

ARTICLES

MITIGATING AMERICA'S MASS INCARCERATION CRISIS WITHOUT COMPROMISING COMMUNITY PROTECTION: EXPANDING THE ROLE OF REHABILITATION IN SENTENCING

by
*Professor Mirko Bagaric**
*Dr. Gabrielle Wolf***
*& William Rininger****

The United States is in the midst of an unprecedented mass incarceration crisis. Financially, this is no longer readily sustainable, even for the world's largest economy. Further, the human suffering that prison causes is no longer tolerable from the normative perspective. Nevertheless, lawmakers have failed to propose or adopt coherent or wide-ranging reforms to mitigate this crisis. The crisis has emerged over the past forty years largely as a result of the emphasis on community protection as the most important objective of sentencing and the fact that the primary means of pursuing community protection during this period has been incapacitation in the form of imprisonment. In this Article, we argue that policy makers and courts took a profoundly wrong turn by equating community protection almost solely with incapacitation. A more progressive and often effective means of protecting the community is by rehabilitating offenders. In theory, rehabilitation is a widely endorsed sentencing objective, so it should already influence many sentencing outcomes, but the reality is otherwise. Rehabilitation is rarely a dominant

* Director of the Evidence-Based Sentencing and Criminal Justice Project, Swinburne University, Melbourne.

** Senior Lecturer, Deakin University, Melbourne.

*** J.D., the University of Akron School of Law, 2017.

or even weighty consideration when courts sentence offenders. This is attributable, at least in part, to skepticism regarding the capacity of criminal sanctions to reform offenders. This approach is flawed. Empirical data establishes that many offenders can be rehabilitated. In this Article, we argue that sentencing courts should place greater weight on the objective of rehabilitation and that such a change would significantly ameliorate the incarceration crisis, while enhancing community safety. We make three key recommendations in order to implement our proposal. First, it is necessary to promulgate rehabilitation as a means of protecting the community. Second, we propose that the role of rehabilitation in sentencing should be expanded. In particular, and contrary to current orthodoxy, rehabilitation should have a meaningful role even in relation to very serious offenses. In indicating the role that rehabilitation has played in their decisions, courts should clearly articulate how they have adjusted penalties in light of assessments of offenders' potential for rehabilitation. Third, it is necessary to ensure that decisions by courts relating to the prospects of rehabilitation are made on the basis of more rigorous, empirically-grounded and transparent criteria. To this end, we examine the under-researched topic of the role that instruments that predict the likelihood of an offender's recidivism should play in guiding sentencing decisions. The solutions advanced in this Article will provide the catalyst for rehabilitation to assume a much larger role in sentencing and thereby significantly ameliorate the incarceration crisis.

INTRODUCTION 3

I. THE UNITED STATES' INCARCERATION CRISIS AND THE DESPERATE NEED FOR AN OVERARCHING SOLUTION 8

 A. *The Alarming Number of Incarcerated Americans*..... 8

 B. *The Massive Financial Burden of Mass Incarceration* 12

 C. *The Human Toll of Mass Incarceration is Intolerable*..... 13

 D. *The Crime Prevention Dividend of Mass Incarceration is Small*..... 15

 E. *The Current Interest in Finding Solutions to the Mass Incarceration Crisis* 16

II. THE CURRENT ROLE OF REHABILITATION IN SENTENCING LAW ... 23

III. CHANGING THE ROLE OF REHABILITATION IN SENTENCING LAW 33

 A. *An Overview of Empirical Data Relating to the Validity of the Sentencing Objectives of General Deterrence, Specific Deterrence, and Retribution*..... 33

 B. *Overview of Empirical Data Regarding Rehabilitation*..... 36

 C. *Rehabilitation Should Play a Greater Role in Sentencing, Even When Offenders Have Committed Very Serious Crimes* 42

IV. SENTENCING COURTS' DETERMINATION OF THE WEIGHT TO ATTACH TO THE OBJECTIVE OF REHABILITATION 43

- A. *Identifying the Best Candidates for Rehabilitation* 43
- B. *Means of Predicting Offenders’ Likelihood of Recidivism*..... 44
- C. *Appropriate Uses of Risk Assessment and Risk and Needs Assessment Tools in Sentencing*..... 49
 - 1. *Use of Risk Assessment and Risk and Needs Assessment Tools Should be Confined to Certain Cases* 49
 - 2. *The Tools Should be Used in a Facilitative, Rather than a Prescriptive Manner*..... 49
- D. *Countering Criticisms of Risk Assessment and Risk and Needs Assessment Tools* 50
 - 1. *Assessment Tools May Produce Inaccurate Results*..... 50
 - 2. *Offenders Who Do Not Exhibit the Generalized Traits on Which the Tools are Based May be Unduly Punished*..... 51
 - 3. *Possible Violation of the Proportionality Principle*..... 51
 - 4. *Risk Assessment Tools Allow Offenders’ Immutable Traits, Including Race, to Result in an Increase to the Penalty*..... 52
- E. *Courts Should Articulate the Weight that They Attach to Offenders’ Potential to be Rehabilitated* 57
- CONCLUSION 59

INTRODUCTION

The United States is in the midst of an incarceration crisis. The imprisonment rate is more than five times the average incarceration level of other developed countries,¹ and it has been observed that the total prison population in the United States is larger than the aggregate population of several American states. The New York Bar Association in its recent examination of mass incarceration in America observes that:

The American criminal justice system currently holds more than 2.2 million people in an estimated 1,719 state prisons . . . No matter how many times the statistics are repeated, they remain shocking: The United States has 4% of the world’s population and 21% of the world’s prisoners, nearly 40% of whom are African-American. If the prison population were a state, it would be the country’s 36th largest—bigger than Delaware, Vermont and Wyoming combined.²

Various factors have led to this crisis, including a “tough on crime” political agenda; the war on drugs; racism that underlies several aspects

¹ MELISSA S. KEARNEY ET AL., THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 10 (2014). Rates in the OECD range from 47 to 266 per 100,000 adults.

² TASKFORCE ON MASS INCARCERATION, N.Y. CITY BAR ASS’N, MASS INCARCERATION: WHERE DO WE GO FROM HERE? 1–2 (2017), http://documents.nycbar.org/files/mass_incarceration_where_do_we_go_from_here.pdf.

of the criminal justice system;³ and, most significantly, an emphasis on the objective of community protection above all other sentencing goals.⁴

Community protection is unquestionably an appropriate aim of criminal justice. Indeed, it is possible to argue persuasively that it should be the paramount objective of sentencing law and practice.⁵ However, the sentencing system has adopted a blinkered approach regarding how best to achieve this objective: courts have relied on incapacitation of offenders through imprisoning them as the principal means of protecting the community from offenders.

We argue that this approach is erroneous, that a more sophisticated and effective means of protecting the community from many offenders is to rehabilitate them, and that the rehabilitative ideal should therefore play a far more prominent role in sentencing than is currently the case. In this context, rehabilitation involves changing offenders' attitudes and mindsets to reduce their likelihood of reoffending.⁶ Traditionally, rehabilitation has been regarded as an offender-oriented sentencing objective, which is inconsistent with community-focused sentencing aims in the form of general deterrence,⁷ specific deterrence,⁸ and community protection. We aim to change this dialogue and understanding by recasting rehabilitation as an effective and important means of community protection.

The effectiveness of incapacitation alone to protect the community has been overstated. Offenders cannot commit offenses in the community during the period for which they are incarcerated, but of the approximately 95 percent of imprisoned offenders who are ultimately released back into free society,⁹ most reoffend.¹⁰ It has been noted that:

³ Mirko Bagaric et al., *Bringing Sentencing into the 21st Century: Closing the Gap Between Practice and Knowledge by Introducing Expertise into Sentencing Law*, 45 HOFSTRA L. REV. 785, 787 (2017).

⁴ See *infra* Part III.

⁵ See WILLIAM R. KELLY ET AL., FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 133, 139–40 (2017).

⁶ See *infra* Part III.

⁷ Under this theory, harsher penalties will discourage potential offenders, thereby leading to lower crime. See *infra* Part III.

⁸ Under this theory, individual offenders will be deterred from crime if they are subjected to harsh sanctions. See *infra* Part III.

⁹ See James Gilligan, *Punishment Fails. Rehabilitation Works*, N.Y. TIMES (Dec. 19, 2012), <http://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works>. The majority of the balance (5 percent) normally die while in prison. A small number are also executed. In fact, in 2016, there was the smallest number of executions (20) in the modern era (i.e., since 1976 when some states commenced re-enacting the death penalty). See DEATH PENALTY INFO CENTER, *THE DEATH PENALTY IN 2016: YEAR END REPORT 3* (2016), <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf>. There are three reasons that prisoners do not get released. The most common is that they are sentenced to

If any other institutions in America were as unsuccessful in achieving their ostensible purpose as our prisons are, we would shut them down tomorrow. Two-thirds of prisoners reoffend within three years of leaving prison, often with a more serious and violent offense. More than 90 percent of prisoners return to the community within a few years (otherwise our prisons would be even more overcrowded than they already are). That is why it is vitally important how we treat them while they are incarcerated.¹¹

Although prisons can, and in some cases do, provide rehabilitation programs for inmates, it appears that prison conditions exacerbate offenders' likelihood of reoffending.¹²

Aside from the near fanatical obsession with community protection over the past 40 years, the other reason why rehabilitation has been relegated to a subordinate sentencing objective is skepticism regarding the capacity of state-imposed sanctions to elicit positive attitudinal reform in offenders. It is understandable why this view has predominated. Several decades ago, the prevailing orthodoxy was that rehabilitative programs were ineffective.¹³ This is no longer the case, however. Recent empirical studies demonstrate that certain programs and treatments can

life imprisonment. There are, in fact, 160,000 inmates serving a life sentence and of these, approximately 49,000 have been sentenced to life without the possibility of parole. SENT'G PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>. Approximately 5,000 inmates die in state or local prisons and jails each year due to natural causes, illness or disease, suicide, or violence. See MARGARET NOONAN ET AL., U.S. DEP'T OF JUST., NCJ 248756, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000-2013 STATISTICAL TABLES 1 (2015), <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf>. The number of deaths in federal prisons (444 in 2014) is reported in MARGARET NOONAN, U.S. DEP'T OF JUST., NCJ 250150, MORTALITY IN STATE PRISONS, 2001-2014 STATISTICAL TABLE 1 (2016), <https://www.bjs.gov/content/pub/pdf/msp0114st.pdf>.

¹⁰ Nearly three-quarters of released prisoners reoffend and are arrested within five years of release and 60 percent of them are reconvicted. NATHAN JAMES, CONG. RESEARCH SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 6-7 (2015); see *infra* Part III.

¹¹ Gilligan, *supra* note 9.

¹² JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUST., HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 7 (2016).

¹³ Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974); NAT'L ACAD. OF SCI., DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 66 (Alfred Blumstein et al. eds., National Academy Press 1978). It is for this reason that one of us previously expressed reservations about the desirability of establishing rehabilitation as a key sentencing objective. See Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159, 167-68 (2012).

reform many offenders.¹⁴ One scholar has even gone so far as to declare, “[p]unishment fails. Rehabilitation works.”¹⁵

There is, nonetheless, a large gulf between knowledge and practice, for lawmakers have not incorporated new learning about rehabilitation into their decisions about sentencing reform. A key aim of this Article is to bridge this gap. In order to expand the role of rehabilitation in sentencing, this Article makes three key recommendations.

First, we argue that it is necessary to promulgate the benefits of increasing the role of the objective of rehabilitation in sentencing and, particularly, its capacity to be a critical means of protecting the community. In this Article, we aim to convince lawmakers and the public of the important role that rehabilitation should play in sentencing decisions. There are several main parts to this argument. We highlight the extent and impact of the current incarceration crisis; explain the prospects of success of rehabilitative measures; challenge the validity of assumptions that underpin present skepticism about the effectiveness of rehabilitation; and demonstrate that some of the other orthodox sentencing objectives that are relied upon in preference to rehabilitation are flawed.

As we show, there is a sympathetic audience for the reforms to the sentencing law and practice proposed in this Article. In the last few years, the problem of mass incarceration has become a prominent issue in political and community discussion, and there has been growing recognition that wide-ranging, effective reforms to sentencing law and practice must be undertaken to reduce the exorbitant expenditure on incarceration and the human suffering that prison causes. Significantly, surveys indicate that many Americans believe that rehabilitation is one of the most important objectives of sentencing,¹⁶ and that it is an attainable goal.¹⁷

Even former President Barack Obama emphasized the desperate need for change to the sentencing system. Not only did Obama refer to this issue in his 2015 State of the Union address,¹⁸ but he became the first

¹⁴ See *infra* Part III; KAREN HESELTINE ET AL., AUSTL. INST. CRIMINOLOGY, PRISON-BASED CORRECTIONAL OFFENDER REHABILITATION PROGRAMS: THE 2009 NATIONAL PICTURE IN AUSTRALIA 14 (2011), http://www.aic.gov.au/media_library/publications/rpp/112/rpp112.pdf.

¹⁵ Gilligan, *supra* note 9.

¹⁶ Michael M. O’Hear & Darren Wheelock, *Public Attitudes Toward Punishment, Rehabilitation, and Reform: Lessons from the Marquette Law School Poll*, 29 FED. SENT’G REP. 47, 48 (2016). See *infra* Part III for further discussion.

¹⁷ O’Hear & Wheelock, *supra* note 16.

¹⁸ Inimai M. Chettiar & Abigail Finkelman, *If You Blinked, You Missed When Obama Made Criminal Justice Reform History*, BRENNAN CTR. FOR JUST. (Jan. 13, 2016), <https://www.brennancenter.org/analysis/if-you-blinked-you-missed-when-obama-made-criminal-justice-reform-history>.

sitting United States President to visit a United States prison. After doing so in July 2015,¹⁹ he “called for lowering—if not ending—mandatory minimum sentences for nonviolent drug offenses, restoring the voting rights of ex-felons, revisiting hiring practices that require applicants to list criminal activity, and expanding job training programs so inmates are better prepared to reintegrate into society.”²⁰ Although public discussion about reducing incarceration numbers seems to have stalled following the election of President Donald Trump,²¹ this is probably attributable to preoccupation with the political changes that the new Administration is likely to make.²² In any event, the imperative to reduce incarceration numbers has not diminished.

Our second key recommendation is that rehabilitation should be explicitly designated as a component of the sentencing calculus. Courts would therefore be required, in determining penalty, to balance the potential for offenders, including those who have committed very serious offenses, to be rehabilitated against other sentencing considerations, and to specify the impact that rehabilitation has had on their sentencing decisions. We argue that rehabilitation should play this more significant role in sentencing in part because a number of orthodox sentencing objectives are flawed. General deterrence and specific deterrence, for instance, both incline in favor of harsher penalties and are therefore often regarded as being inconsistent with rehabilitation, but empirical data establishes that harsh criminal sanctions do not deter sentenced or prospective offenders by virtue of their severity.²³ General and specific deterrence should thus be disregarded as sentencing aims, thereby clearing the way for rehabilitation to play a more prominent role in sentencing outcomes.

The final recommendation of this Article is that, to ascertain the appropriate weight to attach to rehabilitation in sentencing decisions, courts should be required to use empirically-tested means of predicting an individual offender's likelihood of rehabilitation and recidivism. At

¹⁹ Sabrina Siddiqui, ‘An Injustice System’: Obama’s Prison Tour Latest in Late-Term Reform Agenda, THE GUARDIAN (July 16, 2015), <https://www.theguardian.com/us-news/2015/jul/16/barack-obama-prison-tour-criminal-justice-race-reform>.

²⁰ *Id.*

²¹ See *infra* Part I.

²² One commentator has suggested that the Trump Administration is unlikely to introduce measures which will reduce incarceration measures. Marc Mauer states: “Leading Republicans, such as House Speaker Paul Ryan, may be persuasive in making the conservative argument for reform. But President-elect Trump’s ‘tough on crime’ rhetoric, which paints many incarcerated people as ‘bad dudes,’ suggests progress at the federal level will be a challenge. Realistically, opportunities for justice reform are more likely at the state level.” Marc Mauer, *The Obama Legacy: Chipping Away at Mass Incarceration*, TALK POVERTY (Dec. 21, 2016), <https://talkpoverty.org/2016/12/21/obama-legacy-chipping-away-mass-incarceration>.

²³ See *infra* Part III.

present, an offender's prospects of rehabilitation are almost totally determined by a sentencing judge's impressions of them. We argue that this is unreliable and that greater rigor should be injected into this threshold determination. Specifically, we suggest that courts make greater use of "risk assessment" and "risk and needs assessment" tools, which evaluate the likelihood of offenders reoffending and the measures that could best reduce those individuals' risk of recidivism. While these tools are not foolproof, they are far more accurate than judges' raw intuition,²⁴ and courts' increased reliance on them will reduce skepticism about the efficacy of rehabilitative measures. In indicating the role that rehabilitation has played in their sentencing decisions, courts must be required to articulate the weight that they have attached to offenders' potential to be rehabilitated in response to the results of risk assessments and risk and needs assessments.

In the next Part of this Article, we explain the need for a solution to the current incarceration crisis and current receptiveness to wide-ranging reform of sentencing law and practice. In Part II, we provide an overview of the role of rehabilitation in sentencing law at present. Part III explains why that role should be expanded by comparing data relating to the potential for sentencing decisions to achieve rehabilitation and the other sentencing objectives. In this Part, we also outline our proposal for giving rehabilitation a central place in the sentencing calculus. In Part IV, we set out our proposal for how sentencing courts should determine the weight given to the objective of rehabilitation in individual cases. The conclusion summarizes our reform proposals.

I. THE UNITED STATES' INCARCERATION CRISIS AND THE DESPERATE NEED FOR AN OVERARCHING SOLUTION

A. *The Alarming Number of Incarcerated Americans*

To say that sentencing law in the United States is broken is a gross understatement. The most glaring manifestation of the normative and empirical wasteland that is sentencing law and practice in the United States is the unprecedented, extraordinarily high number of Americans who are imprisoned. The United States is in fact the world's biggest incarcerator: its incarceration rate is about five times the average of other OECD countries,²⁵ and ten times that of certain Scandinavian countries, including Sweden and Finland.²⁶

²⁴ See *infra* Part III.

²⁵ KEARNEY ET AL., *supra* note 1, at 9. Rates in the OECD range from 47 to 266 per 100,000 in adult populations.

