

# The Changing Politics of Crime and the Future of Mass Incarceration

*David Cole\**

For too many years, it seemed that the only possible stance a politician could take on crime was to be tougher than his opponent. For almost two generations beginning in the mid-1970s, state and federal legislators enacted increasingly harsh criminal penalties—mandatory minimums, “three-strikes-and-you’re-out” life sentences, parole elimination, and the like. Police pursued “broken windows” or “zero tolerance” strategies, leading to greatly increased arrests. Prosecutors charged defendants as aggressively as possible. And legislators deprived judges of the discretion to sentence based on individualized considerations, mandating specific sentences with no room for leniency. The result was an unprecedented boom in the nation’s population behind bars. Our per capita incarceration rate not only soon parted ways with those of our European allies, but outstripped every nation in the world, as the United States became the world leader in incarceration.<sup>1</sup>

Today, however, “smart on crime” has replaced “tough on crime.” Rather than simply being tougher than the next guy, politicians and government officials increasingly seek solutions that are based on evidence and reason rather than heated rhetoric and demagoguery. To that end, this project brings together a who’s who of experts in criminal law, and asks each contributor to offer both a concise diagnosis of the problems in their particular area of expertise and, more importantly, a prescription for practical reforms. For those who seek to bring reason and common sense to the criminal justice system, this report offers proposals and suggestions in every area of the criminal justice system, from policing to sentencing to interrogation to the treatment of people with mental and physical disabilities. Anyone interested in improving criminal justice will find invaluable guidance here.

---

\* Hon. George J. Mitchell Professor in Law and Public Policy, Georgetown University, and National Legal Director for the American Civil Liberties Union. The following was given as the keynote address on February 11, 2017, at the Academy for Justice conference on criminal justice reform.

1. *Highest to Lowest–Prison Population Rate*, WORLD PRISON BRIEF, [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) (last visited May 28, 2017). The United States has the largest incarcerated population in the world, with approximately 2.1 million people in jail or prison on any given day. It is second only to the island nation of the Seychelles in per capita incarceration. *See id.*

Skeptics may ask whether these reforms stand a chance in the wake of the election of Donald Trump, who ran at least in part as a throwback to the “tough-on-crime” approaches of the 20th century. As a candidate, Trump defended the aggressive “stop-and-frisk” policing that generated racial profiling in New York City and other cities.<sup>2</sup> As president, he appointed as attorney general Jeff Sessions, who, while a senator from Alabama, consistently opposed bipartisan efforts at criminal justice reform.<sup>3</sup> Sessions has already reversed criminal justice reforms introduced by the Obama administration, and has directed federal prosecutors in drug cases to charge the most harsh penalty possible in all cases, regardless of the circumstances.<sup>4</sup> The shift from the prior administration is dramatic on all fronts, but nowhere more so than on criminal justice. So does it make sense to think about criminal justice reform in this political environment?

The answer is yes, for three fundamental reasons. First, it’s the right thing to do. The status quo—in which more than 2 million people are behind bars, many needlessly, and nearly all for much longer than warranted by concerns about recidivism, retribution, or deterrence—is morally problematic and fiscally irresponsible. That the incarcerated population is disproportionately poor and people of color compounds the injustice.<sup>5</sup> Bringing a measure of justice to our criminal law enforcement system is the most urgent civil-rights issue of our time.

Second, criminal justice reform enjoys substantial bipartisan support, despite our highly polarized world, making it possible to forge progress here that is not possible on many other subjects. This project has been financially supported by the Charles Koch Foundation. Meanwhile, also with Koch’s

---

2. Max Ehrenfreund, *Donald Trump Claims New York’s Stop-and-Frisk Policy Reduced Crime; The Data Disagree*, WASH. POST (Sept. 22, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/09/22/donald-trump-claims-new-yorks-stop-and-frisk-policy-reduced-crime-the-data-disagree/?utm\\_term=.cb9aea7f5322](https://www.washingtonpost.com/news/wonk/wp/2016/09/22/donald-trump-claims-new-yorks-stop-and-frisk-policy-reduced-crime-the-data-disagree/?utm_term=.cb9aea7f5322).

