Making American Sentencing Just, Humane, and Effective

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Abstract

American sentencing laws are rigid, harsh, and often unjust. Mass incarceration is a tragedy and a national embarrassment. Laws enacted in the 1980s and 1990s that mandated lengthy prison terms are the primary causes. The challenges are to undo mass incarceration, repeal or fundamentally overhaul the laws that caused it, and rebuild American sentencing systems. American legislators have not yet seriously addressed the subject. Hundreds of minor changes have recently been enacted, but they nibble at the edges—creating narrow exceptions to harsh laws for first offenders, narrowing criteria for probation and parole revocation, and establishing new treatment and "reentry" programs. These changes are important to individuals they affect, but will not reverse mass incarceration or prevent individual injustices. Meaningful change will occur only when the mandatory minimum, three-strikes, life without parole, truth in sentencing, and comparable laws that required prison terms of historically unprecedented severity are repealed and new laws authorizing the release of large numbers of current prisoners are enacted and implemented. Whether these things happen will determine whether mass incarceration and wholesale injustices are much different in 2025 than they were in 2017.

Key words: mass incarceration; sentencing reform; sentencing guidelines; sentencing guidelines; emergency release.

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Most American sentencing systems need to be rebuilt from the ground up. Mass incarceration has to be unwound and the sentencing laws and practices that caused it have to be changed. Unwinding mass incarceration will require creation and extensive use of new systems for reviewing the need for continuing confinement of people serving long prison sentences. Reinventing sentencing will require repeal or radical refashioning of three-strikes, mandatory minimum, truth-in-sentencing, life without parole (LWOPs), and similar laws, and creation of new sentencing systems that treat offenders fairly, justly, respectfully, and parsimoniously.

At rhetorical levels, there is broad agreement that mass incarceration was a huge mistake and that American sentencing systems are deeply unjust. Both have been much less effective at preventing crime than many people envisioned. They are unjustly severe. They do huge damage to offenders, their families, and their communities. They waste vast amounts of money that could more effectively be spent on other things or left in taxpayers' pockets.

Nearly everyone agrees. Newspapers publish interchangeable editorials decrying the system, condemning its excesses, and regretting what it has done. The Soros Foundation and Koch Industries fund major sentencing and correctional reform initiatives. Conservative organizations like the Manhattan Institute, Justice Fellowship, the American Enterprise Institute, and the Texas Public Policy Foundation as often as not find common cause with liberal organizations like the American Civil Liberties Union, the Open Society Institute, the Sentencing Project, and NYU's Brennan Center. Conservative politicians such as Newt Gingrich, Kentucky Senator Rand Paul, and former Governors Jeb Bush of Florida and Tom Perry of Texas support Right on Crime, an organization that decries current practices and calls for major change. So did

Hillary Clinton and Bernie Sanders campaigning in 2016 for the Democratic presidential nomination. To show his interest in the subject, President Obama became the first president in decades to visit a federal prison. Former Attorney General Eric Holder instructed United States Attorneys to be more discriminating and less punitive in their charging decisions and established a program to review the files of federal prisoners with a view to recommending commutations to the president. President Obama announced several small waves of releases.

Despite the rhetoric and the gestures, however, not much has happened. The best evidence: American crime rates have declined substantially and nearly continuously since 1991, to levels not seen since the 1960s, but the imprisonment rate, including local jails, rose for the following quarter century, peaking at 753 per 100,000 population only in 2007. The number of people held in federal and state prisons peaked in 2009, and fell only by three percent through 2014 (Carson 2015). Much of that is attributable to the U.S. Supreme Court's decision in *Brown v. Plata*, 563 US 493 (2011), requiring California to release 35,000 prisoners to remedy extreme overcrowding. Many were diverted to county jails (Petersilia 2014).

Noting that the prison population declined by 1.8 percent between 2011 and 2012, Marc Mauer and Nazgol Ghandnoosh (2013) ruefully observed that it will take 88 years at that rate to reach even the 1980 level, and that was more than double the level in 1973 when the increases began. That in any case is moot. In 2014, Pew Charitable Trusts, using state department of corrections projections, estimated that state prison populations will increase by 3 percent through 2018.

