# Mandatory Minimum Sentencing

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### Inherency/Solvency

#### Despite incremental progress and the success of the First Step Act, mandatory minimums continue to produce disparate sentences that require substantial refom

Osler 5/12/20 Mark William Osler is the Robert and Marion Short Professor of Law, University of St. Thomas (MN). "The First Step Act and the Brutal Timidity of Criminal Law Reform." Published by SSRN on May 12, 2020. Available here: (https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3578123) - AP

Advocates for reform face a conundrum. They can seek broad systemic changes, which are a low-percentage shot but pay off big if they succeed. Or, they can focus their efforts on smaller, incremental changes that offer a better chance for victories along the way. A problem with incrementalism, of course, is that inevitably some injustices remain on the table for years or decades even as things get nominally better. For example, consider the incremental approach to reform of the crack laws:203 first came court rulings that allowed for some discretion by judges to ignore the harsh guidelines.204 Next came the Fair Sentencing Act of 2010, which reduced the disparity in sentencing between crack and powder cocaine but did not eliminate it or make the changes in the law retroactive.205 Then, nearly ten years later, the First Step Act finally made those changes retroactive, but did not close the disparity.206 The cost of this incremental approach to fixing an obvious problem was years of unnecessary incarceration for thousands of people. But, of course, also allowed for the release of thousands of people from prison,207 each with their own story of redemption.208 As Families Against Mandatory Minimums founder Julie Stewart put it in describing her group’s support of the Fair Sentencing Act, “Since 1995, when Congress killed the reform of the crack sentencing guidelines, nearly 75,000 people have received federal crack cocaine sentences. We will not allow another 75,000 to be sentenced at the current unjustifiable levels.... I won’t let the perfect be the enemy of the good.”209 In discussing a pragmatic approach to change in criminal justice, Georgetown Professor Shon Hopwood described the best of the kind of incrementalism that finally brought some level of reform to the crack laws and sentencing guidelines: It moves gradually. It trades in compromise. It demands less while crusaders demand more. Still, it has its place in progressive reform in America. If it starts with the feasible, it does so in the hope that the ideal may someday be realized, at least in some measure. If it is modest, it does so with the knowledge that by aiming lower it increases the chances of hitting its target. Pragmatism is not always a panacea but, then again, neither is it a path to nowhere. 210 One advantage of incrementalism is that it creates victories, however, small. That provides the opportunity for non-profit advocacy groups to take credit and celebrate the advance,211 something that is crucial to fund-raising—after all, there is much more appeal to donors when it is clear that progress is being made. Though hidden, this mechanism is critical to the survival of many advocacy groups. Unfortunately, this creates a tension between ambition for the cause and ambition for the financial success of an individual advocacy group. The financial incentive towards small victories pulls away from the desire for big ones—a tension that is only magnified by the competition between the atomized groups in the field. There is another factor that promotes a limited ambition when it comes to the reduction of America’s prison population: the distinction between violent and non-violent offenders.212 It is much more politically palatable to seek reduced sentences for non-violent offenders,213 but to achieve ambitions goals such as cutting the prison population in half we would have to reach into the pool of those convicted of violent offenses to realize success.21 Because of the nature of federal jurisdiction, relatively few federal prisoners are there for violent offenses.215 The federal system, though, is only a small (but significant) fraction of the incarceration system in the United States.216 In the state systems, where most of the action is, 55% of those locked up are there on charges of violent crime.217 That means that if we are to reach the commonly-proposed goal of cutting incarceration by 50%,218 we are going to have to consider cutting sentences for those who have committed violent crimes. That does not seem to be something that even progressive Democrats have much of a taste for right now, 219 and even the editorial board of the relatively liberal Washington Post opposed a D.C. proposal to lower sentences for some young violent offenders.220 Incrementalism is, right now, the only model of achieved success that we have in the field of criminal law reform. It is not a surprise that it is embraced by advocates and policy-makers.221 However, incrementalism has played a large role in the slowness of change as politicians are offered a convenient stopping point for reform. There are discrete costs to that choice, measured in the human lives that suffer as justice is delayed. IV. Accelerating the Process If over-sentencing in the United States is wrong (and it is), then there is an imperative to fix that grave mistake immediately. The cost of not doing so is nothing less than life and freedom, two of the things that Americans hold most dear. Incremental successes do impact lives, but they also leave behind too many for it to be a principled process. First, we must do a better job as advocates. We should sometimes be willing to be followers, and seek out a unifying message. This will require a new role for one or more of the big funders in the area: turning away from creating dozens of new organizations, and towards coordinating and growing the ones that we have. In so doing, we need to strengthen our message by including plans to keep crime low and respect the victims of crime. Second, our agenda needs to confront the political barriers that have slowed reform by creating a higher profile for the issue, calling out racist appeals, and by seeking to dilute the power of prosecutors in the policy. Finally, we must be bold in what we ask for, particularly in those rare times that the stars align and striking change is politically possible. Reducing incarceration is a laudable goal, but achieving real long-term change will require not only changing sentencing laws, but the structure of our policy process and the way that we define crimes. It is a lot to take on, but it is also right and good.

#### Plan: The United States Federal Government should enact substantial criminal justice sentencing reform in the United States by eliminating federal mandatory minimum sentencing and applying retroactive sentencing relief for people sentenced under mandatory sentences

#### Ending Mandatory sentencing and providing relief is necessary to end the current abuses in criminal justice – Previous reforms prove this is effective

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The forces that created and perpetuate mass incarceration have been entrenched for decades. In her book, Prisoners of Politics: Breaking the Cycle of Mass Incarceration, New York University law professor Rachel Barkow details solutions for fixing the system’s myriad problems. She talked to the Brennan Center’s Ruth Sangree about some of them. What is the best-case scenario for criminal justice reform in the coming years? It involves reform at the state and federal level. It gives us a president who is committed to making criminal justice reform a top priority and uses the bully pulpit to educate the public about all the reforms that are needed as a matter of both fairness and public safety. This president appoints a reform-minded attorney general, as well as similarly reform-minded U.S. attorneys and sentencing commissioners. With the right people in place, I think you would see some positive changes in federal charging and sentencing practices as well as oversight of police departments by the Justice Department’s Civil Rights Division. I think that would also mean a concerted effort to lobby for needed federal legislative reforms, including the end of mandatory minimum punishments and retroactive sentencing relief for those currently serving such draconian sentences. The president should appoint judges who have dedicated themselves to public service and public defense. This will over time result in needed doctrinal changes to check excessive sentencing and charging practices. Right now, the federal bench is overwhelmingly dominated by people who spent part of their careers defending the government and serving as prosecutors. While that is a commendable career choice and we want some of our judges to have that experience, things go awry when you have a bench that disproportionately has that experience. At the state level, the best-case scenario involves the election of more reform-minded prosecutors, governors committed to criminal justice reform and clemency, and legislation curbing the worst excesses. I think it is realistic to see massive reductions in the use of cash bail now that people are beginning to realize that it is nothing more than a punishment of the poor which, far from promoting public safety, ends up undermining it by disrupting people’s lives in fundamental ways. I also think a best-case scenario would see the reduction in or elimination of mandatory minimum sentences and a robust return of second looks at sentencing, whether with parole, clemency, compassionate release, or prosecutorial efforts to change sentences. The hope is that any changes to laws would be retroactively available to those serving under prior laws. I also hope we see massive changes to conditions in jails and prisons, as these institutions are deplorable in so many places. We may also see changes in drug policy, with the legalization of marijuana and the expungement of records of those with marijuana convictions. You write that it isn’t always possible to isolate government agencies from politics. How can agencies best account for and push back against political pressures? We know how to design better agencies because we have done it. Many states, for example, have sentencing commissions that do a much better job creating rational and effective sentencing policies than what we see coming out of the political process. These agencies are charged with staying within their existing prison capacity, which is a fantastic mechanism for keeping policies rational. Successful commissions can also be more effectively insulated if they face judicial review and have to explain the basis of their decisions. That is why we see more rational policies in civil regulatory spheres, and it could work in criminal justice as well. Having said all that, though, it is important to note that no agency will be completely insulated, nor should it be. We want democratic checks on how agencies operate. The key is to make sure that we build in some space for rational reflection and the consideration of evidence. The public often supports policies once it sees that they work, but our current process just doesn’t get these policies off the ground because there is too much fear and misleading rhetoric to get them started. Using a different model gives us space for these efforts to take hold, and once they do, they usually end up making the case for themselves. One example of this is the reduction in federal drug sentences. The U.S. Sentencing Commission reduced all federal crack cocaine sentences in 2007 and made the changes retroactive, so that people serving those sentences could petition to get the new reduced sentence. At the time, critics (including those at DOJ) warned that this would be a public safety disaster because these people would be back on the streets too early. But the agency model allowed the commission’s decision to proceed without being blocked. When the commission studied that population five years later, it found that the recidivism rate of those released earlier was lower than the recidivism rate of those who served their full sentences. That evidence, in turn, paved the way for the commission in 2013 to reduce all federal drug sentences retroactively, not just sentences for crack. So agencies end up making the case for their policies because policies grounded in evidence work more effectively. How do we go about rectifying “excessive uniformity” in sentencing laws? The first key action to take is to eliminate mandatory minimum sentences, which lump together people of vastly different culpability levels and give them the sentence designed for the worst person legislators were thinking about when they passed the law. It results in disproportionate sentences that discriminate on the basis of race. Supporters of mandatory minimums initially thought they would reduce disparities, but they have ended up exacerbating them because prosecutors have discretion whether or not to charge offenses with mandatory minimums, and they have used that discretion in ways that discriminate against people of color. The second key action is to make sure that judges have discretion to tailor sentences to the facts before them. Too often the temptation is to constrain judges to reduce disparities based on which judge you get. And while that is a laudable goal, it ignores the fact that a regime that does that simply shifts the power to prosecutors instead. It doesn’t eliminate disparities; it recreates them in the prosecutors’ office. A third key aspect is to change the way laws define crimes. Too often laws group together people of wildly different levels of culpability. A category like “sex offender” includes violent rapists and teens who sext each other. “Career criminals” or “three strikes” laws end up grouping together people who have committed acts of extreme violence with those who have no violent actions in their past. Our laws need to do a better job recognizing that we need smaller categories, because when we put larger groups under one umbrella, inevitably the entire group gets treated as if they are the worst possible type of offender in that category, and we get excessive sentencing as a result. And finally, this same dynamic exists with collateral consequences of convictions. These often flow to categories as large as “felonies,” so anyone with any felony conviction might find themselves banned from public housing, welfare benefits, or job opportunities. We need a massive overhaul of these collateral consequences because they are far too sweeping and undermine public safety goals because of how difficult they make reentry. It is also critical to note that in all of these areas, the brunt of the overbroad grouping falls on people of color, who are disproportionately affected by all of these policies.

#### Mandatory Sentencing Reform influences state actions – The First Step Act Proves

Hopwood 2019 Shoon Hopwood is a ssociate Professor of Law, Georgetown University Law Center. "The Effort to Reform the Federal Criminal Justice System." Published by the Yale Law Journal, Vol. 128, on February 25, 2019. Available here: (https://www.yalelawjournal.org/forum/the-effort-to-reform-the-federal-criminal-justice-system) - AP

Deciding which tradeoffs, compromises, and bills to support is no easy task. When many of the federal reform groups convened for a meeting about First Step in fall 2018, we were told by congressional staffers that most of the sentencing reform would be applied prospectively only. That was hard to hear. Many of those in federal prison (including some friends of mine) would benefit from retroactive application of these sentencing provisions, which is why I argued for retroactivity at every meeting I attended. Yet at a certain point, when the votes for retroactive application just weren’t there, the question remained: support the First Step Act without retroactive application, or don’t support it at all? In the end, I supported the bill because, even while it was chock full of compromises, the Act met my criteria for “meaningful” reform. In considering whether a federal criminal justice reform bill represents meaningful reform worth supporting, the following factors guide my decision-making: 1) whether the bill supports the goals of increasing fairness and public safety while also reducing reliance on prison as a sanction; 2) whether it reduces racial disparities in the criminal justice system; 3) whether those directly affected by the legislation support it; 4) whether there is a realistic probability of passing a better alternative in the near future; and 5) whether passage will lead to further reform. The First Step Act satisfied every one of those criteria. The First Step Act reduces the imprint of the federal prison system, because it will reduce the time served by those who will be sentenced in federal court and those currently in the system. The First Step Act only contains sentencing provisions that reduce sentences. This is not a bill like the Sentencing Reform and Corrections Act, which, if it had passed, would have removed mandatory minimum punishments for some crimes while creating new mandatory minimums for other crimes.95 On the prison reform side, the Act increases public safety by forcing the BOP to provide evidence-based rehabilitation programs that will reduce recidivism rates while at the same time moving people out of federal prison and into home confinement to serve part of their sentence.96 I support legislation that reduces the worst forms of custody—such as incarceration in prison, which often fails to rehabilitate people and is criminogenic in and of itself97—even if the legislation simply moves people to reduced forms of custody, such as parole or home confinement. Oftentimes legislators are not comfortable with passing legislation leading to outright release, so moving people to home confinement is often the second-best option in our current political climate. To use a concrete example, I supported the Act’s earned-time provisions, which lead to release on monitored home confinement, even as I advocated for expanded good time that would result in outright release. One criminal justice reform organization, JustLeadershipUSA, opposed the First Step Act in part because it does not provide prisoners with outright release and instead expands home monitoring, thereby opening “the door wide open for the federal government to use these tools to expand mass supervision into communities across the country.”98 Michelle Alexander, while not taking a public stance on the First Step Act, also argued that expansion of “e-incarceration” is difficult to call “progress.”99 But the Act does not introduce these measures. The federal criminal justice system already employs halfway houses and home confinement while someone is serving their sentence, and most judges impose a period of supervised release to be served after a prison sentence.100 So the First Step Act doesn’t expand “e-incarceration,” except to the extent that those currently incarcerated can serve more of their sentence in a halfway house or home confinement. Certainly, we don’t want to replace a system of mass incarceration with a system of mass supervision. But the more immediate goal is not to remove supervision; it’s to move over 180,000 people out of the worst form of custody—prison. When people go to prison, they are exposed to a much greater risk of serious bodily injury, death, and suicide, and they are often delayed or even denied medical care.101 Their children are at greater risk of developing health and psychological issues, and they often slip into lower socioeconomic statuses while achieving lower levels of educational attainment. One study estimated that children of incarcerated parents are six times more likely to become incarcerated themselves.102 By moving some people out of federal prison and into home confinement, the First Step Act significantly reduces these harms. Home confinement—where at least families can be reunited, and people can sleep in their own bed without fear of assault—simply does not rise to the same level of harm as a prison sentence. If outright release is not politically feasible in this moment, the reform community should support bills that remove or reduce some of the greatest harms of the criminal justice system even as we move for more reform. The Act will also reduce some, though not all, racial disparities in incarceration. The sentencing provisions of the First Step Act, both the retroactive and prospective provisions, will largely benefit African Americans.103 At the same time, the earned-time provision will likely lead to more racial disparities because non-citizens who have been ordered deported, most of whom are Hispanic,104 were excluded from the ability to earn credits towards early release.105 In addition, the First Step Act excludes certain categories of offenses, which will have further racial consequences. For example, white defendants make up a large percentage of those charged and sentenced to federal sex offenses.106 Because those who have committed sex offenses are precluded categorically from receiving earned time, that largely white group of prisoners will be excluded from early release.107 With the different exclusions, from non-citizens to certain categories of offenders, predicting the racial aftermath is not currently possible. As to the earned-time provision, the Act includes a requirement that DOJ create a risk-assessment tool that is given independent review. This review will hopefully help to prevent future racial disparities for those released through the earned-time provision, and also track those that do occur, leading to refining of the risk-assessment tool until no unwarranted disparities remain.108 When evaluating the First Step Act’s earned-time provision, I give ample deference to the views of those who are currently in prison. I’m in email contact with hundreds of people in federal prison and with their families through Facebook, in addition to serving on the board of FAMM, which remains in email contact with 35,000 of those incarcerated in federal prison. To my knowledge, an overwhelming majority of those in federal prison and their families support the Act, including a system of earned time that moves them from federal prison to home confinement.109 The few in prison against the First Step Act were opposed not because it could lead to home confinement, but because most of the sentencing reform provisions will not be applied retroactively, meaning they will continue serving needlessly long sentences.110 An evaluation of what represents best policy—especially when the policy choice consists of moving those in prison to lesser forms of custody—must consider and give great deference to the views of those currently and directly impacted.111 Any evaluation of the First Step Act should be also mindful of the political climate in Congress. As noted above, that climate does not currently lead to policies providing outright release of those in federal prison.112 Several reform groups pushed for Congress to create a system of expanded good-time credits that cut sentences short, rather than a system of earned-time credits that allow people to serve part of their sentence in home confinement. There was little appetite for more good time in Congress, especially from many conservatives. As noted above, federal reform opportunities rarely occur because of the enormous compromises that a majority of lawmakers must agree upon before a bill even comes to the floor for a vote. Reformers shouldn’t risk holding up a bill that moves people out of prison, without any provisions creating longer sentences, on the off chance that a preferred reform can pass several years from now. And, in fact, reform groups that publicly opposed the Act could not point to a potentially better alternative that is politically feasible in the near future. There is also reason to believe that if the First Step Act’s passage will lead to further reform. If the earned-time provisions lead to lower recidivism rates, states will take notice and pass similar reforms. For better or worse, state governments look to the federal system as a model of best practices. Several states, including Florida, Tennessee, Kentucky, Alabama, and Illinois, have reached out to the reform community in the wake of the First Step Act passing, asking about using the bill as a model for their respective state prison systems.113 That is no coincidence. When Congress passed and President Trump signed the First Step Act into law, it gave sufficient political cover for conservative state legislatures and governors to create their own reforms. The Act thus could ultimately bring about even more meaningful reforms in the state criminal justice systems, which hold the majority of the 2.2 million people held in U.S. jails and prisons. The First Step Act will ultimately affect every person confined in federal prison and their families, even if the sentencing and earned-time provisions do not provide particular prisoners with earlier release. The Act will force changes in rehabilitative programming, and it provides other incentives that will be available to many in federal prison. For those who do obtain earlier release—whether by way of the earned-time, sentencing, or compassionate-release provisions—their release should alleviate some of the overcrowding and staffing issues currently in the federal prison system, creating improvements affecting everyone. Put differently, the Act might be modest, but it is also meaningful reform—undoubtedly the best reform bill to be passed by the Congress in the past forty years.114 CONCLUSION Three years ago, those of us in the criminal justice reform community would have been shocked to hear about a bill like the First Step Act passing. Congress had an almost a forty-year track record of either making criminal justice more punitive or stalling on any potential reform. But with the efforts of the criminal justice reform community pushing from all sides of the political aisle, Congress finally broke the logjam and passed meaningful reform. That incremental and modest reform will provide meaningful relief to those in federal prison and their families, while leading to a decrease in recidivism, making all our communities safer. And with a reinvigorated, newly powerful, and better-funded federal criminal justice reform community, hopefully the bipartisan and incremental second step won’t take so long.

### Racial Discrimination

#### Mandatory sentencing reproduces racial disparities in sentencing

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B. Disparities Can Be Checked with Mandatory Minimums and Guidelines A second fundamental flaw in Congress's approach was its assumption that its reforms would address sentencing disparities. The Senate Report on the CCCA cited a 1974 study that asked fifty federal judges from the Second Circuit to indicate the sentences they would give in twenty different cases, and it commented that "[t]he variations in the judges' proposed sentences in each case were astounding." (170) Congress noted that "[s]entences that are disproportionate to the seriousness of the offense create a disrespect for the law," and those that are disproportionately harsh "create unnecessary tensions among inmates and add to disciplinary problems in the prisons." (171) It approvingly cited the research by the National Academy of Sciences on local sentencing reform efforts that heralded the Minnesota sentencing commission model. (172) But Congress ultimately failed to heed those findings. While it created a sentencing commission and directed it to create a guideline regime just as the Minnesota model had, it failed to follow that model in several key respects. Whereas the Minnesota sentencing commission (like just about every other state commission) is charged with keeping sentences within the existing resource capacity, (173) the federal equivalent operates with no such constraint. The result is that state sentencing agencies have been better able than their federal counterpart to create regimes with proportionate sentencing; the resource constraint acts as a rationalizing influence on the political process, which otherwise can get out of hand. (174) More fundamentally, a guideline model cannot effectively create a rational, proportionate sentencing regime if the legislative body ignores the sentencing agency's research and data and instead imposes mandatory minimums on the basis of no empirical evidence. That is, of course, precisely what Congress did, and in that respect, its approach bears no resemblance to the guideline model it approvingly cited when it created the Federal Sentencing Commission. When Congress hastily imposed mandatory minimum sentences for drug offenses in the Anti-Drug Abuse Act of 1986--before the Sentencing Commission had promulgated its initial set of sentencing guidelines--it prompted the Commission to anchor its drug guidelines to the mandatory minimum sentences that it had already established. (175) As a consequence, like Congress, the Commission created a sentencing regime driven largely by drug quantity. (176) For example, if a drug quantity triggers a five-year mandatory minimum under the statutory scheme, the Commission has that same quantity trigger a guideline range of fifty-one to sixty-three months. (177) "[N]o other decision of the Commission," the Commission has noted, "has had such a profound impact on the federal prison population." (178) Indeed, it was the Commission's decision to base its guidelines around what Congress had decided (without any empirical backing) that drove much of the increase in the number of people in federal prison. (179) Congress's mandatory minimums and the Commission's decision to key its guidelines off them are also leading factors in creating racial disparities among the federal prison population. (180) The Commission concluded that "sentencing guidelines and mandatory minimum statutes ... have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system" that Congress dismantled in the 1980s. (181) One reason the disparities are so great is that prosecutors retain discretion to decide whether to charge mandatory punishments and also whether defendants qualify for relief from a mandatory minimum by offering substantial assistance to the government. (182) The evidence shows enormous differences in how prosecutors exercise that discretion, with substantial variation by district. (183) For example, the Sentencing Commission has found "significant variation" among prosecutors in charging mandatory minimum enhancements under federal law for individuals who have prior offenses. (184) In fiscal year 2016, one district sought enhancements 74.6% of the time, whereas nineteen districts never sought them. (185)

1. Systemic Discrimination: Unequal Treatment First and foremost, abolition of mandatory minimum sentences is necessary if we are to address systemic discrimination in the criminalization and imprisonment of women, members of racialized communities, people with disabilities, the poor, and lesbians and gays. While some people seem to believe that mandatory minimum sentencing amounts to “equal treatment”, this assumption is falsely simplistic. Mandatory sentencing could only be said to be “equal treatment” if everyone had an equal chance at receiving a mandatory sentence. Everyone does not have an equal chance at receiving a mandatory prison sentence for a number of reasons. Disparity is partly created by the choice of offences that are targeted for mandatory minimums -- usually the offences disparately committed by the socio-economic underclass of a particular society (Morgan, 1999 at 276-77). Further, as has been demonstrated over and over again by activists, researchers, and advocates, Aboriginal people, other racialized people, and poor people face a criminal justice system in which discretion is exercised to their disadvantage at every turn, from the investigatory and charge stage by police, to the prosecutorial decisions made by Crown attorneys, to the trial and sentence decisions by judges, to the penal practices, including discipline of prison authorities, through to the parole determinations made by the parole board. There are several dramatic examples that suggest that prosecutorial discretion with respect to the laying of murder charges displays evidence of systemic racism, which in turn will dictate which prisoners face mandatory life sentences. One such example occurred in Prince Albert, Saskatchewan in 1991 when the police and Crown settled on a manslaughter charge, instead of a murder charge, with respect to the shooting death of an Aboriginal man, Leo LaChance, by Carney Nerland, an avowed white supremacist and a police informant. Although this unusual decision was remarked upon by the judge who heard Nerland’s bail application, no change in the prosecutorial decision ensued. Nerland, a prominent member of the Aryan Nation, had boasted after the homicide that “If I am convicted of shooting that Indian, I should get a medal and you should pin it on me”. The evidence that suggested that Nerland had fired the shot at close range, inside of his gun store, also could have supported a murder charge (Abell and Sheehy, 1996 at 121-23). Another example of the significant, albeit hidden role that prosecutorial discretion plays in murder cases is provided by Yvonne Johnson’s case. The result in her prosecution demonstrates the flip side of systemic racism whereby accused who are not the most significant actors in a crime can be accorded the lion’s share of legal and punitive responsibility for a crime. Yvonne Johnson’s account in Stolen Life (Johnson and Wiebe, 1998) illustrates how the Aboriginal woman accused of murder can be denied the benefit of Crown discretion in the prosecution in terms of plea bargaining, even where it is extended to the other perpetrators. She ended up as the only one of four to be convicted of first degree murder and therefore the one who is serving the longest sentence of imprisonment, by far. There are also significant numbers of people with cognitive and psychiatric disabilities who are caught up in the criminal justice system, and for whom stereotypes and discriminatory practices play a role in their conviction and exposure to mandatory sentences of incarceration. For example, the legal treatment of wrongfully convicted Guy Paul Morin was worsened in part by his mental illness, which was used by prosecutors to suggest to jurors that he was the sort of person to commit such an act of violence and to

thereby suggest that he was guilty of murder (Makin, 1997). We need to study how negative social and legal constructions of disability interact with the criminal justice system and produce mandatory life sentences, contrary to the equality interests of persons with disabilities. CAEFS is aware of evidence that indicates a Crown preference for first degree murder charges against women who kill their mates, when either no charges or a manslaughter charge would be warranted on all the evidence (see the cases discussed below of Kim Kondejewski and Lilian Getkate, among others). Given the reality that most women who use lethal force to prevent an attack by an abusive partner are also the first to notify police of the death and their involvement, their own actions are frequently used by Crown prosecutors as the basis for laying first degree murder charges. It is neither logical nor just to allow the gendered context that gives rise to the decision to lay first degree murder charges against such women to dictate a minimum sentence of life imprisonment. In addition to these specific examples, we have statistics on charging decisions by police and other prosecutorial decisions by Crowns, such as the decision to choose the indictable route of prosecution over the summary conviction process, which substantiate that systemic biases against groups such as African-Canadians shape the exercise of discretion with respect to many criminal offences (Final Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, 1995). We also have statistics that illustrate racism in Canadian sentencing patterns (Renner and Warner, 1981), over-use of more punitive measures against Aboriginal and African-Canadian accused (Bridging the Cultural Divide,1996; Final Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, 1995), including discriminatory patterns of commutation of the death penalty (Strange, 1996) and over-representation of Aboriginal women among the women’s population in federal prisons (LaPrairie, 1993). Even among federal prisoners who are serving mandatory life sentences for murder, Aboriginal and other racialized offenders are disadvantaged by systemic racism with respect to the conditions under which they serve their sentences, such as security classification and prison discipline, which in turn affect their chances of release on parole and thus the ultimate length of their life sentences. Given what we know about systemic racism in prison discipline in provincial institutions (Racism Behind Bars, 1994) and in light of Madam Justice Arbour’s comments about the federal prison culture and disregard for the law in her Inquiry into Events at the Prison for Women (Arbour, 1996), we know that racism is carried over from the decisions of police, prosecutors, and judges to those who administer sentences of imprisonment and the terms of parole in federal institutions as well. Cognitive and psychiatric disabilities also generally weigh against an accused in the prison classification process and correctional programming, not to mention the availability of parole. Not surprisingly, in jurisdictions that have attempted to gauge the impact of mandatory sentencing laws, the results indicate consistently that minority groups are the ones targeted by these laws. In Australia, emerging evidence is documenting what we already know. Mandatory sentences are invoked disproportionately for Aboriginal peoples, with crushing results (Thomson, 1999-2000). In the Northern Territories, since 1997 when mandatory sentencing laws were introduced, judicial use of non-custodial dispositions has declined dramatically and a corresponding increase in the imprisonment of Aboriginal adults and youths has been documented (Howse, 1999 at 227-28). In Western Australia, as of 1999, 50 children between 11 and 17 years of age have been sentenced to mandatory sentences of one year in prison (Bayes, 1999 at 287). Australian analysts note that Aboriginal people are disparately affected by the mandatory sentencing laws in part because police enjoy a very high --90 %-- “charge clearance” rate in Aboriginal communities. Police have an easy time here because many Aboriginal people will tell police who was responsible, and will also readily make statements to police that are used to charge them (Howse, 1999 at 226), much like battered women who have killed their violent partners.

