

UNINTENDED CONSEQUENCES: AN ANALYSIS OF SIX PROPOSALS TO REFORM THE U.S. CRIMINAL JUSTICE SYSTEM

*Ellison Berryhill**

I. INTRODUCTION

A. Mass Incarceration and Criminal Justice Reform

The dramatic increase in the incarceration rate in the United States has been well documented. Between 1975 and 2003, the number of prisoners increased by five times the historical average.¹ Reformers and critics typically focus on Presidents Nixon and Reagan as the major causes of this rise.² These presidents spearheaded efforts to fight wars on crime and drugs, respectively, and moved the country towards mass incarceration.³ However, there are many complicated factors that led to the United States holding five percent of the world population but twenty percent of the world's prisoners.⁴

This problem has risen to the forefront of public discourse in recent years, with many books being published and presidential candidates proposing aggressive reform agendas.⁵ Well-meaning people from across the political

* Ellison Berryhill is an Assistant Public Defender in the 18th Judicial District in Tennessee. He is a graduate of Maryville College and Duke University School of Law. The opinions in this article are his own and do not represent the views of the 18th Judicial District Public Defender or the Tennessee Public Defender's Conference. Thanks are due to Marshall "Trey" McClarnen, Carolyn Berryhill, Doug Berryhill, and the editors of the *University of Louisville Law Review* for making this Article better.

¹ BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 13 (2006) (explaining that "on any day for fifty years from 1925 to 1976, about a hundred Americans out of a hundred thousand – just one-tenth of 1 percent of the U.S. population – were in prison" but "[b]y 2003, the share of the population in prison had increased every year for twenty-eight years, standing at nearly half of 1 percent at the beginning of the new century").

² See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 8–18 (2016) (arguing that Nixon's war on drugs was not the only cause of the mass incarceration problem and that Johnson's war on poverty helped lay the foundation for the increased incarceration during the Nixon and Reagan administrations).

³ *Id.*

⁴ Lorna Collier, *Incarceration Nation: The United States Leads the World in Incarceration. A New Report Explores Why — and Offers Recommendations for Fixing the System*, AM. PSYCHOL. ASS'N, <https://www.apa.org/monitor/2014/10/incarceration> (last visited May 3, 2020).

⁵ See, e.g., Elizabeth Warren, *Rethinking Public Safety to Reduce Mass Incarceration and Strengthen Communities*, MEDIUM (Aug. 20, 2019), <https://medium.com/@teamwarren/rethinking-public-safety-to-reduce-mass-incarceration-and-strengthen-communities-90e8591c6255>; Cory Booker, *Restoring Justice*, MEDIUM (June 20, 2019), <https://medium.com/@corybooker/restoring-justice->

spectrum have attempted to fix this problem for years and, although the rise in the incarceration rate has stopped, the United States still incarcerates an inordinately large percentage of the population.⁶ This sobering fact raises the question of whether the rate will inevitably remain high or if the reformers are doing something wrong.⁷

Public opinion is swinging towards reform, so it is important to get reform right. Recent polls show that a majority of Americans believe building more prisons does not reduce crime and think that prisons do not improve quality of life in their communities.⁸ Seventy-one percent of Americans polled in a November 2017 survey agreed that “incarceration for long periods is counterproductive to public safety due to the absence of effective rehabilitation programs in prisons.”⁹ Another poll in January 2018 found that eighty-five percent of those who responded “supported making rehabilitation the goal of the criminal justice system rather than punishment.”¹⁰ These polls show that the general public has some appetite for criminal justice reform and for reducing the prison population.

Because of this public approval for reform, legislators across the country have been passing criminal justice reform legislation. On the federal level, Congress passed the First Step Act in 2018.¹¹ States passed a myriad of laws in 2018¹² to address issues such as bail reform,¹³ civil asset forfeiture

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⁶ John Gramlich, *America's Incarceration Rate Is at a Two-Decade Low*, PEW RES. CTR. (May 2, 2018), <https://www.pewresearch.org/fact-tank/2018/05/04/americas-incarceration-rate-is-at-a-two-decade-low>.

⁷ See *id.* The decline of the incarceration rate in recent years may be due to the decline in the crime rate and not because of any criminal justice reform successes. *Id.*

⁸ See Matthew Clarke, *Polls Show People Favor Rehabilitation over Incarceration*, PRISON LEGAL NEWS (Nov. 6, 2018), <https://www.prisonlegalnews.org/news/2018/nov/6/polls-show-people-favor-rehabilitation-over-incarceration/>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ First Step Act of 2018, 18 U.S.C. § 3621 (2012); see also Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, BRENNAN CENTER (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> (discussing what the First Step Act accomplished and how it came about).

¹² Robert Alt, *Criminal Justice Reform: A Survey of 2018 State Laws*, FEDERALIST SOC'Y (July 9, 2019), https://fedsoc.org/commentary/publications/2018-criminal-justice-reform#_ftn1 (providing an overview of criminal justice reforms in 2018). The state reforms cited in the following footnotes are taken from this article.

¹³ See, e.g., S.B. 556, 2018 Leg., Reg. Sess. (N.H. 2018) (enacted) (revising “procedures for the granting of bail,” amending “the procedure for annulment of violations and class B misdemeanors depending on the date of conviction,” and amending “the requirements for demonstrating indigency for the purpose of annulment of a criminal record”); S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (enacted) (establishing pretrial assessment services that examine the risks of allowing the person to be released on their own recognizance).

reform,¹⁴ and marijuana reforms.¹⁵ The main purpose of this article is to provide words of caution to reformers of the criminal system about the potential unintended consequences of their efforts, an issue that is critically important due to the groundswell of support for reform.

B. Impediments to Reform

However, some groups actively work to make the problem worse. They believe the current system achieves justice and protects citizens and are not as concerned with America's mass incarceration problem. These groups include many police officers and prosecutors.¹⁶ As they are often the actors who actualize the unintended consequences detailed in the body of this article, their identities and motivations warrant some discussion.

While prosecutors could ostensibly be an ally in reducing mass incarceration, the leadership of prosecutors' offices are often elected and wish to appear "tough on crime." This has been shown by the rise of Kamala Harris from San Francisco District Attorney, to California Attorney General, to United States Senator from California, to presidential candidate.¹⁷ She

¹⁴ See, e.g., H.B. 61, 64th Leg., Budget Sess. (Wy. 2018) (enacted) (preventing law enforcement officers from requiring a person to waive their interests in seized property); S.B. 498, 2018 Leg., Reg. Sess. (N.H. 2018) (requiring the state attorney general to be transparent about the property seized); H.B. 447, 64th Leg., 2d Reg. Sess. (Id. 2018) (enacted) (prohibiting law enforcement officers from seizing assets simply because those assets were in close proximity to contraband); H.B. 2459, 2018 Leg., Reg. Sess. (Ks. 2018) (enacted) (requiring the state to establish a repository with information concerning seizures for the purposes of increased transparency); S.B. 813, 2018 Leg., Reg. Sess. (Va. 2018) (enacted) (requiring law enforcement to give information on seizures concerning the offense that justified the forfeiture); S.B. 1987, 2017–2018 Leg., 110th Reg. Sess. (Tn. 2018) (enacted) (requiring law enforcement to provide notice and a hearing within five days of seizing the property).

¹⁵ See, e.g., H.B. 511 2017–2018 Leg. (Vt. 2018) (enacted) (removing civil and criminal penalties for the possession of one ounce of marijuana and some marijuana plants by those twenty-one years or older); German Lopez, *Michigan Votes to Legalize Marijuana with Proposal 1*, VOX (Nov 7, 2018) (reporting on Michigan's 2018 Proposal 1, a ballot initiative legalizing the possession and use of recreational marijuana by adults over twenty-one years old and sales of marijuana through licensed dealers).

¹⁶ But see, e.g., Mark Rivett-Carnac, *U.S. Police Leaders Demand an End to Mass Incarceration*, TIME (Oct. 21, 2015), <https://time.com/4080885/police-law-incarceration-criminal-justice-crime/>.

¹⁷ Lara Bazelon, *Kamala Harris Was Not A 'Progressive Prosecutor'*, N.Y. TIMES, (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html> (noting that while progressives pushed for criminal justice reform, Harris "opposed them or stayed silent" and "fought tooth and nail to uphold wrongful convictions that had been secured through official misconduct").

positioned herself as a tough prosecutor and was rewarded in the polls.¹⁸ Prosecutors across the country reflect this problematic attitude.¹⁹

As Fordham University Professor John Pfaff has written, prosecutors are the most powerful participants in the criminal justice system.²⁰ Pfaff argues that the increase in felony filings per arrest has driven the growth in prison populations.²¹ He discusses other possible explanations for the rise in mass incarceration and determines that felony filings have the highest correlation with number of prison entries and felony convictions.²² Prosecutors almost always have the discretion to determine the charges against individuals²³ and, therefore, have the most prominent role in driving the increase in mass incarceration.

