

## ***SENTENCING REFORM: ENDING MASS INCARCERATION IS ONE STEP TOWARD RACIAL JUSTICE***

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# Expanding Public Safety in the Era of Black Lives Matter

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# ESSAY

## Expanding Public Safety in the Era of Black Lives Matter

NICOLE D. PORTER\*

*Traditional public safety responses to crime involve interactions with the criminal justice system. However, recent killings by police of unarmed black men, women, and children have led to a national dialogue on the fundamental strategy of public safety. The narrative of “Black Lives Matter” offers a new framework for policymakers, activists, practitioners, and other stakeholders to think about a public safety strategy that is not solely defined by arrests and admissions to prison. This essay provides an overview of evidence-based approaches for public safety interventions that exist outside of law enforcement interactions.*

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## INTRODUCTION

Criminal justice reform may substantially scale back the nation's reliance on mass imprisonment. In recent years, the pace of change has been fairly modest, although it has been reinforced by a shift in consciousness. Today, there is a growing coalition of interests, from Michelle Alexander to Newt Gingrich, working to challenge the rate of incarceration in the United States and promoting strategies and practices that expand the framework of public safety beyond arrest and prison.<sup>1</sup>

A salient part of the national dialogue addresses racial disparities present from the point of arrest to post-incarceration experiences for persons sentenced to prison or jail. Justice-involved individuals experience cumulative disadvantage through each criminal justice interaction, often resulting in racial disparity for African Americans and Latinos, who comprise fifty-six percent of the incarcerated population, yet only thirty percent of the United States population.<sup>2</sup>

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<sup>1</sup> See Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control"*, PBS (Apr. 29, 2014), <http://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>; see also Newt Gingrich & Van Jones, *Prison System is Failing America*, CNN (May 22, 2014), <http://www.cnn.com/2014/05/21/opinion/gingrich-jones-prison-system-fails-america/>.

<sup>2</sup> U.S. Census *QuickFacts*, UNITED STATES CENSUS BUREAU (2016), <http://quickfacts.census.gov/qfd/states/>; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, PRISONERS IN

Some factors that exacerbate racial disparity happen outside the criminal justice system and include structural inequality that is central to conditions for high rates of violent crime in some communities of color.

Conversations, animated by recent police killings of unarmed black men, women, and children, have led to a national dialogue on the fundamental strategy of public safety. Current approaches rely on reinforcing the law enforcement apparatus from the point of arrest to sentencing to supervised release for individuals in the criminal justice system.

Yet, the narrative of “Black Lives Matter”<sup>3</sup> offers a new framework for policymakers, activists, practitioners, and other stakeholders to think about a public safety strategy not solely defined by arrests and admissions to prison. Evidence-based research strengthens awareness that public safety interventions can exist outside of law enforcement interactions.

## I. OVERVIEW OF MASS INCARCERATION

### A. *The Politics of Criminal Justice*

In the United States, concerns about crime surface regularly at the national, state, and local levels. In the late nineteenth and early twentieth centuries, the nation’s criminal justice apparatus developed as a response to national campaigns waged against specific categories of crimes, including family violence, prostitution, alcohol, organized crime, child abductions, marijuana and cocaine use, sexual deviancy, and juvenile delinquency.<sup>4</sup> These efforts deepened the

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2013 8 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>; TODD D. MINTON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, JAIL INMATES AT MIDYEAR 2013 - STATISTICAL TABLES 6 (2014), <http://www.bjs.gov/content/pub/pdf/jim13st.pdf>.

<sup>3</sup> Black Lives Matter is a social justice movement and social media framework (#BlackLivesMatter), founded in the United States that started after the July 2013 acquittal of George Zimmerman in the shooting death of Florida teenager Trayvon Martin. The movement was further animated by the 2014 shooting of Michael Brown in Ferguson, Missouri. The social justice organizers who conceived the term, Black Lives Matter, have asserted that it reinforces that African American lives, often viewed without value, are important.

<sup>4</sup> MARIE GOTTSCHALK, THE PRISON AND THE GALLows: THE POLITICS OF MASS INCARCERATION IN AMERICA 3–5, 33 (2006).

role of law enforcement in addressing social problems and had a relatively modest increase on the prison population, during the same time period, although not as high as what was observed in the 1970s and 1980s.<sup>5</sup>

The high rate of incarceration in the United States resulted from the choices of lawmakers to increase the use and severity of prison sentences.<sup>6</sup> According to the National Academy of Sciences, other factors recognized to contribute to United States' place as the world's number one jailer are:

rising crime rates in the 1970s and 1980s; decisions by police officials to emphasize street-level arrests of drug dealers in the 'war on drugs' and changes in prevailing attitudes toward crime and [justice involved persons] that led prosecutors, judges, and parole and other correctional officials to deal more harshly with individuals convicted of crimes.<sup>7</sup>

The rise of the nation's prison population did not happen by accident but rather was due to policy decisions that increase the severity of criminal sanctions.<sup>8</sup> Rising crime rates are only part of the story in accounting for the growth in incarceration. Examining social, political, and institutional change offers an opportunity to understand the historical context and underlying steep increases in the nation's prison population. Other Western democracies experienced rises in crime in the 1960s, yet their social and political culture did not result in punitive responses to crime rooted in harsh sentencing policies.<sup>9</sup>

Public policies enacted in the 1970s through the 1990s led to stricter federal and state sentencing laws, more enforcement and more imprisonment.<sup>10</sup> Mandatory sentencing laws including truth-in-sentencing provisions, habitual offender statutes like California's

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<sup>5</sup> *Id.* at 4, 32–33.

<sup>6</sup> COMM. ON CAUSES AND CONSEQUENCES OF HIGH RIGHTS, NATIONAL RESEARCH COUNCIL. THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter THE GROWTH OF INCARCERATION].

<sup>7</sup> *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> *See id.* at 105.

<sup>10</sup> *See id.* at 3.