²⁶ *Id.* John Pfaff and James Forman argue that the key reason for the increase in incarceration numbers is stricter prosecution practices, where felonies were charged at a higher rate and in larger numbers. See JAMES FORMAN JR., LOCKING UP OUR OWN:

The rate at which Americans are incarcerated has been steadily increasing over the past 40 years,²⁷ and has more than doubled over the past two decades.²⁸ In 2013, the number of American prisoners serving life sentences without the possibility of parole was 22 percent greater than in 2008.²⁹ At the end of 2014, more than 2.1 million Americans were incarcerated in local jails or prisons.³⁰ In 2017, the Sentencing Project reported that more offenders were serving life prison sentences than ever before: 13.9 percent of the entire prison population, comprising 161,957 prisoners serving life terms and 44,311 offenders serving virtual life sentences of 50 years or longer.³¹ According to that report, “the United States incarcerates people for life at a rate of 50 per 100,000, roughly equivalent to the entire incarceration rates of . . . Denmark, Finland, and Sweden.”³² Especially concerning is that over two-thirds of offenders who were serving life prison terms in the federal jurisdiction have not committed violent offenses.³³

Although there have been some decreases in prison numbers—in 2011 and 2012, there was a diminution of approximately 3 percent,³⁴ and slight declines in 2014³⁵ and 2015³⁶ following an increase in 2013³⁷—those

CRIME AND PUNISHMENT IN BLACK AMERICA 133 (2017); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 69–70, 133 (2017).

²⁷ In fact, during this period it has quadrupled. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 1 (Jeremy Travis et al. eds., 2014).

²⁸ Albert R. Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), <http://www.nytimes.com/2011/11/21/us/21iht-letter21.html>.

²⁹ SENT'G PROJECT, *LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA* 13 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

³⁰ DANIELLE KAEBLE ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *NCJ 249513, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014*, at 2 (2016).

³¹ SENT'G PROJECT, *STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES* 5 (2017) [hereinafter *Still Life*].

³² *Id.*

³³ *Id.* at 13.

³⁴ *Id.*

³⁵ In 2014, there was a slight decrease in federal and state prison numbers but this was partially offset by an increase in local jail numbers. See Matthew Friedman, *Just Facts: The U.S. Prison Population Is Down (A Little)*, BRENNAN CTR. FOR JUST. (Oct. 29, 2015), <http://www.brennancenter.org/blog/us-prison-population-down-little>. State and federal prison numbers decreased by 15,400 people from December 31, 2013 to December 31, 2014. *Id.* However, county and city jail numbers increased by 13,384 inmates from mid-year 2013 to mid-year 2014. *Id.* While these time periods are not aligned, they are indicative of a larger trend. The increasing jail numbers are eclipsing the progress made by decreasing prison numbers.

³⁶ The number of prisoners dropped by 51,300 inmates to 2,136,600 (i.e., a drop of about 2.5 percent). DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T OF JUST.,

reductions are marginal, and only a far-reaching, principled solution could drive down the number of prison inmates substantially. David Denvir calculates that, at the current rate at which the number of Americans who are imprisoned is declining, it would take over 30 years for America's prison population to return to its former size before the shift towards mass incarceration:

Mass incarceration, in short, remains a durable monstrosity. As of 2015, an estimated 2,173,800 Americans were behind bars—1,526,800 in prison and 728,200 in jails—according to recently released data from the Bureau of Justice Statistics. That's 16,400 fewer people in jail and 35,500 fewer prisoners than in 2014 But even as the US becomes a much safer country, it still incarcerates its citizens at much higher rates than most any other on earth. . . . At the dawn of mass incarceration in 1980, the US's already-quite-large prison population was estimated at 329,821. To return to that number, the governments would have to replicate the recent 35,500-prisoner reduction for roughly thirty-four years in a row. That's a very long time to wait for the poor communities—particularly but not exclusively brown and black ones—that mass incarceration devastates.³⁸

Previous changes to sentencing law, and particularly reforms that restricted judicial discretion regarding sanctions and required courts to impose increasingly harsh penalties, have been a major cause of the mass incarceration crisis.

As Mark Fondacaro observed, “mass incarceration in America has been fueled by an increased likelihood that an individual will: A) be sent to prison, and B) be assigned to stay for a longer period of time, as prisons have risen as the predominant means of social control.”³⁹ Berry explains how the introduction of mandatory guidelines for courts led to this circumstance:

Prior to 1984, federal judges possessed discretion that was virtually “unfettered” in determining sentences, guided only by broad sentence ranges provided by federal criminal statutes. The Sentencing Reform Act of 1984 . . . moved the sentencing regime

BUREAU OF JUST. STATS., NCJ 250374, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 (2016).

³⁷ There was an increase of 4,300 prisoners in 2013, compared with 2012. While the federal prison population decreased for the first time since 1980, it was more than offset by an increase in the state prison population (the first increase since 2009). E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ247282, PRISONERS IN 2013, at 1 (2014).

³⁸ Daniel Denvir, *America's Durable Monstrosity*, JACOBIN (Jan. 9, 2017), <https://www.jacobinmag.com/2017/01/mass-incarceration-prison-bureau-justice-statistics/>.

³⁹ Mark R. Fondacaro et al., *The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles*, 41 OHIO N.U. L. REV. 697, 707 (2015).

almost completely to the other extreme, implementing a system of mandatory guidelines that severely limited the discretion of the sentencing judge.⁴⁰

Those guidelines, which remain in force to different extents in all United States' jurisdictions,⁴¹ prescribed fixed or presumptive penalties,⁴² with individual penalties calculated according to offenders' criminal history scores⁴³ and the seriousness of their crimes. As Michael Tonry notes, the impact of prescribed penalties has been obvious:

Anyone who works in or has observed the American criminal justice system over time can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), LWOP [life without parole] laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe "career criminal," "dangerous offender," and "sexual predator" laws. These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.⁴⁴

Federal District Judge Mark Bennett confirms the excessively punitive nature of the Federal sentencing laws, describing 80 percent of the mandatory sentences that he imposes as unjust because they are too harsh.⁴⁵ This sentiment is supported by recent data from the United States Sentencing Commission that indicates that in the fiscal year 2016, the average length of a prison term for federal offenders convicted of a crime that carried a mandatory minimum penalty was 110 months, which

⁴⁰ William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After Booker and its Progeny*, 40 CONN. L. REV. 631, 633 (2008).

⁴¹ They are also one of the key distinguishing aspects of the United States' sentencing system compared to that of Australia's (and most other sentencing systems in the world). Connie de la Vega et al., *Cruel and Unusual: U.S. Sentencing Practices in a Global Context*, U.S.F. SCH. OF L. CTR. FOR L. & GLOBAL JUST. 35 (2012) (noting that 137 of 168 surveyed countries had some form of minimum penalties but none was as wide-ranging or severe as in the United States); see also Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 514 (2014).

⁴² For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article.

⁴³ See NAT'L RES. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 325 (Jeremy Travis et al. eds., 2014).

⁴⁴ See Tonry, *supra* note 41, at 514 (citations omitted). For a list of jurisdictions in the United States which use guideline sentencing, see ROBINA INST., *SENTENCING GUIDELINES RESOURCE CTR.*, U. MINN., <http://sentencing.umn.edu/>.

⁴⁵ Mallory Simon & Sara Sidner, *The Judge Who Says He's Part of the Gravest Injustice in America*, CNN POL. (June 3, 2017), <http://.cnn.com/2017/06/02/politics/mandatory-minimum-sentencing-sessions/index.html>.

was nearly four times more (28 months) than the average prison term for offenders who committed an offense that did not have a mandatory minimum.⁴⁶

There are three key reasons why the United States urgently needs to reduce its extreme rate of incarceration: (i) the exorbitant fiscal cost of incarceration; (ii) the toll that incarceration exacts on offenders and their families; and (iii) empirical evidence that establishes that mass incarceration does not meaningfully reduce the crime rate. We now consider these considerations in more detail, demonstrating that mass incarceration inflicts a considerable burden on society without achieving any significant benefits.

B. The Massive Financial Burden of Mass Incarceration

The costs of incarceration in the United States are, by any measure, shocking. The Prison Policy Initiative calculates that \$182 billion is spent annually purely on imprisoning offenders.⁴⁷ This figure does not include the social costs associated with incarceration, which a recent study by the Marshall Project found to be extremely high: for every dollar spent on corrections, ten dollars in incidental social costs is incurred.⁴⁸ The total financial cost of incarceration is therefore closer to one trillion dollars, which equates to nearly 6 percent of America's Gross Domestic Product.⁴⁹ The money relied upon to finance incarceration is drawn from government funds that must be spread across all social services,⁵⁰ with the consequence that there is increasingly less money available for services such as higher education, which currently receive significantly less from

⁴⁶ U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2017); see also *A Matter of Time: The Causes and Consequences of Rising Time Served in America's Prisons*, URB. INST. (2017), <http://apps.urban.org/features/long-prison-terms/intro.html> (“[I]n nearly half the states we looked at, the average time served by this group has risen by more than 5 years since 2000.”).

⁴⁷ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

⁴⁸ Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* 2 (Wash. Univ. St. Louis Inst. for Advancing Just. Res. and Innovation, Working Paper No. AJ107216, 2016).

⁴⁹ *Id.*

⁵⁰ For an analysis of why mass incarceration is flawed from a financial perspective, see Jason Furman & Douglas Holtz-Eakin, *Why Mass Incarceration Doesn't Pay*, N.Y. TIMES (Apr. 21, 2016), http://www.nytimes.com/2016/04/21/opinion/why-mass-incarceration-doesnt-pay.html?_r=0.

that pool than incarceration in several American states.⁵¹ The National Research Council observes:

Budgetary allocations for corrections have outpaced budget increases for nearly all other key government services (often by wide margins), including education, transportation, and public assistance. Today, state spending on corrections is the third highest category of general fund expenditures in most states, ranked behind Medicaid and education. Corrections budgets have skyrocketed at a time when spending for other key social services and government programs has slowed or contracted.⁵²

Notably, President Obama recently opined that the United States' current expenditure on incarceration is unsustainable: "we simply cannot afford to spend \$80 billion annually on incarceration"⁵³

C. *The Human Toll of Mass Incarceration is Intolerable*

In addition to the burgeoning and increasingly unsustainable cost of conventional imprisonment, this means of dealing with offenders inflicts gratuitous and profound suffering on them and their families. Imprisonment causes hardships—indeed considerable human rights violations⁵⁴—that are frequently more severe than the crimes that

⁵¹ See Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 30, 2012), <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>. Reduced investment in education is also occurring at the more junior education level:

In recent years . . . states have cut education funding, in some cases by large amounts. At least 30 states are providing less general funding per student this year for K-12 schools than in state fiscal year 2008, before the Great Recession hit, after adjusting for inflation. In 14 states, the reduction exceeds 10 percent. The three states with the deepest funding cuts since the recession hit—Alabama, Arizona, and Oklahoma—are among the ten states with the highest incarceration rates.

Michael Mitchell & Michael Leachman, *Changing Priorities: State Criminal Justice Reforms and Investments in Education*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 28, 2014), <http://www.cbpp.org/research/changing-priorities-state-criminal-justice-reforms-and-investments-in-education?fa=view&id=4220>; see also Beatrice Gitau, *The Hidden Costs of Funding Prisons Instead of Schools*, CHRISTIAN SCI. MONITOR, (Oct. 3, 2015), <http://www.csmonitor.com/USA/Justice/2015/1003/The-hidden-costs-of-funding-prisons-instead-of-schools> (noting that eleven states spend more on prisons than universities: Michigan, Oregon, Arizona, Vermont, Colorado, Pennsylvania, New Hampshire, Delaware, Rhode Island, Massachusetts, and Connecticut).

⁵² NAT'L RESEARCH COUNCIL, *supra* note 27, at 314; see also KEARNEY ET AL., *supra* note 1, at 13.

⁵³ Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 815 (2017).

⁵⁴ Mirko Bagaric et al., *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663, 1694 (2017); Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in*

incarcerated offenders have committed. Heightening the injustice of this predicament is that racial minorities, and particularly African American⁵⁵ and Latino communities,⁵⁶ as well as white people from social and economically-deprived backgrounds,⁵⁷ are disproportionately over-represented amongst the prison population. For instance, 48 percent of offenders serving life prison terms are African American.⁵⁸

Deprivation of offenders' liberty is more than sufficient punishment for the commission of crimes. Yet "the harshness and inhumanity" of America's prisons, as Adam Gopnik describes it,⁵⁹ inflict further, unnecessary suffering by also depriving inmates of access to goods and services⁶⁰ and sexual relationships;⁶¹ restricting their ability to pursue family relationships and reproduce;⁶² and exposing them to a greater risk of sexual and physical victimization than free Americans⁶³ (over 70,000 prisoners are raped in America annually).⁶⁴ Further, as a consequence of having been imprisoned, former inmates may experience a reduction in their life expectancy,⁶⁵ ongoing problems in obtaining employment, and

Sentencing, 33 LAW & INEQ. 1, 40 (2015) [hereinafter Bagaric, *Rich Offender, Poor Offender*].

⁵⁵ Bagaric, *Rich Offender, Poor Offender*, *supra* note 54, at 46; *see also* Mirko Bagaric, *Three Things That a Baseline Study Shows Don't Cause Indigenous Over-Imprisonment; Three Things That Might But Shouldn't and Three Reforms That Will Reduce Indigenous Over-Imprisonment*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 103, 107 (2016) [hereinafter Bagaric, *Three Things*]. However, it should be noted that in recent years there has been a slight reduction in the extent to which African Americans are imprisoned compared to the rest of the community, but nevertheless, their over-imprisonment rate is more than 5:1. *See* Keith Humphreys, *Black Incarceration Hasn't Been this Low in a Generation*, WASH. POST (Aug. 16, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/08/16/black-incarceration-hasnt-been-this-low-in-a-generation/>.

⁵⁶ Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014).

⁵⁷ Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

⁵⁸ *Still Life*, *supra* note 31, at 5.

⁵⁹ Gopnik, *supra* note 51.

⁶⁰ GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 67–68 (2007).

⁶¹ *Id.* at 70; *see also* Robert Johnson & Hans Toch, *Introduction*, in *THE PAINS OF IMPRISONMENT* 17 (Robert Johnson & Hans Toch eds., 1982).

⁶² Mirko Bagaric et al., *A Principled Strategy for Addressing the Incarceration Crisis: Redefining Excessive Imprisonment as a Human Rights Abuse*, 38 CARDOZO L. REV. 1663, 1697, 1699 (2017).

⁶³ *Id.* at 1667.

⁶⁴ *US: Federal Statistics Show Widespread Prison Rape*, HUMAN RIGHTS WATCH (Dec. 15, 2007), <https://www.hrw.org/print/232148>.

⁶⁵ A study that examined the 15.5-year survival rate of 23,510 ex-prisoners in the U.S. State of Georgia found much higher mortality rates for ex-prisoners than for the rest of the population. There were 2,650 deaths in total, which was a 43 percent

reduced earnings compared with people who have never been imprisoned.⁶⁶

Steven L. Chanenson observes that it is accepted that “society has a right and an obligation to protect itself, but it needs to do so while considering both the short- and the long-term consequences for all involved.”⁶⁷ Even though prison is not intended to punish inmates’ families, they may experience financial, social, and health problems due to their relative’s incarceration,⁶⁸ which the sentencing system at present fails to take into account. Spouses of offenders are more likely to divorce their partners than spouses of free people,⁶⁹ and mass incarceration has had a particularly devastating impact on the over five million American children who have at least one parent who has been imprisoned.⁷⁰ A report by David Murphey and P. Mae Cooper found that those children typically suffered from difficulties that afflicted other children to a far lesser extent, including a greater number of traumatic life events, emotional problems, and difficulties at school, as well as less engagement with school and less oversight from parents.⁷¹ Fondacaro have similarly found that “parental incarceration is more specifically associated with an increase in child aggression, problem behavior, delinquency, arrests, and limited educational attainment.”⁷²

D. *The Crime Prevention Dividend of Mass Incarceration is Small*

Given the heavy financial burden of mass incarceration and the significant amount of suffering that it inflicts on offenders and their families, only an immense countervailing advantage could justify it, but no such benefit is evident. While it might reasonably be expected that a massive increase in the number of people who are incarcerated would

higher mortality rate than normally expected (799 more ex-prisoners died than expected). The main causes for the increased mortality rates were: homicide, transportation accidents, accidental poisoning (which included drug overdoses), and suicide. See Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 482 (2011); see also NAT’L RESEARCH COUNCIL, *supra* note 27, at 220–26.

⁶⁶ NAT’L RESEARCH COUNCIL, *supra* note 27, at 247. One study estimated the earnings reduction to be as high as 40 percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 13 (2010).

⁶⁷ Steven L. Chanenson, Op-Ed., *Society Must Not Forget Those It Incarcerates*, PHILA. INQUIRER (Dec. 26, 2016), http://www.philly.com/philly/news/pennsylvania/20161226_Commentary__Society_must_not_forget_those_it_incarcerates.html.

⁶⁸ NAT’L RESEARCH COUNCIL, *supra* note 27, at 270.

⁶⁹ *Id.* at 277.

⁷⁰ David Murphey & P. Mae Cooper, *Parents Behind Bars: What Happens to Their Children?*, CHILD TRENDS 1 (Oct. 2015), <https://childtrends-ciw49tixgw5lbbab.stackpathdns.com/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf>.

⁷¹ *Id.* at 2.

⁷² Fondacaro et al., *supra* note 39, at 711.

significantly reduce the crime rate, this potential justification for a high rate of imprisonment is unsubstantiated. In fact, many studies have demonstrated that mass incarceration has not meaningfully enhanced community safety. A recent Brennan Center report notes that “[r]igorous social science research based on decades of data shows that increased incarceration played an extremely limited role in the crime decline.”⁷³ The report continues:

Recent reforms enacted by states show that mass incarceration and crime are not inextricably linked. Over the last decade, 27 states have reduced both imprisonment and crime together. From 1999 to 2012, New Jersey and New York reduced their prison populations by about 30 percent, while crime fell faster than it did nationally. Texas decreased imprisonment and crime by more than 20 percent during the same period. California, in part because of a court order, cut its prison population by 27 percent, and violence in the state also fell more than the national average.⁷⁴

Although the overall rate of violent crime in the United States has increased slightly, the growth in offenses has been concentrated in specific locations (especially Chicago) and does not seem to be related to the rate of incarceration.⁷⁵ Moreover, despite the slight increase in crime rate, the reality remains that “Americans are safer today than they have been at almost any time in the past 25 years.”⁷⁶

E. The Current Interest in Finding Solutions to the Mass Incarceration Crisis

The problems associated with the mass incarceration crisis, discussed above, have prompted a growing awareness amongst politicians and the community generally of the need for workable solutions. Some politicians have been especially vocal in proposing reductions to the rate of incarceration and the length of prison terms. Former United States Attorney General Eric Holder observed in 2013, while he was still in office, “too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason. It’s clear, at a basic level, that

⁷³ AUSTIN ET AL., *supra* note 12, at 18–19. For further information, see the studies summarized in Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 367 (2014).

