

# Turning the Corner on Mass Incarceration?

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It is an old story by now. For the past forty years, the American criminal justice system has seen unremitting growth in the number of people behind bars. Over this period, about the only constant has been that the incarcerated population grew. It rose when crime rates decreased as well as when they increased, in lean times as well as prosperous times, under Democratic and Republican administrations, in federal and state institutions, and in red and blue states. But it seems the old story may now need revising. For the first time in forty years, the national incarceration rate is flattening out, even falling in state prisons. For the first time in three decades, the number of adults under any kind of correctional supervision—in prison or jail or on probation or parole—fell in 2009.<sup>1</sup> At the same time, legal reforms that might have seemed impossible in prior years have increasingly been adopted, reducing penalties for certain crimes, eliminating mandatory sentencing for others, and increasing expenditures for reintegration of prisoners into society. And racial disparities, a persistent and deep-rooted problem in the American criminal justice system, after rising for decades, have begun to drop from their highest levels.

Make no mistake—the United States still incarcerates at levels unheard of for any other nation, and the brunt of this policy still rests on the black and Latino population. It is, of course, too early to gauge how far any reversal might ultimately go. But these developments raise new and intriguing questions: is the United States in the midst of a transformation in criminal justice? What might explain the changes? And what can be done to accelerate the trends—if they are trends—toward a less harsh and more humane criminal justice approach? In this essay, I survey the reforms that states and Congress have adopted and look at the interplay of such reforms with the historic racial disparities that have characterized the criminal justice system. I then speculate about the forces that have contributed to these developments and discuss strategies that might lead to further progress. The United States has a long way to go. Even if we were able to cut our incarceration rate in half, it would still be far above those of our European counterparts. But for the first time in two generations, we are seeing signs of progress. The challenge is figuring out how to facilitate further change.

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<sup>1</sup> PRISON COUNT 2010: STATE PRISON POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS, PEW CENTER ON THE STATES PUBLIC SAFETY PERFORMANCE PROJECT 1 (2010) [hereinafter PRISON COUNT 2010], [http://www.pewcenteronthestates.org/uploadedFiles/Prison\\_Count\\_2010.pdf](http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf).

## I. SIGNS OF PROGRESS

The story of America's boom in incarceration is a familiar one, at least to criminal justice scholars and practitioners, if not necessarily to the general public (more on that later). For the first three-quarters of the twentieth century, the United States was on par with its Western counterparts in terms of incarceration rates, as the United States and much of Europe incarcerated approximately 100 persons per 100,000.<sup>2</sup> Since the mid-1970s, however, the U.S. incarceration rate has skyrocketed, while those of most of our counterparts have either stayed relatively constant or increased at a much slower rate.<sup>3</sup> As a result, we are now the world's undisputed leader in incarceration. On any given day, we have locked up approximately 700 persons per 100,000, or more than 2.3 million people.<sup>4</sup>

When the incarceration rate was 100 persons per 100,000, criminologists theorized that it would always be so; given how long the rate had stayed at that level, it seemed that there must be something inevitable about it. Now that the rate has increased steadily for two generations, criminologists have sought to explain the rise. They have looked to the appeal of "tough on crime" politics, the influence of the "prison-industrial complex," the rise in crime rates, the war on drugs, and other factors. I have argued elsewhere that a crucial piece of the puzzle is the extreme racial disparity in the incarcerated population.<sup>5</sup> According to this theory, one reason that the majority can tolerate such high rates of incarceration is that most of those incarcerated are seen as "the other"—African Americans, Latinos, and/or the poor. African Americans, for example, make up about 13% of the general population but about half of the incarcerated population. The per capita incarceration rate among black males was 3161 per 100,000 in 2008, which is six-and-a-half times the rate for white males (487).<sup>6</sup> James Unnever and Francis Cullen recently tested three possible explanations for the punitiveness of the American criminal justice system and concluded that a "prominent reason . . . is the belief that those disproportionately subject to these harsh sanctions are people

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<sup>2</sup> See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 47 fig.3.2 (2007).

<sup>3</sup> See Nicola Lacey, *American Imprisonment in Comparative Perspective*, 139 *DAEDALUS* (Summer 2010), at 108 (showing comparative incarceration). See generally MARC MAUER, *RACE TO INCARCERATE* 15–20, figs. 2-1, 2-2 (1999) (reviewing history of U.S. incarceration rates); Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 *Daedalus* (Summer 2010), at 8, 9.

<sup>4</sup> Lacey, *supra* note 3, at 103 fig.1; Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, *N.Y. TIMES* (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all>.

<sup>5</sup> See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999). See also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MAUER, *supra* note 3; David Cole, *As Freedom Advances: The Paradox of Severity in American Criminal Justice*, 3 *U. PA. J. CONST. L.* 455 (2001).

<sup>6</sup> WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, *BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 2008*, at 36 (2009) (revised Apr. 4, 2010) [hereinafter *PRISONERS IN 2008*], available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

they do not like: African American offenders.”<sup>7</sup> I have argued that if one in three *white* male babies born today could expect to spend time in prison during his life, rather than one in three *black* male babies, the politics of crime would look dramatically different.<sup>8</sup> Instead of demanding harsher penalties, more prisons, and mandatory minimums, politicians would likely be calling for increased investment in education, after-school programs, and job training; expanded alternatives to incarceration; reductions in the severity of criminal sentences; and improved rehabilitation services. The white majority would find it much more difficult to give up on its own sons than to give up on those it can disregard as being different.

Today, however, it appears that politicians *are* increasingly demanding precisely these types of reforms. Although it is too early to know for sure, there are signs that we may be in the midst of another transformative period in American criminal justice. The national incarceration rate, while still rising, has been rising more slowly since 2000 and is now virtually flat. In 2009, the U.S. state prison and jail population, the biggest component of the incarcerated population nationwide, *decreased* for the first time in nearly forty years.<sup>9</sup> Overall incarceration increased slightly as a result of a still-rising federal prison population. But even so, the combined population over whom state and federal correctional authorities had jurisdiction at the end of 2009 grew by only 0.2%, the smallest growth in ten years.<sup>10</sup> This does not appear to be an anomaly; the year before, the increase was only 0.3%.<sup>11</sup> And the number of sentenced prisoners per 100,000 U.S. residents declined in 2009 for the second straight year.<sup>12</sup> State-specific trends vary, but New York, for example, reduced its incarcerated population by 20% in the past decade.<sup>13</sup>

Meanwhile, the “tough on crime” politics of the 1980s and 1990s seem to have abated significantly. Instead of enacting harsh mandatory sentences, Congress and the states have increasingly begun to study and adopt sentencing and criminal law reforms aimed at *reducing* incarceration. Many states have softened

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<sup>7</sup> James D. Unnever & Francis T. Cullen, *The Social Sources of Americans' Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 99, 119 (2010).

<sup>8</sup> See THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1, 8 (2003); NO EQUAL JUSTICE, *supra* note 5 at 8.

<sup>9</sup> PRISON COUNT 2010, *supra* note 1, at 1.

<sup>10</sup> HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2009 [hereinafter PRISONERS IN 2009], *available at* <http://www.bjs.gov/content/pub/pdf/p09.pdf>.

<sup>11</sup> PRISONERS IN 2008, *supra* note 6, at 8.

<sup>12</sup> PRISONERS IN 2009, *supra* note 10, at 1.