It is also clear that Aboriginal and other disempowered groups will be disparately affected by mandatory sentencing laws because they will not have the resources to influence the police charging decisions, nor will they have much to bargain with regarding a possible sentence deal with the prosecutor. It is therefore quite predictable that young people from Aboriginal communities appear to be the hardest hit in the two Australian jurisdictions using mandatory sentencing, since they have neither the resources nor the information with which to strike a deal. Recent research in Western Australia indicates that “Aboriginal children constituted a staggering 80 per cent of the three strikes cases in the Children’s Court of Western Australia from February 1997 to May 1998" (Morgan, 1999 at 277). The implications for these communities resonate with the practices of colonization: “Another generation of indigenous young people are being taken away from their families, from their communities and from their land” (Goldflam and Hunyor, 1999 at 215). These authors continue: The unacceptable level of property crime [i]n some Aboriginal communities is a product of specific social, historical and economic conditions. Mandatory sentencing can only serve to perpetuate the underlying causes of the high levels of property crime in those communities. With young men being removed for lengthy stretches of time, the disruption to the ceremonial life of a community is just one way in which the fabric of such communities will continue to be undermined. (Goldflam and Hunyor, 1999 at 215). Similarly, all of the available evidence from the United States suggests that the harshest impact of mandatory minimum sentencing is felt by African-Americans, and particularly African-American women. For example, the data indicates that African-American women have eight times the chance of European American women of being charged, convicted, and sentenced under mandatory sentencing laws. There is also an enormous disparate impact upon Hispanic-American women, although its magnitude is about half that experienced by African-American women (National Law Journal, 1998). Statistics from 1985-95 indicate that the incarceration rates for drug offences leapt by 707 % for African-Americans, while for European Americans it rose by 306 % (National Law Journal, 1998). Much like the Australian experience, racially discriminatory patterns in mandatory minimum sentencing in the U.S. are created by practices of charging and negotiating plea bargains. Those actors who are accidentally or peripherally involved in offences have little or nothing to bargain with in terms of aiding the prosecution, and therefore not infrequently, these persons end up with lengthier sentences than the major players who can bargain their way out of a charge that carries a mandatory sentence. The U.S. experience indicates that “[w]hites tend to plead guilty and receive motions for reductions of sentence for cooperation more frequently than blacks do” although it is unclear whether this difference is due to the behaviour of prosecutors, the availability of legal counsel, or the different circumstances of accused persons who belong to different racial groups (Vincent and Hofer, 1994 at 23). For example, in the Canadian context, Yvonne Johnson refused to give evidence against her co-accused. She may have thereby lost the opportunity for a “deal” that might have taken her out of the mandatory sentence of life imprisonment (Johnson and Wiebe, 1998 at 303-314). The imposition of mandatory minimum sentences is also influenced by the barriers to access to justice experienced by racialized women, who require access to legal services in order to make legal arguments on their behalf. 2. Systemic Discrimination: Unequal Impact Second, abolition of mandatory minimum sentences is needed because they do not have an equal impact on all, even if it were true that everyone received “equal treatment” in the enforcement of criminal law. Mandatory minimum sentences have a predictably harsher impact upon those who already experience systemic disadvantage or disempowerment. According to both CAEFS and Judge Ratushny in her Self-Defence Review (Ratushny, 1997), due to systemic reasons, most women charged with homicide of allegedly violent mates are prepared to forego the defence of self-defence and plead guilty to manslaughter

in order to avert the threat of a lifetime of incarceration should their defence fail for any reason and they be convicted of first or second degree murder. Women who allege that they killed violent mates face widespread disbelief and misogynist denial, an enormous lack of legal, social, and economic support for their defence, and the prospect of loss of their children for decades. Added to this is the loss of self-worth, confidence, and clarity engendered by male control and violence. Thus, women are systemically disadvantaged when charged with first degree murder in their ability to fight the charge based on self-defence, as a direct consequence of the mandatory life sentence that is tied to a murder conviction. The overwhelming trend in such cases is for the woman to agree to plead guilty to manslaughter in order to open up the possibility of judicial as opposed to mandatory sentencing. Mandatory sentencing also produces unequal results, even if it could be called equal treatment, because it forces a judge to impose a set sentence regardless of mitigating circumstances. For women and other disempowered groups, this results in ignoring systemic oppressions that assist in creating “criminals”, and it even overrides individual responsibility. For example, some women who killed violent mates and plead guilty to manslaughter had, after Lavallee (1990) received suspended sentences and/or community sentences on the basis that they had been battered and that the battering was relevant to their moral culpability (Sheehy, 1994, 1995; Shaffer, 1997). However, new legislation passed in 1995, Bill C- 68, requires a judge to impose a minimum sentence of incarceration in a federal institution for at least four years for offenders convicted of specific offences of violence against the person if a firearm was used. This mandatory sentence of at least four years of imprisonment will be imposed even where there are compelling mitigating circumstances such as long-term abuse of the woman who kills her mate. The legal recognition of the significance of such factors, which was achieved only after lengthy feminist struggle, has been obliterated by this new mandatory minimum sentence. As one academic points out, the new firearms law will also impose the mandatory sentence regardless of the degree of moral fault of the offender (Dumont, 1997), such that a woman who fires a gun at her mate, in an action that is deemed not to amount to self-defence, may receive a longer sentence than the man who beats his wife to death over a period of hours. Furthermore, the mandatory minimum will apply indiscriminately to women who use firearms even though women are very rarely gun owners or collectors. In other words, in a case where a woman uses one of her husband’s guns, the fact that her husband had amassed an arsenal of weaponry and had threatened to kill her and her children could not be considered to entitle her to a suspended sentence since she must now be sentenced to at least four years imprisonment. For offenders with cognitive and psychiatric disabilities, mandatory sentences require that judges ignore their reduced capacities, unless their condition amounts to a mental disorder that deprived them entirely of their ability to distinguish right from wrong, pursuant to s. 16 of the Criminal Code. Again this means that for some categories of offenders, mandatory sentences deliver “equality” with a vengeance. This disparate impact results additionally because long prison terms may have more devastating effects upon prisoners who are racialized or who experience cognitive or psychiatric disabilities, whose prospects of employment will be further crushed by a record of imprisonment. In the case of women, they are more likely to be the primary, often sole parent of children and therefore more likely to experience the loss of their children and the anxiety related to concerns about their well-being. Further, the conditions of women’s imprisonment have often been condemned for their failure to provide appropriate services for women. Finally, the isolation of women’s prisons from the larger community will also differentially affect racialized women, particularly Aboriginal women. It should be emphasized here that the s. 15 violation of women’s equality rights posed by the imprisonment of Aboriginal women in the Kingston Prison for Women was recognized by the Saskatchewan Queen’s Bench in the Daniels (1990) case

#### Reworking mandatory sentences fails - all domestic and international examples show rampant discrimination – Only eliminating them solves

Sheehy 00 Elizabeth A. Sheehy is Shirley Greenberg Professor of Women and the Legal Profession in the Faculty of Law at the University of Ottawa. "Response to the Department of Justice Re: Reforming Criminal Code Defences: Provocation, Self-Defence and Defence of Property." Published Published by the Canadian Association of Elizabeth Fry Societies in January 2000. Available here: (https://www.researchgate.net/publication/274923402\_Response\_to\_the\_Department\_of\_Justice\_Re\_Reforming\_Criminal\_Code\_Defences\_Provocation\_Self-Defence\_and\_Defence\_of\_Property) - AP

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Further, as has been demonstrated over and over again by activists, researchers, and advocates, Aboriginal people, other racialized people, and poor people face a criminal justice system in which discretion is exercised to their disadvantage at every turn, from the investigatory and charge stage by police, to the prosecutorial decisions made by Crown attorneys, to the trial and sentence decisions by judges, to the penal practices, including discipline of prison authorities, through to the parole determinations made by the parole board. There are several dramatic examples that suggest that prosecutorial discretion with respect to the laying of murder charges displays evidence of systemic racism, which in turn will dictate which prisoners face mandatory life sentences. 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The result in her prosecution demonstrates the flip side of systemic racism whereby accused who are not the most significant actors in a crime can be accorded the lion’s share of legal and punitive responsibility for a crime. Yvonne Johnson’s account in Stolen Life (Johnson and Wiebe, 1998) illustrates how the Aboriginal woman accused of murder can be denied the benefit of Crown discretion in the prosecution in terms of plea bargaining, even where it is extended to the other perpetrators. She ended up as the only one of four to be convicted of first degree murder and therefore the one who is serving the longest sentence of imprisonment, by far. There are also significant numbers of people with cognitive and psychiatric disabilities who are caught up in the criminal justice system, and for whom stereotypes and discriminatory practices play a role in their conviction and exposure to mandatory sentences of incarceration. For example, the legal treatment of wrongfully convicted Guy Paul Morin was worsened in part by his mental illness, which was used by prosecutors to suggest to jurors that he was the sort of person to commit such an act of violence and to thereby suggest that he was guilty of murder (Makin, 1997). We need to study how negative social and legal constructions of disability interact with the criminal justice system and produce mandatory life sentences, contrary to the equality interests of persons with disabilities. CAEFS is aware of evidence that indicates a Crown preference for first degree murder charges against women who kill their mates, when either no charges or a manslaughter charge would be warranted on all the evidence (see the cases discussed below of Kim Kondejewski and Lilian Getkate, among others). 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We also have statistics that illustrate racism in Canadian sentencing patterns (Renner and Warner, 1981), over-use of more punitive measures against Aboriginal and African-Canadian accused (Bridging the Cultural Divide,1996; Final Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, 1995), including discriminatory patterns of commutation of the death penalty (Strange, 1996) and over-representation of Aboriginal women among the women’s population in federal prisons (LaPrairie, 1993). Even among federal prisoners who are serving mandatory life sentences for murder, Aboriginal and other racialized offenders are disadvantaged by systemic racism with respect to the conditions under which they serve their sentences, such as security classification and prison discipline, which in turn affect their chances of release on parole and thus the ultimate length of their life sentences. Given what we know about systemic racism in prison discipline in provincial institutions (Racism Behind Bars, 1994) and in light of Madam Justice Arbour’s comments about the federal prison culture and disregard for the law in her Inquiry into Events at the Prison for Women (Arbour, 1996), we know that racism is carried over from the decisions of police, prosecutors, and judges to those who administer sentences of imprisonment and the terms of parole in federal institutions as well. Cognitive and psychiatric disabilities also generally weigh against an accused in the prison classification process and correctional programming, not to mention the availability of parole. Not surprisingly, in jurisdictions that have attempted to gauge the impact of mandatory sentencing laws, the results indicate consistently that minority groups are the ones targeted by these laws. In Australia, emerging evidence is documenting what we already know. Mandatory sentences are invoked disproportionately for Aboriginal peoples, with crushing results (Thomson, 1999-2000). In the Northern Territories, since 1997 when mandatory sentencing laws were introduced, judicial use of non-custodial dispositions has declined dramatically and a corresponding increase in the imprisonment of Aboriginal adults and youths has been documented (Howse, 1999 at 227-28). In Western Australia, as of 1999, 50 children between 11 and 17 years of age have been sentenced to mandatory sentences of one year in prison (Bayes, 1999 at 287). Australian analysts note that Aboriginal people are disparately affected by the mandatory sentencing laws in part because police enjoy a very high --90 %-- “charge clearance” rate in Aboriginal communities. Police have an easy time here because many Aboriginal people will tell police who was responsible, and will also readily make statements to police that are used to charge them (Howse, 1999 at 226), much like battered women who have killed their violent partners. It is also clear that Aboriginal and other disempowered groups will be disparately affected by mandatory sentencing laws because they will not have the resources to influence the police charging decisions, nor will they have much to bargain with regarding a possible sentence deal with the prosecutor. It is therefore quite predictable that young people from Aboriginal communities appear to be the hardest hit in the two Australian jurisdictions using mandatory sentencing, since they have neither the resources nor the information with which to strike a deal. Recent research in Western Australia indicates that “Aboriginal children constituted a staggering 80 per cent of the three strikes cases in the Children’s Court of Western Australia from February 1997 to May 1998" (Morgan, 1999 at 277). The implications for these communities resonate with the practices of colonization: “Another generation of indigenous young people are being taken away from their families, from their communities and from their land” (Goldflam and Hunyor, 1999 at 215). These authors continue: The unacceptable level of property crime [i]n some Aboriginal communities is a product of specific social, historical and economic conditions. Mandatory sentencing can only serve to perpetuate the underlying causes of the high levels of property crime in those communities. With young men being removed for lengthy stretches of time, the disruption to the ceremonial life of a community is just one way in which the fabric of such communities will continue to be undermined. 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The imposition of mandatory minimum sentences is also influenced by the barriers to access to justice experienced by racialized women, who require access to legal services in order to make legal arguments on their behalf. 2. Systemic Discrimination: Unequal Impact Second, abolition of mandatory minimum sentences is needed because they do not have an equal impact on all, even if it were true that everyone received “equal treatment” in the enforcement of criminal law. Mandatory minimum sentences have a predictably harsher impact upon those who already experience systemic disadvantage or disempowerment.

#### Racist criminal justice practices mirror the racialized terror of the past and reproduce stigma that criminalize marginalized communities

Taylor 19 Jennifer Rae Taylor is a senior attorney at the Equal Justice Initiative. "A History of Tolerance for Violence Has Laid the Groundwork for Injustice Today." Published by the American Bar Association on May 16, 2019. Available here: (https://www.americanbar.org/groups/crsj/publications/human\_rights\_magazine\_home/black-to-the-future/tolerance-for-violence/) - AP

The persistent presumption of guilt and dangerousness assigned to African Americans has made minority communities particularly susceptible to the unfair administration of criminal justice. Research demonstrates that implicit bias impacts policing—marking young men of color for disparately frequent stops, searches, and violence—and all aspects of the criminal justice system, leading to higher rates of childhood suspension, expulsion, and arrest at school; disproportionate contact with the juvenile justice system; harsher charging decisions and disadvantaged plea negotiations; a greater likelihood of being denied bail and diversion; an increased risk of wrongful convictions and unfair sentences; and higher rates of probation and parole revocation. Research has also shown that racial prejudice is directly related to public support for “tough on crime” laws that lead to long sentences and mass incarceration. So deeply entrenched is the presumption that people of color are dangerous and guilty that, according to a 2014 study, informing white Americans’ about racial disparities in incarceration rates led to more fear of crime and more support for punitive criminal justice policies. Lynchings were not isolated hate crimes committed by rogue vigilantes; they were targeted racial violence perpetrated to uphold an unjust social order. Perhaps the clearest intersection between the history of racial terror lynching and modern criminal law is seen in the death penalty. As lynching attracted national and international condemnation after the 1920s, capital punishment became a more acceptable means of achieving the same ends. Many defendants of the era learned that replacing a lynching with a death sentence did little to achieve a fair trial, a reliable conviction, or a just sentence. In Sumterville, Florida, in 1902, after a black man named Henry Wilson was convicted of murder after a trial lasting just two hours and 40 minutes, the judge promised the mob of armed white men filling the courtroom that the ordered death sentence would be carried out by public hanging—though that violated state law. When the execution was set for a later date, the mob threatened vigilante action. In response, Florida officials quickly moved up the date, authorized Wilson to be hanged before a jeering mob, and congratulated themselves on the “avoided” lynching. By 1915, court-ordered executions outpaced lynchings in the former slave states for the first time. Between 1910 and 1950, African Americans fell to just 22 percent of the South’s population but constituted 75 percent of those executed in the region. More than 80 percent of documented lynchings in America between 1889 and 1918 occurred in the South, and more than 80 percent of the nearly 1,400 legal executions carried out in this country since 1976 have also been in the South. Modern death sentences are disproportionately meted out to African Americans accused of crimes against white victims; efforts to combat racial bias and create federal protection against racial bias in the administration of the death penalty remain thwarted by familiar appeals to the rhetoric of states’ rights; and regional data demonstrates that the modern death penalty in America mirrors racial violence of the past. The bold and unpunished deaths of black men, women, and children deemed dangerous—like Trayvon Martin in Florida; Philando Castile in Minnesota; Tamir Rice and Samuel DuBose in Ohio; Alton Sterling in Louisiana; Sandra Bland in Texas; Freddie Gray in Baltimore, Maryland; and many, many more—continue to demonstrate the fatal consequences of a racialized presumption of guilt permitted to fester for more than a century. The trauma borne by Anthony Ray Hinton and countless more men and women condemned to death only to be exonerated many years later reveals the arrogance of a judicial system built on a history of injustice but still confident in its ability to fairly and justly judge who should live and who should die. Chattel slavery in the United States required manufacturing a myth of racial difference to justify the brutal practice of buying and selling African men, women, and children as property. The inhumanity of slavery was largely intolerable unless there was a narrative that enslaved people were not really people. The military battles and legal developments that led to the abolition of slavery did nothing to undo that project of dehumanization, and those same ideas survived to justify racial terror lynching through the criminalization of black identity. Today, dehumanization and the fear of the “black criminal” remain at the core of our national acceptance of a prison system that cages and warehouses millions of people of all backgrounds. The impact of American mass incarceration is felt far beyond the black community, but the black community and its history illustrate the roots of this crisis—and potentially a path out. After nearly 30 years advocating on behalf of the condemned and incarcerated in the Deep South, we at the Equal Justice Initiative believe that telling the truth of the slave trade, racial terror lynching, Jim Crow segregation, and mass incarceration can free us from the division and conflict that have grown out of centuries of euphemism and avoidance. We believe that bravely committing to this effort can set our community on the path to the honest reflection that will uproot and expose these poisons, and that this work cannot be relegated to the courtroom. To that end, in April 2018, the Equal Justice Initiative opened two new sites in Montgomery, Alabama: The Legacy Museum: From Enslavement to Mass Incarceration, which presents an interactive and digital narrative exhibit linking the trauma of slavery to modern-day challenges in criminal justice; and the National Memorial for Peace and Justice, the nation’s first memorial to the victims of racial terror lynching. Together, these spaces challenge each one of us to confront a difficult history and commit to creating a more just and peaceful future. We encourage and welcome all to visit. Anti-lynching crusader Ida B. Wells once wrote, “The way to right wrongs is to turn the light of truth upon them.” The museum and memorial strive to further the work of so many activists and advocates, past and present, striving to eradicate the roots of racism and inequality—and working to make that achievement lynching’s final legacy.

#### Prefer resolving structural violence over existential ones – Securitization is founded on sustaining the status quo’s racialized violence

Howell and Richter-Montpetit 19 Alison Howell is Associate Professor of Political Science at Rutgers University – Newark, where she is also a member of Women’s and Gender Studies, Global Affairs, and Global Urban Studies. Melanie Richter-Montpetit is Lecturer in International Security at the University of Sussex. "Is securitization theory racist? Civilizationism, methodological whiteness, and antiblack thought in the Copenhagen School." Published by Security Dialogue, 51(1), 3–22. Available here: (https://journals.sagepub.com/doi/full/10.1177/0967010619862921#articleCitationDownloadContainer) - AP

