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## Dealing with Mass Incarceration The 2019 Minnesota Law Review Symposium - Mass Incarceration

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## Article

# Dealing with Mass Incarceration

Alfred Blumstein<sup>†</sup>

### INTRODUCTION

In today's highly polarized political environment, one of the few issues on which one can see widespread agreement across the parties is the desire to reduce prison populations.<sup>1</sup> This agreement results from the nation's impressively high incarceration rate (typically described as "mass incarceration"), which is almost five times its formerly stable rate, several times higher than all the other developed countries, and is essentially the highest rate in the world.<sup>2</sup> Such agreement also flies in the face of the impressively low crime rate currently prevailing in the United States.<sup>3</sup>

Despite this agreement, however, there are strong forces vigorously committed to a "tough on crime" policy and strongly opposed to such reductions.<sup>4</sup> That opposition comes from a rela-

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1. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/5VLD-DAKF>].

2. ROY WALMSLEY, *WORLD PRISON POPULATION LIST 1* (6th ed. 2006).

3. Samuel Stebbins, *The Midwest is Home to Many of America's Most Dangerous Cities*, USA TODAY (Oct. 26, 2019), <https://www.usatoday.com/story/money/2019/10/26/crime-rate-higher-us-dangerous-cities/40406541> [<https://perma.cc/3JZC-L6FK>] ("There were 369 violent crimes committed in 2018 for every 100,000 Americans, nearly the lowest violent crime rate in the United States in more than three decades.").

4. See, e.g., Alan Greenblatt, *"Tough on Crime" Trump Comes Out for Sentencing Reform*, AM. CONSERVATIVE (Nov. 16, 2018), <https://www.theamericanconservative.com/articles/tough-on-crime-comes-out-for>

tively small political minority who primarily seem to want to exploit the political advantage<sup>5</sup> of appealing to a public who are regularly confronted with news about crime (resulting from the journalistic motto of “if it bleeds, it leads”) and so, overperceive their risks of crime victimization.<sup>6</sup> Also, much of the public views incarceration as the dominant and universally effective means of controlling crime, even when it may be of minimal effectiveness, such as with the incarceration of drug sellers, when incarceration more often serves to recruit replacements, rather than deterring or incapacitating drug sales.<sup>7</sup>

There have been a wide variety of attempts in the literature to respond to mass incarceration by seeking approaches that would reduce the prison population.<sup>8</sup> Some authors even propose a target for the reduction; typically, the most extreme target is a reduction of about 50%,<sup>9</sup> which would not even come close to the incarceration rates of other developed nations. There are many possible approaches to the reduction, and they warrant investigation to assess their effectiveness, crime or other costs they might incur, and their political feasibility in different jurisdictions. For example, Frank Zimring emphasizes one approach designated as “realignment” based on the prison-reduction approach that has been taken in his home state of California, and he emphasizes similar approaches more generally.<sup>10</sup> He also recognizes how many of the reductions in prison population have

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-sentencing-reform [<https://perma.cc/JN4H-LFRF>] (describing various actions that President Trump took that signaled to supporters that he was “tough on crime”).

5. Cf. Lorna Collier, *Incarceration Nation*, 45 AM. PSYCHOL. ASS'N 56 (2014) (explaining how legislators and politicians found it politically advantageous to continue to pursue punitive crime control policies despite their cost).

6. THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 121 (Jeremy Travis et al. eds., 2014).

7. Alfred Blumstein, *Making Rationality Relevant—The American Society of Criminology 1992 Presidential Address*, 31 CRIMINOLOGY 1, 7 (1993).

8. Cf. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 217 (2010) (explaining the difficulties with dismantling mass incarceration).

9. See, e.g., Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503, 503 (2014).

10. FRANKLIN E. ZIMRING, THE INSIDIOUS MOMENTUM OF MASS INCARCERATION (forthcoming 2020) (manuscript ch. 1 at 18).

imposed heavy burdens on local jails and offers many suggestions for easing that burden.<sup>11</sup> In this paper, I raise some questions about the effectiveness of Zimring's approaches and explore a number of alternatives.

Zimring addresses two important themes of how mass incarceration came about and how to bring it down. In the last chapter of his forthcoming book, he also addresses an important aspect of the widespread criminalization in the United States and the collateral consequences suffered by a large number of people, and how these consequences can last well beyond the explicit punishment given to them, often for people's entire lives.<sup>12</sup> Many of the collateral consequences are predominantly targeted at reducing the risks of future crimes that might be associated with identified offenders,<sup>13</sup> but they rarely address the empirical reality that those risks diminish with time free from further involvement with the criminal justice system and that redemption from the burdens people suffer would be provided by dropping the consequences altogether.<sup>14</sup>

#### I. AN EARLIER PERIOD OF STABLE INCARCERATION RATE

The dramatic rise of incarceration in the 1980s and 1990s is well-established. This rise is demonstrated in Figure 1, which depicts the incarceration rate (the annual number of state and federal prisoners divided by the United States population that year), over almost a century from 1920 to 2017.<sup>15</sup>

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11. *Id.* (manuscript ch. 9 at 23).

12. *Id.* (manuscript ch. 10 at 2).

13. *See generally id.* (manuscript ch. 10) (discussing the thousands of restrictions and prohibitions imposed on offenders and the secondary impacts on those with relationships to the offender).

14. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327 (2009).