“three strikes” law, and mandatory minimums contributed to substantially longer sentences.<sup>11</sup> These policies were intended to reduce crime by keeping people behind bars, or deterring them from crime through the possibility of lengthy prison terms.<sup>12</sup>

### B. Factors Contributing to Crime Decline

Recent analysis by the National Academy of Sciences found that the “growth in incarceration rates may have caused a decrease in crime, [but] the magnitude of the crime reduction remains highly uncertain and [the evidence] suggests that it was unlikely to have been large.”<sup>13</sup> Acknowledging the impact of incarceration on crime reinforces that other factors contributed to declines in crime too, including economic conditions, changes in drug markets, strategic policing, and community responses to crime.<sup>14</sup> For example, one study estimated the strong 1990s economy that produced jobs and opportunities was responsible for thirty percent of the crime decline.<sup>15</sup> Changes in the drug market also contributed to crime decline; the crack cocaine epidemic of the late 1980s, combined with the availability of guns, was a significant contributor to increasing rates of violence.<sup>16</sup> Crack use declined by the early 1990s, along with the associated violence of the drug market, and homicide rates for young African American males significantly dropped.<sup>17</sup>

Other contributions to the crime decline were community policing. In San Diego, for example, studies estimate that changes in policing contributed to a greater than forty percent decline in crime rates from 1990 through 1996, which was the second largest drop in the country, resulting from better use of staffing and adoption of a

<sup>11</sup> See *id.* at 70–85.

<sup>12</sup> See *id.*

<sup>13</sup> *Id.* at 91.

<sup>14</sup> See RYAN S. KING, MARC MAUER & MALCOLM C. YOUNG, THE SENT’G PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 4–5 (2005), [http://www.sentencingproject.org/doc/publications/inc\\_iandc\\_complex.pdf](http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf).

<sup>15</sup> Richard B. Freeman & William M. Rodgers III, *Area Economic Conditions and the Labor Market Outcomes of Young Men in the 1990s Expansion* (Nat'l Bureau of Econ. Research, Working Paper No. 7073, 1999).

<sup>16</sup> Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163 (2004).

<sup>17</sup> *Id.* at 180–81.

problem-solving strategy.<sup>18</sup> High crime communities also employed responses that contributed to the crime decline. One study of a Brooklyn neighborhood noted that “the multiple threats of violence, crime, AIDS, and addiction” compelled many young people to “[withdraw] from the danger and [opt] for the relative safety of family, home, church, and other sheltering institutions.”<sup>19</sup>

### C. Racial Disparities in the Criminal Justice System

Deep racial disparities exist throughout the criminal justice system, from the point of arrest to post-incarceration experiences that include voting and employment. Cumulative disadvantage for justice-involved minorities builds because they are more likely to be arrested, convicted, and receive more punitive criminal sanctions than white defendants.<sup>20</sup> However, the complex intersection of various factors, including allocation of public resources for social policy priorities, deindustrialization, and substantial inequality, align with criminal justice policy initiatives that have imaginable consequences for racial disparity and biased discretionary decision-making.<sup>21</sup>

The scale of the black-white ratio in incarceration significantly exceeds all other major social indicators of comparative inequality: unemployment (2:1), infant mortality (2:1), and wealth (1:5).<sup>22</sup> The absence of African American men in the general community due to incarceration may impact other measures of racial progress.<sup>23</sup>

Policy decisions have contributed to racial disparities in the criminal justice system. At the federal level, lawmakers imposed

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<sup>18</sup> KING, *supra* note 14, at 5. See also DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (Oxford Univ. Press, 3d ed. 1999).

<sup>19</sup> Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. OF CRIM. L. & CRIMINOLOGY 1233, 1263 (1998).

<sup>20</sup> THE GROWTH OF INCARCERATION, *supra* note 6, at 91–101.

<sup>21</sup> Dep’t of Research and Dev., *Race, Ethnicity, and the Criminal Justice System*, AM. SOC. ASS’N SERIES ON HOW RACE AND ETHNICITY MATTER 21–22 (Sep. 2007), <http://www.asanet.org/images/press/docs/pdf/ASARaceCrime.pdf>.

<sup>22</sup> BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 16 (2006).

<sup>23</sup> MARC MAUER & NAZGOL GHANDNOOSH, THE SENT’G PROJECT, INCORPORATING RACIAL EQUITY INTO CRIMINAL JUSTICE REFORM 1 (2014), [http://www.sentencingproject.org/doc/rd\\_Incorporating\\_Racial\\_Equity\\_into\\_Criminal\\_Justice\\_Reform.pdf](http://www.sentencingproject.org/doc/rd_Incorporating_Racial_Equity_into_Criminal_Justice_Reform.pdf).

mandatory criminal penalties for crack cocaine in the 1980s that resulted in racial disparities.<sup>24</sup> At the state level, mandatory crack cocaine penalties were adopted in a number of states, including California and Oklahoma.<sup>25</sup> Sentencing enhancements in urban drug-free zones also exacerbate racial disparities; “protected areas are clustered within urban, high-density population areas [and] disproportionately affect people of color and economically disadvantaged citizens.”<sup>26</sup> In other criminal justice practices, racial disparity has been found in certain police tactics, discretionary practices among judges, and denials of parole.<sup>27</sup>

#### D. Cumulative Impact of Criminal Justice Policy on the Black Community

Collateral consequences of felony convictions can create additional barriers to obtaining stable, living-wage employment, securing public and private housing, and public benefits, even for those not sentenced to prison.<sup>28</sup> These issues do confront all justice-involved individuals regardless of race, but the cumulative effects on defendants of color intensify key issues of structural inequality. The Urban Institute documented in a number of cities that an important predictor of success for persons returning from prison are their family relationships and stable employment.<sup>29</sup>

<sup>24</sup> NICOLE D. PORTER & VALERIE WRIGHT, THE SENT’G PROJECT, CRACKED JUSTICE 1 (2011), [http://sentencingproject.org/doc/publications/dp\\_CrackedJusticeMar2011.pdf](http://sentencingproject.org/doc/publications/dp_CrackedJusticeMar2011.pdf).

<sup>25</sup> *Id.* at 3. States include: Alabama, Arizona, Iowa, California, Maine, Maryland, Missouri, New Hampshire, North Dakota, Ohio, Oklahoma, Vermont, and Virginia. *See id.* at 6–9.