3. See AMES C. GRAWERT, BRENNAN CTR. FOR JUST., ANALYSIS: SEN. JEFF SESSIONS’S RECORD ON CRIMINAL JUSTICE (2017).

4. See Rebecca Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html>.

5. See, e.g., E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2015, at 13 (2016); Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (June 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

support, the ACLU, the Center for American Progress, Right on Crime, Prison Fellowship, and the Tea Party's Freedom Agenda have all joined forces to press for criminal justice reform.<sup>6</sup> The time for reform is now.

Third, while the president and attorney general are unlikely to be allies on criminal justice reform, the federal government has less to say on this subject than on many others. About 99% of criminal law cases are brought by state and local officials, in state courts.<sup>7</sup> And about 90% of the nation's incarcerated population is housed in state prisons and jails.<sup>8</sup> It certainly helps to have a president and attorney general committed to reform, as President Barack Obama and Attorney General Eric Holder were. But reform can and must continue without federal assistance. The locus of the debate on criminal justice must be at the state level. And red, blue, and purple states have all shown an interest in getting smarter, more efficient, and more humane in their criminal law policies.

Election Day—November 8, 2016—provided evidence that support for Trump can coexist with criminal justice reform. On that day in Oklahoma, voters preferred Donald Trump to Hillary Clinton by a 65% to 29% margin.<sup>9</sup> This makes Oklahoma a very red state. Yet almost 60% of Oklahoma voters approved ballot measures to reduce many drug and property crimes from felonies to misdemeanors, and to reinvest the savings in rehabilitation for prisoners.<sup>10</sup>

The same day, 64% of California voters supported parole and juvenile justice reform, which requires that judges and not prosecutors decide whether to charge juveniles as adults, and expands parole and early-release opportunities.<sup>11</sup> In New Mexico, a referendum passed that prohibits the detention of individuals who cannot afford to pay bail and are not dangerous or a flight risk.<sup>12</sup> Voters in California, Massachusetts, and Nevada endorsed legalizing marijuana for

---

6. See Jake Miller, *An Unlikely Alliance Forms between Koch Brothers and Liberal Groups*, CBS NEWS (Feb. 19, 2015), <https://www.cbsnews.com/news/koch-brothers-conservative-liberal-groups-unite-on-criminal-justice-reform/>.

7. See JEROLD ISRAEL ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 2* (2016).

8. See Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

9. *Oklahoma Results*, N.Y. TIMES (last updated Feb. 10, 2017), <https://www.nytimes.com/elections/results/oklahoma>.

10. See *id.*

11. John Myers, *Proposition 57, Gov. Jerry Brown's push to loosen prison parole rules, is approved by voters*, L.A. TIMES (Nov. 8, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-election-day-2016-proposition-57-gov-jerry-brown-prison-1478452055-htmlstory.html>.

12. See *New Mexico Results*, N.Y. TIMES (last updated Feb. 10, 2017), <https://www.nytimes.com/elections/results/new-mexico>.

adults.<sup>13</sup> District attorney candidates who advocated reducing incarceration and racial disparities in criminal justice enforcement won in Houston, Birmingham, and Tampa.<sup>14</sup> Florida elected its first African-American state attorney.<sup>15</sup> And in Maricopa County, Arizona, Sheriff Joe Arpaio, infamous for his anti-immigrant and unconstitutional police practices, lost his bid for a seventh term.<sup>16</sup>

In an election that Trump won, these are important reminders that the politics of crime has moved on from the “tough-on-crime” mantra that dominated in the latter part of the 20th century. I graduated law school in 1984. For most of my legal career, all the news on criminal justice was bad. Incarceration increased at record rates from the mid-1970s to the early 2000s.<sup>17</sup> Racial disparities grew as well. Richard Nixon introduced the “war on crime.” Ronald Reagan and George H.W. Bush launched and pursued the “war on drugs.” Bill Clinton took time off from his first presidential campaign to sign the death warrant for Ricky Ray Rector, a man who as a result of a brain injury barely comprehended what was happening to him.<sup>18</sup> Clinton went on to sign the Anti-Terrorism and Effective Death Penalty Act,<sup>19</sup> which restricted federal court review of state criminal convictions. States, meanwhile, were enacting longer and longer sentences, building more prisons, putting more police on the street, and watching as their prisons filled with young men, mostly of color. For decades, the ACLU opposed virtually all criminal law bills—because they all made a bad situation worse.