15. Figures 1, 2, and 4 are based on official data from the Bureau of Justice Statistics. *See* JENNIFER BRONSON & E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017, at 41 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/EC5K-BYFW>]; DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS 1925-81, at 1 (1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf> [<https://perma.cc/HV3Q-8B72>]; *see also* THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 1 (2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/GH7U-YMZK>].

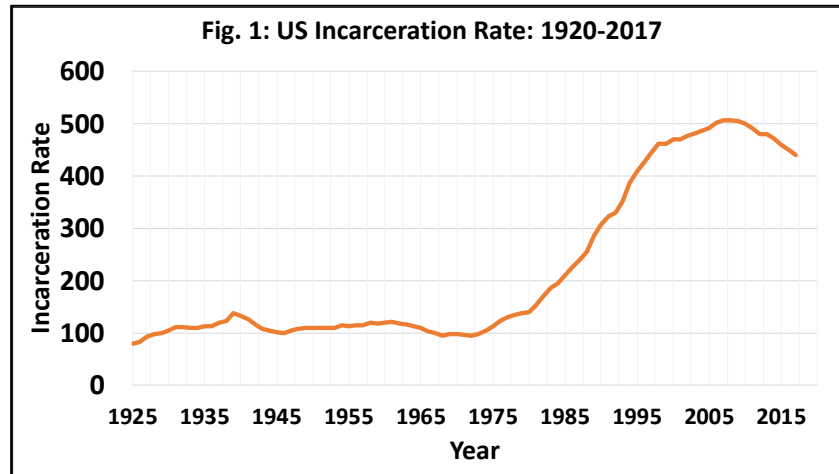
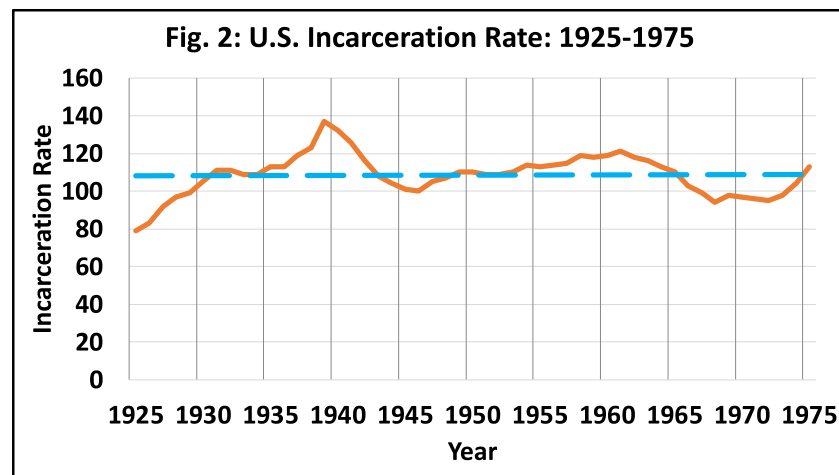


Figure 2 further demonstrates that there was relative stability in the incarceration rate for the first half of that century.



The horizontal trend line depicts the rather stable incarceration rate of 110 per 100,000 (or 0.11% of the U.S. population), with a standard deviation of about 8%, that prevailed in the United States from the 1920s to the early 1970s.<sup>16</sup> From the figure, we can see that there was a rise of incarceration during the depression years of the 1930s and a clear decline during World War II,

16. See *supra* note 15.

when the nation had much better uses for its young men than to have them lingering in prison cells.<sup>17</sup> Those societal impacts clearly affected the ups and downs of that stable rate.

During this whole period, the operational policies of the criminal justice system were under control of the functionaries within that system. If the prison population was getting too high and prisons were getting overcrowded, then a somewhat earlier release on parole could accommodate that.<sup>18</sup> On the other hand, if there was slack in prisons, then the system could pay more attention to crimes of lesser concern like pornography or the sex trade.<sup>19</sup> A paper documenting these observations was published in 1973,<sup>20</sup> just as the national incarceration rate was beginning its dramatic climb as shown in Figure 1, which almost surely contradicted this otherwise interesting academic theory.

## II. THE DRAMATIC RISE OF INCARCERATION RATE

As is evident from Figure 1, there was a slight growth in the 1970s followed by a dramatic rise in the 1980s and 1990s, and a rather stable pattern after 2000. While there was some rise in the 1970s and general stability after 2000, there was a slight increase from 2007 to 2008 and a slight decrease after that. The bulk of the increase occurred in the 1980s and 1990s.

As documented by Allen Beck and myself,<sup>21</sup> it is useful to consider the factors contributing to the dramatic rise shown in Figure 1. The rise could be attributable to an increase in any combination of the four following factors:

- reported crimes;
- arrests per crime;
- commitments to prison per arrest; and
- time served in prison.<sup>22</sup>

An analysis of the trends in these four aspects shows that there was no major increase in reported crimes over this period.<sup>23</sup> Furthermore, there was no major increase in arrests per

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17. *See supra* note 15.

18. Alfred Blumstein & Jacqueline Cohen, *A Theory of the Stability of Punishment*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 198, 204 (1973).

19. *Id.*

20. *Id.*

21. Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17 (1999).

22. *Id.* at 39.