The social contract, for securitization theory, is an (18th-century, white, European, liberal) feat of desecuritization, both within nation-states and among them (Buzan et al., 1998: 51).2 Securitization theory, then, does not merely replicate social contract theory and civilizationist thought: it develops it. By introducing a constructivist methodology, securitization theory places politicization (the instantiation of ‘normal politics’ or social contracts) and minimizing securitization as integral to civilizational progress. Admittedly, securitization theory is an eclectic theory. In addition to thinkers easily identified as civilizationist, it also draws on apparently more critical theorists, notably Arendt. Responding to Foucauldian critiques that describe securitization theory’s conceptualization of security as the exception to politics as Schmittian, Wæver (2011: 470) argues that these critics have misunderstood: ‘it is wrong to claim … that securitization theory involves a “Schmittian” concept of politics – the theory has a Schmittian concept of security and an Arendtian concept of politics’, further clarifying that: The concept of security is Schmittian, because it defines security in terms of exception, emergency, and a decision (although not by a singular will, but among people in a political situation). This does not in itself make securitization theory’s concept of politics Schmittian, because the place of security in the theory is as an anti-politics or the politically constituted limit to politics. This general politics is inspired by Hannah Arendt. (Wæver, 2011: 478) Elsewhere, Wæver (2015: 122) summarizes Arendt’s concept of politics: ‘politics takes place among people, in-between us, because power only emerges when people act together, it basically consists of action directed to and dependent on the reaction of others, not doing things directly’. Here, he adverts to Arendt’s distinction between power (Macht) and violence (Gewalt), which securitization theory mirrors by dividing politicization from securitization. Arendt drew on racist German anthropology that distinguished between (uncivilized) ‘nature people’ (Naturvölker) and (civilized) ‘cultured people’ (Kulturvölker) (Klausen, 2010; Owens, 2017) to divide the world into communities with history, language, and political institutions, and those without (Klausen, 2010: 396). She cast the former as (morally and politically) superior and warned that the latter’s ‘primitivism’ posed a threat to political freedom and democracy. When securitization theory adopts Arendt’s concept of politics, it does not dispense with her civilizationism but replicates and develops it, conceptualizing ‘normal politics’ as the achievement of civilized people capable of resisting violence (securitization) through reasoned dialogue (politicization). Securitization theory also replicates Arendt’s evacuation of violence from politics. Arendt built her idea of power (Macht) on an idealized vision of the Athenian polis, ignoring the ‘raw materials’ of ancient Athenian democracy – slave labor and women’s unpaid reproductive labor (James, 2003: 249f). She similarly idealized the American republic (Gines, 2014; James, 2003; Johnson, 2009; Owens, 2017). Although in her famous ‘boomerang thesis’ Arendt (1979) located the origins of Nazism in European racism and colonialism, she asserted that the USA had never been guilty of imperialism or indigenous genocide (see James, 2003; Johnson, 2009). Though she spoke out against Nazi white supremacy in Europe, she insisted US racism was merely a social phenomenon, not a political structure (James, 2003: 253; Johnson, 2009), even though Nazi policies were explicitly inspired by US settler-colonial genocide, the reservation system, and Jim Crow segregation (Cesaire, 1950; Fanon, 1967; James, 2003; Whitman, 2017). In praising ancient Athens and contemporary America, Arendt actively minimized the imperial, racialized, and gendered violence structuring these ‘civilized’ democracies (Allen, 2001; Gines, 2009, 2014; James, 2003; Johnson, 2009; Norton, 1995). Securitization theory similarly occludes the racial violence of normal (liberal) politics. This is not just a conceptual problem: it results in major empirical oversights. For example, though it contains the word ‘security’, securitization theory places social security outside of its frame of analysis, as part of ‘normal politics’: ‘Although it shares some qualities with “social security,” or security as applied to various civilian guard or police functions, international security has its own distinctive, more extreme meaning. Unlike social security, which has strong links to matters of entitlement and social justice, international security is more firmly rooted in the traditions of power politics’ (Buzan et al., 1998: 21). Securitization theory overlooks the power politics of social security and cannot see how Western welfare state social security systems support white (settler) heteropatriarchal forms of life, such as the nuclear family (Arvin et al., 2013; Cohen, 1997; Duggan, 2003; Kandaswamy, 2008), and disproportionately target racialized, indigenous, and poor communities for direct and violent interventions such as the removal of children from families through enslavement, the residential schools that formed part of the genocide of indigenous people, child welfare systems, migrant detention and removal, and so on. Closer to Copenhagen: Denmark now uses socialized daycare as a means for removing and assimilating Muslim children (Salem, 2018). Social and national security are imbricated. For example, current Islamophobic counter-terrorism programs often use social and health services to identify suspected ‘terrorists’ (Kundnani, 2014; Qurashi, 2018; Qureshi, 2015). Social security only entails ‘entitlement and social justice’ for those privileged by whiteness, heterosexuality, citizenship, and/or class status. Securitization theory’s civilizationist idealization of ‘normal politics’ occludes these dynamics. More strikingly still, Copenhagen School theorists view policing as a positive force: ‘In the West, the police are normally an institutionalized part of society that ensures continuous functioning’ (Buzan et al., 1998: 54). They praise the pacification role of the modern state (Greenwood and Wæver, 2013: 489) and ignore the longstanding use of police in defending class and racial inequality and (hetero)sexual mores (Amar, 2013; Browne, 2015; Davis, 2003; James, 2000; Kelley, 2000; Sexton, 2007; Singh, 2016), and violently occupying indigenous land (Bell and Schreiner, 2018; Byrd, 2011; Dhillon, 2015; Fanon, 1963; Nettelbeck and Smandych, 2010; Razack 2015). Securitization theory also repeatedly refers to the US War on Drugs as a ‘niche securitization’ (Buzan and Wæver, 2003: 327–331, 2009: 265). This minimizes the transnational history of antiblack violence perpetrated by the US state leading into the mass incarceration of black and Latinx people (Davis, 2003; James, 2000; Rodriguez, 2006) and ignores American covert and counterinsurgency action globally, especially in Latin America. Policing ensures ‘good’ order for those privileged by whiteness, property ownership, gender norms, and/or settler status. The constitutive role of policing and law in the racial, (settler-)colonial, sexual, and class violence of ‘normal politics’ is occluded as a direct result of securitization theory’s reliance on civilizationist oppositions between politics versus security and politicization versus securitization. Classic securitization theory is civilizationist in that it believes that there are more or less politically and morally developed civilizations. It identifies ‘normal politics’ with (European) civilization and ‘securitization’ with a return to (racialized) primal anarchy. As a result, it depicts ‘underdeveloped’ civilizations as threats to supposedly more advanced ones. This becomes especially clear when examining securitization theory’s ideas about ‘state failure’. Securitization theory claims that in ‘developed’ states (Buzan et al., 1998: 28) a civilized political sphere generally fends off securitization, except when ‘securitization is unavoidable, as when states are faced with an implacable or barbarian aggressor’ (Buzan et al., 1998: 29). By contrast, in ‘failed’ or ‘weak’ states securitization runs amok: ‘In well-developed states, armed forces and intelligence services are carefully separated from normal political life, and their use is subject to elaborate procedures of authorization. Where such separation is not in place, as in many weak states … much of normal politics is pushed into the security realm’ (Buzan et al., 1998: 28). This excessive securitization, in turn, leads to primal (or ‘Hobbesian’ or ‘Kaplanesque’) anarchy, wherein the state ‘fails to take root or spirals into disintegration. This situation can lead to prolonged periods of primal anarchy, as is currently the case in Afghanistan and various parts of Africa, in which the state is only a shadow and reality is one of rival warlords and gangs’ (Buzan et al., 1998: 50, emphasis added; for analysis of the colonial preoccupation with Afghan ‘tribes’, see Manchanda, 2018). Discourses of state failure are ‘irredeemably rooted in an imperial and racialized imagination’ (Gruffydd Jones, 2015: 65; see also Grovogui, 2001; Shilliam, 2013; Wai, 2012a, 2012b). While they may avoid overt reference to race, they operate within a lineage of racial discourse that emerged to justify colonialism and continuing trusteeship. This racial hierarchy is fully represented in securitization theory’s list of weak and failing states: Nigeria under Abacha, Sudan, Sierra Leone, Somalia, Liberia, and ‘various parts of Africa’, the USSR under Stalin, Bosnia, Colombia, Afghanistan, Tajikistan, and so on (see Buzan et al., 1998: 28, 50, 69, 146). This is a racial discourse: ‘primal anarchy’ is primarily located in ‘brown’ (‘Afghanistan’) and ‘black’ (‘parts of Africa’) regions. Copenhagen School theorists sometimes seem to be aware of how this division falls. This does not lead them to question it. On the contrary, they warn against Western-centrism, but only in order to emphasize that it is in the West that ‘normal’ civilized politics exists: ‘if domestic and international were fixed, there would be a risk of generating a cozy Western view of politics: Domestic politics is normal and without security, whereas the extreme is relegated to the international space. In other parts of the world, domestic is not cozy’ (Buzan et al., 1998: 47n7). For securitization theory, primal anarchy exists, not only in the international realm, but also in non-Western ‘other parts of the world’, where a failure of normal politics leads to ‘“tribalist” forms of association’ (Buzan et al., 1998: 69). Securitization theory refuses to seriously consider the role of modern colonialism and ongoing imperial warfare in ‘failed states’. Such consideration might reveal the significance of Western colonial divide-and-rule policies, extraction of resources and labor, imposition of state borders, and military and covert intervention. Instead, securitization theory frames ‘failed states’ as evidence of a primal state of nature. Civilizationism is not just a collateral, detachable, part of securitization theory’s imaginary, or a sadly unattended-to implication of its Kaplanesque view of anarchy or its Arendtian model of politics. The idea that there has been (white) civilizational progress away from (racialized) primal anarchy is omnipresent in securitization theory because it is fundamental to securitization theory’s opposition between politicization and securitization. Ungrounded in the racist and civilizationist narrative that ‘normal politics’ emerged from ‘primal anarchy’, this opposition would look as arbitrary as it in fact is. Methodological and normative whiteness in securitization theory We have established that securitization theory is founded in a civilizationist conceptualization of politics and security that occludes racial and colonial violence. We now demonstrate that, on the basis of these assumptions, securitization theory develops a methodologically and normatively white theory. As postcolonial, critical race, and feminist scholarship argues, methodology involves making choices about whose perspectives or histories we (de)value. Bhambra (2017) defines methodological whiteness as a way of reflecting on the world that fails to acknowledge the role played by race in the very structuring of that world, and of the ways in which knowledge is constructed and legitimated within it. It fails to recognize the dominance of ‘Whiteness’ as anything other than the standard state of affairs and treats a limited perspective – that deriving from White experience – as a universal perspective. Operating in supposedly neutral and universal terms, methodological whiteness naturalizes the racial status quo, eliding the crucial role of racism in political systems or intellectual traditions. Bertrand (2018) has critiqued securitization theory’s methodology for setting up a colonial relation wherein subalterns cannot speak and securitization theorists speak for them. Our critique is somewhat different: we argue that since securitization theory aspires to describe not just ‘what is’ but ‘what should be’, its methodological whiteness also becomes normative whiteness. To illustrate this argument, we evaluate securitization theory’s incorporation of speech act theory and ask how it interfaces with its civilizationist conceptualizations of politics and security. Securitization theory bases its methodology in J. L. Austin’s notion of illocutionary speech acts: forms of speech having some element of force, such as making a promise or giving a warning. Combining this with an Arendtian concept of politics seems intuitive: Arendt defined politics as action through communication, and Austin provides a method for analyzing communication as action. Notably, this methodology enacts a normative stance, being designed to ‘protect’ Arendtian normal politics: Securitization theory was built from the start on speech act theory, because it is an operational method that can be designed to protect politics in Arendt’s sense. Put in short form, the political conception of securitization theory is inspired by Arendt, implemented through speech act theory. (Wæver, 2015: 122, emphasis in original) As we have seen, by defining violence as outside politics, Arendt failed to acknowledge that, by virtue of gender and racialization, some people are produced as the ‘raw materials’ of others’ political freedom. When securitization theory claims that the purpose of its method is to protect Arendtian ‘normal politics’, it implicitly undertakes to defend the status quo of a violent international racial order. To begin, we can observe that securitization theory does not challenge the ways in which structures of speech acts (like law, civil hierarchy, or international treaties) are and have been central to enforcing a colonial system of global inequality. On the contrary, securitization theory is structured, through its apparent neutrality, to supplement and reinforce those structures: Our relative objectivism on social relations has the drawback of contributing to the reproduction of things as they are, of contributing to the taking for granted that [critical security studies] wants to upset. The advantage is – totally in line with classical security studies – to help in managing relations among units. (Buzan et al., 1998: 206) While acknowledging this methodological and normative investment in maintaining the status quo as a ‘drawback’, the authors claim it is worth the price. ‘Managing relations among units’ – maintaining order – is a higher priority than justice. And how is order to be maintained? By preventing civilized ‘normal politics’ from ‘regressing’ into a ‘state of nature’: Austin gives us insights into the capacity of mankind [sic] for creating shared environments through language…. Herein lies the power of human civilization, as opposed to the ‘state of nature’; the power which alone makes it possible, on occasion, for someone weak and without weapons to be listened to and even obeyed, the power which makes it possible to conceive and pursue things such as social equality or solidarity and equal opportunities for genders, all of which would not be conceivable in a ‘state of nature’ ethology. To acknowledge in theory and investigate such power is at the same time to foster and defend it against the regression into forms of social life based on brute force and coercion. (Wæver, 2015: 121, emphasis added) Although this passage avoids overt mention of race, it mobilizes a racial imaginary. Its argument is that through the use of language to form social contracts, civilized people lift themselves above the savage ‘state of nature’ and create a public political sphere. This superiority is evidenced by the capacity for (Western, liberal) discourses like ‘equal opportunities for genders’ (here, securitization theory echoes imperial feminism’s racist claim that gender equality is most advanced in the West and should be exported, especially to ‘Muslim’ societies). However, while traditional Hobbesian social contract theory views the social contract in quasi-legal terms as happening once for all in the past, securitization theory redefines it as continuously intersubjectively produced through speech acts, and therefore constantly in need of reproduction. For securitization theory, white Western superiority is therefore precarious: it must be protected from (excessive) securitization that risks a ‘regression’ to a lower level of civilization or a fully uncivilized ‘state of nature’. This passage does not merely retell a classic civilizationist narrative in newer philosophical language. It operationalizes this narrative, making its assumptions into a method. If the ability to do things with words and not force distinguishes civilized man, it argues, then to analyze ‘how to do things with words’ via Austin’s method must be in itself to step to the defense of civilized normal politics. Securitization theory offers a methodological procedure by which the scholar can observe that a speech act meets the criteria for ‘securitization’ and make normative statements about whether it should be heeded. For securitization theory, when we deploy this methodology, we inherently proceed in a civilized manner and so contribute to and protect illocutionary, Arendtian politics. The normative goal of securitization theory is to protect ‘normal politics’ though civilized illocutionary action in favor of desecuritization, where desecuritization is constantly understood as synonymous with ‘progress attached to the development of Western international society’: Progress as desecuritization [has been] inherent in the liberals’ project since the nineteenth century…. This project has been taken the furthest in the ‘zone of peace’ that now characterizes Western international society…. With the demise of the Communist counterproject and the closed states and societies associated with it, the prospect exists for a more widespread dissolving of borders, desecuritizing most kinds of political, social, and economic interaction. This development is the most advanced within the EU, but it is also inherent in the shift from modern to postmodern states and from more closed to more open political constructions that is going on in many parts of the world. (Buzan et al., 1998: 209, emphasis added) To describe the 19th-century, golden age of European imperialism as a period of Western liberal progress is to dramatically misapprehend the historical record (see Barkawi and Laffey, 1999; Grovogui, 2001; Krishna, 2001). To equate the growth of Western imperialist hegemony with ‘desecuritization’ is even worse. It is not only to retroactively sanitize white supremacist imperialist history, but also to further insist that it ought to continue. In this sort of normative claim, securitization theory’s racism becomes operative, moving from a white methodology that describes the world from ‘a limited perspective – that deriving from White experience’ (Bhambra, 2017), to a normatively white prescription for how the world ought to be. To illustrate the empirical consequences of this methodological and normative whiteness, consider how securitization theory refuses to distinguish between white nationalist and racial justice movements: The radical white categorizations often line up with the attempts of the avowed progressives of the movements of minorities, multiculturalism, and political correctness to produce a general U.S. trend toward a redefinition of cultural and societal categories in terms of distinct racial and gender groups. The one side wants these groups recognized to ensure affirmative action in favor of the disfavored; the other side wants to use these categories to picture minorities as the threat to them and thereby to the whole. (Buzan et al., 1998: 130) The above passage is not a mistake. Similar lines of thought are articulated elsewhere, for instance in relation to the threat of ‘radical feminism’ (Buzan et al., 1998: 54). Securitization theory frames racial justice and white nationalist movements as equivalent: both potentially securitize cultural and racial categories. This framing is a result of securitization theory’s methodological whiteness, its inability to ask questions about racialized, gendered, and (settler-)colonial orders, and its general preference for order over justice. It is also a normative stance. Securitization theory aims to use speech act theory to defend normal politics from (excessive) securitization, including by racial justice movements. Racial justice, by extension, becomes a danger, threatening regression into a (racially coded) lower level of civilization or, worse, primal anarchy. To summarize: classic securitization theory is fundamentally and avowedly conservative, seeking to excuse and reinforce a white liberal status quo. Securitization theory begins with a theory of ‘normal politics’ as reasoned, civilized dialogue and securitization as a potential regression into an uncivilized ‘state of nature’. It justifies this through a civilizationist history of the world that privileges Europe as the apex of civilization and ‘desecuritization’, ignoring Europe’s violent colonial projects. It then constructs a methodologically white theory that mostly avoids mentioning race even as it locates ‘progress’ towards normal politics and the limitation of securitization in Europe. This methodological whiteness produces normative whiteness: the theory does not merely describe desecuritization as European progress, it normatively asserts that becoming or remaining like Europe is a moral imperative. Through an analysis of classic securitization theory’s representations of Africa, the following section shows how these intellectual commitments issue in clear antiblack racism. Antiblack racism in securitization theory writings on Africa ‘Antiblackness’ is a term used to describe the specificity of racism against people of African descent in the post-Columbus world. Chattel slavery turned people from the African continent into commodities to be traded and accumulated, and thereby placed them as ‘the bottom marker’ of ‘a projected universally human scale of being’ (Wynter, 2003: 308; see also Fanon, 1967; Hartman, 1997; Spillers, 1987). In this imaginary, blackness and black people figured as enslaveable things: the foil against which notions of what it means to be human (and thus a political subject) were invented. Antiblack racism is also complexly entangled with Western gender and sexual formations (Fanon, 1967; Hartman, 1997; Spillers, 1987): black women’s bodies and their alleged sexual difference were cast as proof of African primitivism.3 Significant here are questions of temporality. For Victorians, Africa was ‘a fetish-land, inhabited by cannibals, dervishes and witch doctors, abandoned in prehistory’ (McClintock, 1995: 41). Tropes of ‘the Dark Continent’ as ‘inhabiting not simply a different geographical space but a different temporal zone’ (McClintock, 1995: 40) stubbornly persist, including in much international relations theory, which casts Africa ‘as a metaphor for a number of evils: failed states, AIDS, poverty, corruption’ (Grovogui, 2001: 426). Such representations of Africa are not incidental in traditional international relations theory. They are intrinsic to it. This is because ‘Africa’ serves as a foil (Mills, 1997: 13) to ‘Europe’ and ‘the West’, the ultimate counterpart to not just Western but human development (Mudimbe, 1988; Wai, 2012a). In much international relations scholarship, blackness continues to signify ultimate (moral, sexual, and political) primitivism, an inherent propensity to (sexual and political) violence, and sexual excess and danger. Does securitization theory overcome, replicate, or deepen antiblack thought on ‘Africa’? Certainly, securitization theory sees a tendency towards primal anarchy and the ‘state of nature’ in many non-Western parts of the world (the Balkans; Eastern Europe; Central, South, and East Asia; the Middle East; and South America), but ‘Africa’ is particularly maligned. Often, classic securitization theory treats the entire continent as a single entity, a space where normal politics is weak and oversecuritized, the state or social contract fails (or was never established), and ‘man’ reverts to (or never left) the state of nature. ‘Africa is a pessimist’s paradise, a place where the Hobbesian hypothesis that in the absence of a political Leviathan life for individuals will be nasty, brutish, and short seems to be widely manifest in everyday life’ (Buzan and Wæver, 2003: 219). Elsewhere, however, it adds some complexity by seeing Africa in terms of multiple temporalities, being both ‘premodern’, having elements of the ‘modern’, and threatening a ‘back to the future’ scenario. On the one hand, a book like Regions and Powers (Buzan and Wæver, 2003) offers a sweeping history of Europe over millennia (containing little mention of colonialism), but a history of Africa that covers only official decolonization and the post–Cold War era: a matter of mere decades. Completely missing is any historical account of how colonialism and enslavement shaped not only African but also European security relations (Agathangelou and Ling, 2004b; Barkawi, 2006; Barkawi and Laffey, 1999; Krishna, 2001), and the idea of Europe itself (Mudimbe, 1988; Said, 1979). Conversely, another canonical securitization theory text asserts that ‘in the contemporary international system, some prestate referent objects are still active. The remnants of tribal barbarians still exist in parts of Central Asia and Africa. Some hint of how these tribes worked as referent objects for military security can be gleaned from contemporary civil wars in Afghanistan and Somalia’ (Buzan et al., 1998: 53, emphasis added). The past-tense ‘worked’ here implies that we can learn about premodern times (in Europe) by looking at present-day Afghanistan or Somalia, whose backwards ‘tribal barbarian’ populations constitute a prestate referent. These two temporalities come together in the statement that ‘in Africa, the main societal referent objects are a mix of premodern – the extended family, village, clan, and tribe – and modern, the “state-nation”’ (Buzan et al., 1998: 126). Securitization theory, then, sees Africa as temporally anomalous – that is, both premodern and modern – because it manifests both a postcolonial present and a potential degeneration to a precolonial/premodern past, as when Buzan and Wæver (2003: 221), drawing from other authors, including Kaplan, speculate that: the period of colonization and decolonization might, in the long view, appear as something of an interlude, a period with its own distinctive characteristics, rather than a point of permanent transformation from premodern to modern. If back-to-the-future pessimism is right, then what we are looking at now is some phase in the terminal collapse of the Westphalian experiment in Africa. This passage outlines a ‘back to the future’ scenario in which Africa returns to its default state of precolonial, tribal, anarchic statelessness. Here, as elsewhere, securitization theory does not entirely ignore histories of colonization: it admits that colonialism had an impact on Africa, but it understands this impact not as an extraction of resources and labor and a violent transformation of people into chattel, but as an ‘experiment’ aimed at bringing the European Westphalian state to ‘premodern’ barbarians (see Buzan and Wæver, 2003: 221; Buzan et al., 1998: 53, 126). Colonial and ongoing postcolonial and settler-colonial exploitation does not feature in this analysis, and decolonization appears not as a project of liberation but as a potential backslide into primal anarchy (Buzan and Wæver, 2003: 345). For securitization theory, histories of colonialism look less like violent ongoing exploitation than a missed opportunity for Africa to become more modern, desecuritized, and European. Why is ‘Africa’ missing this opportunity? Securitization theory’s methodological whiteness leads it to assert, without substantiation, that the cause of this backsliding must be not the ongoing extractive violence of liberal powers but the failure of African people and states to ‘desecuritize’: Because political violence has been such an endemic feature of the African landscape, and because the crisis of the African state is so central to the pervasive insecurity on the continent, we will take the existence of systematic political violence to indicate the presence of a dominant securitization. (Buzan and Wæver, 2003: 223) This is strikingly circular reasoning, where premises and conclusions guarantee each other. Securitization theory starts, as we have seen, from the axioms that ‘normal politics’ tames violence and irrational securitizations threaten ‘normal politics’. Seeing Africa as a violent, anarchic space, lacking in ‘normal’ civilized politics, securitization theory assumes this must be because securitization has run amok. As a result, African ‘dominant securitization’ can be taken for granted, as a foil to the supposed peacefulness of Europe, and therefore as evidence that ‘normal politics’ tames violence, and so on. Securitization theory here turns an antiblack narrative of African (a)history (Africa is primitive, violent, anachronistic) into an equally antiblack normative proposition: that Africa is culpable for failing to produce ‘normal politics’. European colonial violence is occluded or, worse, exonerated: many African elites publicly embraced a negative view of globalization, and took the view that their weak position in the global periphery was a major explanation for their difficulties. This led to a convenient rhetoric of ‘neo-colonial’ securitization that sought, often successfully, to divert attention from the indigenous causes of Africa’s difficulties. (Buzan and Wæver, 2003: 251) This not only sanitizes the violence of colonialism and enslavement, it goes so far as to cast anti-colonial politics as the problem.4 With Europe exonerated, Africa is then able to appear as a threat to Europe. We have already seen that securitization theory seeks to protect Western ‘progress’ and normal politics from excessive securitization and a potential fall into primal anarchy. It is similarly concerned to defend normal politics outside the West but sees this as more hopeless: ‘In regions dominated by weak or failed states, real prospects exist that the local level will become dominant, with securitization forming microregions. To the list of microregions we should perhaps add the Hobbesian anarchies in some inner cities of megalopolises’ (Buzan et al., 1998: 70). Later, this idea is expanded: As argued by Robert Kaplan (1994), units other than states have created new lines of division…. The booming megacities in the Third World, with their enormous slum suburbs, produce large populations that identify neither with their clans or tribes nor with states or nations…. Large groups of people who focus on immediate material survival needs become nonidentity factors and might enter the sociopolitical realm as the joker at some later point when they suddenly do acquire or generate an identity. (Buzan et al., 1998: 127) Here, those who dwell in slums are figured as people without identities, or political subjectivities, not fully political, and perhaps not fully human. (Even cursory empirical investigation would prove this false: there are robust traditions of political activism in slums across the globe, including across the African continent.) Because they exist in this state of nature (i.e. ‘focus on immediate material survival needs’), these racialized ‘jokers’ are potential threats to Europe, though in a way that is particularly tied to securitization theory’s constructivist methodology: ‘Another effect of Kaplanesque anarchy, especially the disease–crime–population–migration circles in Africa, is the unofficial erection of Atlantic and Mediterranean walls by which North Americans and Europeans define a category of Africa and Africans as the major zone of anarchy, danger, and disease to be shut off from “our world”’ (Buzan et al., 1998: 127). This asserts that ‘Africa’ is a space of ‘Kaplanesque anarchy’ and, at the same time, warns against the securitization of ‘Africa and Africans’ in the West. What securitization theory’s analysis of Africa produces, in this formulation, is nothing other than an updated ‘white man’s burden’: it is incumbent on the civilized not to turn away from the plight of the primitive, but the civilized must also take care to avoid being corrupted by their primitive anarchy. We can see here, finally, how little separates this contemporary school of security analysis from the openly antiblack racism of its Victorian predecessors. Conclusion This article has illustrated that classic securitization theory is structured not only by Eurocentrism, but also by civilizationism, methodological whiteness, and antiblack racism. This is evident in its conception of politics, borrowed from Arendt, which it defines as a sphere of (white) civilized dialogue where reason triumphs over irrational securitizations. This perspective is only made possible by ignoring colonial history, ongoing (settler-)colonial relations, and the racial violence of normal liberal politics. Securitization theory’s racism is also evident in its methodology, which examines securitizing speech acts in order to defend this (European, civilized) ‘normal politics’. Under cover of ostensibly neutral terms, securitization normatively prioritizes the defense of order over justice, positioning the securitization theorist as the defender of (white) civilized politics against (racialized) ‘primal anarchy’. We have further demonstrated the role of antiblack thought in securitization theory: its racist imaginaries of Africa serve as an indispensable foil, setting up a contrast between normal politics and securitization. One question beyond the scope of this article is whether this is similarly true of ‘second-generation’ and more empirical applications of securitization theory – or, indeed, the mere use of the word ‘securitization’. Postcolonial literature has long deliberated whether it is possible to rework theories built on racist precepts. For example, vigorous debate has surrounded whether the works of Marx (Coulthard, 2014; Rao, 2017; Robinson, 1983) or Foucault (Mbembe, 2003; Stoler, 1995; Thobani, 2007) can be adapted and made to work for anti-racist/anti-colonial purposes. Are there ‘reparative possibilities’ (Sedgwick, 1997; in relation to international relations, see Rao, 2017) for classic securitization theory? Can it excise or surmount its racist foundations? Our analysis suggests that securitization theory’s racism is not an incidental feature, nor ‘merely’ a matter of (empirical) application. Rather, it is baked into securitization theory’s conceptual apparatus and, in particular, its core concepts of politics and security. These problems cannot be remedied by applying classic securitization theory to non-Western spaces (as typically suggested by critics of its Eurocentrism), or by simply adding race or colonialism to its accounts. The retention of securitization theory’s concepts and methods leads to a primary focus on instances of overtly racist speech acts. Global racism is then treated as a matter of mere language. This elides the constitutive role of racist and colonial relations of force and expropriation in the making of the modern order, including ongoing security projects (see Howell and Richter-Montpetit, 2019). Once classic securitization theory is stripped of its racist conceptual and methodological apparatus, including its concepts of ‘normal politics’, its conservative deployment of speech act theory, its view of excessive securitization as threatening a racially encoded lower level of civilization, its faith in the social contract, and so on, there is very little left. Perhaps what remains is simply the word ‘securitization’. But even this word is potentially problematic, because inherent in it is a temporal move from normal politics towards the (exceptional) violence of security. Authors attempting to recuperate the term ‘securitization’ must take care not to indulge in white nostalgia for a better, more innocent time: a time that does not exist for those who have been subject to colonialism or the racial contract on scales from the local to the global – that is to say, the majority of the world’s people. Such a recuperative intellectual project, if at all possible, has yet to be articulated.

### Recidivism

#### Mandatory minimums fail to rehabilitate in the US causing higher recidivism rates

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What is the ultimate goal of incarceration? Is it to punish or to rehabilitate the offender in pursuance of preventing future criminal activity? The societal goals of incarceration differ between cultures.1 These cultural differences and their respective aims for incarceration result in some systems developing to enforce rules, maintain public safety, or rehabilitate wrongdoers, while other systems revolve around the objective to punish offenders.2 The American criminal justice system is the latter—developed with the objective of punishing those who have committed crimes, rather than rehabilitating them.3 This approach to incarceration results in the United States having the largest number of incarcerated persons per capita in the world.4 Because European countries are culturally similar to the U.S., this statistic is notable, if not surprising. This unprecedented and ever increasing incarceration statistic is likely a firsthand result from the passage of rigorous legislation aimed at fighting the “War on Drugs,” the institution of mandatory minimum sentences for drug offenses in the 1980s, and the stringency of parole eligibility.5 What naturally follows from mandatory prison sentences and decreasing parole eligibility is an inevitable increase in the number of prisoners.6 With 189,214 people in federal custody, 46.4% were charged with drug related offenses.7 According to the Federal Bureau of Prisons (BOP), 82,415 inmates are currently serving time for drug offenses.8 This, as this article will argue, can be directly attributed to the aforementioned “War on Drugs” policy, coupled with the institution of mandatory minimum sentences. Mandatory minimum sentences in the U.S. primarily targets major drug dealers and kingpins, but has failed to serve its purpose because in the vast majority of cases, the low level dealers and users are sentenced, while major drug dealers and kingpins rarely serve time.9 A possible reason for the failure of the original legislation to crack down on the kingpins and high level dealers could be credited to them having leverage in the form of information about other criminals.10 They are able to use this information to be granted leniency in their charge, and serve minimal prison time, if any at all.11 Meanwhile, the small-scale dealers, who are ordinarily poor individuals trying to earn a little cash and make ends meet, receive outrageous sentences and serve 20 plus years.12 The legislation by the U.S. Congress condemns the small-scale offenders instead of the big kingpins, and doing so without any real knowledge on the crimes or circumstances surrounding the offense.13 What results is an inhumane system. Due to the mandatory sentences and the federal “War on Drugs” policy, which run contrary to studies that indicate incarceration is not the most effective means of deterrence, the U.S. is now faced with overcrowded prisons.14 The federal government has indicated that it is aware of the issue and is taking steps to address the problem.15 In October 2015, new sentencing guidelines were introduced by a bipartisan group of senators to reduce mandatory minimum sentences for nonviolent offenders.16 In the same month, the Justice Department announced that about 6,000 inmates would be released from federal prisons.17 Even with these steps being taken, and those 6,000 inmates indeed being released, there remains a great deal of work to be done. These additional steps that the government needs to take will be explored in this article. Additionally, the U.S. has the highest recidivism rates in the world, signifying the ineffectiveness of the current system.18 Thus, it is time to explore the successful components of other European prison systems in order to establish a more effective approach. With the lowest recidivism rate, Scandinavian countries, like Norway, are considered models of effective incarceration practices.19 Though drug use and trafficking are prevalent in Norway, as they are in the U.S., their humane and compassionate treatment of inmates is a far better method of achieving rehabilitation goals.20 Norway has an estimated population of 5 million people, yet there are less than 4,000 incarcerated.21 Further, at 20 percent, Norway has one of the lowest recidivism rates in the world.22 This finding suggests that the Norwegian prison systems reduces recidivism more effectively than the U.S.23 The U.S. and Norwegian penal systems are similar in terms of the goals of incarceration.24 Both punish for the crime committed and attempt to rehabilitate the offender.25 They differ, however, in their manner of achieving these goals. Norway has not implemented mandatory minimums, meaning when they incarcerate, the term of incarceration are proportionate to the severity of the crime committed.26 What results is a system more concerned with effective rehabilitation and release of prisoners, not in doling out punishments that do not fit the crime committed.27 Unlike the U.S., where judges have been stripped of their authority in terms of determining the length of an offender’s sentence, judges in Norway have retained this power.28 The Norwegian system views criminals as individuals who have made mistakes and who are capable of being rehabilitated.29 Thus, instead of punishment, the main objective of Norway’s prison system is rehabilitation.30 In addition, Norway advocates the “principle of normalization,” meaning that their rehabilitation includes programs that ensure that recently released prisoners can easily integrate back into society.31 The American criminal justice system must shift its focus from punishment to rehabilitation, particularly for nonviolent drug offenders.32 A good starting point for the shift is to abolish mandatory minimums that remove judicial authority to take into account facts surrounding the crime and the criminal, and instead force judges to sentence offenders for a set period of time specified by statute.33 Part II of this paper will examine the background of U.S. and Norwegian drug laws and further examines the current governing laws and policies. Part III will analyze the problems with mandatory minimums and explain why judicial discretion is a superior method. Part IV will compare the incarceration goals in the U.S. criminal justice system with Norway’s to determine what aspects of the Norwegian criminal justice system may be reasonably adopted in the U.S. Although members of Congress are coming together to decrease the duration of mandatory minimum sentences, I propose eliminating them altogether in favor of judicial discretion.

#### Sentence relief leads to substantial reductions in recidivism rates

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Instrumental Variable Estimates — Table 2 shows the estimates for the second stage and the OLS estimates. Table 3 gives the estimates for the first stage. For the first stage, we use the ordinal position as an instrument for the parole decision, the percentage point reduction in sentence length, and the months less spent in prison. For the second stage, we estimate the effect of the measures of an early release on recidivism. Early release reduces recidivism. Table 2 shows that a 1 percentage point increase in the probability of getting parole reduces recidivism by 0.6 percentage points (see column 2). Column 4 shows that a 1 percentage point reduction in sentence length leads to a 2 percentage point decrease in recidivism. A 1-month reduction in sentence length reduces the propensity to return to prison by 8 percentage points, as shown in column 6. The results are similar when we use the number of minutes passed since the last break or an indicator for the first three cases as instrumental variables (see Tables B.1 and B.2). The OLS estimates are smaller than the instrumental variable estimates. This could be because of selection or because instrumental variable estimation identifies the effect on compliers instead of the effects on the whole population. Compliers are prisoners at the margin of getting parole, for whom getting parole may be particularly important.30 As previous research has shown, prison time in general puts tremendous strain on health and social ties (Fazel and Baillargeon, 2011; Khan et al., 2011; Morenoff and Harding, 2014). The relative reduction in sentence length is substantial as the modal early release is one third of the original prison term. In light of the issues with prisoner health care, overcrowding, and rehabilitation in Israeli prisons, it seems plausible that the marginal prisoner strongly benefits from reduced prison time. The point estimates are comparable to estimated effects of electronic monitoring when compared to incarceration. Exploiting differential rollout of electronic monitoring in France, Henneguelle, Monnery and Kensey (2016) document a 6 to 7 percentage point reduction in recidivism over 5 years, which corresponds to an 11% reduction. The average sentence length for electronic monitoring in their sample is 5 months. Di Tella and Schargrodsky (2013) report a 48% reduction in recidivism after a prisoner receives a more lenient judge who opts for electronic monitoring instead of incarceration. The reduction corresponds to an 11 to 16 percentage points reduction off a 22% recidivism rate over an average of 3 years of follow-up. In their case, prisoners face an average of 14 months on electronic monitoring instead of harsh prison conditions in Argentina. The larger effect in Di Tella and Schargrodsky (2013) compared to Henneguelle, Monnery and Kensey (2016) may be explained by longer sentence lengths and differences in prison conditions. Electronic monitoring differs in that the time spent incarcerated is minimal, but as in the case of an early release, prisoners can move pretty freely and engage in activities they desire. It thus seems sensible that our estimates are in line with the estimated effects of electronic monitoring. Table 3 shows the first stage estimates. A later position leads to a lower likelihood of an early release. The smallest t value is 3.7. Accordingly, the t values are larger than the rule-of-thumb threshold for weak instruments of t = 3.2 or F = 10 (Stock and Yogo, 2005)

#### Mandatory minimums result in longer sentences that increase the likelihood for repeated offenses

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II. Congress's Flawed Assumptions Because Congress has essentially relied on its members' gut instincts about what makes for good punishment policy instead of seeking to get guidance from real-world data and empirical evidence, it has been prone to making a series of erroneous assumptions that undermine public safety, proportionate sentencing, and constitutional values. A. Putting People Behind Bars for as Long as Possible Always Makes Us Safer A central animating principle behind the changes to punishment that began in the 1980s was reducing crime. (146) There were sharp increases in crime and social unrest in the 1960s and 1970s, (147) and Congress sought to tackle these problems through criminal law reform. As senator Specter stated in supporting the ACCA, the legislation "seeks to improve public safety and reduce violent crime by incapacitating career criminals, through lengthy incarceration." (148) Senator Specter explained the fifteen-year mandatory minimum explicitly in incapacitation terms, noting that the goal was "to incapacitate the armed career criminal for the rest of the normal time span of his career which usually starts at about age 15 and continues to about age 30." (149) While incapacitation appeared as the primary motivator, deterrence also played a key role. Legislators "anticipated that the entry of the Federal Government into the field of prosecuting violent street crime will have a substantial deterrent effect." (150) One sees a similar emphasis on deterrence in support of the drug laws in the 1980s and thereafter, with legislators "hoping to deter the would-be drug trafficker from getting involved in drug trafficking." (151) These legislators believed crime would be reduced through incapacitation and deterrence. While the laws drastically increased the federal prison population--increasing it by a whopping thirty-two percent by 1986 and spurring the largest federal prison construction effort in history (152)--they have largely failed to deliver the deterrent or incapacitative effects that their proponents predicted. Although some politicians who supported the laws assumed that they would deter crime, the empirical evidence on mandatory minimum laws suggests they do not increase deterrence. (153) Although these laws increased sentence lengths, empirical studies show that sentence length has little deterrent effect. (154) Both the National Resource Council and the President's Council of Economic Advisers have issued reports concluding that longer sentences are not the best method for deterring crime and summarizing research that "longer sentences are unlikely to deter prospective offenders or reduce targeted crime rates." (155) In addition, although proponents of mandatory minimum punishments believed they would be particularly good deterrents because they would increase the certainty of punishment, in practice they have had the opposite effect. The rigidity of mandatory sentences leads prosecutors to circumvent their application through plea agreements, charging decisions, and substantial assistance departures. (156) The uneven application "dramatically reduce[s] certainty" and ultimately "thwart[s] the deterrent value of mandatory minimums." (157) And when these mandatory minimum sentences are applied, they "chew up scarce capacity," which means those resources cannot be used to bring actions against other people, thus creating an environment (contrary to all the literature on what works for deterrence) where we trade certainty for severity and create "randomized draconianism." (158) Moreover, mandatory minimums can only deter if would-be offenders are aware of their existence, but according to a 1992 Bureau of Alcohol, Tobacco, and Firearms (ATF) study, the ACCA's mandatory minimums (to take one example) went largely unnoticed by their intended audience. (159) Politicians also overestimated the incapacitative benefits. (160) They largely failed to consider how individuals' rates of offending decrease as they age, (161) so many of the long sentences the statutes require are incapacitating people who would no longer be committing crimes in any event. Even more fundamentally, legislators failed to consider the ways in which long sentences could themselves be criminogenic because of how difficult they make reentry once the individual comes out of prison. (162) Studies show longer sentences lead to increased recidivism after release, (163) potentially outweighing any incapacitative benefit. One researcher summarizing the weak evidence of an incapacitation effect and the negative tradeoffs of long sentences on reentry has thus concluded that "incapacitation should not be relied on as a primary motivation for a broad-based incarceration regime." (164) A rational discussion of sentencing would thus factor in these costs of longer sentences (as well as other costs, such as the negative effects on third parties (165)) and not reflexively assume longer sentences are always good for public safety. But because most politicians have no expertise or training in criminal justice policy, they may be unaware of the downsides and tradeoffs of more punitive policies. They are setting criminal justice policies as a general matter and are often responding to particularly heinous cases or press accounts, which they often discuss at length in their floor debates and discussions of proposed laws. (166) The result, as Professor Douglas Berman has observed, is that lawmakers may lack "context for assessing and passing judgments on the actual persons who will come to violate various criminal prohibitions; they can really only consider criminal offenders as abstract and nefarious characters." (167) And with those "nefarious characters" in mind, they support sentences that are far too long for the many other people who get swept up in their laws. The results are laws that economists have concluded pose costs that outweigh their benefits. (168) There are better, more cost-effective ways to target crime, but Congress has failed to consider them because it is dedicated to an approach that relies on longer sentences in general and mandatory minimum sentences in particular. (169)

#### The failure to reduce recidivism leads to increasing crimes from released prisoners, while repeatedly subjecting them to inhumane and violent conditions

