

IS MASS INCARCERATION INEVITABLE?

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ABSTRACT

The claim that American justice system engages in “mass incarceration” is now a cliché, albeit one that seems entirely justified by both the number and rate of people who are behind bars. As a result, a large number of states and the federal government have engaged in wide-ranging reform efforts to shorten sentences, divert people from prison, and in general reduce incarceration numbers to more manageable levels. Although these efforts have made modest gains, there has been little discussion of whether their ultimate goal is feasible—reducing incarceration levels to a point where “mass” incarceration is no longer an apt description.

This article explores the likelihood of a meaningful, sustained reduction in incarceration rates. It begins by asking what we really mean by mass incarceration and finds that while the definition is surprisingly complex, the label ultimately seems justified. Then, using existing and original compilations of data, the article examines some of the less-obvious obstacles to reducing prison populations. In particular, it highlights the difficulty of reducing incarceration rates without addressing the problems created by those convicted of violent crimes, something few reforms have been willing or able to do. It also argues that those who believe prison reform will lead to economic savings—a primary motivation in virtually every state—are misguided, and that illusion of economic savings might ultimately derail the reform efforts.

The article then takes a further step and suggests that efforts to decrease incarceration levels will inevitably be frustrated unless the most influential person in the creation of mass incarceration, the prosecutor, is induced to play a more central role. To date, reform efforts have routinely targeted everyone in the process except prosecutors, and this article offers both suggestions on why this is so and an argument for why prosecutors are an indispensable part of any change. The article concludes with the sobering prediction that, as useful as recent reforms have been, as currently constructed they will ultimately be inadequate to erase the mass incarceration label for years to come.

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INTRODUCTION

The story is now sadly familiar. The United States incarcerates more people than anyone else in the world, both in absolute terms and per capita. The United States has less than 5% of the world's population but 20% of the world's prison inmates.¹ There are 2.1 million people behind bars in this country, which is almost one in every 100 adults.² Many prisons are overcrowded, at times unconstitutionally so.³ Given these facts, is not surprising that the phrase "mass incarceration" is routinely used to describe the American approach to crime and punishment.

The familiar story often continues with a list of culprits that have led us to this place, with the war on drugs, mandatory minimum sentences, and three-strikes laws getting most of the headlines. More nuanced and, at times, more controversial claims identify policies that hinder the reentry of former inmates back into lawful society—stereotypes about people with criminal records, institutional racism, and the failure to treat mental health and substance abuse as medical problems rather than criminal law issues. All of these factors, the story concludes, are part of an unblinking "tough on crime" mindset that has dominated the political landscape for the last half a century.

As sobering as this familiar story is, the more recent news is not all bad. The last decade has heard increasingly loud alarm bells about the state of U.S. prisons and the criminal justice system generally. Many states, as well as the federal government, have undertaken reform efforts in recent years, aiming specifically to reduce their excessive reliance on prisons and generally to make their systems more fair and more economically efficient.⁴ Critically, these efforts appear to be fueled by a genuine change in attitude about the harshness of the criminal law.⁵ For the first

1. See *infra* Section I(C).

2. *Id.*

3. See, e.g., *Brown v. Plata*, 563 U.S. 493 (2011).

4. See *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, PEW CHARITABLE TRUSTS (July 2018), http://www.pewtrusts.org/-/media/assets/2018/07/pspp_reform_matrix.pdf ("Since 2007, 35 states have reformed their sentencing and corrections policies through the Justice Reinvestment Initiative, a public-private partnership that includes the U.S. Justice Department's Bureau of Justice Assistance, The Pew Charitable Trusts . . . and other organizations Some states have engaged in more than one reform effort.")

5. A 2016 Gallup poll showed a steady shift in attitudes about the "toughness" of the criminal justice system. In 2016, only 45% of respondents said that the justice system was "not tough enough," down from 70% in 2000 and 83% in 1992. Justin McCarthy, *Americans' Views Shift on Toughness of Justice System*, GALLUP (Oct. 20, 2016), <http://www.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx>. In 2000, only 3% said that the system was "too tough" and by 2016 the number had risen to 14%. *Id.*; see also Justin McCarthy, *Americans Divided on Priorities for Criminal Justice System*, GALLUP (Oct. 14, 2016), <https://news.gallup.com/poll/196394/americans-divided-priorities-criminal-justice-system.aspx> ("Americans are almost evenly divided on whether strengthening law and order through more police and greater enforcement of the laws (49%) or reducing bias against minorities in the criminal justice system by reforming court and police practices (43%) should be the higher priority for the U.S. criminal justice system"). There has been a "surprisingly bipartisan push" for criminal justice reform:

Coalitions have brought together not just left-leaning reformers who have long opposed the social costs and the disparate racial impacts of our prison system, but also a complicated assortment of conservatives, including both budget hawks, who now prioritize cutting corrections budgets over

time in decades, there is a still-evolving view that longer sentences and more criminalization is not always better and that favoring a more lenient justice system does not automatically lead to the politically-fatal “soft on crime” label.

These changes are having an effect, as both state and federal systems are starting to see a meaningful drop in their prison populations. Between fiscal year 2013 and April 2018, the number of federal prison inmates dropped more than fourteen percent.⁶ State experiences have varied, with many seeing a significant decrease in their prison population, and others seeing little or no decline.⁷ Meanwhile the reform efforts continue, with new states taking up the cause and existing states rolling out their reform plans. Perhaps the familiar story will have a happy ending after all.

Perhaps. Despite the progress, a number of structural barriers remain that can frustrate efforts to reduce the prison population in a meaningful and sustained way. Some of these barriers are obvious, some are subtle, and nearly all are dauntingly difficult to overcome. Section I will briefly describe the scope of the problem. Section II will discuss several of these obstacles that will, if not addressed, eventually blunt the efforts to move the country away from mass incarceration. Section III will discuss one of the important, but to date under-developed paths to prison reduction. The article ends with the discouraging conclusion that even if mass incarceration is not inevitable, and even though much can be done to reduce the current reliance on prison as the default method of punishment, extremely high levels of imprisonment are likely to continue for many years to come.

I. DEFINING THE PROBLEM

A. *How Do We Know that We Have Mass Incarceration?*

If news accounts are our guide, there is no doubt that the United States is now in a period of “mass” incarceration. Hundreds of articles, news stories, blog posts, and books use the label, and it is hard to find anyone who takes a contrary view.

The problem is that “mass” incarceration does not have a fixed meaning. It at least means that there are “a whole lot,” of prisoners, and almost certainly “too many.” But beyond that there is little agreement, because there is no consensus on

their traditional tough-on-crime perspectives, and conservatives who are more ideologically committed to reform, such as redemption-focused evangelicals.

JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION, AND HOW TO ACHIEVE REAL REFORM 4 (2017) (footnote omitted).

6. In fiscal year 2013, the number of federal prison inmates was 219,298. By August 9, 2018, the number was 183,488, a decrease of 16%. FED. BUREAU OF PRISONS, STATISTICS, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Feb. 7, 2019).

7. See *infra* Table 2; see also *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, *supra* note 4 (“In the years since the wave of reforms began, the total state imprisonment rate has dropped by 11 percent.”); JEREMY TRAVIS ET AL., NAT’L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (2014), <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes> (“Between 2006 and 2011, more than half the states reduced their prison populations, and in 10 states the number of people incarcerated fell by 10 percent or more.”).

the “right” level of incarceration in a society. All sensible observers agree that *some* people should be behind bars, either because they are dangerous when they are not locked up, because they have done something terrible that deserves incarceration, or both. On the other hand, most agree that having too large a slice of the population in prison is unduly harsh and prohibitively expensive in both human and economic terms. But without a clear view of where those lines should be drawn, we are left in a world where, as John Pfaff nicely put it, “[t]he criticisms over ‘mass incarceration’ essentially boil down to claims that we have too many people in prison, although we don’t really know how many too many; and that we should reduce that number, although we don’t really know what the new goal should be.”⁸

There is a second problem with the label. “Mass incarceration” denotes that the numbers are very large, but the phrase has a sinister connotation as well. At a minimum, there is a recognition that high levels of imprisonment disproportionately affect the poor and minorities;⁹ in its more bare-knuckled form, the term describes criminal justice policies that are created and enforced *because* they have this effect—imprisonment as a form of social control of disfavored groups.¹⁰ Blending race and class into the meaning of mass incarceration moves the discussion well beyond the numbers, and puts pressure on reform efforts not only to reduce the prison levels but also to reduce the racial imbalance.¹¹

8. PFAFF, *supra* note 5, at 8.

9. See DAVID GARLAND, *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1–3 (2001) (defining mass incarceration as historically extreme rates of imprisonment and the concentration of incarceration among the most marginalized); see also Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (“The gap between black and white incarceration rates . . . has deepened along with rising inmate numbers. . . . [T]he transformation of prison policy at the turn of the twenty-first century is most accurately characterized as the mass incarceration of African Americans.”); STEVEN RAPHAEL & MICHAEL STOLL, *THE HAMILTON PROJECT, A NEW APPROACH TO REDUCING INCARCERATION WHILE MAINTAINING LAW RATES OF CRIME* 8 (May 2014), <https://www.brookings.edu/research/a-new-approach-to-reducing-incarceration-while-maintaining-low-rates-of-crime> (“Perhaps the starkest differences are the very large racial and ethnic disparities in incarceration rates among the least-educated males. Roughly 26 percent of non-Hispanic black men between the ages of eighteen and thirty with less than a high school diploma are in prison or jail on any given day, with the majority of these being men in prison. Among black male high school dropouts that are thirty-one to forty years old, fully thirty-four percent are incarcerated on any given day. The comparable two figures for white men in these age/education categories are 5.5 and 6.9 percent, respectively[.]”).

10. See generally HEATHER SCHOENFELD, *BUILDING THE PRISON STATE* (2018); KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION AND THE RISE OF HUMAN CAGING IN LOS ANGELES* (2017); MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010); see also Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 417 (2018) (“Neglected in our discussion of mass incarceration is our largely-forgotten history of the long-term, wholesale institutionalization of the disabled. This form of mass detention, motivated by a continuing application of eugenics and persistent class-based discrimination, is an important part of our history of imprisonment, one that has shaped key contours of our current supersized correctional system.”).

11. See generally Bernard E. Harcourt, *Reducing Mass Incarceration: Lesson from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 57 (2011) (“It would be absolutely crucial, in any effort to reduce mass incarceration, to avoid both the further racialization of the prison population and the

These concentric definitions of mass incarceration bring us to an important fork in the road. If our goal is simply to reduce the total number behind bars, we can surely make progress—indeed, as noted, this is already happening. We will still have the difficulty knowing how much we can or should reduce the numbers and, as explained in Section II, there are many reasons to doubt that we will be able to reach a numerical goal that will allow us to shed the mass incarceration label. But with a sustained and organized effort, we can consistently have fewer inmates than we have now.

Addressing the race and class aspects of mass incarceration is both enormously important and enormously complicated. At the threshold, it has probably always been true that racial minorities and the poor are over-represented in prison.¹² So if an essential feature of “mass incarceration” is the disparate entanglement of these groups and criminal justice, things have gotten worse in degree when compared to fifty or eighty years ago, but perhaps are not terribly different in kind.¹³

More importantly, in the public arenas where reforms are made, it remains extraordinarily difficult to discuss, let alone answer, questions on how race, poverty, crime, and punishment intersect. Questions such as: What influence does race play in legislative choices about how harshly to punish certain crimes? To what extent is the racial imbalance the result of different levels of criminality versus different levels of enforcement? Is race a meaningful variable, or is poverty doing the work? What role does implicit or explicit bias play in arrests, plea deals, and sentencing? These questions are not only incendiary but wickedly complex. As difficult as it is to find agreement on the strictly numerical question (how many inmates is too many?), it would be virtually impossible to reach political consensus on how to untangle the web of relationships between crime, race, and class. These questions have the potential to paralyze reform efforts,¹⁴ even if we could all agree that the

transinstitutionalization of prisoners into other equally problematic institutions, such as homeless shelters or . . . large mental [health] institutions.”)

12. From at least 1926 through the present, the percentage of African Americans in the prison population was double, and at times triple or even quadruple, the percentage of African Americans in the U.S. population. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RACE OF PRISONERS ADMITTED TO STATE AND FEDERAL INSTITUTIONS, 1926–86 (1991), <https://www.bjs.gov/content/pub/pdf/rpasfi2686.pdf> [hereinafter *Race of Prisoners*]; U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS SERIES, <https://www.bjs.gov/index.cfm?ty=pbse&sid=40> [hereinafter *Prisoners Series*] (compilation of data on file with author).

13. This is at least true with respect to African Americans. In 1940, Blacks made up almost 10% of the U.S. population and 28% of the prison admissions. RACE OF PRISONERS, *supra* note 12, at 5. By 1980, Blacks were about 12% of the U.S. population but 41% of the prisoner admissions. *Id.* By the 1990s, the percentage of prisoners who were African Americans remained just under 50% for several years before beginning a gradual decline to 33% percent in 2016. PRISONERS SERIES, *supra* note 12. African Americans currently make up about 13% of the U.S. population. U.S. CENSUS BUREAU, QUICKFACTS (July 1, 2018), <https://www.census.gov/quickfacts/fact/table/US/PST045218>.

14. *But see* Roberts, *supra* note 9, at 1279 (“Regardless of its cause, however, mass imprisonment inflicts devastating collateral damage on black communities. States are not off the hook because this damage may make mass imprisonment immoral regardless of the reasons for racially disparate rates of incarceration.”).

racial and economic profile of inmates is deeply troubling and that the need for reform is long overdue.

State reform efforts have not been blind to the problems of race and class, but have largely taken a “rising tide lifts all boats” approach to addressing them. The thinking is that reducing the total number of inmates will inevitably reduce the total number of poor and minority-race citizens behind bars (although the impact on their ratio is less clear¹⁵). More helpfully, when states target certain offenses that are claimed to have an unusually large impact on certain groups—reducing the punishment for drug crimes, for example¹⁶—and by seeking to make the transition from prison back to society less perilous,¹⁷ perhaps the disproportionate makeup of the inmate population will be reduced even more.