23. *Id.* at 29 fig.4.

crime<sup>24</sup>—a somewhat surprising result in light of the significant improvements in policing technology and management over that period. Virtually the entire growth has been attributable to increases in the rate of commitments per reported arrest and in time served.<sup>25</sup> Both are associated with decisions at the stages of prosecution, adjudication, sentencing, probation, parole, and beyond.<sup>26</sup> These stages were influenced by legislation that affected decision-making at each time.<sup>27</sup> During the early years of the rise, until about 1993, about three-quarters of the growth was attributable to commitments; after that, the strongest impact was associated with time served.<sup>28</sup>

That phenomenon is important because one must pay attention to these stages if one is to have any meaningful impact on reducing the incarceration rate. This focus should include decisions of the prosecutors, judges, and parole boards, and certainly the legislatures that prescribe both limits and opportunities to these decision-makers.

### III. THE DYNAMICS OF THE RISE

Analysis of the dynamics of the rise in incarceration started in the 1970s as narcotic drugs became more widely available in illegal markets. As I saw it, the rise was initiated by parents who saw their children and their friends, mid-teenagers and beyond, involved as consumers in those markets.<sup>29</sup> They became particularly concerned about those dangers and turned to the political system, particularly legislators, and pushed for them to “do something” to address that problem. At first, legislators saw little that they could do because the criminal justice system had largely been operating on its own. Then, the politically astute legislators came to realize that sentencing practices were con-

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24. *Id.* at 41.

25. *Id.* at 33–36.

26. *Id.* at 33.

27. *Id.* at 57.

28. *Id.* at 33.

29. These insights derive from my involvement with the criminal justice system, not only as an academic but also as a participant in the policy process. I started as a member of the Allegheny County Regional Planning Council of the Governor’s Justice Commission (1969–73) and then as chairman of the Pennsylvania Commission on Crime and Delinquency (1979–90), the agency that coordinated criminal justice programs in the state and allocated Federal funds to that purpose, and as a member of the Pennsylvania Sentencing Commission (1987–97).

strained by long-standing sentencing law, primarily by specifying maximum and minimum sentences for various ranges of offenses. Also, in many cases, the violations of possessing or even selling illegal drugs had not been seen as serious enough to warrant incarceration, so violators were often sentenced to probation.

Thus, those sentencing laws became reasonable targets for “doing something.” First, probation was seen as a reasonable target, so some level of jail or prison sentence could be made mandatory. Then, it would be reasonable to attach a reasonably low mandatory-minimum sentence of two years. That failed to affect the drug trade, so five years became the norm, and then still higher, even to life sentences for certain crimes and prior records. This still did not do much to affect drug trafficking because the illegal drug market was quite facile in recruiting replacements for those taken off the streets for however long.

It is also interesting to note the timing of the replacements and the population from which they were drawn. Arrest reports maintained by the FBI’s Uniform Crime Reports (UCR) show an increase in adult arrests for drug offenses in the early 1980s, but not much growth in juvenile drug arrests.<sup>30</sup> Starting in 1985, however, there was significant growth in juvenile drug arrests, primarily of African-American juveniles.<sup>31</sup> Many of these arrests occurred for selling crack, a variant of powder cocaine, in markets that were operated in the streets, predominantly by African Americans.<sup>32</sup> Inevitably, the street markets also provide a locus for violence. Everyone operating a street drug market had to carry a gun in order to defend themselves against a robber targeting their money or their drugs.<sup>33</sup> Inevitably, those guns were associated with violence between a seller and a cheated consumer, or between competing sellers.<sup>34</sup>

In 1986, Congress passed the Anti-Drug Abuse Act that provided for a five-year mandatory minimum sentence for 500 grams of cocaine, but for only 5 grams of crack.<sup>35</sup> This outrageous

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30. See TINA L. DORSEY & PRISCILLA MIDDLETON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, DRUGS AND CRIME FACTS 19 (1994), <https://www.bjs.gov/content/pub/pdf/DCF.pdf> [<https://perma.cc/J6VD-R5LZ>].

31. Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. LAW & CRIMINOLOGY 10–36 (1995).

32. *Id.*

33. *Id.*

34. *Id.*

35. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-3.



100:1 ratio undoubtedly reflected a response to the violence associated with crack markets, but some saw it as having involved racist intentions.<sup>36</sup> This system disproportionality stayed in place until 2010 when Congress replaced it; but this new law still retained an 18:1 crack-to-powder ratio.<sup>37</sup>

One important negative consequence of the growing presence of juveniles in the crack markets was lesser restraint in the use of guns.<sup>38</sup> Young sellers and their colleagues were involved in a major increase in homicide by and against young African Americans.<sup>39</sup> Thus, the naïveté in the heavy-handed mandatory minimum sentencing laws not only failed to have much impact on the marketing of drugs because of the replacement of adult dealers with juveniles, but it also gave rise to the recruitment of a more dangerous and less restrained body of sellers.<sup>40</sup>

The legislators who invoked the mandatory-minimum sentencing laws were not likely to study the degree to which those laws failed to impact the operation of markets, but the laws did “work” in the sense that they resulted in public appreciation and approval, largely because the public generally holds the view that incarceration inherently “works” to reduce crime and that more incarceration works even better.<sup>41</sup> The more subtle distinctions between punishments that reduce crime through deterrence or incapacitation and punishments that are frustrated by accommodations in the crime markets are sufficiently complex to not enter such political assessments.

Seeing the political success of their “tough on drugs” actions provided an incentive to legislators to do the same with other crimes, especially those of significant public concern like violent crimes and sex offenses. Legislative actions involving mandatory-minimum sentencing laws, fixed-sentencing laws replacing minimum/maximum laws, and three-strikes laws also propagated.<sup>42</sup> All this strengthened the prosecutors’ hands in their plea negotiations, sent messages to the judges encouraging tougher sentences, and encouraged parole boards to be more

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36. See, e.g., AM. CIVIL LIBERTIES UNION, *CRACKS IN THE SYSTEM: 20 YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW* (2006).

37. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

38. Blumstein, *supra* note 31, at 5.

39. *Id.*

40. *Id.* at 8–9.

41. THE GROWTH OF INCARCERATION, *supra* note 6, at 121.

42. *Id.* at 123.

risk-averse in who they released on parole and recommitted following parole violations.<sup>43</sup> All of these things contributed to the growth in incarceration during this period.<sup>44</sup>

In 1994, Congress passed the Violent Crime Control and Law Enforcement Act that awarded grants to states for prison construction, so long as they passed laws requiring that offenders convicted of Part 1 violent crimes (murder, rape, aggravated assault, and robbery) serve at least 85% of their sentence.<sup>45</sup> In contrast to most of the other federal sentencing laws that relate primarily to federal courts, this law addressed state policies.<sup>46</sup> Thus, the federal fiscal incentives provided contributed directly to the growth in time served in state prisons.<sup>47</sup> It is ironic that this 1994 law (known informally as the “Truth in Sentencing” law) was one of the last federal “tough on crime” laws responding to the growth of violent-crime rates since 1986,<sup>48</sup> but 1994 was the start of the major national “crime drop,”<sup>49</sup> which would not be reflected in the UCR crime reports until late 1995.

As should have been expected, there was no significant identifiable impact on drug offending, but there was an important shift in the demand for crack, largely as a consequence of the growing realization of some of the personal side-effects of crack use.<sup>50</sup> This reduction in the demand for crack began in the early 1990s, and it resulted in a lesser involvement of African-American juveniles in drug markets and a consequent decline in their arrests for drug offenses,<sup>51</sup> as well as a related decline in their

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43. *Id.* at 110.

44. *Id.*

45. See FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 49 (2007).

46. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

47. *Id.*

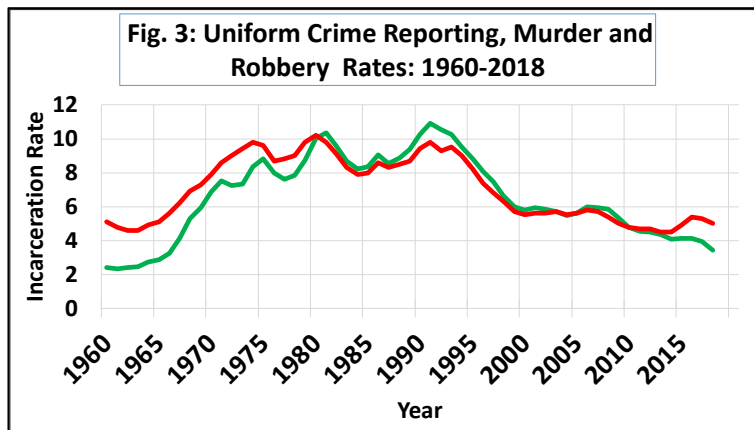
48. Cf. Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, in *THE CRIME DROP IN AMERICA* 6 (Alfred Blumstein & Joel Wallman eds., 2d ed. 2006).

49. *Id.*

50. LLOYD D. JOHNSTON ET AL., *MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975–2013*, at 379–80 (2013), [http://www.monitoringthefuture.org/pubs/monographs/mtf-vol1\\_2013.pdf](http://www.monitoringthefuture.org/pubs/monographs/mtf-vol1_2013.pdf) [<https://perma.cc/8ZVQ-7RJW>].

51. FED. BUREAU OF INVESTIGATIONS, *AGE-SPECIFIC ARREST RATES AND RACE-SPECIFIC ARREST RATES FOR SELECTED OFFENSES 1993–2001*, at 63 (2003), [https://ucr.fbi.gov/additional-ucr-publications/age\\_race\\_arrest93-01.pdf](https://ucr.fbi.gov/additional-ucr-publications/age_race_arrest93-01.pdf).

rates of arrest and victimizations for homicide.<sup>52</sup> Also, the economy was thriving at the time, so there were many other employment opportunities.<sup>53</sup> All of that contributed to the break-up of the drug markets, especially the crack markets that were then being served largely by young people, which led to a major drop in violent crime until 2000, particularly homicide and robbery, as displayed in Figure 3.<sup>54</sup> There are a number of differing explanations for the 45% drop from the peak in about 1993 to a leveling-out after 2000.<sup>55</sup>



During the 1960s, the murder rate (represented by the chart line starting and ending between 4–6%) was well above the robbery rate (represented by the chart line starting and ending below 4%) divided by 25 (to put it on the same scale as murder), but the two are very close for the rest of the interval.

52. *Id.* at 59.

