Long Is Doing 2 Years After She Walked Out of a Tennessee Prison,” KNOX News, August 4, 2021, <https://perma.cc/NS9D-DM43>.

- 126 Michael Tonry, “Community Punishments,” in *Reforming Criminal Justice: Volume 4: Punishment, Incarceration, and Release*, edited by Erik Luna (Phoenix, AZ: Academy for Justice, 2017), 187–203, <https://perma.cc/7P6B-29UW>. See also Francis Cullen, Cheryl Lero Jonson, and Daniel Mears, “Reinventing Community Corrections,” *Crime and Justice* 46 (2016), 27–93, 34.
- 127 Regarding cognitive behavioral programming, the Reasoning and Rehabilitation program—a 36-session group program aimed at teaching problem solving, social skills, negotiation skills, management of emotions, creative thinking, values enhancement, critical reasoning, skills in review, and cognitive exercises—was piloted in the 1980s in Canada among people in the community on probation. It is now used throughout Canada, the United States, and Europe in community and corrections settings. A meta-analysis of the program found a 14 percent reduction in reconvictions compared to controls. L.S. Joy Tong and David Farrington, “How Effective Is the ‘Reasoning and Rehabilitation’ Programme in Reducing Reoffending?: A Meta-Analysis of Evaluations in Four Countries,” *Psychology, Crime & Law* 12, no. 1 (2006), 3–24, 7–8, <https://perma.cc/3G5V-ZPKH>. For a discussion of additional community-based rehabilitative options see Tonry, “Community Punishments,” 2017, 193 (discussing “victim-offender” mediation programs, community service, and restitution piloted in community-based programs in the 1970s in the United States).
- 128 Common Justice, <https://www.commonjustice.org/>; Impact Justice, <https://impactjustice.org/>; S.O.U.L Sisters, <https://soulsistersleadership.org/>; and Collective Justice, <https://www.collectivejusticenw.org/>. Although these programs developed within the community, legislation can also encourage—or even require—restorative justice. See for example Montana Code Ann. § 46-18-101(3)(i) (“Sentencing practices should promote and support practices, policies and programs that focus on restorative justice principles”).
- 129 Kyle Ernest, “Is Restorative Justice Effective in the U.S.? Evaluating Program Methods and Findings Using Meta-analysis” (PhD diss., Arizona State University, 2019), 101, <https://hdl.handle.net/2286/R.I.54883>.
- 130 Heather Strang, Lawrence Sherman, Evan Mayo-Wilson, et al., “Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review,” *Campbell Systematic Reviews* 9, no. 1 (2013), 1–59, https://restorative-justice.org.uk/sites/default/files/resources/files/Campbell_RJ_review.pdf.
- 131 *Ibid.*, 48.
- 132 Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair* (New York: The New Press, 2019), 93–94, 188 (“if we hurt someone we have an obligation to face that pain, to face the person who felt that pain, to answer their questions, to hear how it affected them and their loved ones, to sit in that fire”) and 118 (“People in the community need not hope or believe in a difference: they can see it carried out before their eyes”).
- 133 Katherine Beckett and Martina Kartman, “Violence, Mass Incarceration and Restorative Justice: Promising Possibilities” (paper presented at the University of Washington, June 20, 2016), 4 (“Direct interaction is at the heart of most restorative justice programs”), <https://perma.cc/X5ER-ZSD4>.
- 134 Rachel Morgan and Jennifer Truman, *Criminal Victimization 2019* (Washington, DC: BJS, 2020), 8, Table 6, <https://perma.cc/7VKM-NSDC>.
- 135 Alliance for Safety and Justice (ASJ), *Crime Survivors Speak 2022: National Survey of Victims’ Views on Safety and Justice* (Oakland, CA: ASJ, 2022), 27, <https://perma.cc/3RYR-KLVN>.
- 136 BJS, “National Crime Victimization Survey (NCVS),” archived November 20, 2021, <https://perma.cc/L4CQ-6TJS>. For the 2016 survey, see ASJ, *Crime Survivors Speak: The First-Ever National Survey of Victims’ Views on Safety and Justice* (Oakland, CA: Tides Center, 2016), <https://perma.cc/LPT5-NM6X>. For the 2022 survey see ASJ, *Crime Survivors Speak 2022*, 2022.
- 137 ASJ, *Crime Survivors Speak 2022*, 2022, 5.
- 138 Rachel Morgan and Jennifer Truman, *Criminal Victimization 2019* (Washington, DC: BJS, 2020), Table 8, <https://perma.cc/SV9V-MB89>.
- 139 Maureen Baker, Erica King, and Tara Wheeler, *Working with Victims of Crime: An Integrated Approach for Community Supervision Professionals* (Washington, DC: National Institute of Corrections, 2016), Section 4: Working with Victims of Crime, <https://perma.cc/K6SW-UWRW>. The 2022 ASJ survey reported that seven in 10 survivors experienced at least one symptom of trauma. ASJ, *Crime Survivors Speak 2022*, 2022, 5.
- 140 Baker, King, and Wheeler, *Working with Victims of Crime*, 2016, Section 4.
- 141 ASJ, *Crime Survivors Speak 2022*, 2022, 27, 28, 31.
- 142 A 2013 meta-analysis of research on 10 restorative justice conferencing programs in Australia, England, and New Zealand found that for survivors of violent acts, more than five times as many participants in the court process (as opposed to the restorative conference process) thought the person who harmed them would do so again. Strang, Sherman, Mayo-Wilson, et al., “Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims,” 2013, 37. See also Beckett and Kartman, “Violence, Mass Incarceration and Restorative Justice,” 2016, 7.
- 143 Beckett and Kartman, “Violence, Mass Incarceration and Restorative Justice,” 2016, 7.
- 144 U.S. Const. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”); and U.S. Const. amend. XIV §1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”).