<sup>26</sup> JUDITH GREENE, KEVIN PRANIS & JASON ZIEDENBERG, JUSTICE POLICY INST., DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY—AND FAIL TO PROTECT YOUTH 1 (2006), [http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03\\_rep\\_disparitybydesign\\_dp-jjrd.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/06-03_rep_disparitybydesign_dp-jjrd.pdf).

<sup>27</sup> THE GROWTH OF INCARCERATION, *supra* note 6, at 91–2.

<sup>28</sup> Sarah B. Berson, *Beyond the Sentence - Understanding Collateral Consequences*, 272 NAT’L INST. OF JUST. J. 25 (2013).

<sup>29</sup> “In 2000, the Urban Institute (UI) launched an ongoing investment in prisoner reentry research to better understand the pathways of successful reintegration, the social and fiscal costs of current policies, and the impacts of incarceration and reentry on individuals, families, and communities.” DEMELZA BAER ET. AL., URBAN INST.: JUSTICE POLICY CENTER, UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE’S

The nation's large prison system has had deeply disruptive effects that impact other areas of society. The removal of persons from communities that have high rates of incarceration results in a destabilizing effect known to weaken family and community bonds and contribute to higher rates of recidivism.<sup>30</sup> The effects of incarceration can impact future life outcomes. Individuals with prior felony convictions lose many rights and privileges of citizenship and legal residency in the United States.<sup>31</sup> Depending on where a person with a felony lives, they may be excluded from voting for life and denied the right to serve on a jury.<sup>32</sup>

## II. BLACK LIVES MATTER: SOCIAL INTERVENTIONS THAT LIMIT CRIMINAL JUSTICE INTERACTIONS

Increases in the use of imprisonment as a response to crime reflects changes in policy and practice. Research has documented the diminishing returns resulting from high rates of incarceration and the role of non-criminal justice factors in contributing to declines in crime.<sup>33</sup>

Formerly incarcerated persons return to neighborhoods that are underserved by quality education, affordable housing and transportation, living wage employment, and quality health care.<sup>34</sup> As a result, adopting place-based interventions as a part of broader public safety strategy may lessen interactions with the criminal justice system in communities of color. Research has documented that in many

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PRISONER REENTRY PORTFOLIO 12 (2006), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411289-Understanding-the-Challenges-of-Prisoner-Reentry.PDF>.

<sup>30</sup> Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33, 55, 60 (2003).

<sup>31</sup> DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 1–2 (2006), [http://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral\\_consequences.pdf](http://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> THE GROWTH OF INCARCERATION, *supra* note 6, at 2–7.

<sup>34</sup> JAMES AUSTIN ET AL., THE SENT'G PROJECT, ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 3 (2013), [http://sentencingproject.org/doc/publications/sen\\_Charting%20a%20New%20Justice%20Reinvestment.pdf](http://sentencingproject.org/doc/publications/sen_Charting%20a%20New%20Justice%20Reinvestment.pdf).

jurisdictions formerly incarcerated individuals return to a small subset of neighborhoods challenged by inequality, including poor educational outcomes, high rates of unemployment, health disparities, and a lack of affordable quality housing.<sup>35</sup>

#### A. Early Childhood Education

Policy interventions targeted to first-time, low-income mothers are known to reduce justice involvement for participants and their children. The Nurse Family Partnership (“NFP”) is a home visitation program targeted to first-time mothers who receive home visits and parenting training from registered nurses.<sup>36</sup> The program admits qualifying participants early in their pregnancy who then receive home visits that start during pregnancy and continue until the child is a toddler.<sup>37</sup> Studies have observed reductions in child abuse among participating families and declines in interactions with the criminal justice system.<sup>38</sup>

Quality early childhood education is demonstrated to prevent future contact with the criminal justice system. The most well-known model—the High/Scope Perry Preschool Project—demonstrates that Head Start and other preschool programs produce both short-term and long-term benefits.<sup>39</sup> This includes reduced engagement with the criminal justice system through the age of 27, along with positive school outcomes and reduced need for social services.<sup>40</sup> Cost-benefit analyses conducted by the RAND Corporation show that every \$1 invested in such programs produces \$7.16 in societal savings.<sup>41</sup> Investments in this early childhood initiative lead to a taxpayer return of \$88,433 per child.<sup>42</sup>

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<sup>35</sup> THE GROWTH OF INCARCERATION, *supra* note 6, at 281–87.

<sup>36</sup> Peter W. Greenwood & Susan Turner, *Juvenile Crime and Juvenile Justice*, in CRIME AND PUBLIC POLICY 88, 120 (James Q. Wilson & Joan Petersilia eds., 2011).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> GREG PARKS, OFF. JUV. JUST. AND DELINQ. PREVENTION, NCJ 181725, THE HIGH/SCOPE PERRY PRESCHOOL PROJECT 4 (2000).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

### B. Community Investment and Informal Community Control

Community-level approaches are also known to prevent crime.<sup>43</sup> Studies show that informal social mechanisms like parental friendship networks can help to monitor teenage peer groups reducing arrests.<sup>44</sup> A Baltimore-based study determined persons participating in neighborhood organizations experienced shared responsibility for their surrounding community, thus reinforcing safety goals.<sup>45</sup> Researchers also observed a decline in delinquency in over 500 residents in New York City who reported their participation in neighborhood groups.<sup>46</sup>

### C. Greening High Incarceration Communities

Vacant lots and abandoned buildings can be highly visible signs of disinvestment in high incarceration communities; these sites of a disordered physical environment have been associated with violent crime.<sup>47</sup> Observations note that vacant properties are overgrown and uncared for, which results in likely places of illegal activity, including sex work, unlawful gun possession, and drug activity.<sup>48</sup>

Interventions outside of law enforcement have been found to reduce community violence. Research has found that greening vacant

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<sup>43</sup> THE SENT'G PROJECT, ENDING MASS INCARCERATION: SOCIAL INTERVENTIONS THAT WORK (2013), [http://www.sentencingproject.org/doc/publications/publications/inc\\_Ending%20Mass%20Incarceration.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_Ending%20Mass%20Incarceration.pdf) [hereinafter ENDING MASS INCARCERAT: SOCIAL INTERVENTIONS THAT WORK].