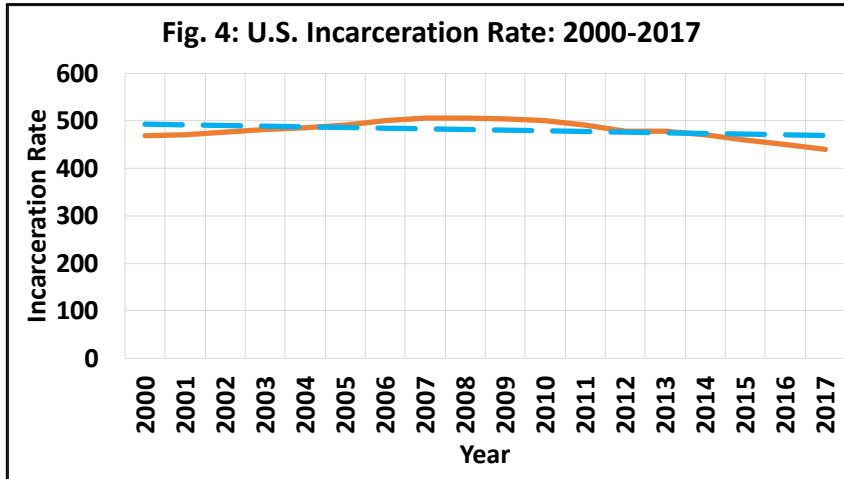
53. *Unemployment Rate in the United States from 1990 to 2019*, STATISTA <https://www.statista.com/statistics/193290/unemployment-rate-in-the-usa-since-1990> [<https://perma.cc/29AT-NAYX>].

54. Figure 3 is based on official statistics from the Federal Bureau of Investigation's Uniform Crime Rates publications. *See, e.g.*, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES tbl.1 (2018), <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-1> [<https://perma.cc/YMZ8-4VW9>].

55. *See*, Richard Rosenfeld, *Patterns in Adult Homicide: 1980–1995* in BLUMSTEIN & WALLMAN, *THE CRIME DROP IN AMERICA*, *supra* note 48, at 131 (describing two institutional shifts that contributed partially to this decline).

## IV. THE SLOW BEGINNINGS OF A REDUCTION

Despite the major drop in violent crimes, which comprise an important fraction of prison populations, the national incarceration rate since 2000, depicted in Figure 4, appears to have been impressively stable, even at its 2017 high rate of 481 per 100,000 inhabitants (more than quadruple the stable rate of Figure 2).<sup>56</sup>



The flatness of Figure 4 raises the concern that we may once again be in a stability situation, even though there is broad bipartisan agreement that the rate should be reduced.

One could also interpret Figure 4 as, finally, demonstrating the end of the rise and the beginning of the decline from the peak rate of 506 per 100,000 inhabitants in 2007 and 2008, which reflected an incarceration of a full 1% of the U.S. adult population.<sup>57</sup>

The 15% decline in the incarceration rate from 506 in 2008 to 440 in 2017 averaged only 1.5% per year. If the decline rate were to double to 3% per year, it would still take 23 years to achieve a 50% reduction in the national incarceration rate, which is a goal championed by Michael Tonry and others that has been seen as overly optimistic.<sup>58</sup> An incarceration rate of 220 would still be double America's earlier stable rate and well above

56. See *supra* note 15.

57. THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 6, at 34.

58. See, e.g., AMERICAN SENTENCING: WHAT HAPPENS AND WHY? (Michael Tonry ed., 2019).

the rate of most other industrialized nations.<sup>59</sup> Clearly, a more aggressive effort at reducing the incarceration rate is needed.

A state-by-state listing of the percentage change in their incarceration rates by 2017 was provided by the Sentencing Project.<sup>60</sup> Eleven states had only increases, but thirty-eight states had decreases dating from earlier highs in 1999 to 2017.<sup>61</sup> More than half of these states (twenty) had double-digit decreases.<sup>62</sup> Of those, California has had a 25% decrease since 2006<sup>63</sup> and New York has had a 32% decrease since 1999;<sup>64</sup> they are the most striking examples. Nevertheless, the net national decrease from 2012 to 2017 was only 7.3%.<sup>65</sup> It was also the case that most of the states reported a decrease in crime along with the reduction in incarceration.<sup>66</sup> This demonstrates that the cost and human benefits of reduced incarceration without incurring a penalty of increased crime has certainly contributed to a widespread search for approaches to contribute to further reduction at an even greater rate. This also certainly suggests that there is a widespread desire among the states to reduce incarceration and that guidance on how to do so effectively would be much appreciated.

There has been considerable literature in law and criminology focused on mass incarceration and its reduction. The journal, *Criminology and Public Policy*, devoted an entire issue in 2014 to the challenge of mass incarceration. In it, Michael Tonry enumerated ten reasonable actions that can be taken to reduce incarceration.<sup>67</sup> He has carried this further with his recent book on sentencing.<sup>68</sup>

Proposed approaches for reduction result from a review of factors that have contributed to the growth, particularly changes

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59. WALMSLEY, *supra* note 2.

60. NAZGOL GHANDNOOSH, SENTENCING PROJECT, U.S. PRISON POPULATION TRENDS: MASSIVE BUILDUP AND MODEST DECLINE (2019), <https://www.sentencingproject.org/wp-content/uploads/2019/09/U.S.-Prison-Population-Trends.pdf> [<https://perma.cc/8HCR-MPWH>].

61. *Id.* at 1, 5 tbl.2.

62. *Id.* at 4 fig.3, 5 tbl.2.

63. *Id.* at 5 tbl.2.

64. *Id.*

65. *Id.*

66. *Id.* at 1.

67. *See generally* Tonry, *supra* note 9.