- 145 Adam Winkler, “Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts,” *Vanderbilt Law Review* 59, no. 3 (2006), 793–871, <https://perma.cc/33VL-SF7Z>. The 13th Amendment (“Neither slavery nor involuntary service, except as punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction”) does provide for slavery and involuntary servitude as a punishment for a conviction, which, as noted in Chapter 1, gave cover to states to establish convict leasing. Although involuntary servitude is a constraint on liberty, this does not mean that the Constitution specifically excludes post-conviction incarceration, a different constraint on liberty, from any consideration as a fundamental right. Indeed, in the absence of such a strict textual exclusion, legislatures are free to claim the right to liberty broadly and find that it cannot be abrogated by post-conviction incarceration, thus requiring a compelling purpose and narrow tailoring in order to take it away.
- 146 As of 2018, the most recently available Uniform Crime Report data, Black people are arrested at a rate that is 2.44 times that of white people. Vera Institute of Justice, “Arrest Trends: Demographics,” database (New York, Vera Institute of Justice), <https://arresttrends.vera.org/demographics>. This disparity continues into bail, where a 2017 analysis of decisions in Miami and Philadelphia found evidence of “substantial bias against [B]lack defendants” in setting bail; and sentencing—a 2018 review of 40 studies of state and federal sentencing showed a “direct race effect” in prevalence and severity of sentencing. David Arnold, Will Dobbie, and Crystal S. Yang, “Racial Bias in Bail Decisions,” *Quarterly Journal of Economics* 133, no. 4 (2018), 1885–1932, <https://perma.cc/79B3-HLVZ>; and Cassia Spohn, “Race and Sentencing Disparity” in *Reforming Criminal Justice: Volume 4: Punishment, Incarceration, and Release*, edited by Erik Luna (Phoenix, AZ: Academy for Justice, 2017), 169–185, <https://perma.cc/KP3B-KXNB>.
- 147 Sherry F. Colb, “Freedom from Incarceration: Why Is This Right Different from All Other Rights?,” *NYU Law Review* 69 (1994), 781–849, 799 (arguing that courts should enforce the fundamental right of liberty by subjecting carceral sentencing laws to strict scrutiny and require a compelling state purpose and narrow tailoring), <https://perma.cc/GW7C-AWUF>; and Salil Dudani, “Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences,” *Yale Law Journal* 129, no. 7 (2020), 2112–2177, 2118, 2131–2133, <https://perma.cc/SYW8-QVSC> (arguing that a right against unwarranted confinement has been acknowledged in jurisprudence and that the U.S. Supreme Court in *Chapman v. United States*, 506 U.S. 453, 464 (1991) did not thoroughly examine or consider why it should be extinguished on conviction and that therefore any limitations on that right must be narrowly tailored to serve a compelling state interest).
- 148 See also Atkinson and Travis, *The Power of Parsimony*, 2021, asserting that parsimony, the principle that the state should use the least restrictive means possible to achieve a legitimate end, calls for “the primacy of the liberty interest” to combat racially driven inequities in punishment. “By forcing a focus on the primacy of individual liberty, and asking whether all state intrusions on liberty through the enforcement of the criminal law were reasonably necessary to accomplish a legitimate purpose, the parsimony perspective brings into sharp focus the ways state power has been mobilized to support racial hierarchies and exclude full participation in our society.” *Ibid.*, 4, 6.
- 149 For example, in the spring of 2022, the Tennessee legislature passed a sweeping bill, HB 2656, that required people convicted of certain violent felonies, including vehicular homicide and carjacking, to serve 100 percent of their sentences without the possibility of good time or release on parole. Tennessee HB 2656 (2022). To justify the bill, State Speaker Cameron Sexton said, “Common sense would tell you, if you lock up the violent criminals, the very bad guys, for longer sentences, you’re gonna have less crime, right?” *Tennessee Journal* 48, no. 9 (May 13, 2022).
- 150 Nazish Dholakia and Daniela Gilbert, “Community Violence Intervention Programs, Explained,” Vera Institute of Justice, September 1, 2021, <https://perma.cc/M6QU-QRDV>.
- 151 Sandra van den Heuvel, Marta Nelson, and Linh Nguyen, “How the American Rescue Plan Can Foster an Equitable Recovery,” Vera Institute of Justice, August 24, 2021, <https://perma.cc/L7KW-U2DT>.
- 152 See for example Floor Statement of Senator Chuck Grassley of Iowa, Ranking Member, Senate Judiciary Committee, on the Smarter Sentencing Act, S1410 (113th Congress), April 8, 2014, <https://perma.cc/8MH6-B9FT>.
- 153 ASJ, *Crime Survivors Speak 2022*, 2022, 31.
- 154 See for example Lisa M. Broidy, Jerry K. Daday, Cameron S. Crandall, et al., “Exploring Demographic, Structural, and Behavioral Overlap among Homicide Offenders and Victims,” *Homicide Studies* 10, no. 3 (2006), 155–180, <https://perma.cc/9V5C-5YPW>. See also F.T. Green, “Victims Are Often Criminals, and That Is a Paradox American Policing Can’t Solve,” *The Outline*, August 6, 2019, <https://perma.cc/S9XE-CT9A>.
- 155 Sered, *Until We Reckon*, 2019, 92–94.
- 156 Sered, *Until We Reckon*, 2019, 43; and Sered, *Accounting for Violence*, 2017, 12–15.
- 157 Nicola Lacey and Hanna Pickard, “To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice,” *Oxford Journal of Legal Studies* 35, no. 4 (2015), 665, 679–680, <https://perma.cc/97WN-WE33>.
- 158 See for example Strang, Sherman, Mayo-Wilson, et al., “Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims,” 2013.
- 159 Restorative justice is one way of centering the survivor’s harm and requiring the responsible party to address it. That frame can be written into statute. See for example Montana Code Ann. § 46-18-101(3)(i) (“Sentencing practices should promote and support practices, policies and programs that focus on restorative justice principles”).