<sup>13</sup> ACLU, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 6 (2011) [hereinafter SMART REFORM], *available at* <http://www.aclu.org/files/assets/smartreformispossible.pdf>.

or repealed mandatory minimum sentences.<sup>14</sup> In August 2010, Congress repealed a mandatory minimum law for the first time since the Nixon administration. The same month, Congress also reduced the disparity in penalties for crack and powder cocaine, a disparity long criticized for its racially disproportionate impact, from 100:1 to 18:1.<sup>15</sup> A disparity remains, to be sure, and it took ten years to make even this progress. But it is, nonetheless, progress. Several states have reduced criminal sentences for a variety of crimes, including drug possession and property crimes.<sup>16</sup> Perhaps most significantly, New York in 2009 dramatically reduced the harsh sentences established by its Rockefeller-era drug laws.<sup>17</sup>

Some states have begun to move toward a public health approach to nonviolent drug offending, providing enhanced substance abuse treatment and offering diversion to treatment as an alternative to incarceration. In November 2000, California voters overwhelmingly approved Proposition 36, which allows first- and second-time nonviolent, drug-possession offenders the opportunity to receive substance abuse treatment instead of incarceration.<sup>18</sup> In 2010, a referendum that would have legalized marijuana possession in California failed but received more than 46% of the vote.<sup>19</sup> Drug courts, devoted to overseeing, guiding, inspiring, and enforcing coerced drug treatment as an alternative to conviction and incarceration, have proliferated dramatically in the past decade, from a rare curiosity to a regular fixture in many state legal systems; there are over 2500 such courts nationwide today.<sup>20</sup>

States are also reforming probation, parole, and alternative sentencing, simultaneously seeking to make community supervision more effective and to reduce reliance on incarceration as a response to technical violations of probation and parole. Parole and probation violations have been a major factor in new prison entries each year. In 1998, for example, parole revocation made up approximately

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<sup>14</sup> See generally ADRIENNE AUSTIN, VERA INSTITUTE FOR JUSTICE, CRIMINAL JUSTICE TRENDS: KEY LEGISLATIVE CHANGES IN SENTENCING POLICY 4 (2010); JUDITH A. GREENE, FAMILIES AGAINST MANDATORY MINIMUMS, POSITIVE TRENDS IN STATE-LEVEL SENTENCING AND CORRECTIONS POLICY 6, 11 (2003), [http://www.famm.org/Repository/Files/82751\\_Positive%20Trends.pdf](http://www.famm.org/Repository/Files/82751_Positive%20Trends.pdf); ACLU, *supra* note 13 at 32.

<sup>15</sup> See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

<sup>16</sup> See generally *supra*, note 14.

<sup>17</sup> Barry Kamins, *New 2009 Drug Crime Legislation—Drug Law Reform Act of 2009*, in 7 NEW YORK CRIMINAL LAW NEWSLETTER, no. 4, at 5 (2009); Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 23, 2009, at A1, available at <http://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html>.

<sup>18</sup> See DRUG POLICY ALLIANCE, PROPOSITION 36: IMPROVING LIVES, DELIVERING RESULTS: A REVIEW OF THE FIRST FOUR YEARS OF CALIFORNIA'S SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2000 (2006), available at <http://www.drugpolicy.org/docUploads/Prop36March2006.pdf>.

<sup>19</sup> Lisa Leff & Marcus Wohlsen, *Pot Activists Vow to Push Legalization in 2012*, SEATTLE TIMES (Nov. 3, 2010, 3:57 PM), available at [http://seattletimes.nwsourc.com/html/nationworld/2013339420\\_apusmarijuanalegalization.html](http://seattletimes.nwsourc.com/html/nationworld/2013339420_apusmarijuanalegalization.html).

<sup>20</sup> *Types of Drug Courts*, NATIONAL ASS'N OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/what-are-drug-courts/models> (last visited Oc. 19, 2011).

one-third of all prison admissions.<sup>21</sup> In 2000, 57% of prison admissions in California were for technical parole violations.<sup>22</sup> In many states, probationers can be returned to prison for failing a drug test. But increasingly, states are changing probation rules to avoid unnecessary re-incarceration, employing a system of graduated sanctions and better supervision instead.<sup>23</sup> By employing such an approach, Kansas reduced the number of technical parole revocations resulting in imprisonment by half between 2005 and 2009.<sup>24</sup> In addition, several states, including Colorado, Kentucky, and Texas, have advanced the time when prisoners become eligible to be released on parole in effort to reduce prison costs.<sup>25</sup>

Stretched by budgetary crises, states have also begun to ask whether they are expending unnecessary funds keeping individuals behind bars who would not pose a significant risk of committing serious crime if released. Several states have undertaken studies or adopted programs that seek to identify candidates for early release from prison. Under a program titled “Justice Reinvestment,” an initiative of the Council of State Governments funded by the U.S. Departments of Justice and Labor, several states have reinvested the savings from such early release programs into the inner-city communities from which so many in the prisons come (and will return), with the aim of increasing public safety and reducing crime there.<sup>26</sup> As of December 2010, fourteen states were participating in the initiative.<sup>27</sup>

Many states—including California, Florida, Georgia, Illinois, Massachusetts, Michigan, Nebraska, Ohio, Pennsylvania, New York, Texas, and Virginia—have consolidated or closed prisons and/or halted new prison construction.<sup>28</sup> Other states and the federal government, however, continue to build more prisons—in some instances, driven by overcrowding in their existing prisons.

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<sup>21</sup> Marc Mauer, *Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism*, 26 CRIM. JUSTICE, no. 1, 2011 at 29, available at [http://sentencingproject.org/doc/publications/s\\_ABACJsentencing2011.pdf](http://sentencingproject.org/doc/publications/s_ABACJsentencing2011.pdf).

<sup>22</sup> TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 59 (2007).

<sup>23</sup> See Mark A. R. Kleiman, *Toward Fewer Prisoners & Less Crime*, 139 DAEDALUS, Summer 2010, at 115, 119–21.

<sup>24</sup> Mauer, *supra* note 21, at 29.

<sup>25</sup> See generally, AUSTIN, *supra* note 14, at 2; GREENE, *supra* note 14, at 10; NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2009: DEVELOPMENTS IN POLICY AND PRACTICE 13 (2010), available at [http://www.sentencingproject.org/doc/publications/s\\_ssr2009Update.pdf](http://www.sentencingproject.org/doc/publications/s_ssr2009Update.pdf).

<sup>26</sup> JUSTICE REINVESTMENT, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (2010), <http://justicereinvestment.org/resources> (last visited Oct. 19, 2011).

<sup>27</sup> JUSTICE REINVESTMENT, THE COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, WORK IN THE STATES, <http://justicereinvestment.org/states> (last visited Oct. 19, 2011).

<sup>28</sup> VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS 6 (2009). *But see* RANDALL G. SHELDON, CENTER ON JUVENILE AND CRIMINAL JUSTICE, THE PRISON INDUSTRY 4–6 (2010), available at [http://www.cjcrj.org/files/The\\_Prison\\_Industry.pdf](http://www.cjcrj.org/files/The_Prison_Industry.pdf) (noting the prison construction boom of the 1990s).

Finally, states have shown increased interest in and directed increased resources toward reentry and reintegration programs. Realizing that something must be done to address the more than 700,000 people being released from prison each year, states are resurrecting rehabilitation under the name of reentry. In his State of the Union address in 2004, President George W. Bush pledged \$300 million to reentry programs.<sup>29</sup> In 2008, Congress passed the Second Chance Act, which is expressly devoted to improving reentry programs.<sup>30</sup> It had the backing of both liberal Democrats, such as Representative John Conyers, and conservative Republicans, such as Senator Sam Brownback. In 2009, the Council on State Governments launched a National Reentry Resource Center devoted to advising and assisting state governments on reentry programs.<sup>31</sup> Funding for such programs remains manifestly insufficient, so much so that Loïc Waquant has dismissed reentry as “myth and ceremony,”<sup>32</sup> but this assessment seems overly harsh and fails to appreciate the importance of renewing efforts at rehabilitation.

The picture is complicated, as the United States does not have one criminal justice system but at least 51—and several thousand, if one considers local law enforcement authorities. Criminal justice policies and practices are largely determined at the state and local levels, and practices vary widely among the states and even among cities, towns, and counties within a single state. States such as Louisiana and Texas have extraordinarily high incarceration rates, while states like Maine and Minnesota have relatively low incarceration rates.<sup>33</sup> As Vanessa Barker has shown, these differences can be attributed, at least in part, to differences in political institutions, avenues for mobilization, and forms of political engagement.<sup>34</sup> California, she argues, with its direct popular referendum system and polarized polity, has adopted a strict retributivist approach to crime, whereas Washington, with a more deliberative democracy and a less polarized polity, has adopted a more accepting approach that stresses use of the least restrictive means in responding to crime.<sup>35</sup> California’s per capita incarceration rate is nearly double that of Washington.<sup>36</sup> Thus, it is dangerous to make generalizations about the “American criminal justice system,” as it does not actually exist. Moreover, the ameliorative developments have been small steps and, as yet, have done little to

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<sup>29</sup> George W. Bush, President of the United States, 2004 State of the Union Address (Jan. 20, 2004), available at [http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext\\_012004.html](http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html).

<sup>30</sup> Second Chance Act of 2007, Pub. L. No. 110-199, 110<sup>th</sup> Congress, 122 Stat. 657 (2008).