68. AMERICAN SENTENCING: WHAT HAPPENS AND WHY?, *supra* note 58.

in legislation and especially changes in drug crimes. Prime targets are changes in sentencing laws, especially mandatory-minimum laws. Many states will choose to focus on changes in policies that target the crime types that have contributed to the largest increases in prison populations. These include the large number of people serving life sentences, especially for crimes other than for murder (e.g., offenders with “three strikes” drug offenses) or for somewhat remote involvement in a felony-murder offense (e.g., a participant other than the trigger puller, such as the driver of a getaway car in a robbery-murder, often designated as “second-degree murder”), and especially for the large number sentenced to life without parole.<sup>69</sup> It is clear that different states will find different opportunities to reduce their prison population and different ranges of opposition. Certainly, exploration of changes that have worked in the states with the largest decreases like New York and California would provide important possibilities for any state to consider.

#### V. ZIMRING’S PROPOSED RESPONSE

Into this array has come Frank Zimring, a distinguished criminologist, with his particular perspective. There have been many proposed approaches and a variety of target reductions in the literature, many of which are reported by Zimring.<sup>70</sup> Zimring devotes considerable attention to what seems to be his favorite approach—analyzing California’s Realignment approach more broadly.<sup>71</sup> Indeed, California has demonstrated a significant reduction in its prison population, but it did so in response to a very insistent judicial demand, initially in 2009 by a federal appeals court and most forcefully in 2011 by the U.S. Supreme Court.<sup>72</sup> The response by California was the 2011 Public Safety Realignment Act that achieved its reduction through a variety of changes: undoing some of the mandatory sentencing laws, reducing many lesser crimes from felonies to misdemeanors, and mandating that parole violators be sentenced to jail or to community-based treatment (especially for drug offenders who comprise a major fraction of parole violators) rather than to prison.<sup>73</sup> In

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69. Tonry, *supra* note 9, at 524.

70. ZIMRING, *supra* note 10 (manuscript ch. 7. at 12–15).

71. *Id.* (manuscript ch. 5 at 18–23) (outlining four lessons from California’s realignment system).

72. See *Brown v. Plata*, 563 U.S. 493 (2011), *aff’g* *Plata v. Schwarzenegger*, No. CIV S-90-520 LKK, JFM P, 2010 WL 99000 (E.D. Cal. Jan. 12, 2010).

73. Assemb. B. 109, 2011–12 Reg. Sess. (Cal. 2011).

2016, California legalized recreational marijuana by public choice through Proposition 64.<sup>74</sup> These and other policy or legislative changes certainly reduced the state's prison population, but they also resulted in some significant crowding in the local jails with some significant negative consequences, including a major growth in suicides within the jails.<sup>75</sup>

The most important and distinctive feature of California's apparently successful reduction in its prison incarceration rate, is the fact that the state had to respond to a Supreme Court order within a limited time.<sup>76</sup> As with most such forced actions, there will be side effects, and the problems of the jails were among the most important. Zimring's response appreciates the burden that would be imposed on the jails, but he appreciates more the "closer to home" value of redistributing the incarceration burden more to jails and community organizations and less to remote prisons.<sup>77</sup> As a result, he calls for a major reconfiguration and expansion of local facilities to accommodate that redistribution.<sup>78</sup> He recognizes the problems created by the rapidity of the redistribution under the Public Safety Realignment Act without adequate time to prepare for it, so he argues for future planning in that direction and with a corresponding allocation of state funds.<sup>79</sup> Thus, his apparent support for a reduction of prison population is in line with the California Realignment because he sees benefit in keeping convicted offenders closer to home. Implementing his approach, however, would represent a major cost in providing the effective local facilities called for by Zimring.

Still, there are many other approaches to be considered if one has the time to do so. Some of the very reasonable approaches taken by California could easily be applied anywhere:

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74. Control, Regulate and Tax Adult Use of Marijuana Act (Prop 64), Assemb. B. 64, 2017–18 Reg. Sess. (Cal. 2016) (permitting adults twenty-one years of age and over to possess and grow specified amounts of marijuana for recreational use).

75. *Suicides Increasing in California Prisons*, EQUAL JUSTICE INITIATIVE (Oct. 4, 2019), <https://eji.org/news/suicides-increasing-in-california-prisons> [<https://perma.cc/GK4C-7H68>].

76. *See Plata*, 563 U.S. at 542 (affirming appropriateness of two-year deadline, but cautioning that modification may be warranted).

77. ZIMRING, *supra* note 10 (manuscript ch. 5 at 34, ch. 7 at 27).

78. *Id.* (manuscript ch. 6 at 31–32).

79. *Id.*

- Cut back substantially on trying to deal with drug problems through incarceration and apply more resources to treatment and public-health measures, approaches that have been implemented appreciably in dealing with the current opioid crisis.
- Reconsider the seriousness of many current felony offenses, especially those that have not yet accounted for financial inflation since their enactment.
- Apply community-based treatments rather than readmission to prison for violations of probation or parole, especially for drug abuse relapses.
- Consider bail reform measures that have been applied in many jurisdictions with a significant reduction of the jail population waiting for trial.

## VI. COLLATERAL CONSEQUENCES

One of the distinctive features of Zimring's forthcoming book is his final chapter on the many collateral consequences that flow from an individual's interaction with the criminal justice system. He has drawn on a list introduced by Joan Petersilia,<sup>80</sup> but he enumerates them with a slight reordering, along with my addition relating to the inability to apply for Pell grants to support college tuition following a conviction:

- employment barriers and workplace restrictions;
- formal restrictions on jobs;
- bonding and licensing;
- housing restrictions;
- restrictions on parenting rights;
- special registration and public notification requirements for sex offenders;
- voting restrictions;
- restrictions on eligibility for welfare and food stamps;<sup>81</sup> and
- denial of access to federal Pell grants for support of college tuition.