- 160 Sered, *Accounting for Violence*, 2017, 18. See also Francis Cullen, “Correctional Rehabilitation,” in *Reforming Criminal Justice: Volume 4: Punishment, Incarceration, and Release*, edited by Erik Luna (Phoenix, AZ: Academy for Justice, 2017), 235–260, 239–240, <https://perma.cc/28W7-MV7T>.
- 161 Marc Mauer and Ashley Nellis, *The Meaning of Life: The Case for Abolishing Life Sentences* (New York: The New Press, 2018), 145; and the Sentencing Project, “Campaign to End Life Imprisonment,” <https://endlifeimprisonment.org>.
- 162 Maurer and Nellis, *The Meaning of Life*, 2018, 150.
- 163 Tapio Lappi-Seppälä, “Nordic Sentencing,” *Crime and Justice* 45 (2016), 17–82, 47.
- 164 See for example Marc D. Rudolph, Oscar Miranda-Domínguez, Alexandra O. Cohen, et al., “At Risk of Being Risky: The Relationship between ‘Brain Age’ Under Emotional States and Risk Preference,” *Developmental Cognitive Neuroscience* 24 (2017), 93–106, <https://perma.cc/YY42-YJ55>; and Catherine Lebel and Christian Beaulieu, “Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood,” *Journal of Neuroscience* 31, no. 30 (2011), 10937–10947, <https://perma.cc/KP28-UXNY>. For a comprehensive discussion of “emerging adults” aged 18 to 25 in the criminal legal system with policy recommendations specific to this group, see Karen U. Lindell and Katrina L. Goodjoint, *Rethinking Justice for Emerging Adults: Spotlight on the Great Lakes Region* (Philadelphia, PA: Juvenile Law Center, 2020), <https://perma.cc/5YYU-MSF9>.
- 165 For example, see Mo. Rev. Stat. § 557.021 (2020).
- 166 The Model Penal Code is a model piece of legislation developed by a panel of judges, lawyers, and legal scholars. States may adopt the Model Code in whole or in part or base novel legislation on its text. Section 6.06 of the Model Code calls for sentencing guidelines to create recommendations for appropriate and consistent sentences below the maximum. Model Penal Code § 6.06 and Explanatory Note (American Law Institute, Official Draft, forthcoming 2022).
- 167 The vast majority of states—44—allow the ability to earn time off the end of a sentence through engaging in prescribed behaviors during incarceration. For a general discussion of the purpose and applicability of such good-time credits, see Nora Demleitner, “Good Conduct Time: How Much and For Whom? The Unprincipled Approach of the Model Penal Code,” *Florida Law Review* 61 (2009), 777–796 (critiquing the Model Penal Code for limiting good-time credits to 15 percent of a sentence), <https://perma.cc/5FC9-XNLQ>.
- 168 Thirty-four states allow people to earn more time for positive program participation in addition to good discipline, often called “earned release.” National Conference of State Legislatures (NCSL), *Good Time and Earned Time Policies for People in State Prisons (as established by law)* (Denver, CO: NCSL, 2020), <https://perma.cc/55CM-3NTS>.
- 169 Ibid.
- 170 Louisiana SB 139, Act 280 (2017), <https://perma.cc/S3HB-GLYJ>; and Illinois SB 1971 (2019).
- 171 Racial disparity in disciplinary tickets occurs particularly in areas involving officer discretion that do not require producing physical evidence, such as disobeying a direct order. See Michael Schwirtz, Michael Winerip, and Robert Gebeloff, “The Scourge of Racial Bias in New York State’s Prisons,” *New York Times*, December 3, 2016, <https://www.nytimes.com/2016/12/03/nyregion/new-york-state-prisons-inmates-racial-bias.html>; and Kathryn M. Young and Jessica Pearlman, “Racial Disparities in Lifer Parole Outcomes: The Hidden Role of Professional Evaluations,” *Law & Social Inquiry* 47, no. 3 (2022), 783–820, <https://perma.cc/8T8H-LYRG>.
- 172 Adapted from 730 Ill. Comp. Stat. 5/3-6-3 (2021).
- 173 Demleitner, Berman, Marc, and Wright, *Sentencing Law and Policy*, 2018, 288 (“Almost all states have habitual-felon statutes, which increase sentences by designated amounts for offenders with a particular prior felony record”).
- 174 For example, see the discussion surrounding Alabama HB 107 (2021), a proposed repeal of Alabama’s 1970s “habitual felon” law. Representative Matt Simpson argued forcefully against repeal: “But we do need to be able to punish for that sentence to make sure that other members of the community don’t follow that path or have some form of deterrence so they don’t do that.” Mike Cason, “Bill Would Give Some Alabama Inmates Under Habitual Offender Law Chance for New Sentence,” AL.com, April 27, 2021, <https://perma.cc/33UE-9BMG>. The repeal bill died in committee. Alabama HB 107 (2021), <https://perma.cc/DCZ7-CUH6>.
- 175 Daniel Mears and Joshua Cochran, “Progressively Tougher Sanctioning and Recidivism: Assessing the Effects of Different Types of Sanctions,” *Journal of Research in Crime and Delinquency* 55, no. 2 (2018), 194–241, 228 (“analyses of second-time felons did not clearly support the hypothesis that progressions to more severe types of sanctions would decrease recidivism”).
- 176 Tonry, *Sentencing Fragments*, 2015, 241 (noting that both collective and selective incapacitation crime control strategies lost credibility after testing in the 1970s and 1980s and that prior record enhancements are an “indiscriminate and wasteful blunderbuss strategy” toward crime control).
- 177 Tonry, *Sentencing Fragments*, 2015, 239.
- 178 United Kingdom Sentencing Act 2020, c. 17, § 65 (“This section applies where a court is considering the seriousness of an offence (‘the current offence’) committed by an offender who has one or more relevant previous convictions. . . (2) The court must treat as an aggravating factor each relevant previous conviction that it considers can reasonably be so treated, having regard in particular to—(a) the nature of the offence to which the relevant previous conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the relevant previous conviction”), <https://perma.cc/25XK-AAS6>.
- 179 See generally the Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary*

Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System (Washington, DC: Sentencing Project, 2018), <https://perma.cc/5HNY-HSKF>.