<sup>31</sup> See generally *About the National Reentry Resource Center*, NAT’L REENTRY RESOURCE CTR., <http://www.nationalreentryresourcecenter.org/about> (last visited Oct. 19, 2011).

<sup>32</sup> Loïc Waquant, *Prisoner Reentry as Myth and Ceremony*, 34 DIALECT. ANTHROPOL. 605 (2010).

<sup>33</sup> See *Interactive Map*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/map/map.cfm> (last visited Oct. 19, 2011).

<sup>34</sup> BARKER, *supra* note 28, at 1–24.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 8 fig.1.2.

dent the United States' extraordinary incarceration rate. After four decades of bad news, however, the fact that much of the news is good is itself worth nothing. It appears that in many states, the last decade has seen what could be the beginning of a trend to reduce reliance on incarceration.

## II. RACE AND REFORM

Any reduction in incarceration and sentence severity will likely benefit African American and Latino offenders, simply because they make up a disproportionate share of the incarcerated population. An across-the-board reduction in incarceration, even if motivated by entirely race-neutral concerns, will likely release higher percentages of African Americans and Latinos than their representation in the general population, simply because they are disproportionately represented in the imprisoned population. Some advocates who are concerned about racial disparities in the criminal justice system have, as a strategic matter, stressed the cost savings that sentencing reforms would bring rather than emphasizing issues of racial equity.<sup>37</sup> Cost savings appeal to the self-interest of all, while arguments predicated on redressing racial injustice may be dismissed by the majority as not concerning them directly.

But developments in recent years have resulted not merely in across-the-board reductions in incarceration for African Americans, Latinos, and whites, but also in a modest reduction in the racial disparities that plague the criminal justice system. The past decade saw a widespread campaign against "racial profiling," which included lawsuits, legislation, and increased public advocacy, education, and training. Perhaps as a result, racial disparities in both *incarceration* and criminal law *enforcement* have begun to diminish. For example, the number of black prisoners in federal or state prisons *declined* by about 18,400 since year-end 2000, which reduced the total number of blacks in state or federal prison to about 591,900 at year-end 2008.<sup>38</sup> In contrast, over the same time period, the number of imprisoned whites *rose* by 57,200 to reach 528,200 at year-end 2008.<sup>39</sup> From 2000 to 2006, the number of black state prisoners fell by 53,300 to 508,700; 55.5% of the decrease was due to the incarceration of fewer black drug offenders.<sup>40</sup> Between 1988 and 1993, blacks were arrested for drug offenses at rates 5.1 to 5.5 times higher than whites; yet, in 2007, the disparity had fallen to, at its lowest, between 3.5 and 3.9.<sup>41</sup> For all crimes, African Americans were arrested at four

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<sup>37</sup> See, e.g., Austin, *supra* note 14, at 8.

<sup>38</sup> PRISONERS IN 2008, *supra* note 6, at 4. These figures are for non-Hispanic whites and non-Hispanic blacks.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*, at 6.

<sup>41</sup> HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 7, tbl.2 (2009), available at [http://www.hrw.org/sites/default/files/reports/us0309web\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf) [hereinafter DECADES OF DISPARITY].

times the rate of whites in 1989, but the disparity dropped to two-and-a-half times by 2006.<sup>42</sup> African Americans comprised 40–42% of all drug arrestees from 1989 to 1993, yet today are about 35%.<sup>43</sup> And Congress's reduction of the crack-powder cocaine disparity from 100:1 to 18:1 will likely reduce racial disparities in federal drug sentencing still further, as 80% of crack cocaine defendants are African American.<sup>44</sup>

Vast disparities remain, to be sure. While African Americans are 13% of the general population and roughly the same percentage of those who use and sell drugs, they are still 35% of those arrested on drug charges and 53.5% of those entering prison for a drug conviction.<sup>45</sup> And, as noted above, the black male incarceration rate remains more than six times greater than the white male incarceration rate. Nearly one in four young black male high school dropouts is in prison or jail, as compared to about one in fourteen young white, Asian, or Hispanic male dropouts.<sup>46</sup> Still, in the last decade, racial disparities in criminal law enforcement have fallen. As a result, the “costs” of criminal law enforcement, in terms of arrests, prosecutions, convictions, and sentences, are today at least marginally more fairly shared than they were a decade ago.

### III. POSSIBLE EXPLANATIONS

When a trend that has been consistent for forty years appears to be changing, one naturally asks why. Social phenomena are notoriously difficult to attribute to specific causal factors, but if one is interested in facilitating, reinforcing, and accelerating the apparent change in direction, it is all the more critical to attempt to understand its causes. A number of factors seem likely candidates. Perhaps most prominent at the moment are the serious budgetary crises afflicting nearly all states and the federal government. As the global financial crisis cuts into tax revenues and public monies grow increasingly scarce, politicians and citizens look for ways to cut costs. Incarcerating a young man costs about \$24,000 a year in direct costs, a tremendous drain on the public fisc.<sup>47</sup> Nationwide, total state spending on

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<sup>42</sup> CLEAR, *supra* note 22, at 8.

<sup>43</sup> DECADES OF DISPARITY, *supra* note 41, at 4.

<sup>44</sup> *Hearing on Federal Cocaine Sentencing Laws Before the S. Comm. on Crime and Drugs of the S. Judiciary Comm.*, 110th Cong. 5 (2008) (testimony of Marc Mauer, Executive Director of The Sentencing Project), *available at* [http://www.sentencingproject.org/doc/publications/dp\\_mm\\_BidenTestimony.pdf](http://www.sentencingproject.org/doc/publications/dp_mm_BidenTestimony.pdf).

<sup>45</sup> DECADES OF DISPARITY, *supra* note 41 at 1, 4–5 tbl. 1; HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 3, 41–44 (2008).

<sup>46</sup> *See* ANDREW SUM, ISHWAR KHATIWADA & JOSEPH McLAUGHLIN, CENTER FOR LABOR MARKET STUDIES, THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL 12 chart 8 (2009), *available at* [http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1022&context=clms\\_pub](http://iris.lib.neu.edu/cgi/viewcontent.cgi?article=1022&context=clms_pub).

<sup>47</sup> PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 11 (2008), *available at* <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf> [hereinafter ONE IN 100].

corrections has increased from \$12 billion in 1987 to \$49 billion in 2007.<sup>48</sup> The indirect and long-term costs are far greater, as incarceration has deep and wide ripple effects on the employment opportunities and likely criminal conduct of not only the incarcerated themselves, but their children and other members of their community.<sup>49</sup>

Moreover, without significant efforts to rehabilitate, incarceration breeds recidivism, and with more than 700,000 prisoners released from prison each year, we can expect that two-thirds of them will be re-arrested and more than half back in prison within three years,<sup>50</sup> once again costing the state more than \$24,000 a year. As Richard Frase has argued:

Poverty and lack of opportunity are associated with higher crime rates; crime leads to arrest, a criminal record, and usually a jail or prison sentence; past crimes lengthen those sentences; offenders released from prison or jail confront family and neighborhood dysfunction, increased risks of unemployment, and other crime-producing disadvantages; this makes them likelier to commit new crimes, and the cycle repeats itself.<sup>51</sup>

From a purely financial point of view, mass incarceration may be a counterproductive and unsustainable long-term strategy (although until the recent recession, cost has played little or no role in criminal sentencing policy).

Second, the violent crime rate has dropped significantly over the past twenty years, from 666.9 violent crimes per 100,000 people in 1989 to 454.5 per 100,000 in 2008.<sup>52</sup> Cities, streets, and parks feel significantly safer in many parts of the country. This reduces public fear and alleviates political pressure to adopt “tough on crime” measures. Some of the falling crime rate is undoubtedly attributable to incarceration—an imprisoned criminal cannot continue to commit crimes. But the effects are less evident than one might think. Criminologists have long examined

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<sup>48</sup> *Id.* at 11.

<sup>49</sup> See CLEAR, *supra* note 22, at 9; John Hagan & Ranit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME AND JUST. 121, 121–22 (1999); Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–83 (2004); THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECTS ON ECONOMIC MOBILITY 3 (2010) [hereinafter COLLATERAL COSTS], [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Collateral%20Costs%20FINAL.pdf?n=5996](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf?n=5996) (detailing the substantial economic burdens faced by incarcerated persons and their families).