The failure of prison populations to fall significantly is no surprise. The kinds of major changes that would cause major declines have not happened. Prosecutors and other practitioners have moderated some practices. The scope of some sentencing laws has been slightly narrowed,

standards for parole release eligibility have been slightly broadened, criteria for parole and probation revocation have become slightly less rigid, prisoner reentry programs have been created, and treatment programs have been expanded (Beckett, Reosti, and Knaphus 2016).

Even the few most ballyhooed changes have been modest. The 2010 conversion of the federal 100-to-1 crack cocaine sentencing law, which treated crack dealers, mostly blacks, much more harshly than powder cocaine dealers, mostly whites, into a still unjust 18-to-1 differential, is one example. Limited amendments to New York's Rockefeller Drug Law, which still require remarkably severe punishments for some offenders, are another. US Attorney General Holder's announcement that low-level, nonviolent federal prisoners who had already served ten years in prison and had no significant criminal history would be considered for commutations is a third. Increased use of executive powers of pardon and clemency s is a good idea. Holder's approach, however, was remarkably narrow. Judges and lawyers outside the US are incredulous when I describe Holder's initiative; they are astonished that anyone convicted of a non-violent first offense would ever be held in prison for more than ten years.

No major legislation to unwind mass incarceration or rebuild American sentencing systems has yet been enacted. No legislature has repealed a three-strikes, LWOP, or truth-in-sentencing law or created a broad-based mechanism for assessing the need for continued confinement of people serving long prison terms. Except in Michigan in 2002, no legislature has repealed all or most of its mandatory minimum sentence laws. Until these things happen, nothing substantial will change. Mass incarceration will continue. Wholesale injustice will continue. Lives will continue to be ruined and families broken.

Few politicians are yet willing to acknowledge publicly that many of the laws enacted in 1984-1996 were unjust and unwise. Those laws attempted to remove compassion, empathy, and

recognition of human weakness—something we all recognize in ourselves—from the processes by which punishments are imposed and administered. When we ourselves, our children, or our close friends make serious mistakes, we instantly recognize the roles of alcohol, drugs, mental health problems, extreme emotion, stress, or momentary impulses that should have been resisted. Such things are seldom valid justifications for seriously wrongful acts, but they are germane to understanding why they happened and how best to respond to them. They are germane to deciding what punishments wrongdoers deserve, if any, and what dispositions will increase their chances of later living law-abiding, satisfying lives. That is the primary reason why judges and prosecutors often resist and circumvent the most severe laws.

The cases to be made for major changes in American sentencing and corrections policies are moral ones, not politically risk-averse claims about minor and first-time offenders, cost-savings, and recidivism reduction. American sentencing laws require punishments that are unjustly and disproportionately severe, ignore the circumstances of people's lives and actions, and ruin lives for no good reason. That is why they should be changed. Citizens by mid-2016 voted for referenda to legalize marijuana in four states and the District of Columbia, authorize medical use if marijuana in many states, and twice retroactively narrow the scope of California's three-strikes laws because they were right things to do (Tonry 2016*a*, chap. 1).

U.S. Supreme Court judges in *Booker v. U.S.*, 543 U.S. 220 (2005), and other cases, humanized the fearsome federal sentencing guidelines and California Supreme Court judges in *People v. Superior Court (Romero)*, 13 Cal. 4th 497 (1996), gave trial judges power to mitigate that state's three-strikes law. The reasons are clear: the federal guidelines and the California law were fundamentally unjust. Something had to be done, and legislatures were not doing it.

Initiatives to roll back mass incarceration and rebuild American sentencing systems must be justified in those kinds of terms. Institutions and processes need to be rebuilt so that they reflect and live up to fundamental Western ideas about justice and fairness. The moral responsibility, human dignity, interests, and needs of defendants and offenders should be restored to their place at the center of the criminal justice system as they were before the 1980s. People's freedom, property, reputations, and lives are at stake. Everything the criminal justice system does should acknowledge that. That does not mean, of course, that victims' interests or state interests in security and crime prevention should be ignored. They are important but there is no zero-sum game. Treating offenders unjustly does not honor victims, affirm moral values, or make a safer society. The ten proposals in table 1, if widely adopted, would go a long way toward reestablishing just systems of sentencing and punishment in the United States.

