

SENSE AND SENTENCING: OUR IMPRISONMENT EPIDEMIC

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INTRODUCTION: A CONFESSION

Confession is good for the soul, and so I want to begin this essay with a confession. But first, some background.

I am a sentencing scholar. For the past decade or so, I have devoted much of my time to thinking and writing about sentencing. My scholarly focus is hardly surprising, given my professional experience. I became a lawyer shortly after the United States Sentencing Guidelines went into effect in 1987, and I spent much of the first decade of my career directly engaged with the practice of federal criminal law – as a law clerk to a federal district judge, as a criminal defense attorney, and as a federal prosecutor. In each of those positions, the Guidelines were a constant presence, and I was able to witness first-hand the competition among judges, prosecutors, and defense lawyers for control of the ultimate sentence.

And so, when I joined the academy, it was natural that I would write about the sentencing process. In that, of course, I have not been alone. In many ways, the Guidelines have ushered in what can be considered a Golden Age of sentencing scholarship. Much of that scholarship, including mine, focused on the distribution of sentencing discretion. In other words, it focused on questions surrounding how sentencing power should be divided among Congress, judges, and prosecutors.¹ That division of that

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¹ See, e.g., James B. Burns et al., *We Make the Better Target (But the Guidelines Shifted Power from the Judiciary to Congress, Not from the Judiciary to the Prosecution)*, 91 NW. U. L. REV. 1317 *passim* (1997) (discussing the mandatory Sentencing Guidelines' effect on the distribution of sentencing discretion); Angela J. Davis, *The American Prosecutor: Independence, Power, and the*

power has obvious practical consequences for defendants, and it implicates a wide variety of topics for scholars: the mandatory or advisory nature of the Guidelines, the constitutionality of various sentencing procedures, the advisability of mandatory minimum sentences, the effect of prosecutorial charging policies, the sentencing of corporations, and the technical particulars of Guidelines operation, including departure authority, relevant conduct, specific offender characteristics, cooperation, and so on.² It has been a good time to be a sentencing scholar.

And now, the confession: I fear I have missed the point. While I concerned myself with unpacking sentencing discretion, the United States ended up with over two million of its citizens incarcerated.³ While I concerned myself with how the sentence was determined, I lost sight of the more basic question: How long is the sentence?⁴ And unfortunately, that

Threat of Tyranny, 86 IOWA L. REV. 393, 408 (2001) (detailing the prosecutor's broad discretion in determining the length, nature, and severity of the sentence); Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 302 (2005) (calling for judicial oversight of sentence bargaining); Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1265 (2004) (recommending legislative elimination or curtailment of mandatory sentences); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1951–52 (1988) (noting the failures of the sentencing guidelines); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342 *passim* (1997) (summarizing the ways in which the Guidelines minimized the effect of prosecutorial charging decisions); Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303 *passim* (2009) (discussing prosecutorial sentencing discretion in the advisory Guidelines era); Hon. Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 26 (1991) (acknowledging criticisms of the Guidelines for failing to take into account a human element).

² See U. S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING app. a, bibliog. (2004) (listing over 200 articles and books and providing just a taste of the rich scholarly literature on sentencing under the Guidelines).

³ See WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2008 8 (2009) [hereinafter SABOL ET AL.], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>; King's College London School of Law, International Center for Prison Studies, World Prison Brief, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php (last visited Apr. 19, 2010).

⁴ I do not want to exaggerate my failings. My work has inevitably been concerned with sentence length, though usually indirectly. See, e.g., Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 955–56 (2002). But, like many sentencing scholars, I focused more on the means for arriving at individual sentences, and less on the overall effect of sentence lengths on American society. *Id.* Of course, there have been voices crying out about our embrace of mass incarceration. See, e.g., Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97 *passim* (2008) (discussing the negative effects that mass incarceration can have on prisoners' communities); James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L.J. 387, 387 (2006) (arguing that mass incarceration leads to a vicious cycle in which former prisoners are shut out of legitimate opportunities, which leads to more crime); Marc Mauer, *Thinking About Prison and Its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607, 609 (2005) (outlining factors which should be considered when studying the effects of mass incarceration in order to determine whether it has a positive or negative effect on society); Marc Miller & Daniel J. Freed, *The Disproportionate Imprisonment of Low-Level Drug Offenders*, 7 FED. SENT. R. 3 *passim* (1994) (discussing the explosion in the federal prison population and the effect of mandatory sentencing); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004) (focusing on the

answer to that question is often “far too long.”

Over the past thirty years, the most important sentencing development has not been the legislative adoption of mandatory guidelines, or the judicial creation of advisory guidelines, or the adoption of a wide variety of guidelines systems in the states, or the widespread elimination of parole, or the abandonment of rehabilitation as a sentencing goal. No, the most important sentencing development has been our rejection of the principal of parsimony: the notion that a sentence should be as long as – but no longer than – necessary to accomplish the goals of punishment.⁵ Instead, we have replaced parsimony with severity, which has resulted in ever longer prison sentences and a sharp increase in incarceration rates. Consider this statistic: over 2.3 million Americans, or about one in every 131 people, are currently incarcerated. As a country, we are suffering from an incarceration epidemic. Part I of this article will trace the history of that epidemic.