Today, by contrast, there is good news. Incarceration rates have flattened out and have started to fall. The nation’s total prison population has declined every

---

13. Katy Steinmetz, *These States Just Legalized Marijuana*, TIME (last updated Nov. 10, 2016), <http://time.com/4559278/marijuana-election-results-2016/>.

14. Maurice Chammah, *These prosecutors campaigned for less jail time — and won*, BUSINESS INSIDER (Nov. 9, 2016), <http://www.businessinsider.com/election-jail-sentences-district-attorneys-2016-11>.

15. Scott Powers, *Aramis Ayala Becomes First Black State Attorney in Florida’s History*, FLA. POLITICS (Nov. 8, 2016), <http://floridapolitics.com/archives/226799-aramis-ayala-becomes-first-black-state-attorney-floridas-history>.

16. Bill Chappell, *Maricopa Sheriff Joe Arpaio Loses Re-election Fight*, NPR (Nov. 9, 2016), <http://www.npr.org/sections/thetwo-way/2016/11/09/501388042/maricopa-sheriff-joe-apraio-loses-reelection-fight>.

17. See THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (2017).

18. Peter Applebome, *Arkansas Execution Raises Questions on Governor’s Politics*, N.Y. TIMES (Jan. 25, 1992), <http://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html>.

19. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of U.S. Code).

year since 2010. The per capita imprisonment rate peaked at 506 per 100,000 in 2008, and was 458 in 2015.<sup>20</sup> Six states—Alaska, California, Connecticut, New York, New Jersey, and Vermont—have reduced their prison populations by at least 20%, without an increase in crime, in the last decade or so.<sup>21</sup> Ten more states have reduced their prison populations by between 10% and 20%.<sup>22</sup> Thirty-six states and the federal Bureau of Prisons have seen declines in their prison populations from their peak years, generally in the early 2000s.<sup>23</sup> In a single year, from 2013 to 2014, Mississippi experienced a decrease of 15% in its prison population.<sup>24</sup>

During 2015, lawmakers in at least 30 states adopted changes in policy and practice that are likely to contribute to further declines in incarcerated populations. Six states expanded access to parole, reducing returns to prison for parole violations. Fourteen reduced the collateral consequences of convictions, including bans on voting and welfare. Four reclassified certain felonies as misdemeanors. And similar reforms have been adopted in many other states over the past five years.<sup>25</sup>

Racial disparities, still shockingly large, have decreased in the first decade of the 21st century. For example, between 1988 and 1993, African-Americans were arrested for drug offenses at rates about 5 times that of whites.<sup>26</sup> In 2007, however, the black arrest rate was between 3.5 and 3.9 times higher than the white arrest rate.<sup>27</sup> For all crimes, African-Americans were arrested at four times the rate of whites in 1989, but 2.5 times the rate of whites in 2006.<sup>28</sup> Racial disparities in traffic stops—“driving while black”—have fallen in recent

---

20. See CARSON & ANDERSON, *supra* note 8, at 5. This number reflects those in federal or state prisons, serving sentences for felonies. It does not include people incarcerated in jails, awaiting trial, or serving short sentences for misdemeanors.

21. THE SENTENCING PROJECT, U.S. PRISON POPULATION TRENDS 1999–2015: MODEST REDUCTIONS WITH SIGNIFICANT VARIATION (2017).

22. *Id.*

23. *Id.*

24. Colleen Curry, *How Mississippi Slashed Its Prison Population and Embraced Criminal Justice Reform*, VICE NEWS (Sept. 23, 2015), <https://news.vice.com/article/how-mississippi-slashed-its-prison-population-and-embraced-criminal-justice-reform>.

25. NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2015: DEVELOPMENTS IN POLICY AND PRACTICE (2016), <http://www.sentencingproject.org/publications/the-state-of-sentencing-2015-developments-in-policy-and-practice/>.

26. See HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 7 (2009), [http://www.hrw.org/sites/default/files/reports/us0309web\\_1.pdf](http://www.hrw.org/sites/default/files/reports/us0309web_1.pdf).