<sup>50</sup> PRISONERS IN 2009, *supra* note 10, at 4; PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7 tbl.8 (2002), [bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf).

<sup>51</sup> Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota’s Prison and Jail Populations?*, 38 CRIME & JUST. 201, 263 (2009).

<sup>52</sup> FEDERAL BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, CRIME IN THE UNITED STATES 2008, TABLE 1 (2009), [http://www2.fbi.gov/ucr/cius2008/data/table\\_01.html](http://www2.fbi.gov/ucr/cius2008/data/table_01.html).

the question and have generally found little direct correlation between incarceration and crime rates. Bruce Western, for example, found that increased incarceration accounted for only 10% of the drop in crime rates between 1993 and 2001.<sup>53</sup> Between 1973 and 2003, the crime rate increased three times and decreased three times, yet the prison population grew every year.<sup>54</sup> Overall, the state prison population grew 400% during that twenty-year period, yet the crime rate grew only 3% in the same period.<sup>55</sup> But the public demand for more aggressive criminal laws and law enforcement is certainly driven by fear of crime, so if reduced crime rates lead to reduced fear, they may create breathing room for liberal reform.

Third, the war on drugs, responsible for much of the rise in incarceration, is increasingly acknowledged to be a failure. Drugs are as widely available and used today as when the war on drugs began. As Gil Kerlikowske, Director of the White House Office of National Drug Control Policy (the nation's drug czar), recently said, "In the grand scheme, [the war on drugs] has not been successful . . . . Forty years later, the concern about drugs and drug problems is, if anything, magnified, intensified."<sup>56</sup> Drug use continues to be widespread.<sup>57</sup> Increasingly, states are seeking alternatives to incarceration for drug crimes.<sup>58</sup> The political culture is more open than ever before to reforming our approach to the war on drugs. Nationwide polls show that the share of Americans favoring legalization of marijuana has grown from just 12% in 1969 to 46% today.<sup>59</sup> Kerlikowske, advocates for treating drug addiction as a disease that calls for a medical response

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<sup>53</sup> BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 187 (2006). See also Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 309–11 (2009) (arguing that the link between crime rates and incarceration rates is "surprisingly small").

<sup>54</sup> CLEAR, *supra* note 22, at 16.

<sup>55</sup> *Id.*

<sup>56</sup> Martha Mendoza, *AP IMPACT: U.S. Drug War Has Met None of Its Goals*, ABC NEWS (May 14, 2010), <http://abcnews.go.com/m/story?id=10642775&sid=81> (statements of Gil Kerlikowske) (last visited Oct. 19, 2011).

<sup>57</sup> In the early 1990s, approximately 6% of persons surveyed reported using illegal drugs in the previous month; in 2006, that figure was over 8%. U.S. DEP'T OF HEALTH & HUMAN SERVICES, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., SUBSTANCE ABUSE IN STATES AND METROPOLITAN AREAS: MODEL BASED ESTIMATES FOR THE 1991–1993 NATIONAL HOUSEHOLD SURVEYS ON DRUG ABUSE, at Exhibits 3.1–3.4 (1996), available at <http://oas.samhsa.gov/96state/toc.htm>; SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVICES, RESULTS FROM THE 2006 NATIONAL SURVEY, APP. G: SELECTED PREVALENCE TABLES, TABLE G.6 (1996), available at <http://oas.samhsa.gov/nsduh/2k6nsduh/AppG.htm#TabG-6>.

<sup>58</sup> See DOUG MCVAY, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, TREATMENT OR INCARCERATION? NATIONAL AND STATE FINDINGS ON THE EFFICACY AND COST SAVINGS OF DRUG TREATMENT VERSUS IMPRISONMENT (2004).

<sup>59</sup> Ethan Nadelmann, *Breaking the Taboo*, THE NATION, Dec. 27, 2010, at 11, available at <http://www.thenation.com/article/157010/breaking-taboo> (last visited Oct. 19, 2011).

rather than as a crime triggering incarceration.<sup>60</sup> Several states, including Massachusetts, California, Connecticut, and Kentucky, have decriminalized altogether or reduced penalties associated with possessions of small amounts of marijuana.<sup>61</sup> New York City's police commissioner issued a memorandum in September 2011 directing officers not to arrest citizens for possession of small amounts of marijuana unless it is in public view.<sup>62</sup>

Fourth, states have begun to recognize that many of those imprisoned need not be. Much of the rise in incarceration over the past forty years has been fueled by locking up hundreds of thousands of nonviolent offenders. In addition, overly harsh sentences have resulted in the incarceration of many older prisoners who, after spending years in prison, are well beyond the age when most criminal conduct occurs. Both nonviolent offenders and older prisoners present lower risks of committing violent crime than younger offenders incarcerated for violent crimes.<sup>63</sup> To the extent that officials can identify persons among those categories who are unlikely to pose a threat to others, releasing them early will save money without undermining public safety.

Fifth, it is possible (though certainly too early to tell) that we have reached a limit to the incarceration levels that the majority will tolerate. Regardless of one's political inclinations, the fact that the United States incarcerates many more people per capita than any other nation in the world can hardly be a point of pride. Just as it appears that the United States cannot tolerate a large number of executions and thus we have not exceeded 100 executions per year in any year since the death penalty was revived in 1976, so, too, there may be a tipping point at which society at large begins to resist further incarceration. In 2009, there were an astonishing 7,225,800 adults in the United States in prison or jail or on probation or parole, a number close to the population of New York City (8.4 million) and constituting

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<sup>60</sup> See Interview by Sasha Abramsky with Gil Kerlikowske, Director, Office of National Drug Control Policy, *Questions for the Drug Czar*, THE NATION, Dec. 27, 2010, at 20, available at <http://www.thenation.com/article/157019/questions-drug-czar>.

<sup>61</sup> SMART REFORM, *supra* note 13, at 57.

<sup>62</sup> Elizabeth A. Harris, *Police Memo on Marijuana Warns Against Some Arrests*, N.Y. TIMES (Sept. 23, 2011), <http://www.nytimes.com/2011/09/24/nyregion/minor-marijuana-possession-charges-require-public-view.html>.

<sup>63</sup> FBI CRIMINAL JUSTICE INFORMATION SERVICE DIVISION, CRIME IN THE UNITED STATES 2010, TABLE 38 (2011), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl38.xls> (showing a strong downward trend in violent crime arrests by age of individuals 35 and above). Compare MATTHEW R. DUROSE & CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROFILE OF NONVIOLENT OFFENDERS EXITING STATE PRISON, tbls.10–11 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pnoesp.pdf> (finding that, for nonviolent state prisoners from 15 states, the rearrest rate for violent offenses was 19.9% within 3 years), with LANGAN & LEVIN, *supra* note 50 (finding that the rearrest rate for all prisoners from 15 states for violent offenses was over 60%).

2.4% of the nation's population.<sup>64</sup> The declining incarceration rate may reflect popular sentiment that enough is enough.

Sixth, the “war on terror” may have, ironically, created space for more sensible reform in the criminal justice system. As Corey Robin has argued, the exploitation of fear is a critical element in maintaining sovereign authority.<sup>65</sup> The sovereign promises to protect the polity from what they fear, and they, in turn, put their faith in the sovereign in exchange for that protection. Dictators, of course, exploit fear quite directly, inflicting terror on the population in order to command its obedience. But democratic leaders also exploit fear to buttress their support; there is nothing like a common enemy to unite a people. This phenomenon may well explain the rallying around the President that inevitably occurs when wars begin. The “war on crime” seems to have filled a gap between the Cold War, when communism was the enemy that united us, and 9/11.<sup>66</sup> But ever since 9/11, public fear of terrorism appears to have supplanted fear of crime—even though the likelihood that a citizen will be the victim of ordinary crime is much higher than the likelihood that he will be a victim of a terrorist attack.<sup>67</sup> A politician who establishes his bona fides by supporting tough policies in the “war on terror” may feel more leeway to support ameliorative reforms in criminal justice. And a populace focused on the “enemy” without may be less likely to focus on “enemies” within.