The racial impact of reform efforts is worthy of much more study. But for the moment, the focus will remain on the somewhat easier questions of how we know that we have too many people behind bars and what we can do about it. Before turning to the numbers, however, it is worth asking a separate, more fundamental, question.

B. Why Should We Care About Mass Incarceration?

People are in prison for a reason—they presumptively violated laws duly enacted by the state or federal government, laws that overwhelmingly enjoy broad popular support. Experience tells us that people in prison very often committed other crimes before they were caught, and we know that those who are convicted of offenses are disproportionately likely to commit crimes in the future.¹⁸ Given this, locking up those who have been properly convicted, and keeping them locked up, sounds prudent rather than vindictive. We are, of course, distressed at the amount of criminal behavior that made the incarceration necessary, and sensible people only want to punish when accurate and fair procedures are followed. But as long as there is a lot of crime, having a lot of prisoners may seem not only inevitable, but also necessary and appropriate.

There are a variety of reasons offered by reformers for why we should care specifically about incarceration *even if* everything in the prior paragraph is true. First,

15. See *infra* Section II(B).

16. See generally JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 17 (2017) (“Blacks are much more likely than whites to be arrested, convicted, and incarcerated for drug offenses, even though blacks are no more likely than whites to use drugs.”); Roberts, *supra* note 9, at 1275; TRAVIS ET AL., *supra* note 7, at 50 (“[D]rug arrest rates, at least since the early 1970s, have always been higher for African Americans than for whites.”).

17. See, e.g., Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1321 (2017) (“By one count, from 2009 to 2014, over forty state legislatures passed 155 statutes to remove or reduce collateral consequences of a criminal record”) (citing RAM SUBRAMANIAN, REBECCA MORENO & SOPHIA GEBRESELASSIE, RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CONVICTION, 2009–2014 4, 11, 30(2014)).

18. See *infra* notes 20–21 & accompanying text.

incarceration can be a harsh, degrading, and at times violent¹⁹ experience, and the less we have of it the better off we are as a society. Keeping (mostly) young (mostly) men locked up in small cages²⁰ for extended periods is not something most of us can imagine, let alone could tolerate for very long; to do so for years at a time is cruel, although not unusual. Nonetheless, standing alone this argument carries little weight, primarily because there are few realistic alternatives. Prison is harsh, but we have taken most of the other punishment options (shaming, banishment, corporal) off the table, leaving the remaining choices as either being inapplicable in many cases (economic sanctions, restorative measures), too expensive (intensive rehabilitation), or not sufficiently harsh to satisfy retributive or deterrence goals (community supervision, home confinement, community service). More pointedly, many believe that the harshness of incarceration is a feature rather than a flaw—the worse the prison conditions, the greater the incentive for people to avoid the underlying behavior.

Second, prisons are expensive. The fiscal year (FY) 2016 budget for the federal prison system was just below \$7.5 billion,²¹ and for the Texas Department of Criminal Justice, the FY 2017 budget for incarcerating felons was more than \$2.7 billion.²² More incarceration means more money, and the desire to cut government costs is perhaps the most widely-shared motivation for reducing prison sizes. But as discussed in Section II(C) below, this justification is bound to disappoint, as the hoped-for savings are likely to be much smaller than believed.

The more persuasive justifications for reducing the inmate population are nuanced. The first is that prison sentences, especially long ones, can be counterproductive. There are many reasons to doubt the rehabilitative powers of prison—half of federal inmates will be rearrested after their release,²³ as will more than 80% of those released from state prison.²⁴ While this might sound like a reason to lengthen

19. See, e.g., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PREA DATA COLLECTION ACTIVITIES, 2017 2 (June 2017), <https://www.bjs.gov/content/pub/pdf/pdca17.pdf> (stating that in the 2011–2012 reporting period, “4.0% of state and federal prisoners reported having experienced some type of sexual victimization perpetrated by another inmate (2.0%) or staff (2.4%). In comparison, 3.2% of jail inmates reported some type of sexual victimization that was perpetrated by another inmate (1.6%) or staff (1.8%)”).

20. The average living space per inmate in Illinois prisons, for example, is thirty-eight square feet. See ILL. DEP'T OF CORRS., QUARTERLY REPORT Table 6 (April 1, 2018), https://www2.illinois.gov/idoc/reportsandstatistics/Documents/IDOC_Quarterly%20Report_April_%202018.pdf.

21. See BUREAU OF PRISONS, FEDERAL PRISON SYSTEM, FY 2017 BUDGET REQUEST AT A GLANCE 1 (2017), <https://www.justice.gov/jmd/file/822106/download> (noting that FY 2016 budget was \$7,478.5 million).

22. See TEX. DEP'T OF CRIMINAL JUSTICE, FISCAL YEARS 2017–2019 BUDGET 1 (Aug. 18, 2016), https://www.tdcj.state.tx.us/documents/bfd/Operating_Budget_FY2017_LAR_Summary_FY2018-19.pdf (noting FY 2017 budgeted goal of \$2,767,631,450).

23. See U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5 (Mar. 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf. Almost one-third (31.7%) of the released inmates were convicted of a new crime, and 25% were re-incarcerated over the eight-year period of the study. *Id.*

24. See 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 (May 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yufup0514.pdf>.

sentences rather than reduce them,²⁵ we now know that time in prison might be exacerbating the crime problem rather than easing it. Research supports the common-sense notion that spending years in very close quarters with other convicted felons has a criminogenic effect, particularly when more dangerous inmates are mixed in with less dangerous ones.²⁶ Longer sentences also increase the difficulties of reentry after release, as family and community ties, connections to the job market, and the development of job skills are increasingly frayed by time spent behind bars.

This point in turn leads to the larger argument for reducing the prison population. The real problem is not simply the number of inmates, but rather the likelihood that we are punishing people *unnecessarily*—we are sending some people to prison who do not need to be there, we are keeping some people incarcerated longer than is necessary to advance the goals of the criminal law, and as a result, we are imposing unjustified consequences on inmates and unwarranted financial, safety, and social costs on the rest of us. Many of the drivers of high incarceration rates—mandatory prison terms, truth-in-sentencing laws, reduced judicial sentencing discretion—are precisely those that fail to distinguish those who genuinely need to be behind bars and those who do not.

This, then, is the task of sentencing reform: focusing on principles of parsimony²⁷ and finding the areas of the system where greater distinctions can be made among inmates who can safely be given reduced sentences, be released earlier because they present an acceptably low threat to public safety, or be diverted from the criminal system entirely. Of course, identifying those for whom a lengthy sentence is “unnecessary” is no easy task. Our ability to predict who will commit crimes, particularly violent crimes, is better than it used to be but is still far short of the ideal. Nonetheless, the debate between justice reformers and skeptics seems to have moved to a more productive place when its focus is on reducing the number of those who are now being incarcerated without affecting public safety, however we define these terms.

Critics will note that one important assumption is ignored when the debate is framed this way. Protecting public safety and predicting future criminality are important, but they are not the only goals of the justice system. One of the critical weaknesses is our analysis of crime is the lack of agreement on why we punish, either in general or in a particular case. Focusing exclusively on deterring future crime and incapacitating those who are not deterred misses the vital role that retribution plays in our sentencing policy and decisions. No matter how confident the

25. See *infra* Section I(C)(3).

26. See Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115 (2009); see also Michael Tonry, *Less Imprisonment is No Doubt a Good Thing, More Policing is Not*, 10 CRIMINOLOGY & PUB. POL. 137, 137–38 (2011) (explaining that “[t]he effects of imprisonment on individual deterrence are most likely perverse; people sent to prison tend to come out worse and more likely to reoffend than if they had received a lesser punishment,” citing “tentative but not yet conclusive” evidence that “imprisonment is criminogenic and increases released inmates’ rates of reoffending”).

27. See 18 U.S.C. § 3553(a) (2012) (“The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of criminal punishment.]”).

prediction that an inmate can be returned safely to society, release will not (and should not) happen if the inmate has not been adequately punished for his behavior. (Think, for example, of the child-murderer who for health reasons is no longer at risk for reoffending.²⁸) How much punishment an inmate deserves can be an emotional, fact-driven question, and this may explain why substantive legal changes in the reform movement have focused mainly on non-violent drug and property offenses.²⁹

Even with these constraints, however, there remains a substantial, near-nationwide push to identify those who can be released or diverted from prison without incurring the costs of incarceration. The next section recounts the case for why the push is necessary.

C. The Numbers

There are three claims that are regularly offered in support of the mass incarceration label: (1) inmate numbers are too large when compared to their size in recent U.S. history; (2) U.S. prisons populations are too large when compared to the rest of the world; (3) U.S. prisons populations are too large when compared to the U.S. crime rate. The first two claims are mostly persuasive, while the third is more problematic.

1. The Relative Size of U.S. Prisons

For more than thirty-five years, the growth in the U.S. inmate population was dramatic. Between 1972 and 2009, the U.S. prison population grew from about 200,000 to about 1.6 million,³⁰ an eight-fold increase in thirty-seven years. Added to the 2009 prison number was another three-quarters of a million inmates held in local jails,³¹ and the total number of incarcerated people reached about 2.4 million. Even after controlling for population growth,³² the *rate* of increase—the number of individuals behind bars per 100,000 people in the population—is astonishing.

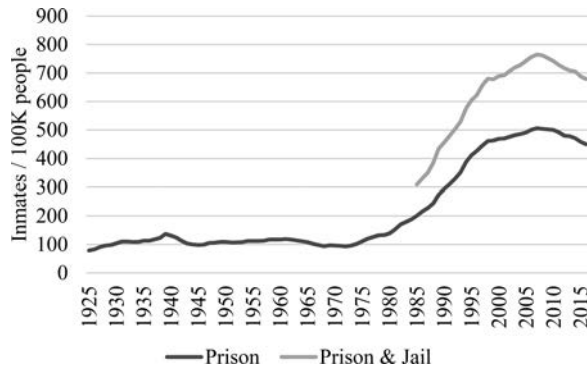
28. John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 FED. SENT. REP. 157, 158 (2014) (“[F]orward-looking and utilitarian risk or needs assessment in criminal sanctioning currently takes place—and in our view *should* take place—within bounds set by backward-looking and moral concerns about culpability and desert.”).

29. See *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, *supra* note 4, at 2 (listing types of state reforms); see also *infra* Section II(B).

30. At the end of 1972, the prison population was 196,092. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS 1925–81 2, Table 1 (1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf>. By 2009 the number was 1,613,740, an increase of more than 800%. HEATHER C. WEST ET AL., U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 1 (Dec. 2010), <https://www.bjs.gov/content/pub/pdf/p09.pdf>.

31. See *Table 6.14.2012 – Number and rate (per 100,000 U.S. residents) of jail inmates, average daily population, rated capacity, and percent of capacity occupied*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, <https://www.albany.edu/sourcebook/pdf/t6142012.pdf> (last visited Feb. 15, 2019).

32. In 1972, the residential U.S. population was about 209 million. By 2009 it was 307 million, a 47% increase. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1973 xiii (1973) <https://www.census.gov/> (last visited Feb. 15, 2019).

Figure 1. U.S. Incarceration Rates (1925-2016)³³

Since 2009 the incarceration rate has declined, as the right side of the chart shows, although it remains at historically high levels. Between 2009 and 2016, the number of people behind bars dropped almost six percent, leaving about 1.5 million in state and federal prison, and another 740,000 in local jails.³⁴ This leaves an incarceration rate of around 679 inmates per 100,000 people, which is still near the high end of the scale.

As the left side of the chart shows, these high rates have no precedent in modern times. For the fifty years prior to 1975, the prison population was remarkably steady at about 100 inmates per 100,000 residents. But for the next thirty-five years, it rose with astonishing speed, making it hard today to imagine the world that existed less than fifty years ago.³⁵

33. The compiled data and calculations underlying Figure 1 are on file with the author.

34. DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 2, Table 1 (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>. In a 2016 report, the Prison Policy Initiative described the U.S. numbers this way: "The American criminal justice system holds more than 2.3 million people in 1,719 state prisons, 102 federal prisons, 942 juvenile correctional facilities, 3,283 local jails, and 79 Indian Country jails as well as in military prisons, immigration detention facilities, civil commitment centers, and prisons in the U.S. territories." Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POL'Y INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html>; see also *Highest to Lowest – Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total/trackback?field_region_taxonomy_tid=All&=Apply (last visited Feb. 15, 2019) [hereinafter WORLD PRISON BRIEF].

35. For a more detailed discussion of the rise in U.S. incarceration rates, see TRAVIS ET AL., *supra* note 7, at 33–42.

Even these numbers, however, should not be taken at face value. As Bernard Harcourt³⁶ and others have persuasively shown, there were other trends in the second half of the twentieth century that significantly affect how we should think about both the relative and absolute number of prison inmates. In particular, in the middle part of the century (when the prison rate was low), there were a large number of people who were involuntarily committed to psychiatric institutions—550,000 in 1950, or roughly one-quarter of today's prison and jail population.³⁷ By the 1990s, however, when prison populations were soaring, the deinstitutionalization of those with mental illness had reduced the numbers of involuntary psychiatric patients to a mere 30,000.³⁸

As a result, if we shift our focus from simple incarceration to institutionalization, the huge spike in Figure 1, above, looks different. As Harcourt makes the point:

Aggregating mental hospitalization and imprisonment rates into a combined institutionalization rate significantly changes the trend line for confinement over the twentieth century. We are used to thinking of confinement through the lens of incarceration only, and to referring to the period prior to the mid-1970s as one of “relative stability” followed by an exponential rise As a literal matter, this is of course right But the truth is, what we are trying to capture when we use the variable of imprisonment is something about confinement in an institutional setting—confinement that renders the population in question incapacitated or unable to work, pursue educational opportunities, and so forth. And from this larger perspective, the period before 1970—in fact, the entire twentieth century—reflects remarkable instability.³⁹

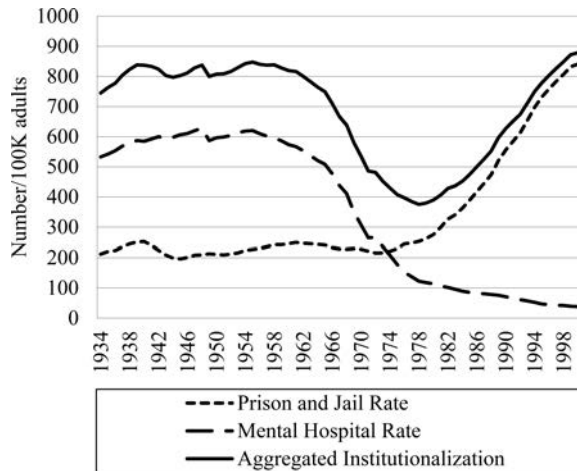
If we consider both incarceration and mental health institutionalization together, we see that the run-up in prison rates is largely offset by the sharp decrease in mental health confinement. The high *prison* rate in 2000 is four-to-five times what it was before 1960, but the *institutional confinement* rate is about the same as it was through the 1930s, 1940s, and 1950s. Thus:

36. See Harcourt, *supra* note 11, at 58, Figure 1; see also Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1755 (2006) (suggesting that statistics indicating “relative stability” should not be taken at face value).