⁷⁴ AUSTIN ET AL., *supra* note 12, at 5; *see also* Matt Thompson, *Imagining the Presence of Justice*, ATLANTIC (May 3, 2017), <https://www.theatlantic.com/national/archive/2017/05/criminal-justice-across-america-reporting-project/524985>. For a discussion of recent prison reforms in California, Texas, and Louisiana, *see infra* Part I.E.

⁷⁵ *See* Ames Grawert & James Cullen, *Crime in 2016: Final Year-End Data*, BRENNAN CTR. FOR JUST. (2017), https://www.scribd.com/document/350458878/Crime-in-2016-Final-Year-End-Data#from_embed.

⁷⁶ *Id.*

20th-century criminal justice solutions are not adequate to overcome our 21st-century challenges.”⁷⁷ Since that time, Holder has reinforced both the need to reduce the rate of incarceration and the fact that doing so will not jeopardize community safety.⁷⁸ Former Deputy Attorney General Sally Quillian Yates in 2015 highlighted the increasing appetite for changes to the sentencing system in both major political parties:

These days, there's a lot of talk about criminal justice reform. We are at a unique moment in our history, where a bipartisan consensus is emerging around the critical need to improve our current system. About a month ago, a coalition of Republican and Democratic senators unveiled a bill—called the sentencing reform and corrections act—to address proportionality in sentencing, particularly for lower level, non-violent drug offenders. In short, we need to make sure that the punishment fits the crime.⁷⁹

Recent surveys have indicated that there is considerable community support for these views. Seventy-one percent of American respondents to a 2013 poll and 77 percent of respondents to a 2014 poll endorsed the notion of abolishing mandatory minimum sentences for non-violent drug offenses.⁸⁰ Significantly, California voters in 2014 approved “California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014),”⁸¹

⁷⁷ Attorney General Eric Holder Delivers Remarks at Annual Meeting of the American Bar Association's House of Delegates, U.S. DEP'T OF JUSTICE (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

⁷⁸ Eric H. Holder Jr., *Eric Holder: We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016), <http://www.nytimes.com/2016/08/14/opinion/sunday/eric-h-holder-mandatory-minimum-sentences-full-of-errors.html>.

⁷⁹ Deputy Attorney Gen. Sally Quillian Yates Delivers Remarks on Criminal Justice Reform at Columbia Law School, U.S. DEP'T OF JUSTICE (Oct. 29, 2015), <http://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-criminal-justice-reform>; see also Ken Cuccinelli, *Criminal Justice Reform: Conservative States Have a Record of Success. So Why Ignore It?*, FOX NEWS (Nov. 5, 2015), <http://www.foxnews.com/opinion/2015/11/05/critics-federal-criminal-justice-reform-ignore-decade-long-success-in-conservative-states.html>.

⁸⁰ REASON-RUPE, PUBLIC OPINION SURVEY, OCTOBER 2014 TOPLINE RESULTS 4 (Oct. 9, 2014), <http://reason.com/assets/db/14128084586864.pdf>.

⁸¹ This law brings about the following key changes: it “[r]equires misdemeanor sentence instead of felony for certain drug possession offenses” and “for the following crimes when amount involved is \$950 or less: petty theft, receiving stolen property, and forging/writing bad checks”; it “[a]llows felony sentence for these offenses if person has previous conviction for crimes such as rape, murder, or child molestation or is registered sex offender”; and it “[r]equires resentencing for persons serving felony sentences for these offenses unless court finds unreasonable public safety risk.” *CA Proposition 47: Criminal Sentences. Misdemeanor Penalties. Initiative Statute.*, CAL. OFFICIAL VOTER INFORMATION GUIDE 1 (2014), <http://vig.cdn.sos.ca.gov/2014/general/pdf/proposition-47-title-summary-analysis.pdf>.

which relaxed California's mandatory penalty regime by reducing some non-violent offenses from felonies to misdemeanors.⁸²

A 2015 press release by the Law Enforcement Leaders to Reduce Crime and Incarceration, an alliance of 130 police officials, prosecutors and attorneys-general from across America, recognized that lowering the incarceration rate can diminish the number of crimes committed. It quoted its Co-Chair, Garry McCarthy, Superintendent of the Chicago Police Department:

As the public servants working every day to keep our citizens safe, we can say from experience that we can bring down both incarceration and crime together Good crime control policy does not involve arresting and imprisoning masses of people. It involves arresting and imprisoning the right people. Arresting and imprisoning low-level offenders prevents us from focusing resources on violent crime. While some may find it counterintuitive, we know that we can reduce crime and reduce unnecessary arrests and incarceration at the same time.⁸³

The approach President Trump will take towards crime and sentencing is unclear. He has indicated his support for "tough on crime" policies,⁸⁴ and Attorney General Jeff Sessions recently issued a memorandum requiring federal prosecutors to "charge and pursue the most serious, readily provable offense,"⁸⁵ which indicates a move towards more punitive sentences.⁸⁶ Yates stridently criticized this approach, stating:

⁸² The law was passed with a majority of 59 percent of voters in favor. Kristina Davis, *Calif Cuts Penalties for Small Drug Crimes*, SAN DIEGO UNION-TRIB. (Nov. 4, 2014), <http://www.sandiegouniontribune.com/news/2014/nov/04/prop-47-misdemeanor-law-vote-election-drug>; see also *San Francisco Called a Model for Ending Mass Incarceration*, CRIME REP. (Dec. 1, 2015), <http://www.thecrimereport.org/news/articles/2015-12-san-francisco-called-a-model-for-ending-mass-incarce>. For an overview of the impact of the reform, see Rob Kuznia, *An Unprecedented Experiment in Mass Forgiveness*, WASH. POST (Feb. 8, 2016), https://www.washingtonpost.com/national/an-unprecedented-experiment-in-mass-forgiveness/2016/02/08/45899f9c-a059-11e5-a3c5-c77f2cc5a43c_story.html.

⁸³ Douglas A. Berman, *Notable New Group Advocating For Sentencing Reforms: Law Enforcement Leaders to Reduce Crime and Incarceration*, SENT'G L. & POL'Y (Oct. 21, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/notable-new-group-advocating-for-sentencing-reforms-law-enforcement-leaders-to-reduce-crime-and-inca.html.

⁸⁴ Jenna Goff & Joan Greve, *Trump vs. Clinton: Criminal Justice Reform*, PBS (Sept. 19, 2016), <http://www.pbs.org/weta/washingtonweek/blog-post/trump-vs-clinton-criminal-justice-reform>; Michelle Mark, *Here's What Hillary Clinton and Donald Trump Think About Criminal Justice*, BUS. INSIDER AUSTR. (Sept. 27, 2016), <http://www.businessinsider.com.au/trump-and-clinton-on-issues-mass-incarceration-and-criminal-justice-2016-9>.

⁸⁵ Memorandum from the Office of the Attorney Gen., on Department Charging and Sentencing Policy 1 (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>. The impact of this in terms of increasing incarceration

While there is always room to debate the most effective approach to criminal justice, that debate should be based on facts, not fear. It's time to move past the campaign-style rhetoric of being "tough" or "soft" on crime. Justice and the safety of our communities depend on it.⁸⁷

Some Republicans have, however, also appreciated that the "tough on crime" agenda is unpopular and have recommended softening sentencing laws,⁸⁸ and reducing the number of prisoners.⁸⁹ Holly Harris and Andrew Howard observed:

First and foremost, it is conservatives in big red states like Texas, Georgia, and South Carolina who have led the way on justice reform issues for a decade. These efforts yielded great success in safely reducing the prison population, saving significant taxpayer resources, and most importantly lowering crime and recidivism rates . . . Surveys in states that will have hotly-contested Senate races such as Florida, Illinois, North Carolina, Nevada, and Speaker Ryan's home state of Wisconsin show support for reform issues ranging from the 60s to high 80s. The smart political play is to embrace these reforms. Doing otherwise could backfire. Just ask Alaska's then-incumbent Senator Mark Begich. In the state's 2014 U.S. Senate race, Begich attacked his Republican opponent, Dan Sullivan, alleging he was soft on crime. Sullivan emerged victorious

numbers in one jurisdiction is discussed in Aaron Cantú, *Two Steps Back: How Jeff Sessions' Memo on Federal Prosecutions Could Take New Mexico Back to a Harsher Era*, SANTA FE REP. (May. 17, 2017), <http://www.sfreporter.com/santafe/article-13419-two-steps-back.html>.

⁸⁶ He has set out the justification for his policies in Jeff Sessions, *Jeff Sessions: Being Soft on Sentencing Means More Violent Crime. It's Time to Get Tough Again*, WASH. POST (June 16, 2017), https://www.washingtonpost.com/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b_story.html?utm_term=.e2ae43686f42.

⁸⁷ Sally Q. Yates, *Making America Scared Again Won't Make Us Safe*, WASH. POST (June 23, 2017), https://www.washingtonpost.com/opinions/making-america-scared-again-wont-make-us-safer/2017/06/23/f53d238e-578a-11e7-ba90-f5875b7d1876_story.html?utm_term=.74b7db841718; see also Jacob Sullum, *Jeff Sessions Wants More Mandatory Minimums, Less Justice*, REASON.COM (July 12, 2017), <http://reason.com/blog/2017/07/12/sessions-wants-more-mandatory-minimums-l>.

⁸⁸ Evan Halper, *Clinton's Call for Easing Harsh Sentencing Laws is Echoed by Republican Rivals*, L.A. TIMES (Apr. 29, 2015), <http://www.latimes.com/nation/politics/la-pn-clinton-prison-reform-20150429-story.html>.

⁸⁹ Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), <http://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html>.

over Begich and is currently serving as the junior senator from Alaska.⁹⁰

In a recent poll of supporters of President Trump, 63 percent of respondents agreed that judges should have more capacity to impose sanctions other than imprisonment.⁹¹

President Trump recently established a Task Force on Crime Reduction and Public Safety⁹² to develop strategies to reduce crime. Although the Task Force appears to be focused on continuing to implement the “tough on crime” agenda, it may be receptive to recommendations for empirically-sound, alternative approaches. Objectives of the Task Force include identifying “deficiencies in existing laws that have made them less effective in reducing crime and propos[ing] new legislation that could be enacted to improve public safety and reduce crime.”⁹³

Even if the Trump administration does not implement measures to reduce incarceration numbers,⁹⁴ there is still a considerable prospect that wide-ranging changes will be made. Some reforms to the sentencing system have in fact already been implemented (especially at the state level) with the intention of lowering the rate of incarceration. Certain prison terms have been shortened, especially for property and drug offenses.⁹⁵ In addition to California Proposition 47, also in 2014, the United States Sentencing Commission voted to reduce the sentencing guideline level for most federal drug-trafficking offenses.⁹⁶ Further, in 2014 and 2015, 46 American states passed legislation that was aimed at “creating or expanding opportunities to divert people away from the criminal justice system; reducing prison populations by enacting sentencing reform, expanding opportunities for early release from

⁹⁰ Holly Harris & Andrew Howard, *Ryan's Victory Trumps Justice Reform Opponents*, THE HILL (Aug. 15, 2016), <http://thehill.com/blogs/pundits-blog/crime/291500-ryans-victory-trumps-justice-reform-opponents>.

⁹¹ Vikrant P. Reddy, *The Conservative Base Wants Criminal Justice Reform: President Trump Supporters Demand Fresh Thinking on Crime and Punishment*, NAT'L REV. (May 8, 2017), <http://www.nationalreview.com/article/447398/criminal-justice-reform-donald-trump-supporters-conservative-base-want-fresh>.

⁹² Task Force on Crime Reduction and Public Safety, 82 Fed. Reg. 10,699 (Feb. 9, 2017).

⁹³ *Id.*

⁹⁴ For an overview of the Trump Administration's activities in this area in his first 100 days, see Ames Grawert & James Cullen, *Crime in 2016: Final Year-End Data*, BRENNAN CTR. FOR JUST. (2017), https://www.scribd.com/document/350458878/Crime-in-2016-Final-Year-End-Data#from_embed.

⁹⁵ News Release, U.S. Sentencing Comm'n, *U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences*, (Apr. 10, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf.

⁹⁶ *Id.*

prison, and reducing the number of people admitted to prison for violating the terms of their community supervision.⁹⁷

Texas has been especially proactive in attempting to reduce prison numbers. In 2017, it will close four prisons.⁹⁸ Never before have so many prisons been closed in a single year in Texas.⁹⁹ The closures have been made possible by a number of measures including investment in diversion programs for offenders and initiatives to assist those suffering from mental illness, and a reduction in penalties for some property offenders. Since 2011, the imprisonment rate in Texas has dropped by 10,000 prisoners, and 146,000 prisoners are currently incarcerated in that state.¹⁰⁰ Even Louisiana, which has the highest imprisonment rate in the United States, is now in the process of introducing a range of measures to reduce incarceration levels, which that state now realizes are unsustainable. The measures include penalty reductions for non-violent offenders and an enhanced focus on prisoner rehabilitation and drug counseling.¹⁰¹

⁹⁷ REBECCA SILBER ET AL., JUSTICE IN REVIEW: NEW TRENDS IN STATE SENTENCING AND CORRECTIONS 2014–2015, VERA INST. JUSTICE 3 (May 2016). Wide-ranging reforms are occurring in Ohio and Michigan. See U.S. JUSTICE ACTION NETWORK, REFORMING THE NATION'S CRIMINAL JUSTICE SYSTEM: THE IMPACT OF 2015 AND PROSPECTS FOR 2016, at 9 (Dec. 2015). Texas, like Ohio and Michigan, is engaging in wide-ranging criminal justice reforms. See Adam Brandon et al., *Congress Should Follow the Red States' Lead on Criminal-Justice Reform*, NAT'L REV. (May 2, 2016), <http://www.nationalreview.com/article/434783/criminal-justice-reform-conservatives-have-led-way>. For a summary of recent changes in some states to lower penalties for property, drunk driving, and other low-level offenders see Sarah Breitenbach, *Prisons, Policing at Forefront of State Criminal Justice Action*, PEW CHARITABLE TR. (June 27, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/06/27/prisons-policing-at-forefront-of-state-criminal-justice-action>; see also *State Advances in Criminal Justice Reform, 2016*, SENT'G PROJECT 1–4 (Sept. 5, 2017); see also H.R. COMM. ON CORR., INTERIM REPORT TO THE 85TH TEXAS LEGISLATURE 47–49 (Tex. 2016), http://www.house.state.tx.us/_media/pdf/committees/reports/84interim/Corrections-Committee-Interim-Report-2016.pdf.

⁹⁸ Brandy Grissom, *With Crime, Incarceration Rates Falling, Texas Closes Record Number of Prisons*, DALL. NEWS (July 5, 2017) <https://www.dallasnews.com/news/texas-legislature/2017/07/05/crime-incarceration-rates-falling-texas-closes-record-number-lock-ups>.

⁹⁹ *Id.*

¹⁰⁰ *Id.* The prison drop in California in recent years did not result in a meaningful increase in crime. See Chris E. Kubrin et al., *Releasing Low-Level Offenders Did Not Unleash a Crime Wave in California*, WASH. POST (Mar. 17, 2016), https://www.washingtonpost.com/opinions/releasing-low-level-offenders-did-not-unleash-a-crime-wave-in-california/2016/03/17/7d376adc-e4b5-11e5-a6f3-21ccdbc5f74e_story.html?utm_term=.27469596d6d8.

¹⁰¹ Julia O'Donoghue, *Louisiana May be Poised to Pass 'Historic' Criminal Justice Reform, Reduce Prison Population*, TIMES-PICAYUNE (May 16, 2017), http://www.nola.com/politics/index.ssf/2017/05/louisiana_looks_poised_to_pass.html.

Two recent bills in particular, even though they may not ultimately be passed, are notable and appear to reflect a growing recognition of the need to reduce prison numbers.¹⁰² The first, titled *Federal Sentencing Reform and Corrections Act*, intends to reduce mandatory minimum penalties for a large number of non-violent offenses,¹⁰³ and has received bipartisan support. The second is the “Reverse Mass Incarceration Act of 2017,” which Senators Cory Booker and Richard Blumenthal introduced¹⁰⁴ and which would provide financial incentives to states to decrease their prison populations by at least seven percent over a three-year period.¹⁰⁵

While these advances are significant, they are piecemeal and not grounded in an overarching jurisprudential or empirical foundation. Their consequent limited impact is highlighted by the pardons that former President Obama granted in his final weeks in office,¹⁰⁶ which failed to address systemic problems that produced the incarceration crisis. It has been noted that the clemency program “has affected less than one-tenth of one percent of the national prison and jail population.”¹⁰⁷ Further, the reduction in the number of prisoners in recent years has been less than five percent.

By contrast, the proposals in this Article seek to achieve wide-ranging, principled, and sustainable evidence-based reform¹⁰⁸ in response to the apparent appetite for changes to the sentencing system,¹⁰⁹

¹⁰² See, e.g., Douglas A. Berman, *Pair of Senators Introduce the “Reverse Mass Incarceration Act of 2017,”* SENT’G L. & POL’Y (June 29, 2017), http://sentencing.typepad.com/sentencing_law_and_policy/2017/06/pair-of-senators-introduce-the-reverse-mass-incarceration-act-of-2017.html; Seung Min Kim & Burgess Everett, *Time Running Out For Major Criminal Justice Bill*, POLITICO (Apr. 20, 2016), <http://www.politico.com/story/2016/04/senate-justice-crime-bill-222225>.

¹⁰³ For a summary of the key aspects of this legislation, see Douglas A. Berman, *With SRCA Now “Officially” Dead . . . Send Your “Thanks” to (Failings of) Prez Obama and Bipartisan Bungling*, SENT’G L. & POL’Y (July 1, 2016), http://sentencing.typepad.com/sentencing_law_and_policy/2016/07/with-srca-now-officially-dead-send-your-thanks-to-failings-of-prez-obama-and-bipartisan-bungling.html.

¹⁰⁴ See generally *Reverse Mass Incarceration Act of 2017*, S. 1458, 115th Cong. (2017).

¹⁰⁵ *Id.* at 2.

¹⁰⁶ TASKFORCE ON MASS INCARCERATION, *supra* note 2, at 1; see also Gregory Korte, *Obama Grants 330 More Commutations, Bringing Total to a Record 1,715*, USA TODAY (Jan. 19, 2017), <http://www.usatoday.com/story/news/politics/2017/01/19/obama-grants-330-more-commutations-bringing-total-record-1715/96791186>.