It is clear that all but the last three of these nine restrictions, which can be seen as just more punishment, are based on an attempt to respond to the concern that individuals may

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80. See generally JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2002).

81. ZIMRING, *supra* note 10 (manuscript ch. 10 at 11 tbl.10.2).



commit a further crime if collateral consequences were not imposed. The fact that many of those restrictions are imposed to apply forever clearly reflects a failure to appreciate the limited duration of this risk. Clearly, limited duration should be taken into account so that any such restriction would only apply for a limited period after a last conviction. Also, any such restriction should take account of the individual's age and recent or prior crime types reflecting the kinds of crimes to be protected against.

Given the large number of individuals handicapped by such rules, there are many organizations engaged in action directed at facilitating community reentry for individuals with a prior criminal record or upon release from incarceration. The Safer Foundation in Chicago is a prime example of one such organization that assesses such individuals, offers them training and direction, and facilitates employment opportunities.<sup>82</sup> One would presume that the initial employment will be provided where other similar employees are around to prevent any continuation of the prior criminal activity.

It is also important to provide opportunities for "redemption" from the stigmatization of a prior record. It is well-established in criminology that an individual who has committed a first crime has a reasonably high probability of recidivism shortly after, but that probability declines monotonically as long as he stays clear of further crime.<sup>83</sup> Furthermore, at some point, the risk of a new crime declines to the same level of risk evidenced by a person of the same age in the general population.<sup>84</sup> The level of this risk is reflected in the classic age-crime curve (number of arrests of individuals of a particular age divided by

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82. *About Us*, SAFER FOUND., <https://saferfoundation.org/About-us> [<https://perma.cc/3YVY-K7YB>] (stating that it is dedicated to promoting successful reentry and reducing recidivism through employment, education, and support services in Illinois).

83. *See, e.g.*, MARIEL ALPER ET AL., U.S. DEP'T OF JUSTICE, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014), at 5 (2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf> [<https://perma.cc/C9CV-PW2L>]; U.S. SENTENCING COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 3 (2017), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207\\_Recidivism-Age.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf) [<https://perma.cc/FZ7J-DPHQ>].

84. Alfred Blumstein & Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, 263 NAT. INST. JUST. J. 10, 12–13 (2014).

the number of people of that age in the general population).<sup>85</sup> It should be reasonable to view this low-risk crossing point as a point of redemption when various restrictions could reasonably be lifted.

That issue has been addressed by Nakamura and myself, and we found that these redemption points typically occur after a first-time arrestee has stayed clear of further involvement with the criminal justice system for about seven to fifteen years depending on the age and original crime type of conviction.<sup>86</sup> We also examined the further sensitivity to future crime types in assessing the former offender's riskiness and found the delay to be longest if the concern was for a violent crime and also if the prior arrest was for a violent crime.<sup>87</sup>

We also examined similar issues for first-time prison releasees.<sup>88</sup> It was not surprising that the prison releasees had a significantly higher recidivism risk than those arrested and convicted but not incarcerated.<sup>89</sup> But it was somewhat surprising to realize that the releasees' risks eventually do come down to be totally comparable to those not incarcerated, which can occur ten to fifteen years after release.<sup>90</sup> A smaller fraction of the releasees reach a comparable point, but those who do should be treated accordingly.<sup>91</sup>

#### VII. RECONSIDER SENTENCING CHANGES ENACTED DURING THE 1980s AND 1990s

Probably the largest growth in incarceration is attributable to the growing concern over violent crimes, especially murder. Life sentences were more often mandated by legislation, even for individuals who were held responsible for a murder committed by a colleague and particularly for offenders with multiple drug

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85. ROLF LOEBER ET AL., NAT'L INST. OF JUSTICE, BULLETIN 1: FROM JUVENILE DELINQUENCY TO YOUNG ADULT OFFENDING 3 (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/242931.pdf> [<https://perma.cc/5QMG-SAKF>] (describing the age-crime curve).

86. *See generally* Blumstein & Nakamura, *supra* note 14.

87. *See generally* ALFRED BLUMSTEIN & KIMINORI NAKAMURA, EXTENSION OF CURRENT ESTIMATES OF REDEMPTION TIMES: ROBUSTNESS TESTING, OUT-OF-STATE ARRESTS, AND RACIAL DIFFERENCES (2012).

88. *See generally* Blumstein & Nakamura, *supra* note 84.

89. *Id.* at 13.

90. *Id.*

91. *Id.*

sentences.<sup>92</sup> There was a significant growth in sentences of life without parole.<sup>93</sup> In fact, the Sentencing Project has estimated that one in seven prisoners is currently serving a life sentence and, as they age, there are significantly increasing costs for health care and other maintenances.<sup>94</sup> The cost of maintaining the older prisoners is estimated to be about double that of the average prisoner.<sup>95</sup> As a result, there has been growing consideration of early compassionate release on parole for individuals over a certain age.

I served on a Pennsylvania committee that recommended consideration of parole release for prisoners older than fifty who had served more than twenty-five years. It seemed clear that the recidivism risk for those individuals would be minimal and the retribution concern long gone.<sup>96</sup> Nevertheless, a victims' committee objected strenuously, and that was sufficient for the relevant legislators to refuse to consider the proposal, but that was well before the widespread national consensus on reducing prison populations.