<sup>44</sup> James Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95, 99–100 (Supp. 1988).

<sup>45</sup> Ralph B. Taylor, Stephen D. Gottfredson, & Sidney Brower, *Block Crime and Fear: Defensible Space, Local Social Ties, and Territorial Functioning*, 21 RES. IN CRIME AND DELINQ. 303 (1984).

<sup>46</sup> Ora Simcha-Fagan & Joseph E. Schwartz, *Neighborhood and Delinquency: An Assessment of Contextual Effects*, 24 CRIMINOLOGY 667, 689 (1986).

<sup>47</sup> Evelyn Wei et al., *Block Observations of Neighborhood Physical Disorder are Associated with Neighborhood Crime, Firearm Injuries and Deaths, and Teen Births*, 59 J. EPIDEMIOLOGY & COMMUNITY HEALTH 904, 907 (2009). See also Eugenia C. Garvin, Carolyn E. Cannuscio, & Charles C. Banas, *Greening Vacant Lots to Reduce Violent Crime: a Randomized Controlled Trial*, 19 INJ. PREVENTION 198, 198 (2013) [hereinafter *Greening Vacant Lots*].

<sup>48</sup> C. Debra M. Furr-Holden et al., *The Growth Of Neighborhood Disorder Among Urban Adolescents: A Case For Policy And Environmental Interventions*, 72 J. STUD. ALCOHOL & DRUGS 371. (2011). See also *Greening Vacant Lots*, *supra* note 47.

lots was associated with reductions in certain gun crimes and improved residents' perception of safety.<sup>49</sup> Greening of vacant lots may limit illegal drug activity and restrict places to hide guns.<sup>50</sup> Urban green space has been shown to increase perceptions of safety that may be caused by strengthening connections to one's neighborhood and facilitating social interaction among residents due to improvements in shared community space.<sup>51</sup> Studies show that efforts to improve the aesthetics of high incarceration communities enhance strategies to reduce violent crime and may have a stronger effect on residents for a lower cost than promoting lifestyle changes on a case-by-case basis.<sup>52</sup> Landscaping vacant lots in urban communities can result in lower mental stress often associated with living in high incarceration neighborhoods.<sup>53</sup>

#### *D. Quality Health Care and Therapeutic Intervention*

Addressing the emotional and physical health for persons at risk of criminal justice involvement is a public safety strategy that can reduce law enforcement interaction. Health interventions found to reduce future justice involvement include cognitive behavioral therapy and therapeutic interventions for justice-involved youth.<sup>54</sup> A comprehensive analysis found that cognitive therapy contributed to reducing returns to prison for persons convicted of serious offenses.<sup>55</sup> This therapeutic intervention has been found to be most effective at reducing justice involvement when participants received other services, including employment assistance, education and

<sup>49</sup> *Greening Vacant Lots*, *supra* note 47.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> I.H. Yen & S.L. Sympe, *The Social Environment and Health: A Discussion of the Epidemiologic Literature*, 20 ANN. REV PUB. HEALTH 287 (1999). See also *Greening Vacant Lots*, *supra* note 47.

<sup>53</sup> Frances E. Kuo & William C. Sullivan, *Aggression and Violence in the Inner City: Effects of Environment via Mental Fatigue*, 33 ENV'T & BEHAV. 543 (2001). See also *Greening Vacant Lots*, *supra* note 47.

<sup>54</sup> THE GROWTH OF INCARCERATION, *supra* note 6, at 197.

<sup>55</sup> Patrick Clark, *Preventing Future Crime With Cognitive Behavioral Therapy*, 265 NAT'L INST. OF JUST. J. 22, 23 (2013), <https://www.ncjrs.gov/pdffiles1/nij/229888.pdf>.

training, and other mental health counseling.<sup>56</sup> Therapeutic interventions for justice-involved youth have also reduced future law enforcement interactions. The most effective programs prioritized family therapies for at-risk youth and the adults who care for them.<sup>57</sup>

#### E. Targeted Employment Programs

Health interventions in conjunction with services like employment and job training are also evidence-based initiatives demonstrated to reduce criminal justice interactions.<sup>58</sup> Overall, aggregate analyses exploring the “relationship between incarceration and employment” are mixed; however, the National Academy of Sciences concluded that the incarceration-employment relationship is strongest among prime-age men, and particularly among African American men with no college education.<sup>59</sup>

Several types of employment programs have been established to increase employment and reduce recidivism for justice-involved persons, including residential and training programs for disadvantaged youth.<sup>60</sup> Employment efforts that provide services combined with housing, drug treatment, and job training result in improved public safety outcomes.<sup>61</sup> A study of Job Corps, which was established by the Economic Opportunity Act of 1964 and operated currently under the Workforce Investment Act of 1998, is a national program targeting economically disadvantaged youth aged 16 to 24, concluded the program helped to reduce crime among participants.<sup>62</sup> Specifically, program participants were less likely to be arrested than those who did not participate, particularly for less serious

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<sup>56</sup> Nana Landenberger & Mark W. Lipsey, *The Positive Effects of Cognitive-behavioral Programs for Offenders: A Meta-analysis of Factors Associated With Effective Treatment*, 1 J. OF EXPERIMENTAL CRIMINOLOGY 451 (2005).

<sup>57</sup> ENDING MASS INCARCERATION: SOCIAL INTERVENTIONS THAT WORK, *supra* note 43, at 2.

<sup>58</sup> See Sandra Lapham, M.D., M.P.H., *Screening and Brief Intervention in the Criminal Justice System*, <http://pubs.niaaa.nih.gov/publications/arh28-2/85-93.pdf> (last visited Feb. 24, 2016).

<sup>59</sup> THE GROWTH OF INCARCERATION, *supra* note 6, at 249.

<sup>60</sup> See generally Peter Z. Schochet, John Burghardt, & Sheena McConnell, *Does Job Corps Work? Impact findings from the National Job Corps Study*, 98 AM. ECON. REV. 1864 (2008).