27. *See id.*

28. TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 8 (2007).

years, with roughly proportional stops reported in many places.<sup>29</sup> Substantial disparities linger in particular jurisdictions, and blacks and Hispanics are still more likely to be searched in a traffic stop than whites in general.<sup>30</sup>

In New York City, as a result of a lawsuit, an advocacy campaign, and the election of Mayor Bill de Blasio in 2013, “stop-and-frisk” encounters, which were disparately targeted at black and Hispanic men, dropped from a high of 686,000 in 2011 to 22,000 in 2015, on pace for 15,000 in 2016.<sup>31</sup> Racial disparities remain, but as a result, black and Hispanic men are the disproportionate beneficiary of the reduction in stop.

These developments reflect a significant change in the prevailing politics of crime. Where in prior decades new criminal justice laws were a one-way ratchet making criminal law more harsh, today they are now more likely to reduce the severity of the criminal laws than to enhance it. The Fair Sentencing Act of 2010,<sup>32</sup> for example, reduced the disparity between sentences for crack and powder cocaine from 100-to-1 to 18-to-1. President Obama was the first president to visit a federal prison. He directed the Justice Department to review solitary confinement, leading to a 2016 guidance that reduced its use in the federal prison system, especially for juveniles and the mentally ill, and urged states to follow suit.<sup>33</sup> Under a clemency initiative, President Obama commuted the sentences of nearly 2,000 people, a marked increase over most of his predecessors.<sup>34</sup> The Justice Department’s Civil Rights Division conducted high-profile investigations of several police departments across the country for systematic civil-rights abuses, including Chicago, Baltimore, New Orleans, Cleveland, Newark, and Ferguson, Missouri. Many of these reports led to consent decrees that require meaningful reform and provide for ongoing monitoring.

29. See, e.g., Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>.

30. See Kia Makarechi, *What the Data Really Shows About Police and Racial Bias*, VANITY FAIR (July 14, 2016), <http://www.vanityfair.com/news/2016/07/data-police-racial-bias>.

31. See *Stop-and-Frisk Data*, NEW YORK CIVIL LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited May 28, 2017).

32. Pub L. No. 111–220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.).

33. Barack Obama, *Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 26, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html?utm\\_term=.5f86a2c3874c](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.5f86a2c3874c).

34. See Justin Sink et al., *Obama Commutes More Sentences than any Other U.S. President*, BLOOMBERG (Jan. 19, 2017), <https://www.bloomberg.com/graphics/2017-obama-clemency/>.

In speeches that would have been unimaginable from any other attorney general in the past 40 years, then-Attorney General Eric Holder publicly questioned the effectiveness and fairness of the war on drugs and spoke forcefully against mass incarceration.<sup>35</sup> He reversed a policy instituted by George W. Bush's attorney general, John Ashcroft, which required prosecutors to charge defendants with the most serious crimes possible. Instead, Holder instructed federal prosecutors to use their charging discretion wisely to prioritize the most serious crimes; to not charge low-level drug offenders with crimes that trigger draconian mandatory-minimum sentences; and to pursue alternatives to incarceration where appropriate. In the wake of these reforms, federal drug-trafficking cases dropped, prosecutors sought mandatory minimums in drug cases much less often, and the federal prison population fell for the first time in decades.<sup>36</sup>

Perhaps most significantly, these initiatives are not supported only by Democrats. Republicans have been equal partners in the calls for criminal justice reform. At the federal level, Paul Ryan, Charles Grassley, Rand Paul, and Mike Lee have all said they want to see federal criminal justice reform. The American Legislative Exchange Council (ALEC), a conservative nonprofit committed to gun rights, cutting taxes, and reducing business regulation, has prioritized the reduction of prison overcrowding, and works with the ACLU to further sentencing reform at the state level.

There are many possible reasons for this transformation in the politics of crime. Crime rates have fallen for about the last quarter-century,<sup>37</sup> reducing the fear that often impedes rational discussion. Meanwhile, states are increasingly seeing a reduction in their prison populations as a way to save money in financially strapped circumstances. Imprisonment is expensive, and especially for those who pose little risk of recidivism, a considerable waste of resources. It's also possible that the country reached a tipping point on incarceration; being the world leader in incarceration hardly induces pride. Revelations, aided by DNA testing and the work of the Innocence Project, that many of those serving substantial prison sentences are innocent has undermined trust in our

---

35. See, e.g., Charlie Savage, *Justice Dept. to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), [http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?\\_r=0](http://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html?_r=0).