37. See Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 32–33 (Oct. 2010).

38. *Id.*

39. Harcourt, *From the Asylum to the Prison*, *supra* note 36, at 1755.

Figure 2. U.S. Institutionalization Rates, (1934-2000)⁴⁰

The fact that many patients who left psychiatric facilities apparently migrated to jails and prisons should hardly surprise us, as the relationship between mental illness and involvement in the criminal justice system is well-known.⁴¹ States have responded accordingly, with nearly two dozen proposing reforms that address the overlap between crime and mental health.⁴²

Whether and how this information should change our thinking about mass imprisonment is an intriguing question. But ultimately, even if the growth in prison and jail inmates is not as dramatic or as straightforward as their numbers suggest, the core point remains, and is perhaps strengthened. Prison and jails are designed to punish and detain, and their rapid, unprecedented growth shown in Figure 1 is cause for concern whatever the source. More pointedly, if addressing the prison size requires targeting those who are behind bars unnecessarily, then inmates with (potentially) treatable problems might be an excellent place to start.

In short, the rapid growth in incarceration in prisons and jails is at least some evidence of an over-reliance on prison and jails, but it is still not conclusive. Another possibility is that in prior years we just *under*-incarcerated those convicted and accused of crimes, and that our prison rates were abnormally low before, rather than abnormally high now. But when we compare the U.S. rate to that of the rest of the world, that possibility rings hollow.

40. *Id.* My thanks to Professor Harcourt for his permission to reprint this chart.

41. See Testa & West, *supra* note 37, at 35 (“It is currently estimated that, among our country’s prison inmates, there is a 10- to 25- percent prevalence of mental illness.”); see also PA. DEP’T OF CORR., INMATE STATISTICS 2017 (Dec. 31, 2017), <http://www.cor.pa.gov/About%20Us/Statistics/Pages/Reports.aspx> (reporting 32% of inmates are on the “mental health roster” and 9% are considered “[s]eriously [m]entally [i]ll”).

42. See 35 *States Reform Criminal Justice Policies Through Justice Reinvestment*, *supra* note 4, at 2 (noting that twenty-three states have adopted or recommended policy reforms to “improve behavioral health interventions”).

2. Compared to Other Countries

As has been frequently noted, the United States not only has the highest *number* of inmates in the world but also incarcerates people at the highest *rate*. The former fact is only slightly surprising, as there are only two other countries (China and India) with a larger population than the United States.⁴³ Still, the numerical gap is impressive: the United States, with about 2.1 million behind bars,⁴⁴ has almost 500,000 more inmates than China, the country with the second highest number of prisoners.⁴⁵ The gap between the United States and India is even more startling. Although India has a general population almost four times that of the United States, its prison population is only about 420,000, about one fifth of the number of U.S. inmates.⁴⁶

The other comparative data—showing that the United States incarcerates at a higher *rate* per capita than virtually any other country—is breathtaking. A list of the top ten countries by incarceration rate reveals the following:

Table 1: Countries with the Highest Rates of Incarceration⁴⁷

Rank	Country	Rate (inmates/ 100k people)
1	United States	655
2	El Salvador	610
3	Turkmenistan	583
4	Virgin Islands (U.S.)	542
5	Maldives	514
6	Cuba	510
7	Thailand	497
8	Northern Mariana Islands (U.S.)	482
9	Virgin Islands (U.K.)	470
10	Bahamas	438

43. As of early 2019, China has more than 1.38 billion people, and India has more than 1.3 billion. U.S. CENSUS BUREAU, U.S. AND WORLD POPULATION CLOCK, <https://www.census.gov/popclock/> (last visited Feb. 15, 2019). The U.S. population is roughly 331 million. *Id.*

44. Note that the incarceration numbers and rates for the United States in this section differ slightly from those in other parts of the article. The U.S. numbers in this section are taken from the WORLD PRISON BRIEF, *supra* note 34, and are used to maintain consistency with the numbers set forth by the same source for other countries.

45. See WORLD PRISON BRIEF, *supra* note 34 (listing the United States with 2,121,600 inmates, and China with 1,649,804).

46. *Id.* (listing India with 419,623 inmates).

47. See *id.* Data on world incarceration rates are gathered by the Institute for Criminal Policy Research at Birkbeck, University of London.

Note that all other countries with a top-10 incarceration rate have much smaller civilian populations than the United States. Thailand is the twentieth largest country in the world (less than a quarter of the size of the United States), Cuba is the eighty-second, and the rest on the list are not in the top 100 by population.⁴⁸

Comparing the U.S. rate to a more comparable peer group—other large, economically complex countries—is reserved for Section III(A) below. For the moment, it is enough to note that however mass-incarceration is defined, there is no doubt that the United States places an extremely heavy reliance on prisons and jails, one that is unique in its own history and distinctive by its magnitude on the world stage.

3. *Compared to the Crime Rate*

As impressive as these relative and comparative figures are, they are not entirely satisfying. Even if the number of U.S. inmates is the highest on the planet, we might view “mass incarceration” differently if it turned out that there were significant offsetting benefits associated with unusually large prisons.

Skeptics of reform correctly point out that that incarceration numbers do not exist in a vacuum; they are the product of criminal arrests, convictions, and parole or probation violations. Naturally the more crime there is the more inmates there will be, and thus, the focus on “prison” or “sentencing” reform may be misdirected. Prison rates grew so fast for so many years, the argument goes, because states were responding to a rapid increase in crime. This suggests that the problem is not mass incarceration but “mass criminality,” and reform efforts should be re-focused accordingly. Otherwise we run the risk of reducing prison size for its own sake, without addressing the underlying crime problem.

Here, the advocates for sentencing reform believe, is the trump card. Crime did increase a great deal in the 1960s through the 1980s,⁴⁹ but then it reversed course. Starting in the mid-1990s and ever since, both the violent crime and the property crime rates have dropped dramatically through the early decades of this century, back to levels last seen in the 1970s.⁵⁰ Logic suggests that significantly fewer crimes should lead to fewer arrests and fewer convictions, which should in turn lead to significantly fewer inmates with the passage of time.⁵¹ The fact that there

48. See *Total Population by Country 2019*, WORLD POPULATION REVIEW, <http://worldpopulationreview.com/countries/> (last visited Feb. 15, 2019).

49. See TRAVIS ET AL., *supra* note 7, at 46, 47 (“The country experienced a large increase in crime from the early 1960s until the 1980s. . . . Incarceration rates showed their strongest period of growth in the 1980s, as violent crime fell through the first half of the decade and then increased in the second.”).

50. *Id.* Violent crime dropped 18% between 2007 and 2016, and about 37% since 1997. The FBI’s property crime rate has dropped 43% since 1997 and 25% since 2007. See *Crime in the United States 2016, Table 1*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1> (last visited Feb. 15, 2019) (calculations on file with the author).

51. There would of course be a time-lag between a decrease in crime and a decrease in prisoners, as those already convicted would remain behind bars for the term of their sentence even as the crime rate dropped. But with 67% of convicted federal defendants being sentenced to 5 years or less in 2017, see U.S. SENTENCING COMM’N, INTERACTIVE

was a sustained drop in crime during the same period where there was a massive increase in the number of inmates—most of the 1990s and the first decade of the 2000s⁵²—is offered as proof that we are simply becoming unnecessarily punitive rather than responding to more crime. Otherwise, reformers ask, if the crime was going down, why didn't the prison population go down as well?

For skeptics, this sounds like a trick question. Of *course*, the crime rate is going down, says the counter-argument—it is dropping precisely *because* the prison population is increasing. Experience and data tell us that a great deal of crime is committed by recidivists—those who have been convicted before, but failed to learn the lesson that the prior incarceration was supposed to teach.⁵³ If more offenders were kept behind bars the first (or second, or third) time they were imprisoned, they would not be able to commit new crimes, or at least would have less time in their lives to commit new offenses after release.⁵⁴ In short, the skeptics argue, keeping future recidivists in prison longer means less crime, which helps explain the combination of lower crime rates and higher incarceration rates. As a result, even if we have mass incarceration as a numerical matter, increased public safety through a decrease in crime might convince us that large prison populations are desirable, despite their costs.⁵⁵

There is intuitive appeal and some truth in both of the competing views on the relationship between crime rates and prison rates. Fortunately, there has been some sophisticated social science research in recent years that has studied this relationship. Unfortunately, the answers provided by this research, while useful, do not

Sourcebook of Federal Sentencing Statistics, Sentence Length (2017), https://isb.ussc.gov/api/repos/USSC:figure_xx.xcdf/generatedContent?&table_num=Figure_AA, and with state inmates also receiving relatively short sentences, *see, e.g.*, ILL. DEP'T OF CORR., FISCAL YEAR 2017 ANNUAL REPORT 85 (2017), <https://www2.illinois.gov/idoc/reportsandstatistics/Documents/FY2017%20IDOC%20Annual%20Report%20FINAL.pdf> (stating that the average prison stay among 27,159 released inmates was 1.5 years); FLA. DEP'T OF CORR., ANNUAL REPORT 2017–2018 18 (2018), http://www.dc.state.fl.us/pub/annual/1718/FDC_AR2017-18.pdf (showing that 84% of the 30,000 released inmates in FY 2018 had an average sentence of 5 years or less), the delay would not be significant.

52. *See* TRAVIS ET AL., *supra* note 7, at 47 (“Incarceration rates continued to climb through the 1990s as the violent crime rate began to fall. Finally, in the 2000s, crime rates have remained stable at a low level, while the incarceration rate peaked in 2007, and the incarcerated population peaked in 2010. Thus, the very high rates of incarceration that emerged over the past decades cannot simply be ascribed to a higher level of crime today compared with the early 1970s, when the prison boom began.”).

53. In 2017, for example, over 60% of the federal defendants sentenced to prison had a record that, under the Sentencing Guidelines, put them in Criminal History Category II or higher. *See* U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-33, Table 14 (2017) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table14.pdf>. A person cannot be in Category II or higher without having been previously convicted of a crime. *Id.*

54. *Cf.* RAPHAEL & STOLL, *supra* note 9, at 13 (“Existing empirical research on the crime-incarceration relationship suggests that most of the impact of incarceration on crime operates through incapacitation.”). The authors of the report note, however, that “this empirical research strongly suggests that this incapacitation effect—that is, the reduction in crime resulting from physically removing an offender from society—declines quite rapidly as the incarceration rate increases.” *Id.*

55. *See generally* TRAVIS ET AL., *supra* note 7, at 130 (“In recent years, policy initiatives to reduce state prison populations often have met objections that public safety would be reduced.”).

support a single conclusion. As the National Resource Council correctly points out, “[t]he link between crime and the growth of the penal population is neither immediate nor direct. Incarceration trends do not simply track trends in crime, although trends in crime have clearly been an important part of the context in which incarceration rates have grown.”⁵⁶

Advocates for prison reform believe that the research convincingly demonstrates that higher levels of incarceration do not, in fact, lead to greater crime reduction. One frequently-cited study conducted by the Brennan Center for Justice concluded:

Since 2000, the effect of increasing incarceration on the crime rate has been essentially zero. Increased incarceration accounted for approximately 6 percent of the reduction in property crime in the 1990s (this could vary statistically from 0 to 12 percent), and accounted for *less than 1 percent* of the decline in property crime this century. Increased incarceration has had no effect on the drop in violent crime in the past 24 years.⁵⁷

The same study found “that incarceration in the U.S. has reached a level where it no longer provides a meaningful crime reduction benefit.”⁵⁸

Similarly, the National Resource Council’s (NRC) comprehensive study on the growth of incarceration rates concluded that “[t]he increase in incarceration may have caused a decrease in crime, but the magnitude of the reduction is highly uncertain and the results of most studies suggest it was unlikely to have been large.”⁵⁹ The NRC report also concluded:

The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.⁶⁰

Even John Pfaff, who is skeptical of much of the conventional wisdom about incarceration and reform, agrees that “[r]ising prison populations continue to contribute to falling crime, but their impact has declined greatly, and it is becoming hard, if not impossible, to justify still larger prison populations on crime-fighting grounds.”⁶¹

It is important to pick through these conclusions carefully. Notice that no one is arguing that increasing the prison population did not lead to *some* reduction in

56. *Id.* at 44.

57. See OLIVER ROEDER ET AL., BRENNAN CENTER FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 15 (2015), http://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf.

58. *Id.* at 7.

59. TRAVIS ET AL., *supra* note 7, at 4.

60. *Id.* at 5; see also *id.* at 131 (“[O]ne of our most important conclusions is that the incremental deterrent effect of increases in length prison sentences is modest at best.”).