- 180 Richard Frase, “Prior Record Enhancements: High Costs, Uncertain Benefits,” Robina Institute Sentencing Guidelines Resource Center, November 28, 2017 (“For example, in Minnesota for a recent 10-year period, an examination of the higher recommended-prison rate for [B]lack defendants compared to white defendants found that almost two-thirds of the higher [B]lack rate was due to higher [B]lack criminal history scores.”), <https://perma.cc/5SFF-LPTK>.
- 181 The states were Kansas, Minnesota, North Carolina, and Washington. When examining the likelihood of a prison sentence, “[c]riminal history accounts for 41 to 57% of the racial disparity in recommended prison sentences.” Richard S. Frase, Julian R. Roberts, Rhys Hester, et al., *Criminal History Enhancements Sourcebook* (Minneapolis, MN: Robina Institute of Criminal Law and Criminal Justice, 2015), 110, <https://perma.cc/52FX-TVNE>.
- 182 Ibid, 114.
- 183 For a summary of this and other arguments for and against prior record enhancements, see USSC, *Simplification Draft Paper, Chapter Four* (Washington, DC: USSC, 1995), <https://perma.cc/U2NC-SBYN>.
- 184 Youngjae Lee, “Repeat Offenders and the Question of Desert,” in *Previous Convictions and Sentencing: Theoretical and Applied Perspectives*, edited by Julian V. Roberts and Andrew von Hirsch (London: Hart Publishing, 2010).
- 185 Sentencing Act of 1995 (WA), § 7(2) (Austl.), <https://perma.cc/DL3D-8MZC>.
- 186 Alison Siegler, “End Mandatory Minimums,” Brennan Center for Justice, October 18, 2021, <https://perma.cc/48VR-97UV>. For federal law, see for example the Anti-Drug Abuse Act of 1986, Public Law No. 99–570, 100 Stat. 3207 (99th Congress).
- 187 The unchecked “gift” of mandatory minimums to prosecutors’ power has been noted by authors on the left and right. See for example John Pfaff, *Locked In*, 2017, 135–136; and Paul Larkin Jr. and Evan Burnick, *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms* (Washington, DC: Heritage Foundation, 2014), <https://perma.cc/6XUX-C2WN>.
- 188 See for example Sarah Lynch and Doina Chiaru, “Key Quotes from U.S. Attorney General Nominee Garland on Criminal Justice Policies,” Reuters, February 22, 2021, <https://perma.cc/RF5J-56V3>.
- 189 Model Penal Code § 6.11, Note (American Law Institute, Official Draft, forthcoming 2022).
- 190 California SB 73 (2021) (signed by governor October 5, 2021), <https://perma.cc/L7YK-EB7N>. Under the new provisions, probation is allowed as a matter of course for all convictions for drug sales except those for selling to minors. Probation for sentences for drug sales to minors is permissible “only in an unusual case where the interests of justice would best be served. When probation is granted pursuant to this subdivision, the court shall specify on the record . . . the circumstances supporting this finding” (codified at Cal. Penal Code § 1203.07(c)).
- 191 New Jersey AB A4369 (2020); and New Jersey SB 2586 (2021). See also Nikita Biryukov, “Murphy to Veto Mandatory Minimums Bill—Again,” *New Jersey Globe*, June 25, 2021, <https://perma.cc/T3TF-XRWJ>.
- 192 HR 3800, 115th Congress (2017) (died in committee).
- 193 NYC Mayor’s Office of Criminal Justice, *Alternatives to Incarceration: Court-Mandated, Supportive, Community-Based Services* (New York: Mayor’s Office of Criminal Justice, 2020), <https://perma.cc/B2ZU-ZCBJ>.
- 194 Examples of such programs in New York City include the Fortune Society’s Freedom Program, https://fortunesociety.org/our-services/#tab_detail2; CASES’s Nathaniel Assertive Community Treatment, <https://www.cases.org/nathaniel-act/>; and Exodus Transitional Community, <https://www.etcny.org/alternatives-to-incarceration>.
- 195 Common Justice, “The Common Justice Model,” https://www.commonjustice.org/the_common_justice_model.
- 196 Alexi Jones, *Reforms without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms* (Northampton, MA: Prison Policy Initiative, 2020), Chart 1, <https://perma.cc/AW2H-WV2G>. On the other hand, Hawai’i’s HOPE program focuses on people with long histories of involvement with the criminal legal system. Although HOPE does use incarceration as a sanction, over the course of the program, participants spend 48 fewer days reincarcerated than people in traditional probation programs, and they are 55 percent less likely to be arrested on new charges. Angela Hawken, “Program Profile: Hawaii Opportunity Probation with Enforcement (HOPE),” National Institute of Justice, May 31, 2011, <https://perma.cc/F9GM-Z7K3>.
- 197 Council of State Governments Justice Center and Arnold Ventures, *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets* (New York: Council of State Governments Justice Center, 2019), 1, <https://perma.cc/7VRS-G4GC>.
- 198 Lama Hassoun Ayoub, Jennifer A. Tallon, Sarah Picard, and Cassandra Ramdath, *Probation Reform in New York City: An Outcome Evaluation (2013–2016)* (New York: Center for Court Innovation, 2020), 2, 5–8, <https://perma.cc/SDP8-C8CD>.
- 199 Vincent Schiraldi and Michael Jacobson, “Could Less Be More when It Comes to Probation Supervision?” *American City and County*, June 4, 2014, <https://perma.cc/9EBA-ATCV>.
- 200 An example is the District of Columbia’s Incarceration Reduction Amendment Act, in which a person who was sentenced to incarceration after conviction for an offense committed before they were 25 years old may petition the court for resentencing after 15 years. To resentence, the court must find that the person “is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.” DC Code § 24-403.03(a)(2) (2020).

- 201** Richard Frase, “Second Look Provisions in the Proposed Model Penal Code Revisions,” *Federal Sentencing* 12, no. 3 (2009), 194–202, <https://perma.cc/76W5-BRPN>.
- 202** Illinois HB 3443 (2021) (enrolled as Public Act 102-0028); Maryland SB 494 (2021) (governor veto overridden April 20, 2021); and Oregon SB 819 (2021) (approved by governor June 23, 2021). For a living spreadsheet of second-look legislation, see Famm, “Second Chance Legislation in the States,” database, https://docs.google.com/spreadsheets/d/13a-FuNUNGaphzq-GsAd8E54veaZhU_nWkmh2gxy-iCs/edit#gid=0. See also Famm, “Second Chances Agenda,” <https://perma.cc/F66A-8Y3G>.
- 203** See for example California’s 2018 resentencing law, which allows district attorneys, parole boards, or correctional facility administrators to petition the court for resentencing any time after 120 days from the imposition of sentencing if such resentencing is “in the interest of justice.” California AB 2942 (2018) (approved by governor September 30, 2018), <https://perma.cc/MK53-TWMX>.
- 204** Incarceration Reduction Amendment Act (codified at D.C. Code § 24-403.03, and modified by the Second Look Amendment Act of 2019).
- 205** S 2146 (116th Congress, 2019), <https://www.congress.gov/116/bills/s2146/BILLS-116s2146is.pdf>.
- 206** California AB 2942 (2018) (approved by governor September 30, 2018), <https://perma.cc/MK53-TWMX>; Washington SB 6164 (2020) (codified at Wash. Rev. Code § 36.27.130); and Oregon SB 819 (2021) (signed by governor June 23, 2021).
- 207** *State v. Zarate*, No. 084516 (N.J. 2022) (“The test under [the United States and New Jersey] Constitutions is generally the same: First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?”).
- 208** The nonprofit For the People advocated for the passage of California’s prosecutor-filed resentencing, AB-2942. Its website tracks successful petitions under the statute. For the People, “By the Numbers,” database (Oakland, CA: For the People), archived December 1, 2021, <https://perma.cc/EX9Z-MQ5Y>. For California’s incarcerated population, see Jacob Kang-Brown, Chase Montagnet, and Jasmine Heiss, *People in Jail and Prison in 2020* (New York: Vera Institute of Justice, 2021), 6, <https://perma.cc/H7HW-8U3D>.
- 209** Scott MacFarlane, Katie Leslie, Lance Ing, et al., “Man Released Under DC’s Second Look Act Sentencing Reform,” NBC4 News, August 27, 2021, <https://perma.cc/NNB4-FCJP>; and DC Department of Corrections, *DOC Population Statistics: Average Daily Population for October 2016 through June 2021* (Washington, DC: DC Department of Corrections, 2021), <https://perma.cc/5N4C-BNE6>.
- 210** Second-look resentencing may provide opportunities for release where traditional parole has failed. Discretionary parole release

has raised concerns about vesting release decisions in the hands of people presumed to be under political pressure, and it has yet to be seen whether judges are able to weather those pressures more effectively than parole boards, which are typically appointed by governors. Kevin Reitz and Cecelia Klingele, “Model Penal Code: Sentencing—Workable Limits on Mass Punishment,” *Crime and Justice* 48 (2019), 255–311, 285, 295, <https://perma.cc/TD3C-GP-GJ>. “Model Penal Code: Sentencing” removes all indeterminate sentencing and release decision-making by parole boards because the authors believe that parole boards are too politically motivated, that parole board release decision-making suffers from a fatal lack of due process, and that risk-based sentence lengths can be determined at the time of sentencing. *Ibid.*, 284–286.