And yet, in the midst of this epidemic, there is evidence that the sentencing pendulum may have finally started to swing back toward moderation, as Part II of this essay will discuss. Indeed, some politicians have even begun to recognize that it is politically feasible to replace being “tough on crime” with being “smart on crime.” After thirty-years of ever increasing severity, there may be reason for hope. We may finally be ready to talk sense about sentencing.⁶

I. THE U.S. ADDICTION TO INCARCERATION

A. How Did We Get Here?

The magnitude of our current incarceration rate can be difficult to grasp. To me, at least, the notion that 2.3 million Americans are incarcerated is rather abstract. Converting that number into a ratio – approximately one out of every 131 Americans – makes it somewhat more concrete. Perhaps the best way to understand our incarceration rate is to compare the United States to other countries. Incarceration rates are typically measured as the number of persons incarcerated for every 100,000 residents. Most

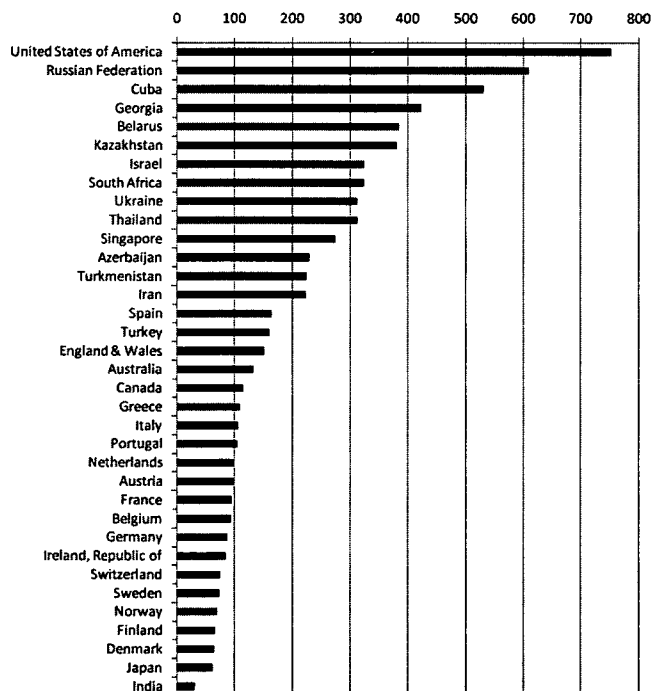
effects of mass incarceration on African American communities because the surge in prison populations has involved African Americans in “grossly disproportionate numbers”).

⁵ 18 U.S.C.S. § 3553(a)(2) (2010) (outlining the considerations on which the court should base the sentence imposed).

⁶ This essay builds ideas that I first explored in a post on NPR’s Talking Justice Blog. *See* Posting of Michael A. Simons to NPR’s Talking Justice Blog, <http://communities.justicetalking.org/blogs/day28/archive/2008/01/28/Sense-and-Sentencing.aspx> (Jan. 28, 2008, 1:06 PM EST).

industrialized democracies incarcerate fewer than 200 of every 100,000 residents. So, for example, the Scandinavian countries all have incarceration rates lower than 74 per 100,000 residents – Denmark (66), Finland (67), Norway (70), and Sweden (74). Most of the rest of Europe has incarceration rates of less than 200 per 100,000 residents, including Ireland (85), Germany (88), France (96), Austria (99), Portugal (106), Italy (107), Greece (109), England and Wales (152), Turkey (161), and Spain (165). Other democracies typically have similarly low rates: India (32), Japan (63), Canada (116), Australia (134). Of the larger countries with incarceration rates over 200, many are former Soviet republics, including Turkmenistan (224), Azerbaijan (229), Ukraine (314), Kazakhstan (382), Belarus (385), and Georgia (423). Other countries with relatively high incarceration rates include Iran (223), Singapore (274), Thailand (313), Israel (325), South Africa (325), and Cuba (531). Only two countries of any significant size have incarceration rates higher than Cuba's: the Russian Federation at 610 and the United States at 753.⁷

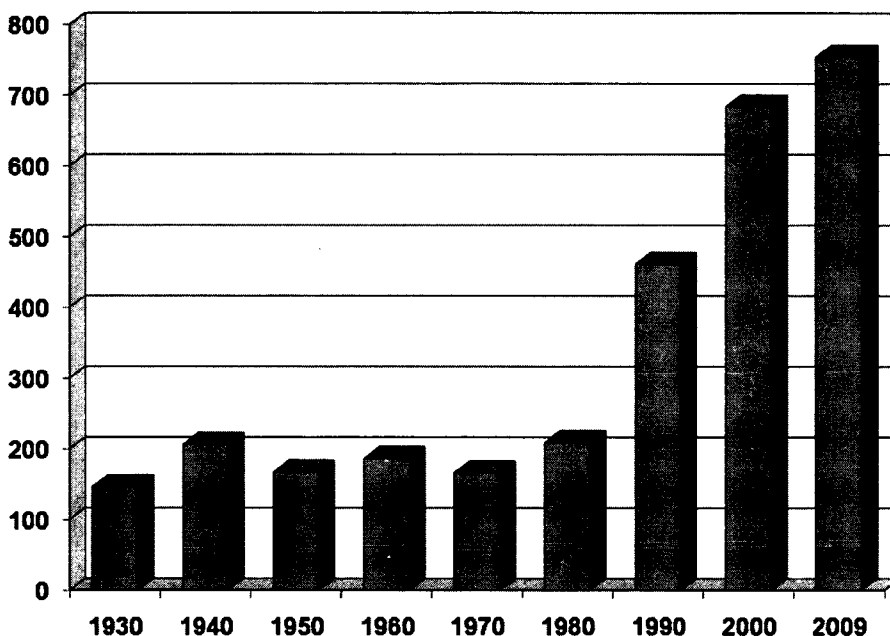
Worldwide Incarceration Rates (2008)



⁷ Roy Walmsley, International Centre for Prison Studies, World Prison Brief, available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited May 21, 2010).