<sup>61</sup> See generally *id.*

<sup>62</sup> *Id.*

crimes.<sup>63</sup> Participants were also found to be less likely to be convicted and spend time in jail.<sup>64</sup>

### III. ROLE OF THE CRIMINAL JUSTICE SYSTEM IN BLACK LIVES MATTER

The Black Lives Matter framework offers a way for policymakers and practitioners to address underlying structural issues that may lead to contact with the criminal justice system. While there are interventions that may prevent arrests, there are also interventions at the time of arrests to sentencing to post-incarceration supervision that can strengthen public safety and reduce future criminal justice interactions.<sup>65</sup>

Black disadvantage accumulates throughout the criminal justice system resulting in racial disparities at different points within the system for justice-involved persons. A little bias goes a long way to exacerbate racial disparities in a system that has many decision-makers. Discretion surfaces among police, who can decide whether to make an arrest or not, and prosecutors, who use their discretion to decide whether or not to drop charges or charge a defendant with a misdemeanor or felony offense.

#### *A. Arrest Policies*

The recent deaths of unarmed African Americans during law enforcement interactions have renewed a national conversation on the fundamental nature of policing and criminal justice policies. Broken windows and quality-of-life policing strategies have influenced law enforcement practices for several decades with modest impact on serious crime rates.<sup>66</sup>

Among the outcomes following law enforcement interaction for a low-level offense are criminal records that can complicate future

<sup>63</sup> *Id.* at 1874.

<sup>64</sup> *Id.*

<sup>65</sup> ENDING MASS INCARCERATION: SOCIAL INTERVENTIONS THAT WORK, *supra* note 43, at 3.

<sup>66</sup> NAZGOL GHANDNOOSH, THE SENT'G PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 1, 7, 8 (2015), [http://sentencingproject.org/doc/publications/rd\\_Black\\_Lives\\_Matter.pdf](http://sentencingproject.org/doc/publications/rd_Black_Lives_Matter.pdf).

employment.<sup>67</sup> Collateral sanctions are the penalties outside of sentencing and a conviction.<sup>68</sup> Records of arrests that do not result in a charge or conviction may still end up in publicly accessible databases.<sup>69</sup> In recent years, given the expansion of third-party record checks, arrests for misdemeanor offenses can also impact life outcomes for persons who have contact with law enforcement.<sup>70</sup> Criminal records can isolate certain justice-involved persons from employment opportunities and private rental housing.<sup>71</sup>

The outcomes of misdemeanor police interactions can also result in fatal outcomes. According to ProPublica, the more than 1,200 fatal police killings from 2010 to 2012 showed a significant racial disparity.<sup>72</sup> African Americans were killed at a rate of 31.17 per million, compared to the 1.47 per million white males in that age range who died at the hands of police.<sup>73</sup> The analysis acknowledges the available data is incomplete.<sup>74</sup> The overwhelming majority of the nation's 17,000 police departments do not report data on fatal police encounters.<sup>75</sup>

The nature of policing has changed in recent years and may contribute to the increase in the number of fatal police encounters. In 1985, the Supreme Court in *Tennessee v. Garner* "concluded that police officers could not shoot at a fleeing suspect simply to prevent their escape but could shoot if they had probable cause and determined the individual to be a violent felon who posed a public safety risk."<sup>76</sup> Additionally, "[f]rom 1980 to 1984, 'officer under attack' was listed as the cause for 33 percent of the deadly shootings.

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<sup>67</sup> Shawn D. Stuckey, *Collateral Effects of Arrests in Minnesota*, 5 U. ST. THOMAS L. J. 335, 337 (2008).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 337, 340.

<sup>71</sup> *Id.*

<sup>72</sup> Ryan Gabrielson, Ryann Grochowski Jones & Eric Sagara, *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014), <http://www.propublica.org/article/deadly-force-in-black-and-white>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*; Carol D. Leonnig, *Current Law Gives Police Wide Latitude to Use Deadly Force*, WASH. POST (Aug. 28, 2014), [http://www.washingtonpost.com/politics/current-law-gives-police-wide-latitude-to-use-deadly-force/2014/08/28/768090c4-2d64-11e4-994d-202962a9150c\\_story.html](http://www.washingtonpost.com/politics/current-law-gives-police-wide-latitude-to-use-deadly-force/2014/08/28/768090c4-2d64-11e4-994d-202962a9150c_story.html).

Twenty years later, looking at data from 2005 to 2009, ‘officer under attack’ was cited in 62 percent of police killings.<sup>77</sup>

Subsequent Supreme Court rulings also changed the way police interactions are governed. In the 1989 case of *Graham v. Connor*, the Supreme Court concluded that excessive police force is justifiable when law enforcement officers believe the force they use can “prevent or detect a crime in progress.”<sup>78</sup> During the 1980s, changes in policy and practice supported a law enforcement strategy to deter drug offenses by increasing arrests and admissions to prison.<sup>79</sup> The War on Drugs sentencing policies “resulted in dramatic growth in incarceration for drug offenses. Since its official beginning in the 1980s, the number of Americans incarcerated for drug offenses has skyrocketed from 41,000 in 1980 to nearly a half million in by 2013.”<sup>80</sup>

The law enforcement strategy of broken windows policing has increased police interactions for misdemeanor offenses ranging from traffic violations to jaywalking.<sup>81</sup> The guidance under *Graham* may contribute to increased use of excessive force, sometimes resulting in the deaths of unarmed African Americans that have animated discussions of racial disparity in the criminal justice system.

### B. Prosecutorial Impact

Arrests by police can lead to charges by prosecutors that may result in felony convictions, admissions to prison, and further isolation from civic life through collateral consequences.<sup>82</sup> Prosecutors have the discretion to bring a case or drop charges against a defendant and whether or not to charge a defendant with a misdemeanor or a felony offense. Prosecutorial discretion can also result in a prison sentence or probation term.

Leadership among prosecutors can contribute to expanding approaches for public safety beyond order-maintenance enforcement.

<sup>77</sup> Leonnig, *supra* note 76.

<sup>78</sup> *Id.*

<sup>79</sup> The SENT’G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 3 (2015), [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf).

<sup>80</sup> *Id.*

<sup>81</sup> GHANDNOOSH, *supra* note 66, at 6.