- 211** Such a model provision would read:

(a) *Notwithstanding any other provision of law, the court shall reduce a term of imprisonment imposed on an incarcerated person if:*

(1) *The person has served at least [15] 10 years in prison; and*

(2) *The court finds, after considering the factors set forth in subsection (c) of this section, that the person is not a danger to the safety of any person or the community and that the interests of justice warrant a sentence modification.*

(b)(1) *An incarcerated person (the “petitioner”) may file an application for a sentence modification under this section. The application shall be in the form of a motion to reduce the sentence. The application may include affidavits or other written material. The application shall be filed with the sentencing court, and a copy shall be served on the prosecuting attorney.*

(2) *The court may direct the parties to expand the record by submitting additional testimony, examinations, or written materials related to the motion. The court shall hold a hearing on the motion at which the petitioner and petitioner’s counsel shall be given an opportunity to speak on the petitioner’s behalf. The court may permit the parties to introduce evidence. The court may consider any records related to the underlying offense.*

(3) *Except as provided in subparagraph (B) of this paragraph, the petitioner shall be present at any hearing conducted under this section unless the petitioner waives the right to be present. Any proceeding under this section may occur by video teleconferencing, and the requirement of a petitioner’s presence is satisfied by participation in the video teleconference.*

(4) *The court shall issue an opinion in writing stating the reasons for granting or denying the application under this section, but the court may proceed to sentencing immediately after granting the application.*

(c) *The court, in determining whether to reduce a term of imprisonment pursuant to subsection (a) of this section, shall consider:*

(1) *The history and characteristics of the petitioner;*

(2) *Whether the petitioner has substantially complied with the rules of the institution to which they have been confined and whether the petitioner has completed any educational, vocational,*

or other program, where available;

(3) Any report or recommendation received from the prosecuting attorney;

(4) Whether the petitioner has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;

(5) Any statement, provided orally or in writing, by a person harmed by the offense for which the petitioner is imprisoned or by a family member of the person harmed if they are deceased;

(6) Any reports of physical, mental, or psychiatric examinations of the petitioner conducted by licensed health care professionals;

(7) Any other information the court deems relevant to its decision.

(d) (1) Notwithstanding any other provision of law, when resentencing a petitioner under this section, the court:

(A) May issue a sentence less than the minimum term otherwise required by law; and

(B) Shall not impose a sentence greater than the sentence originally being served by the petitioner.

- 212** See generally Catherine London, “Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations,” *Minnesota Journal of Law & Inequality* 29, no. 1 (2011), 211–248, 211–212, <https://perma.cc/8ES3-KWNL>.
- 213** Ibid.; and Marc Mauer, “Racial Impact Statements: Changing Policies to Address Disparities,” *Criminal Justice* 23, no. 4 (2009), <https://perma.cc/FR44-HPT2>.
- 214** London, “Racial Impact Statements: A Proactive Approach to Addressing Racial Disparities in Prison Populations,” 2011; and Mauer, “Racial Impact Statements: Changing Policies to Address Disparities,” 2009.
- 215** The nine states are Colorado, Connecticut, Florida, Iowa, Maine, Maryland, New Jersey, Oregon, and Virginia. Nicole Porter, “Racial Impact Statements,” Sentencing Project, June 16, 2021, <https://perma.cc/8MGB-75LK>.
- 216** Iowa Code Ann. § 2.56(1). For a comparison to other legislation, see Jessica Erikson, “Racial Impact Statements: Considering the Consequences of Racial Disproportionalities in the Criminal Justice System,” *Washington Law Review* 89, no. 4 (2014), 1425–1465, 1446–1447, <https://perma.cc/QKL9-UPAJ>.
- 217** Porter, “Racial Impact Statements,” 2021. In Colorado, the only people who can request “demographic notes” are the speaker of the House of Representatives, the minority leader of the House of Representatives, the president of the Senate, and the minority leader of the Senate. Each member is authorized to request up to five demographic notes “or more at the discretion of the director of research of the legislative council.” Colorado HB 19-1184 (2019), <https://perma.cc/HE2C-A2KT>. In Connecticut, racial impact statements are “only conducted when ‘a majority of the committee members present’ request a statement to be prepared for a bill that may affect the ‘population of correctional facilities in the state.’” Erikson, “Racial Impact

Statements: Considering the Consequences of Racial Disproportionalities in the Criminal Justice System,” 2014, 1448; and Conn. Joint Rules of the Senate and the House of Representatives § 15(c)(2).

- 218** See New Jersey SB 677 (2016), <https://legiscan.com/NJ/bill/S677/2016>.
- 219** Or. Rev. Stat. §§ 137.683, 137.685.
- 220** Minnesota Sentencing Guidelines Commission, “Racial Impact Statement Policy,” April 9, 2015, <https://perma.cc/5BY7-XJ88>.
- 221** Erikson, “Racial Impact Statements: Considering the Consequences of Racial Disproportionalities in the Criminal Justice System,” 2014, 1457.
- 222** Ibid., 1459–1464.
- 223** Arkansas SB 1093 (2013), <https://perma.cc/K9GT-CLED>.
- 224** This percentage reflects only the prison population and not the more than 600,000 people detained in local jails or youth facilities or held on behalf of the federal government in immigration detention. Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2022* (Northampton, MA: Prison Policy Institute, 2022), <https://perma.cc/ZTW5-CAQY>.
- 225** Vera compressed the 43 federal crime severity levels into six categories for practicality of analysis and so that the six categories would be translatable to a state felony classification of five to six levels of severity. USSC, *U.S. Sentencing Guidelines Manual* (Washington, DC: USSC, 2018), ch. 5, pt. A., <https://perma.cc/6P9K-R6CL>. States can and do use a variety of alphanumeric schemes to categorize crimes by severity. For example, Illinois has six degrees of felony: first-degree murder (as its own class), Class X felonies, and then Class 1–4 felonies, in decreasing order of severity; the state also has Class A–C misdemeanors. 730 Ill. Comp. Stat. § 5-4.5-10. On the other hand, the state of Washington has only three felony classifications, A–C, and two descriptive classifications for misdemeanors. Wash. Rev. Code § 9A.20.020. For simplicity’s sake, Vera used a six-level division with numerical indicators from one (least severe) to six (most severe).
- 226** Vera assumed that not everyone would earn all the good time available. Based on a review of good-time awards in other states, the researchers estimated that 82 percent of the population would earn all the good time on offer. These states include Illinois (95.4 percent earned full amount); New York (90 percent); Louisiana (89 percent in 2017); Nebraska (86 percent); Missouri (82.6 percent); Washington State (80 percent); and Oregon (60 percent). Within this range, the researchers selected 82 percent as a somewhat conservative estimate. Researchers translated this into a 41 percent reduction off of sentences by multiplying the 50 percent reduction availability by an 82 percent earning rate.
- Federal good-time policy has been in flux since passage of the First Step Act in 2018. That act created increased ability for “earned time off” for participating in a variety of qualified activities. First Step Act of 2018, Public Law 115–391, 132 Stat. 5194 (2018). The earned time off program took four years to lead to releases because of a lack of available programming, a lengthy delay in determining how

to count hours of participation, and a dispute about this determination, which was resolved in January 2022. FSA Time Credits, 874 Fed. Reg. 2705, 270-2719 (final rule, effective January 19, 2022) (to be codified at 28 C.F.R. §§ 523 & 541). Even with this resolution, the act contains conviction-related exclusions for earned time eligibility, such that more than half of the people in the prison population are not eligible to earn time off of their sentences. James M. Byrne, Patti Butterfield, Faye S. Taxman, et al., “Report of the Independent Review Committee Report Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018 (P.L. 115–391),” submitted to the U.S. Senate Committee on the Judiciary; the U.S. Senate Committee on Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies; the U.S. House of Representatives Committee on the Judiciary; and the U.S. House of Representatives Committee on Appropriations Subcommittee on Commerce, Justice, Science, and Related Agencies, December 21, 2020, 2, <https://perma.cc/5RAP-8Q3R>.