It was not always so. The United States' staggeringly high incarceration rate is a relatively recent development. For most of the past ninety years—through Prohibition in the 1920s and 1930s, through the wartime difficulties of the 1940s, through the communist scares of the 1950s, and through the social turmoil of the 1960s and 1970s—our incarceration rate hovered between 100 and 200 people per 100,000 residents. In 1980, it climbed into the low 200s,⁸ at least in part as a result of a growing trend away from rehabilitation as the primary objective of sentencing and towards deterrence and incapacitation.⁹ But it was not until the last twenty-five years that our incarceration rate skyrocketed.

U.S. Incarceration Rates (1930-2009)



⁸ See JUSTICE POLICY INSTITUTE, *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM* 4, graph 4 (2000), available at http://www.justicepolicy.org/images/upload/00-05_REP_PunishingDecade_AC.pdf (reporting incarceration rates between 1910 and 1990); SABOL ET. AL., *supra* note 3, at 8 (detailing incarceration rates for 2000, 2007 and 2008).

⁹ See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429 (2001) (noting that in the past few decades, the criminal justice system's focus has shifted to preventing future violations through incarceration and control).

The story behind these numbers is, in many ways, a political one. In 1964, in the face of rising crime rates, presidential candidate Barry Goldwater made being “tough on crime” a national issue. Although Goldwater did not win the election, his campaign tactic changed the politics of crime on the national stage.¹⁰ In the 1970s, as the fear of crime by heroin addicts grew, the governor of New York, Nelson Rockefeller, pushed for long mandatory sentences for drug crimes. Under the Rockefeller Drug Laws, which were enacted in 1973, a defendant who was convicted for possession of four ounces of heroin or cocaine had to serve a minimum sentence of fifteen years.¹¹

The federal government followed with its own “tough on crime” policies in the 1980s, when Congress established mandatory minimum sentences for narcotics offenses and violent crime.¹² Prior to the Anti-Drug Abuse Act of 1986, judges and parole officers had broad discretion to select an individualized sentence based on the drug offender’s rehabilitative need and potential.¹³ This system of almost unfettered judicial discretion came under increasing attack in the 1970s and early 1980s due to the perceived unjustness of vast disparities in sentences for similar crimes, widespread fear about rising drug abuse and drug-related crime, and concerns about the effectiveness of penal rehabilitation.¹⁴ Congress responded with stiff minimum penalties for offenses involving certain quantities of drugs, requiring, for instance, a five-year prison term for offenders convicted of distributing 100 grams of heroin, 500 grams of cocaine, or five grams of crack.¹⁵

In 1987, the federal Sentencing Guidelines went into effect and

¹⁰ See, e.g., TED GEST, *CRIME & POLITICS: BIG GOVERNMENT’S ERRATIC CAMPAIGN FOR LAW AND ORDER* 1 (2001).

¹¹ Rockefeller Drug Laws, N.Y. Times, http://topics.nytimes.com/top/reference/time_stories/subjects/d/drug_abuse_and_traffic/rockefeller_drug_laws/index.html (last visited Apr. 28, 2010).

¹² U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 8–11 (1991), available at http://www.ussc.gov/r_congress/manmin.pdf.

¹³ See Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 94 (1999).

¹⁴ See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL POLICY* 12–31 (1981) (discussing the rise and fall of rehabilitation as the theoretical justification for punishment); Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 686–88 (discussing criticisms of indeterminate sentencing and noting that the public began to blame the sentencing system for the rising crime rates in the 1970s and 1980s); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1286–93 (discussing public fear of drug abuse and attendant crime in the 1970s and 1980s).

¹⁵ See 21 U.S.C. § 841(b)(1)(A)–(B) (2001). Those minimum sentences may be doubled for second offenders. See *id.* at § 841(b).

established rigid mathematical formulas that resulted in narrow—and often quite severe—“sentencing ranges” based on the crime and the defendant’s criminal history.¹⁶ The Guidelines incorporated the mandatory minimum sentences of the Anti-Drug Abuse Act of 1986, and their mandatory nature restricted a judge’s authority to depart from the Guideline range.¹⁷ These sentencing reforms, along with the federal government’s elimination of parole, contributed significantly to the steady rise in the incarceration rate.¹⁸

In the 1990s, our incarceration rate jumped into the 600s¹⁹ as an increasing number of states eliminated parole, enacted “three strikes” laws, and made regular use of “life without parole” sentences.²⁰ Since then, while the rate of increase has begun to slow, the incarceration rate itself has continued to rise.²¹ In 2003, we surpassed Russia to become the worldwide leader in incarceration.²²

We have become, to put it bluntly, an outlier. And our status as the world’s most enthusiastic incarcerator cannot be attributed to anything unique about American culture, because we have assumed that status only in the past twenty-five years. Instead, our current incarceration epidemic is the direct result of political choices, and those choices have created a host of problems.