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By contrast, most criminologists reject the idea that the extended experience of imprisonment can be adequately captured in terms of a simple price tag or a cost. Such an approach truncates reality. When offenders are incarcerated, they enter a “prison community” (Clemmer, 1940) or a “society of captives” (Sykes, 1958). For a lengthy period of time, they associate with other offenders, endure the pains of imprisonment, risk physical victimization, are cut off from family and prosocial contacts on the outside, and face stigmatization as “cons.” Imprisonment is thus not simply a cost to be weighed in future offending but, more important, a social influence that shapes inmates’ attitudes toward crime and violence, peer networks, ties to the conventional order, and identity. Most criminologists would predict that, on balance, offenders become more, rather than less, criminally oriented due to their prison experience. In academic language, they would argue that imprisonment increases exposure to criminogenic risk factors. These would include differential associations with offenders in a “school of crime,” enduring noxious strains, having conventional social bonds severed, and facing stigmatizing labels that foster anger and a sense of defiance. Even if inmates might wish to avoid prisons in the future, they reenter society harboring an intensified, if not overpowering, propensity to offend. We have, then, two diametrically opposed views about the effect of imprisonment on recidivism. Deterrence theory predicts that prisons increase the cost of offending and thus reduce recidivism. Social experience theory predicts that prisons increase criminal propensity and thus increase recidivism. Oddly, these two competing views have not been subjected to a wealth of rigorous empirical analyses. Nonetheless, some relevant research can be cited in attempt to decipher which theory is more accurate. The Failure of Prisons One way to assess the capacity of prisons to reduce reoffending is to inspect rates of recidivism. If such rates are high—if numerous offenders return to crime—then this finding would call into question specific deterrence theory. Of course, even with high recidivism rates, custodial sanctions might stop more crime than noncustodial sanctions. Still, if a high proportion of inmates reoffend, this would be like saying that a high proportion of hospital patients are not cured of their ailments. Given the inordinate investment of resources that 24/7 care in a total institution requires, the efficacy of prisons—or hospitals—would be problematic. In fact, the news for prisons is not promising. In one of the most sophisticated assessments of recidivism, Langan and Levin (2002) traced the criminal involvement of state prisoners released in 1994 (for similar results, see Beck & Shipley, 1989). Within 3 years of release, 67.5% of the prisoners were rearrested for a new offense, 46.9% were reconvicted for a new crime, and 25.4% were resentenced to prison. Notably, within 3 months of release, roughly 30% of the inmates had been rearrested. For the sample, Langan and Levin also examined the rate of return to prison for either new crimes or technical violations, discovering that 51.8% ended up back behind bars. Furthermore, these figures surely underestimate the extent to which these prisoners recidivated because they include only those cases in which officials detected a releasee committing a crime. These findings are inconsistent with prisons as a powerful specific deterrent. Remember, prisons are not a mild or temporary behavioral incentive—such as glancing at a price tag when deciding to purchase a coat or cell phone. Rather, the cost of imprisonment is imposed on offenders daily and for months, if not for years, on end. Despite this reality, prisons appear to be a weak change agent. Indeed, high recidivism rates suggest that many offenders simply are not moved by imprisonment to stay out of trouble. Five Illustrative Studies In recent years, criminologists have become increasingly interested in whether contact with the justice system (and not simply prisons) makes offenders more or less criminal (see, for example, Sherman, 1993). These studies typically test specific deterrence theory against labeling theory—a perspective that hypothesizes that such contact has the ironic and unanticipated effect of increasing offenders’ criminal propensity by stigmatizing them, cutting their family bonds, increasing their association with other offenders, and reducing their employment opportunities. Notably, this newer body of research is tilting decidedly in favor of labeling theory. For example, Chiricos, Barrick, Bales, and Bontrager (2007) examined a Florida law that allowed judges that sentenced felons to probation to withhold a formal adjudication of guilt, with the record of arrest vanishing if probation was successfully completed. In essence, this allowed for a natural experiment in which some offenders received a felony label whereas others did not. Based on a study of 95,919 men and women over 2 years, they discovered that those who received a formal label were more likely to recidivate. Similarly, data from the Rochester Youth Survey show that formal criminal labeling—juvenile justice intervention—was associated with increased unlawful conduct both in the short term and into adulthood (Bernberg & Krohn, 2003; Bernberg, Krohn, & Rivera, 2006; see also Gatti, Tremblay, & Vitaro, 2009). Furthermore, in a review of 29 controlled trials conducted for The Campbell Collaboration, Petrosino, Turpin-Petrosino, and Guckenburg (2010) found that juvenile justice system processing “does not appear to have a crime control effect. In fact, almost all of the results were negative” (p. 6). Taken together, these findings create doubt about the ability of criminal penalties to function as a cost that, when imposed, dissuades offenders from recidivating. Again, these sanctions risk disrupting conventional relationships and pushing offenders into more antisocial contexts. Still, we need to address the more significant issue of whether, despite their potential problems, custodial sanctions can be shown to have a specific deterrent effect. In this section, we thus consider five important studies. We used three criteria in deciding which investigations to highlight. First, the studies had to be of the highest quality so that their findings could not be attributed to methodological bias. Second, the studies had to approach the issue of prison effects from different angles so that their findings could not be attributed to the use of a particular methodological strategy. And third, the studies had to be conducted in different times and/or places so that their findings could not be attributed to a specific social context. Collectively, these five works illustrate the limits of incarceration as a crime-control strategy. In the next section, we will consider systematic reviews of evidence on this topic. A similar conclusion will be reached. We begin with the classic study by Sampson and Laub (1993) published in Crime in the Making. Reanalyzing the Gluecks’ data, they examined how length of incarceration as a juvenile and adult influenced offending. They found no direct effects, leading them to note that “these results would seem to suggest that incarceration is unimportant in explaining crime over the life course” (p. 165). Such a conclusion, however, would be misleading. As Sampson and Laub point out, controlling for criminal propensity, time incarcerated substantially lessened job stability, which in turn affected recidivism. Phrased differently, imprisonment had strong indirect criminogenic effects. “Perhaps the most troubling aspect of our analysis,” conclude Sampson and Laub, “is that the effects of long periods of incarceration appear quite severe when manifested in structural labeling—many of the Glueck men were simply cut off from the most promising avenues of desistance from crime” (pp. 255-256; see Wimer, Sampson, & Laub, 2008). Second, Cassia Spohn and David Holleran (2002) examined 1993 data from offenders convicted of felonies in Jackson County, Missouri (which contains Kansas City). Following subjects for 48 months, they compared the recidivism rates of 776 offenders placed on probation versus 301 offenders sent to prison. Their message was straightforward: “We find no evidence that imprisonment reduces the likelihood of recidivism” (p. 329). Indeed, they found that being sent to prison was associated with increased recidivism and that those incarcerated reoffended more quickly than those placed on probation. Furthermore, they discovered that the criminogenic effect of prison was especially high for drug offenders, who were 5 to 6 times more likely to recidivate than those placed on probation. Third, Smith and Gendreau (2010; see also Smith, 2006) also reveal that imprisonment might have differential effects on offenders. For 2 years, they followed a sample of 5,469 male offenders serving time in Canadian federal penitentiaries. Notably, these institutions had a commitment to rehabilitating offenders. Their analysis showed that for high-risk offenders, the impact of imprisonment varied by whether inmates received appropriate rehabilitation (which reduced recidivism) or inappropriate treatment (which increased recidivism) (for a discussion of appropriate treatment, see Andrews & Bonta, 2010). Most telling, regardless of the type of programming received, low-risk offenders were negatively impacted by incarceration, experiencing inflated recidivism rates. Fourth, Nieuwbeerta, Nagin, and Blokland (2009) used data from the Criminal Career and Life-Course Study, which is based in the Netherlands. They studied 1,475 men who were imprisoned for the first time between ages 18 and 38. The focus on first-time imprisonment was innovative because it avoided the problem of discerning the effects of current as opposed to past incarceration experiences. The comparison group included 1,315 offenders who were convicted but not imprisoned. To minimize problems of selection bias, Nieuwbeerta et al. used a sophisticated methodology (i.e., group-based trajectory modeling combined with risk-set matching). Over a 3-year follow-up period, they reported that “first-time imprisonment is associated with an increase in criminal activity”—a finding that held across offense type (p. 227). We should add that these results are important because they occurred in a nation where the conditions of confinement are less harsh than in the United States and for a sample where the mean stay in prison was only 14 weeks (and only 1% of the sample served more than 1 year). It is possible that the effects of imprisonment might be stronger in the United States or that any form of imprisonment is so disruptive as to have untoward consequences. Fifth, Nagin and Snodgrass (2010) recently took advantage of a system used in Pennsylvania (and in other states) whereby offenders are randomly assigned to judges. Research on the effect of incarceration on recidivism based on nonexperimental data may be biased because those sent to prison may differ from those not sent to prison in systematic ways even with extensive statistical controls. Such hidden bias may then distort the results. To avoid this potential problem, Nagin and Snodgrass capitalized on the random assignment of cases to judges in Pennsylvania—judges who differed in their harshness. This allowed Nagin and Snodgrass to compare the recidivism of the caseloads of judges with very different propensities to send convicted defendants to prison or jail. If incarceration specifically deterred, then the recidivism rates of the caseloads assigned to harsh judges should have been lower than the caseloads assigned to more lenient judges. But this did not occur. The analysis revealed no differences in the recidivism of caseloads across judges. These studies thus illustrate how, across various contexts and methodologies, scholars have investigated the effect of imprisonment. In the least, they suggest that incarcerating offenders is not a magic bullet with special powers to invoke such dread that offenders refrain from recidivating when released. If anything, it appears that imprisonment is a crude strategy that does not address the underlying causes of recidivism and thus that has no, or even criminogenic, effects on offenders. As we see below, systematic reviews of all available studies tend to confirm this conclusion. Systematic Reviews of Evidence A systematic review attempts to examine a number of studies so as to provide an overall assessment of how some factor—in this case, imprisonment—affects criminal involvement. Gendreau, Goggin, Cullen, and Andrews (2000) undertook one of the first of these reviews, concluding that “clearly, the prison deterrent hypothesis is not supported” (p. 13). Across all comparisons, they found that incarceration resulted in a 7% increase in recidivism compared with a community sanction. They also examined the weighted effect size; this is a statistic that takes into account the size of each study and gives more “weight” to the findings computed on larger as opposed to smaller samples. In this analysis, the impact of a custodial sanction was not criminogenic, with the effect falling to zero. Nonetheless, there was still no evidence that sentencing offenders to prison reduced recidivism. A subsequent extension of this research by Smith, Goggin, and Gendreau (2002) reached similar results—with one important exception. They discovered that when the analysis focused on studies with high-quality research designs, the criminogenic effect associated with imprisonment jumped to 11%. Even when the weighted mean effect size was calculated, the iatrogenic effect of imprisonment remained, with custodial sanctions associated with an 8% increase in recidivism. In a more extensive consideration of the literature, Villettaz, Killias, and Zoder (2006) investigated 23 studies that included 27 comparisons of custodial versus noncustodial sanctions. Custodial sanctions were associated with reduced recidivism only twice, with increased recidivism for 11 comparisons, and with no difference for 14 comparisons. A subsequent “meta-analysis based on four controlled and one natural experiment” revealed “no significant difference” between custodial and noncustodial sanctions. In the least, these findings again suggest no clear specific deterrent effect of imprisonment. Notably, a similar review by Nagin, Cullen, and Jonson (2009) examined 6 experimental/quasi-experimental, 11 matching, and 31 regression-based studies. They echoed Villettaz et al.’s call for more rigorous studies. They also concluded that incarceration has a null or slight criminogenic effect on recidivism. Finally, in the most systematic review, Jonson (2010) meta-analyzed 57 studies. She discovered that, overall, the impact of a custodial versus a noncustodial sanction was slightly criminogenic, increasing recidivism 14%. When Jonson limited her assessment to studies of the highest methodological quality, the effect size for custodial sanctions was reduced but still criminogenic, boosting reoffending 5%. Furthermore, she examined a limited number of studies that explored whether harsher prison conditions were associated with lower reduction (see, for example, Chen & Shapiro, 2007). Inconsistent with deterrence theory, harsher conditions were associated with increased recidivism. Again, we must caution that despite the mass usage of imprisonment, the research in this area is not extensive or of high quality. Precise estimates of prison effects are not possible, and more work is needed to unpack whether the prison experience has differential impacts on offenders of varying characteristics. Nonetheless, when all sources of information are taken into account, the weight of the evidence falls clearly on one side of the issue: Placing offenders in prison does not appear to reduce their chances of recidivating.

### Mass Incarceration

#### Mandatory Minimum Sentencing insulates police from accountability and enables corrupt practices that result in mass incarceration

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Last year, Jacob, a young man I represented, made an exceedingly rare choice. He rejected a favorable plea offer because he wanted to hold the police accountable in a hearing to challenge his illegal stop, search and arrest. To those who do not work in criminal court, Jacob’s decision may not seem particularly momentous. Yet everyday across the country, police officers willfully violate people’s rights, in large part because of their certainty of never having to take the stand to answer for their actions. Police departments rightfully get blamed for the crisis in violent and corrupt policing. The recent firing of Daniel Pantaleo, the New York Police Department officer who strangled Eric Garner to death, lied about it, kept his job for five years and got terminated only after international pressure and the recommendation of a Police Department judge, underscores why. But the near impossibility of getting fired is only part of the crisis of impunity. An overlooked but significant culprit is mandatory minimum sentencing. In criminal courts throughout this country, victims of police abuse — illegal stops and frisks, car stops and searches, home raids, manufactured charges and excessive force — routinely forgo their constitutional right to challenge police abuse in a pretrial hearing in exchange for plea deals. They do so because the alternative is to risk the steep mandatory minimum sentence they would face if they went to trial and lost. Prosecutors use the fear of these mandatory minimums to their advantage by offering comparatively less harsh plea deals before pretrial hearings and trials begin. The result is not only the virtual loss of the jury trial — today, 95 percent of convictions come from guilty pleas instead of jury verdicts — but also the loss of the only opportunity to confront police misconduct in criminal proceedings. In New York City, for example, less than 5 percent of all felony arrests that are prosecuted have hearings to contest police misconduct. For misdemeanor arrests that are prosecuted — a third of which are initiated by the police — less than .5 percent of cases go to a hearing. A guilty plea also has the effect of insulating police from any civil rights lawsuit asserting false arrest because a plea of guilty serves as an admission that the officers’ arrest was justified. A year before his court appearance, Jacob was heading home when undercover detectives stopped a car he had borrowed. They ordered him and his three friends out of the car, handcuffed them and searched the car without justification. The officers later claimed that he failed to signal and that they smelled a strong odor of marijuana emanating from the vehicle when they approached, both common police lies used as pretexts to stop and search predominately black and Latinx people. During the search, the officers recovered a handgun from inside the spare tire compartment in the trunk. Jacob adamantly denied knowledge of the gun — it was not his car, other people used the vehicle, and there were multiple passengers — but he was charged with possession of a loaded firearm, a “violent felony” under New York law. The stakes were significant for this 21-year-old with no criminal record. At a pretrial hearing, where the legitimacy of the stop and search of the vehicle would be examined and a judge would determine whether to suppress (preclude the prosecutor from using any evidence relating to the firearm at trial), it would be his word against the officers’. And if he lost and went to trial, he would face the mandatory minimum of three and a half years in prison. On the day of the hearing, the prosecutor in Jacob’s case offered a last-minute plea deal: a nonviolent felony with a sentence of probation. But if he turned it down that day, the deal would forever be off the table. Prosecutors call this a “one-time offer,” a routine pressure tactic that undermines a meaningful opportunity to make a truly voluntary decision. Most people take the deal. The framers of the Constitution envisioned a far different system. They knew well from British rule that the government’s power to stop, search, detain, accuse, judge and punish people suspected of committing crimes presented unique risks for abuse. While they did not envision plea bargaining or the kind of policing we have today, three of 10 amendments in our Bill of Rights — the Fourth, Fifth and Sixth — when read together, collectively describe the view that government power should be vigorously challenged, without fear of reprisal or punishment, at every turn when it threatens the liberty of individuals. This original intent becomes meaningless if defendants cannot seek and receive judicial protection. As the United States Supreme Court warned nearly 60 years ago in the landmark Mapp v. Ohio: “Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.” Jacob got his public hearing. Two of the officers involved in his stop, search and arrest were compelled to testify. I cross-examined them over three days. They were visibly uncomfortable, even upset at times. It was clear that they never expected to testify. The judge found the officers’ testimony “implausible,” holding that the search violated Jacob’s constitutional rights, and granted Jacob’s motion to suppress the firearm. Soon after, the prosecution dismissed all charges. A month later, however, I learned that the same prosecutor was relying on the same team of officers to prosecute another man. He, too, was charged with possession of a gun found under similar circumstances. A week after that, I passed by the officer whose testimony under oath the judge had rejected as “implausible.” He was sitting in court, waiting for another judge to sign off on a search warrant — to enter and search someone’s home — sworn out by him. The message that the system sent to this officer and continues to send to others is clear: You can do anything and the system will not hold you accountable. In fact, the system will protect you. We must abolish mandatory minimum sentences. Aside from denying individualized justice and driving mass punishment, they usurp the role of the jury, coerce guilty pleas and, yes, insulate police misconduct. But as Jacob’s case underscored, even in the rare cases where officers are forced to testify and a judge finds them unbelievable, there is no mechanism to ensure that they are halted from being able to contribute to future prosecutions. Fortunately, there is a growing national conversation among forward-thinking district attorneys and prosecutors to take police accountability more seriously. District attorneys like Larry Krasner in Philadelphia and Kim Gardner in St. Louis have developed “do not call” lists of officers whom they refuse to rely upon based on previous findings of incredibility or misconduct. If more prosecutors start rejecting arrests from bad officers, a strong message can be sent and their ability to continue hurting people can be stymied. Prosecutors must also end the practice of the “hearing penalty,” where a plea offer made is forever lost once the hearing starts. A plea offer, once made, should not depend on a person’s having the audacity to exercise their constitutional rights. A system that provides no disincentive for misbehavior and no accountability for those with the greatest responsibility and the power to take away a person’s liberty is profoundly dangerous. Jacob’s demand for accountability for the officers who illegally stopped and searched his car, despite the risks, despite the institutional pressures not to, should serve as a model for lawmakers, prosecutors and anyone else who claims to care about justice and the epidemic of police abuse and violence.

#### Changing Mandatory Minimum legislation is historically effective at reducing prison populations with no adverse affects

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II. Rise of the Movement to End Mass Incarceration A popular framework to explain the growing movement for criminal justice reform is that it was occasioned by conservatives recognizing the high fiscal cost of incarceration, particularly following the financial crisis of 2008. Further, some observers trace the origins of the new reform movement to substance abuse treatment expansion policies adopted by Texas in 2008, leading to growing interest in justice reform in red states in particular. While these developments have enhanced support for reform, the origins of the reform movement are both broader and earlier in time. Four developments are key in understanding this history. First, crime rates have been declining since the early 1990s12); both overall crime and violent crime rates have been cut almost in half. This is not to suggest that upticks in murder rates in some cities in recent years are not of concern, but overall, this two-decade trend has been significant. As a result, the “crime issue” has been less salient in political campaigns and voters now consistently rank economic security and other social issues as greater matters of concern. Second, the growing critique of the “war on drugs” has greatly influenced beliefs about mass incarceration. A broad range of the public now recognizes that prioritizing punishment over treatment fails to recognize the supply and demand dynamics of the drug trade. Despite enormous resources being devoted to both domestic law enforcement and international interdiction, any impact on supply or pricing of illegal drugs has been minimal at best. Conversely, by failing to invest adequately in prevention and treatment programming, demand for drugs remains at disturbingly high levels. Third, the reentry movement, which originated during the Clinton Administration in the late 1990s, came about at a moment when there was increasing receptivity to evidence-based and compassionate approaches to working with people convicted of crimes. The understanding that ninety-five percent of the people sentenced to prison would be coming home someday provided an opening for liberals and conservatives to come together to support the shared goals of skills development needed to improve prospects for reentry. Fourth, a burgeoning grassroots movement focused on racial injustice has heightened the focus on the need for broad criminal justice reform to a broader constituency. Books such as Bryan Stevenson’s Just Mercy and Michelle Alexander’s The New Jim Crow, along with films such as Ava DuVernay’s 13th, have elevated these issues in popular discourse. Further, ignited by the spate of police killings of black men, social justice leaders such as former NAACP president Ben Jealous have framed mass incarceration as the civil rights issue of the twenty-first century.13) These and other developments combined to create interest and opportunity among both policymakers and advocacy organizations to press for changes in law enforcement and sentencing policy. Various campaigns have shared the twin goals of making law enforcement agencies more accountable to the communities they serve and addressing the need for significant reductions in the scale of incarceration. III. The Impact—And Limitations—Of Education Strategies Over the past two decades a handful of states have made significant inroads into reducing their prison populations. Seven states—New Jersey, Alaska, New York, Vermont, Connecticut, California, and Michigan—have achieved reductions of more than twenty percent since their peak population years.14) These reductions are generally attributable to a mix of policy and practice initiatives aimed at reducing admissions to prison, reducing time served in prison, and/or reducing probation and parole revocations. Notably, these reductions have come about without adverse effects on public safety. A 2014 analysis of the prison population reductions in California, New Jersey, and New York concluded that the 23% to 26% decline in those states was accompanied by a continuing decline in crime that outpaced national declines in most categories.15) At the federal level, the prison population continued its historic rise through 2011, but then declined 13% by 2016.16) Several factors have been influential in this regard. Policy shifts by the U.S. Sentencing Commission (“the Commission”) have reduced sentence lengths for many individuals serving drug sentences. Most significant in this regard was the sentencing Guidelines reduction of “drugs minus two” in 2014 that lowered the offense severity level for drug crimes and was subsequently applied retroactively.17) About 31,000 people qualified for sentence reductions averaging two years and have been released from prison on a rolling basis as their recalculated prison term makes them eligible for release. A prior reduction in sentence length for crack cocaine offenses contributed to the population decline as well, as has the declining number of drug prosecutions since FY 2012. In addition, Attorney General Eric Holder’s 2013 charging memorandum,18) which called on federal prosecutors to avoid seeking a mandatory minimum penalty in cases which met the criteria for a low-level drug offense, reduced the proportion of drug cases receiving a mandatory penalty from 60% in FY 2012 to 46% in FY 2015.19) The impact of this shift has not yet been fully realized since most of these convictions have still resulted in a prison term, albeit shorter terms than in the past. Any future impact of this advance in policy was muted upon Attorney General Jeff Sessions’s reversal20) of the charging memo shortly after taking office in 2017. While the political and practical shift toward reducing prison populations to a more rational level is encouraging, the overall scale of that change is still quite modest. As previously noted, a small number of states have achieved substantial reductions, but in most states the picture is one of stabilizing the growth of prison populations or only modest reductions. Additionally, eight states continue to increase their prison populations.21) Growing numbers of critics have called for a 50% reduction in the number of people in prison. Yet an assessment of the rate of population decline of recent years shows that it would take seventy-five years to cut the prison population in half.22) Such projections suggest that current strategies for decarceration are far too limited to meet such an ambitious goal.

#### Mandatory Minimum Reform leads to drastic reductions in the prison population – Empirics prove

Pryor et al. 2017 William H Pryor is the Acting Chair of the United States Sentencing Commission (USSC); Rachel E. Barkow is a USSC Commissioner and the Vice Dean and Segal Family Professor of Regulatory Law and Policy and Faculty Director, Center on the Administration of Criminal Law, NYU School of Law; Charles R. Breyer is a USSC Commissioner; Danny C. Reeves is a USSC Commissioner; J. Patricia Wilson Smoot is a USSC Ex Officio; Jonothan J. Wroblewski is a USSC Ex Officio; and Kenneth P. Cohen is a USSC Staff Director. "Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System." Published by the United States Sentencing Commission in July 2017. Pp. 48-58. Available here: (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\_Mand-Min.pdf) - AP

Impact of Mandatory Minimum Penalties on the Federal Prison Population This section further explores the continuing impact of mandatory minimum penalties on the overall prison population, including an update of the Commission’s analysis regarding the current portion of the federal prison population who were convicted of a mandatory minimum penalty. This section also provides new analyses regarding the size and composition of the federal prison population convicted of an offense carrying a mandatory minimum penalty by race, gender and citizenship. As discussed in this section, many of the changes seen in the prison population were likely the result of the changes in charging practices discussed above. Nevertheless, the full impact of these policies will not be seen for many years as offenders sentenced between 2010 and 2016 serve out their sentences. Many of these offenders received shorter sentences than they would have under different policies, and therefore their release could continue to impact the overall makeup of the prison population in future years. Also unclear is the extent to which the Department of Justice’s decision to refocus its efforts on prosecuting the most serious, readily provable offense will reverse the recent trends seen in the data below. Federal Population Overall There have been significant changes to the federal prison population over the past 25 years. The federal population steadily increased for most of that period from 71,608 on December 31, 1991 to a high of 217,815 as of December 31, 2012. The steady increase through 2012 was the result of several factors, including the scope and use of mandatory minimum penalties.193 Specifically, in the 2011 Mandatory Minimum Report, the Commission noted that these factors have included changes to mandatory minimum penalties themselves, both in terms of number and scope, as well as other systemic changes to the federal criminal justice system, such as the expanded federalization of criminal law, increased size and changes in the composition of the federal criminal docket, and higher rates of imposition of sentences of imprisonment.194 0 50,000 100,000 150,000 200,000 250,000 SOURCE: Allen J. Beck and Darrell K. Gilliard, Prisoners in 1994, Bureau of Justice Statistic Bulletin, 1 (1995), Allen J. Beck and Paige M. Harrison, Prisoners in 2000, Bureau of Justice Statistic Bulletin, 1 (2001), Heather C. West, William J. Sabol, and Sarah J. Greenman, Prisoners in 2009, Bureau of Justice Statistics Bulletin, 2 (2010), and E. Ann Carson and Elizabeth Anderson, Prisoners in 2015, Bureau of Justice Statistics Figure 19. Number of Offenders in Federal Prison as of December 31 1991 - 2015 49 Section Five: Data Analysis Not Convicted of Offense Carrying a Mandatory Minimum Penalty 44.3% (N=73,901) Convicted- Relieved of Mandatory Minimum Penalty 13.0% (N=21,592) Convicted- Subject to Mandatory Minimum Penalty at Sentencing 42.7% (N=71,278) SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 2016 Datafiles, USSCBOP. This trend has reversed in recent years. Since the high point at the end of 2012, the number of federal inmates steadily decreased, falling to 196,455 inmates (a 9.8% decrease) on December 31, 2015. This decrease is the result of other more recent changes in the federal criminal justice system. In particular, there have been a number of changes related to the charging and sentencing of drug trafficking offenders. As discussed above in Section Four, these include the statutory changes made by the Fair Sentencing Act and the accompanying changes to the guidelines, and subsequent changes to Department of Justice policies pursuant to its Smart on Crime Initiative. Additionally, the Commission separately reduced the drug guidelines for all drugs, including crack cocaine, by two levels in 2014.195 These 2014 amendments were also made retroactive,196 resulting in a sentence reduction for 30,327 offenders as of May 2017, with an average decrease of 25 months.197 Mandatory Minimum Offenders in the Federal Prison Population The Commission also combined Commission data with data received from the BOP to study the scope and impact of mandatory minimum penalties in the federal system.198 This data was used to determine how many offenders were in prison, what percentage of prisoners were convicted of violating a statute containing a mandatory minimum penalty, and what percentage of prisoners were subject to a mandatory minimum penalty at sentencing.199 As of the end of fiscal year 2016, there were 166,771 offenders in BOP custody, of whom 92,870 (55.7%) were convicted of an offense carrying a mandatory minimum penalty. As shown in Figure 20, 42.7 percent of all offenders in BOP custody were convicted of and remained subject to a mandatory minimum penalty, while 13.0 percent were convicted of an offense carrying a mandatory minimum penalty but received relief, and 44.3 percent were convicted of an offense that did not carry a mandatory minimum penalty. Figure 20. Percentage of Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum Penalty, Convicted of an Offense Carrying a Mandatory Minimum Penalty, and Subject to a Mandatory Minimum Penalty at Sentencing By End of Fiscal Year 2016 50 United States Sentencing Commission Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System (2017) As depicted in Figure 21, the number of offenders convicted of an offense carrying a mandatory minimum penalty has decreased in recent years, which is consistent with the downward trend in the overall federal prison population. As of September 30, 2010, combined Commission and BOP data identified 108,022 offenders in BOP custody who were convicted of an offense carrying a mandatory minimum penalty. By September 30, 2016, there were 92,870 such inmates in BOP custody, a 14.0 percent decrease. The number of offenders in BOP custody who were convicted of a non-mandatory minimum offense has also decreased since 2010, but to a lesser extent. After hitting a high of 79,126 on September 30, 2014, the population of offenders in BOP custody convicted of violating a statute with no mandatory minimum penalty fell to 73,901 as of September 30, 2016, a 6.6 percent decrease from 2010. The differing rates of decrease between the number of offenders in the federal prison population who were convicted of violating statutes with and without mandatory minimum penalties is most likely the result of the change in charging and sentencing practices discussed above. As fewer offenders were convicted of offenses carrying mandatory minimum penalties, that population declined, while the rate of non-mandatory minimum offenders remained relatively stable. The revised charging practices were also reflected in the population of offenders who were ultimately relieved of a mandatory minimum penalty versus those who remained subject to such a penalty at sentencing. Both groups have decreased in number since 2010, but they have done so at drastically different rates. While the number of offenders in BOP custody who remained subject to a mandatory minimum penalty at sentencing decreased 4.3 percent between September 30, 2010 (n=74,479) and September 30, 2016 (n=71,278), the number of offenders who were convicted but relieved of such penalty decreased 35.6 percent. This again appears consistent with the intent of the Department of Justice’s 2013 Smart on Crime Initiative. That is, while fewer offenders were convicted of an offense carrying a mandatory minimum penalty in recent years, those who were tended to be more serious offenders who are less likely to be eligible for relief. Combined Commission and BOP data also reflected changes in the distribution of offenders in the federal prison population who were convicted of violating statutes with and without mandatory minimum penalties. As a percent of the total prison population, offenders convicted of statutes carrying mandatory minimum penalties decreased slightly from 58.6 percent as of September 30, 2010 to 55.7 percent as of September 30, 2016. Among this group, the portion of offenders who remained subject to a mandatory minimum penalty at sentencing steadily increased from 40.4 percent as of September 30, 2010 to 42.7 percent as of September 30, 2016, the highest percentage for any period under study. Conversely, the portion of offenders who were convicted of a statute carrying a mandatory minimum penalty but relieved of the penalty before sentencing steadily decreased from 18.2 percent to 13.0 percent during this same period, the lowest percentage for any period under study. 0.0% 20.0% 40.0% 60.0% 80.0% 100.0% Not Convicted of an Offense Carrying a Mandatory Minimum Penalty Convicted - Relieved of Mandatory Minimum Penalty Convicted - Subject to Mandatory Minimum Penalty at Sentencing SOURCE: U.S. Sentencing Commission, and Bureau of Prisons Combined 1995 through 2016 Datafiles, USSCBOP. Figure 22. Percentage Offenders in Prison Not Convicted of an Offense Carrying a Mandatory Minimum Penalty, Convicted of an Offense Carrying a Mandatory Minimum Penalty, and Subject to a Mandatory Minimum Penalty at Sentencing By End of Fiscal Years 1995 - 2016 52

#### Mass Incarceration creates disastrous health effects plaguing communities and individuals

Wildeman and Wang 17 Dr Christopher Wildeman PhD Department of Policy Analysis and Management, Cornell University, Bureau of Justice Statistics, Rockwool Foundation Research Unit. Emily A Wang MD Yale School of Medicine, Bureau of Justice Assistance. "Mass incarceration, public health, and widening inequality in the USA." Published by The Lancet Vol. 3898, issue 10077. Pages 1464-1474. Available here: (https://www-sciencedirect-com.ezproxy.lib.utah.edu/science/article/pii/S0140673617302593#!) - AP