The “progressive prosecutor” movement has built momentum in recent years—progressives have run against traditional prosecutors and won.²⁴ These victories have resulted in some actual change. State Attorney Kim Foxx in Chicago “raised the threshold for felony theft prosecution to reduce the number of shoplifters who go to jail.”²⁵ District Attorney Larry Krasner in Philadelphia “instructed his prosecutors to make plea offers for most crimes below the bottom end of Pennsylvania’s sentencing guidelines.”²⁶ In those specific cities, progressive prosecutors actually may be making a difference. Additionally, progressive prosecutors continue to win elections across the country. For example, Chesa Boudin, a former public defender, won the election to be the district attorney in San Francisco in November 2019.²⁷

¹⁸ *But cf.* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 80–81 (2019) (arguing that Senator Harris attempted to demonstrate a moderate view throughout her career though agreeing that Harris’s experience as a prosecutor helped her in her search for higher office).

¹⁹ *See id.* at 77–80. Bazelon notes that, absent major scandal, district attorneys normally win reelection until they retire; thus, it is curious that they pursue a tough-on-crime attitude so regularly. *Id.*

²⁰ John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations*, (July 12, 2011) (unpublished manuscript), <https://ssrn.com/abstract=1884674>.

²¹ *Id.* at 3.

²² *Id.* at 28–37. Causes that he dismisses include sentencing severity and parole violations. *Id.*

²³ *Id.* at 3.

²⁴ *See* BAZELON, *supra* note 18, at 147–77 (chronicling the success of various progressive prosecutors and their work to improve the system).

²⁵ Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

²⁶ *Id.*

²⁷ Heather Knight, *How Chesa Boudin, a Public Defender who Never Prosecuted a Case, Won SF D.A. Race*, S.F. CHRON. (Nov. 11, 2019), <https://www.sfchronicle.com/bayarea/heatherknight/article/How-Chesa-Boudin-a-public-defender-who-never-14826323.php>.

However, as Paul Butler has argued, prosecutors' offices have such inherently pro-incarceration motivations, that any reform-minded assistant prosecutor is likely to face stiff resistance.²⁸ Specifically, Butler argues that progressive junior prosecutors are unsuccessful for three reasons. First, the adversarial system requires that the prosecutors be zealous advocates for the government.²⁹ "In an adversarial system, the prosecutor who is too sympathetic toward the defendant's plight or too suspicious of the police is not doing her job."³⁰ Second, prosecutors' offices create an environment that supports traditional law and order.³¹ Third, as discussed above, the politics of prosecution motivate the heads of the offices to be tough on crime.³² The second and third factors lead to prosecutors' offices that measure junior prosecutors by their abilities to get harsh sentences and obtain large numbers of convictions.³³ Those measuring rods prevent junior attorneys with a motivation to reduce incarceration from staying long at prosecutors' offices. Therefore, new prosecutors who want to succeed in their jobs must adopt the pro-incarceration mindset.

Prosecutor associations also are involved in fighting for tough-on-crime policies through their associations and lobbying groups.³⁴ These associations make the argument that, because the vast majority of cases are resolved by plea bargains, the laws on the books need to be draconian.³⁵ If the potential sentence at trial is harsh, a defendant has strong motivation to plead guilty to avoid that cost. Therefore, prosecutors' associations lobby to get bills passed in the legislature that increase incarceration and, thereby, increase their leverage.³⁶ They have been generally successful in this effort. For example, between 2012 and 2015 in Louisiana, "criminal-justice bills backed by the [prosecutors' association] had an 85 percent rate of passage . . . while criminal-justice bills it opposed passed only 38 percent of the time."³⁷

The police are also motivated to be tough on crime. Much scholarship exists detailing problems with the police, an overarching theme

²⁸ PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 118 (2009).

²⁹ *Id.* at 114.

³⁰ *Id.* at 115.

³¹ *Id.* at 116–17.

³² *Id.* at 118.

³³ *Id.* at 109.

³⁴ Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/> (explaining that the Florida Prosecuting Attorneys Association provides resources and training for prosecutors, testifies before the legislature, lobbies for or against pending bills, and writes amicus briefs).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

being that police departments have fundamentally pro-incarceration motivations.³⁸ Alex Vitale's book *The End of Policing* lays out a myriad of ways that police efforts hurt society, make us less safe, and cause mass incarceration.³⁹ These include criminalizing children, violently policing low-income and minority communities, and criminalizing homelessness and sex work.⁴⁰ The police have a history of acting to enforce the prejudices of society at large.⁴¹ This is not a new development—following the country's founding, the police worked to enforce slavery, and enforce Jim Crow laws following emancipation.⁴²

The political popularity of tough-on-crime legislation has led to an increase in police budgets.⁴³ In 2017, the United States spent \$100 billion on policing.⁴⁴ Police officers work to control crime, but officers all too frequently do so in a manner that increases racial prejudice and ensures that those in low-income communities stay there. Almost every police officer would deny the charge of being called racist, but their actions speak louder.⁴⁵ Communities ask the government to help them solve their problems and, instead of sending sufficient social supports or financial backing, the government sends the police.⁴⁶ The police do what they know how to do—they patrol the streets and lock people up.⁴⁷

³⁸ See Theodore Kupfer, *Law-Enforcement Unions Have Too Much Power*, NAT'L REV. (Feb. 2, 2018), <https://www.nationalreview.com/2018/02/law-enforcement-unions-powerful-obstacle-criminal-justice-reform-fiscal-responsibility/> (noting specifically that police unions have the power to lobby or oppose legislation in ways that put a significant damper on criminal justice reform).

³⁹ See generally ALEX S. VITALE, *THE END OF POLICING* (2017).

⁴⁰ See generally *id.*

⁴¹ See generally *id.*

⁴² See, e.g., ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE*, 52–53 (2010) (noting that one Texas governor said that the purpose of policing was to protect “the fairest portion of Texas” from “unruly negroes, wild Indians,” and “Mexican marauders.” Gangs of white vigilantes started murdering people of color and laid the groundwork to become the notoriously racist Texas Rangers).

⁴³ Niall McCarthy, *How Much Do U.S. Cities Spend Every Year on Policing?*, FORBES (Aug. 7, 2017), <https://www.forbes.com/sites/niallmccarthy/2017/08/07/how-much-do-u-s-cities-spend-every-year-on-policing-infographic/#73733730e7b7>.

⁴⁴ *Id.*

⁴⁵ See Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force* 1–6 (Nat'l Bureau of Econ. Research, Working Paper No. 22399, 2016), <http://scholar.harvard.edu/fryer/publications/empirical-analysis-racial-differences-police-use-force>.

⁴⁶ See Mychal Denzel Smith, *Rough Justice: How America Became Over-Policed*, NEW REPUBLIC (June 5, 2018), <https://newrepublic.com/article/148304/rough-justice-america-over-policed>.

⁴⁷ This is not to argue that every police officer is bad. There are police officers on the streets who work effectively to serve their communities and make their cities safer places. My point is that police departments create such negative incentives that the average police officer likely is working to increase mass incarceration.

These two groups, prosecutors and police, are the active arms of the portion of the population that wishes to increase crime control and, ultimately, the prison population. Reformers, on the other hand, have the goal of improving the U.S. criminal system and decreasing incarceration. In furtherance of that goal, they push for reforms. However, those reforms regularly miss the mark. The reformers either overlook the unintended consequences of their efforts or the groups wishing to increase incarceration prevent reforms from meeting their intended goals.

C. Specific Reforms and their Consequences

This article will analyze several reforms that anti-carceral groups have proposed. It will review the goals and efficacy of those reforms. Some will be backward-looking—the analysis will focus on where those reforms failed and how they, in fact, increased incarceration. Some will be forward looking—the analysis will focus on current efforts of reform and how, if we are not careful, they could be usurped and lead to an increase in incarceration instead of the intended decrease. The goal of this article is to bring awareness to the difficulty in reforming the U.S. criminal system and how even those with the best motivations can accidentally make things worse.

Criminal justice reform has been in progress for several years, and a review of that history provides some examples of how reform can go wrong. Modern day reformers must learn from that history in their reforms now. Prior efforts to improve the system failed to take adequate account of potential problems with their reforms. The development of public opinion in this area provides a prime opportunity to reduce the incarceration rate. Reformers should seize that opportunity but not leave avenues for the opponents of criminal justice reform to use reform-minded laws in a manner that raises the incarceration rate.

It is important to clarify what the purpose of this article is not. These policies are not necessarily bad or inadvisable, and this article does not assert that they are. They simply have consequences. Most of these are good policies that reduce incarceration and make the system less harsh. However, it is important for policymakers to be aware of what can happen if they do not account for the unintended consequences of their policies.