¹⁶ See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A(3) (2009) (presenting sentencing table used to determine sentence range).

¹⁷ See *id.* ch. 1, pt. A(3) (noting that the mandatory minimum sentences of the 1986 Act required the Commission to depart from its normal practice of drafting Guidelines to reflect pre-Guidelines practice); Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENT. R. 19, 19 (1996) (stating that the goal of the Guidelines was to restrict judicial discretion).

¹⁸ Between 1986 and 1999, the average federal drug sentence more than doubled. See JOHN SCALIA, DEPARTMENT OF JUSTICE, FEDERAL DRUG OFFENDERS, 1999 WITH TRENDS 1984-99, at 1 (2001). In addition, the number of federal prisoners incarcerated for drug offenses increased by 400 percent during the same time period. See *id.* at 7.

¹⁹ See King’s College London School of Law, International Center for Prison Studies, Prison Brief for the United States of America, http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=190 (last visited Apr. 28, 2010).

²⁰ See Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 494-95 (1999) (stating that Maine abolished parole in 1976, and by the end of 1998 fourteen states had followed suit); Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1842 (2006) (noting that the number of states with life-without-parole statutes on the books increased from thirty in 1990 to forty-eight in 2005); Larry Rohter, *In Wave of Anticrime Fervor, States Rush to Adopt Laws*, N.Y. TIMES, May 10, 1994, at A1 (reporting that so-called three-strikes laws were the most popular of new laws states were enacting to combat crime).

²¹ WILLIAM J. SABOL ET AL., *supra* note 3, at 8; CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUST., THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES 3 (2009), available at http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf.

²² See MARC MAUER, SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION, 2 (2003), available at http://www.sentencingproject.org/doc/publications/inc_comparative_intl.pdf.

B. What Is Wrong With the Current State of Affairs?

A complete analysis of the costs and benefits of our current incarceration rate is far beyond the scope of this essay. But a number of problems are becoming increasingly apparent.

Incarceration is, of course, a necessary evil. But I fear that legitimate concerns for public safety have allowed us to turn a blind eye to the suffering caused by the wholesale warehousing of over two million human beings. While some of the prisoners currently incarcerated are no doubt dangerous and deserve punishment, more than half are serving time for nonviolent crimes.²³ In a noteworthy speech at the American Bar Association's Annual Meeting in 2003, Supreme Court Justice Anthony Kennedy noted the dehumanizing experience of prison and highlighted the need "to bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach."²⁴

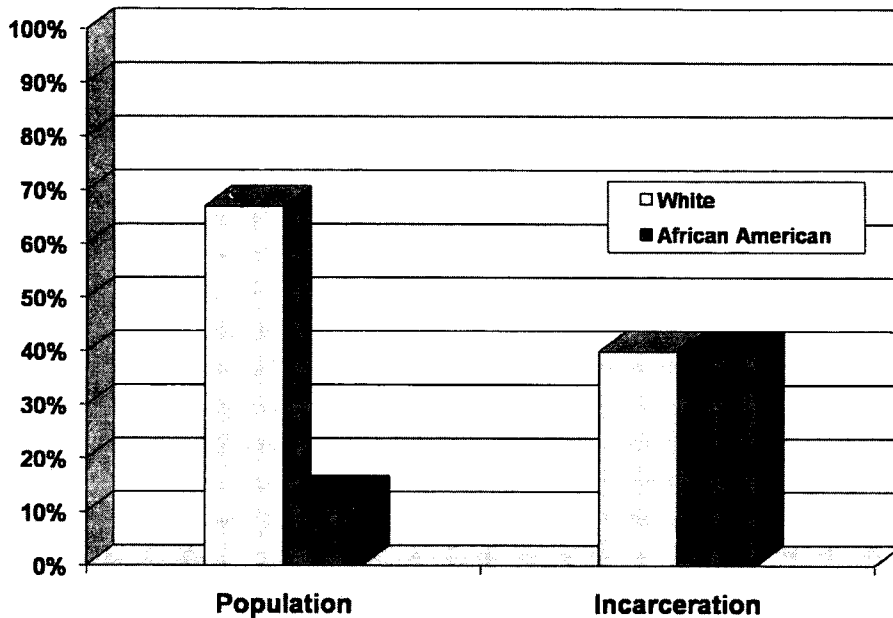
Our system of mass incarceration also perpetuates endemic racial disparity. In 2008, one out of every twenty-one African American males was in prison, while only one out of 138 white males was incarcerated. In other words, our incarceration rate for African American men is more than six times greater than the rate for white men. Thus, although 67 percent of the United States' population is white and 13 percent is African American, both groups make up approximately 40 percent of the inmate population.²⁵

²³ Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 52, 67 (2008).

²⁴ Anthony M. Kennedy, Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003) [hereinafter Kennedy Speech], available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html.

²⁵ Press Release, Bureau of Justice Statistics, Dep't of Justice, Growth in Prison and Jail Populations Slowing: 16 States Report Declines in the Number of Prisoners (Mar. 31, 2009), available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/BJS090331.htm>; see also *Hearing on Racial Disparities in the Criminal Justice System Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Dr. Barry Krisberg, President, Nat'l Council on Crime and Delinquency), [hereinafter *Hearing on Racial Disparities*] available at http://judiciary.house.gov/hearings/hear_091029.html.