61. PFAFF, *supra* note 5, at 10.

crime.⁶² Instead, the claim is (at least) that we have reached the point of sharply diminishing returns, where increasing the number of people behind bars will not lead to further reductions in the crime rate. If we were to continue the course of the last fifty years, this argument goes, we would simply be inflicting additional harms on inmates and society without achieving public safety gains in return.⁶³

One problem with this argument is that practically no one is making it—or at least few were making it until recently.⁶⁴ With limited exceptions, states are not advocating making sentences longer or increasing the number of inmates even further as a way to combat crime.⁶⁵ The question the states are asking as they struggle

62. See, e.g., PEW CENTER ON THE STATES, *TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS* 1 (2012), <http://www.pewtrusts.org/en/research-and-analysis/reports/2012/06/06/time-served-the-high-cost-low-return-of-longer-prison-terms> (“[P]rison expansion has delivered some public safety payoff. Serious crime has been declining for the past two decades, and imprisonment deserves some of the credit. Experts differ on precise figures, but they generally conclude that the increased use of incarceration accounted for one-quarter to one-third of the crime drop in the 1990s.”).

63. See ROEDER ET AL., *supra* note 57, at 7 (“[T]he current exorbitant level of incarceration has reached a point where diminishing returns have rendered the crime reduction effect of incarceration so small, it has become nil.”); *id.* at 22 (“Put simply, this report finds that, at current levels, incarceration is no longer as effective a crime-reducing tool as it once was. More incarceration does not always lead to less crime.”); PEW CENTER ON THE STATES, *supra* note 62, at 1 (“[C]riminologists and policy makers increasingly agree that we have reached a ‘tipping point’ with incarceration, where additional imprisonment will have little if any effect on crime.”); RAPHAEL & STOLL, *supra* note 9, at 9 (“[W]hen the incarceration rate is high, the marginal crime-reduction gains from further increases tend to be lower, because the offender on the margin between incarceration and an alternative sanction tends to be less serious. In other words, the crime-fighting benefits of incarceration diminish with the scale of the prison population.”).

64. At the federal level there has been a still-evolving change in approach to crime issues after the election of President Donald Trump. Among other changes, the Justice Department has indicated an intent to return to some of the earlier approaches to law enforcement, particularly with respect to drug crimes. See, e.g., Press Release, U.S. Dep’t of Justice, Justice Department Issues Memo on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> (“The Department of Justice today issued a memo on federal marijuana enforcement policy announcing a return to the rule of law and the rescission of previous guidance documents. . . . ‘It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission,’ said Attorney General Jeff Sessions.”); Karoun Demirjian, *Grassley ‘Incensed’ by Attorney General’s Attempt to Stymie Sentencing Reform*, WASH. POST (Feb. 14, 2018), https://www.washingtonpost.com/powerpost/grassley-incensed-by-attorney-generals-attempt-to-stymie-sentencing-reform/2018/02/14/96217cc2-11e5-11e8-9065-e55346f6de81_story.html?utm_term=.3c91a2b724c8 (noting Attorney General Session’s resistance to a Congressional bill that would reduce mandatory minimum sentences for non-violent drug offenders, eliminate some three-strikes provisions, and reduce sentences for low-level crimes). *But see* Seung Min Kim, *Trump to Huddle with Governors, Other Officials on Prison Overhaul*, WASH. POST (Aug. 9, 2018), https://www.washingtonpost.com/politics/trump-to-huddle-with-governors-other-officials-on-prison-overhaul/2018/08/09/f66919b8-9be8-11e8-b60b-1c897f17e185_story.html?utm_term=.55c33da14f4b (“President Trump is publicly pressing for prison reform while his administration privately works on an agreement with Congress that would overhaul a bigger swath of the criminal justice system but may rile tough-on-crime conservatives.”).

65. See TRAVIS ET AL., *supra* note 7, at 44:

Since the mid-1990s, no states have created new comprehensive sentencing systems, none has enacted new truth-in-sentencing laws, and only one has enacted a three strikes law. New mandatory minimum sentence laws have been narrowly targeted at such crimes as carjacking, human smuggling, and child pornography.

with crowded prisons is whether *reducing* the prison population and *reducing* sentence lengths will *increase* the amount of crime. Perhaps it will not; it might well be that we are now punishing people more harshly than a strict public safety rationale would justify. But it is also possible that the current state of incarceration and sentencing has hit an equilibrium in penal policy: further increases in inmate numbers will not help reduce crime, but decreasing the inmate population could lead to an increase in crime.

The preliminary evidence from the states that have engaged in penal reform over the last several years is somewhat ambiguous, but it certainly favors the view that prison rates can be decreased without causing crime to increase. According to data gathered by The Pew Charitable Trust, between 2010 and 2015, the states and the federal government saw the following relationship between crime rates and imprisonment rates:

Table 2: Relationship of Crime Rate and Incarceration Rates⁶⁶

	Crime Rate Decrease	Crime Rate Increase
Prison Rate Decrease	32 States + Federal	4 States
Prison Rate Increase	13 States	2 States

To be clear, neither the studies cited nor any others that were found establishes the equilibrium hypothesis; while they cast doubt on the notion that we have hit the incarceration sweet spot, there remains too much about the cause-and-effect relationship that remains unknown.⁶⁷ As the NRC concluded after reviewing the evidence, “[t]hese [studies’] divergent findings are one of the key reasons the [NRC] committee concludes that that we cannot arrive at a precise estimate, or even a modest range of estimates, of the magnitude of the effect of incarceration on crime rates.”⁶⁸

But as is often true with important public issues, states have decided that they do not have the luxury of waiting for unequivocal evidence before acting. Many have concluded that, balanced against the uncertain effect of lower incarceration rates are the indisputable and enormous human and economic costs imposed on prisoners, their families, and society by large prison populations. Given this, and given the historically high inmate numbers, many states have chosen to forge ahead with reform efforts, despite the possible impact on public safety.

66. Information in this Table is compiled from a chart created by The Pew Charitable Trusts. See *National Imprisonment and Crime Rates Continue to Fall*, PEW CHARITABLE TRUSTS (Dec. 2016), http://www.pewtrusts.org/-/media/assets/2017/03/pspp_national_imprisonment_and_crime_rates_fall.pdf.

67. It is interesting to note that in the sophisticated Brennan Center study, see ROEDER ET AL., *supra* note 57, the researchers tried to quantify the effect of a dozen variables on the decrease in the crime rate, from increased incarceration, unemployment, and decreased alcohol consumption to legalized abortion and lower lead in gasoline. Even after accounting for the cumulative effect of these factors, roughly half of the crime decrease between 1990 and 2013 remains unexplained. See *id.* at Figure 1 & Table 3.

68. TRAVIS ET AL., *supra* note 7, at 140–41.

There are, however, reasons to be concerned about the staying power of these efforts. The obvious barriers to significant reduction in prison size are easy to catalogue. Treating many of the root causes of criminal behavior—lack of family structure, lack of education, substance abuse, mental illness—is extremely expensive and painfully slow. This approach requires the commitment of new dollars,⁶⁹ which are always hard to come by. It also requires patience, persistence, and cooperation by public officials with different viewpoints, qualities that are often more scarce than new dollars. Spikes in crime (think opioids and gun violence) are unnerving for both the public and public officials, making it hard to predict that the recent commitment to reform is permanent.

Other barriers are more subtle. The next section looks at three of the reasons the efforts to end mass incarceration may well be frustrated.

II. BARRIERS TO REDUCING THE INMATE POPULATION

A. *The Numbers Barrier – Much Smaller Is Still Very Large*

If there is no consensus on a proper rate of imprisonment, picking a target number for prison reduction feels arbitrary. Still, it is worth some effort to define what we mean by success in the quest to reduce mass incarceration, as it is difficult to marshal resources and political momentum if the goal of reform is simply to “do better.”

Like a bad sports team, perhaps our immediate goal should be to climb out of last place—to reduce the prison population sufficiently that we are no longer the world leader in the rate of incarceration. With some effort, this goal is achievable. Holding everything else constant, a reduction of 150,000 inmates (about 7% of the national total) would move the United States to second place in the percentage of its population behind bars.⁷⁰

But moving behind El Salvador while staying ahead of Turkmenistan would be quite a modest victory. So our second-order goal might be to reduce the incarceration rate to levels found in countries with the largest economies, another area where the United States is at the top of the charts. Using economic size to define the peer group ensures some comparability in the complexity of society and the competing resource burdens shared by governments of a certain size and wealth. In addition, many of the world’s largest economies are also democracies, which ensures some political comparability as well. If the United States could achieve

69. See *infra* Section II(C).

70. See *supra* Table 1. For the United States to reduce its incarceration rate to 609 per 100,000 people, and thus drop behind El Salvador, it would require an inmate reduction from 2,121,600 to 1,972,551, based on a population of 323,900,000, the figure used in the latest World Prison Brief. See WORLD PRISON BRIEF, *supra* note 34. This assumes no change in the general or prison populations of El Salvador. Moving into second place in terms of the raw number of inmates would be more difficult. To fall behind China (which has the second highest number of inmates) would require the United States to reduce its inmate population by almost 500,000 inmates, or about 23% of those now behind bars. These numbers again assume a constant number of Chinese inmates.

rough parity with this group of countries, it might find comfort in knowing that its approach to incarceration is worrisome but not unique.

A comparison of the United States to the other ten largest world economies reveals the following:

Table 3: Incarceration Rates for Countries with the Largest Economies⁷¹

GDP Rank	Country	Incarceration Rate
1	United States	655
2	China	118
3	Japan	45
4	Germany	78
5	United Kingdom	141
6	India	33
7	France	102
8	Brazil	328
9	Italy	96
10	Canada	114
11	Russia	411
	Non-U.S. Average	147

If the goal were to reduce the U.S. prison rate so that it was in the middle of the pack among the largest world economies, there is still a long way to go. Stated differently, this is not going to happen in our lifetime. To get to the big-economy incarceration average of 147 inmates per 100,000 citizens, the United States would have to cut its rate by *more than seventy-five percent*, a staggering notion. We

71. Economy size was measured by 2017 GDP. See *GDP: All Countries and Economies*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?year_high_desc=true (last visited Feb. 15, 2019). The incarceration rates come from the WORLD PRISON BRIEF, *supra* note 34.

could empty every state and federal prison in the country, leaving only inmates in local jails, and still not reach that level.⁷²

To broaden the point: the United States could cut its national incarceration rate in half and *still* have a higher rate than twenty-four of the twenty-five countries with the largest economies (everyone except Russia). In fact, outside of the United States there appears to be almost no correlation between size of the economy and the rate of people behind bars. Among the other ten largest economies listed in Table 3, only two rank in the top one hundred in the world in incarceration rates (Russia at fourteenth and Brazil at twenty-seventh). America truly does stand apart, and largely alone.

Alternatively, we might simply look to cut the rate back to what it was in an earlier point in our own history. As shown in Figure 1, above, the rate of prison incarceration was stable for fifty years, from 1925 until about the mid-1970s, at roughly 100 prisoners per 100,000 people. Returning to these rates seems fanciful—as Jeff Bellin puts it, “we are closer to landing an astronaut on Pluto than we are to returning to 1970s incarceration levels.”⁷³ Even a return to the 1990s, which would require a 20% to 25% reduction in current incarceration rates, would present a formidable challenge. And even if we could cut 25% of our current inmates, the United States would still have the seventh highest incarceration rate in the world and the second highest number of inmates.

In short, if “mass” incarceration is defined in relative terms—how we compare to the rest of the world—or in reference to historical incarceration rates in this country, no realistic amount of sentencing and criminal law reform is going to change the distinctive space the United States now occupies.

B. The Challenge of Violent Crime

Meaningful change also will be hard because our commitment to reducing the size of prisons may not be matched by our willingness to take the political risks needed to make this happen. This is most clearly seen in the treatment of violent crimes.

No jurisdiction has yet proposed that the prison population as a whole be reduced in a sweeping, across-the-board manner. For example, no state has proposed that all current sentences be shortened by 10%, or that all sentences authorized by statute be reduced by 5%, regardless of the crime of conviction. Instead,

72. Using World Prison Brief numbers, a U.S. incarceration rate of 147 would result in about 476,000 inmates. These same figures show that at the end of 2016 there were more than 700,000 inmates in local jails. See *World Prison Brief Data: United States of America*, WORLD PRISON BRIEF, <http://www.prisonstudies.org/country/united-states-america> (last visited Feb. 15, 2019).

73. This memorable line appeared in a draft of Jeffrey Bellin’s *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*. See Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018). Although the phrase was squeezed out in the editing and does not appear in the final version of the article, the point remains valid.

the dominant prison reduction efforts have focused on those convicted of non-violent crimes.⁷⁴

Thus, President Obama was widely praised when he embarked on an effort to use the presidential clemency power to reduce some long federal sentences in 2014.⁷⁵ But eligibility was limited to those inmates who had no history of violence either before or during their imprisonment.⁷⁶ And while some reformers viewed the reduction of non-violent offenders as just a first step, the President's public pronouncements—"I tend not to have a lot of sympathy when it comes to violent crime"—helped ensure that this was not the case.⁷⁷ Other reform efforts have drawn similar distinctions.⁷⁸

This focus is hardly surprising. Violent people scare us and enrage us, which makes the decision to lock them away for long periods understandable. Statistics also tell us that there are far more property crimes than violent crimes committed in this country (by a ratio of more than six-to-one in 2016).⁷⁹ When we add the property crimes to the very large number of drug crimes that are prosecuted each year,⁸⁰ we might conclude that it is both more productive and safer to concentrate reform efforts on reducing the number of non-violent inmates.⁸¹ This approach is

74. "Many policy makers, community members, and law enforcement professionals are justifiably concerned about any potential reductions in prison terms for people who committed violent crimes. As a result, the current policy discussion in most states focuses on reforms to time served for non-violent offenders." PEW CENTER ON THE STATES, *supra* note 62, at 35.

75. The praise was not universal, however. See Paul J. Larkin, "A Day Late and a Dollar Short": President Obama's Clemency Initiative 2014, 16 GEO. J. L. & PUB. POL'Y 147, 149 (2018) (discussing why the President's clemency initiative "was hardly the unqualified success that Obama claims").