II. POLICY ONE: COMMUNITY POLICING

Some reformers believe that, if police were more involved in communities, they would be able to cure the problems within them. Followers of this idea believe the police represent the highest ideals of

community behavior and have the skills to cure any problem. In 2016, the Tennessee Supreme Court described this belief:

Police officers wear many hats: criminal investigator, first aid provider, social worker, crisis intervener, family counselor, youth mentor and peacemaker, to name a few. They are charged with the duty to protect people, not just from criminals, but also from accidents, natural perils and even self-inflicted injuries. We ask them to protect our property from all types of losses—even those occasioned by our own negligence. They counsel our youth. They quell disputes between husband and wife, parent and child, landlord and tenant, merchant and patron and quarreling neighbors. Although they search for clues to solve crime, they also search for missing children, parents, dementia patients, and occasionally even an escaped zoo animal. They are society's problem solvers when no other solution is apparent or available.⁴⁸

This view believes the problems in society that lead to incarceration can be solved by more police involvement. Police can play many roles in society, and society will benefit from their performance of those roles. In fact, they believe that, if police were more involved in the community, incarceration would decrease.⁴⁹ They have faith in the police's ability to stop conflict before it escalates and use their skills as peacemakers to prevent crime before it happens. This is often referred to as community-oriented policing.⁵⁰

This view is not without support. Several scholars conducted a systematic review of community-oriented policing in an effort to determine its effects.⁵¹ They found that community-oriented policing is effective to increase citizen satisfaction and police legitimacy while decreasing perceived disorder.⁵² This study did not, however, find that community policing was strongly related to a reduction in crime.⁵³ This theory may be extended to argue that community policing improves the citizens' views of the police and, therefore, will reduce crime in the long-term.⁵⁴

⁴⁸ *State v. McCormick*, 494 S.W.3d 673, 683 (Tenn. 2016) (quoting *State v. Matalonis*, 875 N.W.2d 567, 576–77 (Wis. 2016) (quoting *Ortiz v. State*, 24 So. 3d 596, 607 n.5 (Fla. Dist. Ct. App. 2009) (Torpy, J., concurring and concurring specially))).

⁴⁹ See Will Johnson, *Community Policing: Much More Than Walking a Beat*, COMMUNITY POLICING DISPATCH, https://cops.usdoj.gov/html/dispatch/05-2018/walking_a_beat.html (last visited May 3, 2020).

⁵⁰ *Id.*

⁵¹ See Charlotte Gill et al., *Community-Oriented Policing to Reduce Crime, Disorder and Fear and Increase Satisfaction and Legitimacy Among Citizens: A Systematic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 399 (2014) (identifying sixty-five independent studies of community oriented policing).

⁵² *Id.* at 399.

⁵³ *Id.*

⁵⁴ *Community Policing and Procedural Justice*, GEO. MASON UNIV. CTR. FOR EVIDENCE-BASED

There also exist on-the-ground assessments of community-oriented policing. In May of 2018, Chief Will Johnson of the Arlington Texas Police Department wrote that, using “a blend of statistics, hard data, community surveys, and what we hear from officers,” he can determine “unequivocally that community policing has helped to increase public safety and order in Arlington, Texas.”⁵⁵ He continued, stating that community policing also “improved officer safety and led to a more positive work environment.”⁵⁶ With backing of scholarly research and law enforcement, it is understandable that some people would believe community policing is a good way to make the communities safer.

In reality, this strategy has some problems because it allows police officers to get closer to communities and, therefore, allows them to increase arrests. An example comes from 1968, when Washington, D.C. police began establishing “mini-stations” with a goal of providing social services that were sorely needed in those communities, such as counseling and a place for youth to hang out.⁵⁷ However, the strategy allowed police to over-police impoverished areas and observe the residents as they went about their everyday activities.⁵⁸

There is some scholarly evidence for the idea that community-oriented policing increases arrests. Researcher Rob Tillyer recognized the dearth of research on actual arrest rates when societies instituted community policing practices, so he conducted a study.⁵⁹ Tillyer found that societies that instituted certain community-oriented policing practices experienced increased arrests.⁶⁰ The amount that the arrests increased depended on the type of community-oriented policing and the specific types of violent crime.⁶¹

Police departments have historically relied on arrest rates as a method of assessing their officers.⁶² In 1987, the *New York Times* published an article

CRIME POL'Y, <https://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/community-policing/> (last visited May 3, 2020).

⁵⁵ Johnson, *supra* note 49.

⁵⁶ *Id.*

⁵⁷ ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 113–14, 120 (2016).

⁵⁸ *Id.* at 122 (discussing how bureaus in the South Bronx were intended to help identify potential juvenile offenders and route them away from criminal activity, but they actually “stigmatized even larger numbers of young people and precipitated contact between low-income youth of color and law enforcement officials,” even requiring the recipients of their social services to be labeled as “delinquents” before they received those services).

⁵⁹ See Rob Tillyer, *Assessing the Impact of Community-Oriented Policing on Arrest*, 35 JUST. Q. 526 (2018).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Todd S. Purdum, *Transit Scandal: Do Arrest Incentives Motivate the Police or Invite Abuse?*, N.Y.

questioning whether such methods of evaluation motivate good police work or incentivize police to behave improperly.⁶³ Police quotas continue to this day and have problematic results for the motivation of police.⁶⁴ Police officers are more likely to receive praise and promotions if they are catching bad guys instead of playing cards with students.⁶⁵ Thus, police are motivated to arrest people when they get the chance.

Alex Vitale also discusses the issues with community policing in his book *The End of Policing*.⁶⁶ He says that community policing sounds nice, but “[w]hen their job is to criminalize all disorderly behavior and fund local government through massive ticketing-writing campaigns, their interactions with the public in high-crime areas will be at best gruff and distant and at worst hostile and abusive.”⁶⁷ Vitale argues throughout the book that modern police forces do not have the motivation to actually help the community.⁶⁸ He focuses on the criminalization of everyday behavior as fundamentally inconsistent with a group that actually wants to help people.⁶⁹

Detroit and New York City Police Commissioner Patrick Murphy personified this tension during his career.⁷⁰ While in Detroit, he created a police force that spent time walking the streets with the goal of meeting residents and forming ties to the community.⁷¹ He simultaneously believed one of the major problems in society was that the police did not make enough arrests.⁷² He explained this position in a 1990 article, stating that police departments are not meant to impose their wills on the community but, rather, to be a reflection of the community.⁷³ This view would inform his actions.⁷⁴

TIMES (Dec. 16, 1987), <https://www.nytimes.com/1987/12/16/nyregion/transit-scandal-do-arrest-incentives-motivate-the-police-or-invite-abuse.html>.

⁶³ *Id.*

⁶⁴ See Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NPR (Apr. 4, 2015), <https://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers>; see also Shaun Ossei-Owusu, *Race and the Tragedy of Quota-Based Policing*, AM. PROSPECT (Nov. 3, 2016), <https://prospect.org/article/race-and-tragedy-quota-based-policing-0>.

⁶⁵ HINTON, *supra* note 57, at 130.

⁶⁶ See generally ALEX S. VITALE, *THE END OF POLICING* (2017).

⁶⁷ *Id.* at 16.

⁶⁸ *Id.* The specific examples included in the book are summarized by chapter titles: *The School-to-Prison Pipeline*, *Criminalizing Homelessness*, *The Failures of Policing Sex Work*, *The War on Drugs*, *Gang Suppression*, *Border Policing*, and *Political Policing*. *Id.*

⁶⁹ See *id.* at 16.

⁷⁰ HINTON, *supra* note 57, at 188–89.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Hubert Williams & Patrick Murphy, *The Evolving Strategy of Police: A Minority View*, PERSP. ON POLICING, Jan. 1990, at 1, 2–3, available at <https://www.ncjrs.gov/pdffiles1/nij/121019.pdf>.

⁷⁴ To his credit, Murphy’s article also argues that policing has historically discriminated against racial minorities and that the reforms to make the police more “professional” have not sufficiently reduced that

Murphy believed that an effective police force became involved with community members but also arrested more of them.⁷⁵ He sent plainclothes officers to integrate with the community, and those officers were successful in the goal of arresting more people—they arrested five times as many people as uniformed officers.⁷⁶ This is not a method by which people come to trust the police (in fact, the effect was likely the opposite), but Murphy rose through the ranks to become the first public safety director in Washington, D.C., and eventually founded the Police Foundation.⁷⁷

The Dolan Consulting Group is an organization focused on promoting community policing.⁷⁸ They hold courses to educate people about community policing and argue that police departments should adopt community policing practices.⁷⁹ The Dolan group reports that attendees frequently question whether community policing is tough on crime, so the group issued a brief with the evidence to show otherwise.⁸⁰ They cite the Tillyer article⁸¹ to support their contention that community-oriented policing leads to higher arrest rates.⁸² The fact that this brief exists shows that groups still disagree about whether community-oriented policing is actually an anti-carceral reform and ultimately concludes that it is not. The Dolan group believes that explaining the pro-carceral results of community policing makes it *more* popular.

Community policing is not a completely hopeless intervention. James Foreman, Jr. is a former public defender, current law professor, and founder of a school for underprivileged youth in Washington, D.C. He discusses a police intervention into his school in which the police did not act appropriately.⁸³ In that situation, police engaged in a number of raids to find crack cocaine, targeting students at Foreman's school.⁸⁴ The staff organized

discrimination. *See id.* at 2.