¹⁰⁷ TASKFORCE ON MASS INCARCERATION, *supra* note 2, at 1–3.

¹⁰⁸ As to the need for more wide-ranging solutions see, e.g., Michael M. O’Hear, *Justice Reinvestment and the State of State Sentencing Reform*, 29 FED. SENT’G REP. 1, 4–5 (2016).

¹⁰⁹ It should be noted that not all of the momentum is toward less incarceration. Senator Cotton has recently stated that the U.S. is suffering from ‘under-incarceration’. See Nick Gass, *Sen. Tom Cotton: U.S. Has ‘Under-Incarceration Problem’*,

including a call for the “rebirth of rehabilitation” as a central objective of sentencing.¹¹⁰ Studies show that a significant and increasing number of Americans agree that rehabilitation is an important sentencing objective. A recent study of Wisconsin voters found that 74.1 percent of voters regarded rehabilitating offenders as a very important or absolutely essential priority of the criminal justice system.¹¹¹ Most of the respondents also considered that rehabilitation was achievable,¹¹² but that the criminal justice system was not pursuing this aim adequately.¹¹³ It is therefore clear that many Americans share the view that rehabilitation should assume a far greater role in the criminal justice system than it currently plays.

II. THE CURRENT ROLE OF REHABILITATION IN SENTENCING LAW

Each of the states in the United States and the federal jurisdiction have their own separate sentencing systems.¹¹⁴ While the systems are different, there are important commonalities between them. The jurisdictions share the same overarching sentencing objectives, namely, community protection (also known as incapacitation), general deterrence, specific deterrence, rehabilitation, and retribution.¹¹⁵ There is ostensibly no hierarchy of sentencing aims, but in reality, community protection has been the overwhelming goal of sentencing in the United States for the past 40 years.¹¹⁶

The objective of community protection has been pursued most evidently through the enactment of prescriptive sentencing laws.¹¹⁷ Fixed

POLITICO (May 19, 2016), <http://www.politico.com/story/2016/05/tom-cotton-under-incarceration-223371>. However, this view is not commonplace.

¹¹⁰ Fondacaro et al., *supra* note 39, at 725.

¹¹¹ O’Hear & Wheelock, *supra* note 16, at 47–48. An earlier nation-wide survey was consistent with this finding. PRINCETON SURVEY RESEARCH ASSOCS. INT’L, NAT’L CENTER FOR ST. CTS., THE NCSC SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS 20 (2006).

¹¹² PRINCETON SURVEY RESEARCH ASSOCS. INT’L, *supra* note 111, at 20.

¹¹³ O’Hear & Wheelock, *supra* note 16, at 48.

¹¹⁴ Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 L. & INEQ. 343, 350–52 (2001). Sentencing (and more generally, criminal law) in the United States is mainly the province of states. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) (citing United States v. Lopez, 514 U.S. 549, 564 (1995)). The sentencing framework regarding federal offenses in general is derived from Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349, 413 (2014).

¹¹⁵ *See* U.S. SENT’G COMM’N, GUIDELINES MANUAL 1 (2014).

¹¹⁶ NAT’L RESEARCH COUNCIL, *supra* note 27, at 9.

¹¹⁷ *Id.* at 3. Berry III, *supra* note 40, at 633.

minimum or presumptive penalties¹¹⁸ now apply to varying degrees in all jurisdictions in the United States.¹¹⁹ Prescribed penalties are typically set out in sentencing grids, which normally use criminal history scores¹²⁰ and offense seriousness to calculate an appropriate penalty.¹²¹ When courts consider an offender's criminal history in determining the sanction,¹²² for most offenses, a criminal history can approximately double the presumptive sentence. For example, an offense at level 14¹²³ in the Federal Sentencing Guidelines carries a presumptive penalty for a first offender of imprisonment for 15 to 21 months, and this penalty increases to 37 to 46 months if an offender has 13 or more criminal history points.¹²⁴ For an offense at level 36, a first offender has a presumptive penalty of 188 to 235 months, which increases to 324 to 405 months for an offender with the highest criminal history score.¹²⁵ Thus, an extensive criminal history can add between 136 to 170 months (over 14 years) to the jail term to which an offender is sentenced.¹²⁶

Rehabilitation is one of the central stated objectives of the United States Sentencing Commission Guidelines Manual (the Federal Sentencing Guidelines),¹²⁷ which are particularly significant prescribed penalty laws both because many sentences have been informed by them

¹¹⁸ For the purposes of clarity, these both come under the terminology of fixed or standard penalties in this Article.

¹¹⁹ They are also one of the key distinguishing aspects of the United States' sentencing system compared to that of Australia (and most other sentencing systems in the world). See Connie de la Vega et al., *supra* note 41, at 46–47 (2012) (noting that 137 of 168 surveyed countries had some form of minimum penalties, but none of the others were as wide-ranging or severe as in the United States).

¹²⁰ This is based mainly on the number, seriousness, and age of the prior convictions.

¹²¹ See Tonry, *supra* note 41, at 519.

¹²² Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1110 (2008) (highlighting the importance of a defendant's criminal history in assessing their sentence).

¹²³ U.S. SENT'G COMM'N, *supra* note 115, at 63, 67, 129. The offense levels range from 1 (least serious) to 43 (most serious). Examples of level 14 offenses are criminal sexual abuse of a ward, failure to register as a sex offender, and bribery (if the defendant is a public official). *Id.*

¹²⁴ *Id.* at 395. The criminal history score ranges from 0 to 13 or more (worst offending record). *Id.*

¹²⁵ See *id.* at 400.

¹²⁶ As noted above, prescribed penalties have contributed significantly to the incarceration crisis. See Tonry, *supra* note 41, at 514; Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005); Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 175 (2010); Berman & Bibas, *supra* note 126, at 40.

¹²⁷ U.S. SENT'G COMM'N, *supra* note 115, at 1.

and they have influenced state-based prescribed penalty laws.¹²⁸ It has been acknowledged that:

[H]istory proves that decisions made in Washington affect the whole criminal justice system, for better or worse. Federal funding drives state policy, and helped create our current crisis of mass incarceration. And the federal government sets the national tone, which is critical to increasing public support and national momentum for change. Without a strong national movement, the bold reforms needed at the state and local level cannot emerge.¹²⁹

The Federal Sentencing Guidelines state:

The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.¹³⁰

Notwithstanding this reference to rehabilitation, it does not feature prominently in the setting of penalties. This anomaly may be explained by the manner in which the Guidelines operate. Because of the United States Supreme Court's decision in *United States v. Booker* in 2005,¹³¹ the Federal Sentencing Guidelines are no longer mandatory and, rather, are

¹²⁸ See Berman & Bibas, *supra* note 126, at 38. There are more than 200,000 federal prisoners. See CARSON, *supra* note 37.

¹²⁹ Ames C. Grawert et al., *A Federal Agenda to Reduce Mass Incarceration*, BRENNAN CTR. FOR JUST. 1 (2017).

¹³⁰ U.S. SENT'G COMM'N, GUIDELINES MANUAL 1–2 (2016).

¹³¹ *United States v. Booker*, 543 U.S. 220, 258 (2005). In *Booker*, the Supreme Court held that the mandatory aspects of the Guidelines were contrary to the Sixth Amendment right to a jury trial. *Id.* at 258–59 (Breyer, J., concurring); see also *Pepper v. United States*, 562 U.S. 476, 481 (2011) (“[W]hen a defendant’s sentence has been set aside on appeal, a district court at resentencing may consider evidence [that may] support a downward variance from the now-advisory Federal Sentencing Guidelines range.”); *Irizarry v. United States*, 553 U.S. 708, 715 (2008) (“[T]here is no longer a limit comparable to the one at issue in *Burns* on the variances from Guidelines ranges that a district court may find justified under the sentencing factors set forth in 18 U.S.C. § 3553(a).”); *Greenlaw v. United States*, 554 U.S. 237, 237 (2008); *Gall v. United States*, 552 U.S. 38, 38–39 (2007) (“[W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”); *Rita v. United States*, 551 U.S. 338, 350 (2007) (stating that a federal appellate court may apply presumption of reasonableness to a district court sentence that is within the properly calculated Sentencing Guidelines range).

advisory in character.¹³² However, the guideline range remains an influential sentencing reference point. Until recently, sentences within the Guidelines were still the norm.¹³³ In 2014, however, for the first time, federal courts imposed more sentences that were outside the Federal Sentencing Guidelines than sentences that were within them. The margin was small (44 percent to 46 percent), but it does reflect a trend by the judiciary to deviate from the Federal Sentencing Guidelines,¹³⁴ notwithstanding a very slight increase in the imposition of sentences that have fallen within the guideline range more recently (47 percent and 49 percent of sentences were inside the guideline range in 2015 and 2016, respectively).¹³⁵

Although the perceived severity of the offense and an offender's criminal history score are the key sentencing considerations,¹³⁶ the

¹³² Consequently, district courts are required to properly calculate and consider the Guidelines when sentencing, even in an advisory guideline system. See 18 U.S.C. § 3553(a)(4)-(5) (2012); *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *Rita*, 551 U.S. at 351 (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range); *Gall*, 552 U.S. at 49 (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”). The district court, in determining the appropriate sentence in a particular case, therefore, must consider the properly calculated guideline range, the grounds for departure provided in the policy statements, and then the factors under 18 U.S.C. § 3553(a). See *Rita*, 551 U.S. at 350–51; see also *Gall*, 552 U.S. at 38 (“A district judge must consider the extent of any departure from the Guidelines and must explain the appropriateness of an unusually lenient or harsh sentence with sufficient justifications. An appellate court may take the degree of variance into account and consider the extent of a deviation from the Guidelines, but it may not require ‘extraordinary’ circumstances or employ a rigid mathematical formula using a departure’s percentage as the standard for determining the strength of the justification required for a specific sentence.”).

¹³³ Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); see also Amy Baron-Evans & Jennifer Niles-Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines’ Prohibitions and Restrictions on Mitigating Factors*, FED. PUB. DEF. 1 (2010), https://www.fd.org/docs/select-topics—sentencing/no_more_math_without_subtraction.pdf. For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, see William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 247 (Julian V. Roberts ed., 2011).

¹³⁴ U.S. SENT’G COMM’N, FINAL QUARTERLY DATA REPORT: FISCAL YEAR 2014 1 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf.

¹³⁵ U.S. SENT’G COMM’N, ANNUAL REPORT: FISCAL YEAR 2016 A-5 (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/2016-Annual-Report.pdf>.

¹³⁶ Hessick, *supra* note 122, at 1109 (highlighting the importance of a defendant’s criminal history in assessing their sentence).

Guidelines expressly set out over three dozen considerations that can also influence the penalty and enable a court to depart from a Guideline.¹³⁷ To determine the appropriate guideline penalty, courts may factor in a number of mitigating and aggravating considerations,¹³⁸ which are either “adjustments” or “departures.” Adjustments are considerations that increase or decrease penalty by a designated amount.¹³⁹ For example, a demonstration of remorse can result in a decrease of penalty by up to two levels; it can decrease the penalty by three levels if it is accompanied by an early guilty plea.¹⁴⁰ Departures¹⁴¹ more readily enable courts to impose a sentence outside the applicable Guideline range,¹⁴² and can preclude the impact of certain considerations on penalty.

The Guidelines do not expressly mention rehabilitation as a basis for a downward departure, even though they also state that it is one of the key objectives of sentencing. As such, rehabilitation is absent from the operational level of the Guidelines. To the extent that it is explicitly addressed, its role is diminished by section 5K2.19, which provides that post-sentencing rehabilitative efforts are not a ground for departure.¹⁴³

¹³⁷ See U.S. SENT'G COMM'N, *supra* note 130, at 457.

¹³⁸ See *id.* at 6; 18 U.S.C. § 3553(b)(1) (2012).

¹³⁹ These are set out in Chapter 3 of the U.S. Sentencing Guidelines. See U.S. SENT'G COMM'N, *supra* note 130, at 357.

¹⁴⁰ See U.S. SENT'G COMM'N, *supra* note 115, at 371. However, section 5K2.0(d)(4) of the 2014 Guidelines provides that the court cannot depart from a guideline range as a result of “[t]he defendant’s decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court.” *Id.* at 460 (citation omitted).

¹⁴¹ See U.S. SENT'G COMM'N, *supra* note 130, at 457.

¹⁴² See *id.*

¹⁴³ This has been criticized by Baron-Evans who states:

The Commission’s 2008 amendment to USSG § 1B1.10, the policy statement addressing sentence reductions under 18 U.S.C. § 3582(c) based on retroactive guideline amendments, further demonstrates the unsoundness of its general prohibition on considering post-sentencing rehabilitation as a mitigating factor within the guidelines framework in ordinary resentencing proceedings. As noted above, the Commission justified the prohibition on considering post-offense rehabilitation as a mitigating factor at resentencing in part because such a prohibition was ‘consistent with Commission policies under § 1B1.10.’ USSG, App. C, Amend. 602 (Nov. 1, 2000) (Reason for Amendment). Although the Commission did not specify which policies it meant, the language of § 1B1.10 at the time may have suggested that in § 3582(c)(2) proceedings, courts should determine whether and to what extent to reduce the sentence based on the facts as they existed at the time the defendant was sentenced. Not long before, however, a panel of the Eighth Circuit had held, over a dissent, that its ruling in *Sims* (prohibiting consideration of post-sentencing rehabilitation in ordinary resentencings) did not apply in proceedings under § 3582(c)(2) and that in those proceedings courts could depart below the guideline range based on post-

That section states, “[p]ost-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense.”¹⁴⁴ One purported justification for this provision is that allowing a discount for post-sentence rehabilitation would “inequitably benefit only those few who gain the opportunity to be resentenced *de novo*, while others, whose rehabilitative efforts may have been more substantial, could not benefit simply because they chose not to appeal or appealed unsuccessfully.”¹⁴⁵ Yet this is not a reason to penalize offenders who have been rehabilitated.

There is, however, some latitude for a court to import rehabilitation into the sentencing calculus under the Guidelines. Pursuant to 18 U.S.C. § 3553, in rare instances, considerations that are not set out in the Guidelines can be invoked to justify departing from the range,¹⁴⁶ providing that a court states its reason for doing so,¹⁴⁷ and 18 U.S.C. § 3553 provides:

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence *sufficient, but not greater than necessary*, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide *just punishment* for the offense;
 - (B) to afford adequate *deterrence* to criminal conduct;
 - (C) to *protect the public* from further crimes of the defendant; and

sentencing rehabilitation. *See* *United States v. Hasan*, 205 F.3d 1072 (8th Cir. 2000). The Commission did not mention this decision in its reason for Amendment, but it was aware of the decision and concerned about it.

Baron-Evans & Niles-Coffin, *supra* note 133, at 184–85. Further, in *Pepper v. United States*, 562 U.S. 476, 501 (2011), the Court held that the decision to exclude post-sentence rehabilitation by the Commission “rest[ed] on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.”

¹⁴⁴ U.S. SENTENCING GUIDELINES MANUAL § 5K2.19 (U.S. SENTENCING COMM’N 2000).

¹⁴⁵ Baron-Evans & Niles-Coffin, *supra* note 133, at 177.

¹⁴⁶ U.S. SENT’G COMM’N, *supra* note 115, at 458; *see also* *Gall v. United States*, 552 U.S. 38, 47 (2007); *Pepper*, 562 U.S. at 476.

¹⁴⁷ U.S. SENT’G COMM’N, *supra* note 130, at 461.

(D) to provide the *defendant with needed educational or vocational training, medical care, or other correctional treatment* in the most effective manner¹⁴⁸

In *Pepper v. United States*, the United States Supreme Court held that post-sentence rehabilitation may be relevant to a number of § 3553(a) factors including, “the history and characteristics of the defendant as well as the need for deterrence, incapacitation, and to provide needed educational or vocational training or other correctional treatment [and the need not to] impose a sentence sufficient, but not greater than necessary to serve the purposes of sentencing.”¹⁴⁹ Notwithstanding this ruling, rehabilitation is clearly, at best, a footnote in the scheme of the federal sentencing law.

Amongst the sentencing systems of America’s five most populous states, with the exception of Illinois, rehabilitation plays a similarly minimal role. California, Texas, Florida, New York, and Illinois¹⁵⁰ approach rehabilitation differently from one another, but on the whole their sentencing provisions are less prescriptive than those of the federal jurisdiction.

In surveying the role of rehabilitation in the sentencing regimes of the United States’ five largest state jurisdictions, a good starting point is California. The status of the objective of rehabilitation in this state’s sentencing system has fluctuated significantly over time and is set to change further in the next few years. From 1917 until 1977, California employed a system of indeterminate sentencing whose primary purpose was the rehabilitation of offenders.¹⁵¹ However, in 1978, the state legislature, perceiving a failure in this rehabilitation-focused scheme, reformed California’s sentencing system.¹⁵² Thereafter, it was abundantly clear that rehabilitation was no longer the chief object of sentencing in California; California’s Penal Code explicitly stated, “[t]he Legislature finds and declares that the purpose of imprisonment for crime is punishment,”¹⁵³ and merely noted that the sentencing regime should “encourage the development of policies and programs designed to educate and rehabilitate *non-violent* offenders.”¹⁵⁴ Courts observed that “the Legislature completely reversed the purpose of sentencing in California from rehabilitation to punishment,” and “[r]ehabilitation and

¹⁴⁸ 18 U.S.C. § 3553(a) (2012) (emphasis added).

¹⁴⁹ *Pepper*, 562 U.S. at 491.

¹⁵⁰ *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock>.

¹⁵¹ See *People v. Caddick*, 160 Cal. App. 3d 46, 51 (Cal. Ct. App. 1984).

¹⁵² See *id.*

¹⁵³ CAL. PENAL CODE § 1170(a)(1) (West 2017).

¹⁵⁴ *Id.* § 1170(a)(2) (emphasis added).

individualization of sentencing [were] no longer a dominant purpose of the sentencing law.”¹⁵⁵

Punishment as the primary objective of sentencing remained a fixture of Californian sentencing law for most of the succeeding 40 years, until 2016 when the California legislature made significant amendments to the Penal Code that will place a greater emphasis on rehabilitation in sentencing. Although those amendments will not take effect until 2022, the shift in focus is clear, for they state, “[t]he Legislature finds and declares that the purpose of sentencing is public safety, achieved through punishment, rehabilitation, and restorative justice.”¹⁵⁶ Further, the California legislature has encouraged the development of rehabilitation programs and specified that their availability not be restricted to *non-violent* offenders: “programs should be available for inmates, including, but not limited to, educational, rehabilitative, and restorative justice programs that are designed to promote behavior change and to prepare all *eligible offenders* for successful reentry into the community.”¹⁵⁷ While the courts have yet to comment on the changes, the language of these amendments certainly suggests that the status of rehabilitation as a sentencing objective in California will revert to its pre-1978 role.