- 227** USSC, *The Criminal History of Federal Offenders* (Washington, DC: USSC, 2018), 2, <https://perma.cc/S84R-Z7CH>; and Office of the General Counsel, USSC, *Primer on Criminal History* (Washington, DC: USSC, 2020), 2, 7, <https://perma.cc/XY5K-RY2A>.
- 228** USSC, “The Interactions between Mandatory Minimums and the Sentencing Guidelines,” in *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, DC: USSC, 2011), 37–62, 54, <https://perma.cc/2MK6-GKGM>.
- 229** The relatively small number of mandatory minimum sentences does not indicate their power to drive prison populations. Mandatory minimums are often used as a bargaining chip to influence a person charged with a crime to plead guilty to a lesser charge, because if they go to trial and lose, they will face the minimum carceral sentence on a more serious conviction, which is often a much longer amount of jail or prison time than the plea deal being offered. Pfaff, *Locked In*, 2017, 132. It is difficult to show this “but for” effect on sentencing in this modeling, so the true decarcerative effect of removing this blunt instrument cannot be seen.
- 230** This report focuses on the Black-white disparity because of difficulties obtaining consistent and coherent data about Indigenous or Latino populations. However, it is important to acknowledge that these populations are also disproportionately affected by the criminal legal system. See for example Sarah Eppler-Epstein, Annie Gurvis, and Ryan King, “The Alarming Lack of Data on Latinos in the Criminal Justice System,” Urban Institute, archived May 27, 2022, <https://perma.cc/TN3H-9RND>.
- 231** Three points, the highest increment, are added to a person’s conviction history score for each prior sentence of incarceration exceeding a year. *U.S. Sentencing Guidelines Manual*, ch. 4, pt. A (USSC, 2018), <https://perma.cc/GM8X-52DQ>.
- 232** M. Marit Rehavi and Sonja B. Starr, “Racial Disparity in Federal Criminal Sentences,” *Journal of Political Economy* 122, no. 6 (2014), 1320–1354, 1323 (“We identify an important procedural mechanism that appears to give rise to the majority of the otherwise-unexplained disparity in sentences: how prosecutors initially choose to handle the case, in particular, the decision to bring charges carrying ‘mandatory minimum’ sentences. The racial disparities in this decision are stark: ceteris paribus [all else being equal], [B]lack men have 1.75 times the odds of facing such charges, which is equivalent to a 5 percentage point or 65 percent increase in the probability for the average defendant. The initial mandatory minimum charging decision alone is capable of explaining more than half of the [B]lack-white sentence disparities not otherwise explained by pre-charge characteristics.”)
- 233** Stephen A. Siegel, “The Origin of the Compelling State Interest Test and Strict Scrutiny,” *American Journal of Legal History* 48, no. 4 (2006), 355–407, 388, 393.
- 234** See for example Richard H. Fallon, “Strict Judicial Scrutiny,” *UCLA Law Review* 54 (2007), 1267–1337, 1268, <https://perma.cc/8JW9-UBYD>.
- 235** Danielle Allen, “Toward a New Social Contract: Embracing the Principle of Association for the Administration of Justice” (paper presented at Roundtable on the Future of Justice Policy Square One Project, April 23, 2020), <https://perma.cc/WD9K-GNZT>.
- 236** *Ibid.*, 5 (“The principle of association recognizes that removal from the community is in itself a sanction, and that time spent in incarceration does not need further elements of penalty added to it. Instead, time spent in incarceration needs to be structured to help offenders rebuild positive social relationships”). See also Rachel Kushner, “Is Prison Necessary? Ruth Wilson Gilmore May Change your Mind,” *New York Times Magazine*, April 17, 2019 (“[I]n the unusual event that someone in Spain thinks he is going to solve a problem by killing another person, the response is that the person loses seven years of his life to think about what he has done, and to figure out how to live when released.”), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>.
- 237** “Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. . . .” *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) (citing *Williams v. New York*, 337 U.S. 241 (1949)).
- 238** The most severe sentence in Denmark, Finland, and Sweden is “life,” which means a prison term of 15–18 years. Norway has replaced the life sentence with a 21-year maximum term. Besides life sentences, the maximums are 16 years in Denmark, 12 years in Finland, and 10 years in Sweden (but 18 for murder). These limits are for single offenses, and in the case of multiple charges (or in Denmark and Sweden in case of recidivism), people may receive longer sentences. Lappi-Seppälä, “Nordic Sentencing,” 2016, 17–82, 44.
- 239** Michael H. Tonry, “Sentencing in America, 1975–2025,” *Crime and Justice* 42 (2013), 141–198, 155, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321174.
- 240** Stemen, Rengifo, and Wilson, *Of Fragmentation and Ferment*, 2005, 45.
- 241** *Ibid.*, 44.