⁷⁵ HINTON, *supra* note 57, at 188–89.

⁷⁶ *Id.*

⁷⁷ *See Former Syracuse Police Chief Patrick V. Murphy, Who Urged Restraint and Fought Corruption, Dies at 91*, SYRACUSE.COM (Dec. 17, 2011), https://www.syracuse.com/news/2011/12/former_syracuse_police_chief_p.html. Murphy was lauded at the time of his death for being a proponent of restraint in policing, but this restraint was largely focused on preventing police from using lethal force. *Id.*

⁷⁸ Richard R. Johnson, *Community Policing Is Not Soft on Crime: The Evidence*, DOLAN CONSULTING GRP. (Aug. 2017), https://www.dolanconsultinggroup.com/wp-content/uploads/2017/08/ResearchBrief_CommunityPolicing.pdf.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Tillyer, *supra* note 59.

⁸² *Id.*

⁸³ JAMES FOREMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 180–83 (2017).

⁸⁴ *Id.* at 180.

a meeting with the students and law enforcement but, instead of listening to the students' concerns, the law enforcement officers made offensive suggestions.⁸⁵ Foreman says the students would have been more likely to assist the police by investigating and reporting crimes had the law enforcement officers actually engaged with the students.⁸⁶ Additionally, this approach could have motivated the students to act better and obey the law. He recommends a community policing model where students are engaged in fixing the problems their schools are facing.⁸⁷

Overall, this form of intervention can have potential benefits.⁸⁸ Society needs more social workers and more people who are willing to help the impoverished. However, community policing has shown itself to be occasionally ineffective. Police departments regularly do not have motivations that are consistent with the goals of community policing. Instead, their primary motivations often are to make arrests and patrol for crime. If those continue to exist as the primary motivations, there is no way community policing can be an effective tool for fighting mass incarceration. Community policing will, in fact, serve to increase incarceration and expand the surveillance state.

III. POLICY TWO: BAN THE BOX

Reducing recidivism and promoting rehabilitation outside of prison are both essential to reducing incarceration. The idea that prison rehabilitates the prisoners inside has largely been shown to be a myth.⁸⁹ Researchers have shown that incarceration does not reduce recidivism and instead leads to more criminal behavior.⁹⁰

Danielle Sered discusses the limits on rehabilitation in her book *Until We Reckon*.⁹¹ She argues that incarceration makes people *more* likely to commit

⁸⁵ *Id.* at 181.

⁸⁶ *Id.* at 183 (noting that this model of cooperation between the police and society seems like it could generate some positive results but, without a fundamental altering of how police think and act, it does not seem likely to actually decrease incarceration).

⁸⁷ *Id.*

⁸⁸ Community policing itself is likely to raise the incarceration rate because of the inherent motivations by the police. One strategy that could achieve some of the goals of community policing without the costs of increased arrests would be to integrate more social workers into low-income communities. Social workers can do the work to help raise people out of poverty without having the problematic motivations described herein.

⁸⁹ See Francis Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 THE PRISON J. 48S, 53S–54S (2011).

⁹⁰ *Id.* (discussing the idea that imprisonment is a social experience that deepens illegal involvement and presenting research to show that incarceration has a criminogenic effect).

⁹¹ See generally DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A*

crimes rather than less because incarceration exposes people to the experiences that lead to criminal behavior.⁹² She cites years of research to show that the experience of incarceration exposes people to shame, isolation, violence, and diminished ability to meet one's economic needs, which are four major drivers of criminal activity.⁹³

The statistics on recidivism are troubling. The Bureau of Justice Statistics conducted a study between 2005 and 2014 that measured recidivism rates.⁹⁴ The prisoners released in 2005 averaged five new arrests by 2014.⁹⁵ Each year following release, more released persons became rearrested: 44% within the first year, 68% within three years, 79% within six years, and 83% within nine years.⁹⁶ This shows a fundamental problem with our country's responses to crime and how we deal with recidivism.

Resource deprivation has been shown to significantly influence recidivism.⁹⁷ Resource deprivation can take many forms, but lack of employment is the most obvious cause. Many of those reentering society after terms of incarceration struggle to obtain employment and, therefore, experience resource deprivation. Employment is the single most important influence on reducing reoffending.⁹⁸

Sered discusses the connection between one's inability to meet basic needs and the likelihood of violence.⁹⁹ Lack of income increases stressors within families, and a perceived lack of ability to improve circumstances may lead to frustration and acceptance of a life of violence.¹⁰⁰ In prison, options for work are limited and often any income earned from prison jobs is simply put toward payment of fines and fees.¹⁰¹ There are insufficient resources in prison for inmates to obtain education and skills they can use to obtain

ROAD TO REPAIR (2019).

⁹² *Id.* at 66–67.

⁹³ *Id.* at 66–79. The discussion of shame, isolation, and violence as sources of recidivism is fascinating, though a fuller discussion exceeds the scope of this Article. For readers interested in learning more about the connection between incarceration and future criminal behavior, Sered's book is an excellent source.

⁹⁴ MARIEL ALPER, ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 1 (2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Daniel P. Mears et al., *Social Ecology and Recidivism: Implications for Prisoner Reentry*, 46 *CRIMINOLOGY* 301, 301 (2008) (“The findings suggest that [resource deprivation] is consequential for recidivism, and it differentially influences some groups more than others.”).

⁹⁸ *The Business Case: Becoming a Fair-Chance Employer*, NAT'L EMP. L. PROJECT (June 2016), <http://stage.nelp.org/wp-content/uploads/Business-Case-Fair-Chance-Employment.pdf>.

⁹⁹ SERED, *supra* note 91, at 77–79.

¹⁰⁰ *Id.* at 77.

¹⁰¹ *Id.* at 78.

employment upon release, so they are often reentering society without marketable skills.¹⁰² Also, a criminal record is a significant barrier to obtaining long-term employment and increases feelings of frustration and hopelessness.¹⁰³ There are many reasons those leaving prison struggle to maintain steady employment, but one reason is “the box.”¹⁰⁴

Employers frequently ask applicants to check a box to confirm that they do not have a criminal conviction.¹⁰⁵ Individuals who have at least one prior conviction are up to sixty percent less likely to get callbacks when they apply for jobs.¹⁰⁶ Research shows that these policies have terrible consequences for formerly incarcerated people and society at large.¹⁰⁷ Criminal justice reformers argue stridently against the box.¹⁰⁸ For instance, the National Employment Law Project has provided employers with resources they can use to modify their box policies in ways that accomplish their employment-related goals while lessening the negative impacts on formerly incarcerated people.¹⁰⁹ Generally, such “ban-the-box” policies reduce discrimination against formerly incarcerated persons during the hiring process, which helps reduce recidivism by giving these individuals a better chance at stable employment.¹¹⁰

However, these ban-the-box policies are not without unintended consequences. To an extent, they ignore the underlying currents of racism within society and the criminal justice system. As Professor Paul Butler argues in his book *Chokehold*, the criminal system is built to control African American men, and racism expands to every aspect of the system.¹¹¹ Butler

¹⁰² *Id.* at 78–79.

¹⁰³ *Id.* at 78.

¹⁰⁴ *Research Supports Fair Change Policies*, NAT’L EMP. L. PROJECT (Aug. 2016), <https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>.

¹⁰⁵ It is legal on the federal level for employers to ask about criminal history and use that information to make hiring decisions. They cannot use that information to “significantly disadvantage” individuals protected by the Civil Rights Act of 1964, but that disadvantage is not easy to prove. *See Pre-Employment Inquires and Arrest & Conviction*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm (last visited Feb. 27, 2020).

¹⁰⁶ DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 67–72 (2009) (finding that white applicants are fifty percent less likely to receive a callback if they have a conviction as compared to sixty percent for African Americans).

¹⁰⁷ *Id.*

¹⁰⁸ *See, e.g., Michelle Natividad Rodriguez & Ben Beach, Community Hiring Model Language: Why Do We Need It and How Does It Work?*, NAT’L EMP. L. PROJECT (Mar. 22, 2014), <https://www.nelp.org/publication/community-hiring-model-language-need-work/>.

¹⁰⁹ Michelle Natividad Rodriguez & Anastasia Christman, *The Fair Chance / Ban the Box Toolkit*, NAT’L EMP. L. PROJECT (Apr. 2, 2015), <https://www.nelp.org/publication/the-fair-chance-ban-the-box-toolkit/>.

¹¹⁰ *See id.*

¹¹¹ PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 57–61 (2017) (discussing, for example, the

points out that employers often assume that African American men are criminals and, therefore, discriminate against them.¹¹² The system as it is constituted now, with the box, helps African American men who have not been convicted show employers that they are without a conviction.