References to rehabilitation of criminal offenders in relevant legislation in Texas focus on its capacity to protect the public. For instance, Texas’ penal code indicates that “the provisions of this code are intended to . . . insure the public safety through . . . the rehabilitation of those convicted of violations of this code,”¹⁵⁸ and courts should “prescribe penalties . . . that permit recognition of differences in rehabilitation possibilities among individual offenders.”¹⁵⁹ While the Texas legislature has not elaborated on the role that rehabilitation should play in sentencing determinations, the courts have contributed some guidance on the matter. Rather than attributing to rehabilitation a special status amongst the sentencing objectives, Texas courts have noted that rehabilitation is one of three stated ends of sentencing (the other goals are deterrence and punishment) and have conferred equal weight to each of them in fixing sentences.¹⁶⁰ Generally, Texas courts have been unwilling to reduce or overturn sentences that have been particularly effective at achieving deterrence and punishment, but that did not reflect

¹⁵⁵ *Caddick*, 160 Cal. App. 3d at 51–52.

¹⁵⁶ CAL. PENAL CODE § 1170(a)(1).

¹⁵⁷ *Id.* § 1170(a)(2) (emphasis added).

¹⁵⁸ TEX. PENAL CODE ANN. § 1.02(1)(B) (West 2017).

¹⁵⁹ *Id.* § 1.02(3).

¹⁶⁰ See *Short v. State*, No. 03-11-0000719-CR, 2012 Tex. App. LEXIS 9479, at 2–4 (Tex. Ct. App. Nov. 7, 2012).

the attribution of significant weight to the offender's rehabilitative capacity.¹⁶¹

While an offender's rehabilitative potential informs sentencing for all crimes in California and Texas (except, of course, capital offenses), in Florida, the role that rehabilitation plays as an objective of sentencing varies depending on whether the offender is convicted of committing a misdemeanor or a felony. Within the context of its general criminal laws, the Florida legislature has stated that criminal sanctions should "provid[e] for the opportunity for rehabilitation of those convicted and for their confinement when required in the interests of public protection."¹⁶² It appears that this statement applies exclusively to sentencing misdemeanants, however, for the Criminal Punishment Code, which applies to all felony offenses, except capital offenses, notes that the "primary purpose of sentencing is to punish the offender,"¹⁶³ and that rehabilitation is a "desired goal of the criminal justice system but is subordinate to the goal of punishment."¹⁶⁴ Significantly, the courts have uniformly reinforced the subordinate status of rehabilitation as an objective of Florida's felony sentencing scheme.¹⁶⁵

One of the stated purposes of sentencing according to the New York penal law is "[t]o insure the public safety by . . . the rehabilitation of those convicted, [and] the promotion of their successful and productive reentry and reintegration into society."¹⁶⁶ While New York is not unique in neglecting to make rehabilitation the preeminent principle that guides sentencing determinations, sentences have been overturned in that state for a court's failure to consider properly an offender's rehabilitative potential. For example, in *People v. Burgh*, a sentence for first-degree robbery was remanded for re-sentencing where the sentencing judge commented that he was "not concerned with rehabilitation."¹⁶⁷ The court held that, although the offender's rehabilitation is only one objective to consider in determining a sentence (and of equal significance to the goals of community protection and deterrence),¹⁶⁸ in crafting a sentence, a sentencing court should not

¹⁶¹ See, e.g., *Meadoux v. State*, 325 S.W.3d 189, 195–96 (Tex. Crim. App. 2010); *Harris v. State*, 2015 Tex. App. LEXIS 10439 (Tex. Ct. App. Oct. 8, 2015); see also *Wilkerson v. State*, 881 S.W.2d 321, 321 (Tex. Crim. App. 1994).

¹⁶² FLA. STAT. ANN. § 775.012(6) (LexisNexis 2017).

¹⁶³ *Id.* § 921.002(1)(b).

¹⁶⁴ *Id.*

¹⁶⁵ See, e.g., *Moore v. State*, 882 So. 2d 977, 985 (Fla. 2004); *Charles v. State*, 204 So. 3d 63, 66 (Fla. Dist. Ct. App. 2016).

¹⁶⁶ N.Y. PENAL LAW § 1.05(6) (Consol. 2017).

¹⁶⁷ *People v. Burgh*, 453 N.Y.S.2d 783, 785 (N.Y. App. Div. 1982).

¹⁶⁸ See *People v. Farrar*, 419 N.E.2d 864, 865 (N.Y. 1981) ("[t]he determination of an appropriate sentence requires the exercise of discretion after due consideration

completely ignore an offender's rehabilitative capacity.¹⁶⁹ According to that court, if appropriate, "the sentencing statute's purpose of retribution and deterrence should be balanced and yield to the sentencing goal of rehabilitation of the individual."¹⁷⁰ It is, however, important to note that, while New York courts are generally encouraged to consider an offender's rehabilitative capacity in determining the sentence, courts will not hesitate to impose draconian sentences where the legislature has deemed an offender's conduct to be particularly dangerous or worthy of opprobrium, even where it is possible that the offender can be fully rehabilitated.¹⁷¹

In contrast to the status accorded to rehabilitation amongst the sentencing objectives in the criminal sentencing systems of the states discussed above, rehabilitation plays a pivotal role in sentencing offenders in Illinois. That state's Constitution stipulates that rehabilitation should significantly influence sanctions: "[a]ll penalties shall be determined . . . with the objective of restoring the offender to useful citizenship."¹⁷² Restoring offenders to "useful citizenship" is also one of the stated purposes of the Illinois Code of Corrections.¹⁷³ The courts have affirmed that rehabilitation is a guiding principle of Illinois sentencing law. In *People v. Kish*, the court observed, "[i]t is the policy of this State to prescribe penalties which are proportionate to the seriousness of the offenses and which allow for the possibility of rehabilitation."¹⁷⁴ In carrying out this policy, the maximum length of a prison sentence is "dependent upon the court's divination as to the length of time required to achieve rehabilitation."¹⁷⁵ In fact, Illinois courts have reduced otherwise sound sentences due to the trial court's failure, in settling on a punishment, to consider either expressly or adequately the offender's rehabilitative potential.¹⁷⁶ With rehabilitation of

given to, among other things, . . . the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence").

¹⁶⁹ *See id.*

¹⁷⁰ *People v. Dowd*, 530 N.Y.S.2d 733, 735 (N.Y. Sup. Ct. 1988).

¹⁷¹ *See People v. Broadie*, 332 N.E.2d 338, 343–47 (N.Y. 1975) (rejecting the argument that mandatory life sentences for drug offenses violated the Eighth Amendment because the sentences did not consider rehabilitative potential).

¹⁷² ILL. CONST. art. I, § 11.

¹⁷³ 730 ILL. COMP. STAT. ANN. 5/1-1-2(d) (2017).

¹⁷⁴ *People v. Kish*, 374 N.E.2d 10, 11 (Ill. App. Ct. 1978).

¹⁷⁵ *People v. Lillie*, 223 N.E.2d 716, 719 (Ill. App. Ct. 1967).

¹⁷⁶ *See People v. Steffens*, 475 N.E.2d 606, 615–16 (Ill. App. Ct. 1985) (thirty year sentence for murder reduced by 10 years for trial court's failure to consider defendant's youth, lack of a significant criminal record, and unplanned nature of the crime as relevant to the likelihood of his rehabilitation); *see also People v. Kosanovich*, 387 N.E.2d 1061, 1061 (Ill. App. Ct. 1979) (sentence reduced on basis of rehabilitative potential where defendant had limited education and came from poor social environment); *People v. Nelson*, 436 N.E.2d 655, 655 (Ill. App. Ct. 1982)

criminal offenders elevated to the lofty status of a constitutional decree and with the apparent willingness of the legislative and judicial branches of government to give effect to this goal, Illinois is unique amongst the five largest American jurisdictions in its emphasis on rehabilitation as the principal preferred object of sentencing.

It is thus clear that, while rehabilitation is, in principle, one of the key orthodox aims of sentencing, with the exception of the sentencing system of Illinois, it is, in practice, largely a subordinate sentencing consideration that rarely operates to reduce a penalty meaningfully, especially for an offender who has committed a very serious crime. Although rehabilitation has played some role in sentencing, there is no formal indication of the weight that it carries in the overall decision-making calculus. We now explain further why rehabilitation should occupy a greater role in sentencing, especially compared with some of the other sentencing objectives, and how it should inform sentencing decisions.

III. CHANGING THE ROLE OF REHABILITATION IN SENTENCING LAW

A. *An Overview of Empirical Data Relating to the Validity of the Sentencing Objectives of General Deterrence, Specific Deterrence, and Retribution*

The roles of community protection and rehabilitation in sentencing law and the appropriate overlap between these objectives are the main themes of this Article. Before considering how these aims should operate in the sentencing system, it is necessary to place them in the context of the other goals of sentencing. This requires a brief examination of the relevance of the additional key sentencing objectives, which as noted earlier, are specific deterrence, general deterrence, and retribution. It is only legitimate to include an objective in a sentencing system if it is achievable. An enormous number of empirical studies have considered the capacity of the sentencing system to fulfill the goals of specific deterrence and general deterrence. While it is not possible to review all of those studies as they are not the focus of this Article, we are able to provide an overview of their findings given their relative consistency with one another.

The existing research establishes that specific deterrence—which relies on the notion that individual offenders will not reoffend if they are incarcerated because they will wish to avoid any further experience of this unpleasant sanction¹⁷⁷—is ineffective. Offenders who receive lenient

(sentence reduced where defendant expressed an interest in continuing and completing his education).

¹⁷⁷ Bagaric & Alexander, *supra* note 13, at 159. Daniel S. Nagin et al., *Imprisonment & Re-offending*, 38 CRIME & JUST. 115, 116 (2009).

sanctions are no less likely to reoffend than offenders who receive harsh sanctions,¹⁷⁸ such as imprisonment.¹⁷⁹ Indeed, studies indicate that incarceration actually increases offenders' likelihood of recidivism.¹⁸⁰ All of these studies thus confirm that the objective of specific deterrence should be excluded from a rational, progressive sentencing system.

The sentencing aim of "marginal general deterrence" has been similarly proven to be ineffective. While the theory underpinning it—that harsher penalties will reduce crime—seems plausible (because we assume that prospective offenders will consider that the risk of receiving heavy sanctions outweighs any benefits they might accrue from committing crimes), it is unsubstantiated by empirical data.¹⁸¹ In a recent review of relevant studies, the United States National Academy of Sciences concluded, "[t]he 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."¹⁸² Although the sentencing objective of marginal general deterrence should be discarded, a more moderate form of the theory of general deterrence remains valid. Studies have confirmed the effectiveness of "absolute general deterrence," that is, the mere existence of a sanction, regardless of its harshness, can deter would-be offenders from committing crimes if they fear being apprehended and prosecuted.¹⁸³ It is clear from this research that the most effective way to reduce crime is to improve law enforcement strategies, such as increasing the visible police presence, so that prospective offenders recognize the high risk of their crimes being

¹⁷⁸ In fact, some studies show the rate of recidivism among offenders sentenced to imprisonment to be higher. See Nagin et al., *supra* note 177, at 120.

¹⁷⁹ *Id.*

¹⁸⁰ See William D. Bales & Alex R. Piquero, *Assessing the Impact of Imprisonment on Recidivism*, 8 J. EXPERIMENTAL CRIMINOLOGY 71, 97 (2012).

¹⁸¹ For an overview of the literature, see NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60–61 (1969); John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 129 (1994); Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569, 569 (2001); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 164 (2004); Dieter Dölling et al., *Is Deterrence Effective? Results of Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL'Y RES. 201, 202 (2009); Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 144 (2003); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 177–78 (2004); Richard Berk, *New Claims about Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 328 (2005); NAT'L RESEARCH COUNCIL, *supra* note 27, at 90.

¹⁸² NAT'L RESEARCH COUNCIL, *supra* note 27, at 4.

¹⁸³ See Bagaric & Alexander, *supra* note 13.

detected and prosecuted, rather than to increase the severity of penalties.¹⁸⁴

While retribution is not a clearly-defined sentencing objective, it is commonly used interchangeably with proportionality, a relatively well-established principle of sentencing law that, in crude terms, embodies the notion that the “punishment must fit the crime.”¹⁸⁵ The United States Supreme Court has held that proportionality is implied from the Eighth Amendment,¹⁸⁶ it is a requirement of the sentencing regimes of ten American states,¹⁸⁷ and it is a core principle that supposedly informs the Federal Sentencing Guidelines.¹⁸⁸

Proportionality has two elements: the seriousness of the crime and the harshness of the sanction. Further, the principle has a quantitative component: those two limbs must be matched. For the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.¹⁸⁹ While there are no clearly-established criteria for evaluating the severity of offenses and the harshness of criminal sanctions, it has been suggested that the most persuasive manner for grading levels of harm and levels of sanction hardship is by referring to the concept of well-being.¹⁹⁰ Thus, a criminal sanction should set back the interests of the offender to the same degree that the crime has set back the interests of the victim.¹⁹¹ Proportionality has wide-ranging support. In a recent survey, 88.1 percent of respondents indicated that they believed

¹⁸⁴ See Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work—and What it Means for Sentencing*, 35 CRIM. L.J. 263, 269 (2010).

¹⁸⁵ See Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 SAINT LOUIS U. L.J. 169, 169–242 (2016).

¹⁸⁶ The principle of proportionality applies only to invalid sentences which are grossly disproportionate to the seriousness of the relevant offense. See *Ewing v. California*, 538 U.S. 11, 20 (2003); see also *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991); see also *Solem v. Helm*, 463 U.S. 277, 284 (1983).

¹⁸⁷ See Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 250 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington, and West Virginia).

¹⁸⁸ See NAT'L RESEARCH COUNCIL, *supra* note 27, at 23. In addition to this, a survey of state sentencing law by Thomas Sullivan and Richard Frase shows that at least nine states have constitutional provisions relating to prohibiting excessive penalties or treatment and 22 states have constitutional clauses which prohibit cruel and unusual penalties, including eight states with a proportionate-penalty clause. See E. THOMAS SULLIVAN & RICHARD S. FRASE, *PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS* 155–56 (2009).

¹⁸⁹ JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION* 102 (2004).

¹⁹⁰ See Mirko Bagaric, *Injecting Content into the Mirage that Is Proportionality in Sentencing*, 25 N.Z. U. L. REV. 411, 411–41 (2013).

¹⁹¹ RYBERG, *supra* note 189, at 102; ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 131–64 (2005).

that “[e]nsuring that people who commit crimes receive the punishment they deserve” was a “very important” or “absolutely essential” priority of the criminal justice system.¹⁹² Empirical data confirms that the crimes that have the most detrimental effect on victims are serious sexual and violent offenses.¹⁹³ The most severe sanction (apart from capital punishment) is imprisonment, so, in theory, prison should be reserved for offenders who commit those especially grave offenses.¹⁹⁴

From this discussion, it is clear that (in addition to rehabilitation) the only sentencing objectives that are valid and should be taken into account are community protection and proportionality, both of which are congruent with the goal of rehabilitation. Rehabilitation can often achieve community protection, and application of the proportionality principle, which is vague, is unlikely to undermine any pursuit of the goal of rehabilitation. Indeed, in practice, proportionality will generally influence courts to impose a lighter penalty than they otherwise would have handed down. While in theory proportionality could also operate to preclude the imposition of unduly lenient penalties, proportionality has pragmatically never been used to justify the imposition of harsher penalties.

B. Overview of Empirical Data Regarding Rehabilitation

Before discussing the manner in which we consider that rehabilitation should play a more prominent role in sentencing decisions, it is necessary to provide a brief overview of the role it has played in sentencing law in the past, and of research that has been conducted into its efficacy.

While the objective of rehabilitation has featured in sentencing practice for nearly 200 years, it has been interpreted in different ways. Rehabilitation first appeared in sentencing law in 1829 in the form of the understanding that offenders could be reformed by demonstrating penance.¹⁹⁵ Another notion of rehabilitation, which is closer to the modern conception of it, emerged during the “Progressive Era” of the early Twentieth Century, when criminal offending was regarded as being largely a medical problem; accordingly, “causes of criminality [were]

¹⁹² O’Hear & Wheelock, *supra* note 16, at 48. The only higher priority was community safety (91.6 percent). *Id.* Rehabilitation was fourth highest at 74.1 percent. *Id.*

¹⁹³ See Bagaric & Gopalan, *supra* note 185, at 169–242.

¹⁹⁴ *Id.*

¹⁹⁵ Fondacaro et al., *supra* note 39, at 701 (citing Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 L. & INEQ. 343, 350, 352 (2001) and Marvin E. Wolfgang, *The Medical Model Versus the Just Desserts Model*, 16 J. AM. ACAD. PSYCHIATRY L. 111, 116 (1988)).

'diagnosed' and then treated."¹⁹⁶ This perception endured for some time and between 1950 and 1970, prison sentences were often not determinate and inmates were released when they were deemed to have been cured.¹⁹⁷ Programs designed to cure offenders "included individual counseling, group counseling, behavioral modification, vocational training, work release, and education."¹⁹⁸ This medical model of the purported causes of and remedies for criminality led to the advent of interventions, such as indeterminate sentencing, probation, and parole.¹⁹⁹

The strongest objection that can be mounted to the proposition that rehabilitation constitutes a suitable goal of sentencing law is that it does not work. The effectiveness of rehabilitation as a means of reducing repeat offending has been the subject of a large number of studies. Following extensive research conducted between 1960 and 1974, in an influential paper, Robert Martinson concluded that empirical studies had not established that any rehabilitative programs had succeeded in reducing recidivism.²⁰⁰ Several years later, the Panel of the National Research Council in the United States similarly found that there were no significant variations between the recidivism rates of offenders who received different sentences, which "suggests that neither rehabilitative nor criminogenic effects [that is, the possible corrupting effects of punishment] operate very strongly."²⁰¹ Martinson subsequently moderated his views, however, stating that some types of rehabilitation programs could be effective and that "no treatment . . . is inherently either substantially helpful or harmful. The critical fact seems to be the *conditions* under which the program is delivered."²⁰² Other succeeding studies appear to have considered that rehabilitation of offenders is rare. For instance, in 1999, David Brody observed:

Research so far has on the whole confirmed what one would expect: that individual success may sometimes be claimed by routine psychotherapy or counselling with intelligent, articulate, neurotic offenders; by guidance in personal, social, and domestic matters among those hampered by incompetence in these spheres; by sympathy and encouragement for those unsure of their limits and capabilities; and by direct assistance and support for those weighed

¹⁹⁶ Fondacaro et al., *supra* note 39, at 701.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Martinson, *supra* note 13, at 25.