76. See Press Release, Dep't of Justice, Announcing New Clemency Initiative, Deputy Attorney General James M. Cole Details Broad New Criteria for Applicants (Apr. 23, 2014), <https://www.justice.gov/opa/pr/announcing-new-clemency-initiative-deputy-attorney-general-james-m-cole-details-broad-new>.

77. See FORMAN, *supra* note 16, at 221.

78. See, e.g., Press Release, Chuck Grassley, U.S. Senator for Iowa, Senators Introduce Bipartisan Comprehensive Criminal Justice Reform Package (Oct. 4, 2017), <https://www.grassley.senate.gov/news/news-releases/senators-introduce-bipartisan-comprehensive-criminal-justice-reform-package>. This shows an example of the bipartisan criminal justice reform legislation as described by one of its co-sponsors, Senator Grassley of Iowa. The summary describes how the bill would "recalibrate prison sentences for nonviolent drug offenders, target violent and career criminals and save taxpayer dollars. The legislation permits more judicial discretion at sentencing for offenders with minimal criminal histories and helps inmates successfully reenter society, while tightening penalties for violent criminals." *Id.*

79. According to the FBI, in 2016 there were 7,919,035 property crimes committed in the United States, and 1,248,185 violent crimes, a ratio of 6.34 to 1. See *Crime in the United States 2016, Table 1, supra* note 50.

80. Drug crimes are not measured by the FBI crime index, and national numbers are hard to find. But there are a lot of drug cases filed. In Florida, for example, there were 49,300 drug cases filed in FY 2016–17, which made up more than 28% of the felony docket. See FL. OFFICE OF THE STATE COURTS ADM'R, CIRCUIT CRIMINAL OVERVIEW 3-2–3-3, http://www.flcourts.org/core/fileparse.php/541/urlt/Chapter-3_Circuit-Criminal.pdf. In the federal system, there were almost 25,000 drug cases filed in 2017, which was more than 30% of the criminal cases that year. See *Table D-2, U.S. District Courts – Criminal Defendants Commenced (Excluding Transfers), by Offense, During the 12-Month Periods Ending December 31, 2013 Through 2017*, ADMIN. OFFICE OF THE U.S. COURTS (Dec. 31, 2017), <http://www.uscourts.gov/statistics/table/d-2/statistical-tables-federal-judiciary/2017/12/31>.

81. See FORMAN, *supra* note 16, at 220 ("[C]riminal justice reformers increasingly separate 'nonviolent drug offenders'— including those convicted of marijuana possession—from 'violent criminals.' In this view,

also consistent with the idea of reducing the number of people incarcerated “unnecessarily,” as there is less downside risk to releasing non-violent inmates earlier than we do now. The result is that state reform efforts usually have little to say about murders, rapists, armed robbers, and sex offenders.⁸²

Distinguishing between violent and non-violent offenders—two categories that occasionally overlap—makes political sense and common sense.⁸³ But there are two problems with this approach. First, it is not correct to assume that “violent criminals” (that is, those convicted of a violent crime) are so statistically likely to commit another crime after they are released that it makes sense to exclude them as a group from any reform proposals. In an extensive study of recidivism of state inmates, the Bureau of Justice Statistics found:

- After their release from prison, those who had been incarcerated for committing a violent crime were no more likely to be arrested for a new offense than those who had been imprisoned for any other type of crime.⁸⁴
- Those who had been imprisoned for a violent crime were only slightly more likely to be re-arrested for a violent crime than those who had been previously imprisoned for a property or public order crime.⁸⁵
- Those previously convicted of a violent crime were somewhat more likely to be rearrested for a violent crime than those previously convicted of a drug offense, however.⁸⁶

This does not mean that violent criminals present the same risk of future violence as other former inmates—although the differences in risk are relatively small—or that those convicted of violent crimes are morally comparable to those who commit

nonviolent drug offenders are worthy of compassion and a chance to redeem themselves; violent offenders, by contrast, deserve what they get.”).

82. It is an exaggeration to say that *none* of the reform proposals would benefit those convicted of violent crimes. Proposals to reduce the impact of Truth-in-Sentencing Laws, for example, would often directly benefit violent offenders by making them eligible for sentencing credits and programing that they are currently barred from receiving. *See, e.g.*, ILL. STATE COMM’N ON CRIMINAL JUSTICE & SENTENCING REFORM, FINAL REPORT (PARTS I & II) 58–59 (Dec. 2016), http://www.icjia.org/cjreform2015/pdf/CJSR_Final_Report_Dec_2016.pdf. Disclosure: the author was a member of the Illinois Sentencing Commission that produced the cited Report. The views in this article are mine alone and should not be attributed to the Commission.

83. Interestingly, reducing the number of non-violent inmates may not be fully supported by the research. There is at least some evidence that higher incarceration rates have the greatest effect on reducing property crime rather than violent crime. *See* RAPHAEL & STOLL, *supra* note 9, at 13 (explaining that “[o]ur research indicates that each one-person increase in the incarceration rate lowers the property crime rate between 1 and 2 incidents per 100,000,” while it currently has a minimal effect in reducing violent crime).

84. ALPER ET AL., *supra* note 24, at 9, Figure 9 (“During the first year following release, the percentage of prisoners released for a property offense who were arrested for any type of offense (including violent, property, drug, or public order offenses) was higher than the percentage of prisoners released for a drug or violent offense. This general pattern was maintained across the 9-year follow-up period.”).

85. *Id.* at 12 (“During the first year of the follow-up period, a larger percentage of prisoners released for a violent offense were arrested for a violent crime than those released for a property or drug offense.”). Note, however, that the Report goes on to say that “beginning in year-6, prisoners released for a violent offense were similarly likely to be arrested for a violent crime as those released for a property or public order offense.” *Id.*

86. *Id.*

property or public order crimes. It may be appropriate to exclude at least some violent criminals from reform efforts on retributivist grounds, regardless of their likelihood of reoffending. The point is simply that categorically excluding violent crime from reform proposals may be based on exaggerated assumptions about the risks of doing otherwise.

The second problem is a more practical one: it will be very hard to escape a world of mass incarceration without addressing those convicted of violent crimes. While it is true that property and drug crime dwarf the amount of violent crime in this country, more than half of prison inmates are behind bars because they were convicted of a violent offense.

This too should not be surprising. Violent crimes have higher clearance rates,⁸⁷ after conviction the offenders are the most likely to receive a prison sentence rather than probation, and those convicted of violent crimes receive the longest sentences among those who are sent to prison. Indeed, about 25% of prisoners nationwide are incarcerated for homicide or sexual assault,⁸⁸ even though these crimes make up less than 0.2% and 1.5%, respectively, of the index crimes each year.⁸⁹ As a result, at the end of 2015 the U.S. prison population looked like this:

Table 4: Prison Inmate Population by Most Serious Crime of Conviction⁹⁰

Category Crime	Percent of Inmates
Violent	54%
Property	18%
Drug	15%
Public Order ⁹¹	12%
Other	1%

87. The clearance rate is the percentage of criminal matters that are resolved through an arrest and charge of an individual, or through some other means where the offender has been identified but prosecution is not feasible, such as when the suspect has died or will not be extradited. In 2016, the clearance rate for violent crimes was 46%, compared to 18% for property crimes. See *Crime in the United States 2016, Table 17*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-17> (last visited Feb. 15, 2019).

88. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 18 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

89. See *Crime in the United States 2016, Table 17*, *supra* note 87.

90. See CARSON, *supra* note 88, at 18, Table 12.

91. Public order offenses include weapons charges, driving under the influence, and other morals and vice charges. *Id.*

So, unless prison-reduction efforts include within their scope those convicted of violent crimes, the reduction of non-violent inmates will need to be unrealistically large. Consider a simplified example. Assume a state has 10,000 prison inmates distributed according to the national average. If the state wanted to reduce its prison size by, say, 20%, to a total of 8,000 inmates, and if it chose not to reduce the sentences or otherwise divert from prison its violent offenders, it would need to cut the number of non-violent inmates by something like the following:

Table 5: Hypothetical Reduction of Inmate Population

	Current		Post-Reform	
Crime Type	Number	Percent	Number	Percent Reduction
Violent	5,400	54%	5,400	0%
Property	1,800	18%	1,200	33%
Drug	1,500	15%	750	50%
Public Order	1,200	12%	600	50%
Other	100	1%	50	50%
Total	10,000	100%	8,000	

Thus, to reach the 20% target for overall population reduction in this example, the state would have to release half its drug offenders, roughly half of its weapons violators, and more than one-third of its thieves and burglars.

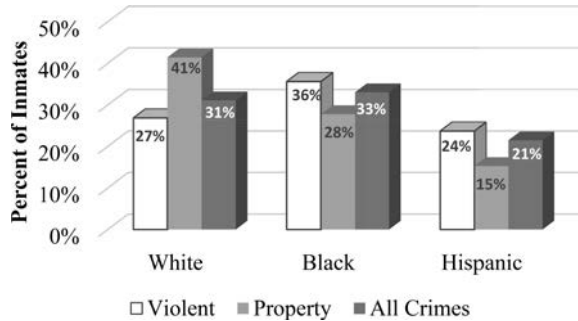
To make the point more broadly: we could tomorrow release 50% of all burglars who are now behind bars, all thieves, all those convicted of drug crimes, fraud, drunk driving, and weapons offenses, and *still* have the highest rate of incarceration among the world's largest economies and the second highest number of inmates.⁹² However we define mass incarceration, the situation is unlikely to change unless there is a meaningful effort to reduce the length of stay for inmates

92. In September 2016, the U.S. population was about 323.5 million. See U.S. CENSUS BUREAU, AMERICAN FACT FINDER, <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Feb. 15, 2019). If that number is held constant, reducing the incarceration rate to that of Russia (the second highest rate among the top world economies) would mean decreasing the number of inmates by about 789,000, or about 37% from current levels. Emptying the prisons and jails as suggested would reduce U.S. incarceration levels by about 32%. See WORLD PRISON BRIEF, *supra* note 34 (calculations on file with the author); see also James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 48 (2012) (explaining that even if all “drug offenders were released tomorrow, the United States would still have the world’s largest prison system”).

convicted of violent crimes.⁹³

The race variable provides still another layer of complication. African Americans and Hispanics are already over-represented in the prison population, and the figures get worse when we focus on violent crime.

Figure 3. Percentage of State Prison Inmates by Race/Ethnicity & Crime of Conviction⁹⁴



As Figure 3 shows, African Americans and Hispanics are more likely to be imprisoned for violent crimes rather than property crimes—in contrast with Whites, where the opposite is true. To the extent reform efforts exclude violent crimes from their scope, the racial and ethnic imbalance is likely to get noticeably worse rather than better.

C. *The Illusion of Economic Savings*

No argument for reform is more persistent and comforting than the claim that reducing the prison population will save big money. Regardless of their political orientation, all actors agree that running prisons is expensive—states spent more than \$43 billion on prisons in 2015⁹⁵—and many assume that reducing the prison

93. The effect of violent crime on the prison population, and the ineffectiveness of limiting reform to non-violent offenses, is discussed in detail in PFAFF, *supra* note 5, at 186–202; *see also id.* at viii (describing “a common pattern in criminal justice reform, which for years has been premised on the idea that we can scale back our prison population primarily by targeting low-level, nonviolent crimes. A major theme of this book is that this is wrong: a majority of people in prison have been convicted of violent crimes, and an even greater number have engaged in violent behavior. Until we accept that meaningful prison reform means changing how we punish violent crimes, true reform will not be possible”).

94. This chart was created from data generated by the Bureau of Justice Statistics. *See* CARSON, *supra* note 88, at 19, Table 13. The data are for state prison inmates as of December 31, 2015.

95. *See* CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015 7 (May 2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy_downloads/the-price-of-prisons-2015-state-spending-trends.pdf.

population will free up resources to be used on roads, pensions, parks, and teachers. As one report put it: “Policymakers and other advocates for reform have assumed that a direct relationship exists between a prison’s population and spending in a corrections budget; specifically, the belief persists that a decline in prison population should necessarily register a decline in spending.”⁹⁶

At one level the point is undeniable. Feeding, housing, and guarding 900 inmates surely costs less than performing the exact same functions for 1,000 inmates. The Federal Bureau of Prisons calculates that it costs an average of \$36,299 per year (\$99.45 per day) to incarcerate a federal prisoner in fiscal year 2017,⁹⁷ with the state average being roughly comparable.⁹⁸ At these levels, surely a meaningful cut in the inmate population would free up a meaningful number of dollars.

These figures are enticing but misleading. The assumption often seems to be that if each inmate costs \$36,000 per year, then reducing the population by 100 inmates will result in annual savings of \$3.6 million, that 1,000 fewer inmates will save \$36 million, and so on. Even very sophisticated observers can at times discuss the relationship between prison population reduction and cost savings as if this were the proper formula.⁹⁹

96. *Id.* at 10.

97. Notice, Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18863 (Apr. 30, 2018), <https://www.federalregister.gov/documents/2018/04/30/2018-09062/annual-determination-of-average-cost-of-incarceration>. Note that this is a 14% increase (from \$87.61) in the average cost since FY2015, *see* Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46957 (July 19, 2016), although the number of federal inmates dropped almost 10% during this period.

98. In a study of fiscal year 2015 prison costs, the Vera Institute calculated that for the 45 states studied, the average cost per prison inmate was \$33,274. MAI & SUBRAMANIAN, *supra* note 95, at 7, 8. There is, however, substantial variation among the states. California and New York had an average cost per inmate between \$60,000 and \$70,000, while the Texas reported average cost per inmate was \$22,012, and the Indiana average was \$18,065. *Id.* at 8, Table 1.