Ban-the-box policies have real consequences on African American men. Employers who may have given an African American man an interview if they could confirm his criminal history sometimes refuse an interview because they cannot be sure.¹¹³ This discrimination has been shown to result in approximately a fifteen percent decrease in employment for young black men without a GED or high school diploma.¹¹⁴ The same study found that white applicants were called back six times more often than black applicants once ban-the-box policies were implemented.¹¹⁵ African American callback rates in ban-the-box jurisdictions are lower than white applicants' rates in non-ban-the-box jurisdictions, suggesting that employers "would rather call back a white applicant with a known criminal record than [an African American] applicant whose criminal record was unknown."¹¹⁶

Employment discrimination is a harsh reality in modern society. Legislatures pass laws to prevent employers from discriminating against those in need,¹¹⁷ but employers are motivated by their bottom line. They want to avoid litigation and create a workforce that reaches toward their ideal. Ban-the-box policies help reduce discrimination against formerly incarcerated persons but contribute to discrimination against African American men generally.

IV. POLICY THREE: REMOVING SUBJECTIVITY

Discrimination does not just hurt people in the employment setting; it is a strong force in the U.S. criminal justice system itself. Plenty has been written on the topic, including the racist origins of the institution itself. Michelle Alexander notes this history in her groundbreaking book *The New*

"super powers" that American law enforcement have to kill, to arrest, and to racially profile—all supported by U.S. Supreme Court case law).

¹¹² *Id.* at 21.

¹¹³ Jennifer L. Doleac & Benjamin Hansen, *How Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden 1* (Soc'y Sci. Research Network Working Paper No. 23, July 1, 2016), available at <https://www.nber.org/papers/w22469> (explaining that employers who wish to avoid hiring those with criminal convictions feel the need to "guess" at who has a conviction, which leads them to avoid hiring "young, low-skilled black and Hispanic men when criminal records are not observable").

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.* at 6.

¹¹⁶ Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1087 (2019).

¹¹⁷ *Id.* at 1087–1092.

*Jim Crow*¹¹⁸ and Angela Davis explains it in her book *Are Prisons Obsolete?*¹¹⁹ These narratives track the development of policing from a practice to maintain slavery, to the effort to enforce Jim Crow laws, to its modern-day use to police and control African Americans in cities.¹²⁰ The current effect of these discriminatory policies is that the war on drugs disproportionately targets African Americans despite evidence “showing that they are no more likely to use or sell illegal drugs than whites.”¹²¹ Indeed, “A 2013 ACLU report found that a black person is about four times more likely to be arrested for marijuana possession than a white person, even though blacks and whites use marijuana at similar rates.”¹²²

Efforts to stop discrimination have resulted in movements to reduce subjectivity in policing and sentencing, which is thought to cause discriminatory results.¹²³ If law enforcement officers and prosecutors are racist and want to negatively harm people of color, then the only way to stop that would be to remove their decision-making ability. If the actors are not allowed to make choices, then they will lack the agency to express their discriminatory intent.

Professor Naomi Murakawa discusses this idea thoroughly in her book *The First Civil Right*.¹²⁴ She explains that the liberal ideal of a perfect criminal justice system is one with enough regulation on the actors that they are forced to act properly.¹²⁵ Liberals accepted the idea that a system that worked fairly could be created if regulations were stringent enough.¹²⁶ She says that “[t]ightening machinery meant leaving no slack for the ‘arbitrary’ biases of parochial administrators; more procedures and higher professional standards could insulate criminal justice from personal prejudices.”¹²⁷ President Truman’s Commission on Civil Rights recommended an increase

¹¹⁸ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS*, 185–87 (2010) (demonstrating how the War on Drugs disproportionately targets African American men and that, by doing so, sweeps them into the system that criminalizes them and locks them up).

¹¹⁹ ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?*, 22–39 (2003) (describing the connections between slavery, convict leasing, and our modern penal system).

¹²⁰ *Id.*

¹²¹ MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS*, 127 (2015) (citing figures that show African Americans make up only twelve percent of the population but constitute one-third of the people arrested for drug crimes and nearly half of those serving prison time for drug offenses).

¹²² *Id.*

¹²³ See MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 44–48 (2014).

¹²⁴ *Id.*

¹²⁵ *Id.* at 44.

¹²⁶ *Id.*

¹²⁷ *Id.*

in professionalism to indoctrinate police officers to the problems with civil rights.¹²⁸ Democrats in the 1950s and 1960s passed bills with the goal of increasing this professionalism and included in those bills an increase in funding to assist with that change.¹²⁹

The debate surrounding the Law Enforcement Assistance Act of 1965 gave voice to the different goals of police professionalism.¹³⁰ President Johnson stated the purpose of this act was to “authorize the Attorney General to assist state, local and private groups to improve and strengthen crime control programs and make generally available information as to their effectiveness.”¹³¹ Johnson believed that “[t]rained, professional law enforcement personnel are . . . essential to the preservation of our national health and strength.”¹³² This act got the federal government involved in local law enforcement for the purpose of improving the professionalism and quality of local law enforcement.¹³³

Liberals wished the act to improve police professionalism in ways that helped racial minorities and reduced discrimination.¹³⁴ The act increased police salaries and training while raising recruitment requirements,¹³⁵ and people on both sides of the aisle believed such changes would help achieve their goals. Congress passed the 1965 act unanimously, which led to the Safe Streets Act of 1968.¹³⁶ The 1968 act began as a group effort to put the lauded police professionalism standards into effect, but it eventually gave power to the police and increased their funding.¹³⁷ This funding did not have the effect

¹²⁸ *Id.* at 45.

¹²⁹ *Id.* at 47.

¹³⁰ *Id.* at 79–81.

¹³¹ *Message to Congress: Johnson's March 8 Message on Crime*, in CQ ALMANAC 1965, 1394–97 (21st ed., 1966), <http://library.cqpress.com/cqalmanac/cqal65-875-26756-1260715>.

¹³² *Id.*

¹³³ See generally Elizabeth Hinton, “A War within Our Own Boundaries”: Lyndon Johnson’s Great Society and the Rise of the Carceral State, 102 J. AM. HIST. 100 (2015).

¹³⁴ During Johnson’s tenure, he appointed Illinois Governor Otto Kerner, Jr. to head a commission aimed at analyzing the causes of the race riots in the mid-1960s. See Julian E. Zelizer, *Fifty Years Ago, the Government Said Black Lives Matter*, BOSTON REVIEW (May 5, 2016), <http://bostonreview.net/us/julian-e-zelizer-kerner-report>. This commission, called the Kerner Commission, released a report that put the blame squarely on white racism and its manifestation through the police force. See *Id.* This report and its findings were radical at the time and brought up issues that were often “kept on the sidelines of mainstream political discourse.” *Id.*

¹³⁵ MURAKAWA, *supra* note 123, at 47.

¹³⁶ Hinton, *supra* note 133, at 102. President Lyndon Johnson is often derided for his involvement in the creation of this bill, and some derision is probably appropriate, but scholars have found that Congress played the primary role in producing this bill. See generally BARRY MAHONEY, *POLITICS OF THE SAFE STREETS ACT, 1965–1973: A CASE STUDY IN EVOLVING FEDERALISM AND THE NATIONAL LEGISLATIVE PROCESS* (1976).

¹³⁷ MURAKAWA, *supra* note 123, at 87.

that the democrats desired.¹³⁸ Instead, the increase in funding and regulations turned police forces more punitive.¹³⁹

The 1968 act created the Law Enforcement Assistance Administration (LEAA), which increased block-grant funding to state law enforcement agencies.¹⁴⁰ Even though the purpose of the federal intervention in many liberals' eyes was to reduce subjectivity, the LEAA's block grants gave states more control, "effectively restoring them a degree of autonomy that was threatened by the dismantling of Jim Crow."¹⁴¹ Some oversight was included in the 1968 bill, but it also "encouraged states to acquire surplus M-1 military carbines, army tanks, bulletproof vests, and walkie-talkies for local police."¹⁴²

Murakawa argues that calls for removing subjectivity from police actually distracted from the real problems.¹⁴³ Because liberal lawmakers were focused on moments of discretion that led to overt discrimination, they did not account for the less-obvious, inherent and underlying discrimination in the system.¹⁴⁴ For example, violence against people of color continued at the normal rate, with massive numbers of people of color being killed by the police each year.¹⁴⁵ The goal of reducing discretion in policing directed attention away from the foundation of racism that underlies the system as a whole.¹⁴⁶

Additionally, police officers who have less discretion can increase mass incarceration because they are forced to make arrests in situations where they would otherwise let persons go. The 1974 drug laws passed by New York Governor Nelson Rockefeller provide a good example of how law enforcement discretion can be useful.¹⁴⁷ Those laws were exceptionally punitive but, after their creation, the incarceration rate in New York did not markedly increase.¹⁴⁸ This was because the police and prosecutors used their discretion to decline to prosecute certain people under those laws.¹⁴⁹ Without

¹³⁸ *Id.* at 89–90.

¹³⁹ *Id.*

¹⁴⁰ Hinton, *supra* note 133, at 109.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ MURAKAWA, *supra* note 123, at 90.