²⁰¹ NAT'L ACAD. OF SCIENCES, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 66 (Alfred Blumstein et al. eds., National Academy Press 1978).

²⁰² Robert Martinson, *New Findings. New Views: A Note of Caution Regarding Sentencing Reforms*, 7 HOFSTRA L. REV. 243, 254 (1979).

down by practical difficulties. But none of these approaches is appropriate for other than a minority of the offender population, whose misdemeanours reflect some real psychological maladjustment and not just their social “deviance.”²⁰³

Support for the rehabilitative ideal continued to dissipate, in part, because the concept of retributivism (also described as the exaction of “just desserts”) replaced utilitarianism, at least ostensibly,²⁰⁴ as the principal philosophical underpinning of punishment²⁰⁵ in the Western world. It is also generally perceived that the philosophical leaning towards retributivism has permeated most sentencing systems,²⁰⁶ despite the gulf that normally exists between theories of punishment and sentencing practice and the tendency of the sentencing systems of most jurisdictions not to adopt any single rationale for sentencing decisions.

Retributive theories of punishment have not been clearly defined, and there are differences between theories that share this label.²⁰⁷ Although all retributive theories assert that offenders deserve to suffer by receiving punishment,²⁰⁸ they provide different reasons for why this is the case.²⁰⁹ There are nonetheless three broad similarities between retributive theories.²¹⁰ The first commonality is the principle that only those who are blameworthy deserve to be punished and that an offender’s blameworthiness is the principal justification for punishing him/her.²¹¹ Thus, according to this notion, punishment is only justified, broadly speaking, in cases of deliberate wrongdoing.²¹² The second similarity between the various theories is the understanding that punishing criminals is just in itself and it does not need to be justified on the basis of pursuing some other aim.²¹³ Accordingly, the justification for

²⁰³ S. Brody, *How Effective are Penal Treatments?*, in *PRINCIPLED SENTENCING* 9, 11 (A. von Hirsch & A. Ashworth eds., 1999).

²⁰⁴ MIRKO BAGARIC, *PUNISHMENT AND SENTENCING: A RATIONAL APPROACH* 55–57 (2001).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See id.* at 38.

²⁰⁸ *See* Jami L. Anderson, *Reciprocity as a Justification for Retributivism*, 16 *CRIM. JUST. ETHICS* 13, 13–14 (1997).

²⁰⁹ *See* Antony Duff & Andrew von Hirsch, *Responsibility, Retribution and the “Voluntary”*: A Response to Williams, 56 *CAMBRIDGE L.J.* 103, 106–67 (1997).

²¹⁰ *See* Anderson, *supra* note 208, at 13–14.

²¹¹ *See id.* at 13.

²¹² *See id.* at 13–14.

²¹³ *See id.* at 14. Some retributive theories assert that punishment has an instrumental component. *See* Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 *MELBOURNE U. L. REV.* 124, 128–29 (2000). For example, Von Hirsch claims that deterrence is one goal of punishment, but all retributive theories at least assert that any incidental aim should be a subsidiary goal and that punishment is justifiable even if the incidental aim cannot be achieved. *Id.* at 129.

punishment does not turn on the likely achievement of desirable outcomes; it is justified even when “we are practically certain that” attempts to attain consequentialist goals, such as deterrence and rehabilitation, “will fail.”²¹⁴ Retributive theories are therefore perceived to be backward-looking, focusing merely on past events in order to determine whether punishment is justified, in contrast to utilitarian theories of punishment, which are concerned only with the likely future consequences of punishing offenders. The third unifying aspect of most retributive theories is their claim that punishment must be equivalent to the level of the offender’s wrongdoing.²¹⁵ Thus, the proportionality principle is an in-built definitional aspect of many retributive theories. Within this construct, there is no scope for instrumental objectives of sentencing, such as rehabilitation, to influence sentencing decisions significantly. On the contrary, the notion of retribution has allowed the “tough on crime” agenda to flourish unabated. The retributive theory of punishment does not expressly prescribe harsh penalties. The key retributive determinant regarding the severity of a penalty is the principle of proportionality. As discussed above, this principle is so vague that in effect it imposes no fetters on the harshness of sanctions that can be imposed.²¹⁶

A paradox about the diminution of rehabilitation as a sentencing consideration over the past few decades is that, during this time, empirical studies have increasingly indicated that interventions can be put in place to reduce the likelihood of many offenders reoffending. For example, following a wide-ranging review of published studies about rehabilitation (which compared the recidivism rates of offenders who received rehabilitative treatment with those who did not), Howells and Day, nearly 20 years ago, suggested that certain rehabilitative programs appeared to reduce recidivism.²¹⁷ In particular, cognitive-behavioral programs were observed to have had some success. These programs target factors that are presumably changeable and are directed at the criminogenic needs of offenders, that is, factors that contribute to an individual’s likelihood of offending, such as anti-social attitudes, self-control, and problem-solving skills.²¹⁸ Promising programs were developed in the areas of anger management, sexual offending, and drug and alcohol use, which appear to have been more effective than programs based on confrontation or direct deterrence, physical

²¹⁴ R. A. DUFF, TRIALS AND PUNISHMENTS 7 (Sydney Shoemaker et al. eds., 1986).

²¹⁵ See Anderson, *supra* note 208, at 14.

²¹⁶ See *infra* Part III.

²¹⁷ KEVIN HOWELLS & ANDREW DAY, THE REHABILITATION OF OFFENDERS: INTERNATIONAL PERSPECTIVES APPLIED TO AUSTRALIAN CORRECTIONAL SYSTEMS I (1999); see, e.g., Kelly Richards, *Trends in Juvenile Detention in Australia*, in 416 TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE I (May 2011).

²¹⁸ Howells & Day, *supra* note 217, at 1.

challenge, or vocational training (which tend to constitute merely work assignments in custodial environments).²¹⁹

To ascertain the comparative effectiveness of correctional sanctions and rehabilitative treatment in reducing offenders' likelihood of recidivism, in 2007, Mark W. Lipsey and Francis T. Cullen undertook a broad but thorough review of many relevant studies and meta-analyses of that research that had been undertaken since Martinson's work.²²⁰ The authors acknowledged the limitations of available research, including that more studies had examined the effects of rehabilitation treatment on juvenile offenders than on adult offenders, and that there was a need for research addressing "when, why and for whom [rehabilitation] works best."²²¹ They were nonetheless able to reach the following significant conclusions from the available data. Punishments do not achieve specific deterrence and, in fact, offenders' receipt of correctional sentences may increase their likelihood of reoffending.²²² By contrast, and unlike correctional sanctions, rehabilitation treatment, which focuses on encouraging changes to factors that lead to individuals' offending, can lower rates of recidivism amongst convicted offenders and has "greater capability for doing so than correctional sanctions [alone]."²²³ Although the effectiveness of different treatments varied considerably, the most successful programs, including multi-systemic therapy, sex offender treatment, and cognitive behavioral therapy, had more refined theoretical and research bases, addressed offenders' criminogenic needs (as Howells and Day had found), and were well implemented.²²⁴

A 2011 report by Karen Heseltine, Andrew Day, and Rick Sarre²²⁵ summarized some more recent studies into the effectiveness of certain rehabilitation programs, and noted that, while there were mixed results, some programs reported positive outcomes. Sexual offender programs were found to be particularly successful, with some studies showing that the recidivism rate of offenders who completed such programs was less than half the rate at which other offenders, who had not participated in the programs, reoffended.²²⁶ The results of programs directed towards violent offenders were less encouraging, but a wide-ranging review of

²¹⁹ *Id.* at 3. See also Michael S. King, *Therapeutic Jurisprudence Initiatives in Australia and New Zealand and the Overseas Experience*, 21 J. JUD. ADMIN. 19, 22–24 (2011); Mark Lipsey & Francis Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297 (2007); David Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FLA. COASTAL L. REV. 111 (2006).

²²⁰ Lipsey & Cullen, *supra* note 219, at 298, 302, 306, 313.

²²¹ *Id.* at 313.

²²² *Id.* at 299, 302, 314.

²²³ *Id.* at 306, 314.

²²⁴ *Id.* at 306–07, 310–11.

²²⁵ HESELTINE ET AL., *supra* note 14.

²²⁶ *Id.* at 14.

studies focusing on programs in the United Kingdom noted that they had resulted in reductions of around seven to eight percent of offenders reoffending by committing violent offenses.²²⁷ Other overseas research reported some success with anger management programs, though there was no cogent evidence of the effectiveness of domestic violence programs²²⁸ or victim awareness programs.²²⁹

According to Heseltine, Day and Sarre's report, drug and alcohol programs had been shown to be effective at reducing substance abuse and reoffending.²³⁰ This assessment is consistent with the findings of Ojmarrh Mitchell, David Wilson, and Doris MacKenzie, who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison.²³¹ The studies they focused on related to drug users and compared reoffending patterns between 1980 and 2004 amongst offenders who completed a drug rehabilitation program with those who did not complete such a program, or completed only a minimum program. They analyzed 66 studies in total. The report concluded that, "[o]verall, this meta-analytic synthesis of evaluations of incarceration-based drug treatment programs found that such programs are modestly effective in reducing recidivism."²³² Further, it was noted that programs that addressed multiple problems of drug users (termed "therapeutic communities") were the most successful rehabilitative programs, whereas there was no evidence of good outcomes from "boot camp" programs.²³³

A recent illuminating report investigated the most effective methods of reducing recidivism by surveying the views of offenders in the federal prison system. The report made 13 recommendations,²³⁴ which included that federal prison officials "conduct a thorough and individualized assessment of every prisoner's strengths, needs, and risk factors," and provide inmates with greater access to jobs, computers, and quality education inside prison.²³⁵

The above overview of research into the efficacy of rehabilitation paints a relatively positive picture about the capacity for programs to

²²⁷ *Id.* at 17–18.

²²⁸ *Id.* at 22.

²²⁹ *Id.* at 30.

²³⁰ *Id.* at 26–27.

²³¹ Ojmarrh Mitchell et al., *The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behavior: A Systematic Review*, CAMPBELL COLLABORATION, Sept. 18, 2006, at 17; see also Lipsey & Cullen, *supra* note 219, at 297.

²³² Mitchell et al., *supra* note 231, at 17.

²³³ *Id.*

²³⁴ KEVIN A. RING & MOLLY GILL, FAMS. AGAINST MANDATORY MINIMUMS, USING TIME TO REDUCE CRIME: FEDERAL PRISONER SURVEY RESULTS SHOW WAYS TO REDUCE RECIDIVISM 23–24 (2017).

²³⁵ *Id.* at 23.

reform prisoners.²³⁶ It is, however, important to note that a considerable degree of progress needs to occur with respect to the development of rehabilitative measures for offenders. While some rehabilitation programs reduce reoffending, others appear to have been ineffective and certain programs have led to increased recidivism, such as the main sex offender rehabilitation program in the United Kingdom at present; a slightly higher number of the offenders who undertook the “Core Sex Offender Treatment Programme (SOTP)” committed at least one sexual offense during the follow-up period than matched offenders who did not complete the program (ten percent compared to eight percent).²³⁷

C. Rehabilitation Should Play a Greater Role in Sentencing, Even When Offenders Have Committed Very Serious Crimes

We argue that the sentencing objective of rehabilitation should play a far more significant role in the sentencing calculus than is currently the case. In particular, courts should balance the potential for an offender to be rehabilitated against other sentencing considerations and indicate the impact that the goal of rehabilitation has had on their decisions.

As noted above, courts often disregard the aim of rehabilitation when making sentencing decisions to promote the goal of community protection, especially in cases where offenders have committed very serious offenses. The distinction between the objectives of community protection and rehabilitation has, however, been overstated. In fact, given that nearly all offenders will at some point re-enter the community, rehabilitation and community protection are interrelated objectives. Offenders who do not reoffend because they have been rehabilitated do not imperil community safety. Accordingly, rehabilitation is a means of community protection, rather than a conflicting objective.

It is possible for courts to punish those who have committed serious violent and sexual offenses notwithstanding their focus on the sentencing objective of rehabilitation. As we have indicated above, proportionality is the most important sentencing principle in determining penalty. This principle can, however, be moderated in light of other objectives, including rehabilitation and community protection. We recommend that sentencing courts assess offenders’ rehabilitative potential and, where they have significant potential for rehabilitation, adjust the penalty to facilitate achievement of this objective. This proposal does not preclude the possibility that even in relation to some offenders who are found to

²³⁶ See also Lipsey & Cullen, *supra* note 219, at 306; Ruth M. Hatcher et al., *Aggression Replacement Training with Adult Male Offenders within Community Settings: A Recidivism Analysis*, 19 J. FORENSIC PSYCHIATRY & PSYCHOL. 517, 525–26 (2008); Fondacaro et al., *supra* note 39, at 713.

²³⁷ Dominic Casciani, *Sex Offender Treatment in Prison Led to More Offending*, BBC NEWS (Sept. 3, 2017), <http://www.bbc.com/news/uk-40460637>.

have reasonable prospects of rehabilitation, the adjustment that courts make will be negligible. For example, the principle of proportionality requires that all offenders convicted of murder should serve very long prison terms. Nevertheless, many of these offenders will be released at some point and community safety will be enhanced if these offenders participate in rehabilitation programs while they are in prison.

IV. SENTENCING COURTS' DETERMINATION OF THE WEIGHT TO ATTACH TO THE OBJECTIVE OF REHABILITATION

The potential for offenders to be rehabilitated, thereby reducing their likelihood of reoffending and enhancing community safety, depends on the efficacy of rehabilitative techniques. It appears that some current rehabilitation programs do need to be improved and refined, but such investment will occur if there is a high level of government and community commitment to rehabilitating offenders. Even if rehabilitation programs are well developed, however, not all offenders will necessarily benefit from them to the same extent or at all. It is thus important that courts draw on reliable indicators of which offenders are most likely to have successful outcomes from participating in rehabilitation programs. This information should be used to determine the appropriate weight to attach to the objective of rehabilitation in deciding on penalties in individual cases.

A. *Identifying the Best Candidates for Rehabilitation*

Given the impact of criminal sanctions on offenders and the broader community, it is vital that the considerations that influence the choice of penalty are justifiable and as accurate as possible. Two considerations are especially relevant to the attempt to achieve the objectives of community protection and rehabilitation: the likelihood of the individual offender reoffending and the potential for rehabilitative measures to reduce that person's probability of recidivism.²³⁸ Richard Berk and Jordan Hyatt note that “[i]deally, the forecasts [of an offender’s likelihood of recidivism and rehabilitation] should be highly accurate. They also should be derived from procedures that are practical, transparent, and sensitive to the consequences of forecasting errors.”²³⁹

At present, however, courts rely on no such procedures or scientific learning to identify which offenders will be the best candidates for rehabilitation and have a low probability of recidivism. Rather, sentencing judges use “clinical judgement” to perform this evaluation,

²³⁸ Richard Berk & Jordan Hyatt, *Machine Learning Forecasts of Risk to Inform Sentencing Decisions*, 27 FED. SENT’G REP. 222, 222 (2015).

²³⁹ *Id.*

which is an approach “that relies on intuition guided by experience,”²⁴⁰ and often leads to risk assessments that are “wildly inaccurate” and whose “rationale” is “opaque.”²⁴¹ Moreover, there is no mechanism for systematically reviewing the success or otherwise of the participation in rehabilitation programs by offenders whom the courts have deemed likely to be rehabilitated.

It is impossible to predict with complete certainty whether a particular offender will reoffend. Substantial data has been accumulated on characteristics that are associated with offenders who have a higher likelihood of reoffending, including previous imprisonment,²⁴² extensive criminal record,²⁴³ male gender,²⁴⁴ and young age.²⁴⁵ Although courts generally take into account offenders’ criminal histories and age in attempting to predict their prospects of rehabilitation, and thus not reoffending, this crude data is meaningless if it is not interpreted by applying empirically-tested tools for forecasting rehabilitation and recidivism. Such instruments are already available.²⁴⁶

B. Means of Predicting Offenders’ Likelihood of Recidivism

Three broad methodologies have been applied to predict offenders’ likelihood of recidivism.²⁴⁷ The first—and least reliable—is unstructured clinical assessments, which involve an individual determining the offender’s risk of reoffending according to impressionistic criteria that are informed by experience alone without empirical validation.²⁴⁸

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² JESSICA ZHANG & ANDREW WEBSTER, AUSTRAL. BUREAU STAT., AN ANALYSIS OF REPEAT IMPRISONMENT TRENDS IN AUSTRALIA USING PRISONER CENSUS DATA FROM 1994 TO 2007, at ii (2010).

²⁴³ *Id.* at 31.

²⁴⁴ *Id.* at 27.

²⁴⁵ *Id.*

²⁴⁶ MIRKO BAGARIC & RICHARD EDNEY, AUSTRALIAN SENTENCING 28–29 (3d ed. 2016).

²⁴⁷ As discussed further in this section, the main three methodologies are unstructured clinical assessments, actuarial methodologies, and structured professional judgment assessments. See Michael R. Davis & James R. P. Ogloff, *Key Considerations and Problems in Assessing Risk for Violence*, in *PSYCHOLOGY AND LAW: BRIDGING THE GAP* 191, 195 (David Canter & Rita Zukauskiene eds., 2008); Christopher Slobogin, *Risk Assessment*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 196, 203–05 (Joan Petersilia & Kevin R. Reitz eds., 2012).

²⁴⁸ Slobogin, *supra* note 247, at 198; see also Jordan M. Hyatt & Steven L. Chanenson, *The Use of Risk Assessment at Sentencing: Implications for Research and Policy* (Vill. U. Sch. of L., Working Paper Series, 2016), <http://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1201&context=wps>.