36. See Christopher Ingraham, *The Justice Department is Getting Smart About Drug Sentencing; Here's the Data to Prove it*, WASH. POST (Feb. 17, 2015), [https://www.washingtonpost.com/news/wonk/wp/2015/02/17/the-justice-department-is-getting-smart-about-drug-sentencing-heres-the-data-to-prove-it/?utm\\_term=.20805c9f406f](https://www.washingtonpost.com/news/wonk/wp/2015/02/17/the-justice-department-is-getting-smart-about-drug-sentencing-heres-the-data-to-prove-it/?utm_term=.20805c9f406f).

37. John Gramlich, *5 Facts About Crime in the U.S.*, PEW RESEARCH CTR. (Feb. 21, 2017), <http://www.pewresearch.org/fact-tank/2017/02/21/5-facts-about-crime-in-the-u-s/>.

criminal justice system. And the war on terror may have given politicians an alternative focus for fear-mongering and “get tough” stances.<sup>38</sup>

Whatever the causes of the new politics of crime, the urgent questions now are what should be done. This report offers an extraordinary range of detailed and pragmatic answers. Those seeking to improve the system will find here multiple ways to fix multiple problems. I leave the details to the experts, but want to emphasize a few general points here.

First, it is important to make the cause of reducing incarceration appealing to a wider swath of voters. To this end, it is important to understand and emphasize the ways in which incarceration harms us all. Fiscal concerns, for example, affect all of us. If we are needlessly spending tax dollars incarcerating people who don’t pose a threat, that’s money that cannot be spent on schools, infrastructure, or job creation. Recidivism, too, affects all of us, as we are all potentially victims of crime. If incarceration itself breeds recidivism, we should be motivated to identify alternatives to incarceration that produce better results.

Second, reform efforts must be bipartisan. Most state legislatures are in Republican control, so if Republicans are not on board, reform will be a nonstarter. And even where Democrats are in the majority, bipartisan support is critical to ensure that the issue not become an opportunity for demagoguery. As the latter part of the 20th century demonstrated, it is all too easy for politicians of both parties to encourage fear of crime and fan the flames of retribution. If reform efforts are bipartisan, there will be less temptation to engage in partisan finger-pointing by both sides. If we are going to be truly smart on crime, we need to rise above partisan politics. But the good news, as noted above, is that this has already begun to happen.

Third, reformers need to focus on the states. This is not just because the federal government is unlikely to be a sympathetic forum in the short term, but because that’s where the problem—and the solution—lies. As noted above, states are overwhelmingly the principal enforcers of criminal law, and as a result, house about 90% of the nation’s prison population.<sup>39</sup> We routinely talk about the per capita incarceration rate of the United States, but in fact each state has its own independent political and legal processes, and incarceration rates vary widely among the states. The only way to achieve systemic reform is to work at the state level.

---

38. For a more detailed exploration of these causes, see David Cole, *Turning the Corner on Mass Incarceration?* 9 OHIO ST. J. CRIM. L. 27 (2011).

39. See E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2015 (2016).

Fourth, reformers should seek to engage faith-based communities in the effort. At the heart of any major reform effort must be the idea, common to virtually all religions, that human beings are capable of redemption, or as noted criminal defense attorney Bryan Stevenson often puts it, no one is as bad as the worst thing they've ever done.<sup>40</sup> Many religious organizations are already involved in prison work. Religious groups can provide an opportunity to bridge partisan divides. Prison Fellowship, for example, is a conservative Christian organization devoted to helping inmates rehabilitate through religious involvement and support.<sup>41</sup>

Fifth, we must press for investment in disadvantaged communities, and in forms other than more police and prisons. As two recent award-winning books, *Evicted* and *Ghettoside*, demonstrate, those born into inner-city poverty face enormous obstacles, most of which are beyond the capacity of the criminal justice system to fix.<sup>42</sup> The "Justice Reinvestment" program tries to address that fact, by seeking to reduce incarceration and direct the savings to programs in disadvantaged communities that promise to reduce crime without resorting to incarceration (such as better schools, after-care, and job training).<sup>43</sup>

Sixth, reform should focus on prosecutors' incentives. John Pfaff has shown that prosecutors' increased proclivity to charge arrestees with felonies is one of the principal drivers of the rise in imprisonment rates.<sup>44</sup> Prosecutors should be encouraged to adopt a more nuanced approach, reserving the most serious charges for the most dangerous offenders, and generally favoring the least severe penalty absent specific reasons to seek a longer sentence. As attorney general, Eric Holder issued a memo to federal prosecutors to that effect with respect to drug crimes. But the vast majority of prosecutors are county officials, enforcing state law, so the U.S. attorney general's memos do not apply to them.