One approach that would seem to be reasonable in all states would be to review the legislative changes that have occurred since about 1980 that include mandatory-minimum laws, three-strikes sentences, fixed sentences (usually the maximum) that replaced the previous minimum/maximum sentencing laws, and increases in many sentences. In recent years, there has been growing attention to an increasing number of approaches for reducing recidivism.<sup>97</sup> Implementing those would have an obvious effect long-term in reducing prison populations. For example, efforts at restorative judgment—involving a mediator in an interaction with the victim and offender, which seeks to get the offender to appreciate the harm caused and have the victim accept the offender's forgiveness—would help to reduce the risk of further offenses. When this works and the court accepts the non-incarceration outcome, one result can be one fewer prisoner.

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92. ASHLEY NELLIS, THE SENTENCING PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 23 (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf> [<https://perma.cc/PG69-Y3AB>].

93. *Id.*

94. *Id.* at 5.

95. *Id.* at 26.

96. *See supra* notes 83–90 and accompanying text.

97. *See, e.g.*, Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (First Step Act), H.R. 5682, 115th Cong. (2018).

It is clear that most states have a strong interest in reducing their prison population, and it is clear they can do so without incurring increases in crime and with significant cost savings that could be applied to a wide variety of many other needs. It would certainly seem desirable for each and every state to create an organizational entity, say a task force, charged with considering a variety of approaches to reducing its prison population. Political considerations are inevitably an important part of that effort and so would require bipartisan legislative participation. Since the magnitude of projected population reduction is always a consideration to counter the inevitable political opposition to almost any such approach, an important player in the variety of re-considerations called for is the state's sentencing commission. Its staff or staff in the Department of Corrections typically have the analytic technology to estimate the impact of any policy changes on that state's prison population. Since racial disproportionality in prison is almost always an issue of significant concern, representatives of the relevant minority groups should be involved to bring their perspectives and concerns into consideration. Also, since substance abuse and mental illness have become of increasing consideration in diverting offenders from prison, expertise in treatment of these problems should certainly be accessible to the task force.

#### VIII. SOME NEXT STEPS

It strikes me that most states would like to move forward in reducing their prison populations. Doing so will require information on what works, both politically and programmatically, and will benefit from the evaluation of initiatives undertaken in a number of other states. There have been many proposals offering suggestions for doing so.

Zimring's suggestions, drawing on the lessons of California and his broader criminological involvement, are certainly interesting and to be considered. He has had an opportunity to identify the problems associated with California's Realignment and to offer suggestions for addressing them. These involve reconsidering the threshold between felonies and misdemeanors, and local responses to parole or probation violations, which can involve treatment or community supervisions when appropriate, or short sentences in local jails.<sup>98</sup> The latter has created problems

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98. See notes 70–79 and accompanying text.

in many of the state's jails and Zimring has offered suggestions for addressing those problems.<sup>99</sup>

Mark Mauer has also proposed a policy that is probably the least likely to work its way through considerable political opposition: elimination of life sentences.<sup>100</sup> This is a response to the considerable increase of such sentences, which currently account for fourteen percent of all prisoners.<sup>101</sup> An alternative that would address the accumulation of life sentences over the past few decades is to make prisoners older than age fifty eligible for parole review and possible release if they have served for more than twenty-five years. This could apply to prisoners with life sentences imposed in the reasonably distant past and would take into account any changes in their behavior over at least the past twenty-five years.

Many states have taken a wide variety of steps to reduce their prison populations.<sup>102</sup> It would certainly be desirable to have a review of the many approaches that have been taken and compile a list of all the approaches. The Sentencing Project has initiated such an effort in five states (Connecticut, Michigan, Mississippi, Rhode Island, and South Carolina).<sup>103</sup> It would be especially helpful to accompany these with evaluation assessments of the magnitude of prison population reductions achieved, and any increase or decrease in recidivism associated with individuals released earlier under the previous policies.

Also, many states have introduced treatment approaches intended to reduce recidivism, including treatments while in

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99. ZIMRING, *supra* note 10 (manuscript ch. 6 at 31–32).

100. See MARC MAUER & ASHLEY NELLIS, *THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES* (2018).

101. THE SENTENCING PROJECT, *THE FACTS OF LIFE SENTENCES 1* (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/12/Facts-of-Life.pdf> [<https://perma.cc/3UZU-J8JX>].

102. See *supra* notes 60–66 and accompanying text.

103. DENNIS SCHRANTZ ET AL., *THE SENTENCING PROJECT, DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS* (2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions> [<https://perma.cc/2BEK-BWYG>].

prison, and facilitate the transition from incarceration to community living.<sup>104</sup> A compilation of these approaches, and any estimate of their effects in crime reduction, would certainly be helpful as well.

Finally, it would be particularly valuable for the Bureau of Justice Assistance to establish a project with an organization like the National Criminal Justice Association to undertake analyses of state innovations directed at prison-population reduction. State-level surveys and assessments could be undertaken by evaluating the various approaches in terms of the magnitude of incarceration reduction achieved, much as Zimring did with respect to California's Realignment. This effort could result in a handbook of approaches to prison-population reduction with some reasonable estimates of the reductions achieved by states that have used similar approaches. This handbook could be a developing online document to provide the necessary and sufficient information on the magnitude of the reductions achieved and any side effects to be considered.

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104. *Cf.* AMERICAN SENTENCING: WHAT HAPPENS AND WHY?, *supra* note 58, at 19, 21 (emphasizing the community-based aspects of treatment programs as alternatives to incarceration).