The second mechanism for predicting offenders' risk of reoffending is actuarial-based assessments,²⁴⁹ which are often termed "risk assessment" tools.²⁵⁰ These instruments "focus on measuring an individual's chances of endangering public safety by reoffending,"²⁵¹ mostly according to actuarial methodologies that examine past events and seek to identify variables that contributed to their occurrence.²⁵² This information is extrapolated via an algorithm to create rules regarding the likelihood of future events occurring. Developers of "actuarial instruments manipulate existing data in an empirical way to create rules. These rules combine the more significant factors, assign applicable weights, and create final mechanistic rankings."²⁵³ Such tools are relatively new and, for this reason, are sometimes regarded circumspectly, but both the concept and approach underpinning them are well-established. As Berk and Hyatt note:

Forecasting has been an integral part of the criminal justice system in the United States since its inception. Judges, as well as law enforcement and correctional personnel, have long used projections of relative and absolute risk to help inform their decisions. Assessing the likelihood of future crime is not a new idea, although it has enjoyed a recent resurgence: an increasing number of jurisdictions mandate the explicit consideration of risk at sentencing.²⁵⁴

A large number of risk assessment tools have been developed. The key differences between them are the integers that they use and the weightings that they apply to relevant considerations that have been ascertained as being relevant to the risk of future offending. Typically, an offender's criminal history is a constant base determinant.²⁵⁵ Other key

²⁴⁹ Davis & Ogloff, *supra* note 247, at 195. Paisly Bender, *Exposing the Hidden Penalties of Pleading Guilty: A Revision of the Collateral Consequences Rule*, 19 GEO. MASON L. REV. 291, 313 (2011); Melissa Hamilton, *Back to the Future: The Influence of Criminal History on Risk Assessments*, 20 BERKELEY J. CRIM. L. 76 (2015); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT'G REP. 167, 249 (2014). Such tools are in fact now used in the majority of states in the United States. See Shawn Bushway & Jeffrey Smith, *Sentencing Using Statistical Treatment Rules: What We Don't Know Can Hurt Us*, 23 J. QUANTITATIVE CRIMINOLOGY 377, 378 (2007).

²⁵⁰ Davis & Ogloff, *supra* note 247, at 195; Pari McGarraugh, *Up or Out: Why "Sufficiently Reliable" Statistical Risk Assessment Is Appropriate at Sentencing and Inappropriate at Parole*, 97 MINN. L. REV. 1079, 1093–94 (2013).

²⁵¹ McGarraugh, *supra* note 250, at 1091. In addition, actuarial methodologies and other risk assessment approaches include unstructured clinical assessments and structured professional judgment assessments. See Davis & Ogloff, *supra* note 247, at 195; Slobogin, *supra* note 247, at 198.

²⁵² McGarraugh, *supra* note 250, at 1092.

²⁵³ Hamilton, *supra* note 249, at 92.

²⁵⁴ Berk & Hyatt, *supra* note 238, at 222.

²⁵⁵ Hamilton, *supra* note 249, at 89.

variables are an offender's criminal associates, pro-criminal attitudes, and antisocial personality.²⁵⁶ One of the most sophisticated tools is the Post Conviction Risk Assessment (PCRA), which is currently used in relation to probation assessments in the United States federal jurisdiction.²⁵⁷ It is described as one of the latest (fourth) generation predictive tools,²⁵⁸ and is more nuanced than many earlier predictive models because it scores not only static factors (such as prior criminal history), but also dynamic variables, including employment status and history, education and family relationships.²⁵⁹

Courts in some American states already use risk assessment tools in reaching sentencing decisions, but do so in a very rudimentary way that is not systematic and does not have a significant impact on the sentencing calculus.²⁶⁰ The Brennan Center summarized the use of risk assessment tools in sentencing determinations in the United States, highlighting differences between various states as follows:

Driven by advances in social science, states are increasingly turning toward risk assessment tools to help decide how much time people should spend behind bars. These tools use data to predict whether an individual has a sufficiently low likelihood of committing an additional crime to justify a shorter sentence or an alternative to incarceration. . . . Some courts have implemented risk assessments to determine whether defendants should be held in jail or released while waiting for trial; similarly, some parole boards use them to decide which prisoners to release. States such as Kentucky and Virginia have implemented the former, while Arkansas and Nevada have implemented the latter. More recently, states are applying risk

²⁵⁶ *Id.* at 90.

²⁵⁷ Other assessment tools are: COMPAS (Correctional Offender Management Profiling for Alternative Sanctions); LSI-R (Level of Service Inventory—Revised); LSI/CMI (Level of Service/Case Management Inventory); LS/RNR (Level of Service/Risk, Need, Responsivity); ORAS (Ohio Risk Assessment System); Static-99 (for sex offenders/ offenses only); STRONG (Static Risk and Offender Needs Guide); and Wisconsin State Risk Assessment Instrument. Most of these tools are used for assessing post-sentencing correctional populations. Hyatt & Chanenson, *supra* note 248, at 4.

²⁵⁸ *Id.*

²⁵⁹ Hamilton, *supra* note 249, at 91–92. Another similar tool is the Level of Service Inventory, which incorporates 54 considerations. *See* Slobogin, *supra* note 247, at 199. In terms of predicting future violence, it has been noted that dynamic measures are slightly more accurate than static measures for short- to medium-term predictions of violence. *See* Chi Meng Chu et al., *The Short- to Medium-term Predictive Accuracy of Static and Dynamic Risk Assessment Measures in a Secure Forensic Hospital*, 20 ASSESSMENT 230, 230 (2013). Given that these tools go beyond the use of static factors and incorporate dynamic factors, they are sometimes referred to as structured professional judgment tools.

²⁶⁰ They are most commonly used in Virginia, Missouri, and Oregon. Slobogin, *supra* note 247, at 202–03.

assessments to guide sentencing decisions. The first state to incorporate such an instrument in sentencing was Virginia in 1994. By 2004, the state implemented risk assessments statewide, requesting judges to consider the results in individual sentencing decisions. Courts in at least 20 states have begun to experiment with using risk assessments in some way during sentencing decisions. . . . Because these instruments do not change existing sentencing laws, which the authors believe are a root cause of overly long sentences, this report does not delve further into the use of risk assessment in sentencing.²⁶¹

The third mechanism that has been developed to predict offenders' recidivism is "risk and needs assessments," which assess the risk of offenders reoffending and identify needs of those offenders that, if met, would lower their probability of recidivism.²⁶² Although these instruments are often referred to interchangeably with risk assessment tools, there are functional differences between them. While risk assessments focus on measuring individuals' chances of reoffending and thus endangering the public,²⁶³ risk and needs assessments attempt to reduce offenders' risk of recidivism by ascertaining which programs and other interventions would meet their needs.²⁶⁴ The methodology underpinning risk and needs assessment tools is often termed "structured professional judgment."²⁶⁵ It differs from a strictly actuarial approach because the "primary goal of this type of instrument is to provide information relevant to needs assessment and a risk management plan rather than to predict antisocial behavior."²⁶⁶ The score that results from application of this instrument is therefore not designed to reflect definitively the offender's risk of reoffending, and considerations other than those in the instrument can be taken into account to reduce the individual's risk of recidivism.

Various risk and needs assessment tools have been developed. One of the most popular is the Ohio Risk Assessment System (ORAS),²⁶⁷ which

²⁶¹ AUSTIN ET AL., *supra* note 12, at 18–19. Judges often pay little regard to the results of risk assessment tools. As noted by Slobogin, in Virginia, 59 percent of defendants who were considered to be at low risk of reoffending by a risk assessment tool were still sentenced to a prison. Slobogin, *supra* note 247, at 202; *see also* Ric Simmons, *Quantifying Criminal Procedure: How to Unlock the Potential of Big Data in Our Criminal Justice System*, 2016 MICH. ST. L. REV. 947, 966.

²⁶² NATHAN JAMES, CONG. RESEARCH SERV., RISK AND NEEDS ASSESSMENT IN THE CRIMINAL JUSTICE SYSTEM, 1–2 (2015).

²⁶³ McGarraugh, *supra* note 250, at 1091.

²⁶⁴ *Id.*

²⁶⁵ Slobogin, *supra* note 247, at 199.

²⁶⁶ *Id.*

²⁶⁷ For an explanation of the manner in which it is used, see MASS. SUPERIOR COURT WORKING GRP., SENTENCING BEST PRACTICES, CRIMINAL SENTENCING IN THE SUPERIOR COURT: BEST PRACTICES FOR INDIVIDUALIZED EVIDENCE-BASED SENTENCING, at viii (2016).

applies the following eight risk and need factors: history of antisocial behavior; antisocial personality patterns; antisocial cognition; antisocial associates; quality of family relationships; performance at school and work; levels of involvement in leisure and recreation; and any history of substance abuse.²⁶⁸ Risk and needs assessment tools are widely used in determining conditions for probation,²⁶⁹ and the appropriateness of parole.²⁷⁰ They are, however, used only occasionally in the sentencing process, specifically to determine whether an offender should be imprisoned, placed under community supervision,²⁷¹ and/or be subject to any conditions or requirements.²⁷²

Existing research suggests that, while risk assessment and risk and needs assessment tools are far from perfect, “the best models are usually able to predict recidivism with about 70 percent accuracy—provided it is completed by trained staff.”²⁷³ Risk assessment and risk and needs assessment tools are more accurate than unstructured judgments. For instance, current risk assessment tools have been found to produce a true positive rate of fifty to eighty-five percent, which is much higher than chance and the true positive rate of unstructured assessments.²⁷⁴ Further, the rate of recidivism even amongst offenders who were deemed to have been a high risk of reoffending was reduced when they participated in treatment programs that risk and needs assessments identified would benefit them.²⁷⁵

²⁶⁸ JAMES, *supra* note 262, at 7–8.

²⁶⁹ Latessa & Lovins, *supra* note 269, at 205.

²⁷⁰ *Id.*

²⁷¹ PAMELA M. CASEY ET AL., NAT’L CTR FOR ST. CTS., USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 13 (2011).

²⁷² JAMES, *supra* note 262, at 4; *see also* Slobogin, *supra* note 247, at 202.

²⁷³ Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203, 212 (2010). Moreover, risk assessment tools are generally more accurate than predictions based solely on clinical judgment. *See* D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 12–13 (2006); William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta Analysis*, 12 PSYCHOL. ASSESSMENT 19, 25 (2000).

²⁷⁴ Slobogin, *supra* note 247, at 201.

²⁷⁵ JAMES, *supra* note 262, at 5, 8. For the earlier research findings regarding the accuracy of such tools, *see* CARLEEN THOMPSON & ANNA STEWART, GRIFFITH UNIV., REVIEW OF EMPIRICALLY BASED RISK/NEEDS ASSESSMENT TOOLS FOR YOUTH JUSTICE: AMENDED REPORT FOR PUBLIC RELEASE ii, 33–34 (2006); Frank Morgan et al., *Risk Assessment in Sentencing and Corrections, A Report to the Criminology Research Council*, CRIMINOLOGY RESEARCH COUNCIL, 99–101 (1996), <http://crg.aic.gov.au/reports/22-95-6.pdf>; Max Maller & Richard Lane, *A Risk Assessment Model for Offender Management*, AUSTL. INST. CRIMINOLOGY 9 (Sept. 2002), http://www.aic.gov.au/media_library/conferences/probation/maller.pdf; Brooke Rae Winters & Hennessey Hayes, *Assessing the Queensland Community Corrections RNI (Risk Needs Inventory)*, 12 CURRENT ISSUES CRIM. JUST. 288, 289 (2001); *see also* Slobogin, *supra* note 247, at 200.

Although courts in some states refer to the results of risk assessments and risk and needs assessments to a certain extent in reaching sentencing decisions, they tend not to attribute significant weight to them. It appears that judges lack confidence in the validity of these tools and are concerned that they could be used in a manner that entrenches racial disparities in sentencing determinations. We examine these and other criticisms of risk assessment and risk and needs assessment tools more closely below. Before doing so, however, we explain the manner in which we consider that these tools should be used in the sentencing system.

C. Appropriate Uses of Risk Assessment and Risk and Needs Assessment Tools in Sentencing

1. Use of Risk Assessment and Risk and Needs Assessment Tools Should be Confined to Certain Cases

We recommend that risk assessment and risk and needs assessment tools be used widely in sentencing determinations. Nevertheless, as application of the tools demands relatively extensive and detailed analyses of individual offenders, in the interests of efficiency and resource preservation, it is appropriate to confine the use of these tools to cases where offenders are at significant risk of receiving a prison sentence.²⁷⁶ In such matters, the tools could be used in three broad ways, as follows: to determine whether an offender should be sentenced to prison; to decide upon the appropriate length of the prison term where it is found that imprisoning the offender is necessary; and to inform the choice of rehabilitation programs in which the offenders should be required to engage.

2. The Tools Should be Used in a Facilitative, Rather Than a Prescriptive Manner

Further, we suggest that risk and needs assessment tools be used to guide rather than prescribe sentencing outcomes. It is appropriate for judges to begin their process of determining an offender's likelihood of recidivism and the probable success of rehabilitative interventions by considering the results of risk assessments and risk and needs assessments. Nevertheless, they should then have discretion to make decisions that deviate from that information in individual cases (for example, if the offender's profile or nature of his/her offense is atypical). Even if judges do not follow the conclusions derived from risk assessments and risk and needs assessments, merely encouraging them to examine this data will inject greater rationality, predictability, and accuracy into their sentencing decisions.

²⁷⁶ See Berk & Hyatt, *supra* note 238, at 223.

D. Countering Criticisms of Risk Assessment and Risk and Needs Assessment Tools

In order for risk assessment and risk and needs assessment tools to assume a greater role in the sentencing calculus, it is necessary to surmount various objections that have been leveled against them. It is to these that we now turn.

1. Assessment Tools May Produce Inaccurate Results

An ostensibly sound criticism of these tools is that they have the potential to produce inaccurate results, and it is therefore unfair to reach sentencing decisions based on them.²⁷⁷ Although risk assessments and risk and needs assessments are not entirely foolproof, they are more reliable than the intuitive predictions that, as noted above, have long been relied upon in the criminal justice system, including for sentencing, as judges have in many cases been required to assess the likelihood of offenders' recidivism.²⁷⁸ Professor Harcourt notes:

The truth is, most criminal justice determinations rest on probabilistic reasoning. The jury's verdict at trial, for instance, is nothing more than a probabilistic determination of prior fact. So is a police officer's determination whether there is sufficient cause to search or arrest a suspect; a judge's decision whether a suspect was coerced to confess; or even a forensic laboratory's conclusion regarding a DNA match—or DNA exoneration.²⁷⁹

Such predictions are based on individuals' unstructured, impressionistic views, which will generally be less accurate than the results of risk assessments and risk and needs assessments. Consequently, although it is difficult to forecast the efficacy of rehabilitation programs for individual offenders with complete certainty, attempts to do so by using empirically-tested tools and the best available data are preferable to instinctive judgments. Indeed, some maintain that failure to use evidence-based modeling in assessing offenders' risk constitutes "a kind of sentencing malpractice."²⁸⁰ The inescapable conclusion remains that "scientists have empirically demonstrated that statistical risk assessment much more accurately predicts recidivism than do individuals relying on intuition and experience."²⁸¹ There is no rational reason why sentencing should fall outside the general protocol that is applied to other decision-making,

²⁷⁷ Tonry, *supra* note 249, at 168.

²⁷⁸ See Simmons, *supra* note 261, at 967.

²⁷⁹ BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 17 (2007).

²⁸⁰ Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice* 1 (Chapman U. Sch. of L., Legal Studies Research Paper Series, Paper No. 09-41, 2009), <http://ssrn.com/abstract=1424008>; see also McGarraugh, *supra* note 250, at 1106.

²⁸¹ McGarraugh, *supra* note 250, at 1106.

namely, that choices should be informed by the best available empirical data.

2. *Offenders Who Do Not Exhibit the Generalized Traits on Which the Tools are Based May be Unduly Punished*

It has also been argued that using risk assessment and risk and needs assessment tools in sentencing will unfairly penalize those offenders to whom the generalized traits on which such tools are based do not apply.²⁸² This criticism is misguided for a number of reasons.

The use of predictive tools does not, by its nature, penalize offenders. Indeed, many offenders will receive a positive assessment regarding their prospects of rehabilitation, which will lead to a reduction in the severity of their sentences. Further, legal rules and principles must apply universally and it is therefore inevitable that the development of legal norms will be influenced by generalizations regarding how those norms typically impact individual rights and interests.²⁸³ The fact that those generalizations and assessments may not apply to all individuals is not a reason to abandon them for the purpose of developing law and legal decision-making. This is illustrated in the sentencing domain by the harshest sanction (apart from capital punishment) in our system of law: imprisonment. It is assumed that people will seek to avoid this disposition because deprivation of liberty significantly sets back the interests of most individuals. There are, however, individuals who suffer less than others from the prison experience and even certain people who prefer being inside prison to being outside it.²⁸⁴ Notwithstanding this anomaly, it is not tenable to assert that imprisonment should be abolished as a sentencing option. In addition, rehabilitation is not the only sentencing objective whose pursuit depends on predictions regarding people's future behavior. For instance, general deterrence, a key sentencing objective, is justified on the basis of the prediction that individuals will be less likely to commit crimes if offenders receive harsh sanctions.²⁸⁵

3. *Possible Violation of the Proportionality Principle*

Some have maintained that it is possible that courts will increase penalties for offenders on the basis that risk assessments evaluate them to be at a higher risk for recidivism and that this is unjust because such sanctions could infringe the proportionality principle²⁸⁶ and effectively

²⁸² See Hamilton, *supra* note 249, at 116.

²⁸³ See H. L. A. HART, *THE CONCEPT OF LAW*, at xxiii (3d ed. 1961).

²⁸⁴ See, e.g., Jazmine Ulloa, *Convict Couldn't Handle Being Free*, MY SAN ANTONIO (Sept. 25, 2011), http://www.mysanantonio.com/news/local_news/article/Convictcouldn-thandlebeing-free-2187648.php.

²⁸⁵ See *infra* Part III.

²⁸⁶ Tonry, *supra* note 249, at 167.

punish offenders for future crimes that they may never commit.²⁸⁷ Nevertheless, as we have argued, it is crucial that courts continue to apply the principle of proportionality in conjunction with considering the results of risk assessments. Moreover, they must use the data from risk assessments solely to assist them in determining whether an offender has potential to be rehabilitated, rather than to ascertain whether a penalty should be increased for reasons such as community protection or specific deterrence.

4. *Risk Assessment Tools Allow Offenders' Immutable Traits, Including Race, to Result in an Increase to the Penalty*

Another criticism of predictive tools is that they unfairly allow offenders' immutable traits, especially race, to result in an increase to the penalty that is imposed.²⁸⁸ This criticism has been advanced two ways: first, it is morally inappropriate to rely on such considerations; and second, it is unconstitutional to do so.²⁸⁹ Thus, it has been contended that "[e]nhancing the punishment of an offender because of gender, age, or any other immutable characteristic strikes some as grossly unfair,"²⁹⁰ and that, in influencing sentencing determinations, predictive algorithms may breach the Equal Protection Clause of the Fourteenth Amendment, which prohibits the use of factors that illegitimately discriminate between offenders and may therefore disallow reliance on immutable traits such as race, age and gender in the sentencing calculus.²⁹¹

An offender's immutable characteristics can potentially influence sentencing considerations expressly or, more commonly, where they stand as a proxy for other considerations, such as education and employment status. Race is not a consideration that at present has an express impact on sentencing considerations,²⁹² and there is no foundation for maintaining that it is part of any risk assessment tool.