Summary In this Series paper, we examine how mass incarceration shapes inequality in health. The USA is the world leader in incarceration, which disproportionately affects black populations. Nearly one in three black men will ever be imprisoned, and nearly half of black women currently have a family member or extended family member who is in prison. However, until recently the public health implications of mass incarceration were unclear. Most research in this area has focused on the health of current and former inmates, with findings suggesting that incarceration could produce some short-term improvements in physical health during imprisonment but has profoundly harmful effects on physical and mental health after release. The emerging literature on the family and community effects of mass incarceration points to negative health impacts on the female partners and children of incarcerated men, and raises concerns that excessive incarceration could harm entire communities and thus might partly underlie health disparities both in the USA and between the USA and other developed countries. Research into interventions, policies, and practices that could mitigate the harms of incarceration and the post-incarceration period is urgently needed, particularly studies using rigorous experimental or quasi-experimental designs. Previous article in issueNext article in issue This is the fourth in a Series of five papers about equity and equality in health in the USA uh Introduction In this Series paper, we review research into the effects of mass incarceration on health and health disparities within the USA and between the USA and other developed democracies. We first outline the contours of mass incarceration. According to sociologist David Garland,1 who first used a variant of the term mass incarceration, it entails historically and comparatively extreme levels of incarceration that are so heavily concentrated among some groups that incarceration has become a normal stage in the lifecourse. We then consider the health effects of current incarceration and having ever been incarcerated, as well as health disparities attributable to these effects. We next review data about the broader health effects of mass incarceration, focusing on families, communities, states, and nations, as well as health disparities attributable to these effects. Finally, we focus on the next steps for researchers, medical professionals, and policy makers. Throughout, we are careful to note that the teasing out of causal relationships between incarceration and health outcomes on the basis of existing research is difficult because there are no randomised controlled trials of incarceration relative to no incarceration in this research area. To overcome these obstacles to causal inference, we focus (when possible) on studies in which confounders were rigorously addressed through various strategies, including natural experiments. Key messages • In the USA, incarceration is common and concentrated in the black community • Individuals who experience incarceration at any point in their life are disproportionately in poor health both before, during, and after their incarceration • The physical health of individuals improves in some domains during incarceration, although the mental health of individuals generally worsens • Having been formerly incarcerated is associated with poor mental health and physical health outcomes, as well as elevated mortality risk • Although little research considers the indirect health consequences of incarceration, having a family member incarcerated harms the mental and physical health of non-incarcerated female partners and children • High incarceration prevalence also compromises community health, with the strongest evidence implicating community-level increased incidence of HIV • Mass incarceration contributes to racial health disparities in the USA across a range of outcomes because of its direct and indirect consequences for health, and the disproportionate concentration of incarceration among black communities • Because the USA incarcerates many more of its citizens than do other developed democracies, mass incarceration might have contributed to the country's lagging performance on health indicators such as life expectancy We find that incarceration is a pressing public health concern, affecting not only the health of currently and formerly incarcerated individuals but also that of their families and communities.2, 3, 4 Because of these myriad negative consequences of mass incarceration for American society, we argue—consistent with some research in this area5, 6—that mass incarceration might partly account for widening health inequality both within the USA and between the USA and other developed democracies. Mass incarceration On any given day, the USA incarcerates more of its citizens (2·2 million) and at a higher level (700 per 100 000) than any other country. Yet, for much of its history, the USA was no outlier in terms of incarceration. As in most developed democracies—the focus of all of our comparisons, because these countries are more similar to the USA in key ways (such as general standard of living, political structure, and core population health indicators such as infant mortality and life expectancy at birth) than some other counties (eg, China and Russia) that have high incarceration prevalence—the US incarceration prevalence hovered between 100 per 100 000 and 200 per 100 000 in the mid-20th century.7 In 1950, for instance, the US incarceration prevalence was roughly 175 per 100 000,8 somewhat lower than Finland's (185 per 100 000).9 This prevalence was considerably increased for developed democracies, but not an aberration. Starting in the mid-1970s, the US incarceration prevalence started to spiral upward (figure 1).5 By 1985, the USA incarcerated 312 of every 100 000 residents. 20 years later, the prevalence had risen to 743 per 100 000. Its closest competitors among developed nations were New Zealand (173 per 100 000), Luxembourg (159 per 100 000), and Spain (140 per 100 000). Download : Download high-res image (789KB)Download : Download full-size image Figure 1. Trends in incarceration prevalence in 21 developed democracies, 1981–2007 Calculations based on data from Wildeman (2016).5 Although the causes of mass incarceration are complex, social and criminal justice policies such as the so-called War on Drugs, the deinstitutionalisation of people with mental illnesses, and punitive sentencing policies such as three-strike laws (mandating life imprisonment for third offences of even relatively minor felonies) and mandatory minimum sentences (requiring judges to impose long sentences for specific offences, even for some first-time offenders) undoubtedly helped to both launch mass incarceration and keep it going.10, 11 Disparities in incarceration by race or ethnicity and education in the USA are marked and have been since the earliest statistics were collected.10, 12 Incarceration has become common for poor men from ethnic minorities.13, 14 2·8% of (non-Hispanic) white men born in the late 1960s and 20·3% of (non-Hispanic) black men from the same cohort spent time in prison by their 30s (figure 2).15, 16 For black men who did not complete high school, this risk was 57·0%. Moreover, these figures in fact underestimate the number of men who have experienced incarceration, because the data refer only to incarceration in prisons (facilities run by the state or the federal government that hold inmates with sentences in excess of 1 year) and exclude incarcerations in jails (local facilities that hold inmates awaiting trial or sentenced to less than 1 year), which are far more common. No data are available for the cumulative risk of total incarceration (in prisons and jails) because accurate estimates of the cumulative risk of ever experiencing jail incarceration in the USA do not exist. Download : Download high-res image (342KB)Download : Download full-size image Figure 2. Risk of ever experiencing imprisonment by age 30–34 years for US men by birth cohort, and risk of ever experiencing paternal imprisonment by age 14 years for US children by birth cohort Sources: Western and Wildeman (2009);15 Wildeman (2009).16 The conditions of incarceration in the USA are also extreme, a fact much less discussed in the literature. For example, although precise estimates are not available for the number of individuals in solitary confinement (a form of imprisonment in which an inmate is isolated from any human contact, often with the exception of guards and other members of the prison staff), one study's investigators estimated that 100 000 prisoners are in solitary confinement in the USA on any given day,17 a figure that suggests that the USA has more prisoners in solitary confinement than the UK has prisoners overall. Because men who experience incarceration are connected to families, their incarceration can have implications for the health and wellbeing of women and children as well. Furthermore, because of the vast racial disparities in the risk of experiencing incarceration, the spillover effects of incarceration for family members could have implications not only among men but also among whole communities, divided along racial and ethnic lines. The proportion of black children who will ever have a father imprisoned is high (figure 2). A black child born in 1990 had a 25·1% chance of having their father sent to prison;16 for those whose fathers did not finish high school, the risk was roughly double that, at 50·5%. According to the Bureau of Justice Statistics, 52% of state and 63% of federal inmates reported being parents, to an estimated 1·7 million children (ie, 2·3% of American children).18 The exposure of black families to incarceration cuts deeper still. Nearly half of black women have a family member or extended family member imprisoned (figure 3).19 For white women, the risk is only a quarter as high, at 12%.19 Black people are also more likely than the overall population to know someone who is incarcerated, have a neighbour incarcerated, or have a confidante incarcerated.19 Download : Download high-res image (319KB)Download : Download full-size image Figure 3. Proportion of people in the USA who know individuals currently in state or federal prison, by race and gender Source: Lee and colleagues (2015).19 The pronounced disparities in exposure to incarceration emphasise the salience of research into its health effects. If incarceration substantially worsens the health of non-incarcerated family members, mass incarceration could be an important driver of broader health disparities in the USA. Moreover, stark disparities in exposure to incarceration probably extend to acquaintances, neighbours, and confidantes, potentially amplifying the contribution of incarceration to health inequities in the USA.19 Effects on the health of prisoners A growing number of studies have examined the effects of incarceration on health.2, 3, 4 In this section, we review these effects, which have also been reviewed elsewhere,2, 3 including in a 2016 series in The Lancet that explored the relationship between incarceration and communicable diseases such as HIV, viral hepatitis, and tuberculosis. The Series documented the burden of these communicable diseases among prisoners,20 as well as options for treatment21 and prevention22 in carceral settings. Importantly—and by contrast with most research in this area—the Series also considered the implications of communicable diseases for the human rights of prisoners23 and in regions where disease transmission is an especially pressing problem (sub-Saharan Africa,24 eastern Europe,25 and central Asia25). We consider in more detail the family and community consequences of mass incarceration, a topic that has received little attention in the medical community. Although we focus on adults, it is important to note that incarcerated young people are at high risk for poor physical and mental health.26, 27 Research into the effects of current incarceration on health is beset by several shortcomings beyond the obstacles to causal inference mentioned in our introduction. Scant research has examined objectively measured health outcomes, and relatively few studies have considered the mental health of current and former inmates in the USA.28 Even fewer studies have explored how different durations (eg, months or years) or types (eg, prison or jail) of incarceration affect health. In a similar vein, little research has considered how the conditions of confinement (eg, solitary confinement) or types of criminal justice policies (eg, three-strike laws) affect health. Despite these caveats, most evidence suggests that incarceration has strongly harmful effects on the health of prisoners over their lifecourse. Effects of current incarceration Being incarcerated might, paradoxically, decrease mortality and physical morbidity in the short term for some groups. Black male prisoners, for instance, have far lower mortality than similarly aged black men in the general population.29, 30, 31, 32 Researchers speculate that the protective effects of current imprisonment for this group might be driven by a decreased risk of death by violence or accidents, reduced access to illicit drugs and alcohol, and improved health-care access, although the mechanisms are debated.29, 30, 31, 32 However, the decreased mortality for black male prisoners does not hold for other subpopulations of prisoners.29, 30, 31, 32 Adjudication between these competing hypotheses is beyond the scope of this Series paper, but we note that prisons and jails are some of the only places in the USA where health care is guaranteed by law (although the often-dramatic variation in the quality of health care in correctional facilities undermines the notion that this mandate has been met). In 1976, the US Supreme Court ruled in Estelle v Gamble that failure to provide basic health care in correctional facilities violated the constitutional prohibition against cruel and unusual punishment. That ruling mandated that prisons and jails provide acute care services, but, as the prison population has aged, prison health-care services have had to provide increased care for chronic diseases as well.4 For many Americans, correctional facilities provide incarcerated adults with their first access to preventive and chronic medical care.4 An estimated 40% of individuals with chronic medical conditions are diagnosed with a chronic condition while incarcerated,33 and 80% report seeing a medical provider while incarcerated.34 Unfortunately, the quality of medical care for chronic disorders in correctional settings is highly variable,35 and overcrowding of correctional facilities (especially prisons) has even reached the stage at which judges have mandated the release of prisoners because the level of overcrowding constitutes cruel and unusual punishment.4 Compared with the non-incarcerated population, incarcerated individuals have increased prevalence of infectious disease (including sexually transmitted diseases, HIV, and hepatitis C), chronic medical conditions (eg, hypertension, diabetes, and asthma), substance use disorders, and mental health disorders;34, 36 Fazel and Baillargeon2 provide a more exhaustive list of differences. While incarcerated, inmates also have a high prevalence of vitamin D deficiency.37 However, findings from a few studies have shown that incarceration can improve the management of chronic conditions relative to time spent outside of prison, especially in cases of severe functional limitation38 and HIV.39 However, in the time between release and re-incarceration, the probability of viral suppression declines from roughly 50% to 30%.25 Unfortunately, because of data limitations, the effect of incarceration on many of these disorders is unclear. Overall, physical and psychological wellbeing worsens for inmates, while mortality declines for black inmates. Some study findings show worsening of depressive symptoms40 and life satisfaction41 during incarceration. Furthermore, inmates placed in solitary confinement suffer greatly,41 and such confinement has serious short-term and long-term repercussions.42, 43 For instance, inmates in solitary confinement in the New York City jail system had 6·27 greater odds (95% CI 3·92–10·01) of potentially fatal self-harm (including hanging and ingesting poison) than those not placed in solitary confinement.44 Nonetheless, most research into the mental health of inmates, while acknowledging the high prevalence of mental health problems in correctional populations, has not tested whether mental health changes as a result of incarceration.36 Of course, the total health effect of incarceration is a product of time spent incarcerated and time spent free. Individuals who experience incarceration spend, on average, far more time out of prison than in it, with much of that time happening after prison release since most individuals experience their first incarceration by their late 30s. For instance, black men who ever experience prison incarceration spend 13·4% of their working lives in prison.45 In other words, the average prisoner spends roughly six times as long exposed to the consequences of past incarceration as they do being incarcerated. Hence, in considering the lifelong health effects of incarceration, the period after release is of crucial importance. Effects of past incarceration Although current incarceration has mixed effects on prisoners' health, past incarceration has a clearly deleterious impact on health. Patients with chronic conditions are often released without medications or a follow-up appointment in the community.46 Even when provided with a prescription at release, many do not obtain them.47 Recently released inmates are less likely to have a primary care physician, disproportionately use emergency departments for health care, and have high levels of preventable hospital admissions compared with the general population.48 Because former inmates are also at disproportionately high risk of mental health problems that can interfere with their ability to follow through with care for serious medical conditions,49 these obstacles to receiving care are even more important. Before the Affordable Care Act, four-fifths of former inmates were uninsured at release; even among those who are insured, many do not have the resources to pay for their care.50 The Affordable Care Act might diminish the health consequences of incarceration, because 10% of the uninsured population has a recent history of criminal justice involvement.51 Unfortunately, the refusal on the part of several states to accept the Act's expansion of Medicaid coverage for the poor will probably attenuate this benefit. Upon release, former inmates often have no housing, employment, and family support, and face discrimination in finding jobs and housing.10, 11 Individuals with health issues are also confronted with the responsibility to manage these problems, obtain health care, and keep up with medications and appointments while also meeting their basic needs. Individuals convicted of drug felonies are also prohibited from accessing safety-net services such as public housing and food subsidies.1 Given the many barriers that individuals face after incarceration, it is unsurprising that they earn 30% less than similar never-incarcerated individuals and that some of this effect is driven by discrimination.10, 11 Findings from studies of administrative data have shown increased mortality among former inmates, although the magnitude of this association varies.29, 30, 52 Investigators of one study53 that used a quasi-experimental design to assess whether incarceration caused premature mortality found an effect for women, but not for men, after adjustment for confounders measured before incarceration to ensure appropriate time-ordering of confounders, explanatory variables, and dependent variables (such as a history of illicit drug use, low education, and pre-existing health problems). The findings of this single study should be tested in further research, especially because it is the sole study to suggest that prison release might not increase mortality risk. The evidence that a history of incarceration is associated with increased morbidity is somewhat more consistent than the data for mortality, although, again, it remains unclear whether this relationship is indeed causal. However, with the exception of the Coronary Artery Risk Development in Young Adults (CARDIA) study54 and the Veterans Aging Cohort study,55 few studies include both incarceration measures and objective health data. In CARDIA, the adjusted odds of left ventricular hypertrophy (a common sequela of poorly controlled hypertension) among the ever-incarcerated were 2·7 (95% CI 0·9–7·9) compared with the never-incarcerated.54 In a matched sample, a history of incarceration was associated with 1·8 times increased odds (95% CI 1·147–2·519) of having hepatitis or tuberculosis.56 Studies including less precise measures of health have also consistently linked previous incarceration with poor health.3 Research has also shown that the formerly incarcerated have very high prevalence of psychiatric morbidity, with associations especially pronounced for dysthymia and major depressive disorder, and that incarceration is at least partly to blame for this increase.40, 49 The direct effects of incarceration on health disparities Although black populations have high levels of incarceration, few studies have examined the direct effects of incarceration on racial health disparities. The scant research in this area supports two conclusions. First, racial health disparities among prisoners are muted; differences in mortality and morbidity between black and white individuals are smaller in prison than in the general population.2, 38 Second, the post-release effects of incarceration certainly contribute somewhat to racial health disparities, although the magnitude of this effect is unclear. In an analysis, investigators using data from the National Longitudinal Survey of Youth56 concluded that disparities in incarceration prevalence contributed greatly to disparities between black and white men in midlife self-reported health, as measured by the 12-Item Short Form Health Survey; findings from another study38 that used the same data and a measure of self-reported functional limitation (defined as having had any health problem that precluded working) showed that incarceration explained only 6% of racial disparities in this measure. Findings from a population-based study in New York City57 suggested that disparities in incarceration contributed substantially to disparities in asthma prevalence. Mass incarceration also creates methodological problems in documentation of racial health inequities in prospective longitudinal studies. Because black men have very high levels of incarceration, they are more likely than others to drop out of prospective longitudinal surveys. As a result, research based on such surveys could misestimate the magnitude of health disparities if the health status of black men who experience incarceration is worse than those who do not, as most research suggests is indeed the case.58 The indirect effects of incarceration on health Overview Until the past 10 years, most research into the health consequences of incarceration had focused exclusively on how incarceration affects those who experience it. However, as incarceration has become increasingly common, researchers have become aware of the broader health effects of mass incarceration on families, communities, and even nations. Because little research has examined the spillover effects of mass incarceration on direct measures of health, our Series paper also encompasses broader studies of wellbeing. In this area, we are unable to make distinctions between the effects of current and past incarceration. Effects of family member incarceration on health Research into the broader family consequences of incarceration suggests myriad channels through which incarceration might matter. For example, incarceration decreases the financial contributions individuals can make after release;59 while incarcerated, their financial contributions are virtually nil.60 Because keeping in touch with a prisoner is costly,52 incarceration exacerbates financial hardships beyond what would be expected due just to decreased earnings. Incarceration also disrupts romantic unions.61 The resulting decrease in adults' time available for household duties might reduce the time spent on health-related activities. Having an incarcerated family member—and re-incorporating a former inmate—is also stressful. Moreover, if the stigma attached to incarceration pervades families, as research suggests,62, 63 having a family member incarcerated could reduce the social support available to families.64 Although incarceration can also affect prisoners' siblings, husbands, boyfriends, and parents, most research has focused on the heterosexual partnerships and children of male prisoners. Findings from two studies have suggested a link between parental incarceration and child mortality: investigators of a US study65 found elevated infant mortality, whereas findings from a Danish study66 of mortality up to age 18 years showed increased mortality among sons but not daughters of incarcerated men. A few other studies have also shown evidence of gender-specific effects; parental incarceration was associated with significantly more weight gain67 and higher levels of inflammatory markers (eg, C-reactive protein) among adolescent girls than among boys.68 Yet, given the dearth of research in this area, these findings about gender differences should be interpreted with some caution. Although very few studies have used physiological measures to assess the health of children of incarcerated parents, the literature assessing self-reported, caretaker-reported, and teacher-reported outcomes for children is vast. These study findings tell a consistent story: paternal incarceration is associated with behavioural and mental health problems throughout childhood,69 and a host of poor outcomes (including increased prevalence of substance misuse70) in adolescence and adulthood.71, 72, 73 The most wide-ranging assessment of the effect of parental—mostly paternal—incarceration used data from the National Survey of Children's Health,74 showing links to a host of negative health outcomes among children, including self-rated health, depression, anxiety, asthma, and obesity. Findings from a study75 that used data from the National Longitudinal Study of Adolescent Health (Add Health) underscored that many of the negative consequences of paternal incarceration continue throughout adolescence and early adulthood.75 For maternal incarceration, the story is more complicated. A handful of studies have linked maternal incarceration with worse self-reported health,75 educational,76 and criminal justice outcomes77 for children. However, other study findings78, 79 have shown no effects on children after adjustment for factors that are associated with the risk of incarceration and poor child health, such as low parental education, financial instability, and criminal activity. Given the paucity of studies on this topic, and evidence that maternal incarceration helps some children and harms others,80 the net effect of maternal incarceration on children remains an open question. Fewer quantitative studies (but many qualitative ones60, 62, 63) have assessed how incarceration affects other adult family members. Women whose partners are incarcerated experience substantial mental health deterioration,81 as well as a host of elevated risk factors for cardiovascular disease.82 However, this effect on cardiovascular risk factors was not observed among men in the household.82 We must note that the effect of incarceration on family violence is unclear. There is little doubt that incarcerated individuals83 and their families65, 84 experience great exposure to violence throughout their lives. The incarceration of a family member might increase family violence by destabilising already-disadvantaged homes. Alternatively, the removal of violent family members from the household might decrease exposure to violence for the remaining household members. Existing research provides little guidance regarding either possibility. Effects of incarceration on communities Neighbourhoods with high levels of incarceration are associated with poor population health, including high prevalence of asthma, sexually transmitted infections, and psychiatric morbidity;85, 86, 87, 88, 89, 90 the challenge is to decipher whether imprisonment, rather than the factors that lead to imprisonment, is the driver. All studies done so far85, 86, 87, 88, 89, 90 have tested a linear effect of imprisonment, yet a non-linear relationship between neighbourhood-level prevalence of incarceration and community health is also possible. Clear85 proposed a hypothesis of coercive mobility, suggesting that the crime-fighting benefits of imprisonment at low levels are substantial, but that these benefits fall as imprisonment increases, and that further increases in imprisonment raise—rather than reduce—crime. Testing of this hypothesis is difficult. If true, it has profound implications for understanding the effect of incarceration on community health, not only because high levels of violent crime remain one of the most serious threats to public health in these communities but also because it suggests that the public health consequences of incarceration in these communities could be far larger than an additive model would imply. Indirect effects of incarceration on states, nations, and health disparities The indirect effects of incarceration on states and nations, and health disparities more broadly, are most readily measured at the population level. Hence, we discuss all three in the same section. Variation at the state level has rarely been used to analyse the health effects of differences in incarceration prevalence, despite the availability of state-level data about key health outcomes and incarceration. Findings from a few studies have suggested that states with large numbers of former inmates have poorer-quality health-care systems,91 lower life expectancy,92 and higher incidence of HIV infection93 and infant mortality65 than do states with few former inmates. These state-level studies have also shown a link between incarceration prevalence and health disparities. Findings from one study,93 for instance, showed that mass incarceration explained most of the racial disparities in the incidence of HIV infection. There is less country-level than state-level research into the relationship between incarceration and health. Of these studies, two stand out. Stuckler and colleagues6 showed that increased incarceration was linked with increased tuberculosis incidence (a 1% increase in incarceration was associated with a 0·3% increase in tuberculosis incidence) and increased multidrug-resistant tuberculosis. Findings from another cross-national study5 showed that increases in incarceration were associated with substantial worsening of life expectancy and infant mortality, although the population-level consequences of incarceration for health were significantly worse in the USA than in other developed democracies. This analysis suggested that US life expectancy would have increased 51·1% more and infant mortality would have fallen 39·6% more from 1983 to 2005 if incarceration had remained at the mid-1980s level. Taken together, these findings suggest that mass incarceration could contribute to both within-country and between-country inequalities in health. Finally, as for longitudinal studies, the US point-in-time surveys underlying much of the epidemiological and health services research (eg, the National Health Interview Survey) exclude inmates,94 resulting in substantial misestimates of disease prevalence and, particularly, racial disparities. With so many minority men behind bars, their exclusion from almost all research provides a fanciful picture of progress in the USA, especially for health inequities between black and white populations.

## Extensions

### Inherency

#### Despite progress current mandatory sentencing legislation remains harmful and allows for continued abuse

Hayer 19 Jules Hayer is the Associate Editor for the Michigan Journal of Race and Law. "The First Step Act: It Needs to be the First Step." Published by the Michigan Journal of Race and Law. Published February 18, 2019. Available here: (https://mjrl.org/2019/02/18/the-first-step-act-it-needs-to-be-the-first-step/) - AP

On December 21, 2018 the President signed into law the First Step Act. The First Step Act is a criminal justice reform bill that decreases mandatory minimum sentences for nonviolent drug offenses, modifies the three strikes rule from requiring a life sentence to mandating a 25-year sentence, and gives judges more discretion when sentencing people convicted of nonviolent drug offenses. The Act also makes retroactive a 2010 law that reduced the sentencing disparity between crack and powder cocaine offenses, and also includes provisions that improve prison conditions.[1] These tangible changes demonstrate that parts of the First Step Act are a push in the right direction for criminal justice reform. After all, this year the collective changes outlined in the Act are expected to reduce the sentences of more than 9,000 people currently serving time. Yet critics of the Act point out that this impact is nominal. Not only will this Act impact less than 5% of the federal prison population, which now exceeds 180,000,[2] the Act will also only impact those serving time in federal prisons, when in fact more than 88% of the nation’s prison population is serving time in the state system.[3] And rather than demonstrating laudable progress, some parts of the Act demonstrate just how fundamentally flawed the policies that were previously in place were. For example, the Act prohibits the shackling of women during childbirth and prior to the completion of postpartum recovery, mandates that the Bureau of Prisons make tampons and sanitary napkins available to women in prison for free, and requires that efforts are made to place individuals within 500 driving miles of their primary residence.[4] While all of these changes demonstrate a degree of progress, they also bring to light how damaging many of the Bureau of Prisons policies have been in the past. Moreover, many experts in the field of criminal justice reform posit that the First Step Act does more long-term harm than good. After all, the Act is narrowly focused and may create an illusion of reform that in turn hinders the progress of greater change. Perhaps most significantly, the Act does nothing to help those convicted of violent crimes reduce their sentences.[5] Rather, individuals convicted of violent crimes are prevented from reducing their sentences through participation in the reform programs that the Act posits are an essential component of true criminal justice reform.[6] In doing so, the Act perpetuates the narrative that individuals convicted of certain offenses should be excluded from any reform efforts that would assist them in reintegrating into their communities upon release. Such a stigma is not only socially damaging, it is based on assumptions that are patently false. In fact, people that are convicted of murder and after serving time are paroled are the group of people least likely to commit even a minor infraction. Their recidivism rate is roughly 1%.[7] Additionally, the Act will rely on an algorithm to determine who will be eligible for release due to an expansion in the “good time credits” program. Yet these algorithms have been known to perpetuate racial disparities in the criminal justice system. For example, one study on racial bias in these algorithms found that black defendants were incorrectly labeled as high risk at twice the rate as white defendants, and white defendants were in actuality far more likely to be charged with new offenses after release in comparison to black defendants with comparable algorithm scores.[8] Thus, expanding the Bureau of Prisons reliance on algorithms may perpetuate discriminatory practices in the system.

### Solvency

Davidson 20 Joe Davidson is a columnist at the Washington post that covers federal government issues in the Federal Insider. "Federal prison reform has bipartisan support. But it’s moving slowly." Published by the Washington Post on January 9, 2020. Available here: (https://www.washingtonpost.com/politics/federal-prison-reform-has-bipartisan-support-but-its-moving-slowly/2020/01/08/81edfbd6-3268-11ea-898f-eb846b7e9feb\_story.html) - AP

Like any 1-year-old, the First Step Act’s first steps to reform the criminal justice system have been significant, if not always sure and steady.

The law’s first anniversary fell just before Christmas. By limiting mandatory minimum sentences, retroactively reducing sentences and expanding rehabilitation programs for federal inmates, the bipartisan achievement marked a major diversion from the mass incarceration mania that dominated American law enforcement for decades.

But moving from the intent of the law — trumpeted by President Trump, Democrats and Republicans, liberals and conservatives — to the reality of implementation is akin to a baby learning to walk. Celebrated progress is mixed with inevitable stumbles.

At the center of the change is the U.S. Bureau of Prisons, which currently incarcerates about 175,250 inmates. Although the law applies only to the federal government, Uncle Sam’s policies often influence what happens in the states, where the bulk of the nation’s 2 million prisoners are held.

“While sentence reductions have been approved by judges, the Department of Justice (DOJ) has attempted to block hundreds of eligible beneficiaries,” according to a report by the Sentencing Project, an interest group that has long pushed criminal justice reform. “There has also been a problematic rollout of the risk and needs assessment tool to determine earned-time credit eligibility and limited programming for rehabilitation.”

That appraisal contrasts with self-praise from bureau Director Kathleen Hawk Sawyer. She didn’t agree to an interview, but in a statement, she said her agency “has made great progress in implementing” the law.

It led to sentence reductions for more than 1,500 inmates as of October, she told the House Judiciary Committee in the fall. Nearly 100 prisoners, generally old or ill, received compassionate release, with 328 approved for an elderly offender pilot program that placed 242 offenders in home confinement. Within seven months of the law’s implementation, she said, the agency released more than 3,000 inmates because of changes to good-conduct time calculations.

Although Hawk Sawyer said prisons officials have long believed that inmate “release preparation begins on the first day of incarceration,” prisoner advocates see a different side of the agency.

“The BOP has a long history of acting in ways that result in lengthier and less productive terms of incarceration despite the obvious will of Congress,” David E. Patton, executive director of the nonprofit Federal Defenders of New York, said in a statement.

“For decades the BOP took an unreasonably restrictive view of good time, resulting in thousands of years of additional overall prison time,” he said. “For decades it refused to exercise the authority given to it by Congress to release incarcerated people who were terminally ill, infirm, or otherwise suffered from extraordinary circumstances . . . and for decades it has not provided enough vocational, educational, mental health, and substance abuse programming despite abundant need and lengthy waitlists.”

Participation in those programs can help inmates secure early release from incarceration, but only if slots are available

Pointing to Justice Department data, Patton said waitlists include 25,000 prisoners for prison work assignments, 15,000 for vocational and educational training and 5,000 for drug treatment.

Almost half the bureau’s prisoners complete no programs, more than half don’t get needed drug treatment, over 80 percent haven’t taken technical or vocational courses, and over 90 percent have no prison industry employment, according to the data.

Program participation is an element in an assessment system that classifies inmates’ risk of recidivism. That assessment affects their chances of early release.

One controversial element of the Trump administration’s implementation of the law is the Justice Department’s selection of the conservative Hudson Institute to select members of an Independent Review Committee, which advises on the assessment system.

While the Hudson Institute took no institutional position on the First Step Act, the organization did publish a 2016 article on “Why Trump Should Oppose ‘Criminal-Justice Reform.’ ”

Andrea James, formerly a criminal defense attorney and federal inmate, called on the Justice Department to “create a community oversight board that truly represents the political spectrum and makes a place for formerly incarcerated people to join the conversation.” Prisoners and formerly incarcerated people, James — executive director of the National Council for Incarcerated and Formerly Incarcerated Women and Girls — told Congress, “must have significant input in designing the recidivism assessment instrument.”