<sup>82</sup> Hugh Lafollette, *Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 22 J. OF APPLIED PHIL. 241 (2005).

John Chisholm, the District Attorney in Milwaukee County, has changed the county's approach to the use of prosecutorial discretion to challenge racial disparity.<sup>83</sup> Prosecutors worked to minimize racial disparity by intentionally reviewing the outcomes of cases, supporting treatment requirements, and requiring prosecutors to consult with their supervisors for additional feedback on case filings.<sup>84</sup> "Chisholm instituted a policy that all burglary-case filings must be approved by a senior prosecutor"; disparate decision-making in these cases led to more charges against blacks than whites.<sup>85</sup> During Chisholm's administration, Wisconsin's prison population has dropped from roughly 24,500 incarcerated persons in 2007 to 22,000 in 2015, a decline of more than ten percent; most of the reduction has come from Milwaukee County.<sup>86</sup>

Yet, a 2013 study found that Wisconsin had the highest rate of racial disparity in incarceration in the nation; blacks were imprisoned at a rate of 12.8 times the rate of whites, which is nearly double the national rate of 6.7.<sup>87</sup> It is widely recognized that there are solutions to reduce high rates of incarceration of African Americans. This reinforces the need to prioritize support for public safety interventions outside of the criminal justice system.

### C. Community Supervision Policies

Incarcerated persons are a minority among the nation's justice-involved population. Misdemeanor enforcement policies frequently lead to sentences of community supervision.<sup>88</sup> The number of per-

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<sup>83</sup> *A Prosecutor's Guide for Advancing Racial Equity*, VERA INSTITUTE FOR JUSTICE 16–17 (Nov. 2014), <http://www.vera.org/sites/default/files/resources/downloads/prosecutors-advancing-racial-equity.pdf>.

<sup>84</sup> Angela A. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 832–36 (2013).

<sup>85</sup> Jeffrey Toobin, *The Milwaukee Experiment*, THE NEW YORKER (May 11, 2015), <http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment>.

<sup>86</sup> *Id.*

<sup>87</sup> JOHN PAWASARAT & LOIS M. QUINN, EMP'T & TRAINING INST., UNIV. OF WISCONSIN-MILWAUKEE, WISCONSIN'S MASS INCARCERATION OF AFRICAN AMERICAN MALES: WORKFORCE CHALLENGES FOR 2013 2 (2013), <http://www4.uwm.edu/eti/2013/BlackImprisonment.pdf>.

<sup>88</sup> Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1024 (2013).

sons under community supervision has increased substantially, similar to increases in the nation's prison population. Persons on probation more than quadrupled from 1977 to 2013, from just over 800,000<sup>89</sup> to over 4.7 million.<sup>90</sup> Additionally, the post-incarceration supervision population grew from more than 173,000<sup>91</sup> to over 853,000<sup>92</sup> during the same period. Many of the highest rates of probation are found in states with low rates of incarceration, including Minnesota and Washington, indicating that policies and practices have increased the scale of the criminal justice system beyond prison walls.<sup>93</sup>

Post-incarceration supervision and probation are typically viewed as alternatives to imprisonment, and yet these dispositions may result in delayed admissions to prison.<sup>94</sup> The shifts in culture in supervision may strengthen surveillance practices that increase revocations to prison. The same changes in policy that lengthened prison terms and expanded community supervision during the 1980s and 1990s also led to a shift in approach among supervision agents from a casework model to a crime-control model.<sup>95</sup> High profile cases of persons under supervision who have committed serious offenses, like homicide, have placed political pressure on elected officials and correctional agencies to react harshly to violations.<sup>96</sup> Even though revocation rates and probation are not well documented, and the rates vary substantially among states, in many states "the failure

<sup>89</sup> *Id.* at 1018.

<sup>90</sup> ERINN J. HERBERMAN & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2013 1 (revised January 21, 2015), <http://www.bjs.gov/content/pub/pdf/pps13.pdf>.

<sup>91</sup> Klingele, *supra* note 88, at 1018.

<sup>92</sup> HERBERMAN & BONCZAR, *supra* note 90.

<sup>93</sup> MICHELLE PHELPS, MINN. POPULATION CENTER, UNIV. MINN., MASS PROBATION: TOWARD A MORE ROBUST THEORY OF STATE VARIATION IN PUNISHMENT 16 (2014), <http://www.pop.umn.edu/sites/www.pop.umn.edu/files/4.WorkingPaper%20Mass%20Probation%20%20Rev%20Jan%202015.pdf>.

<sup>94</sup> Klingele, *supra* note 88, at 1030–31.

<sup>95</sup> See generally NAT'L RESEARCH COUNCIL, PAROLE, DESISTANCE FROM CRIME, AND COMMUNITY INTEGRATION (2007).

<sup>96</sup> Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479 (1999).

of community supervision accounts for a dramatic portion of new prison admissions.”<sup>97</sup>

#### D. *Criminal Justice Response for Persons Convicted of Violent Offenses*

A salient question for many policymakers and practitioners is what to do with the “worst of the worst” who are sentenced to prison for violent offenses. The question is critical in the era of Black Lives Matter politics. Racial disparities among persons who commit serious offenses in large part reflect the fact that African Americans are more likely to live in economically disadvantaged communities.<sup>98</sup> Substantial rates of property and violent crime have been documented in high poverty neighborhoods.<sup>99</sup> One measure to assess racial disparities is arrest records. During 2012, blacks comprised thirty-nine percent of arrests for violent crimes and twenty-nine percent of arrests for property crimes, but represented only thirteen percent of the U.S. population.<sup>100</sup> African Americans comprised forty-nine percent of those arrested for the most serious crimes: murder and non-negligent manslaughter.<sup>101</sup>

Blacks are more likely than whites to experience and live in communities with concentrated disadvantage, and those experiences

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<sup>97</sup> Klingele, *supra* note 88, at 1031.

<sup>98</sup> NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 20 (2014).

<sup>99</sup> Lauren J. Krivo and Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOCIAL FORCES 619, 619 (1996).

<sup>100</sup> “Violent crimes” include: murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault. “Property crimes” include: burglary, larceny-theft, motor vehicle theft, and arson. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012 (2013) [hereinafter UNIFORM CRIME REPORT 2012], <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/offensesknownmain.pdf>; KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. See also GHANDNOOSH, *supra* note 98.