The indirect influence of offenders' immutable characteristics on sentencing decisions is a much more complex issue. This is in part due to the fact that race has a far more wide-ranging, albeit tacit, role in sentencing than is generally acknowledged. As noted above, an

²⁸⁷ Michael Marcus, *MPC—The Root of the Problem: Just Deserts and Risk Assessment*, 61 FLA. L. REV. 751, 753 (2009).

²⁸⁸ See, e.g., Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

²⁸⁹ See Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 819 (2014); J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1386–88 (2001).

²⁹⁰ Slobogin, *supra* note 247, at 205.

²⁹¹ *Id.* at 204.

²⁹² *United States v. Taveras*, 585 F. Supp. 2d 327, 336–37 (E.D.N.Y. 2008).

offender's prior convictions are the most important sentencing consideration apart from the seriousness of an offense, and can operate to considerably increase the penalty. The relevance of and reliance on prior convictions is neutral on their face. However, African Americans have more prior convictions than other Americans and, as one of us has argued previously, the sentencing premium that applies for prior criminality operates in a manner that discriminates against African American offenders.²⁹³ Despite this bias, current orthodoxy maintains that the recidivist sentencing loading is appropriate.

Indeed, courts have accepted that immutable characteristics can influence sentencing outcomes. Christopher Slobogin observes:

The Supreme Court, however, does not believe that risk assessment is antithetical to criminal justice. It has even approved death sentences based on dangerousness determinations (*Jurek v. Texas* 1976, 275–276). If sentences can be enhanced in response to risk, then neither society's nor the offender's interests are advanced by prohibiting consideration of factors that might aggravate or mitigate that risk simply because they consist of immutable characteristics. In any event, risk-based sentences are ultimately based on a prediction of what a person will do, not what he is; immutable risk factors are merely *evidence* of future conduct, in the same way that various pieces of circumstantial evidence that are not blameworthy in themselves²⁹⁴

The first state appellate decision to consider expressly the appropriateness of relying on risk assessments and risk and needs assessment in sentencing was *Malenchik v. Indiana*.²⁹⁵ In *Malenchik*, the court held that “evidence-based assessment instruments can be significant sources of valuable information for judicial consideration in deciding whether to suspend all or part of a sentence.”²⁹⁶ Moreover, the court explicitly rejected the argument that it was discriminatory for a court to rely on a tool that factored in considerations such as economic status and social circumstances on the basis that current sentencing law already:

[M]andates that pre-sentence investigation reports include “the convicted person's history of delinquency or criminality, social history, employment history, family situation, economic status, education, and personal habits.” Furthermore, supporting research convincingly shows that offender risk assessment instruments, which are substantially based on such personal and sociological data, are

²⁹³ Bagaric, *Three Things*, *supra* note 55, at 105–06.

²⁹⁴ Slobogin, *supra* note 247, at 205 (emphasis in original).

²⁹⁵ *Malenchik v. Indiana*, 928 N.E.2d 564 (Ind. 2010).

²⁹⁶ *Id.* at 574.

effective in predicting the risk of recidivism and the amenability to rehabilitative treatment.²⁹⁷

Nevertheless, we recommend that risk assessment tools and other instruments that are used to predict the likelihood of offenders' recidivism should expressly articulate the relevant considerations that they take into account, so that offenders' immutable characteristics will only be incorporated into them if it is definitively established that they can have an impact on this risk (as opposed to being a proxy for other considerations, such as an offender's deprived social and economic background). Further, if the tools are developed carefully and with a focus on preventing the operation of factors that may lead to indirect discrimination, they can minimize the potential for considerations such as race to influence sentencing outcomes inappropriately. The results of significant research into the effects of race on one risk assessment tool in particular—the PCRA—which were published in 2016, illustrate this point.

Jennifer Skeem and Christopher Lowenkamp examined the results of risk assessments performed using the PCRA on 34,794 federal offenders for the purpose of determining probation conditions.²⁹⁸ The study did not focus on the results of the instrument in relation to sentencing because, in the federal system, risk assessments do not inform sentencing decisions.²⁹⁹ The study noted that the accuracy rate of the tools exceeded 70 percent,³⁰⁰ and that:

First, there is little evidence of test bias for the PCRA. The instrument strongly predicts re-arrest for both Black and White offenders. Regardless of group membership, a PCRA score has essentially the same meaning, i.e., same probability of recidivism. So the PCRA is informative, with respect to utilitarian and crime control goals of sentencing. Second, Black offenders tend to obtain higher scores on the PCRA than White offenders ($d = .34$; 13.5% nonoverlap). So some applications of the PCRA might create disparate impact—which is defined by moral rather than empirical criteria. Third, most (66%) of the racial difference in PCRA scores is attributable to criminal history—which strongly predicts recidivism for both groups, is embedded in current sentencing guidelines, and has been shown to contribute to disparities in incarceration (Frase et al., 2015). Finally, criminal history is *not* a

²⁹⁷ *Id.*; see also, Commonwealth v. [Redacted], No. 2015-590, 2016 WL 1460521, at 2 (Mass. Super. Ct. Apr. 12, 2016).

²⁹⁸ Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, & Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 680 (2016).

²⁹⁹ *Id.* at 686–87.

³⁰⁰ *Id.* at 691.

proxy for race. Instead, criminal history partially mediates the weak relationship between race and a future violent arrest.³⁰¹

Another possible constitutional prohibition on using risk assessment tools in sentencing may derive from the Due Process Clause on the basis that such tools are not sufficiently accurate and therefore should not influence decisions that affect offenders' liberty. Nevertheless, this argument, too, is unlikely to succeed. Slobogin notes:

[T]he Supreme Court rejected this type of argument in *Barefoot v. Estelle* (1983) stating that a contrary holding would be akin to "disinventing the wheel" and would ignore the ability of legal factfinders, aided by the adversary process, to "separate the wheat from the chaff" (pp. 896, 900). . . . [Further most courts] . . . have held that prediction evidence—whether it is clinical or actuarial—is admissible at sentencing proceedings Many of these decisions simply declare that the rules of evidence do not apply in sentencing and post-sentencing contexts.³⁰²

The advantage of using predictive tools to assess offenders' likelihood of reoffending is that all of the relevant considerations need to be expressly incorporated into the instrument and there is total transparency regarding the relevance of each factor. This is a far superior process to the current system whereby sentencing decisions are often infected by racial considerations that are, for the most part, relatively imperceptible.

In evaluating the potential for risk assessment tools to factor the race of offenders into sentencing determinations, it is necessary to consider current decision-making in relation to sentencing in which such tools are not used. To this end, it is important to note that, at present, race influences many sentencing decisions for a number of reasons and most commonly due to sentencing judges' subconscious bias.

African Americans are imprisoned at more than five times the rate at which white Americans are imprisoned.³⁰³ Moreover, as a particularly wide-ranging study that surveyed over 77,000 offenders who received sentences observed, black defendants are sentenced to prison terms that are 12 percent longer than prison terms issued to white offenders who have committed the same crimes and have identical criminal histories.³⁰⁴ Likewise, a study undertaken for the United States Bureau of Justice

³⁰¹ *Id.* at 700.

³⁰² Slobogin, *supra* note 247, at 206.

³⁰³ HEATHER C. WEST ET AL., U.S. DEP'T OF JUST., NCJ 231675 PRISONERS IN 2009, at 9 (2011); see PRISON REFORM TRUST, BROMLEY PRISON FACTFILE 35 (2012), <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Autumn%202016%20Factfile.pdf> (showing that the over-representation of racial minorities in the United Kingdom is similar).

³⁰⁴ David Abrams, *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012); Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189, 206–07 (2002).

Statistics and the United States Department of Justice Working Group on Racial Disparity found that, in the federal jurisdiction between 2005 and 2012, judges imposed prison sentences on black men that were approximately five percent to ten percent longer than those imposed on white offenders for similar offenses.³⁰⁵ During that period, courts had considerable discretion regarding sentencing because, as noted above, in 2005, the United States Supreme Court held in *Booker v. United States* that the Federal Sentencing Guidelines were advisory rather than mandatory.³⁰⁶ While the report for this study emphasizes that it is “difficult to attribute racial disparity to skin color alone,”³⁰⁷ it also comments:

We are concerned that racial disparity has increased over time since *Booker*. Perhaps judges, who feel increasingly emancipated from their guidelines restrictions, are improving justice administration by incorporating relevant but previously ignored factors into their sentencing calculus, even if this improvement disadvantages black males as a class. But in a society that sees intentional and unintentional racial bias in many areas of social and economic activity, these trends are a warning sign. It is further distressing that judges disagree about the relative sentences for white and black males because those disagreements cannot be so easily explained by sentencing-relevant factors that vary systematically between black and white males. . . . We take the random effect as strong evidence of disparity in the imposition of sentences for white and black males.³⁰⁸

As noted above, a considerable advantage of using risk assessment tools in sentencing is that every variable that is taken into account must be

³⁰⁵ William Rhodes et al., *Federal Sentencing Disparity: 2005–2012*, BUREAU JUST. STAT., 38–41 (Oct. 22, 2015), <https://www.bjs.gov/content/pub/pdf/fsd0512.pdf>. This report also systematically documents previous studies in the United States that support the conclusion that subconscious bias causes racial disparity in sentencing. See also Brian D. Johnson & Ryan D. King, *Facial Profiling: Race, Physical Appearance, And Punishment*, 55 CRIMINOLOGY 520, 537 (2017).

³⁰⁶ Rhodes et al., *supra* note 305, at 4.

³⁰⁷ *Id.* at 67.

³⁰⁸ *Id.* at 68. Recently, it has been suggested that predictive tools used to assess future criminality are biased against black Americans. Angwin et al., *supra* note 288, at 3. Several states use algorithms to predict the likelihood of reoffending. See Adam Liptak, *Sent to Prison by a Software Program's Secret Algorithms*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-program-secret-algorithms.html>; see also Jason Tashea, *Courts Are Using AI to Sentence Criminals. That Must Stop Now*, WIRED (Apr. 17, 2017), <https://www.wired.com/2017/04/courts-using-ai-sentence-criminals-must-stop-now/>. The legality of this was challenged but the Supreme Court declined to consider the matter. See Michelle Lu, *Supreme Court Refuses to Hear Wisconsin Predictive Crime Assessment Case*, MILWAUKEE J. SENTINEL (June 26, 2017), <http://www.jsonline.com/story/news/crime/2017/06/26/supreme-court-refuses-hear-wisconsin-predictive-crime-assessment-case/428240001/V>.

expressly invoked, so there is the opportunity for extensive scrutiny to ascertain the appropriateness of the various factors by reference to all considerations, including race. Consequently, these tools will minimize and potentially totally exclude courts relying inappropriately on race and other immutable traits in applying the sentencing calculus.

It is clear that potential criticisms of the use of risk assessment and risk and needs assessment tools are readily surmountable. Moreover, in evaluating the persuasiveness of those criticisms, it is important to consider the tools' advantages. To this end, as alluded to above, it has been noted that using risk assessments and risk and need assessments at the sentencing stage "has real value to protect the public, reduce expenditures, and divert low-risk offenders from incarceration."³⁰⁹ Given the likely profound benefits of using appropriately adopted risk and needs tools in sentencing, the criticisms of such instruments are relatively inconsequential.

E. Courts Should Articulate the Weight That They Attach to Offenders' Potential to be Rehabilitated

We recommend that courts articulate the impact that rehabilitation has had on their sentencing decisions in part by indicating the weight that they have attached to the results of risk assessments and risk and needs assessments regarding offenders' potential to be rehabilitated, and the adjustments that they have made to their sentences in response to that information.

Where courts reduce sentences that they would otherwise have imposed in light of offenders' rehabilitative potential, conveying that they have discounted the penalty for this reason will emphasize the importance of rehabilitation and provide a strong incentive to offenders to undertake rehabilitative measures, such as enrolling in educational courses, finding employment, or seeking drug or alcohol treatment, before they are sentenced. Expedient motives will probably drive some offenders to undertake rehabilitative measures in these circumstances. Indeed, it is such self-interest that inclines offenders, after being charged with crimes, to comply with the law to avoid incurring further sanctions, enter plea arrangements and, sometimes, give evidence against other offenders. Notwithstanding this motivation, if offenders do undertake rehabilitation, it may lead to positive attitudinal reform. Courts' clear articulation of the manner in which they adjust penalties in response to offenders' likelihood of rehabilitation will also encourage other judges to think more carefully about the nature and structure of their sentences.

It is difficult to nominate a standard discount by which penalties should be adjusted to take into account offenders' probability of

³⁰⁹ McGarraugh, *supra* note 250, at 1111–12.

rehabilitation. Nevertheless, one of us has suggested elsewhere that, if an offender has strong prospects of rehabilitation, a penalty discount in the order of 25 percent should be applied, while weaker prospects of rehabilitation would attract a lower discount.³¹⁰ Where the sanction that a court intends to impose is a prison term, it could provide a discount for prospects of rehabilitation simply by reducing the head sentence and imposing a non-parole period. If a court would be inclined to impose a short prison term, the discount could be applied by making a less burdensome sentence, such as parole or probation. Regardless of the discount made, it is important for courts to indicate the sanction that they would have imposed had they not taken into account the offender's prospects of rehabilitation. Likewise, where courts alter the conditions of a community-based order that they might otherwise have made in light of the offender's rehabilitative potential, they should indicate the manner in which they have adjusted this sanction.

In cases where risk assessments lead courts to determine that offenders would have extremely poor prospects of rehabilitation, it may still be appropriate for them to articulate the consideration that they have given to rehabilitation in the sentencing calculus. For instance, where a court determines as a factual matter that an offender cannot be rehabilitated at all and will never abide by the law, it could indicate that rehabilitation can play no role in reducing or framing the sanction that is imposed in such a case.

It will still be appropriate for rehabilitation to play a role in the sentencing calculus where courts determine that offenders do not require rehabilitation because risk assessments confirm that they almost certainly will not reoffend. Courts may make such an assessment where the crime has occurred in highly unusual circumstances and is unlikely to be repeated³¹¹ or where the crime was committed many years before sentencing and the offender has not reoffended in the interim period. In such cases, it will be fair for offenders to receive discounts to their penalties—and for courts to stipulate the nature of that reduction—for the reason that, if rehabilitation had no impact on sanctions in these circumstances, offenders who are not at risk of reoffending would receive heavier penalties than those who have committed the same crimes, but require rehabilitation and are likely to reoffend. The manner in which rehabilitation operates in the sentencing calculus should not confer a

³¹⁰ For a discussion regarding the appropriate weight to be accorded to mitigating factors, see Mirko Bagaric, *Rational Theory of Mitigation and Aggravation in Sentencing: Why Less Is More When It Comes to Punishing Criminals*, 62 *BUFF. L. REV.* 1159, 1160–63 (2015).

³¹¹ For example, mercy killing cases typically attract very lenient penalties. See *Euthanasia—the Australian Law in an International Context*, PARLIAMENT AUSTRAL., http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp4.

greater sentencing advantage on offenders who have prospects of rehabilitation compared with those who are already rehabilitated.

CONCLUSION

The United States is experiencing an unprecedented mass incarceration crisis. The crisis has occurred largely due to the unabated pursuit over four decades of a “tough on crime” political agenda and the use of imprisonment as the principal means of achieving the sentencing objective of community protection. It is slowly dawning on American society, however, that the fiscal impost of imprisoning more than two million citizens is no longer sustainable, the human cost of mass incarceration is intolerable, and greater numbers of prisoners have not made the community safer, partly because so many offenders reoffend following their release from prison.

In this Article, we have proposed a principled, progressive and coherent solution to this crisis: expand the role of the objective of rehabilitation in sentencing decisions. We maintain that community protection should remain the paramount goal of sentencing, but that rehabilitation is intertwined with and is a means of achieving it; offenders who are rehabilitated and do not therefore reoffend do not endanger the community. Sentencing courts should mitigate the incarceration crisis and enhance public safety by placing greater weight on rehabilitation, rather than focusing on incapacitating offenders.

Although rehabilitation is, on its face, a well-established sentencing objective, in practice, it is typically subordinated to other sentencing goals and, as noted above, the sentencing objective of community protection is most commonly pursued through incapacitation of offenders. Even in jurisdictions in which courts formally attribute significant weight to rehabilitation in the sentencing calculus, it rarely influences the penalty that is ultimately imposed. To some extent, this is understandable given that there is some skepticism about the efficacy of rehabilitative measures to elicit positive attitudinal reform in offenders. Recent empirical data suggest, however, that many offenders can be rehabilitated by participating in well-targeted and well-developed programs.

This Article makes several recommendations to expand the role of rehabilitation in sentencing. First, the advantages of rehabilitation to protect the community should be promulgated. Second, rehabilitation should have a more prominent and explicit place in the sentencing calculus, so that courts are required to balance the potential for offenders to be rehabilitated against other sentencing considerations (and those other considerations should not readily override rehabilitation except in relation to very serious offenses) and to indicate expressly the weight that they have accorded to rehabilitation in applying

that calculus. Third, courts should use empirically-tested means of predicting offenders' likelihood of rehabilitation and recidivism, such as risk assessment and risk and needs assessment tools (which are currently used most commonly at the post-sentencing stage, though they are more useful in assisting to reach sentencing determinations), and articulate the weight that they have attached to the results of those evaluations. Where there is a reasonable risk of offenders' recidivism, courts must put in place interventions to mitigate it.

It is important to highlight that expanding the role of rehabilitation in sentencing does not entail that offenders who commit serious sexual and violent offenses should no longer be subjected to harsh penalties, including long prison terms. As we have argued, in addition to community protection and rehabilitation, the principle of proportionality is a valid sentencing objective that should be applied in determining penalties. Nevertheless, unless offenders fall within the small cohort of offenders who cannot be rehabilitated, it is vital still to implement measures to reduce their inclination to reoffend, given that most of them will be ultimately released from prison.

For our recommendations to be implemented successfully, it will be crucial for American governments to invest more heavily in developing rehabilitative programs and improving the accuracy of risk assessment and risk and needs assessment tools, and provide legislative direction for greater emphasis to be accorded to rehabilitation. Further, the public and political dialogue surrounding how to protect the community through sentencing needs to shift from a focus on incapacitation to recognition that eliciting positive attitudinal reform in offenders is the most effective way to safeguard the community. Unless changes of this nature are made, many more Americans will be sentenced to prison than ought to be the case.