Racial Disparities in Incarceration (2008)



The reasons for this racial disparity are numerous and complex, but one evident cause is our approach to the “war on drugs.” Although African Americans made up 14 percent of drug users in 2005, they represented 53 percent of the persons incarcerated for drug offenses.²⁶ In some cities, as Justice Kennedy pointed out during his ABA speech, “more than 50 percent of young African-American men are under the supervision of the criminal justice system.”²⁷ While some of the racial disparity in incarceration may be explained by differing patterns of criminal activity, a 2004 study by the Sentencing Project concluded that nearly 40 percent of

²⁶ See *Hearing on Racial Disparities* *supra* note 25 (statement of Marc Mauer, Exec. Director, The Sentencing Project) available at http://judiciary.house.gov/hearings/hear_091029.html; see also *Hearing on Racial Disparities*, *supra* note 25 (statement of Rep. Steve Cohen) available at http://judiciary.house.gov/hearings/hear_091029.html (stating that well-documented racial disparities at various stages of the criminal justice system include “racial profiling of potential suspects, prosecutorial discretion over charging and plea bargaining decisions, mandatory minimum sentences, and countless other policies and decisions”).

²⁷ Kennedy Speech, *supra* note 24.

the disproportionately high incarceration rates of African Americans cannot be attributed to greater involvement in crime.²⁸

There is also little evidence that long prison sentences have been effective in reducing crime.²⁹ Instead, the evidence suggests that deterrence is most effectively accomplished by arrest and rapid prosecution, not by enhanced sentence length.³⁰ Indeed, mass incarceration may actually worsen crime rates. In recent years, approximately 650,000 prisoners have reentered society each year and the recidivism rates of those prisoners are striking: approximately 67 percent of former state prisoners and 40 percent of former federal prisoners re-offend within three years.³¹

Aside from societal costs, our addiction to incarceration also bears a considerable monetary price. A recent survey of 37 states indicated that those states spent nearly \$52 billion on corrections in 2008, a 300-percent increase since 1988 (which, not surprisingly, tracks the 300-percent increase in incarceration rates over that same time period). Throughout most of the incarceration boom, those costs have been borne without complaint (indeed, often with encouragement from communities eager for the jobs created by nearby prisons. Now, however, we are mired in the second year of a deep recession, and a growing number of states are facing severe budget deficits that threaten funding for healthcare, education, and other public services. In this economic climate, the costs of mass incarceration have increasingly come under attack.³²

²⁸ *Hearing on Racial Disparities supra* note 25 (statement of Marc Mauer, Exec. Director, The Sentencing Project) available at http://judiciary.house.gov/hearings/hear_091029.html. The most recent analysis of federal sentencing by the United States Sentencing Commission has reached similarly disturbing conclusions. See UNITED STATES SENTENCING COMMISSION, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT'S MULTIVARIATE REGRESSION ANALYSIS (March 2010) The analysis concluded, after controlling for other variables, that "Black male offenders received longer sentences than white male offenders" and that such disparities have increased since judges were given more discretion over sentence lengths in 2005. *Id.*

²⁹ John M. Darley, *On the Unlikely Prospect of Reducing Crime Rates by Increasing the Severity of Prison Sentences*, 13 J.L. & POL'Y 189 *passim* (2005).

³⁰ See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954 (2003) (discussing the meaningful chance for punishment and a lack of delay in being punished as important for deterrence).

³¹ PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf> (reporting recidivism rates for prisoners from fifteen states); MILES D. HARER, FEDERAL BUREAU OF PRISONS, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987, at 1, available at http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprecid87.pdf (discussing recidivism rates of federal prisoners).

³² See SCOTT-HAYWARD, *supra* note 21, at 3 (noting that 43 states are facing an aggregate budget gap of \$100 billion in fiscal year 2009).

II. HOPE FOR THE FUTURE

In January 2008, in the midst of a hotly-contested Democratic presidential primary, then-candidate Barack Obama issued a position paper outlining his criminal justice priorities. His announced proposals included eliminating the sentencing disparity between crack and cocaine offenses, reducing or eliminating mandatory sentences to stop the “ineffective warehousing of non-violent drug offenders,” increasing the use of drug courts that focus on treatment instead of incarceration, and increasing programs for released offenders to reduce recidivism.³³ In making these proposals, Obama was hardly breaking new ground. Judges and academics had been making similar arguments for years.³⁴ But, it was a bold move for a presidential candidate to risk being labeled “soft on crime.” And yet, Obama’s proposed criminal justice reforms did not become a political liability.³⁵ It in no way disparages the sincerity of Obama’s views to point out the obvious: He had made the political calculation that being reflexively “tough on crime” was no longer a requirement for a presidential candidate. He recognized, several months *before* the economic crisis, that public views about crime and incarceration were shifting in important ways.

Since taking office, President Obama has continued to support sentencing reform. His administration has replaced the old “tough on crime” mantra with a new one: “smart on crime.” This new approach, according to Attorney General Eric Holder, involves “thinking about crime in context—not just reacting to the criminal acts, but developing the government’s ability to enhance public safety before the crime is committed and after the former offender is returned to society.” In more concrete terms, the administration advocates treatment and reentry programs to prevent recidivism, as well as evidence-based methods to develop incarceration alternatives and programs that target at-risk individuals before they commit crimes. The Department of Justice is also conducting a review of federal sentencing and corrections policy in order to use the findings as a basis for sentencing reform legislation.³⁶ And, while

³³ Obama’08, Barack Obama: Creating Equal Opportunity and Justice for All, http://obama.3cdn.net/98f87f977e34c1d670_501umvuin.pdf (last visited Apr. 28, 2010).