99. For example, in its insightful report on the impact of long prison terms, the Pew Center on the States discusses potential economic costs and savings as if they equaled the average cost per inmate times the number of greater or fewer inmates. *See* PEW CENTER ON THE STATES, *supra* note 62, at 4, 37. Thus, the report notes that if Florida, Maryland, and Michigan had used a risk analysis model, it would have reduced their average daily prison population by a certain amount, which would in turn have resulted in costs savings of tens of millions of dollars in each state. Although the report does not say so directly, it appears that the cost savings were calculated by multiplying the average cost per inmate times the number of fewer inmates. *See id.* at 12, Figure 3 (calculating the extra costs of keeping people in prison longer by multiplying an additional length of stay (nine months) by the “average cost of keeping offenders in prison longer” and concluding that the total state cost of keeping offenders in prison the extra time was \$10.4 billion). *See generally* State v. Miller, 513 S.E.2d 147, 160 n.7 (W. Va. 1998) (Starcher, J., concurring) (“There is no evidence that [defendant] poses any danger to the public at large. Isn’t it somewhat wasteful and unnecessary for the State to feed, clothe, house, and treat her medically for the next 50 years, at an annual cost somewhere around that of a Harvard education?”). Note that the *additional* costs of *increasing* the prison population calls for a different analysis than calculating the money *saved* by *decreasing* the population. Rapid population growth means building more prisons and hiring more guards, a very expensive undertaking, one that may or may not be reflected in the annual state prison budget. Regardless, it seems unlikely that the “average cost” figure would give states much more guidance when expanding their inmate population than in the current setting where states are trying to save money by reducing population. My thanks to Jake Horowitz at the Pew Center on the States for helping me understand this point.

There are many problems with this cost-saving assumption. The main problem is that the average cost—the one most widely reported¹⁰⁰—typically comes from dividing the number of inmates into the total costs of running the prison. But this average-cost calculation creates a distorted picture of how reducing the inmate numbers would reduce a state's real costs.

The actual amount saved by imprisoning one fewer inmate is a relatively few dollars a day for food, clothing, health care, and incidentals.¹⁰¹ The major costs of running a prison are the same as they are for any other service business: personnel and infrastructure. The guards' and administrators' salary, benefits, and pension account for about two-thirds of a facility's expenses,¹⁰² and another significant slice of the budget goes to paying for heat, electricity, and the maintenance of the physical structure, as well as for debt service and legal judgments.¹⁰³

Most of these costs are fixed and lumpy. If a facility spends on average \$36 million to house 1,000 inmates (using the federal average), reducing the inmate population by, say, 5% may not reduce the budget much at all. The prisons would still need about the same number of guards and administrative staff, and the facility would still need heat. For large savings to accrue, there would need to be a big enough decline in the number of inmates to allow a significant drop in personnel costs, which often would not come until an entire cell block was shuttered, or most dramatically, until an entire prison can be closed, and the inmates consolidated into the state's remaining facilities.¹⁰⁴

The political difficulties of doing this need little elaboration. Trying to shrink or eliminate prisons in the face of a (perhaps) unionized staff, particularly in a small community where the prison is a significant employer, is a daunting task. Nevertheless, it happens, and when it does, states can reap a financial reward. New York, for example, recently decreased its prison population by 10% (about 6,000 people), which allowed it to close fourteen prisons and reduce its prison

100. See MAI & SUBRAMANIAN, *supra* note 95, at 7 (“A common measure used by states to understand [their prison] cost[s] is the ‘average cost per inmate,’ calculated by taking the total state spending on prisons and dividing it by the average daily prison population. This figure represents the amount the state spends annually, on average, to staff and maintain the prisons and provide all prison services.”).

101. *Id.* at 9 (“[O]nly 11 percent of prison spending nationally was spent on payments for prison health care, including payments to outside health care providers, pharmaceuticals, and hospital care.”).

102. *Id.* (“[P]ersonnel costs—including salaries, overtime, and benefits—comprised the lion’s share of state prison expenditures, making up more than two-thirds (68 percent) of total spending in 2015.”).

103. *Id.* (“Seventeen percent of spending nationally was devoted to a catch-all category that includes facility maintenance, programming costs for incarcerated people, debt service, and legal judgments.”). A lower number of inmates might reduce the amount needed to be spent on rehabilitative programming costs for inmates. Although to the extent the supply of these programs is now smaller than the demand, there might be no change in this cost even with many fewer inmates.

104. For a useful discussion of how to calculate potential prison cost savings, see CHRISTIAN HENRICHSON & SARAH GALGANO, VERA INST. OF JUSTICE, A GUIDE TO CALCULATING JUSTICE-SYSTEM MARGINAL COSTS (May 2013), <https://www.vera.org/publications/a-guide-to-calculating-justice-system-marginal-costs-1>.

employment by 11%.¹⁰⁵ The savings were significant, but there are reasons to be skeptical that these benefits are widely available to states seeking a similar return.

Most obviously, in many jurisdictions the prison population could be dramatically reduced, and its prisons would *still* be overcrowded. At the end of FY 2016, federal facilities exceeded their rated inmate capacities by 16%, and this was after the Justice Department had carried out significant sentencing reform.¹⁰⁶ So while the cramped conditions were lessened as a result of the changes—overcrowding dropped from 23% to 16% in a single year¹⁰⁷—there was still only a modest prospect that the reductions would allow the Bureau of Prisons to reduce its staff, close parts of facilities, or make other cuts that would significantly decrease costs.¹⁰⁸

The situation in many of the states is no better. In 2016, the inmate numbers in fifteen states exceeded the operational capacity of their prison facilities, while an additional eleven states exceeded their design or rated capacities.¹⁰⁹ And this was after the national prison population dropped 3.6% between 2014 and 2016.¹¹⁰

As long as prisons are overcrowded, it is hard to close cell blocks and save money. Illinois is a case in point. Between the end of fiscal years 2014 and 2017, there was a 12% drop in the number of inmates, a noteworthy reduction that left the prison significantly below its operational capacity but still at 131% of its design

105. MAI & SUBRAMANIAN, *supra* note 95, at 11. Similarly, South Carolina saw a 12% drop in its prison population between 2010 and 2015, which allowed it to close three minimum security prisons and helped the state reduce its spending by more than \$11 million during that period. *Id.* at 13.

106. U.S. DEP'T OF JUSTICE, FY 2016 AGENCY FINANCIAL REPORT I-25 (Nov. 2016), <https://www.justice.gov/doj/page/file/910486/download#page018> (“The impact of the Department’s Smart on Crime initiative, legislative changes, and clemency have all contributed to reducing the inmate population and projections; nonetheless, the BOP continues to experience high levels of crowding, particularly at medium and high security institutions. For example, as of September 30, 2016, the overcapacity rate at high security institutions was 31 percent.”).

107. *Id.*

108. The Justice Department also was not optimistic that the reductions in the federal inmate population would continue. It noted that even if “acquisition, expansion, construction, and activation plans detailed in the [Bureau of Prison’s] Long Range Capacity Plan are funded as proposed, the overcapacity rate for both FYs 2017 and 2018 is projected to stay at 16 percent—the same rate as at the end of FY 2016.” *Id.*

109. See CARSON, *supra* note 88, at 14 & Table 16. Measuring the “capacity” of prisons is harder than it sounds. The Bureau of Justice Statistics uses three different measures of capacity:

[T]he operational capacity, which is based on the ability of the staff, programs, and services to accommodate a certain size population; the rated capacity, which measures the number of beds assigned by a rating official to each facility; and the design capacity, which is the number of beds that the facility was originally designed to hold.

E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRISONERS IN 2014 11 (Sept. 2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf>. Because many states only report two of these numbers rather than all three, the BJS draws the statistical conclusions set forth above by using the maximum and minimum capacity figures provided by each state. *Id.*

110. In 2014, the national prison population was 1,562,300, and by the end of 2016 it had dropped to 1,505,400, a decline of 56,900 inmates. See KAEBLE & COWHIG, *supra* note 34, at 2, Table 1. Note, however, that almost 40% of the population drop came from the federal system, which lost about 22,000 inmates between 2014 and 2016. See FED. BUREAU OF PRISONS, *supra* note 6.

capacity.¹¹¹ Over the same period, expenditures on the prisons increased by 7% (a 2% increase after adjusting for inflation).¹¹² At the same time, the ratio of guards per inmate, as well as the total prison staff per inmate, increased by more than 25%, suggesting that the same number of guards and staff were now covering a smaller inmate pool.¹¹³ The new ratios undoubtedly made prisons safer and more effective,¹¹⁴ but the decline in population did not seem to free up cash.

A third problem is that even if releasing prison inmates saves the State Bureau of Prisons money, it does not necessarily save the government *as a whole* money. In many subtle and significant ways, releasing a person from prison shifts, rather than decreases, the economic costs.

Some of this cost-shifting is easy to identify. One of the core components of separating those who need to be behind bars from those who do not,¹¹⁵ is to decrease the use of prison by increasing the amount of “community corrections”—probation, parole, and supervised release for those who pose a low risk to the public. This is a sensible idea on its own terms, but the economic benefits of fewer prisoners are partially offset by the need to hire more probation and parole officers to staff offices that already struggle with large caseloads.

Cost shifting also can occur when inmates serve their sentence in the local jail rather than the state prison. Many inmates are in prison for a relatively short time, especially after receiving credit for jail time served prior to conviction.¹¹⁶ When jurisdictions reform their sentencing practices by reclassifying crimes from felonies to misdemeanors (think smaller drug offenses and theft crimes¹¹⁷), this will move many inmates out of prison entirely, because they can now serve their full

111. See ILL. DEP'T OF CORRS., QUARTERLY REPORT Table 4 (July 1, 2017), https://www2.illinois.gov/idoc/reportsandstatistics/Documents/IDOC_QuarterlyReport_July_2017.pdf. For the difference in types of capacity, see *supra* note 109.

112. Figures regarding the Illinois prisons are compiled from data in the various Illinois Department of Corrections Annual Reports, which are found at <https://www2.illinois.gov/idoc/reportsandstatistics/Pages/AnnualReports.aspx>.

113. In July 2014, there were 0.157 security officers per inmate, and 0.203 staff members (including guards) per inmates. See ILL. DEP'T OF CORRS., QUARTERLY REPORT Table 7 (July 1, 2014), https://www2.illinois.gov/idoc/reportsandstatistics/Documents/IDOC_Quarterly_Report_Jul_%202014.pdf. By July 2017, the ratio had improved to 0.201 security officers per inmate and 0.258 staff members. ILL. DEP'T OF CORRS., QUARTERLY REPORT, *supra* note 111, at Table 7.

114. See, e.g., TRAVIS ET AL., *supra* note 7, at 6 (“[R]esearch has found [that] overcrowding, particularly when it persists at high levels [is] associated with a range of poor consequences for health and behavior and an increased risk of suicide.”).

115. See *supra* Section I(B).

116. In Pennsylvania, for example, the average time served by inmates who were released in 2016 was 3.9 years. See PENN. DEP'T OF CORRS., ANNUAL STATISTICAL REPORT 27, Table 29 (2016), <http://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2016%20ASR%20Report.pdf>. In Illinois, the average length of incarceration among all inmates released in FY 2017 was 2.8 years, but after subtracting the time spent in jail, the average time in prison was 1.5 years. See ILL. DEP'T OF CORRS., FISCAL YEAR 2017 ANNUAL REPORT, *supra* note 51, at 85.

117. See, e.g., ILL. STATE COMM'N ON CRIMINAL JUSTICE & SENTENCING REFORM, *supra* note 82, at 40, 50 (recommending an increase in the minimum dollar amount for felony theft and lowering the classifications of drug crimes).

sentence in the local jail. The overall incarceration expenses will be reduced because of the shorter sentence, but the decrease in the prison costs, which are typically borne by the state, will again be partially offset by the increased costs to local governments who pay for the jail. Even this may not be a bad thing, as there may be some value to having the local government consider the true costs when it exercises the prosecutorial discretion.¹¹⁸ But the savings will be less than appears from a simple calculation of the lower number of prisoners.

Less obviously, but most importantly, are the increased costs to governmental units outside the criminal system. Former inmates who will be released earlier (or who would have gone to prison in a pre-reform era but now will not), frequently have a hard time finding a job, paying rent, and paying health insurance premiums. This means they will often call on public resources, through welfare benefits, subsidized housing, and subsidized health care. This is particularly true for long-term inmates who are released at an advanced age. Releasing elderly prisoners might be a safe and even humane thing to do, but this will only save “the government” money if the inmate’s subsistence, housing, and the increasing health care needs, including medicine and nursing home care, are met more efficiently through government programs outside of prison than they would have been inside of prison.

Not all newly released inmates will have to call on public services—health care and housing needs may be met through private resources, or perhaps are simply not met at all. The first option is unlikely on a large scale, as most inmates are poor going in to prison and poorer coming out. The second is unpalatable, but undoubtedly occurs frequently.

This is not to deny that some savings will be realized. At the least satisfying level, a state might figure that a released inmate is likely to call on *federal* government dollars for health care or housing, while those who remain behind bars absorb state dollars. Reducing the prison size will thus save the states some money, although this will be small comfort to taxpayers who are footing both federal and state bills. Some number of inmates will also have families on the outside willing to assume the costs of care, while others will defy the odds and find gainful employment, and not only reduce the demand on public dollars but also contribute by paying taxes.

It is unclear as an empirical matter how much more or less it would cost society to provide for the health care, living expenses, and housing needs of those who would have been in prison pre-reform but will not be post-reform. But at a minimum, reformers should be cautious about assuming that resources now devoted to prison inmates would suddenly be saved by the government as a whole if inmates were released from prison sooner.

118. See PFAFF, *supra* note 5, at 143 (“Prosecutors get all the tough-on-crime political benefit of sending someone to prison, but the costs of the incarceration are foisted onto the state as a whole. . . . That the alternatives—misdemeanor probation or jail time—are paid for by the county only exacerbates the problem. For the prosecutor, leniency is actually more expensive than severity, and severity is practically free.”).

Perhaps the largest obstacle to saving money by shirking prisons is the one hiding in plain sight. There is now widespread agreement that serving time in prison is not itself rehabilitative. While our predictive powers are imperfect, we can confidently identify some of the criminogenic factors that led to the person being incarcerated in the first place: substance abuse, mental health problems, dysfunctional families, and lack of realistic job opportunities are among the most obvious. Prison usually does not solve these problems and often exacerbates them, making these untreated problems a big contributor to the high levels of recidivism.