Finally, a number of factors may have coalesced to make Americans more likely to identify with those behind bars: (1) the large numbers of incarcerated persons; (2) the recent revelations, fueled by DNA evidence, that demonstrably innocent people have been incarcerated and even sentenced to death;<sup>68</sup> and (3) the reduction, albeit minor, in racial disparities in criminal justice detailed above. Each of these developments might have the effect of increasing public sympathy for those behind bars. The larger the number of persons incarcerated, the greater the likelihood that any given citizen will know someone in that situation. That

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<sup>64</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, KEY FACTS AT A GLANCE: CORRECTIONAL POPULATIONS (2010), available at <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm>. The population of the United States in 2009 was approximately 307 million. U.S. CENSUS BUREAU, PEOPLE QUICKFACTS (2010), <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Oct. 19, 2010).

<sup>65</sup> See COREY ROBIN, FEAR: THE HISTORY OF A POLITICAL IDEA 29, 39 (2004).

<sup>66</sup> Senator John Kerry, for example, argued that a transnational war on crime should be the focus of U.S. foreign policy in the wake of the Cold War. JOHN KERRY, THE NEW WAR: THE WEB OF CRIME THAT THREATENS AMERICA'S SECURITY (1997). See also Allegra McLeod, *Exporting U.S. Criminal Justice*, 29 YALE L. & POL'Y REV. 83, 102–08 (discussing John Kerry and others).

<sup>67</sup> See Paul Campos, *Undressing the Terrorist Threat*, WALL. ST. J. (Jan. 9, 2010), [http://online.wsj.com/article/SB10001424052748704130904574644651587677752.html?mod=WSJ\\_hp\\_mostpop\\_email](http://online.wsj.com/article/SB10001424052748704130904574644651587677752.html?mod=WSJ_hp_mostpop_email) (“The chances that [an individual is] subjected to a terrorist attack can, for all practical purposes, be calculated as zero.”).

<sup>68</sup> See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011) (reviewing transcripts of 250 people who were convicted and later demonstrated to be innocent).

likelihood is still quite low, as I will discuss below. Yet, as the Pew Center on the States noted in 2008, at current rates one of every 100 American adults is in prison or jail on any given day.<sup>69</sup> While this is still a small overall percentage, the greater the incarcerated population becomes over time, the more ties there will be between the public at large and the incarcerated.

The fact that the system has not infrequently incarcerated the innocent may also make it more likely that the majority will be able to imagine themselves behind bars, as it becomes more difficult to dismiss the incarcerated as “deserving it.” And if the fact that the incarcerated population is disproportionately black, Latino, and poor makes it easier for the majority to discount or ignore the costs of incarceration, more equitable distribution might have the opposite effect. When the costs of mass incarceration cannot be dismissed as principally affecting “the other,” but must be internalized, the majority may be more open to reform. It may not be coincidence that we have seen in recent years both a reduction in the rate of increase of incarceration and a reduction in the racial disparities reflected in both incarceration and arrest rates.

Of course, there are reasons to be skeptical that the American public has become more sympathetic to those in prison. The incarceration rate remains extraordinarily high, and there is no mass movement to reduce it. The fact that incarceration is concentrated on the most vulnerable segments of our increasingly divided society means that even with the highest incarceration rate in the world, most members of the majority do not know anyone in prison. The “innocence” movement’s focus on the very small number of those incarcerated who are demonstrably innocent may make the public more assured that the rest are guilty, and it may concentrate sympathy on the innocent while disregarding the vast numbers of those who are, in fact, guilty. And while racial disparities have diminished, the changes are thus far quite marginal, so that the overall incarcerated population remains disproportionately black, Latino, and poor. Thus, it is important not to overstate the openings for empathy; still, it is striking that the apparent shift in incarceration has coincided with both the “innocence” movement and the beginnings of a reduction in racial disparities.

#### IV. MOVING FORWARD

The critical question going forward is how to take what could be a turning point in incarceration trends and make it a major transformation. What is ultimately needed is substantial reform of sentencing practices, reduced reliance on incarceration, especially for drug crimes and other nonviolent offenses, and shortened criminal sentences for many crimes, including serious offenses. But reform cannot be limited to the criminal justice system itself; it must be accompanied by real investments in poverty alleviation in inner-city communities to ensure that those born and raised there have meaningful opportunities to pursue

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<sup>69</sup> ONE IN 100, *supra* note 47.

productive, law-abiding lives. Reentry programs, alternatives to incarceration, and reform of parole and probation—the most common types of reform adopted thus far—are intermediate steps that help move us in the right direction but are insufficient standing alone. Most criminal law experts agree that the above reforms would be sensible and would likely lead to less crime and fewer prisoners; the challenge is not so much proving these measures would work as it is generating the political will to alter the status quo.

If true reform is ever to take hold, the biggest hurdle to overcome may be the empathy gap that exists between the law-abiding and the criminally convicted, and, in particular, between the white majority and the inner-city communities from which so many of America's prisoners come. For that reason, my colleague Michael Seidman's suggestion that reformers appeal to the majority's self-interest by stressing how criminal justice spending disparately serves the minority community would be deeply counterproductive. It would reinforce race and class division and appeal to our worst selves when what we need to do is support empathic identification by appealing to our better selves.

#### A. *What to Do*

The unprecedented growth in America's prison population was the result of a variety of factors, but the principal culprit was the increased length of criminal sentences. From 1973 to 2003, the prison population grew every year, yet arrests for felonies and conviction rates remained essentially constant.<sup>70</sup> Thus, to reduce incarceration rates, we must reduce sentence lengths. It is that simple.

A vast proportion of the increase is attributable to the war on drugs, and as we have seen, reform efforts have sensibly begun to target drug laws at both the federal and state levels. Drug courts and other treatment alternatives alleviate some of the pressure for incarceration, although the extent to which they are, in fact, alternatives to incarceration turns on whether the individuals they target would, absent drug courts, actually have been subject to incarceration. The reduction or elimination of mandatory minimums for minor drug offenses also makes good sense, as those sentences bear little relation to culpability or rehabilitation.

Reform can also come in the guise of enforcement strategies. In one effort that appears to hold promise, for example, police and prosecutors develop evidence against identified dealers, but instead of arresting them they call them in, show them the case against them, threaten them that if they do not immediately desist they will be arrested and prosecuted, and simultaneously offer services that might help them avoid criminal behavior. This tactic, known as the "High Point" strategy, was developed by David Kennedy, director of the Center for Crime

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<sup>70</sup> CLEAR, *supra* note 22, at 50; Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 30 (1999).

Prevention and Control at John Jay College.<sup>71</sup> It has been implemented successfully in several cities, eliminating open-air drug markets without the sort of aggressive, across-the-board enforcement tactics that have contributed to mass incarceration and have fueled distrust between police and the community.<sup>72</sup>

But about half of the incarcerated population is serving time for violent crimes.<sup>73</sup> Treatment alternatives are not a sufficient response for most of these offenders, and incarceration is frequently necessary. The *lengths* of the sentences imposed, however, are often not necessary. In the last three decades, the average time served in the United States has nearly doubled.<sup>74</sup> Today, one out of eleven sentences being served is a life sentence.<sup>75</sup> For the same types of crimes, American sentences are roughly twice as long as those in the United Kingdom, four times longer than those meted out by the Dutch, five times longer than those in Sweden, and five to ten times longer than those imposed in France.<sup>76</sup> There is no evidence that the relative severity of sentences affects general deterrence.<sup>77</sup> And when, as is often the case, sentences extend long past the age when most offending occurs, extended incarceration is even less likely to serve an incapacitation purpose. Thus, there is plenty of room to reduce the severity of sentences without undermining public safety.

Sentencing reform is necessary but insufficient. It is equally essential that public resources be directed at reducing the root causes of crime. Drug dealing is

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<sup>71</sup> See generally DAVID M. KENNEDY & SUE-LIN WONG, OFFICE OF COMMUNITY ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, THE HIGH POINT DRUG MARKET INTERVENTION STRATEGY (2009), available at <http://www.cops.usdoj.gov/files/RIC/Publications/e08097226-HighPoint.pdf>.

<sup>72</sup> Tate Chambers, *The High Point Strategy: Its Creation, Implementation, and Future*, 58 U.S. ATT'YS' BULLETIN, Mar. 2010, at 23, 25–29, 35; Jeffrey Rosen, *Prisoners of Parole*, N.Y. TIMES MAG. (Jan. 10, 2010), at MM36, available at <http://www.nytimes.com/2010/01/10/magazine/10prisons-t.html?pagewanted=all>. As a Justice Department description provides in further detail, the approach:

is a strategic problem-solving initiative aimed at permanently closing down open-air drug markets. The strategy targets individual drug markets using focused deterrence with transformational elements. The most violent offenders are targeted and prosecuted as examples. The strategy then targets low-level offenders and stages an intervention with families and community leaders. Law enforcement mobilizes community residents, leaders, and family members of low-level drug dealers to voice their intolerance for this criminal behavior and to create opportunity and support for the offenders. Offenders are given the option to straighten up or face lengthy prison sentences and are provided assistance in locating employment, housing, transportation, health care, and access to other social services.