³⁴ See, e.g., Kennedy Speech, *supra* note 24; Beth A. Colgan, *Teaching a Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 SEATTLE J. SOC. JUST. 293 (2006); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049 (2008); Hon. Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U.L. REV. 1389 (2008).

³⁵ Indeed, it appears that they got very little attention at all.

³⁶ Eric Holder, U.S. Att’y Gen., Speech at the 2009 ABA Convention (Aug. 3, 2009) [hereinafter

President Obama has hit several political bumps in the road, none of them has been related to his support for “smart on crime” policies.

In addition to the Obama administration’s new rhetoric about incarceration, other recent developments suggest that the cycle of ever increasing severity in sentencing may finally be broken. In 2005, the Supreme Court ruled that the sentencing ranges established by the Federal Sentencing Guidelines were no longer mandatory, but rather merely advisory.³⁷ Judges must still calculate a Guidelines range, but that range is just a starting point, and the sentence can be varied up or down significantly to “impose a sentence sufficient, but not greater than necessary,” to comport with the traditional purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.³⁸ In 2007, in two cases involving lengthy Guidelines sentences for drug offenders, the Court emphasized that sentencing judges have wide judicial discretion to impose sentences below the narrow Guidelines range based on the defendant’s individual situation.³⁹

Also in 2007, the United States Sentencing Commission amended the Guidelines to reduce the disparity between crack and powder cocaine sentences from a 100-to-1 ratio to ratios varying at different offense levels between 25-to-1 and 80-to-1. The Commission expects that this modification “will result in a reduction in the estimated average sentence of all crack cocaine offenses from 121 months to 106 months.”⁴⁰ This change to the Guidelines is retroactive, so that almost 20,000 prisoners are now

Holder Speech] (discussing the use of data and research to shape sentencing policy).

³⁷ *United States v. Booker*, 543 U.S. 220 (2005).

³⁸ *See id.* at 245–46, 260 (citing 18 U.S.C. § 3553(a)(2) (2000)).

³⁹ In *Gall v. United States*, the Court held that a sentence of 36 months parole—instead of the Guidelines’ 30 to 37 months of imprisonment—was reasonable given the judge’s individualized assessment of the circumstances of the case and the defendant’s characteristics, which included his youth and immaturity at the time of the offense and the fact that he “self-rehabilitated” and stopped selling drugs more than three years before his indictment. 552 U.S. 38, 41–43, 56–60 (2007). In *Kimbrough v. United States*, a case involving the distribution of crack cocaine, the Court upheld the district court judge’s decision to impose a below-Guidelines sentence—15 years, as opposed to 19 to 22.5 years—based on the judge’s disagreement with disparity between crack and powder cocaine sentences. The Court held that the Guidelines’ 100-to-1 ratio for crack and powder cocaine offenses was not mandatory, even though it was set by Congress in the 1986 Act. 552 U.S. 85, 91–93, 102–103, 110–112 (2007).

⁴⁰ *See Kimbrough*, 552 U.S. at 106; U.S. SENTENCING GUIDELINES MANUAL app. C, supp., at amend. 706 (2009). While the pre-amendment Guidelines ranges for crack offenses started above the statutory mandatory minimum, the ranges now include the minimum sentences. For instance, under the pre-amendment Guidelines, offenses involving 5 grams of crack cocaine received base offense level 26 and a sentencing range of 63 to 78 months, which exceeded the five-year (60-month) statutory mandatory minimum by three months. Under the current Guidelines, 5 grams of crack are assigned a base offense level of 24, corresponding to a sentencing range of 51 to 63 that includes the 60-month mandatory sentence. Offenses involving other quantities of crack cocaine are similarly reduced by two base offense levels in the amended Guidelines. *Id.*

eligible for sentence reductions. Eighty-six percent of those prisoners are black.⁴¹

States have also taken steps to reduce their incarceration rates and costs. In 2008, several states implemented initiatives aimed at keeping non-violent offenders out of prison, such as declaring marijuana enforcement to be a low law enforcement priority and expanding the use of drug courts and home incarceration. In addition, some states addressed racial disparities by enacting laws that require “racial and ethnic impact statements” to assess the potential effect of new legislation on minority communities. Others focused on recidivism reduction, shorter prison terms, and review of sentencing policies. The Sentencing Project, which conducted a survey of state-level criminal justice policy developments, concluded that although these reforms are promising, most “fail to address the most significant engines of the growth of the correctional system,” including disproportionately long sentences, life without parole, and minimum mandatory sentences.⁴²

In 2009, New York addressed some of these “tough on crime” policies in its reform of the state’s Rockefeller drug laws. The reform bill eliminated many minimum mandatory sentences, restored judicial discretion, and enhanced drug treatment programs and reentry initiatives. New York, in fact, began implementing programs focusing on incarceration alternatives, rapid disposition of cases, drug courts, data analysis for crime prevention, and shorter sentences for non-violent offenders long before the current economic crises forced other states to act. Not surprisingly, the state saw its prison population decline by 9 percent over the past decade, as other states experienced a steady increase.⁴³

Of course, while these signs of sentencing reform are cause for hope, they hardly represent a fundamental shift in sentencing policy. To date, the Obama administration’s criminal justice reforms have been mostly talk. The Sentencing Commission’s revisions to the sentencing ranges for crack cocaine still leave in place the statutory mandatory minimum sentences,

⁴¹ U.S. SENTENCING GUIDELINES MANUAL app. C, *supp.*, at amend. 713 (stating that Amendment 706 should be applied retroactively and discussing the Commission’s reasons); Darryl Fears, *Panel May Cut Sentences for Crack: Thousands Could Be Released Early*, WASH. POST, Nov. 13, 2007, at A1 (discussing the effects of making the amended Guidelines retroactive).