Hawk Sawyer acknowledged her agency’s “less than stellar performance” in some high-profile instances and promised to address the problems. Among them is understaffing.

“The BOP is struggling to fulfill the requirements of the Act as the Bureau is still more than 4,000 positions short,” Shane Fausey, president of the American Federation of Government Employees Council of Prison Locals, said by email. He complained of “abusive overtime and mandatory double shifts,” adding that requirements of the First Step Act have worsened the crisis.

Hawk Sawyer put the understaffing at over 3,700 vacancies and said resolving that “is among my highest priorities . . . but doing so will take time.”

Correctional officers aren’t the only people in prison with overtime problems. Inmates doing less time is a key point of the First Step Act.

### Racial Discrimination

#### Mandatory minimums create larger racial disparities in prison populations

Pryor et al. 2017 William H Pryor is the Acting Chair of the United States Sentencing Commission (USSC); Rachel E. Barkow is a USSC Commissioner and the Vice Dean and Segal Family Professor of Regulatory Law and Policy and Faculty Director, Center on the Administration of Criminal Law, NYU School of Law; Charles R. Breyer is a USSC Commissioner; Danny C. Reeves is a USSC Commissioner; J. Patricia Wilson Smoot is a USSC Ex Officio; Jonothan J. Wroblewski is a USSC Ex Officio; and Kenneth P. Cohen is a USSC Staff Director. "Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System." Published by the United States Sentencing Commission in July 2017. Pp. 48-58. Available here: (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\_Mand-Min.pdf) - AP

Mandatory Minimum Offenders in the Federal Prison Population – By Race All racial groups experienced a steady decrease in population since 2013, following more than a decade of increases. At the end of fiscal year 2012, Hispanic offenders (n=65,384) became the most common racial group in federal prison for the first time, overtaking Black offenders (n=63,807). This trend continued in the years since, with Hispanic offenders (n=58,960) making up the largest portion of offenders in BOP custody at the end of fiscal year 2016. Black offenders (n=56,509) comprised the second largest group, followed by White offenders (n=45,157) and Other Race offenders (n=5,844). While Hispanic offenders now make up the largest population in BOP custody, Black offenders in prison were more likely than any other race to have been convicted of an offense carrying a mandatory minimum penalty across all years under study. As shown in Figure 24, 62.7 percent of Black offenders in prison were convicted of an offense carrying a mandatory minimum penalty at the end of fiscal year 2016. This percentage, however, has been on a steady decline since fiscal year 2010 (69.4% of all Black offenders in prison). The percentage of Hispanic offenders and Other Race offenders convicted of an offense carrying a mandatory minimum penalty also decreased during this time to 51.4 percent and 35.7 percent, respectively, at the end of fiscal year 2016. Conversely, the percentage of White offenders in prison convicted of an offense carrying a mandatory minimum penalty has slowly increased since the end of fiscal year 2004, reaching a high of 55.1 percent at the end of fiscal year 2016. Similar trends can be seen in Figure 25 regarding offenders who remained subject to an offense carrying a mandatory minimum penalty at sentencing. At the end of fiscal year 2016, 51.0 percent of Black offenders in prison were subject to a mandatory minimum penalty at sentencing, followed by White offenders (44.3%), Hispanic offenders (35.2%), and Other Race offenders (26.4%). Unlike each of the other categories, however, only the percentage of White offenders in prison subject to a mandatory minimum penalty increased since the end of fiscal year 2010 (from 36.3% to 44.3%).

#### Sentencing disparities are based in unverified and misinformed assumptions on drug crimes

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B. The Hallmarks of Modern Federal Criminal Lawmaking While the federal criminal legislation of the 1980s and thereafter varies in content, the laws (including the ACCA) share disturbing attributes: first, the lack of research about or empirical support for the policies behind the laws to reduce crime, and second, a tendency to lump together individuals of varying degrees of culpability for the same harsh treatment. A prime example of Congress's failure to engage in research or empirical analysis before creating sweeping new policies and punishments is its reaction to the emergence of crack cocaine in the 1980s. (124) Viewing crack as a drug of unprecedented danger, Congress decided that the mere possession of five grams of crack should yield a mandatory minimum sentence of five years. (125) Possession of fifty grams of crack (an amount associated with trafficking) yielded a ten-year mandatory minimum. (126) The differential treatment of crack and powder cocaine was based on "sensationalized media stories and anecdotes that suggested crack was more addictive than powder and ... made people more prone to violence." (127) Instead of researching the issue or seeking expert guidance--for example, by asking the newly created Sentencing Commission to address the topic--Congress set policy based on nothing more than its assumptions drawn from media accounts. As one member of Congress noted about the process: "We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it." (128) If legislators had consulted any experts or taken more time to study crack, they would have learned that crack and powder have indistinguishable pharmacological effects and that crack is no more addictive than powder cocaine. (129) They also would have learned that individuals taking crack are no more likely to have violent reactions than those who use powder cocaine. (130) And if they had analyzed who would be affected by their crack sentences, they would have learned that there would be large racial disparities between those sentenced for crack and those sentenced for powder. In 2018, 80% of those charged with crack-trafficking offenses were black, but only 6.3% were white. (131) In contrast, blacks comprised only 27.3% of powder cocaine-trafficking offenders, Hispanics made up 66.3%, and whites made up S.7%. (132) Even after all this became clear--through Sentencing Commission reports and other research--Congress persisted in its approach to crack sentencing. More than twenty-four years passed before the disparity between crack and powder was reduced, and even then the reduction was not to a i-to-i ratio, but to an 18-to-1 ratio. (133) In the absence of hearings or consultation with experts, Congress remained focused on crack as an especially dangerous drug associated with violence, and no other information could break through to change Congress's course. Congress's approach to drug trafficking in general reflects a similar dynamic. (134) The legislative history of the Anti-Drug Abuse Act of 1986 makes clear that the five-year mandatory minimum sentence in the law was "specifically intended for the managers of drug enterprises" and the ten-year mandatory minimum was designed for "organizers and leaders." (135) Put another way, Congress aimed to create a "two-tiered penalty structure for discrete categories of drug traffickers." (136) Legislators thus had a particular idea of what constituted a drug trafficker--someone fairly high level dealing with large quantities--and then set penalties with that image in mind. These penalties were rushed through with less than three months between the time the Act was initially introduced and its enactment. (137) In fact, however, the quantity triggers for the mandatory minimums cover anyone involved in the sale of drugs and are not limited to high-level operatives. Most people sentenced under this law are actually low-level members of drug conspiracies. (138) Legislators failed to appreciate how conspiracy law would interact with the mandatory minimum scheme, and they did not ask experts about how their law would play out in practice. If they had, they would have seen that the law they wrote went far beyond the population they aimed to target. Under federal conspiracy law, all the people who participate in a drug-trafficking offense--whether the kingpin or the street peddler or the courier--are deemed equally responsible for the reasonably foreseeable quantities distributed by their organization. (139) But requiring a mandatory minimum meant judges could not distinguish among different people in organizations based on their role in the offense and that prosecutors would instead be deciding the fate of drug-trafficking participants with their charging decisions. (140) These flaws in the federal drug laws prompted a bipartisan task force charged with evaluating federal criminal law to conclude "that the mandatory minimum framework ... is fundamentally broken" because "judges find their hands tied by an extraordinarily punitive one-size-fits-all structure." (141) The task force recommended maintaining the mandatory minimum only for kingpins but repealing the mandatory minimum penalty for all other drug offenses. (142) Instead of deferring to expert recommendations on how to address this problem, lawmakers have made only minor modifications to their flawed framework, in part because of a concern that lowering sentences could produce incidents of well-publicized crime by those who receive a lower sentence. Thus, while a so-called "safety valve" has been enacted to allow exceptions from mandatory minimum sentences, it is narrow. (143) It covers only a limited category of low-level drug offenders with no or minimal criminal history, and for an offender to be eligible, the prosecutor must also agree that the individual has provided the government with whatever information he or she has about the drug operation. (144) In 2014, only about 14.5% of offenders qualified under its terms for relief from mandatory minimums, showing the limits of the safety valve's reach. (145) The entire statutory scheme remains skewed toward high-level traffickers even though that group is not who is being sentenced most of the time. These illustrations are part of a larger pattern. When it is engaged in policymaking in the area of criminal law, Congress repeatedly shows inattention to empirical evidence and disinterest in what the relevant expert agency (the Sentencing Commission) has to say. The result is that Congress often ends up producing laws that undermine rather than promote public safety and that create more disproportionate and disparate sentences.

### Recidivism

### Mass Incarceration

#### Lengthy prison sentences result in mass incarceration despite producing no benefit to public safety

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VII. Time Served in Prison Can Be Reduced Without Harming Public Safety There are two primary reasons that explain why time served in prison has increased so exponentially in recent decades. The first relates to the political environment which led to the “tough on crime” policies of the 1980s and 1990s. With only a handful of notable exceptions, politicians across the board and at every level of government embraced the movement to impose ever harsher penalties on people convicted of crime. Bidding wars erupted in proposing ever more punitive measures for both serious and lower-level offenses. Federal financial incentives to encourage states to adopt “truth in sentencing” policies, whereby parole consideration would not be possible until a prisoner incarcerated for a violent offense had served eighty-five percent of his sentence, contributed to more than half the states endorsing such legislation in the 1990s.59) Legislators in Mississippi went one step further, passing a truth in sentencing statute that required eighty-five percent time served for all offenses.60) Within just a few years, Mississippi’s prison population and associated costs had ballooned so much that policymakers were forced to scale back the initiative substantially. The second key factor in understanding the expansion of long sentences is that they make intuitive sense to most people as a crime control mechanism. If for no other reason, keeping known offenders behind bars for a period of time ensures they will not harm anyone on the outside during their sentence. As we have seen, this “intuitive” understanding substantially overestimates the actual impact on crime in the era of mass incarceration. Believing that incarceration inherently improves public safety naturally correlates with a belief that reducing time served in prison would have negative consequences since the affected individuals would no longer be incapacitated. Here, too, the common-sense observation turns out to be incorrect but remains as a significant obstacle to decarceration. A number of real world case studies, at both state and federal levels, demonstrate that prison populations can be reduced substantially without adverse effects on public safety. Trends in California have been the subject of a good deal of analysis following several initiatives designed to substantially reduce the prison population. One of these, Proposition 47, reclassified a half-dozen property and drug offenses as misdemeanors rather than felonies and required that convictions result in local supervision rather than state incarceration.61) The initiative was also applied retroactively, and as of 2017 nearly 4,700 people have been released from prison.62) A comprehensive analysis by researchers at the University of California- Irvine found the shift had no impact on overall crime rates or violent crime.63) Policy decisions of the U.S. Sentencing Commission over the past decade have also demonstrated that federal sentences can be reduced without adversely affecting crime control goals. The first instance occurred from the Commission’s Guidelines amendment change for crack cocaine convictions in 2007, which was made retroactive as of 2008. More than 16,000 individuals had their sentences reduced by about two years (from 107 months to 85 months).64) A follow-up study compared recidivism rates for similar offenders released before and after the amendment took effect and found no statistically significant difference between the two groups.65) A second study explored recidivism rates for prisoners affected by the retroactive application of the Fair Sentencing Act, lowering time served in prison by twenty percent (thirty months), and found virtually identical recidivism rates for this group and a comparison group who had served their full sentence prior to the adoption of the Act.66) As previously noted, the most substantial sentencing reduction initiative of the Commission was its “drugs minus two” decision in 2014 that reduced sentencing guideline levels for all drug offenses by two levels and was subsequently made retroactive in 2015.67) This initiative decreased the average time served for those granted a reduction from twelve years to ten years. The Commission established a review process for these cases, requiring judicial approval for any sentence reduction. In most federal jurisdictions, the U.S. Attorney’s office and the Federal Public Defender reviewed cases and made a joint recommendation for sentence reduction in a substantial number of cases. For those cases where there was a disagreement, a hearing was held in court and a judicial determination was made. Overall, about two-thirds of the eligible population, or 31,000 individuals, were approved for a sentence reduction, to be applied over many years as these cases neared their end term.68) A telling moment in this process illustrates the public environment in which criminal justice policymaking takes place. The retroactive drug guideline reduction went into effect on November 1, 2015, and because of the delay in implementation, there was a backlog of cases that became eligible for release on that day. Newspaper headlines across the country noted that 6,000 individuals would be released during that first week. Because I am the executive director of a national organization engaged in public policy discussions on sentencing, I received a slew of interview requests from media outlets that week, generally seeking to discuss what preparations were being made to aid these people in their transition to the community. The question is an appropriate one, though painfully naïve in the context of mass incarceration. Of course we should be addressing the needs of these 6,000 people coming home from prison. But many overlooked the fact that these 6,000 releases represented less than one percent of the more than 600,000 people returning home from prison that year— and the previous year, and the year before that. Even with growing attention on reentry, the scale of resources devoted to such services is quite modest given the challenges in this area. The Commission’s policy shift should certainly be commended as a significant step toward curbing excessive punishments. But it is telling that, when we do “business as usual” with millions of people flowing in and out of prisons and jails each year, there is ordinarily little public consideration of our policy approaches to enhancing public safety. VIII. International Comparisons The vast use of long-term sentences in the U.S. is an anomaly by international standards,69) and in line with the position of the United States broadly as a world leader in its use of incarceration. Sentence lengths in most European nations, either by law or practice, rarely exceed twenty years.70) Perhaps the most compelling evidence in this regard is the prison term of twenty-one years imposed on Norwegian Anders Breivik, the ultra-right terrorist who killed seventy-seven people one day in 2011—mostly youths attending a political camp.71) Under Norwegian law, the maximum prison term is twenty-one years, which can be extended for five-year terms if the prisoner is deemed to still pose a risk to public safety.72) Contrast this policy with sentencing laws in the U.S., where it is not unusual for a repeat drug seller who has not engaged in violence to receive a comparable prison term. The most substantial sentencing contrast between the U.S. and other nations (in addition to our use of the death penalty) concerns life imprisonment. While 161,000 individuals are serving life with or without parole in the U.S., such sentences are an aberration in many nations. Norway abolished life sentences in 198173); in Denmark and Sweden, lifers can be released after twelve years and eighteen years of imprisonment, respectively.74) It is not only European nations that reject the imposition of life sentences. In Latin America, only six of nineteen nations maintain statutes that permit life imprisonment, though in many jurisdictions prison terms can be so lengthy that they constitute de facto life terms.75) There is also the practice of the International Criminal Court, which tries cases of war crimes, genocide, and crimes against humanity. The Court has no provision for sentences of life without parole and, for those cases in which a life sentence is imposed, there is a requirement for review after twenty-five years.76) Within the U.S., the American Law Institute (“ALI”) adopted its revised Model Penal Code in 2017. The Code’s standards line up with the American Bar Association in calling for a length of incarceration that is “no longer than needed to serve the purposes for which it is imposed.”77) Regarding long sentences, the ALI concludes that “terms for single offenses in excess of twenty years are rarely justified on proportionality grounds, and are too long to serve most utilitarian purposes.”78) IX. A Reform Agenda Of the record number of people serving life prison terms in the United States, 6,720 are serving a federal life sentence, with more than half of those (3,861) serving life without parole.79) These sentences produce diminishing returns for public safety, are far out of line with practices of comparable nations and divert resources from more constructive interventions for public safety. Challenging the status quo and reducing the scale of these policies is a substantial undertaking, but as the previously described history suggests, there is reason to believe that such shifts are politically viable and can be accomplished without compromising public safety. There are four primary actors who have the authority to change current policy and practice in this area: members of Congress, the United States Sentencing Commission, federal prosecutors, and federal judges. Much of the opportunity to address harsh prison terms clearly lies with Congress. The mandatory sentencing laws enacted in 1986 and 1988, along with other provisions added since that time, have led to the large-scale problem of life- and long-term imprisonment imposed on federal offenders, with drug offenders getting particularly harsh sentences. Scores of federal judges have spoken out about the injustices produced by these policies, and criminological research makes clear that there are diminishing returns for public safety of these policies. While there is a strong argument for across the board repeal of all mandatory sentencing provisions, there is also much that the Congress can accomplish short of that goal. In 2018, for example, the Senate Judiciary Committee approved the Sentencing Reform and Corrections Act on a bipartisan vote.80) The bill was championed by Committee Chair and long-time conservative Sen. Chuck Grassley (R-IA) and long-time liberal member Sen. Dick Durbin (D- IL). The bill’s provisions would have lowered mandatory penalties in certain cases, granted federal judges greater latitude in approving “safety valve” sentencing provisions, and applied retroactive changes to crack cocaine and other penalty shifts. Although this legislation has to date not been endorsed by both chambers of Congress, it is illustrative of the evolving political environment on criminal justice policy. Unlike in the decades of the 1980s and 1990s, most states do not have ambitious plans to construct new prisons; in fact, many are enacting measures to reduce unnecessary incarceration. Voices of reform are increasingly heard across the political spectrum, with newfound attention being devoted to pretrial incarceration, solitary confinement, and the collateral consequences of conviction. Encouraging as these developments are, we should not lose sight of the fact that the pace of change in most jurisdictions is still quite modest and falls far short of what will be necessary to reverse mass incarceration. The second area of attention to federal sentencing can come from the ongoing consideration of policy change by the U.S. Sentencing Commission. As previously noted, the Commission has adopted a number of significant changes to the Guidelines structure over the past decade which have contributed to a substantially reduced federal prison population. The Commission is also undertaking a deeper examination of the scale and potential for expanding alternatives to incarceration, a long overdue but welcome development. But as this essay has documented, we would also be well served by a Commission review of not only the utility of imprisonment, but an examination of the length of imprisonment in terms of the goals of sentencing and public safety. Such an undertaking could incorporate analysis of both mandatory penalties and the Guidelines structure, with a particular focus on assessing the points at which diminishing returns for public safety develop for varying combinations of offense and offender characteristics. The third set of actors capable of producing significant change in sentencing outcomes are the U.S. Attorneys. Particularly in an era characterized by broad determinate and mandatory sentencing, the power of federal prosecutors to influence the scale of punishment is quite substantial. Through charging practices, plea negotiations, and sentencing recommendations, prosecutors often exert a more significant effect on sentencing outcomes than do judges. As previously noted, the impact of Attorney General Holder’s charging memorandum to federal prosecutors produced a significant reduction in the number of federal defendants charged with an offense requiring a mandatory penalty.81)) Conversely, Attorney General Sessions’s reversal of that policy is likely to produce an expansion of the federal prison population, though it is too early to assess that impact yet. The fourth area of change can arise through federal judges themselves as they consider how to impose sentences in the post-Booker82) era that now grants federal judges greater discretion in sentencing. While there has been much discussion about the problems brought about by mandatory sentencing, in fact most federal defendants are sentenced under a mandatory statute. Therefore, the appropriate use of judicial discretion can be quite critical in most cases. One proposal for a reexamination comes from U.S. District Judge Mark Bennett, who notes that “the length and severity of federal sentences, for the most part, has not changed” in the post-Booker period.83) Judge Bennett attributes this in part to the psychological concept of the “anchoring effect,” the human tendency to rely too heavily on the first piece of information offered (the “anchor”) when making decisions.84) Research indicates that sentencing judges are influenced by anchors, even irrelevant anchors, to the same extent as lay people and that the effects of the anchors are not reduced by the judges’ actual experience. Judge Bennett argues that the anchoring effect in federal sentencing comes into play through the presentence report.85) The reports first calculate how the elements of the crime and criminal history translate into a sentencing cell on the Guidelines chart, and subsequently present more detailed information about the offender’s history and circumstances. Even though the Guidelines are now advisory, their effect is to create a marker for the sentence to be imposed. Judge Bennett’s modest suggestion is to reverse the order of how information is presented.86) That is, judges should first review the circumstances of the offense and offender, make an initial determination of sentence, and then consult the guidelines. If the initial sentence is substantially above or below the guideline range, judges can review the reasoning behind their decision and make adjustments if they think they are warranted. X. The Way Forward Mass incarceration did not develop overnight, nor will it end suddenly. The unprecedented rise of the prison population in the United States was the result of complex decision making and policy implementation by political leaders and criminal justice practitioners, playing out in a public environment characterized by fear and scapegoating. Thus, no single piece of legislation or change in leadership will be sufficient to reverse these decades-long trends. Acknowledging this reality should not be cause for despair. As we have seen over the past decade, criminal justice leaders and their political allies in many states have embraced new ways of thinking about problem-solving within the justice system, and they have generally received public support in doing so. As more jurisdictions embrace a reform strategy, we will have more models of change to choose from, along with increasing evidence of what works and what does not work to produce public safety. As this essay suggests, there are many ways in which sentencing policy and practice can be changed in order to produce more rational outcomes for both the individual and society. A key element of that change should be a reconsideration of the scale of punishment in the United States, one of the driving forces that makes the American court system an outlier among democratic nations. Taking on this challenge has the potential to contribute to a broader dialogue about the role of the justice system in our society today.

#### Mandatory minimums are a key contributor to prison population expansion and fail at deterring crime

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V. The Impact of Time Served on Prison Populations and Public Safety Lengthy prison terms, particularly at the state level, have been a major source of prison growth since the 1980s. As previously noted, the National Research Council’s analysis of the rise in the state prison population between 1980 and 2010 attributed the increase entirely to changes in sentencing policy. Half of this growth was due to an increased number of admissions to prison and half was a function of greater time served in prison.36) Corrections data analyzed by the Urban Institute support these findings and demonstrate the significance of long-term sentences on the growing prison population.37) Of the forty-four states with complete data for the time period 2000-2014, all experienced an increase in time served by their prison populations, with those serving a sentence for a violent offense experiencing the greatest increase.38) At the federal level, the prison population expanded from 20,000 in 1980 to 189,000 by 2016.39) The combined effect of the surge in drug prosecutions and the expansion of mandatory minimum sentences was a key factor in this growth. As of 2016, 55% of the federal prison population had been sentenced under a mandatory provision.40) One measure of the impact of mandatory minimum sentencing can be seen in the range of cases in which President Obama issued sentence commutations, particularly during his last years in office. A total of 1,715 individuals convicted of a drug offense received such commutations, almost all of whom had been sentenced under mandatory provisions of drug law generally requiring decades of incarceration.41) Nearly a third were sentenced to life without parole for a repeat drug offense. These cases were subject to review by the White House and Department of Justice, and most were not the “low level, non-violent offenders” who are generally the focus of policymaker attention. A quarter of this group had a prior conviction for a violent offense, and eighty-six percent had a “significant” criminal history.42) These individuals were released despite their “significant” criminal history, a gesture which recognizes the transformation that many individuals undergo in prison but also demonstrates that a substantial number of inmates do not pose an unreasonable public safety risk upon release. While mandatory sentencing policies are a key driving force in producing lengthy federal prison terms, the establishment of the federal sentencing guidelines since the 1980s has contributed to these developments as well. When the original Commission members established the Guidelines structure, they overrode several key elements of the statutory directive creating the Commission, including the directive to ensure that nonviolent, first-time offenders should ordinarily receive non-prison sentences. While 37% of the offenders sentenced in 1985 received probation alone,43) by 2013 that figure had declined to 7.1%.44) The Commission also ignored the statutory requirement that it take into account available bed space in federal prisons to reduce overcrowding. Finally, in establishing lengths of prison terms, the Commission relied on then-current sentencing practices data when developing the Guidelines grid. But since the Commission members only used data on prison sentences and not probation, this had the effect of increasing average prison terms since such a smaller proportion of offenders were deemed probation-eligible under the Guidelines.45) By developing the Guidelines in this manner, the Commission missed an opportunity to take a fresh look at the utility of the sentencing practices of the time. To what extent did length of sentence affect potential deterrent or rehabilitative goals? Did long prison terms provide increasing incapacitation benefits or did they have a “criminogenic” effect on future behavior? These and other concerns could have shaped the development of an objective examination of the efficiency of federal sentencing policy, instead of recreating a version of prevailing practices. VI. Long Sentences Are Counterproductive for Public Safety Increasingly lengthy prison terms for federal offenses have become counterproductive for promoting public safety. There are several reasons for this: long-term sentences produce diminishing returns for public safety as individuals “age out” of the high-crime years; such sentences are particularly ineffective for drug crimes as drug sellers are easily replaced in the community; increasingly punitive sentences add little to the deterrent effect of the criminal justice system; and mass incarceration diverts resources from program and policy initiatives that hold the potential for greater impact on public safety. A. “Aging Out” of Crime A longstanding finding in the criminology literature is that involvement in criminal activity is strongly dependent on age, an outcome that cuts across race and class lines. Increased involvement in crime begins in the mid-teen years and rises sharply, but for a relatively short period of time.46) For most crimes, these rates of involvement begin declining by a person’s early to mid-twenties and continue on a downward trajectory. Looking at rates of robbery, for example, these peak at age nineteen and, by their late twenties, have declined by more than half.47) These dynamics have significant meaning for the length and effectiveness of prison terms. In the federal prison system, the median age range in prison is 36 to 40 years old,48) well past the peak age of criminal involvement. Further, the length of stay for released federal prisoners doubled between 1988 and 2012, from an average of 17.9 months to 37.5 months.49) This rise is largely attributed to policy changes, including the implementation of the sentencing Guidelines, elimination of parole, and advent of a new generation of mandatory sentencing laws. To be clear, just because the risk an individual may pose to public safety declines with age does not mean that incarceration is an inappropriate sentencing option. Long periods of incarceration can satisfy other sentencing goals, such as recognizing the seriousness of an offense. But to the extent that incarceration is imposed primarily for incapacitation, judges and policymakers should be cognizant that each successive year of incarceration is likely to produce diminishing returns for public safety. Another key element of the declining effectiveness of incapacitation is that the aging process leads to higher costs of incarceration, primarily due to increased health care needs.50) In this regard, prisoners are no different than the general population; they require more health resources as they age. But a key distinction is that a person’s health generally declines more rapidly in prison.51) This is partly a function of the relatively inadequate access to health care services of many individuals before they came to prison, and partly related to the stressful environment of a correctional institution. As a consequence, the annual cost of incarceration—generally estimated at about $30,000 per prisoner—can easily double for elderly prisoners. B. Limited Deterrent Effects On the day of sentencing, judges frequently tell a convicted defendant that they are being sentenced to prison to “send a message” that their criminal behavior will not be tolerated. The human instinct to do so is understandable, but unfortunately, the value of this message is often insignificant. The deterrent effect of the criminal justice system has been studied for hundreds of years, with increasing sophistication in recent decades. In regard to the impact of punishment on potential offenders, a key finding is that deterrence is primarily a function of the certainty of punishment, not its severity.52) Daniel Nagin, a leading deterrence scholar in the United States, concluded that “[t]he evidence in support of the deterrent effect of the certainty of punishment is far more consistent and convincing than for the severity of punishment” and that “the effect of certainty rather than severity of punishment reflect[s] a response to the certainty of apprehension.”53) This finding makes intuitive sense. Consider a person who is thinking about stealing a car or burglarizing a local business. If he is thinking rationally, he will take into account a variety of factors when considering how to commit the crime, including time of day, ease of entry, presence of security personnel or technology, or his ability to leave the crime scene. He does this to avoid being caught in the act because being arrested and prosecuted will impose significant burdens on him. Additionally, because he is not planning on being apprehended, he is unlikely to be thinking about how much time he might spend in prison and whether his sentence will be three, five, or seven years. Notably, this example looks at the behavior of a rational person, which rarely fits the picture of a substantial portion of those who actually commit a crime. Many are teenagers seeking peer approval for their illegal behavior, individuals under the influence of alcohol or drugs at the time of the offense,54) or are motivated by economic challenges. Many of these individuals are not even thinking about the risk of being caught, let alone know how much prison time they may face. The limited impact of extending sentence length becomes even more attenuated for long-term incarceration. If the penalty for a second robbery conviction is twenty years and a legislative body increases that penalty to twenty- five, few would-be robbers undeterred by the prospect of “only” a twenty year sentence would balk at an additional five years. Again, there are multiple possible reasons for imposing a given prison term, depending on the circumstances of the crime. But policymakers and judges should be cognizant of the evidence to support any particular goal of sentencing. If the length of a prison term has little deterrent value, it may be time to forego the rationale of “sending a message.”