BUREAU OF JUSTICE ASSISTANCE, DRUG MARKET INTERVENTION PROGRAM (2010), <http://www.ojp.usdoj.gov/BJA/topics/DMII.pdf>.

<sup>73</sup> See PRISONERS IN 2009, *supra* note 10, at 7 tbl.7.

<sup>74</sup> CLEAR, *supra* note 22, at 188.

<sup>75</sup> MARC MAUER, RYAN S. KING & MALCOLM C. YOUNG, THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 3 (2004).

<sup>76</sup> CLEAR, *supra* note 22, at 188.

<sup>77</sup> *Id.* at 33 (quoting Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 157 (2003))

an economically attractive option in inner-city communities where the schools are deficient, parents are often incarcerated or absent, jobs are scarce, negative role models are prevalent, and having done time in prison is so common that prison loses its stigmatic effect. If we do not provide support for children in such communities, the drug trade and other crime will continue to flourish.

Most of the ameliorative criminal justice reforms adopted thus far, however, have not come in the form of reduced criminal sentences or increased resources directed at inner-city communities. Instead, the reforms that seem to have gained official assent are reentry programs, increased access to probation and parole, and alternatives to incarceration for nonviolent drug offenses. These measures make sense, but absent more aggressive reforms, they are unlikely to lead to significant reductions in the incarcerated population. Reentry programs assist prisoners leaving prison to reintegrate into the community. But absent public support for the communities from which the offenders disproportionately come, they will be returning to situations that offer little hope or support.

Early access to parole and increased reliance on probation may well reduce the incarcerated population, but they are likely to be limited to low risk, nonviolent offenders. And absent a new approach to supervision, technical probation and parole violations are likely to continue to be major factors in new prison commitments each year. Mark Kleiman has advocated increased use of GPS ankle bracelets to more closely monitor probationers and parolees, coupled with the use of swift, certain, and short sanctions (such as a day or two in jail) for violations as an alternative to longer-term incarceration or re-incarceration.<sup>78</sup> His proposal would likely make Michel Foucault and his followers very uneasy, as it envisions intimate state monitoring of individuals' daily lives. But if the alternative is prison, the trade-off may well be worth it. The question is whether, as with drug courts, such measures would in fact become *substitutes* for incarceration or merely *supplements* to it, leading the public to support or tolerate even broader state control over citizens' lives without reducing incarceration seriously.

The same question holds true for alternatives to incarceration more generally. On the one hand, for some conduct, such as violent crimes, there will often be no credible alternative. On the other hand, a wide range of other anti-social conduct could, in theory, be subject to a range of sanctions, from civil fines to monitoring to enforced treatment to incarceration. If "alternatives to incarceration" are truly alternatives taking the place of incarceration, they will have an ameliorative effect on over-incarceration. But if they largely apply to individuals who probably would not have been incarcerated, they are not really "alternatives to incarceration" at all but simply additional sanctions that can be imposed on an even wider swath of the public.

What is more, reentry programs, early parole, more liberal use of probation, and alternatives to incarceration all pose substantial political risks. It is inevitable that such programs will, in some instances, fail. Individuals who were released

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<sup>78</sup> Kleiman, *supra* note 23, 120–21.

before the maximum length of time authorized will commit more crimes. Some of those crimes will be violent, and their stories, like that of Willie Horton, who escaped while on furlough from prison and committed a brutal rape,<sup>79</sup> will be easily used to galvanize public support for even harsher criminal policies. This risk is increased if, because of budgeting concerns, there is little meaningful investment in inner-city communities. More broad-based sentencing reforms pose the same risk in the abstract, of course. But where government officials exercise discretion to release someone on probation or parole rather than to incarcerate him, they are especially vulnerable to charges that, but for their discretionary decision, the subsequent crime would not have occurred.

In short, if we are to reduce incarceration in any significant measure, it is essential that legislatures (1) authorize more non-incarceration responses to low-level crimes, especially drug offenses; (2) shorten sentences substantially for crimes generally, to bring them more in line with those of other industrialized nations; and (3) invest in inner-city communities where children face the biggest barriers to achieving law-abiding, productive careers.

#### B. *How to Get There*

Among criminal justice experts, the reforms laid out above are familiar and generally viewed positively. While there are, as with any group of experts, areas of disagreement about what collection of measures would work best, the areas of consensus far outweigh the areas of dispute. The challenge in addressing America's incarceration problem is not that the experts disagree about what should be done, but that politicians, and the public at large, lack the political will to effectuate reform. At the core of the dilemma is the fact that, as Loïc Waquant and others have pointed out, "mass incarceration" is actually a misnomer.<sup>80</sup> Even though the United States has an unprecedented number of people behind bars, far outstripping any other nation, the incarcerated population is still less than 1% of the total population. Thus, the vast majority of Americans have not been in prison and probably do not even know anyone in prison. Moreover, the concentration of incarceration among impoverished African American and Latino residents of inner-city communities means that the likelihood that the majority knows anyone in prison is even lower than the general figures suggest. How does one convince the public to care about prison reform when the vast majority do not know anyone in prison and are probably reassured that most people who do spend time in prison are not like them?

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<sup>79</sup> Bernard Weinraub, *Campaign Trail: Crime Ads and Punishment*, N.Y. TIMES (Oct. 17, 1988), available at <http://www.nytimes.com/1988/10/17/us/campaign-trail-crime-ads-and-punishment.html?src=pm>.

<sup>80</sup> See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS, Summer 2010, at 74.

There are two principal schools of thought on this front. Some seek to appeal to self-interest by demonstrating the ways that current policies impose unnecessary and ineffectual costs on all taxpayers.<sup>81</sup> Others insist that we must highlight the race and class inequities that plague the criminal justice system.<sup>82</sup> In my view, we can and should do both.<sup>83</sup>

It seems clear that, at least in the last several years, budget pressures have prompted states to take criminal justice reform more seriously. Arguments that incarcerating low-level drug offenders is unnecessary, costly, and ineffective appeal to everyone's self-interest as taxpayers at a minimum. Thus, it continues to be critical to emphasize the costs of overreliance on incarceration. In recent years, this work has moved beyond a focus on how much it costs to house a prisoner—itsself a major expense—to an examination of the indirect collateral costs of incarceration on individuals, family members and communities.<sup>84</sup>

The appeal of emphasizing collateral costs in particular is that these effects extend beyond the offender to innocent third parties—including children, other family members, and even unrelated neighbors. There are 2.7 million children in the United States with a parent in prison or jail.<sup>85</sup> Children with an incarcerated parent confront substantial psychological and economic difficulties.<sup>86</sup> Yet children can hardly be “blamed” for having a parent in prison. Nor, for that matter, can the prisoner's wife or next-door neighbor. Yet studies have shown that the collateral consequences of concentrated incarceration extend beyond the family to the neighborhood as a whole, degrading its “social capital,” undermining its support networks, and denying imprisonment the stigma so critical to its deterrent effects.<sup>87</sup> By emphasizing collateral consequences that affect persons other than the offender himself, reform advocates may make their appeals more sympathetic.

Even those collateral consequences that are, at least in the first instance, limited to the individual offender himself have negative effects, as they interfere with the reintegration of offenders into the community, making it harder for former convicts to pursue a law-abiding path and more likely that they will return to offending.<sup>88</sup> The costs of the consequent criminal behavior are, in turn, shared

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<sup>81</sup> See, e.g., McVAY ET AL., *supra* note 58.

<sup>82</sup> See, e.g., ALEXANDER, *supra* note 5.

<sup>83</sup> For an example of advocacy that combines these themes, see NAACP, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE (2011) (arguing that prison spending is wasteful and has a disparate impact on the most vulnerable segments of society).

<sup>84</sup> See Hagan & Dinovitzer, *supra* note 49, at 134–35; Roberts, *supra* note 49, at 1280–85.