¹⁴⁴ *Id.* This warning was clearly given to lawmakers by groups such as the Kerner Commission. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See GOTTSCHALK, *supra* note 121, at 264; Brian Mann, *The Drug Laws That Changed How We Punish*, NPR (Feb. 14, 2013), <https://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish>.

¹⁴⁸ GOTTSCHALK, *supra* note 121, at 264.

¹⁴⁹ *Id.* (explaining that the rate did not increase because of "selective pragmatic enforcement" by participants in the legal system). *Cf.* Stephen D. Mastrofski et al., *Organizational Determinants of Police*

the exercise of that discretion, the rates likely would have skyrocketed.¹⁵⁰ Additionally, Mayor Ed Koch of New York City began a campaign to fight against drugs and belatedly forced police, prosecutors, and judges in New York State to embrace the Rockefeller laws.¹⁵¹

Even British law enforcement has instances of discretion being overly controlled by regulation.¹⁵² A study by Michael Rowe addressed a policy where the government reduced police discretion when it came to instances of domestic violence.¹⁵³ Officers were required to intervene and make arrests without discretion.¹⁵⁴ They, in turn, “tended to find the limits that this policy placed on their discretion difficult to reconcile with their notion of their own professionalism.”¹⁵⁵ Officers would rather not make some arrests, but, because of the regulations, they must make them.¹⁵⁶ As we know, arrest often leads to conviction.¹⁵⁷ Such arrests, therefore, increase the incarceration rate.

The use of police body cameras represents another aspect of the removal of police discretion. Studies have shown that police forces with larger lobbying bodies tend to oppose body cameras because their use stifles the possibility of police discretion.¹⁵⁸ Body cameras have been found to be a useful mechanism to control the police and ensure they are accountable for their actions.¹⁵⁹ This makes sense. If police officers know their actions are being recorded, then they are less likely to act in discriminatory or brutal ways because it will fall back on them later. However, recordings also make it more difficult for the police to exercise their discretion when doing so might warrant less harsh treatment or sentencing.

Discretion: The Case of Drinking-Driving, 15 J. CRIM. JUST. 387 (1987).

¹⁵⁰ In fact, the incarceration rates did skyrocket in much of the country between 1973 and 2003. See Mann, *supra* note 147 (discussing the nation’s prison population increase following the enactment of Rockefeller-style laws).

¹⁵¹ GOTTSCHALK, *supra* note 121, at 264.

¹⁵² See Michael Rowe, *Rendering Visible the Invisible: Police Discretion, Professionalism and Decision-Making*, 17 POLICING & SOC’Y 279 (2007).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *FAQ Detail*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=qa&iid=403> (last visited May 03, 2020).

¹⁵⁸ See, e.g., Jeffrey S. Nowacki & Dale Willits, *Adoption of Body Cameras by United States Police Agencies: An Organisational Analysis*, 28 POLICING & SOC’Y 841 (2018).

¹⁵⁹ See Anthony A. Braga et al., *The Las Vegas Body-Worn Camera Experiment: Research Summary*, (UNLV Ctr. for Crime & Justice Policy: Research in Brief, CCJP 2017-2, Nov. 2017), available at https://www.cna.org/cna_files/pdf/LV-BWC-RIB-2017.pdf (finding that “officers with body-worn cameras had fewer complaints of misconduct than their control counterparts”).

This interest in removing subjectivity from the U.S. criminal justice system also led to the rise in mandatory minimum sentences.¹⁶⁰ Mandatory minimums were a quite popular bipartisan issue when they were passed.¹⁶¹ Conservatives supported mandatory minimums because they were consistent with the Reagan era tough-on-crime perspective.¹⁶² However, liberals also supported the idea of mandatory minimums because they believed judges might use their discretion in racially discriminatory ways.¹⁶³ They expected judges to give low sentences to white defendants while giving people of color harsh sentences.¹⁶⁴ To avoid this, liberals supported setting sentencing guidelines that prevented judges from giving low sentences. The idea of setting a sentencing floor when you believe the judge has discriminatory motives has some sound logic, but in practice it fails.

In reality, sentencing is harshly discriminatory towards people of color even with mandatory minimums. What these guidelines do is prevent judges from giving anyone a sentence below a certain level, even if the judge believes a reduced sentence to be fair.¹⁶⁵ And even with the mandatory minimums, statistics suggest that judges still express racial bias in their sentencing.¹⁶⁶ Minimums do not completely tie judges' hands, because they can always sentence someone they do not like above the minimum. They take advantage of this discretion on a regular basis, and sentencing is broadly derided as discriminatory.¹⁶⁷ Therefore, liberals supported mandatory sentencing as a way to avoid judges giving white defendants breaks in sentencing; what they did in practice was increase sentences across the board while still allowing prejudiced judges to discriminate against people of color.

¹⁶⁰ *Mandatory Minimums and Sentencing Reform*, CRIM. JUST. POL'Y FOUND., <https://www.cjpf.org/mandatory-minimums> (last visited May 3, 2020) (noting that, "[i]n essence, Congress abandoned the idea that Federal judges -- appointed by the President and confirmed by the U.S. Senate -- have the wisdom and training to identify the most serious drug offenders and punish them appropriately").

¹⁶¹ Eda Katharine Tinto, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906, 909–10 (2001).

¹⁶² *See id.*

¹⁶³ *Id.* at 910–11.

¹⁶⁴ *See id.*

¹⁶⁵ The sentiment that judges may be inappropriately lenient also extends to sentences of life without the possibility of parole. *See* Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole as an Alternative to the Death Penalty*, 67 MIAMI L. REV. 439, 446–47 (2013) (“When the public struggles to believe that lengthy sentences will be carried out in their entirety, it will prefer lifelong, determinate sentencing structures. . . . Fear of judicial leniency makes the public leery of sentences that allow for even the remote possibility of release.”)

¹⁶⁶ *See id.* at 454.

¹⁶⁷ *See* B. Keith Crew, *Race Differences in Felony Charging and Sentencing: Toward an Integration of Decision-Making and Negotiation Models*, 14 J. CRIME & JUST. 99, 99 (1991).

The issue of reducing discretion is a complicated mix of goals and outcomes. Conservatives want to reduce discretion to cut breaks so they can be tough on crime. Liberals want to reduce discretion so that racial animus does not have such a large effect. Some of the reforms in this realm are productive and lead to better results. However, much of these reforms tie the hands of the judicial system when they wish to avoid overly punitive results. Officers may wish to avoid an arrest but cannot due to regulation. Judges may wish to give a defendant a lenient sentence due to circumstances of the case but cannot due to regulation. Some regulations to remove subjectivity from law enforcement and judges are good and productive but some lead to unfortunate and unintended consequences.

V. POLICY FOUR: DEATH PENALTY

Abolition of the death penalty has long been one of the primary goals of those who wish to reform the U.S. criminal system. Some argue that the arbitrary application of the death penalty in the U.S. is cruel and unusual.¹⁶⁸ Some argue that the financial cost of the death penalty is unjustified.¹⁶⁹ Some point to the increasing flow of exonerations to show that the finality of the death penalty is unconscionable.¹⁷⁰ Some argue that the death penalty is ineffective at deterring violent crime and, therefore, fails at its primary purpose.¹⁷¹

The debate on whether American society should end the death penalty is ongoing. Recently, the U.S. federal government restarted the death penalty after a several-year hiatus.¹⁷² The groups that approve of capital punishment believe the death penalty is an effective deterrent and that society needs this form of punishment to properly deal with the most heinously violent criminals.¹⁷³

Death penalty abolition can have unintended consequences. It can happen that those making the arguments against the death penalty propose

¹⁶⁸ See, e.g., *The Case Against the Death Penalty*, ACLU, <https://www.aclu.org/other/case-against-death-penalty> (last visited May 03, 2020).

¹⁶⁹ See, e.g., *Death Penalty Cost*, AMNESTY INT'L, <https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-cost/> (last visited May 03, 2020).

¹⁷⁰ See, e.g., *Exonerations of Innocent Men and Women*, NAT'L COAL. TO ABOLISH THE DEATH PENALTY, <http://www.ncadp.org/pages/innocence> (last visited May 03, 2020).

¹⁷¹ *A Clear Scientific Consensus that the Death Penalty Does Not Deter*, AMNESTY INT'L, <https://www.amnestyusa.org/a-clear-scientific-consensus-that-the-death-penalty-does-not-deter/> (last visited May 03, 2020).

¹⁷² Katie Benner, *U.S. to Resume Capital Punishment for Federal Inmates on Death Row*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/politics/federal-executions-death-penalty.html>.