⁴² See RYAN S. KING, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2008: DEVELOPMENTS IN POLICY AND PRACTICE 2–11 (2009).

⁴³ Holder Speech, *supra* note 36; Jackie Rothenberg, *For State Prisons, West Isn’t Best: California Clogs Its Jails While New York’s Court Reform Frees Funds*, 95 A.B.A. J. 15, 15–16 (2009); New York State Assembly, 2009 NYS Assembly Significant Legislation, <http://assembly.state.ny.us/Press/2009SigLeg/#lnk9> (last visited April 29, 2010) (bringing the user directly to the significant legislation regarding corrections, including Rockefeller Drug Law reform).

which contain the infamous 100-to-1 ratio.⁴⁴ And a recent survey of state-level criminal justice policy developments concluded that while reforms such as racial impact statements and reentry programs are promising, most “fail to address the most significant engines of the growth of the correctional system,” including disproportionately long sentences, life without parole, and minimum mandatory sentences.⁴⁵

There is much more to be done. And yet, the time may be right for real meaningful reform. Whether prompted by falling crime rates, persistent recidivism, or rising corrections budgets, policy makers are increasingly exploring reforms that have the potential to make a real difference. Many states are rethinking the “war on drugs” and redirecting resources to treatment, particularly of addiction and mental illness. Many states are focusing their sentencing policies on reducing recidivism rather than on “punishing” offenders. One promising avenue of exploration is “evidence-based sentencing,” which uses rigorous empirical analysis in an effort to identify those offenders who must be incarcerated to protect society and those who can be effectively punished without resort to lengthy incarceration.⁴⁶ The current budget crisis has only given more momentum to these efforts to reign in rampant incarceration.

* * *

After a three-decade march toward ever-increasing sentencing severity, Americans may be ready for a different approach. President Obama seems to think so. Granted, Obama’s proposals relate only to federal law and none has yet been enacted. But the particulars of his proposals are less important than the fact that he is willing to make them. For years, politicians have avoided even talking about sentencing reform for fear of being labeled “soft on crime.” That reticence is not surprising, as the

⁴⁴ See U.S. SENTENCING GUIDELINES MANUAL app. C, *supp.*, at amend. 716 (noting that “[a]ny comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress”); THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING 1, 6–8 (2009), available at http://sentencingproject.org/detail/publication.cfm?publication_id=153 (discussing recent developments in federal crack cocaine sentencing and concluding that the “likelihood of legislative reform in the 111th Congress is the strongest it has ever been”). It is also worth noting that any changes to federal sentencing practices would not significantly reduce incarceration rates since most prisoners are incarcerated by the states, not by the federal government. See Bureau of Justice Statistics, Total Correctional Population, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11> (last visited April 29, 2010) (stating the number of prisoners under state jurisdiction was 1,409,166, while the number of those under federal jurisdiction was 201,280 as of midyear 2008).

⁴⁵ See KING, *supra* note 42.

⁴⁶ See THE PEW CENTER ON THE STATES, ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS 4 (2009), *passim*; see also Holder Speech, *supra* note 36; Symposium, *Evidence-Based Sentencing: The New Frontier in Sentencing Policy and Practice*, 1 CHAP. J. CRIM. JUST. 1 (2009).

primary beneficiaries of sentencing reform – prisoners and their communities – tend not to wield much political clout. But that only increases the moral imperative to think seriously about these issues.

Real sentencing reform requires real leadership – from the President, from Congressional leaders, and from policy makers in all fifty states. If policy makers are willing to talk sense about sentencing, they may find that the American public is willing to listen. Being “smart on crime” may set us on a path to curing our imprisonment epidemic.

Appendix A

Prison Population Rates per 100,000 of the national population¹

1	United States of America	753
2	St. Kitts and Nevis	660
3	Russian Federation	610
4	Rwanda	593
5	Virgin Islands (USA)	561
6	Cuba	c.531
7	Virgin Islands (United Kingdom)	488
8	Palau	478
9	Belize	476
10	Georgia	423
11	Bahamas	407
12	Anguilla (United Kingdom)	401
13	Bermuda (United Kingdom)	394
14	Belarus	385
15	Kazakhstan	382
16	Seychelles	371
17	French Guiana/Guyane (France)	365
18	Grenada	358
19	Suriname	c.356
20	Cayman Islands (United Kingdom)	346
20	St. Vincent and the Grenadines	346
22	Maldives	343
23	Antigua and Barbuda	329
24	Barbados	326
25	Israel	325
25	South Africa	325
27	Dominica	324
28	Latvia	319
28	Netherlands Antilles (Netherlands)	319
30	Ukraine	314
31	Thailand	313
32	Puerto Rico (USA)	303
32	St. Lucia	303
34	Chile	301
35	Trinidad and Tobago	293
36	Panama	292
37	Guam (USA)	287
38	Taiwan	279
39	Singapore	274
40	El Salvador	273
40	Estonia	273
42	Guyana	272
43	Aruba (Netherlands)	269
44	Botswana	267
45	Tunisia	c.263
46	Uruguay	244
47	Brazil	242
48	United Arab Emirates	238
49	Greenland (Denmark)	234
49	Lithuania	234
51	Azerbaijan	229

¹ Walmsley, *supra* note 7.