<sup>85</sup> COLLATERAL COSTS, *supra* note 49, at 18.

<sup>86</sup> See generally JEREMY TRAVIS, ELIZABETH CINCOTTA McBRIDE & AMY C. SOLOMON, URBAN INSTITUTE JUSTICE POLICY CENTER, FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY (2003, rev. June 2005); COLLATERAL COSTS, *supra* note 49, at 18–21 (2010) (detailing effects on children of incarcerated parents).

<sup>87</sup> See, e.g., Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 389 (2005); Roberts, *supra* note 49, at 1282 (2004).

<sup>88</sup> COLLATERAL COSTS, *supra* note 49, at 9–17.

more broadly, first by the individuals or community victimized by the crimes, and second by society at large, which must again foot the bill for the offender's incarceration.

But as powerful as these economic arguments are, they are likely insufficient standing alone. As the response to 9/11 dramatically illustrates, fear tends to overwhelm virtually all considerations of cost. Economic arguments may work as long as crime rates seem relatively manageable but may not have much lasting effect if crime rates again begin to rise (or if, for some other reason, fear of crime increases).<sup>89</sup> In addition, as Marc Mauer has argued, fiscal concerns are a double-edged sword, for while they may lead legislators to look for cost savings by reducing incarceration, they are also likely to lead to reduced expenditures on the social services that help those at risk avoid crime in the first place.<sup>90</sup>

Moreover, arguments that focus on economic concerns and fail to address the racial injustice of a system that so disproportionately relegates black and Latino men to lives of imprisonment and hopelessness are necessarily incomplete. The level of incarceration in the United States would be shameful even if its distribution matched the race and class makeup of the nation at large (although today's incarceration levels would likely be politically unthinkable if they were equally distributed). But the fact that the burden of incarceration is borne largely by black and Latino men from impoverished inner-city communities, that one of every three black male babies born today can expect to spend time in prison, and that 60% of black male high school dropouts will be imprisoned, adds a distinct element of injustice.<sup>91</sup> As a moral matter, reformers should not be afraid to take on that particular injustice. As a political matter, it seems unlikely that substantial reform will come until the country as a whole comes to reject the existing state of affairs. One solid ground for finding it unacceptable is its inequitable distribution. As Michelle Alexander has argued, "Martin Luther King, Jr. could have argued that separate water fountains were too expensive, a waste of money. He would have been right about that. But cost was beside the point. It should be beside the point today."<sup>92</sup>

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<sup>89</sup> Fear of crime is not necessarily connected to actual crime levels and may be affected by many factors, including visible public presence and media coverage. See GARY CORDNER, U.S. DEP'T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVS., REDUCING FEAR OF CRIME: STRATEGIES FOR POLICE, 1-11 (2010), available at <http://www.popcenter.org/library/reading/pdfs/ReducingFearGuide.pdf> (discussing fear of crime).

<sup>90</sup> Marc Mauer, *State Sentencing Reforms: Is the "Get Tough" Era Coming to a Close?*, 15 FED. SENT'G REP. 50, 51-52 (2002).

<sup>91</sup> See Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 151 (2004); David Cole, *Can Our Shameful Prisons Be Reformed?*, N.Y. REV. OF BOOKS (Nov. 19, 2009), <http://www.nybooks.com/articles/archives/2009/nov/19/can-our-shameful-prisons-be-reformed/>.

<sup>92</sup> Michelle Alexander, *Obama's Drug War*, THE NATION, Dec. 27, 2010, at 27, available at <http://www.thenation.com/article/156997/obamas-drug-war>.

There is potential tension here. One set of claims contends that costs are borne by all; the other stresses the disproportionate burden borne by minority communities. To the extent that broad political buy-in is necessary to support reform, economic arguments that highlight the effects on everyone's tax bill may be more effective. But if the majority is willing to incur heavy costs to allay their fears—whether it is rational or not to do so—fiscal considerations may not be enough. Admittedly, \$49 billion annually for criminal corrections is a lot of money, but when spread across a population of over 300 million it comes out to \$163 a year per person. The striking race and class disparities in the criminal justice system—disparities that far outstrip black-white disparities in virtually any other realm—offer an important moral impetus to reform.

There is a risk that emphasizing these disparities will undermine incentives for reform among the majority. They may play into racial and class stereotypes that reduce sympathy for reform efforts. And while they make a claim on our collective commitment to fairness, they also underscore that the costs of our incarceration policy are *not* equally borne by all but concentrated on particular communities.

Still, reform is most likely to succeed where reformers can appeal *both* to people's sense of justice and to their self-interest. The race and class disparities pose a direct challenge to our nation's highest ideal of equal justice, and reformers should not be afraid to appeal to that ideal. Recent successful reform campaigns, leading to reductions in the federal law's 100:1 disparity in sentencing for crack and powder cocaine and in New York's harsh Rockefeller era drug laws, both stressed the racial unfairness of the laws.<sup>93</sup> Moreover, the loose-knit national campaign against racial profiling, which at least until 9/11 was one of the most successful criminal justice reform efforts in decades, was expressly based on claims of racial discrimination.

The fact that our incarceration policy affects not just African-American, Latino, and poor *offenders*, but their children, family members, and neighbors, adds a distinct level of injustice that is much harder to dismiss with charges of "just deserts." Moreover, arguments of racial justice and economic waste can sometimes be combined so that they reinforce each other. Eric Cador, for example, has shown that incarceration is so concentrated in particular urban neighborhoods in Brooklyn, New York, that the government spends \$1 million annually to incarcerate people from a single block.<sup>94</sup> If we spent a fraction of that amount to improve education, supervision of juveniles, and job opportunities for students and young men on the block, we could reduce the incidence of crime,

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<sup>93</sup> Mauer, *supra* note 21, at 34. Mauer adds, however, that in both campaigns, the racial justice arguments were "accompanied by a strong argument that the prevailing drug policies were counterproductive."

<sup>94</sup> Eric Cador, Charles Swartz & Mannix Gordon, *Criminal Justice and Health and Human Services: An Exploration of Overlapping Needs, Resources, and Interests in Brooklyn Neighborhoods*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2003).

increase public safety, diminish racial disparities in the criminal justice system, *and* save money.

Perhaps the most difficult and elemental challenge is how to bridge the empathy gap that plagues criminal justice policy in a society where most people do not even know anyone who has been to prison, while for other select communities, going to prison has become a norm. A family that responded to wrongdoing by one of its own members in the way our criminal justice system does—years of incarceration, life imprisonment, even execution—would almost certainly be condemned as pathological. More homogeneous communities, such as Japan or the Scandinavian countries, have much less harsh criminal justice systems.<sup>95</sup> The very diversity of the United States, coupled with the racially disproportionate manner in which its criminal justice system operates, allows the majority to pursue policies that would not be tolerated if members of the white majority saw their fellow citizens more empathically. But how does one promote empathy with convicted criminals in a large, diverse society, especially where they are disproportionately concentrated among a few minority groups?

Bernard Harcourt has suggested that we draw lessons from a prior campaign of deinstitutionalization, which succeeded in radically reducing the detention of the mentally ill in mental hospitals.<sup>96</sup> But the challenges of reducing criminal incarceration are qualitatively different. The discovery of drugs to treat many mentally ill patients made detaining them less necessary. Moreover, given the high numbers of mentally ill in prisons today, there is reason to believe that a significant number of those released from mental institutions may for all practical purposes have been transferred to prisons. But most significantly, the stigma attached to criminal behavior is likely to be much more difficult to overcome. While the stigma associated with mental illness was and remains not insignificant, it pales in comparison to the stigma associated with criminal offending. Indeed, one of the purposes of criminal punishment is precisely to stigmatize antisocial behavior. Harcourt ends his piece by imagining a president launching an initiative to reduce criminal incarceration by half, as President John F. Kennedy did with respect to mental institutionalization in the 1960s.<sup>97</sup> But despite the recent reforms I have detailed above, the chasm between such a vision and today's reality seems virtually unbridgeable, in large part because it is almost impossible to imagine the kind of care and empathy for the criminally convicted that would be required.

My colleague, Michael Seidman, proposes that we give up on empathy and instead seek to exploit naked self-interest and racially selective sympathy.<sup>98</sup> He suggests that reformers appeal to the white majority by arguing that criminal

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<sup>95</sup> See Lacey, *supra* note 3, at 103.

<sup>96</sup> Bernard Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53 (2011).