¹⁷³ David Muhlhausen, *The Death Penalty Deters Crime and Saves Lives*, HERITAGE FOUND. (June 27, 2007), <https://www.heritage.org/testimony/the-death-penalty-deters-crime-and-saves-lives>.

life without the possibility of parole as an alternative.¹⁷⁴ Capital defense attorneys also use this argument in their jury trials.¹⁷⁵ They try to assuage jurors' fears about letting the defendant live by promising that he will never be released from prison.¹⁷⁶ However, researcher Ashley Nellis explains, "[p]romotion of [life without the possibility of parole] as a humane, reasonable alternative to the death penalty desensitizes society to the fact that this, too, is a death sentence."¹⁷⁷ As a result of this finding, more states have passed laws to expand punishments to life sentences.¹⁷⁸ Between 1992 and 2008, the number of prisoners serving sentences of life without the possibility of parole increased from 12,453 to 41,095.¹⁷⁹

Connecticut provides a good example of the problems of expanding life without the possibility of parole. In 2012, to much acclaim, Connecticut removed the death penalty from their criminal law.¹⁸⁰ However, they required all people who would have been eligible for the death penalty to receive sentences of life without the possibility of parole and to serve those sentences in supermax prisons.¹⁸¹

However, life without the possibility of parole shares many features with the death penalty and cuts against some fundamental principles of the criminal system.¹⁸² When a person is sentenced to death or life without the possibility of parole, the judge or jury is deciding that the person has no ability to be rehabilitated and, therefore, must be removed from society forever. This directly contradicts the idea that the criminal system should function as a way to rehabilitate those involved and reintroduce them into society. If a person is sentenced to life without the possibility of parole, they (just like those who are executed) will never be reintroduced into society.

Abolitionists who care about the greater cause of reducing mass incarceration should not make the argument that life without the possibility of parole is a suitable alternative to capital punishment. They should instead argue that both capital punishment and life without the possibility of parole are unacceptable outcomes. Society should not give up on people. It should always hold out hope that a person can be rehabilitated and earn their way out of prison. The goal of the abolitionist movement should not be simply to

¹⁷⁴ GOTTSCHALK, *supra* note 121, at 191–95 (arguing that “many leading abolitionists have ardently supported LWOP” and have “uncritically accepted LWOP as a viable alternative to the death penalty”).

¹⁷⁵ *Id.* at 192–93.

¹⁷⁶ *Id.*

¹⁷⁷ Nellis, *supra* note 165, at 448.

¹⁷⁸ *Id.* at 441.

¹⁷⁹ *Id.*

¹⁸⁰ GOTTSCHALK, *supra* note 121, at 193.

¹⁸¹ *Id.*

¹⁸² *Id.* at 191–92.

stop the death penalty—it should be focused on reducing extreme punishments that dehumanize people and prevent them from ever achieving rehabilitation and reintegration.

Life without the possibility of parole has another major flaw as a punishment method—most criminal behavior is done by young people.¹⁸³ To be sure, “[i]t is now a truism that age is one of the strongest factors associated with criminal behavior.”¹⁸⁴ As people get older, they typically age out of crime.¹⁸⁵ There is some logic in sentences which remove people from society for several years while they are in their twenties or thirties. Those are the prime years for criminal activity for those who have a propensity to commit crime.¹⁸⁶ Studies have shown that “[r]ates of criminality generally increase through adolescence and peak at age 17.”¹⁸⁷ However, life without the possibility of parole ensures that defendants will be incarcerated forever. Even as they get older and are less likely to commit further crimes, life without the possibility of parole keeps them imprisoned. This is not productive.

Overall, the capital punishment abolitionist movement has a laudable goal. However, without care, the goal of eliminating the death penalty could result in harsh sentences on people who do not deserve them. Abolitionists must avoid normalizing life without the possibility of parole or they risk winning the battle and losing the war. They could remove one brutal penalty while setting the stage for the expansion of another.

VI. POLICY FIVE: BUDGET CUTS IN PRISONS/NO NEW PRISONS

One logical method for reducing the incarceration rate is to reduce the number of prisons. Theoretically, if the number of prison beds were to go down, the number of prisoners would go down a commensurate amount.¹⁸⁸

¹⁸³ Jeffrey T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship*, in *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY* 23, 378 (Kevin M. Beaver et al. eds., 2014), available at https://www.sagepub.com/sites/default/files/upm-binaries/60294_Chapter_23.pdf.

¹⁸⁴ *Id.* at 378.

¹⁸⁵ Much of the scholarship on this issue even makes the argument that “the familiar inverted J-curve association between age and crime is invariant, inexplicable with social science variables, and involves no interaction between age and any variable that explains or correlates with crime.” Charles Tittle & Harold Gasmick, *Criminal Behavior and Age: A Test of Three Provocative Hypotheses*, 88 *J. CRIM. L. & CRIMINOLOGY* 309, 309 (1998).

¹⁸⁶ Caitlin V. M. Cornelius et al., *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling*, *SOC'Y FOR MODELING & SIMULATION INT'L* 2 (2017), https://scs.org/wp-content/uploads/2017/06/6_Final_Manuscript.pdf.

¹⁸⁷ *Id.*

¹⁸⁸ See Nicole D. Porter, *Repurposing: New Beginnings for Closed Prisons*, SENTENCING PROJECT

Organizations like No New Jails NYC promote the closing of existing jails and a moratorium on building new jails.¹⁸⁹ They believe that jails do nothing to promote public safety, that new jails do not fix any problems, and that government focus should be on reducing the culture of violence in correctional facilities and on the street.¹⁹⁰

However, simply reducing prison budgets as a method of reducing their population is not an effective strategy. Prison reformers often argue that the cost of mass incarceration should be one of the primary motivating factors behind reducing the prison population.¹⁹¹ Reformers believe it is too expensive to house 2.3 million people.¹⁹² There is logic behind this argument, but it ignores some of the reality of prisons—many of the costs are static.¹⁹³ The costs of the increase or decrease of a few inmates does not dramatically change the costs of running the prison and simply reducing the number of inmates will not fix the financial problems.¹⁹⁴ Only closing prisons will do that.¹⁹⁵

Closing prisons is an uphill battle. A regular refrain of reformers is that private prisons and the correctional employees' lobbies promote criminal policies that increase incarceration.¹⁹⁶ They do so because an increase in criminal punishments increases the number of inmates in their facilities and increases their budgets.¹⁹⁷ It is natural for correctional employees to want job security and to grow their businesses. Many prisons are in rural areas and closures would devastate the community.¹⁹⁸ For these reasons, it is easier to

(Dec. 14, 2016), <https://www.sentencingproject.org/publications/repurposing-new-beginnings-closed-prisons/> (explaining how a reduction in prisoners has allowed some prisons to close and how states are using those prisons productively following their closure).

¹⁸⁹ *How We Got Here*, NO NEW JAILS NYC, <https://www.nonewjails.nyc/who-we-are-1> (last visited May 03, 2020).

¹⁹⁰ Noah Goldberg, *Who Is No New Jails NYC?*, BROOKLYN DAILY EAGLE (May 14, 2019), <https://brooklyneagle.com/articles/2019/05/14/no-new-jails-nyc/>.

¹⁹¹ *Id.*

¹⁹² German Lopez, *Mass Incarceration Doesn't Do Much to Fight Crime. But It Costs an Absurd \$182 Billion a Year*, VOX (Jan. 27, 2017), <https://www.vox.com/policy-and-politics/2017/1/27/14388024/mass-incarceration-cost>.

¹⁹³ GOTTSCHALK, *supra* note 121, at 27.

¹⁹⁴ *Id.*

¹⁹⁵ Also, even if prisons close, the inmates in those prisons may not be freed from criminal supervision. They will likely just be transferred to some other form of state supervision. This cost would be borne either by the convicted person or the state, and neither outcome is ideal. *Id.*

¹⁹⁶ See Austin McCoy, *Prison Guard Unions and Mass Incarceration: Prospects for an Improbable Alliance*, 26 NEW LAB. F. 74, 75 (2017) (explaining how prison guard unions and their members stand to profit from mass incarceration due to the increased number of facilities and job security associated with a high incarceration rate).

¹⁹⁷ *Id.*

¹⁹⁸ Tracy Huling, *Building a Prison Economy in Rural America*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 197 (2002),

get reforms done that reduce the prison population but do not actually close prisons.

This leads to the idea of cutting prison budgets as a method of reducing the prison population. Reformers believe that, if prisons do not have the money to house people, they will release some prisoners or support policies that reduce the incarceration rate. Conservatives are quick to agree with the idea that the costs of incarceration are too high, but they do not agree with the conclusion that, to reduce the high cost, we need to close prisons entirely.¹⁹⁹ They believe costs should instead be reduced by cutting non-essential prison services.²⁰⁰

The Supreme Court in *Rhodes v. Chapman*²⁰¹ and *Wilson v. Seiter*²⁰² affirmed that prisons do not have to be comfortable places. Budget cutting takes this to heart, with some prisons reducing the number of meals from three to two on weekends and holidays and others cutting basic pleasures such as television.²⁰³ Additionally, if a prison does not want to pay for a service, they frequently provide that service but only at the inmate's expense.²⁰⁴ It is difficult to properly track the true costs of budget cutting in prisons because there is insufficient oversight controlling how prisons must behave.²⁰⁵ But the examples we do know of show that a reduction in prison budgets leads directly to major harms on the inmates.²⁰⁶

Another issue with the no-new-prisons movement is that it leads to overcrowding. If the incarceration rate continues to rise and no new prisons are built to house new inmates, then prisoners necessarily will be more tightly packed.²⁰⁷ Increase in prison density has been shown to have severe negative

https://www.prisonpolicy.org/scans/huling_chapter.pdf (noting that new rural prisons in the 1990s employed 75,000 workers but also discussing the fringe costs of having a prison in a small town).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ 452 U.S. 337 (1981) (holding that double-celling prisoners does not constitute cruel and unusual punishment because it did not inflict unnecessary or wanton pain on the inmates and was not a punishment grossly disproportionate to the severity of crimes warranting imprisonment).