Prisons do what they can, but few believe that current levels of programming and treatment inside of prison are adequate, or that community treatment programs for those on probation or supervised release are sufficient to address the problems that so many inmates carry with them after release. Criminal justice reform that is serious about reducing the size of prisons, doing it safely, and then sustaining the gains that are made, needs to invest in additional services, including widely-available substance abuse and mental health treatment. But these programs are expensive, and at least in the short term, can more than offset any financial savings from a reduced the inmate population.

The experience among the states has shown that the relationship between decreases in the prison population and decreases in spending are tenuous. In a study of forty-five states, the Vera Institute of Justice found that between 2010 and 2015, there was the following relationship between prison population and prison spending:¹¹⁹

Table 6: Relationship of Inmate Population and Prison Spending

	Increased Prison Spending	Decreased Prison Spending
Increased Inmate Population	15 States	7 States
Decreased Inmate Population	10 States	13 States

It is hard to detect a predictable pattern. Among the twenty-three states that decreased their prison population during the five-year period studied, slightly more than half (thirteen of twenty-three) also decreased their spending, while the other ten increased spending despite the lower inmate numbers. Among the states that decreased both the inmate population and prison spending, the relationship between the two was also murky. Some states cut their prison populations a lot and

119. See MAI & SUBRAMANIAN, *supra* note 95, at 16–17.

saved very little,¹²⁰ other states cut their population very little and saved a great deal.¹²¹ On the other hand, among the thirteen who cut spending, the savings were significant: a cumulative \$1.6 billion saved, as compared to the \$1.1 billion spending increase by the remaining ten states that reduced their prison populations.¹²²

The bottom line is that people who think that prison reduction will lead to economic savings in the short and medium term should temper their enthusiasm. The recipe for significant costs savings requires: (1) releasing enough inmates that prisons or parts of prisons can be consolidated, thereby reducing personnel and facilities costs; along with (2) an assumption that government dollars previously spent on prison inmates will be higher than the public assistance, housing, and health care dollars spent on those who, in a post-reform world, will not be incarcerated; and (3) an assumption that the costs saved by the first two points will not be fully absorbed by services needed to reduce of recidivism among the newly released.

III. THE POTENTIAL FOR PROGRESS: WHAT ABOUT THE PROSECUTORS?

Even if very high incarceration rates will exist for the foreseeable future, sustained progress can still be made. But to continue making gains will require efforts from all participants in the process, and here the list of actors is long. As James Forman, Jr. notes:

The police make arrests, pretrial service agencies recommend bond, prosecutors make charging decisions, defense lawyers defend (sometimes), juries adjudicate (in the rare case that doesn't plead), legislatures establish the sentence ranges, judges impose sentences within these ranges, corrections departments run prisons, probation and parole officers supervise released offenders, and so on. The result is an almost absurdly disaggregated and uncoordinated criminal justice system.¹²³

The size of the inmate population is ultimately the product of two factors: (1) the number of prison admissions, and (2) the inmates' length of stay. State reform efforts have accordingly focused most of their attention on ways to influence, restrict, or expand the authority of those in the "almost absurdly disaggregated" process who make the decisions that affect these two variables.

Many of the reform recommendations target legislators, urging them to eliminate mandatory minimum sentences, lower the punishment for drug or property crimes, or soften the impact of three-strikes and truth-in-sentencing laws.¹²⁴ Other

120. For example, South Carolina cut its prison population 12% between 2010 and 2015, but decreased its prison spending by only 2%. Colorado cut its inmate population by 9%, but saw a 0% change in constant dollars. *Id.* at 14.

121. Florida cut its inmate population by 1% but saw a 12% decrease in spending, while Ohio cut its prison size by 1% and cut its prison spending by 13%. *Id.*

122. *Id.* The dollar figures cited in the Vera Institute Report were adjusted to fiscal year 2015 dollars. *Id.* at 6.

123. FORMAN, *supra* note 16, at 13–14.

124. For a useful summary of the various reforms implemented by the states, see *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, *supra* note 4, at 2; See also RAPHAEL & STOLL, *supra* note 9, at 6

proposals target judges, encouraging them to use risk-assessment tools when sentencing, or to more closely consider alternative sanctions rather than incarceration. Still other reforms focus on probation and parole officers, police, prison officials, and various other state officials, all recommending changes in practice that will reduce the number of people being sent to prison, speed up departures from prison, or both.

Curiously, the actor who is least likely to be the target of the reforms may well be the most important—the prosecutor. As John Pfaff writes:

Prosecutors . . . have used [their] power to drive up prison populations even as crime has declined over the past twenty or so years. To date, however, no state- or federal-level proposal aimed at cutting prison populations has sought to explicitly regulate this power. Everyone else in the criminal justice system currently faces reforms, such as efforts to change interactions between civilians and police, or to amend sentencing laws and parole policies. But prosecutors have remained untouched.¹²⁵

This lack of attention is remarkable, because at each stage of the process, the prosecutor has a dominant influence on both of the relevant variables: how many or how few of those charged with crimes end up in prison, and, for those who are imprisoned, for how long.¹²⁶

Consider the factors that influence the number of prison admissions. The most important variable is the crime of conviction, and it is almost a cliché to note that prosecutors have unreviewable power to decide whether to charge and what to charge.¹²⁷ Prosecutors can only charge what the legislature criminalizes, of course, but legislatures are usually eager enablers of wide-reaching prosecutorial discretion. They routinely enact overlapping statutes that makes anti-social conduct a violation of both greater and lesser crimes, which in turn subjects the offender to greater and lesser punishment depending on how it is charged.¹²⁸ Did the defendant

(recommending the reduction in the scope and severity of truth-in-sentencing laws, and the reworking or abandoning of mandatory minimum sentences).

125. PFAFF, *supra* note 5, 133–34; *see also* Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 335 (2017) (“[S]urprisingly, in looking for the causes and cures for the mass incarceration state, very little, if any, attention has been paid to the role of the most powerful actor in the criminal justice system: the prosecutor.”).

126. *See generally* Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 677–78 (2016) (“No serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”).

127. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”) (internal quotation marks and citations omitted).

128. As Paul Robinson and his co-authors have observed: “Politicians bear few costs from enacting or developing poorly organized and drafted criminal codes because the social costs of having such a code, even if substantial, are hidden and diffuse: uncertainty and confusion in prosecutions and the lack of predictability and uniformity in adjudicative out-comes.” Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 2 (2000). For an insightful analysis of how the “depth” of a state’s

commit aggravated assault, or should it be charged as a simple assault, reckless endangerment, or even disorderly conduct? When the defendant entered the victim's home and stole a computer, was that burglary, home invasion, trespass, theft, or all of the above? When the defendant sold the drugs and had a gun in his car, should he separately be charged with being a felon in possession of a firearm as well as the drug sale? The prosecutors' choices are not limitless, but they are substantial, and, just as importantly, are not subject to review.¹²⁹

A criminal charge is not a conviction, but in modern times it is nearly the same thing. As is now widely understood, a high percentage of formal charges lead to a conviction (more than 90% in the federal system),¹³⁰ nearly all convictions are the result of a guilty plea (98% in the federal system),¹³¹ and a large percentage of those pleas are the result of a negotiated agreement between the prosecutor and the defense. The prosecutor's decision to offer a reduced charge in return for a guilty plea—or whether to increase the charges in the absence of a plea¹³²—has a dominant effect on who ends up behind bars and for how long.

Of course, the fact that prosecutors have this discretion does not *inevitably* mean that more people will be sent to prison rather than fewer. Prosecutors are acutely aware of incarceration rates and their impact on prisons, and they might exercise their discretion to file a lower charge rather than a higher one, or may bargain away those factors that aggravate the sentence (reducing the weight of the drugs for which the defendant is responsible, for example). Prosecutors also may decide to charge a defendant in ways that allow for an alternative sanction other than incarceration. Part of the sentencing reform focus has been to increase the availability and use of probation, home confinement, and diversion,¹³³ options that are hugely influenced by the manner in which a prosecutor crafts the allegations.

But there is only modest evidence that these options have made a difference in how cases are being charged. For example, over the last twenty years, with only

criminal code effects the prosecutor's ability to charge bargain, see Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935 (2006).

129. See *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) (“This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.”) (internal citations omitted).

130. In the federal system in FY 2017, 92% of criminal defendants who were formally charged were eventually convicted, 8% had their cases dismissed for various reasons, and less than one-half of 1% (0.37%) were acquitted at trial. See *Table D-4, U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2017*, ADMIN. OFFICE OF THE U.S. COURTS (Sept. 30, 2017), http://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2017.pdf.

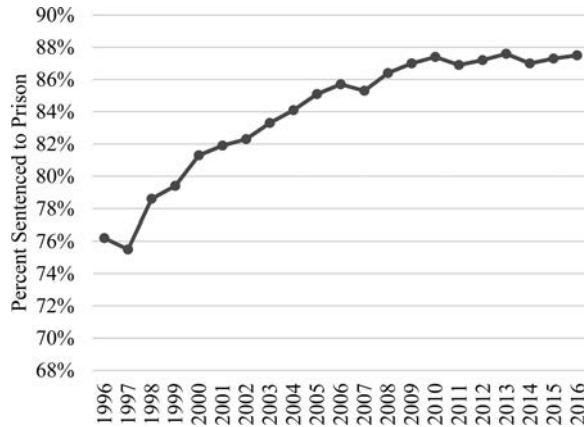
131. In FY 2017, 69,017 federal criminal defendants were convicted, 67,418 of whom entered a guilty plea. *Id.*

132. Threatening to bring a higher charge should the defendant refuse to plead guilty is constitutionally permitted as long as the prosecutor has a legitimate basis for the more serious charge. *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978).

133. See, e.g., *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, *supra* note 4, at 2 (noting that eight States have established or improved their electronic monitoring program, and eight States have reformed or piloted specialty courts).

trivial exceptions, the percentage of convicted offenders in the federal system who were sentenced to prison rather than to some other sanction increased each year.

Figure 4. Percent of Federal Defendants Sentenced to Prison¹³⁴



To be sure, once the defendant has been convicted, the judge is the one who sets the duration of the sentence (the “length of stay” variable). This sentence will be based on the presentence report, the applicable statutes and sentencing guidelines, and the court’s judgment. But while the judge is the lead actor, the prosecutor is not far off stage. Indeed, it is only a modest overstatement to say the by the time the judge imposes the sentence, her discretion has been so channeled and constrained by the prosecutor that the sentence length is a near-formality.

Consider the many ways that a prosecutor shapes the eventual sentence. After setting the initial charge, the prosecutor typically will enter a plea agreement to resolve the case. The agreement may involve dropping certain counts or reducing the severity of charges, which obviously cabins the eventual sentence the judge can impose, particularly when consecutive sentencing would be an option.¹³⁵ The judge also must base her sentence on those facts that are admitted by the defendant in the plea deal,¹³⁶ which normally is drafted by the government.

A guilty plea may also be induced by a promise of a favorable sentencing recommendation by the prosecutor.¹³⁷ The judge is not obligated to follow the

134. This chart was created from data found in the U.S. Sentencing Commission’s *Annual Sourcebook of Federal Sentencing Statistics*, Figure D, for the years in question. All relevant Sourcebooks are available at <https://www.ussc.gov/research/sourcebook/archive>. The compiled data are on file with the author.

135. For a useful discussion on the various approaches to concurrent and consecutive sentences, see 6 WAYNE R. LAFAYE, ET AL., *CRIMINAL PROCEDURE* § 26.3(f) (4th ed. 2015).

136. See *United States v. Booker*, 543 U.S. 220, 232, 244 (2005).

137. See, e.g., FED. R. CRIM. P. 11(c)(1)(B) (explaining that in return for a guilty plea the prosecutor may “recommend, or agree not to oppose the defendant’s request, that a particular sentence or sentencing range is

recommendation but presumably considers the suggestion carefully, as courts are aware that the parties know the case better than the judge does. Alternatively, prosecutors and defendants who want more certainty about what a judge will do can enter into a plea deal that conditionally restricts the judge's sentencing flexibility.¹³⁸ Under this type of agreement, if the parties agree that a maximum five-year sentence is an appropriate disposition, the court must either agree to the sentencing cap, or reject the deal and give the defendant a chance to withdraw his plea. Judges are always free to reject the proposed sentencing limit, but it is unlikely that they do so very often.¹³⁹

Interestingly, prosecutors may not have always exercised quite so much control over sentences. In 1980, Attorney General Benjamin Civiletti urged prosecutors to show restraint in influencing a defendant's punishment, writing that there should be a "clear separation of prosecutorial and judicial responsibilities" when it came to sentencing, with courts naturally taking the lead role.¹⁴⁰ As a result, Civiletti said the prosecutors should "avoid routinely taking positions with respect to sentencing," and that sentencing recommendations should only be given in "unusual cases."¹⁴¹

But the hydraulic pressure of plea bargaining, coupled with the restraints imposed on judges by federal and state sentencing guidelines, soon overwhelmed the Civiletti notion of prosecutorial modesty. The Federal Sentencing Guidelines, for example, explicitly give prosecutors a part of the sentencing process, at times placing the authority to decide whether the defendant qualifies for a marginally lower or higher sentence entirely in the hands of the government. Thus, a defendant who accepts responsibility for his own criminal conduct may sometimes receive an additional downward adjustment on his criminal history score, but only if the prosecutor agrees that the extra reduction is warranted.¹⁴² Also, a defendant may

appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply").

138. See, e.g., FED. R. CRIM. P. 11(c)(1)(C). A "Type C" plea agreement (named after the subsection of Rule 11) allows the parties to agree that "a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Federal Sentencing Guidelines . . . does or does not apply." *Id.* The parties present the agreement to the court, which then must accept or reject the deal. If the judge accepts the deal, the agreed-upon sentence binds the court at sentencing. If the judge rejects the agreement the defendant can withdraw the plea. FED. R. CRIM. P. 11(c)(5).