<sup>101</sup> GHANDNOOSH, *supra* note 98.

contribute to disproportionate rates of committing violent offenses.<sup>102</sup> Blacks living in disadvantage also experience disadvantage as justice-involved individuals. Experiences among African American defendants are often at the intersection of race and social policy. Specifically, a study of sentencing decisions in Pennsylvania determined that sentences were influenced by the lack of stabilizing social bonds among young black male defendants. Individuals found to not have family connections or stable employment were judged to be a risk to the public. Research found that conditions outside of the sentencing process interacted with the court system, resulting in harsher punishment.<sup>103</sup>

Many of the African Americans sentenced as juveniles to lengthy prison terms grew up in high poverty communities and were exposed to violence at an early age.<sup>104</sup> The Sentencing Project found that more than thirty percent of juveniles sentenced to life prison terms lived in public housing prior to their incarceration.<sup>105</sup> Also, a substantial majority of juvenile lifers were exposed to violence in their homes and communities.<sup>106</sup> More than half of the surveyed lifers reported witnessing violence in their communities, while seventy-nine percent reported observing violence in their homes.<sup>107</sup>

Lawmakers have enacted a variety of measures designed to lengthen prison terms for violent offenses, which has been a primary reason for the growth in incarceration. These policies have included harsh mandatory minimum penalties and truth-in-sentencing provisions that led to the elimination or a substantial scaling back of parole release policies.<sup>108</sup> Studies demonstrate that increasing the severity of punishment has at best only a modest additional deterrent

<sup>102</sup> Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME AND JUSTICE 311, 324–330 (1997).

<sup>103</sup> Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998).

<sup>104</sup> ASHLEY NELLIS, THE SENT’G PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY (2012).

<sup>105</sup> *Id.* at 2.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> ASHLEY NELLIS, THE SENT’G PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 14–16 (2013).

effect.<sup>109</sup> The vast majority of people incarcerated for a serious, violent offense against another person are no more likely to commit such an act in the future than those who have not been convicted but come from the same social circumstances and situation.<sup>110</sup> Violent crime is generally situational and often happens as a result of interpersonal conflict influenced by substance abuse.<sup>111</sup> In addition, “[f]or the few who have a long-term propensity to violence, proper risk assessment and the use of some indeterminacy in our sentencing laws for violent crime could allow for selective incapacitation.”<sup>112</sup>

The deterrent and incapacitation effects of long prison terms are modest for several reasons. Persons sentenced for violent offenses tend to be present oriented; lengthy statutory penalties, like life without parole, are unlikely to have a major effect on persons who are not necessarily thinking about the consequences of their actions.<sup>113</sup> Additionally, research has found that age is one of the most important predictor of criminality and that most persons age out of crime.<sup>114</sup> The majority of persons who commit violent offenses do so when they are fairly young and, more likely than not, they will “age out” of illegal activity before middle age.<sup>115</sup> Studies show that less than about thirty-three percent of lifers released from prison will recidivate for a new offense.<sup>116</sup>

Research from California that followed 860 individuals with murder convictions, who were sentenced to life and released in the mid-1990s, found that five individuals (less than one percent) were

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<sup>109</sup> Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced*, 10 CRIMINOLOGY & PUB. POL’Y 13 (2011).

<sup>110</sup> PAULA SMITH ET AL., THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES (2002).

<sup>111</sup> Letter from Nicole D. Porter, The Sent’g Project, to Joseph F. Vallario, Chairman, House Judiciary Committee (Feb. 17, 2015).

<sup>112</sup> Jonathan Simon, *Prop. 47: A Simple Step Toward Reducing Mass Incarceration*, THE BERKELEY BLOG (Oct. 22, 2014), <http://blogs.berkeley.edu/2014/10/22/prop-47-a-simple-step-toward-reducing-mass-incarceration/>.

<sup>113</sup> MARC MAUER ET AL., THE SENT’G PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 177 (2004).

<sup>114</sup> *Id.*

<sup>115</sup> MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 166–195 (2014).

<sup>116</sup> MARC MAUER ET AL., *supra* note 113.

convicted of new felonious offenses and returned to prison.<sup>117</sup> During that same year, the New York State Parole Board found that returns to prison were low among individuals released to parole with murder convictions.<sup>118</sup> Lastly, another New York State-based study found that the two-year recidivism rate for men who had served eight years or more in the state's prisons was twenty percent; nearly three-quarters of those who returned to prison recidivated due to a technical parole violation, not because of the commission of a new crime.<sup>119</sup>

Sentences like life without parole are not just about deterrence, but also reflect the principle of retribution in U.S. criminal justice policy. Recognizing the lack of utility for a harsh penalty structure as a response to violence could dramatically shift sentencing policies and practices. Life prison terms and other excessive prison sentences create a "reference price for crime that makes other extreme but less severe punishments seem appropriate."<sup>120</sup> Mandatory minimum prison terms of 10 years are considered modest in the U.S. criminal justice system because of life without the possibility of parole as a sentencing option, while it is considered severe and exceptional in many European countries.<sup>121</sup>

#### CONCLUSION: BLACK LIVES MATTER: EXPANDING THE CONCEPT OF PUBLIC SAFETY

The idea that persons convicted of violent offenses may age out of crime has particular relevance in the era of Black Lives Matter politics. Many of the youth sentenced for homicide and other violent

<sup>117</sup> ROBERT WEISBERG ET AL., STANFORD UNIVERSITY CRIMINAL JUSTICE CENTER, *LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASES FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA* (2011).

<sup>118</sup> *Low Recidivism Rate Reported from Paroled NY Murders*, THE CRIME REPORT (Jan. 7, 2011), <http://www.thecrimereport.org/archive/low-recidivism-rate-reported-for-paroled-ny-murderers/>.

<sup>119</sup> Marquez-Lewis et al., *How Much Punishment Is Enough? Designing Participatory Research on Parole Policies for Persons Convicted of Violent Crimes*, 69 J. SOC. ISSUES 771 (2013) (paper presented at the Annual Meeting of the American Anthropological Association, Montreal, Canada).