²⁰² 501 U.S. 294 (1991) (holding that prisoners claiming that prison conditions constitute cruel and unusual punishment must show that the prison officials showed deliberate indifference).

²⁰³ GOTTSCHALK, *supra* note 121, at 40.

²⁰⁴ Lauren-Brooke "L.B." Eisen, *Tennessee Inmates Must 'Pay-to-Stay,'* BRENNAN CTR. FOR JUST. (Aug. 28, 2013), <https://www.brennancenter.org/blog/tennessee-inmates-pay-stay> (discussing the fact that prisoners in Anderson County, Tennessee are charged money for "everything from toilet paper to prison garb").

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ The Court in *Rhodes v. Chapman* addressed the issue of prison overcrowding and concluded that it was not constitutionally problematic on its own. 452 U.S. 337, 348 (1981).

effects on prisoner health, including being correlated with higher suicide rates among inmates.²⁰⁸

This does not deter certain states that have prison systems operating over capacity. According to the Bureau of Justice Statistics' 2013 numbers, Alabama was operating at 197% of design capacity, Illinois 173%, Delaware 163%, Hawaii 164%, and Nebraska 158%.²⁰⁹ It is difficult to imagine spending years in a prison that is operating at nearly double the capacity that the builders intended. Density is the inevitable result if prisons continue to attempt to reduce cost while lawmakers do nothing to reduce the incarceration rate.

Cutting costs in prisons caused a stir in the news recently with the death of billionaire Jeffrey Epstein. Two of the guards that were supposed to be watching Epstein are accused of sleeping through inmate checks and falsifying records.²¹⁰ The *New York Times* reported that Epstein was left alone for three hours when he should have been checked every thirty minutes.²¹¹ The *Times* further reported that budget cuts in prisons may have contributed to the poor jobs done by these prison guards.²¹² It provided, "Some prisons, including the Manhattan jail, have been so pressed for guards that they have forced teachers, nurses, cooks and other support staff members to step in."²¹³ If situations like this happen with the wealthy and famous members of our society, there is no imagining the collateral consequences for the average members of the prison population.

This section is not meant to argue that closing prisons or reducing their budgets is a bad idea. It can be an effective way to reduce the prison population if done properly. However, lawmakers who agree with the goal of cutting costs but also wish to appear tough on crime can use that goal to do great harm. Thus, reformers must be careful. Using financial arguments is a good way to get people on board with the fight to end incarceration, but they must be joined with arguments addressing the humanity of the situation. Cutting costs alone can lead to crowded and inhumane jails that cause significant and enduring harm to those housed within.

²⁰⁸ GOTTSCHALK, *supra* note 121, at 41.

²⁰⁹ *State Prison Capacity, Overcrowded Prisons Data*, GOVERNING (Dec. 31, 2013), <https://www.governing.com/gov-data/safety-justice/state-prison-capacity-overcrowding-data.html>.

²¹⁰ Katie Benner & Danielle Ivory, *Jeffrey Epstein Death: 2 Guards Slept Through Checks and Falsified Records*, N.Y. TIMES (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/nyregion/jeffrey-epstein-jail-officers.html>.

²¹¹ *Id.*

²¹² Azi Paybarah et al., *Epstein Suicide Inquiry Grows: Roughly 15 Jail Workers Are Subpoenaed*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/nyregion/epstein-suicide-jail-investigation.html>.

²¹³ *Id.*

VII. POLICY SIX: NON-VIOLENT OFFENDER REFORM

When criminal justice reform is successful, those successes often center around certain consensus topics. Specifically, more and more people are coming to agree with the idea that current punishments for non-violent drug or property offenders are too high.²¹⁴ Voters are more likely to think of them as people who made a mistake rather than unredeemable criminals. The historical hatred of people who commit crimes has waned in recent years, specifically for this group.

This opinion has manifested in the First Step Act, which reduces some penalties for non-violent drug offenders.²¹⁵ This act reduced the sentences defendants received before 2010, when Congress passed the Fair Sentencing Act, which reduced the disparity between sentences for crack cocaine and powdered cocaine.²¹⁶ Such reductions are vitally important and improve the amount of justice in our society.

However, these adjustments have limitations. First, reducing the amount of non-violent drug offenders in U.S. prisons will not do enough to adjust the incarceration rate. Fordham law professor John Pfaff has written extensively about this issue, specifically in his insightful book *Locked In*.²¹⁷ He argues that, while the “war on drugs” had some effect on the incarceration rate, it is “unequivocally secondary to other factors.”²¹⁸ Only about sixteen percent of people in prison are there for drug-related crimes.²¹⁹ That is certainly a lot of people (around 300,000), but not enough to fundamentally change the nature of incarceration in America. Releasing all inmates in jail for drug-related crimes would reduce our incarceration rate to that of 1996–97, which was already past the point at which the incarceration rate had exploded.²²⁰ Reform of non-violent sentences is necessary to reduce the incarceration rate.

Second, the idea that mercy should be given for non-violent drug offenders is good; but it should not be limited there. If we want to meaningfully reduce the incarceration rate, we need to reduce sentences for violent offenders as well. Setting aside the non-violent drug offenders as the

²¹⁴ *Most Americans Support Sentencing Reforms for Nonviolent Offenders – But Political Obstacles Remain*, SCHOLARS STRATEGY NETWORK (Aug. 2, 2018), <https://scholars.org/brief/most-americans-support-sentencing-reforms-nonviolent-offenders-political-obstacles-remain>.

²¹⁵ See Justin George, *What's Really in the First Step Act?*, MARSHALL PROJECT (Nov. 16, 2018), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act>.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 23 (2017).

²¹⁹ *Id.* at 46.

²²⁰ *Id.* at 49.

only group deserving of mercy sets up the dichotomy between them and violent offenders, implying that those who commit violent crimes always deserve the long sentences against them. Setting up such a dichotomy may also motivate reform efforts that increase punishments for those convicted of violent crime.²²¹ If non-violent offenders are worthy of a decrease in sentencing, then reformers must similarly recognize that violent offenders are worthy of decreased sentences.

Violent offenses have been the leader in prison population growth for years. Between 1990 and 2009, sixty percent of all new inmates were incarcerated due to a violent offense.²²² This does not take into account people who are charged with violent offenses but plead guilty to lesser, non-violent offenses.²²³ Thus, any real reform to reduce the incarceration rate must include a reduction in those convicted of violent offenses.²²⁴ This task is difficult to undertake because the public is not sympathetic toward people convicted of violent crimes.²²⁵ Reformers can search for “low-hanging fruit” in the violent crime context, but most people spending time in prison for violent crime are there because they committed serious violent crimes like murder or manslaughter.²²⁶

The goal of reform efforts must be to show that most criminal defendants do not deserve the harsh sentences the government imposes. It is not acceptable to set aside a group that deserves leniency against a group that deserves the harshness of the punishment. We must fight to create a system that dramatically reduces the amount of punishment doled out to citizens regardless of the crime they are accused of committing.

VIII. CONCLUSION

Any legislation or social movement has consequences. Whenever a group pushes for reforms to the criminal system, there will be people who oppose that change. The change goes to the public for debate, and one side usually wins out. History is filled with changes that developed in this manner.

²²¹ *Id.* at 23.

²²² *Id.* at 187.

²²³ *Id.* at 188.

²²⁴ *Id.* at 190-96 (discussing the traditional rationales for long prison sentences and preparing a defense for why those rationales are wrong).

²²⁵ *National Tracking Poll*, MORNING CONSULT (Sept. 2016), https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7052001/160812_topline_Vox_v1_AP.0.pdf (finding that sixty percent of those responding to the poll opposed or strongly opposed reducing prison time for people who committed a violent crime and have a low risk of committing another crime).

²²⁶ PFAFF, *supra* note 218, at 200-201.

However, history also is filled with groups using their opponents' arguments for their own purposes.

In the effort to improve the U.S. criminal system, reformers are full of ideas. The system is complicated and must be changed in many ways in order to provide justice and security to the country without brutally and over-harshly dealing with those who violate the law. Many of the ideas proposed by reformers are productive and will result in positive change. However, pro-incarceration groups turn these ideas into harmful pro-incarceration practices.

We have seen this happen in the past with some of the positions discussed above, and the risks continue to the future. This article presents a word of caution for reformers as they do their important work. Minor changes are unlikely to get us to where we need to be. We need systematic change and an alteration of the fundamental ideals.