- 242 See Kohler-Hausmann, *Getting Tough*, 2017, 207–289. See generally Alan M. Dershowitz, “Criminal Sentencing in the United States: An Historical and Conceptual Overview,” *The Annals of the American Academy of Political and Social Science* 423 (1976), 117–132.
- 243 See Michael Tonry, *Sentencing Fragments: Penal Reform in America, 1975–2025* (New York: Oxford University Press, 2015), 62–63.
- 244 Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 74–78.
- 245 For more, see generally Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America* (Washington, DC: Sentencing Project, 2013), <https://perma.cc/RFC9-E3D7>.
- 246 *Ibid.*, 18.
- 247 *Ibid.*, 3. For death penalty hiatus, see *Furman v. Georgia* 408 U.S. 238 (1972); and *Gregg v. Georgia* 428 U.S. 153 (1976).
- 248 Nellis, *Life Goes On*, 2013, 3.
- 249 Comprehensive Drug Abuse Prevention and Control Act of 1970, HR 18583, 84 Stat. 1236, Pub. Law 91-513 (91st Congress), codified at 21 U.S.C. §§ 801 & 951.
- 250 1973 N.Y. Laws 1040–65. See also Joint Committee on New York Drug Law Evaluation, *The Nation’s Toughest Drug Law: Evaluating the New York Experience* (Washington, DC: National Institute of Law Enforcement and Criminal Justice, 1978), <https://perma.cc/6XV3-WGWU>.
- 251 Drug Policy Alliance, *Background on New York’s Draconian Rockefeller Drug Laws* (New York: Drug Policy Alliance, 2009), <https://perma.cc/AWK8-8J28>.
- 252 See Chapters 276, 277, 278, 676, and 1051 of the 1973 Laws of New York State. See also Joint Committee on New York Drug Law Evaluation, *The Nation’s Toughest Drug Law: Evaluating the New York Experience*, 1978, Appendix A; and Mann, “The Drug Laws That Changed How We Punish,” 2013.
- 253 Drug Policy Alliance, *Background on New York’s Draconian Rockefeller Drug Laws*, 2009.
- 254 Jim Parsons, Qing Wei, Christian Henrichson, et al., *End of an Era? The Impact of Drug Law Reform in New York City* (New York: Vera Institute of Justice, 2015), 5, <https://perma.cc/J2DW-FKT2>.
- 255 Greg Newburn and Sal Nuzzo, *Mandatory Minimums, Crime, and Drug Abuse: Lessons Learned, Paths Ahead* (Tallahassee, FL: James Madison Institute, 2019), 8, <https://perma.cc/MQ9C-G4MA>.
- 256 Anti-Drug Abuse Act of 1986, Public Law 99-570, 100 Stat. 3207 (99th Congress).
- 257 Anti-Drug Abuse Act of 1988, Public Law 100-690, 102 Stat. 4181 (100th Congress).
- 258 Powder cocaine symbolized wealth and status, while crack cocaine was cheaper, associated with Black people, and “portrayed as producing uniquely addictive, unpredictable and deadly effects.” See for example Michael Demarest, “Cocaine: Middle Class High,” *Time*, July 6, 1981, <https://perma.cc/G7V6-V2GP>; Carl Hart, “How the Myth of the ‘Negro Cocaine Fiend’ Helped Shape American Drug Policy,” *The Nation*, February 17, 2014; and Andrew Cohen, “How White Users Made Heroin a Public-Health Problem,” *Atlantic*, August 12, 2015, <https://perma.cc/9Z6N-KQUV>.
- 259 Dorothy K. Hatsukami and Marian W. Fischman, “Crack Cocaine and Cocaine Hydrochloride. Are the Differences Myth or Reality?,” *Journal of the American Medical Association* 276, no. 19 (1996), 1580–1588, 1580 (“The physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of cocaine hydrochloride or crack cocaine [cocaine base].”).
- 260 German Lopez, “The Controversial 1994 Crime Law that Joe Biden Helped Write, Explained,” *Vox*, September 19, 2020, <https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration>.
- 261 USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Washington, DC: USSC, 1995), v, <https://perma.cc/C64Q-AHQX>.
- 262 California AB 971 (1994) (approved by governor March 7, 1994), <https://perma.cc/QY8U-9MB2>.
- 263 California Legislative Analyst’s Office, *A Primer: Three Strikes—The Impact After More Than a Decade* (Sacramento, CA: Legislative Analyst’s Office, 2005), <https://perma.cc/VV22-Y4NM>.
- 264 These states include Arkansas, California, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. Stemen, Rengifo, and Wilson, *Of Fragmentation and Ferment*, 2005, 108.
- 265 Violent Crime Control and Law Enforcement Act, Public Law 103-322, 108 Stat. 1796 (103rd Congress).
- 266 Lauren-Brooke Eisen, “The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System,” Brennan Center for Justice, September 9, 2019, <https://perma.cc/ZXK2-UZLP>. For additional information on the Federal Death Penalty Act of 1994 (Title IV of the Violent Crime Control and Law Enforcement Act), see U.S. Department of Justice, *Criminal Resource Manual* (Washington, DC: DOJ, 2020), 69, “The Federal Death Penalty Act of 1994,” <https://perma.cc/3ZAE-PZT8>.
- 267 Violent Crime Control and Law Enforcement Act, Public Law 103-322, 108 Stat. 1796 (103rd Congress).
- 268 Travis, Western, and Redburn, eds., *The Growth of Incarceration in the United States*, 2014, 79–83.
- 269 Stemen, Rengifo, and Wilson, *Of Fragmentation and Ferment*, 2005, 19. See Eisen, “The 1994 Crime Bill and Beyond,” 2019 (“The number of state and federal adult correctional facilities rose 43 percent from 1990 to 2005. For a period in the 1990s, a new prison opened every 15 days on average.”).
- 270 Stemen, Rengifo, and Wilson, *Of Fragmentation and Ferment*, 2005, 19.

- 271 Ibid.
- 272 Michael Wilson, “Michael Wilson Consulting,” <http://www.w.m-w-consulting.org>.
- 273 To obtain this data, Vera compiled data from publicly available sourcebooks, herein referred to in its entirety for convenience as the “Sentencing Commission data.” For USSC sourcebooks, see USSC, “Sourcebook Archives,” database (Washington, DC: USSC, 1996–present), <https://www.ussc.gov/research/sourcebook/archive>.
- 274 USSC, *Variable Codebook for Individualized Offenders: Standardized Research Data Documentation for Fiscal Years 1999–2020* (Washington, DC: USSC, 2021), 60, <https://perma.cc/HF3C-8G5T>.
- 275 18 U.S.C. § 3624(b)(1) states that people are eligible for 54 days of good time per year, or 15 percent off of their sentences. Vera assumed that not everyone would earn all available time and set the assumption at 13 percent off of a sentence based on a conversation with former Sentencing Commission employee Paul Hofer.
- 276 For estimation purposes, Vera needed to assume an age cut off point beyond which people would stop accruing time in prison due to death. People in prison tend to have accelerated aging—perhaps due to its stressors or to health conditions that people have coming into prison. See Helene Merkt, Sophie Haesen, Leila Meyer, et al., “Defining an Age Cut-Off for Older Offenders: A Systematic Review of the Literature,” *International Journal of Prisoner Health* 16, no. 2 (2020), 95–116. As such, Vera considered 75 to be a defensible cut off. If people entered prison at age 75 or later, Vera assumed that they would be incarcerated for no more than five years.
- 277 Researchers took the annual number of people admitted to prison from the Sentencing Commission data and divided it by 12 to create an equal distribution across each month.
- 278 In estimating the downward adjustment, researchers accounted for people sentenced prior to 2006 who would not be subject to the policy change but still remained in prison as of 2016. More details of the adjustment calculation are on file with the authors and available upon request.
- 279 States can and do use a variety of alphanumeric schemes to categorize crimes by severity. For example, Illinois has six degrees of felony: first-degree murder (as its own class), Class X felonies, and then Class 1–4 felonies, in decreasing order of severity; the state also has Class A–C misdemeanors. 730 Ill. Comp. Stat. § 5-4.5-10. On the other hand, the state of Washington has only three felony classifications, A–C, and two descriptive classifications for misdemeanors. Wash. Rev. Code § 9A.20.020. Most states, however, have classifications more like Missouri, which uses an A–E severity range for felonies and A–D for misdemeanors. Mo. Rev. Stat. § 557.021 (2020).
- 280 *U.S. Sentencing Guidelines Manual*, ch. 5, pt. A (USSC, 2018), <https://perma.cc/6P9K-R6CL>.
- 281 Vera examined publicly available records from several states and calculated the percentage of eligible people who earned all available good time/did not have good time permanently rescinded: Illinois (95.4 percent earned full amount); New York (90 percent); Louisiana (89 percent); Nebraska (86 percent); Missouri (82.6