<sup>120</sup> KEITH O. LAWRENCE, RACE, CRIME, AND PUNISHMENT: BREAKING THE CONNECTION IN AMERICA 140 (2011).

<sup>121</sup> GOTTSCHALK, *supra* note 115, at 171.

offenses were raised in areas of concentrated poverty and personally experienced violence themselves.<sup>122</sup> The underlying structural issues that lead to violent crime require policy solutions outside of the criminal justice system. However, policymakers, practitioners, and other criminal justice stakeholders should consider solutions that align to not only decrease contact with the criminal justice system but are demonstrated to reduce criminal offending and severity of punishment. There are current opportunities for criminal justice reform that support the broader framework of Black Lives Matter and may influence new approaches to public safety. The political environment to address criminal justice policy has shifted over the past twenty years to recognize that the scale of incarceration has diminishing returns and there are moral and fiscal reasons to reduce the nation's prison population.<sup>123</sup>

At the federal level, Congress reduced the quantity-based sentencing differential between federal crack and powder cocaine convictions that resulted in significant racial disparities and excessive penalties.<sup>124</sup> According to *Cracked Justice*, “[t]he bipartisan measure addressed the 100-to-1 disparity that punished defendants with five grams of crack cocaine (also known as cocaine base) with the same five-year mandatory minimum penalty imposed on powder cocaine defendants with 100 times that amount,” and reduced the disparity to 18-to-1.<sup>125</sup> Several states have reformed laws impacting admissions to prison and length of confinement in an effort to control correctional spending and manage prison populations.<sup>126</sup>

Reducing the scale of the nation's prison population may free up resources to prioritize interventions that strengthen public safety. In recent years, several states have moved to shut down prison facilities following declines in the incarcerated population and the need to reduce correctional spending.<sup>127</sup>

Reforms and prison closures offer an opportunity in the era of Black Lives Matter to reorient the nation's criminal justice policies

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<sup>122</sup> NELLIS, *supra* note 108.

<sup>123</sup> KING, *supra* note 14, at 6.

<sup>124</sup> PORTER & WRIGHT, *supra* note 24, at 1.

<sup>125</sup> *Id.*

<sup>126</sup> KING, *supra* note 14, at 2–3.

<sup>127</sup> NICOLE D. PORTER, THE SENTENCING PROJECT, ON THE CHOPPING BLOCK 2012: STATE PRISON CLOSINGS (2012) (“From 2011 to 2012, 17 states closed some of their correctional facilities.”).

that result in substantial incarceration rates and law enforcement interactions. Scaling back the prison system allows for budget priorities to emerge that leverage public monies towards solutions demonstrated to prevent and reduce crime. Redirecting resources to early childhood education, greening initiatives, employment and quality health services support that public safety framework.

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# Criminal justice reform doesn't end system's racial bias

*Leah Sakala and Nicole D. Porter, Opinion contributors*

5-6 minutes

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## **Efforts still leave black men more likely to be arrested, sentenced and imprisoned for the same behavior**

This week marks significant progress in the fight for criminal justice reform. Senate Majority Leader Mitch McConnell announced that he will bring the FIRST STEP Act — a measure with strong bipartisan support that would, among other things, give some people in federal prison the chance for early release — to the floor for a vote.

While many assume that broad criminal justice reforms would automatically reduce racial disparities that have become so pervasive in the justice system, data tell us this simply is not the case.

A new Urban Institute online tool, the [Prison Population Forecaster](#), allows users to see how different approaches to state criminal

justice reform would affect the number of people in prison. In every state we looked at, broad cuts to the number of people in prison — both overall and within individual offense categories — do little to reduce the share of the prison population made up of people of color.

New Jersey, for example, is often heralded as one of the most successful examples of reversing mass incarceration, passing justice reforms that led to a [26 percent decline](#) in the state prison population between 1999 and 2012. However, the state did not target racial disparities in incarceration, and a 2016 Sentencing Project analysis found that black people in New Jersey were still more than [12 times](#) as likely to be imprisoned as white people — the highest disparity of any state in the nation.

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The reality is that implicit bias and structural racism ensnare people of color — particularly black, Latino and Native American people — in the justice system at astronomical levels, and the evidence is clear that people with identical criminal histories who have committed the same crimes are nonetheless treated differently because of the color of their skin.

For example, research shows that black people are more likely to be stopped, [arrested](#) and [detained before trial](#); not have

opportunities for [reduced charges](#) in plea deals; receive [harsher penalties](#); and serve [longer terms](#) in prison than white people in the same situations.

For this reason, racial disparity is prevalent throughout the justice system and grows at every stage, from policing, to arrest and pretrial detention, to trials, sentencing and post-release opportunity.

Not only does this have a devastating impact on communities of color, it also undermines public safety by [eroding their confidence](#) in law enforcement. What's more, it wastes criminal justice resources that could be used for prevention, treatment and services.

The bottom line is that efforts to undo the harmful legacy of mass incarceration must go hand in hand with explicit and intentional racial justice strategies.

Focus on correcting policies known to unfairly affect people of color.

State and local governments around the country are developing innovative ways to address racial disparity in the criminal justice system. At the local level, cities and towns can reform law enforcement practices to reduce concentrated overpolicing and prioritize promising community approaches instead. They can also reject unfair policies such as pretrial money bail.

State lawmakers can examine and reform policies that seem neutral but that can result in disparate outcomes, such as risk-assessment tools, discriminatory gang sentencing enhancements or geography-based school zone drug penalties.

Policymakers can also build checks and balances into the legislative process, such as requiring racial impact statements before any new criminal justice law or regulation is passed to

evaluate the potential for unfair outcomes.

The private sector, too, has a role to play with ensuring that all returning citizens have access to the employment and housing they need to succeed.

As Michelle Alexander, author of the book "[The New Jim Crow: Mass Incarceration in the Age of Colorblindness](#)," and many others have pointed out, the U.S. criminal justice system is deeply rooted in racism and inequality.

Coming to terms with this past requires policymakers, advocates and voters to commit to undoing the harm that has been done and moving forward on a better, fairer path.

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