### AT - Deterrence

#### Deterrence fails to stop crime – even the most generous assumptions demonstrate massive criminal justice abuse

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In recent years, there has been a growing bipartisan consensus that the uniquely American policy of mass incarceration is both fiscally and morally unsustainable. Several decades of policy initiatives prioritizing the use of the criminal justice system as the primary means of addressing crime have vaulted the United States into the unenviable position of being a world leader in the use of imprisonment.1) This phenomenon has produced a host of undesirable ripple effects—the collateral consequences of a felony conviction—that now greatly impair the life prospects of millions of individuals, with a particularly striking effect on low-income communities of color. This article will describe the origins and contours of the growing movement for justice and sentencing reform and assess its impact on the scale of incarceration to date. There are good reasons to be encouraged about these developments. However, it is also clear that at the current pace of decarceration, the cumulative effect of this movement will fall far short of what is necessary to achieve a more rational, compassionate balance in the justice system. A key issue in assessing the decarceration trend is American sentencing policy and practice related to the length of prison terms. Defendants convicted of felonies in the U.S. are more likely both to be sentenced to prison and to serve more time in prison than in comparable nations.2) The excessive nature of punishment in the U.S. is not based on a rational analysis of incarceration and the fundamental objectives of sentencing policy. Moreover, unduly long prison terms are counterproductive for public safety and contribute to the dynamic of diminishing returns as the prison system has expanded. I. The Rise of Incarceration Incarceration in the United States rose at an unprecedented rate for nearly four decades beginning in 1973.3) Research by the National Research Council reveals that, between 1980 and 2010, the 222% increase in the rate of incarceration in state prisons was a function of changes in policy, not changes in crime rates.4) Those initiatives, under the rubric of “tough on crime,” involved enacting a range of sentencing policies designed to increase admissions to prison and to lengthen the amount of time served on a felony sentence. Such policies were adopted by the federal government and every state to varying degrees. As a result of these changes, the combined prison and jail population of about 330,000 in 1972 has mushroomed to 2.2 million today.5) This growth has far outpaced the overall increase in the national population and is accompanied by a similar pace of growth in community supervision, with approximately 4.6 million people under probation or parole supervision in 2016.6) As articulated by the policymakers who enacted these measures, the goal of mass incarceration was to improve public safety outcomes.7) Whether framed as “getting tough,” “sending a message,” “three strikes and you’re out,” or other slogans, the objective was to affect crime rates through a mix of deterrent and incapacitative measures imposed on people convicted of crimes. There is a growing body of scholarship examining the relationship between incarceration and crime. While it is beyond the scope of this essay to review that work in full, we should note two primary findings of this research. First, incarceration has an impact on crime, but the scale of that effect is much more modest than many policymakers or members of the public believe. At best, some studies conclude that the rise of incarceration may have produced about a quarter of the decline in crime that has occurred since the early 1990s.8) Other studies have found this effect to be as low as five percent.9) Even if one concludes that one quarter of the decline is the most defensible finding, that means that three quarters of the decline in crime was not due to increased incarceration. Possible factors offered to explain this substantial portion of the crime decline include strategic policing, decline of the crack cocaine drug markets, community-based anti-crime initiatives, and enhanced economic opportunity. The second primary research finding on the effects of incarceration is that there are diminishing returns to public safety brought about by the prison expansion.10) Two key factors underlying this conclusion are that expanded prison space encourages more substantial incarceration of less serious offenders and that lengthy prison terms keep individuals behind bars long after they present a significant risk to public safety.11)

## Cards for other Possible Plans¯\\_(ツ)\_/¯

#### Establishing economic status as a factor in mandatory sentencing is key to reducing disparities in sentencing

Stamm 17 Michael Stamm J.D., Georgetown University Law Center, 2017. "Between a rock and discriminatory place: How sentencing guidelines and mandatory minimums should be employed to reduce poverty discrimination in the criminal justice system." Published in the Georgetown Journal on Poverty Law & Policy Vol. 24(3). Published Spring 2017. Available here: (https://go-gale-com.ezproxy.lib.utah.edu/ps/retrieve.do?tabID=T002&resultListType=RESULT\_LIST&searchResultsType=SingleTab&searchType=AdvancedSearchForm&currentPosition=22&docId=GALE%7CA503262698&docType=Article&sort=Relevance&contentSegment=ZONE-MOD1&prodId=AONE&contentSet=GALE%7CA503262698&searchId=R1&userGroupName=marriottlibrary&inPS=true&ps=2&cp=22) - AP

1. Mandatory Minimums Are Imposed for Crimes that More Often Affect People Living in Poverty. Mandatory minimum sentencing laws bind judges to sentence a minimum specified term of incarceration when a defendant has been convicted of certain offenses. (83) For example, as of 2012, a conviction for drug trafficking, if the amount trafficked was at least: 1kg if trafficking heroin, 5kg if trafficking cocaine, or 280g if trafficking crack-cocaine, the federal guidelines outlined three different mandatory minimums. (84) The guidelines proscribed 10 years in prison for a first offense and 20 years in prisons for a second offense if no death or serious bodily injury resulted. The recommended sentence for a third offense was life in prison. (85) Mandatory minimums come into play in federal jurisdictions and in most states. (86) Mandatory minimums reduce fairness in the system by curtailing the discretion of judges to consider the circumstances of each case. (87) They also create an environment with more weight behind the threat of conviction, leading more defendants to accept plea deals when they otherwise may not have. (88) According to Norman L. Reimer and Lisa M. Wayne, Executive Director and President of the National Association of Criminal Defense Lawyers, respectively, the prime example of the excessive increase in prosecutorial discretion vis-a-vis mandatory minimums is the ability of prosecutors to negotiate the charges with minimums away. (89) This allows prosecutors to coerce defendants into cooperation, usually in order to bring charges against another alleged criminal, by threatening, for example, tens of years of incarceration if the defendant does not cooperate. (90) Mandatory minimum sentences represent a bias against defendants in poverty because they are most prevalent for crimes that most affect people in poverty. (91) The crimes subject to mandatory minimums include drug offenses, weapon offenses, and offenses of illegal reentry (e.g., offenses preventing aliens who have been deported from returning to the United States). (92) Lawmakers make a choice to impose mandatory minimums for some crimes and not others. (93) Mandatory minimum sentencing represents another expression of bias, whether explicit or implicit, against indigent defendants. III. MANDATORY MINIMUMS AND SENTENCING GUIDELINES CAN BE REWORKED TO COUNTERACT DISCRIMINATION AGAINST THE POOR IN THE CRIMINAL JUSTICE SYSTEM. Any system that discriminates against the poor cannot, in truth, be called a "justice" system. The Constitution of the United States and the Supreme Court both forbid government discrimination based on economic status. Discretion in different stages of the criminal process is important to tailor the process to the specifics of each case, but it often leads to impermissible bias against individuals living in poverty. To preserve these necessary discretionary practices but also decrease bias in the system, legislatures and courts can adjust sentences and mandatory minimums on a sliding scale based on economic status to counter-act the bias facing defendants living in poverty. A. The Charge of the Constitution and the Supreme Court The Fourteenth Amendment to the Constitution guarantees that no state shall, "deny to any person within its jurisdiction the equal protection of its laws." (108) The Supreme Court has extended this charge to the federal government, arguing that the Due Process clause of the Fifth Amendment can include a prohibition against discrimination. (109) State governments and the federal government are charged with treating people equally without regard to external factors such as economic status (110); however, people in poverty are treated far worse by the criminal justice system than their wealthier counterparts. (111) The Supreme Court does not see the equal treatment of people regardless of their economic status as an empty charge. In Griffin v. Illinois, the Court opined, "[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color." Yet, the criminal justice system discriminates against defendants on account of their poverty. Policing practices, statutes criminalizing effects of poverty, lack of funding for public defenders, lack of acceptance of a poverty defense, the imposition of mandatory minimums for crimes that primarily affect people in poverty, and imprisonment due to nonpayment of LFOs combine to create a system that overwhelming punishes poor defendants for their poverty. B. Discretion Can Create Disparate Impact Many of the problems in the criminal justice system stem from the discretion various actors are allowed throughout each stage of the process. However, completely foregoing discretionary structures in the system is not the best solution to eliminate the disparate impact experienced by people in poverty. A certain amount of discretion is necessary for a fair system. Actors should be able to vary their practices based on the specifics of each case and situation. Police should be able to increase enforcement in places where evidence suggests more crimes are being committed. Legislators should be able to budget government funds as they see Fit. Prosecutors need a certain amount of discretion to perform their jobs effectively. Judges need to be able to alter sentences based on specific circumstances. Yet the disparate impact that these discretionary measures and other practices mentioned create for people in poverty is unjust, unfair, and illegal. The best way to counteract the discriminatory nature of the criminal justice system would be to refashion a mandatory structure to benefit the poor and counterbalance all the ways the system disadvantages the poor. This would maintain discretion in areas where it is prudent but reduce the discriminatory effect of discretion on people of lower economic status. An example of this type of remedy in other areas of the law is affirmative action. Affirmative action was introduced to reduce discriminatory effects in a discretionary system. (113) As in the criminal justice system, discretion is important in the higher education and employment contexts. Colleges and universities need to be able to decide whom to admit, who is likely to succeed at their school, and who will have a positive effect on the school environment. Employers need to be able to decide whom to hire, who will fulfill the obligations of their employment successfully, and who will get along with the other employees. Starting in the 1960s, politicians and judges decided that race (among other attributes) is not a proper consideration when choosing whom to admit or hire. (114) However, leaving these decisions up to someone's discretion means race can play a part, whether explicitly or implicitly. Affirmative action addresses disparities for members of disadvantaged groups in higher education and employment contexts. This policy corrects the discriminatory effect of discretionary decisions, while retaining the beneficial aspects of discretion itself. C. Economic Status Should be a Sentencing Factor As previously discussed, mandatory minimums are employed in many states and the federal jurisdiction. (116) Mandatory minimums provide minimum sentences that must be imposed when defendants are convicted of certain crimes. (117) Legislators also establish sentencing guidelines to determine criminal sentences. (118) The Federal Sentencing Guidelines ("Guidelines") consider two factors: the level of the offense committed and defendant's criminal history. The level of the offense is represented by a number between 1 and 43. (120) Offenses have a "base level" which may be increased if certain factors are met. (121) For example, the offense of "Conspiracy of Solicitation to Commit Murder" has a Base Offense Level of 33; that level increases by 4 if the offense involved the offer or receipt of something of pecuniary value. (122) Criminal history ratings are split in categories, represented by roman numerals I--VI, which each represent a group of "criminal history points" ratings--for example, an offender with a criminal history point value of 2 or 3 would be in Category II; an offender with a criminal history point value of 4, 5, or 6 would be in Category III. (123) Criminal history points are based on previously imposed sentences of imprisonment and whether the defendant was under supervision by the criminal justice system when he or she was convicted. (124) If a defendant is convicted of an offense of level 20--for example, robbery--and has no criminal history, the Guidelines suggest a punishment of 10 to 16 months. (123) Although the Guidelines were initially intended by Congress to be mandatory, (126) the Court made them effectively advisory in United States v. Booker. (121) Booker held that mandatory sentencing guidelines violated the mandate of the Sixth Amendment that the jury decide any fact made necessary for punishment by law. (128) The sentencing court is required to consider the Guidelines, however, it may tailor the sentence based upon the consideration of certain statutory concerns. (129) Because this decision was made on constitutional grounds, it should apply to state sentencing guidelines as well. (130) In order to counteract the discriminatory impact of the criminal justice system on people living in poverty, mandatory minimums and sentencing guidelines should include economic status as a factor. First research will need to be done to determine at what level of income disparate treatment on economic status becomes negligible. This will be called the maximum income. Above this level of the income the mandatory minimums and recommended sentences would be the same as they are now. Then, research would need to be done to ascertain the discriminatory effect of disparate treatment based on economic status. The research would look, at the impact of the criminal justice system on defendants with the maximum income or above and defendants with no income. This impact would have to be quantified, which would then be turned into a minimum factor. If, for example, research determines, controlling for type of crime and other factors, that defendants with no income ultimately suffered sentences that were on average twice as long as defendants with the maximum level of income, the factor would be 0.5. For defendants who had no income and were convicted, the mandatory minimum prescribed, or the sentence recommended by guidelines, would be multiplied by this factor. The continuum between the maximum income and no income, which would correspond to proportional factors between the minimum factor and a factor of one. Courts would hold evidentiary hearings to determine defendants' incomes and wealth--including assets, looking at such documents as tax records, pay stubs, social security information, bank statements, etc., under penalty of perjury for defendants who try to misrepresent their income. This policy would allow for all the previously discussed discretionary policies to remain in effect, while neutralizing the discriminatory impact they have on people in poverty. IV. POTENTIAL CRITICISMS Two arguments could be made against this policy proposal. One argument is that economic class is a proxy for race; the criminal justice system is truly biased against minorities, and remedying the situation on the basis of economic status does not address the real issue. The second argument is that the solution proposed will not Fix the actual problems inherent with each individual institution mentioned, such as discriminatory policing practices or the lack of funding for public defenders. The argument that the implicit bias in the system is directed at minorities and not people living in poverty is justified. Many scholars have elucidated the existence of implicit racial bias in the legal system. (131) However, a similar policy focused on race would be much more difficult to implement. First, such a policy may be held to be unconstitutional. The Supreme Court has defined race as a suspect classification. (132) This means that a government program that discriminates against a specific racial group is constitutional only if it is "narrowly tailored to further compelling governmental interests." (133) If this policy proposal used race as its determinant, instead of income, it may be found to discriminate against non-minorities. Reducing the discriminatory effect of the criminal justice system on minorities could be a compelling interest. However, changing the sentencing structure so that minorities have a smaller possible range of sentences may not be seen as narrowly tailored to achieve that interest, as such a practice would have the unintended consequence of creating a disparate sentencing scheme that discriminates against non-minorities, relatively. Second, and less hypothetical, if the policy proposal were based on race instead of economic status, it would be difficult to implement. Economic status can be quantified; in contrast, race is an artificial classification. (134) It would be impossible to implement for people who have parents of two different races, or who have grandparents of three or four different races. Even if this proposed policy could be implemented to include race as a factor, the existence of implicit racial bias does not discredit the implicit bias against people in poverty. Some of the discriminatory practices previously discussed, such as police enforcement strategies, may discriminate on the basis of race as well as poverty. However, some of the practices, such as the underfunding of public defender offices or the discriminatory effect of the imposition of LFOs, discriminate primarily against people in poverty, since they are monetarily based. (135) The other obvious argument against the proposed policy is that each of the discriminatory practices previously mentioned in this article represent individual problems that require individual solutions. The policy proposed in this article addresses the symptoms of the discrimination, not the causes. However, the causes of the discrimination are systemic issues which will take a lot of work and a lot of time to solve. (136) Implicit biases which are deeply-rooted in the psyches of droves of systemic actors will not change anytime soon. While people work to solve these problems, people in poverty are suffering--and such suffering will continue until actively addressed. The policy proposed herein is not a long-term solution, but it would help to address some of the discrimination against people in poverty and urge legislators to pass laws that reduce such discrimination. V. FURTHER RESEARCH Further research must be conducted to properly implement the proposed policy of reducing sentences for defendants of lower economic status. Data must be collected on the economic status of individuals charged with crimes. There is a lot of data on the underfunding of public defender offices (137) and the relationship between nonpayment of LFOs and debtors' prisons, (138) but more accurate statistics should be compiled on other practices which could lead to a disparate criminal justice effect for people living in poverty. This includes practices discussed in this article, for example, how crimes committed by indigent defendants correlate with mandatory minimum legislation. This also includes practices not mentioned in this article, which may exhibit discrimination against people living in poverty, but for which no data is currently being collected. For example, whether juries are more likely to convict defendants who live in poverty or whether the effect of a prison sentence on a defendant's reintegration into society is greater when the defendant is experiencing poverty. More research is necessary to figure out the complete extent of discrimination facing lower-income defendants in the criminal justice system. This information is essential to truly counteract the discriminatory effect of the criminal justice system on people living in poverty. VI. CONCLUSION An equitable system of justice is important to the functioning of a well-ordered society. In the United States, there are also Constitutional and precedential requirements of equitable justice. However, theory is far-removed from practice for indigent defendants. People living in poverty are more heavily policed, leading to more people in poverty entering the criminal justice system. This heavy policing is a result of both more enforcement in poor neighborhoods and criminalization of aspects of poverty. At trial, indigent defendants receive less adequate representation than their wealthier counterparts. Their lawyers are overworked and oftentimes do not have the proper resources to zealously advocate on their clients' behalves. Poverty does not mitigate guilt at trial, since judges on the whole have refused to accept "rotten social background" as a defense or partial defense. Indigent defendants also face discrimination in the sentences levied against them. Crimes primarily committed by indigent defendants are more likely to have mandatory minimum sentences. Additionally, the imposition of fines affects indigent defendants more harshly and can lead to re-incarceration or extended incarceration. The discriminatory effects felt by indigent defendants are the result of discretionary decisions made by different actors at different stages of the criminal justice process. Police make decisions on enforcement. Legislatures decide to criminalize aspects of poverty, to reduce funding for public defenders, and to impose mandatory minimums. Judges decide whether to accept a poor background as a defense at trial and on whom to impose legal financial obligations. However, the solution to the problem is not to do away with discretion. Some amount of discretion in the criminal justice system is important. Every crime, every case, every defendant is different; actors in the criminal justice system must be able to tailor their actions to the case before them. The solution is to minimize the discriminatory effect that the sum of all the discretion is having on the less wealthy subsections of society. Essentially, the goal is to take the result of all the discretionary actions and alter that result, based on economic class, to achieve some level of parity in society. By comparing differences in sentencing and factoring in socioeconomic status to reduce those differences, we can try to ensure that, at least, justice will be blind to the trappings of wealth.

# Neg

## Mandatory Minimums Good

#### Mandatory sentencing reform leaves the federal government incapable from stopping drug epidemics – the Fentanyl crisis proves

Higham, Horwitz, & Zezima 19 Scott Higham is a Pulitzer-Prize winning investigative reporter at The Washington Post; Sari Horwitz is a Pulitzer-Prize winning reporter who covers the Justice Department, law enforcement and criminal justice issues for The Washington Post; Katie Zezima is a national correspondent covering drugs, guns, gambling and vice in America. "The Fentanyl Failure." Published by the Washington Post on March 13, 2019. Available here: (https://www.washingtonpost.com/graphics/2019/national/fentanyl-epidemic-obama-administration/) - AP

In May 2016, a group of national health experts issued an urgent plea in a private letter to high-level officials in the Obama administration. Thousands of people were dying from overdoses of fentanyl — the deadliest drug to ever hit U.S. streets — and the administration needed to take immediate action. The epidemic had been escalating for three years. The 11 experts pressed the officials to declare fentanyl a national “public health emergency” that would put a laserlike focus on combating the emerging epidemic and warn the country about the threat, according to a copy of the letter. “The fentanyl crisis represents an extraordinary public health challenge — and requires an extraordinary public health response,” the experts wrote to six administration officials, including the nation’s “drug czar” and the chief of the Centers for Disease Control and Prevention. The administration considered the request but did not act on it. The decision was one in a series of missed opportunities, oversights and half-measures by federal officials who failed to grasp how quickly fentanyl was creating another — and far more fatal — wave of the opioid epidemic. In the span of a few short years, fentanyl, a synthetic painkiller 50 times more powerful than heroin, became the drug scourge of our time. Fentanyl has played a key role in reducing the overall life expectancy for Americans. If current trends continue, the annual death toll from fentanyl will soon approach those from guns or traffic accidents. Among the dead are the anonymous and the famous, including musicians Prince and Tom Petty . It is so powerful that just a few flecks the size of grains of salt can cause rapid death. Synthetic opioids\* 28,869 Prescription painkillers 20,000 U.S. overdose deaths 17,029 Heroin 15,690 10,000 0 1999 2013 2017 \*The recent rise in synthetic opioid deaths has been fueled almost entirely by fentanyl. It can be mixed into other drugs like heroin, counterfeit pain pills and cocaine. Between 2013 and 2017, more than 67,000 people died of ­synthetic-opioid-related overdoses — exceeding the number of U.S. military personnel killed during the Vietnam, Iraq and Afghanistan wars combined. The number of deaths, the vast majority from fentanyl, has risen sharply each year. In 2017, synthetic opioids were to blame for 28,869 out of the overall 47,600 opioid overdoses, a 46.4 percent increase over the previous year, when fentanyl became the leading cause of overdose deaths in America for the first time. “This is a massive institutional failure, and I don’t think people have come to grips with it,” said John P. Walters, chief of the White House Office of National Drug Control Policy between 2001 and 2009. “This is like an absurd bad dream and we don’t know how to intervene or how to save lives.” How a back injury turned a doting father into a fentanyl kingpin 11:34 (Dalton Bennett/The Washington Post) Federal officials saw fentanyl as an appendage to the overall opioid crisis rather than a unique threat that required its own targeted strategy. As law enforcement began cracking down in 2005 on prescription opioids such as OxyContin and Vicodin, addicts turned to heroin, which was cheaper and more available. Then, in 2013, fentanyl arrived, and overdoses and deaths soared. “Fentanyl was killing people like we’d never seen before,” said Derek Maltz, the former agent in charge of the Drug Enforcement Administration’s Special Operations Division in Washington. “A red light was going off, ding, ding, ding. This is something brand new. What the hell is going on? We needed a serious sense of urgency.” But for years, Congress didn’t provide significant funding to combat fentanyl or the larger opioid epidemic. U.S. Customs and Border Protection didn’t have enough officers, properly trained dogs or sophisticated equipment to curb illegal fentanyl shipments entering the country from China and Mexico. The U.S. Postal Service didn’t require electronic monitoring of international packages, making it difficult to detect parcels containing fentanyl ordered over the Internet from China. CDC data documenting fentanyl overdoses lagged behind events on the ground by as much as a year, obscuring the real-time picture of what was happening. Facing hotly contested midterm elections in 2018, Congress finally passed legislation aimed at addressing the increasingly politicized opioid crisis, including a measure to force the Postal Service to start tracking international packages. Manchester Fire District Chief Hank Martineau runs up the stairs of a building to respond to an overdose call on Oct. 16 in New Hampshire, which has one of the country’s highest fentanyl overdose rates. (Salwan Georges/The Washington Post) “How many people had to die before Congress stood up and did the right thing with regard to telling our own Post Office you have to provide better screening?” Sen. Rob Portman (R-Ohio), sponsor of the legislation, asked on the Senate floor last fall. Local and state leaders in hard-hit communities say the federal government wasted too much time at a cost of far too many lives. “Everybody was slow to recognize the severity of the problem, even though a lot of the warning signs were there,” said New Hampshire Gov. Chris Sununu (R), whose state has one of the highest fentanyl overdose rates in the United States. Barack Obama, U.S. president, January 2009-January 2017 The opioid epidemic exploded during his time in office. He didn’t focus on the rise of fentanyl until the final months of his administration. His spokeswoman said it is “impossible to divorce fentanyl from the broader opioid epidemic” and the administration took a “comprehensive approach” to the crisis. In Sununu’s state, Narcan, which delivers an opioid-overdose antidote, has become standard issue for some school districts. Addicts overdose on the sidewalks and in public parks of Manchester and are found slumped over the steering wheels of cars in traffic. Firefighters and paramedics are called nearly every day to fentanyl overdoses and have opened their station houses to addicts seeking treatment. “In the city of Manchester, we saw 20 overdoses to 80 overdoses a month. We were like, ‘What the heck is happening with these overdoses?’ ” said Manchester Fire Chief Dan Goonan. He said politicians and policymakers held numerous roundtable discussions to talk about solutions, but there was little action. “I said, ‘If I had to go to another roundtable, I’m going to jump out the window myself because we’re going nowhere with these roundtables,’ ” he said. [What you need to know about fentanyl] Drug treatment experts compared the government’s slow response to an earlier failure to face the AIDS epidemic. “There was a stigma about being gay,” said Luke J. Nasta, executive director of the largest drug treatment facility on Staten Island, N.Y. “There is also a stigma about being addicted to drugs. The entire society is suffering and the government can’t seem to get their arms around this epidemic. “If it’s an epidemic, then treat it like an epidemic.” In 2013, 3,220 people died from fentanyl and other synthetic opioids. Judith Varone, 53, a waitress in Lincoln, R.I., was one of them. She died on March 23. Ground zero The first wave of the opioid epidemic began in 1996 after drug manufacturer Purdue Pharma introduced what it claimed to be a wonder drug for pain — OxyContin, a powerful opioid that was aggressively marketed to physicians as less addictive than other prescription narcotics. As the medical community embraced the new drug, it became a blockbuster for Purdue, generating billions in sales. Over the next decade, doctors and corrupt pain management clinics prescribed massive amounts of opioids. To meet the demand, drug manufacturers and distributors flooded communities across the country with opioid pills, including oxycodone and hydrocodone. Drug users and dealers diverted hundreds of millions of doses to the streets. The DEA started to crack down on the illegal trade in 2005. Two years later, Purdue paid $600 million in fines and its executives pleaded guilty to federal criminal charges for claiming the product was less addictive than other painkillers. The company agreed to make its marketing conform to federal rules and has launched programs to combat opioid abuse. “It is deeply flawed to suggest that activities that last occurred 18 years ago are responsible for today’s complex and multi-faceted opioid addiction crisis,” the company said in a recent statement. The federal government also fined the largest drug distributors and pharmacies tens of millions of dollars over allegations that they failed to report suspicious orders of pain pills. As the supply of prescription opioids began to tighten, America’s pill addicts became desperate. Street prices soared. Mexican drug cartels saw an opening to sell more heroin, a cheaper, more potent way to get high. That set off the second wave of the epidemic by 2010 and a rise in overdose deaths. Then fentanyl hit the streets. A synthetic opioid developed in 1960 by a Belgian physician, fentanyl is normally reserved for surgery and cancer patients. It is up to 100 times more powerful than morphine, its chemical cousin. For traffickers, illicit fentanyl produced in labs was the most lucrative opportunity yet, a chance to bypass the unpredictability of the poppy fields that produced their heroin. The traffickers could order one of the cheapest and most powerful opioids on the planet directly from Chinese labs over the Internet. It was 20 times more profitable than heroin by weight. By lacing a little of the white powdery drug into their heroin, the dealers could make their product more potent and more compelling to users. They called it China White, China Girl, Apache, Dance Fever, Goodfella, Murder 8 or Tango & Cash. Samples of pure drugs that could kill the average human — heroin, fentanyl and carfentanil, a synthetic opioid 100 times more powerful than fentanyl — at the New Hampshire State Police Forensic Laboratory in Concord. (Salwan Georges/The Washington Post) The third wave of the opioid epidemic was about to begin. Ground zero was Rhode Island, already reeling from a crippling prescription pill and heroin problem. The first signs were detected in the spring of 2013 when overdose deaths spiked at the state morgue in Providence. Then-Rhode Island Health Director Michael Fine wondered: What was killing so many so quickly? Subscribe on:Alexa Apple PodcastsGoogle Podcasts Spotify Stitcher TuneIn RadioPublic iHeartRadio RSSPost Reports | Podcast How the Obama administration missed the fentanyl crisisSubscribe0:00151527:55 Fine was surprised to learn when the toxicology reports came back that 12 people who overdosed between March and May had died from fentanyl. They ranged in age from 19 to 57, and most were from the northern part of the state. Fine notified the CDC about the cluster. On Aug. 30, 2013, the CDC in its Morbidity and Mortality Weekly Report highlighted the unusual spike in Rhode Island. It didn’t attract much national attention. Eighteen days before the CDC issued its “Notes from the Field,” then-Attorney General Eric H. Holder Jr. traveled to the other side of the country to issue one of the biggest policy proclamations of his career. Standing before hundreds of lawyers gathered for the American Bar Association’s annual conference in San Francisco, Holder announced that he was rolling back the aggressive prosecution strategy that had been launched to target the crack cocaine crisis of the 1980s and 1990s. Eric H. Holder Jr., U.S. attorney general, February 2009-April 2015 The Drug Enforcement Administration warned Holder in June 2014 about an alarming number of fentanyl deaths and the involvement of Chinese traffickers. His spokesman said the former attorney general did not take any action because the DEA didn’t make any specific requests. Calling the new policy “Smart on Crime,” Holder said he was directing federal prosecutors to stop bringing low-level, nonviolent drug charges that would trigger mandatory-minimum sentences. The charges had resulted in harsh sentences for first-time offenders, many of them young black men. Holder told his prosecutors to focus on large drug-trafficking organizations. He wanted a major reduction in the burgeoning federal prison population, but his initiative also was part of the Obama administration’s strategy to favor drug treatment over incarceration. “Our system is, in too many ways, broken,” Holder said that day. “A vicious cycle of poverty, criminality and incarceration traps too many Americans and weakens too many communities.” Prison reform activists, civil rights groups and some federal prosecutors hailed the new policy, laid out in a three-page Justice Department memorandum that became known as the “Holder Memo.” In 2014, 5,695 people died from fentanyl and other synthetic opioids. Kristen Coutu, 29, an assistant manager at GameStop in Cranston, R.I., was one of them. She died on Feb. 17. ‘This huge spike’ Tim Pifer and his team at the state crime lab in Concord, N.H., started to see the same pattern in 2014 that Fine had noticed in Rhode Island the previous year. “We were thinking, why would anyone inject something that’s so potentially deadly?” Pifer, the veteran chief of the lab, said in a recent interview. “We saw this huge spike in drug deaths.” To get the word out, state health and law enforcement officials in New Hampshire and Rhode Island joined with the DEA, which had been seeing the same pattern across New England. In January 2014, the DEA issued a bulletin warning local authorities nationwide about “killer heroin” cut with fentanyl. First responders needed to “exercise extreme caution” because fentanyl could be absorbed through the skin. The bulletin resulted in a few local news stories. But, once again, there was little national attention. “There was a stigma about being gay,” said Luke J. Nasta, 70, a former heroin addict who lost several friends to AIDS. “There is also a stigma about being addicted to drugs.” (Salwan Georges/The Washington Post) Nasta is executive director of Camelot, the largest drug treatment facility on Staten Island in New York. Participants in the program eat lunch on Sept. 6. (Salwan Georges/The Washington Post) In March, a month after actor Philip Seymour Hoffman’s heroin overdose generated national headlines, Holder released a video to notify the public of the rising number of heroin deaths across the country. He called heroin an “urgent and growing public health crisis.” Between 2006 and 2010, heroin overdose deaths had increased by 45 percent. “Confronting this crisis will require a combination of enforcement and treatment,” Holder said in the video. “The Justice Department is committed to both.” Holder made no mention of fentanyl; top officials in Washington were still focused on heroin and prescription pain pills. Loretta E. Lynch, U.S. attorney general, April 2015-January 2017 For much of her time in office, Lynch rarely mentioned in public statements the threat posed by fentanyl. Toward the end of her tenure, she directed the Justice Department to focus on the “greatest threats” to the nation, including fentanyl traffickers. Former DEA agents said they provided Holder with a personal briefing that included a 30-slide PowerPoint presentation about the dangers of fentanyl in June 2014, three months after Holder’s video. Several DEA officials were present, including then-DEA administrator Michele Leonhart. The PowerPoint, which The Washington Post reviewed, warned that heroin was being laced with fentanyl and there had been an “outbreak” of fentanyl overdoses in the Northeast. It also noted that the drug was being ordered over the Internet. The agency had traced the source to Chinese drug-trafficking organizations. While raising red flags, the PowerPoint presentation itself did not request any particular action. “We were hoping and expecting a briefing to the nation’s number one law enforcement official would not only raise the level of awareness, but would cause him to take action within the department to direct people to make this matter a high priority since people were dying,” Maltz, the DEA’s former agent in charge of the Special Operations Division, later told The Post. Maltz’s division prepared and delivered the PowerPoint. He said he and his agents believed that a national problem like fentanyl was “way bigger than the DEA,” and the attorney general could have taken a leadership role, urging other agencies to focus on the emerging threat. Downtown Manchester, N.H., from Rock Rimmon Park in the fall of 2018. The city is at the center of the fentanyl crisis, with firefighters and paramedics called nearly every day to overdoses. (Salwan Georges/The Washington Post) Leonhart did not respond to requests for comment. Holder declined an interview request. His former spokesman said it was up to the DEA to ask the attorney general for specific action. “It says something that the people pointing fingers at the attorney general can’t point to a single action they recommended that he declined to take,” said Matthew Miller, Holder’s former spokesman at DOJ. “Eric Holder made fighting the opioid crisis a major focus, he strongly supported the DEA’s work in this area, and if the officials trying to now lay the blame at someone else’s feet had asked for more assistance, he would have given it, as he did in nearly every instance a law enforcement agency made such a request.” Ten months after the briefing, Holder left the administration. By then, fentanyl was spreading across the country. Large increases in fentanyl seizures were being reported in Massachusetts, New Jersey, Ohio, Pennsylvania, Florida, Kentucky, Maryland and Virginia. At the same time, in the wake of Holder’s memo, federal drug cases were dropping. In a year, the number of people charged with federal drug crimes fell by more than 4,700 — from 27,106 in 2013 to 22,387 in 2014. “There was a dramatic decline in drug prosecutions,” Rod J. Rosenstein, who served as the U.S. attorney in Baltimore during the Obama administration and is now the deputy attorney general, recently told The Post. “That was a reflection of administration policy to de-emphasize imprisonment and to shift focus away from prosecution into treatment.” Michael Botticelli, director of the White House Office of National Drug Control Policy, March 2014-January 2017 He assumed office just as fentanyl overdoses began to soar. The former drug czar said the time lag of overdose data reporting from local communities was “incredibly frustrating” and made it difficult to “see around the corner.” Then-Deputy Attorney General Sally Q. Yates said in 2016 that U.S. Sentencing Commission data showed that the number of serious drug prosecutions — such as those involving firearms — increased. But a report by Justice Department Inspector General Michael E. Horowitz found that the sentencing data Yates used had “significant limitations” because it did not count the number of cases from drug agents that assistant U.S. attorneys turned down for prosecution. Horowitz concluded that there was no way to gauge the precise impact Holder’s memo had on drug prosecutions. Holder’s former spokesman said the memo did not take away tools from prosecutors. “It gave them discretion,” Miller said in a written statement. “They have the same ability to charge cases they have always had, they are just supposed to use discretion and not automatically trigger mandatory minimums when they aren’t appropriate. There are many reasons for the increase in fentanyl abuse, but there is no evidence that the Smart on Crime initiative is one of them.” But out in the field, some drug agents and prosecutors said they noticed an immediate difference, just as fentanyl started to show up on the streets. Dominick Capuano, a former veteran New York City narcotics supervisor who worked with federal task forces on Staten Island, said his agents traditionally launched their cases by arresting low-level dealers. Prosecutors would then offer plea deals for information about bigger traffickers. Law enforcement would work its way up to the kingpins. Federal laws carry long prison sentences and provide powerful incentives for people to talk. After the Holder memo, Capuano said federal prosecutors would no longer take the lower-level cases and morale among his drug agents plummeted as heroin and fentanyl overdoses soared. “The low-lying fish is where you start the cases,” said Capuano, who recently retired after 21 years on the job. “Those are the people who flip, who give information, and that’s what leads to these bigger cases.” Utah U.S. Attorney John W. Huber, an Obama appointee who was renamed to the position by the Trump administration, said in a recent interview that the change in policy “took the edge off” drug prosecutions. The message, he said: “This isn’t so important anymore.” In 2015, 9,803 people died from fentanyl and other synthetic opioids. Jonathan Squire Jr., 25, a dry cleaning employee and part-time college student in Louisville, was one of them. He died on Jan. 12. ‘It hits you in the heart’ On March 18, 2015, nine months after its presentation to Holder, the DEA put out its strongest warning yet to law enforcement agencies and the public about the mounting threat, issuing a “Nationwide Alert on Fentanyl.” The alert was a distillation of what the agency had learned about the drug in the previous two years. It was intended to sound the alarm, not only to the agency’s field offices, but also to federal and state officials, and to the public. The DEA warned that fentanyl was increasingly showing up in heroin. DEA agents said fentanyl was being ordered by traffickers and users over the Internet and the dark Web. They paid for the drug with bitcoin and other forms of cryptocurrency. The agency noted that Mexican cartels were smuggling fentanyl through ports of entry along the southwest border, hiding it in wheel wells and secret compartments in cars and trucks. State and local labs reported that seizures had risen from 942 in 2013 to 3,344 in 2014.