139. This is not to suggest that courts routinely acquiesce to those plea deals that limit the judge's sentencing options. Judges are protective of their prerogatives and will reject a Type C agreement if they think the agreed-to sentence is inappropriate. But because prosecutors who craft these agreements usually are familiar with a judge's sentencing patterns, they will hesitate to agree to a deal that runs a high risk of rejection.

140. See U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 51–52 (1980), <http://hdl.handle.net/2027/uc1.b4177340>. The "unusual circumstances" prosecutors could offer a sentencing recommendation were when the plea agreement required it, or when the public interest warranted an expression of the government's view. *Id.* at 51. See also Alan Vinegrad, *Justice Department's New Charging, Plea Bargaining and Sentencing Policy*, 243 N.Y. L.J. 2 (June 10, 2010). This point is developed in slightly more detail in Andrew Leipold, *Criminal Dockets, Sentencing, and the Changing Role of Federal Prosecutors*, 30 FED. SENT'G REP. 177, 180 (2018).

141. See PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 140, at 51–52.

142. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 3E1.1 & comment (backg'd) (Nov. 2018). Defendants who accept responsibility may receive a two-level downward adjustment in their criminal history

receive a downward sentencing departure if he or she provides “substantial assistance in the investigation or prosecution of another person,” but once again, only if the prosecution approves.¹⁴³

There is a debate in the literature about the precise role prosecutors have played in creating the high levels of incarceration. John Pfaff has forcefully argued that increases in prosecutorial aggressiveness, as reflected in the decisions to charge felonies rather than misdemeanors for behavior that could be either, accounts for a great deal of the prison population increase.¹⁴⁴ His conclusions have caught the eye of many prominent observers, including then-President Obama.¹⁴⁵ In contrast, Jeffrey Bellin has cogently questioned some of Pfaff’s empirical conclusions, and argues that once these flaws have been recognized, the “primary culprits (legislators and judges)” in the mass incarceration story reemerge.¹⁴⁶

For current purposes it is unnecessary to decide the exact degree of influence (or blame) attributable to prosecutors in creating the incarceration status quo. It is enough to recognize—as all observers seem to—that prosecutors have a significant influence over the size of the prison population, which means they should be an important player in reform efforts as well.

Why have prosecutors remained largely untouched by these efforts? Perhaps there is simply a lack of popular support for putting limits on an office that consistently does what it sets out to do—convict and imprison people who commit serious crimes. The notion that we are unnecessarily incarcerating people apparently resonates with people,¹⁴⁷ but so does the fear of crime,¹⁴⁸ maybe the apparent change in attitude toward incarceration that has fueled sentencing reform efforts is overstated. Or perhaps prosecutors are especially good at resisting regulation. Criminal justice reform is an intensely political undertaking, and prosecutors are a powerful force in the political arena. It would hardly be surprising if prosecutors as a group opposed policy changes that limited their authority and influence.

score, and in the case of certain serious crimes, may receive an extra point adjustment, but in the latter instance only if the prosecutor agrees. In 2017, about 60% of all sentenced federal defendants benefited from the prosecution-approved 3-level reduction. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS S-43, Table 18 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf.

143. U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 5K1.1 (Nov. 2018). In 2017, about 11% of all sentenced federal defendants received the prosecution-approved Substantial Assistance Departure. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, S-53 Table N (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf.

144. See PFAFF, *supra* note 5, at 127–60.

145. See Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 824, n.53 (2017).

146. See Bellin, *supra* note 73, at 837.

147. See PFAFF, *supra* note 5, at 203–32.

148. Note that although crime has dropped steadily over the last two decades, see *Crime in the United States 2016*, Table 1, *supra* note 50, for at least the last twelve years, a Gallup poll has revealed that about two out of three respondents believe that crime is getting worse from year to year. See Megan Brenan, *Americans’ Perceptions of Local Crime Slightly Improved*, GALLUP (Nov. 2, 2017), <https://news.gallup.com/poll/221222/americans-perceptions-local-crime-slightly-improved.aspx>.

Or perhaps prosecutors are not targeted by the reforms because the prosecutorial power has become so great that legislative and judicial powers are simply inadequate for the task—or at least, are inadequate without making major and systemic changes. Legal reforms that *compel* prosecutors to charge cases differently, that restrict the power to plea bargain, or that require prosecutors to seek lower or alternative sentences would inevitably require some mechanism for enforcement, one located in either the judicial or legislative branches.¹⁴⁹ And there is little evidence in the reform efforts to date that there is either the appetite or the will to enact the foundational changes that would make this feasible.¹⁵⁰

This dark picture of unchecked prosecutorial power is at least mildly exaggerated; there are in fact recent legal reforms that cabin a prosecutor's discretion to affect the prison population. Raising the dollar threshold for theft crimes, reducing sentences on drug crimes, and removing automatic sentence enhancements (for, say, crimes near a school), will ultimately lower some sentences because the same behavior will simply be punished less harshly.

But the impact of these reforms may be less than we would expect, because the prosecutors' discretion is sufficiently robust that they can often find work-arounds through the charging power and the plea bargain process if they are inclined to do so. This means that prosecutors can, *if they wish*, degrade efforts to reduce the size and use of prisons.

If the goal of sentencing reform is to identify those inmates who do not “need” to be behind bars, a greater amount of discretion—by judges, by parole officers, by prison officials—has to become part of the system. Many of the drivers of high incarceration rates are explicitly anti-discretion. Mandatory minimum laws, for example, allow no threshold distinctions between defendants; if you were carrying a gun during the drug trafficking crime, you must serve a minimum sentence regardless of any mitigating factors.¹⁵¹ Truth-in-sentencing laws cap the sentencing credit that all inmates convicted of certain crimes can earn, even if one inmate is getting drug treatment and a GED while behind bars, while another inmate is not.¹⁵² A “third strike” conviction automatically results in an extremely long sentence, even if some of the strikes were highly dangerous and others were less so.¹⁵³

149. As a structural matter, prosecutors could also be regulated by grand juries, which have “not been textually assigned . . . to any of the branches described in the first three Articles” of the Constitution, and thus are “a constitutional fixture in [their] own right.” *United States v. Williams*, 504 U.S. 36, 47 (1992) (internal citation omitted). But whatever oversight authority grand juries may have once exercised over prosecutors, few people today believe that the institution today imposes any meaningful restraint over prosecutorial decision making. *See, e.g.*, Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

150. This is not to say that there have not been thoughtful proposals to impose limits on prosecutorial powers or to change charging and plea-bargaining practices to reduce incarceration rates. *See, e.g.*, PFAFF, *supra* note 5, 203–32. *See generally* Josh Gupta Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WISC. L. REV. 669 (2018) (proposing changes in charging, detention, and sentencing practices for young adults as a way of reducing mass incarceration).

151. *See, e.g.*, 18 U.S.C. § 924(c) (2012).

152. *See, e.g.*, 730 ILL. COMP. STAT. 5/3-6-3 (2018) (Illinois Truth-in-Sentencing law).

153. *See, e.g.*, CAL. PENAL CODE § 667 (West 2018) (California three-strikes statute).

Restricting prison to those who truly are dangerous requires making distinctions, and acting on those distinctions requires discretion.

The problem is that the exercise of discretion often requires a fact-intensive inquiry, and the flow of facts is overwhelmingly controlled by the prosecutor. As a result, either through the charging power or through the factual allegations that are made relevant to the case, prosecutors will often have the ability to bargain around most changes in the law, and thus reach the same result as they would have prior to any reform.

Consider an example. In a pre-reform world Dan beats up a victim. After examining the facts, the prosecutor concludes that Dan should do some prison time, but not a lot. She initially charges Dan with aggravated assault, and in return for a guilty plea, she offers to lower the charge to simple assault with a sentence recommendation of one year in prison, which the prosecutor is confident that the judge will accept.¹⁵⁴

Then the law changes, encouraging judges to make greater use of probation, home confinement, or restitution as punishment for simple assault. The prosecutor has not changed her views; she still believes that incarceration is an appropriate sanction for Dan. So now she simply keeps the aggravated assault charge in place and offers a sentence recommendation of one year, which is now at the low end of the punishment scale for the aggravated form of the crime. Dan still takes the deal, because the risks at trial are greater than the discounted value of the plea deal. The court still follows the recommendation, because the prosecutor knows the case, and the court is not inclined to second guess her judgment. The prosecutor has still reached what she thinks is a just result, and for purposes of the prison population, the outcome is the same: a defendant who serves one year in prison.

Examples like this can be multiplied. Eliminating mandatory minimum sentences will have no effect if the prosecutor will now bargain in a way that results in a sentence that is the same (or higher) than the previously-required minimum. She could accomplish this by dismissing fewer charges than she previously would have, by seeking sentence-enhancements that she might have previously forgone, or by simply recalculating her sentencing recommendations to the court to ensure that people who were sent to prison for five years before the reform receive a comparable sentence afterward. As long as defendants believe that pleading guilty will lead to a shorter sentence than the discounted risk of going to trial, they will take the deal, and the prosecutors influence over the sentencing process strongly suggest that prosecutors will still be able to bring about this belief, despite the reform efforts.

These examples are stylized, and a prosecutor's ability to reach the same sentencing outcome regardless of reforms will not always be available. More broadly, prosecutors' views of the punishment that a particular crime "deserves" is

154. See, e.g., Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 MARQ. L. REV. 9, 14 (2007) (finding in a study of North Carolina plea bargaining that "88% of the assaults originally charged as Class C felonies moved to some less serious version of assault; the same was true for 75% of the original Class E assaults and 67% of the Class F assaults").

undoubtedly influenced by what the substantive law allows for punishment, and if the law changes, in time the prosecutor's anchor of the appropriate outcome is likely to shift as well.

Ultimately, the question of how reforms will affect prosecutors (and thus the incarceration rate), is an empirical one, with at least two parts: (1) how often does the law and the facts of the case give prosecutors the flexibility suggested in the examples above; and (2) how often would prosecutors change their bargaining behavior after reforms are implemented in ways that would maintain the number of people going to prison and for roughly the same length of time? The intuition here is that the answer to the first question is "frequently," and the answer to the second is "sometimes." But a data-driven answer remains to be discovered.¹⁵⁵

To be clear, this is not a claim that prosecutors as a group are at peace with the high incarceration rates, nor is it a claim that prosecutors collectively would (or have) set out to undermine reform efforts. Prosecutors are not only advocates but also ministers of justice, and there will be many who are troubled by the high incarceration rates and by the social and financial costs that prison imposes. But the point remains that prosecutorial changes in approach are still discretionary rather than mandatory, and that prosecutors can limit the effect of many reforms if they do not agree with the premises of reform.

"Prosecutors" are not monolithic and describing their actions and attitudes in group terms is risky. Nonetheless, there are institutional reasons to think that collectively, prosecutors may be less persuaded than others that the status quo in incarceration needs changing.

First, prosecutors (like everyone else) suffer from confirmation bias,¹⁵⁶ and, like most of us, believe that they do their job properly and honorably. So, the moral basis for sentencing reform—that it is "unnecessary" and therefore unjust to lock up this many people for this number of years—is likely less convincing to prosecutors, especially when they collectively have played such a large role in creating the current state of affairs. This same mindset is also true of judges, police, and prison officers, but none of these actors have the same wide-ranging decision-making power as prosecutors.

Second, and at the risk of stereotyping, prosecutors are probably more comfortable on average with the vigorous application of criminal laws and with long sentences. Chief prosecutors are elected and re-elected because of their success in convicting criminals and putting people in prison, not because they give a law-

155. Work is being done to fill the empirical gap. *See id.* But as Professors Wright and Engen have observed: "Scholars note in general that charge movement happens, but they do not document how often, or the size of those movements. We know little about when prosecutors shift the charges instead of engaging in other forms of bargaining, and we know little about what limits the movement of charges." *Id.* at 9.

156. Confirmation bias is the tendency to gather and evaluate information in a way that confirms existing views and disregards or minimizes conflicting information. *See* Jean R. Sternlight & Jennifer Robbenolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. DISP. RESOL. 437, 454 (2008).

breaker a third chance to stay out of prison, especially when that third chance went poorly and resulted in another crime, as some third chances inevitably do.

It is important not to make this point too broadly. Changes in statutes, whether it is the substantive criminal law or sentencing policies, can change prosecutor behavior, and can result in lower incarceration rates. But as long as prosecutors are on the outside of the reform efforts, and unless prosecutors collectively embrace both the need for and the methods of reform, change will be substantially harder come by, and even then, reform will largely be a matter of grace rather than of true change.

CONCLUSION

The most encouraging development in criminal justice over the last twenty years has been a more thoughtful, less reflexive approach to how we punish and how we view the role of prisons. A large number of states have taken significant steps to create a penal system that is more efficient, effective, and fair, and the declining incarceration rate over the last few years without a large increase in crime has been small but meaningful move.

Perhaps the most discouraging development has been the recognition that it is extraordinarily difficult to unwind the processes that have led to the high numbers and rates of inmates in the first place. In an odd way, we might wish that prisons were filled with more low-level offenders who posed no real threat, so that with a bit of effort and common sense, we could quickly reduce the number of people behind bars with little risk to the public. But that is not the current state of affairs; the incarceration numbers and rates have become so out of line with the rest of the world and with our own history that the problem defies an easy solution.

As James Forman, Jr. has correctly observed, “[m]ass incarceration wasn’t created overnight; its components were assembled piecemeal over a forty-year period.”¹⁵⁷ Unwinding the missteps and excesses is likely to take at least that long. But even assuming societal patience with the task, there is nothing inevitable about a long-term decrease in incarceration. Extremely hard choices have to be made—are we willing to release those who commit violent crimes earlier than we do now?—and the declining crime rates of the last twenty years that have made reform feasible are unlikely to last forever.

Perhaps most importantly, change will require a greater engagement by prosecutors. Formal restrictions on their critical role are not likely to materialize, which leaves persuasion and cooperation as the tools of engagement. Whether prosecutors collectively are ready and willing to take an active role in the process remains to be seen. If yes, there is reason to be hopeful that the prison system can become permanently smaller and more effective. If not, it seems very likely that the label of mass incarceration will continue to apply for many, many years to come.

157. FORMAN, *supra* note 16, at 208–09.