52	Costa Rica	224
52	Turkmenistan	224
54	Iran	223
55	Poland	220
56	Swaziland	219
57	Czech Republic	204
57	Mexico	204
59	Libya	200
60	American Samoa (USA)	198
61	New Zealand	197
62	Gabon	196
63	Namibia	194
64	Martinique (France)	191
65	Jersey (United Kingdom)	190
66	Dominican Republic	189
67	Mongolia	188
68	Moldova (Republic of)	184
69	Cape Verde (Cabo Verde)	178
69	Saudi Arabia	178
71	Gibraltar (United Kingdom)	174
71	Guadeloupe (France)	174
71	Jamaica	174
74	Macau (China)	173
75	Colombia	167
75	Morocco	167
77	Mauritius	166
78	Spain	165
79	Honduras	161
79	Reunion (France)	161
79	Turkey	161
82	Albania	159
82	Lebanon	159
84	Algeria	158
85	Luxembourg	155
86	French Polynesia (France)	153
86	Hungary	153
86	Montenegro	153
89	United Kingdom: England & Wales	152
90	Peru	151
90	Slovakia	151
92	United Kingdom: Scotland	146
93	Lesotho	144
94	Serbia	143
95	Northern Mariana Islands (USA)	142
96	Hong Kong (China)	141
97	Australia	134
98	Kyrgyzstan	133
98	New Caledonia (France)	133
100	Argentina	132
100	Myanmar (formerly Burma)	132
102	Kuwait	130
103	Burundi	129
103	Sri Lanka	129
105	Isle of Man (United Kingdom)	127
105	Malaysia	127
107	Cook Islands (New Zealand)	126

107	Ecuador	126
109	Romania	125
110	Bulgaria	124
111	Armenia	122
111	Uzbekistan	c.122
113	Fiji	120
113	Malta	120
113	Zambia	120
116	China	119
117	Jordan	118
118	Guernsey (United Kingdom)	117
118	Kenya	117
120	Canada	116
121	Brunei Darussalam	115
122	Cameroon	114
122	Zimbabwe	114
124	Philippines	111
125	Greece	109
125	Tajikistan	109
127	Croatia	107
127	Italy	107
127	Macedonia (former Yugoslav Republic of)	107
127	Nicaragua	107
127	Vietnam	107
132	Iraq	106
132	Portugal	106
134	Netherlands	100
135	Austria	99
135	Samoa (formerly Western Samoa)	99
137	Ethiopia	c.98
138	Republic of (South) Korea	97
139	France	96
140	Bahrain	95
140	Paraguay	95
142	Belgium	94
143	Tanzania	92
144	Uganda	91
145	Madagascar	90
146	Egypt	89
146	Micronesia, Federated States of	89
146	Tonga	89
149	Germany	88
150	Ireland, Republic of	85
150	Mayotte (France)	85
150	Venezuela	85
153	Cyprus (Republic of)	83
153	Haiti	83
153	Sao Tome e Principe	83
153	Yemen	83
157	Bolivia	80
158	Cambodia	79
158	Papua New Guinea	79
160	Malawi	78
160	Marshall Islands	78
162	United Kingdom: Northern Ireland	77
163	Kiribati	76

163	Monaco	76
163	Switzerland	76
166	Sweden	74
167	Mozambique	c.73
168	Guatemala	70
168	Norway	70
170	Laos	69
171	Bosnia and Herzegovina: Federation	67
171	Finland	67
173	Benin	66
173	Bosnia and Herzegovina: Republika Srpska	66
173	Denmark	66
176	Slovenia	65
176	Togo	65
178	Japan	63
179	Kosovo/Kosova	c.62
180	Djibouti	61
180	Indonesia	61
180	Oman	61
183	Syria	58
184	Democratic Republic of Congo (formerly Zaire)	c.57
185	Cote d'Ivoire	56
185	Ghana	56
187	Iceland	55
187	Pakistan	55
187	Qatar	55
190	Senegal	53
190	Vanuatu	53
192	Angola	c.52
192	Mali	52
194	Bangladesh	51
195	Niger	46
196	Sudan	45
197	Afghanistan	44
198	Sierra Leone	41
199	Liberia	40
200	Andorra	37
200	Republic of Guinea	37
202	Chad	35
203	Solomon Islands	34
204	Gambia	32
204	India	32
206	Congo (Brazzaville)	c.31
207	Comoros	c.30
208	Central African Republic	c.29
209	Burkina Faso	27
209	Nigeria	27
211	Mauritania	26
212	Faeroe Islands (Denmark)	25
212	Tuvalu	25
214	Nepal	c.24
215	Nauru	23
216	Liechtenstein	20
216	Timor-Leste (formerly East Timor)	20