---

40. See BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17-18 (2014).

41. See PRISON FELLOWSHIP, <https://www.prisonfellowship.org> (last visited May 28, 2017).

42. Matthew Desmond's *Evicted: Poverty and Profit in the American City* chronicles the struggles of several individuals and families over the course of a single year in Milwaukee, as they bounce from apartment to apartment in a failed search for a steady home. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016). *Ghettoside*, by Jill Leovy, addresses the problem of black-on-black homicide in South Los Angeles in the early 2000s, and also underscores the massive challenges faced by those who live in communities that have lost trust in the police and in which gangs have filled the void in law enforcement with deadly vengeance. JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* (2015).

43. JUSTICE REINVESTMENT INITIATIVE, <https://www.bja.gov/programs/justicereinvestment/> (last visited May 28, 2017).

44. See John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (July 12, 2011) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1990508](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508).

New Jersey has imposed charging guidelines on prosecutors.<sup>45</sup> California used financial incentives, requiring counties to hold more convicted criminals in county jails rather than state prisons. The ACLU, where I am the national legal director, has conducted public education about prosecutors' responsibility for mass incarceration in connection with electoral campaigns for district attorney. And many advocates have sought to reduce the severity of statutory penalties, which has the effect of reducing the lopsided advantage prosecutors exercise over defendants that may coerce many to plead guilty.

Finally, and perhaps most importantly, reform efforts must not be limited to nonviolent drug and property crimes. To be sure, those are the easiest problems to tackle, and it may make sense to start there. But we cannot stop there, because the majority of those serving time are doing so for violent crimes. The solution is not to stop punishing violent crime, of course. But we might pursue social investments in high-crime communities to reduce the prevalence of violent crime in the first place. We might reduce the sentences handed out for violent crime; deterrence is more a function of the certainty of punishment than of its severity,<sup>46</sup> so sentences can be reduced without undermining deterrence. Moreover, individuals tend to "age out" of criminal behavior as they get older,<sup>47</sup> so we should consider reviewing and commuting the sentences of those serving long sentences, much as President Obama did with respect to prisoners serving long sentences for drug crimes.

At one extreme, sentences of life in prison without the possibility of parole grew by 22% from 2008 to 2012.<sup>48</sup> One in nine prisoners, totaling about 160,000 prisoners, are serving a life sentence.<sup>49</sup> Some 10,000 of those are for nonviolent offenses, and another 10,000 are serving life sentences for crimes committed as juveniles.<sup>50</sup> In part because of the "aging out" phenomenon, those who do eventually obtain release from life sentences are less prone to recidivism.<sup>51</sup>

---

45. See *Attorney General Issues Directive to Guide Prosecutors and Police*, N.J. ASS'N OF COUNTIES (Oct. 13, 2016), <http://njac.org/attorney-general-issues-directive-to-guide-prosecutors-and-police/>.

46. See NAT'L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCE* 132-40 (Jeremy Travis et al. eds., 2014).

47. See *id.* at 141-43; see also Dana Goldstein, *Too Old to Commit Crime?*, THE MARSHALL PROJECT (Mar. 20, 2015), <https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime#.B6zrQE2K>.

48. ASHLEY NELLIS, *THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA I* (2013), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.

49. *Id.*

50. *Id.*

51. *Id.* at 17.

The essays collected in this report offer many more concrete steps that state and local governments can take to reduce our collective reliance on mass incarceration. Collectively, they demonstrate that the problem is not that we don't know how to address this problem, but that until now, we have lacked the will to do so. That the United States is the world leader in incarceration is a national tragedy. It's also unnecessary. All of the nations that we associate ourselves with have much lower per capita incarceration rates. They manage to keep crime rates low without locking up large swaths of their young and most disadvantaged people. We could do the same. This report provides a road map, offering multiple options to achieve a more sensible criminal justice system. All that is needed is the will to change. And in recent years, Americans of all political stripes, from red, blue, and purple states, from cities and rural areas, have begun to develop that will. My hope is that this report helps us realize this truly worthy bipartisan goal.