## Solvency

#### Federal Action Fails – State action is required to stop mass incarceration

Eisen 20 Lauren-Brooke Eisen is the Director of Justice at the Brennan Center for Justice. "Criminal Justice Reform at the State Level." Published by the Brennan Center for Justice on January 2, 2020. Available here: (Eisen 20 Lauren-Brooke Eisen is the Director of Justice at the Brennan Center for Justice. "Criminal Justice Reform at the State Level." Published by the Brennan Center for Justice on January 2, 2020. Available here: (https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level) - AP

The criminal justice system in America is complex, made up of county courts and jails, state courts and prisons, and a federal justice system with its own courts, judges, and prisons. Reducing mass incarceration means working across this tangled web. Despite the attention that the federal system gets, most Americans encounter the justice system at the county and state level. In fact, most incarcerated people in America are held in state and county facilities. That is why state reform efforts are so important. The staggering number of people behind bars in America Today, some 2.2 million people are incarcerated in county jails and state and federal prisons, giving the United States the largest prison population in the world. Many factors building over decades got us here. Since the late 1960s, the government has spent billions of dollars funding crime prevention in the United States that was focused more on policing and punishment than on addressing the root causes of crime. States also enacted a series of laws that dramatically lengthened sentences for many crimes and created entirely new ones. In particular, mandatory minimum sentencing and truth-in-sentencing provisions required individuals to serve longer periods of time behind bars, contributing to the explosion in the nation’s prison population. The criminal justice system encompasses more than 1,700 state prisons, 100 federal prisons, 1,700 juvenile correctional facilities, 3,100 local jails, and 80 jails on Native American reservations, as well as other facilities like military prisons. These figures underscore an important point: it is impossible to end mass incarceration by focusing on just one aspect of this sprawling system. Harsher state criminal laws, followed by the prison-building boom State laws contributed to mass incarceration, and those laws must change to end it. Federal crimes cover a relatively narrow range of conduct, such as drug offenses. State laws, on the other hand, cover crimes that are more recognizable to the average citizen, like drunk driving, shoplifting, and homicide. It’s no surprise, then, that state courts handle many more cases than federal courts. As crime rose in the 1970s and 1980s, lawmakers at the state and federal level enacted more draconian laws that ensnared more people in the criminal justice system. In 1973, legislators in New York passed the so-called Rockefeller drug laws, which imposed mandatory minimum 15-year terms for possession of marijuana and other drugs. Michigan and other states quickly enacted similar laws. Continuing this trend, Washington State in 1984 adopted the nation’s first “truth-in-sentencing” law, which required people to serve at least 85 percent of their sentences before becoming eligible for parole. In a domino effect across the country, 27 other states imposed similar requirements. Although violent crime in America peaked in 1991, and crime today remains at historic lows, our nation’s punitive responses to crime resulted in a prison building spree throughout the 1990s. According to the Congressional Research Service, in the mid-1990s, at the peak of the prison construction boom, a new prison opened every 15 days on average. Prosecutors and the vanishing criminal trial As the United States continued to build prisons, another trend emerged: the gradual disappearance of the jury trial and its replacement with plea bargaining, to the detriment of defendants’ rights. About 94 percent of criminal cases at the state level are resolved through plea bargaining. This trend increases the already vast discretion wielded by local prosecutors, who handle more than 95 percent of America’s criminal cases. Prosecutors enjoy unique authority to make decisions about what to charge someone with, making deals with witnesses, and negotiating pleas — and they frequently dictate sentences or sentencing ranges. As a result, they have gained greater leverage to extract guilty pleas from defendants and reduce the number of cases that go to trial, often by using the threat of more serious charges with mandatory minimum sentences or other harsh penalties. In fact, fewer than 1 in 40 felony cases results in a trial, according to data from 9 states that have published their records since the 1970s, when the ratio was closer to 1 in 12. As New York University Law and Sociology Professor David Garland recently wrote, “The move away from rehabilitation, the spread of mandatory penalties, the creation of new categories of crimes, and the priority given to public safety over offenders’ rights — these all increased prosecutors’ leverage and incentivized them to use it aggressively.” State prosecutors often seek higher sentences against people who exercise their right to trial — something known as “the trial penalty” or the “trial tax.” Historically, bringing the maximum possible charges has persuaded defendants to plead guilty instead of going to trial. This practice emerged to prioritize resources when courts across the country were overburdened lacked the resources to take every case to trial. Yet, as the late legal scholar William Stuntz noted in The Collapse of American Criminal Justice, “The law of guilty pleas made such pleas easy for prosecutors to extract, which allowed the justice system to increase dramatically the ratio of convicted felons to prosecutors and defense lawyers.” As Stuntz also explained, “Guilty pleas and the quick bargains that precede them have become the system’s primary means of judging criminal defendants’ guilt or innocence.” County jail systems Many of those incarcerated have yet to even be convicted of a crime. According to 2017 figures from the Justice Department, about 482,000 people in jail were “awaiting court action on a current charge,” and about 260,000 people were convicted of violating a law. Jails are run by local governments, often managed by a sheriff’s department, and they operate independently from other jails in the same state. Jail populations typically consist of those who are being held on bail or bond pending trial and individuals who are serving out short sentences of less than a year. On any given day, about 612,000 people are behind bars in county jails. But that number doesn’t reflect the roughly 10.6 million instances of people cycling through jails each year. These are not all separate individuals, as it includes some people who have been rearrested, sometimes many times in one single year. State prison systems State prisons today hold about 1.3 million people, representing the biggest chunk of those who are behind bars in America. They typically house people convicted of felonies, which in most states are crimes that carry a sentence of one year or more. According to Justice Department statistics, more than half of those in state prisons are serving sentences for violent crimes: approximately 14 percent were serving time in state prison for murder or non-negligent manslaughter, and about 13 percent of state prisoners were sentenced for rape or sexual assault. As opposed to the federal population, where nearly half of the prison population is incarcerated for a drug offense, only about 15 percent were convicted of a drug offense. Minor violations Many state prison admissions result from violations of probation or parole conditions. In fact, in 2017, the states of Washington, Idaho, Vermont, Utah, Maine, New Hampshire, and Pennsylvania admitted more than half of their prisoners for probation or parole violations. Overall, one-third of state prisoners admitted to prison in 2017 entered on a “new commitment” on such a violation, compared with only 10 percent in the federal system. These re-incarcerations are often for minor violations, such as failing a drug test or not completing a drug or other required program. States could make a huge dent in the prison population by passing reforms to ensure people are not sent back to prison for minor violations of conditions of probation such as not attending a hearing. Needed Reforms Given the toll that mass incarceration takes at the state and county level, it’s essential that we focus reform efforts there to ensure that states roll back punitive laws that send too many people to prison for far too long. We’ve created blueprints for that work, including recommendations for sentencing reform and guidelines for prosecutors. Another key step would be for Congress to pass the Reverse Mass Incarceration Act. None of these proposals offers a silver bullet. But they will do a great deal to improve the lives of countless Americans as we continue the fight to improve our justice system on multiple fronts.

#### No Solvency: Federal sentencing reform has little to no impact on states even in cases where grants produce direct incentives

Rosich and Kane 05 Katherine Rosich is a writer for the National Institute of Justice. Kamala Mallik-Kane is a senior research associate in the Justice Policy Center at the Urban Institute; she is a multidisciplinary researcher and project director with nearly 20 years of expertise studying the nexus between health, human services, and criminal justice. "Truth is Sentencing and State Sentencing Practices." Published by the National Institute of Justice on July 1, 2005. Available here: (https://nij.ojp.gov/topics/articles/truth-sentencing-and-state-sentencing-practices) - AP

Starting in the late 1980’s, States enacted various reforms to increase punishments for violent offenders and ensure greater certainty in sentencing, including mandatory minimum sentences and truth in sentencing (TIS). TIS refers to practices designed to reduce the apparent disparity between court-imposed sentences and the time offenders actually serve in prison. Federal legislation passed in 1994 as part of the Violent Crime Control and Law Enforcement Act (“the Crime Act”) and amended in 1996 aimed to promote reform by providing States with grants to expand their prison capacity if they imposed TIS requirements on violent offenders. The Federal TIS Incentive Grant Program was based on a so-called 85-percent rule, meaning that States were to have or pass laws requiring serious violent offenders to serve at least 85 percent of their imposed sentences in prison.[1] Several grant eligibility criteria were established, allowing States with diverse sentencing structures to qualify, including those with determinate or indeterminate sentencing and those with parole release. An Urban Institute study sponsored by NIJ examined the effects of this Federal TIS legislation on State TIS reforms and of selected State TIS policies on prison populations. The study focused on two questions: Did States incorporate TIS into their laws and, if so, to what extent did the Federal TIS Incentive Grant Program influence reforms? Although many States had enacted TIS laws, the study concluded there was limited Federal influence on State TIS policies. State reforms typically pre-dated the Federal legislation or were incremental adjustments to existing practices. Did State TIS practices lead to changes in prison populations? The study found that State TIS practices generally increased the expected length of time to be served, but these increases were rarely the main contributor to increases in prison populations. Changes in crime rates, arrests, and prison admissions were often more influential. Effects of the Federal TIS Incentive Grant Program on State Reforms The Federal TIS Incentive Grant Program was implemented during a time when many States were already reforming their sentencing structures, approaches, and practices. State TIS reforms varied widely—for example, the percentage of sentence to be served differed and could be applied to either the minimum or maximum term—and many pre-dated the enactment of the Federal grant program. By the end of the 1990’s, regardless of whether they received Federal TIS grants, most States (41, plus the District of Columbia) had implemented some form of TIS activity: 28 States and the District of Columbia had met the eligibility criteria for Federal funding and received grants, while 13 States that had a form of TIS activity did not receive Federal TIS grants. Having systematically reviewed all 50 States’ sentencing reform activities before and after the enactment of the Federal TIS Incentive Grant Program in 1994, the researchers concluded that the Federal program, at best, modestly influenced State TIS reforms. Overall, Federal TIS grants were associated with relatively few State TIS reforms. There was relatively little reform activity after the 1994 enactment of the Federal TIS grant program, as many States had already adopted some form of TIS by that time. A comparison of States’ TIS provisions before and after 1994 found that: Most States (30) made no further changes to their TIS laws (including nine States that remained without any TIS laws). Seven States made slight changes to the percentage of sentence to be served by violent offenders (for example, from 75 to 85 percent). Four States and the District of Columbia increased the percentage of sentence to be served and eliminated parole release for violent offenders. Nine States that had no TIS laws before 1994 passed sentencing reforms that included TIS provisions. Of the 21 States that enacted reforms after 1994, some pursued Federal TIS grant funding and some did not. Analysis of the reform process and reports from State officials revealed that Federal TIS grant funding was a consideration in some but not all of the States that made incremental changes to increase the severity of existing TIS requirements. However, Federal TIS grant funding was rarely the impetus behind major reforms. In the nine States that introduced TIS provisions, the reform process typically began before 1994 and, in all but one, State officials cited it as a minor consideration relative to other goals. The analysis of reforms in just those jurisdictions that received Federal TIS grants (28 States and the District of Columbia) revealed a similar pattern of limited Federal influence. Nearly half of the States (13) were funded on the basis of preexisting TIS practices. Although Federal TIS grant funding was often cited as influential in the nine States that made incremental changes to their existing TIS laws, among the seven jurisdictions (six States and the District of Columbia) that undertook major reforms, it was reported as a significant consideration in the reform process by only one State. Furthermore, among States that received Federal TIS funding, the average annual grant award of $7.9 million was relatively modest, equivalent to an average of 1 percent of the States’ annual corrections expenditures. ABOUT THE STUDY—LEGISLATIVE EFFECTS The effects of the Federal TIS Incentive Grant Program on State laws were evaluated through an analysis of the Federal legislation along with a systematic examination of the timing and nature of relevant State legislation. Interviews with State and Federal officials were also conducted, and the existing literature was reviewed.

#### No Solvency - Recidivism and incarceration are best predicted by behavior

DeLisi and Wright 19 Matt DeLisi is coordinator of criminal justice studies, professor in the Department of Sociology, and faculty affiliate of the Center for the Study of Violence at Iowa State University. John Paul Wright is a professor at the School of Criminal Justice at the University of Cincinnati. "Behavior Predicts Why Some People Spend Their Lives In Poverty and Social Dysfunction." Published by Behavior Matters in Summer 2019. Available here: (https://www.city-journal.org/behavioral-poverty) - AP

Researchers in the United States, Europe, and Asia have led longitudinal studies examining how various features of an individual’s life are associated with conduct problems. These studies also have shed light on various protective factors that appear to buffer youth from antisocial behavior, even in negative environments. Chief among these factors are higher intelligence (especially verbal intelligence), better self-regulation, a long-term time horizon with expectations for future achievement, and greater parental investment. Protective factors and risk factors both have compelling predictive power well into adulthood, as shown compellingly by findings from the Dunedin Multidisciplinary Health and Development Study, which has tracked a birth cohort of 1,037 individuals in Dunedin, New Zealand, since 1972. Researchers found that just four factors present as early as age three—maltreatment, low IQ, low self-control, and low socioeconomic status—were significantly associated with life outcomes four decades later. They also compared the 22 percent of the cohort showing the greatest risk profiles with the 30 percent of the cohort showing the lowest risk profiles. The comparisons starkly revealed the relative societal burden that each group would go on to impose. The more severe 22 percent—those whom we assert exhibited behavioral poverty—accounted for 66 percent of the social-welfare spending, 77 percent of the prevalence of fatherless children, 54 percent of the prevalence of smoking, 40 percent of the prevalence of excess weight/obesity, 57 percent of hospital stays, 78 percent of prescription fills, 36 percent of injury claims, and 81 percent of crime. The lowest-risk 30 percent accounted for 6 percent of social-welfare spending, 3 percent of the prevalence of fatherless children, 7 percent of the prevalence of smoking, 1 percent of the prevalence of excess weight/obesity, 7 percent of hospital stays, 3 percent of prescription fills, 15 percent of injury claims—and 0 percent of crime. The Dunedin data reveal the sprawling negative consequences of having poor self-regulation and the equally versatile benefits of having good self-regulation. Persons with behavioral poverty live moment to moment and give little consideration to how their conduct affects others. What could be better evidence of this than siring children, and then neither acknowledging nor parenting them? Such individuals are likely to smoke, drink alcohol to excess, and use drugs, and equally likely to drive recklessly, to play with loaded firearms, to run from the police—and not to exercise, eat well, enjoy a regular sleep schedule, or take their health seriously. Given these behaviors, they often rely on the emergency room for medical care. Their actions too often come at others’ expense, in terms of the victimization and criminal-justice system expenditures that arise from their criminal offending and in their reliance on welfare programs. Behavioral poverty is perhaps most vividly illustrated in the lives of drug addicts. Here, adult responsibilities and even basic human needs, such as eating and sleeping, are subordinated to the compulsive ingestion of alcohol, cocaine, methamphetamine, heroin, or a mixture of these substances. We’ve interviewed offenders who reported staying mostly awake for ten to 20 days while on a binge. When drugs are not available, the addicts usually resort to crime. Drug offenders commit offenses at rates several times higher than their non-drug-using peers. Much of the incidence of crime, particularly burglary and theft, is tied to drug use. Criminological research demonstrates the failure of many offenders to turn their lives around. Using data from the Northwestern Juvenile Project, a longitudinal study of 1,829 juveniles detained at the Cook County Juvenile Temporary Detention Center in Chicago, with follow-ups after release, Feinberg School of Medicine professor Karen Abram and her colleagues examined positive outcomes in eight areas: educational attainment, residential independence, gainful activity, interpersonal functioning, parenting responsibility, desistance from criminal activity, abstaining from substance abuse, and mental health—the basic responsibilities of adult life. Only 55 percent of the female delinquents and 22 percent of the males achieved more than half of the positive outcomes. These findings were largely reaffirmed by a series of studies on the Second Chance Act, where offenders reentering society were provided with a wide range of social, psychological, and employment services. All these services and support systems had almost no effect and, in some cases, were associated with worse outcomes. When considering the recipients’ behavioral poverty, these results are not surprising. Behavioral poverty makes compliance with the criminal-justice system highly unlikely. First, except for incarceration—where a sedentary lifestyle is somewhat possible—other forms of criminal punishment, such as probation or parole, impose requirements on correctional clients that many find challenging to meet. They must work or provide evidence that they are seeking employment; they must abstain from alcohol and drugs; they must attend various treatment programs; they must avoid associating with victims in their case or with categories of people who share their victims’ characteristics—for instance, sexual offenders must stay away from children—and with other offenders, felons, or gang members. They must pay fines and restitution, meet with their probation or parole officer at scheduled times, and cooperate with correctional officers conducting home visits. The correctional system accommodates many technical violations and even many substantive-law violations and continued substance use while an offender is under supervision. Extensive criminal-justice system data indicate that many offenders lack the wherewithal to succeed, and this dismal assessment is intensified for the behaviorally poor. A recent Bureau of Justice Statistics report on recidivism among more than 400,000 offenders released from prison showed that nine years after release, only 18 percent remained arrest-free.

## Framing

#### Prioritize security when evaluating impacts – the ability to live establishes the frame that we understand all other impacts

Sears 20 Nathan Alexander Sears is a PhD Candidate in Political Science at The University of Toronto; Trudeau Fellow in Peace, Conflict and Justice at the Munk School of Global Affairs; and 2019/2020 Cadieux‐Léger Fellow at Global Affairs Canada. "Existential Security: Towards a Security Framework for the Survival of Humanity." Published by Durham University and John Wiley & Sons on April 17, 2020. Available here: (https://onlinelibrary.wiley.com/doi/10.1111/1758-5899.12800) - AP

One paradigm of thinking in particular has shaped the security practices of human societies: security from violence . The relationship between security and violence helps provide an answer to the constitutive question about what security is : security is protection from violence between human actors. While this helps to create a bounded realm of security for theory and policy, it ultimately rests on an analytical – and normative – decision about what is (not) to be considered a ‘security issue’ (Huysmans, 1998; Ullman, 1983). Within security studies, this represents either the core assumption of most theoretical and empirical inquiry, or the central point of contention. It is also reflected in the security practices of nations, in which ‘the state’ continues to be understood in the ‘Weberian’ sense of possessing the monopoly of the legitimate use of violence, and state practices for ensuring security against the threat of violence are well‐understood and developed. Thus, states have found it relatively easy to adapt to threats that fall within the scope of ‘security from violence’ (e.g. terrorism), while faring relatively poorly in responding to threats outside the scope of what is typically considered a ‘security issue’ (e.g. environmental degradation). Ultimately, the theoretical logic of security as protection from threats to the survival of some referent object is unchanged by variation in its empirical content. Whether the referent object is a human being, a nation, or planet Earth, or whether the threat is terrorism, environmental pollution, or nuclear war, the logic of protection remains. Security can therefore be conceptualized as a distinct domain . It is distinct not for its empirical concerns, but for its theoretical logic. For instance, the domain of economics is ‘about wealth’, with a theoretical logic that emphasizes the constituent elements of, inter alia , production and consumption. Politics is ‘about governance’, with a theoretical logic that focuses on power and authority. To treat a problem within a particular domain is to apply its theoretical logic to that problem. The choice of domain is not neutral; it shapes how humans think about and act towards a problem. If one considers the problem of climate change within the domain of economics, then the analysis would most likely examine how certain production and consumption patterns drive climate change, or its consequences for poverty and inequality. The question of domain is therefore salient for policy, since the application of a particular logic to a problem will reveal certain physical and/or social dynamics while obscuring others. Thus, to say that anthropogenic existential threats should be treated as a ‘security issue’ is to invoke a logic of protection. While it may be wrong to assert, a priori , that ‘security’ is a higher goal or value than all others (Baldwin, 1997), security holds a privileged position in human societies. Thomas Hobbes saw the value of security as being of such importance to the individual so as to justify the sacrifice of human liberty found in the ‘state of nature’. In International Relations (IR), neorealist theory gives a privileged status to security amongst the possible objectives of national policy, with Kenneth Waltz (1979) seeing ‘survival’ as the core interest of states, and John Mearsheimer (2001, p. 31) arguing that ‘survival is the primary goal of great powers’. Securitization theory contends that ‘security’ is ‘the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics’ (Buzan et al., 1998, p. 23). Security is therefore not only a distinct domain, but one that appears to hold a privileged position amongst the possible values and goals of human societies. This, too, has important consequences for policy, since a problem that is treated as a matter of security may be given heightened priority – for example, greater urgency of attention and/or the allocation of resources – than would be the case if it were treated as a matter of ‘normal’ policy; for security implies that if an existential threat is not dealt with, nothing else matters (Buzan et al., 1998, p. 24). While calling some problem a matter of security can be dangerous (e.g. the expansion of the political powers of the state for ‘security’ against the threat of terrorism),7 it may be justified if there is a high probability that treating it as ‘normal’ policy could lead to disastrous outcomes. Thus, to argue that anthropogenic existential threats are a matter of ‘security’ is not only to apply a logic of protection, but also to place them above ‘normal’ policy.

#### Prioritizing human-caused existential threats is key to developing better long-term oriented strategies and thinking

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Existential security Humanity’s capacity for self‐destruction poses a radically different problematique for security policy: survival interdependence . Survival interdependence means that the survival of human societies on one side of the world increasingly depends on the (in)action of human societies on the other. For most of history, human societies – clans, tribes, city‐states, empires, and nation states – could seek security irrespective of the security of other societies; but today no single nation state can solve the biggest security problems of the times on their own, nor in many cases can they hope to escape their security consequences. Humankind is becoming ever more tied together as a single ‘security unit’. The forces behind this process are not political – indeed, international politics remains stubbornly committed to ‘national security’ – but material (Deudney, 2007, 2018), especially certain human‐driven trends in technology and the environment that could threaten humanity with destruction. Security policy must take into account the significance of these changes. Thus, a new security framework is required. ‘Existential security’ responds to a similar set of questions as alternative security frames (see Table 2). Security for whom? The ‘referent object’ of existential security is humanity. Security is therefore about humanity’s survival . Security for which values? The ‘values’ to be secured are, at the minimum, the survival of humanity (i.e. the biological entity of the human species and cultural entity of human civilization), and, at the maximum, the long‐term prosperity of human civilization and the planet. The security of humankind ranges from the survival of existing human beings and societies to past and future generations of humanity – the past whose memory is recorded in history and preserved by the present, and the future whose possibilities of existence depend on actions taken in the present. Existential security therefore adopts an intergenerational perspective of security, not only for utilitarian reasons (e.g. quantifying the potential gains/losses in ‘future lives’) (Baum, 2015; Bostrom, 2002, 2013; Torres, 2017), but also because the significance of humankind – that is, all its past sufferings, present achievements, and future potential – is at stake, since existential risks simultaneously threaten humanity’s past, present, and future (Morgenthau, 1961). How much security? Nick Bostrom (2013, p. 19) proposes the principle of ‘maxipok’, in which security policy would seek to ‘maximise the probability of an “OK outcome”, where an OK outcome is any outcome that avoids existential catastrophe’. While reducing the probability of existential risk to ‘zero’ may be impossible, the amount of security should be determined by a level of risk‐aversion equivalent to existential threats. Since thinking in terms of ‘worst‐case scenarios’ is a common practice in the security domain, and since some ‘worst‐case scenarios’ could include civilizational collapse or human extinction, this should imply a strong aversion to risk. Although there are logical limits to the ‘precautionary principle’ with respect to existential risks,10 it has practical implications for security policy, such as taking preventive, cost‐effective, and long‐term oriented action (Clarke, 2005). More generally, making (existential) security a priority does not imply the sacrifice of all other values (e.g. political liberty, economic wealth), but it does mean that potential gains in other values be weighed against potential losses in security. Security is always a question of degree (Wolfers, 1952). From what threats? Existential security is concerned with those threats that have their origins in human agency and could bring about civilizational collapse or human extinction. This requires broadening the security agenda beyond its conventional focus on ‘security from violence’, while excluding ‘natural’ existential risks (e.g. asteroids and supervolcanos). There are two main reasons for emphasizing anthropogenic threats. The first is the low probability of natural risks on timescales relevant to humanity (Bostrom, 2013; Bostrom and Cirkovic, 2008;), whereas anthropogenic threats are, by definition, relevant to human timescales, including the twenty‐first century (Rees, 2003). The second is that many prevention/mitigation strategies for anthropogenic existential threats act on their drivers in human agency, which makes little sense for natural risks. The spectrum of anthropogenic existential threats includes threats to international peace and security (e.g. nuclear war), dangers from human intervention in the natural environment (e.g. climate change), and risks from emerging technologies (e.g. AI). Existential security must take into account the complex relationships between human, environmental, and technological systems, as well as inherent uncertainties about existential threat scenarios (e.g. ‘nuclear winter’, ‘hothouse Earth’, or ‘superintelligence’). By what means and modes of protection? The existential security frame requires innovation in the means and modes of security policy. This is because the conventional emphasis on military capabilities and balancing is either inadequate (e.g. nuclear war), irrelevant (e.g. climate change), or counterproductive (e.g. AI). Moreover, the pursuit of relative gains/losses in security is fundamentally misguided for anthropogenic existential threats, since – as a general principle – either all human societies are safe, or none of them are. Existential security requires a paradigm shift from thinking about security policy as a matter of (national) ‘defense’ to being a matter of (global) ‘governance’. Governance is not an end in itself (e.g. the creation of a ‘world state’), but rather a means to security (i.e. the survival of humankind). The pursuit of existential security requires means of protection that involve a comprehensive set of political, economic, and technological resources – not merely military capabilities. The modes of protection are primarily ‘restraint’ and ‘resilience’. Restraint is a prevention strategy, while resilience is a mitigation strategy, which take on different forms for different threats. For the nuclear threat, restraint manifests itself in the policies of disarmament, arms control, and nonproliferation, while resilience comes mostly in the form of nuclear bunkers and shelters (Bull, 1961; Deudney, 2007). For climate change, restraint is primarily about limiting greenhouse gas emissions and the degradation of carbon sinks, while resilience is about making societies less vulnerable to heat stress, rising seas, food and water scarcities, new diseases, and human migration (Wallace‐Wells, 2019; World Bank, 2012). For AI, restraint entails the slow and careful development of AI (Bostrom, 2014) – or perhaps forgoing the ‘AI dream’ altogether (Joy, 2000) – while resilience is about reducing societal vulnerability to technological disruption (e.g. cybersecurity). Importantly, the growing survival interdependence of human societies implies that restraint and resilience must be mutual to be effective. If only some states choose disarmament or nonproliferation, if some societies reduce carbon emissions while others increase them, or if one technology firm decides to rapidly pursue ‘superintelligence’, then the (in)action of some actors may affect the security of all humankind. This emphasis on mutual restraint and resilience contrasts with the national security frame's emphasis on ‘self‐help’.