percent); Washington State (80 percent); Oregon (60 percent). Within this range, the researchers selected 82 percent as a somewhat conservative estimate. For more information on Vera’s calculation methodology and underlying sources, please contact the authors.

“Case studies: Prison releases as a result of sentencing changes and administrative decisions that did not impact public safety.” p. 27.

- a** For prison population, see Vera Institute of Justice, “Incarceration Trends: California,” database (New York, Vera Institute of Justice), <https://trends.vera.org/state/CA>. For conditions of incarceration, see *Brown v. Plata*, 563 U.S. 493 (2011).
- b** *Brown v. Plata*, 563 U.S. 493 (2011). For the history of lawsuits, see Magnus Lofstrom and Brandon Martin, *Public Safety Realignment: Impacts So Far* (San Francisco: Public Policy Institute of California, 2015), 1–2, <https://perma.cc/DXZ6-T7XK>.
- c** California AB 109 (2011) (approved by governor April 4, 2011), <https://perma.cc/LGAT-F36A>. See also Lofstrom and Martin, *Public Safety Realignment*, 2015, 1–2.
- d** CA Proposition 47, the Safe Neighborhoods and Schools Act (2014); California Judicial Council, Criminal Justice Services, *Proposition 47 Frequently Asked Questions* (Sacramento, CA: California Judicial Council, 2016), <https://www.courts.ca.gov/documents/Prop47FAQs.pdf>; and Stanford Law School Justice Advocacy Project, *Proposition 47 Progress Report: Year One Implementation* (Stanford, CA: Stanford Law School, 2015), 1, <https://perma.cc/5Z9R-6EB3>.
- e** Stanford Law School Justice Advocacy Project, *Proposition 47 Progress Report*, 2015; and Magnus Lofstrom, Brandon Martin, and Steven Raphael, *Proposition 47’s Impact on Racial Disparity in Criminal Justice Outcomes* (San Francisco: Public Policy Institute of California, 2020), 3, <https://perma.cc/7NRY-FK62>.
- f** Lofstrom, Martin, and Raphael, *Proposition 47’s Impact on Racial Disparity in Criminal Justice Outcomes*, 2020, 16. Although the authors note the methodological difficulties in causally attributing the reduction of racial disparities to Proposition 47, they nonetheless suggest that “similar reform efforts in other states could redirect and/or reduce the use of criminal justice resources while also narrowing disparities in criminal justice experiences.” *Ibid.*, 17–18.
- g** Magnus Lofstrom, Brandon Martin, and Steven Raphael, “The Effect of Sentencing Reform on Racial and Ethnic Disparities in Involvement with the Criminal Justice System: The Case of California’s Proposition 47,” *Criminology and Public Policy* 19, no. 4 (2020), 1165–1207. For one lawsuit, see Sam Stanton, “Judge Rules California Can Allow Increases in Good-Conduct Credits for Prison Inmates,” *Sacramento Bee*, January 21, 2022, <https://perma.cc/RWC5-8JLY>.
- h** Bradley J. Bartos and Charis E. Kubrin, “Can We Downsize Our Prisons and Jails without Compromising Public Safety? Findings from California’s Prop 47,” *Criminology and Public Policy* 17, no. 3 (2018), 693–715; Steven Raphael, Patricio Dominguez Rivera, and Magnus Lofstrom, *The Effect of Sentencing Reform on Crime Rates: Evidence from California’s Proposition 47* (working paper, University of California Berkeley Goldman School of Public Policy, August 2019), <https://perma.cc/H5EV-RX33>; and Mia Bird, Magnus Lofstrom, Brandon Martin, et al., *The Impact of Proposition 47 on Crime and Recidivism* (San Francisco: Public Policy Institute of California, 2018), <https://perma.cc/5WF4-XNNT>.
- i** Bird, Lofstrom, Martin, et al., *The Impact of Proposition 47 on Crime and Recidivism*, 2018, 18.
- j** Fair Sentencing Act of 2010, Public Law No. 111–220, 124 Stat. 2372 (111th Congress); and U.S. Sentencing Commission [USSC], *U.S. Sentencing Guidelines Manual*, App. C, amend. 759 (effective November 1, 2011). See also Kim Steven Hunt, Kevin Maass, and Todd Kostyshak, *Recidivism among Federal Offenders Receiving Retroactive Sentence Reductions: The 2011 Fair Sentencing Act Guideline Amendment* (Washington, DC: USSC, 2018), 2–3, <https://perma.cc/RB75-HLVL>.
- k** Hunt, Maass, and Kostyshak, *Recidivism among Federal Offenders Receiving Retroactive Sentence Reductions*, 2018, 3.
- l** *Ibid.*
- m** 1973 N.Y. Laws 1040–65. See also Madison Gray, “A Brief History of New York’s Rockefeller Drug Laws,” *Time*, April 2, 2009, <https://perma.cc/ZK8V-T9PZ>.
- n** New York AB 156B, 2009 Drug Law Reform Act (DLRA) (2009), signed as Chapter 56 on April 7, 2009, <https://perma.cc/W4TE-F9L4>.
- o** See Jim Parsons, Qing Wei, Joshua Rinaldi, et al., *A Natural Experiment in Reform: Analyzing Drug Policy Change in New York City* (New York: Vera Institute of Justice, 2015), 12–15, <https://perma.cc/MY55-ES9C>.
- p** *Ibid.*, 66.
- q** *Ibid.*
- r** *Ibid.*, 55. On the other hand, those sentenced to incarceration saw their average sentence length increase. *Ibid.*, 66.
- s** *Ibid.*, 147.
- t** James Austin, *Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy* (Washington, DC: National Institute of Justice, 1986), ii, 12–13, <https://perma.cc/LZJ3-4PWB>.
- u** *Ibid.*, 20–21 and Table 2–3.
- v** *Ibid.*, 33.
- w** *Ibid.*, 63–85, 77, 82.
- x** *Ibid.*, 82, 95.

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About citations

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Cover image: A grandmother comforts her grandson who is going into juvenile court for sentencing. Credit: Joseph Rodriguez/Redux

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