<sup>97</sup> *Id.* at 88.

<sup>98</sup> See Louis Michael Seidman, *Hyper-Incarceration and Strategies of Disruption: Is There a Way Out?*, 9 OHIO STATE J. CRIM. L. 109 (2011).

justice spending is a welfare program that largely “serves” minority communities, since criminal victimization is concentrated in poor, minority, inner-city neighborhoods, and that therefore the majority should oppose such spending.<sup>99</sup> If this were offered in the spirit of Jonathan Swift’s “modest proposal”<sup>100</sup> as a rhetorical device to underscore the extent to which African Americans and Latinos are disproportionately victimized by crime and the targets of unfair criminal justice policies, it would be one thing. If, however, Seidman intends to offer a genuine proposal that reformers consciously adopt a strategy of appealing to racial antipathy or lack of empathy, it is both morally objectionable and doomed to fail. The better argument is that the current policy, far from “serving” the black community, disserves us all—inner-city black communities because of the negative consequences of incarceration on those very communities, the white majority because it wastes scarce resources on a response that has so many negative consequences, the middle class black community because of the stigma and stereotypes that the system reinforces, and all of us because of the message it sends about America’s lack of commitment to equality. The problem of over-incarceration exists at least in significant part because of racially selective sympathy. What is needed, therefore, is *more* empathy across racial lines, not *less*. We need to appeal to our best selves, not to our worst selves.

There are a variety of ways to encourage empathy. As noted above, the “innocence” movement may have the effect of increasing identification with the incarcerated, by stressing the possibility that those who are innocent may well find themselves behind bars. If members of the majority cannot so easily dismiss the imprisoned as “guilty” and “deserving it,” they may be more open to concerns about the fairness of the criminal justice system. Concerns about innocence, for example, seem to play some role in opposition to the death penalty.<sup>101</sup> At the same time, however, there are risks with this approach as a strategy for systemic reform, as the demonstrably innocent remain few and far between, and a focus on them may further isolate the vast majority of the imprisoned population, who cannot demonstrate their innocence.<sup>102</sup>

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<sup>99</sup> *Id.* at 131.

<sup>100</sup> JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE IN IRELAND FROM BEING A BURDEN ON THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK (1729).

<sup>101</sup> See Charles Lane, *Changing Attitudes about the Death Penalty*, WASH. POST, (Jan. 2, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/01/AR2006010100787.html> (“Attitudes about the death penalty may have grown more skeptical after recent revelations, aided by modern DNA analysis, that some innocent people have been sentenced to death.”); DEATH PENALTY INFORMATION CENTER, INNOCENCE AND THE DEATH PENALTY (last updated Feb. 22, 2011), <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

<sup>102</sup> See Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer’s Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315 (2010) (raising concerns about the effects of the focus on the innocent).

Books, films, and media coverage devoted to life behind bars may also facilitate empathy. The imprisoned are relegated to a world apart. Bringing that world to the attention of the general public is a key element in reminding us that those behind bars are our fellow citizens, and they remain a part of our community, as much as we build bars and fences to isolate them. In a recent book, Wilbert Rideau, who spent more than forty years in a Louisiana state prison for murder, writes movingly of the world behind bars, illustrating the humanity of its inhabitants and reminding us that even those who have committed murder are capable of rehabilitation.<sup>103</sup>

A third way to reinforce empathy may be to reduce racially disparate criminal law enforcement. To the extent that the majority finds mass incarceration easier to accept because they do not identify with most of those behind bars, reform efforts that lead to more equitable law enforcement may induce the majority to internalize the costs of criminal law enforcement, thereby producing more accurate trade-offs of the costs and benefits of incarceration.<sup>104</sup> In this sense, appeals to racial justice may, in the long run, reinforce efforts to reduce incarceration across the board.

A fourth way to build empathy might be to increase contacts between the incarcerated world and the outside world. Few Americans have been inside a prison, much less communicated with a prisoner. Human beings are much easier to demonize or disregard at a distance. Efforts to reduce the distance should therefore be encouraged. Some professors lead classes in prisons that allow college or law students and prisoners to study together. James Forman, Jr., and Shaimma Hussein have suggested a program like Teach for America that would provide stipends for teaching not only in impoverished communities, but also in prisons.<sup>105</sup> AmeriCorps and other National Service programs might emphasize the provision of vocational training, rehabilitation services, and the like to those under incarceration or on probation or parole. Law schools might make it a priority to establish clinics that involve representation of detained individuals. Seidman, in his contribution to this symposium, dismisses such proposals on the ground that they will appeal only to those who already feel empathy with prisoners.<sup>106</sup> But the experience of actually spending time in a prison and getting to know prisoners as human beings, especially as a young person, could well have a life-altering effect

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<sup>103</sup> WILBERT RIDEAU, *IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE* (2010).

<sup>104</sup> Vanessa Barker has argued that institutional political reforms may also have an ameliorative effect. She maintains that certain political arrangements, in particular those that promote deliberative dialogue, are more conducive to humane criminal justice approaches that seek to minimize reliance on incarceration, while systems of “direct democracy” through referenda and the like, may encourage harsh retributive responses. *See* BARKER, *supra* note 28, at 72–74. Barker may well be right, but altering political frameworks is likely to be extraordinarily difficult and unlikely to happen unless they can be shown to cause a wide range of pernicious effects.

<sup>105</sup> James Forman, Jr. & Shaimaa Hussein, Presentation at Faculty Workshop, Georgetown Law, *Isolation, Empathy, and the Politics of Crime*, (Sept. 15, 2009).

<sup>106</sup> Seidman, *supra* note 98, at 123.

on the careers such men and women pursue and on the energy they devote to the problem—much as the “Freedom Riders” campaign did for many involved in it, and the Loewenstein Project’s case at Yale Law School challenging the detention of Haitian refugees at Guantanamo did for many of the students who worked on it.<sup>107</sup> All political reform efforts begin by mobilizing people who are sympathetic, so Seidman’s criticism proves too much. Moreover, as between supporting and encouraging empathy, and supporting and encouraging selfish racism, the choice ought to be clear.

Prisoners are by necessity behind bars, often in remote settings, set apart from the rest of society by miles, steel doors, and high security. They are further insulated from the majority by their makeup—disproportionately African American, Latino, uneducated, poor, and residents of blighted urban communities. But if the United States is to develop a more humane criminal justice policy, reformers need to develop ways to break down the barriers to empathy between those on the outside and those locked inside.

## V. CONCLUSION

The tragedy of the United States’ forty-year incarceration epidemic remains very much with us. No country on earth incarcerates more people, or at a higher rate per capita. And while that strategy has imposed unnecessary costs on us all, the burden has been disproportionately borne by African American and Latino men. But that is old news. The new news is that after forty years of increasing incarceration and widening racial disparities, the trend lines appear to be shifting. In recent years, the incarceration rate has dropped, as has the total number of persons incarcerated in state prisons. And racial disparities are also falling. Legislatures that were once obsessed with enacting mandatory minimums and increasing the severity of criminal sentences are now eliminating mandatory minimums, reducing criminal penalties, and directing new resources to alternatives to incarceration and reentry. The politics of crime, at least for the moment, appears to have changed. It is less captured by demagoguery and more susceptible to arguments about costs and benefits.

These developments should not be overstated. The changes have as yet been only marginal, offering little challenge to the United States’ dubious distinction of being the world leader in incarceration rates. Moreover, the criminal justice system, at every stage, still disproportionately targets minority groups. But the change in direction is nonetheless good, and surprising, news. The story has been otherwise for two solid generations. Might we be in the midst of a new story line, a new strategy, a new criminal justice policy?

It is too early to tell, of course. But it is not too early to recognize the changes, to ask what may have prompted them, and to think about strategies for

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<sup>107</sup> See generally BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2005).

facilitating further positive change. We ought to build on what has worked and push for change that might create further improvements. While what must be done is relatively clear—reduce criminal sentences, reduce reliance on criminal penalties for illicit drugs, increase resources for alternatives to incarceration, and invest in communities that are most vulnerable to crime—it is less clear how we persuade the public that these measures are worth it. Pragmatic arguments about cost savings need to be paired with moral appeals to America’s commitment to equality. But most importantly, we must bridge the empathy gap between the public at large and the incarcerated population. If Americans were to come to view those behind bars as part of our community, indeed our family, mass incarceration would no longer be tolerated.