[Table 1 about here]

This essay explains what must be done. It has four parts. The first explains more fully why the case for change must in large part be made on normative grounds. The laws and policies that produced mass incarceration were adopted because policy makers believed or said they believed that to be the right thing to do and not simply because they were cost-effective or crime-reductive. The argument that must be made now is that those laws and policies are unjust, cruel, and gratuitously destructive. The right thing to do now is to create sentencing laws and processes that are fair, just, proportionate, and parsimonious.

The second section discusses the formidable body of evidence that shows that the policies that led to mass incarceration could not be justified in crime prevention terms when they were enacted and cannot be justified now. To the extent that they were predicated on beliefs that lengthy prison sentences and mandatory minimum sentence, LWOP, three-strikes, and truth-in-

sentencing laws are effective or cost-effective preventers of crime, they were misconceived.

The third lays out concrete steps that need to be taken to rebuild American sentencing systems. Judges impose sentences but that is the last step in a process that begins with discretionary decisions of police and prosecutors. The proposals thus include changes in police and prosecution practice. They also include repeal of most or all of the severe sentencing laws enacted in the 1980s and 1990s, creation of sentencing commissions and presumptive guidelines systems, enactment of new statutory constraints on judges' sentencing authority, and reestablishment or revivivification of parole boards and parole release.

The fourth section concerns measures needed to roll back mass incarceration. That will not happen for many decades unless systems are created that allow for reconsideration of the need for continued confinement, and major reductions in sentence lengths, of people now locked up. The sentencing policy changes proposed in section III will reduce the flow of people into prisons and shorten the time they spend there, but will not substantially reduce the number of prison inmates. That number rose for decades after American crime rates began their historic decline, and in 2015 was only a few thousand below the all-time high. Sentences became so long that inmates simply accumulated. Many people were admitted to prison to serve 25 year, life, and LWOP sentences under laws enacted in the 1980s and 1990s. Very few of those sentences have expired. Under California's 1994 three-strikes law, which set minimum 25-year terms, of which at least 85 percent had to be served, the earliest possible expiration of the sentence of anyone sentenced under it was in 2016.

Taken together, the proposals illustrate what just systems of American sentencing would look like. They incorporate the best features of the indeterminate systems that existed in all 50 states and the federal system from the 1930s to the mid-1970s and of the short-lived sentencing

reform period that immediately followed it. A just system would be based on the four principles of punitive justice drawn from the work of legal, moral, and political philosophers:

* *Justice as Fairness*: Processes for responding to crimes should be publicly known, implemented in good faith, and applied even-handedly (e.g., Rawls 1958, 1971).

* *Justice as Equality*: Defendants and offenders should be treated as equals; their interests should be treated with respect and concern when decisions affecting them are made (e.g., Dworkin 1978).

* *Justice as Proportionality*: Offenders should not be punished more severely than can be justified by their blameworthiness or the gravity of their offenses relative to the severity of punishments justly imposed on others for the same and other offenses (e.g., Kant 1965 [1798]; von Hirsch and Ashworth 2005).

* *Justice as Parsimony*: Offenders should not be punished more severely than can be justified by valid, normatively based purposes for which they are being punished (Bentham 1970 [1789], Morris 1974; Beccaria 2007 [1764])[1].

Those are not airy-fairy propositions. They describe what any person accused or convicted of crime would want for him or herself or their loved ones. They are minimal requirements of justice.

I. Moral Values

There will be fundamental change only when it becomes widely accepted that the policies that led to mass incarceration are morally wrong. A handful of liberal reform advocates have long

[1] The derivation of the four principles of punitive justice is discussed in detail in Tonry 2016*a*, chap. 5.

said this. Many of the spokesmen for "Right on Crime" now also say it. In 2014, Newt Gingrich and Van Jones wrote: "It would be hard to overstate the scale of this tragedy. For a nation that loves freedom and cherishes our rights to life, liberty and the pursuit of happiness, the situation should be intolerable. It is destroying lives and communities." Other prominent conservatives and most liberals say similar things.

Some conservative critics of the status quo, however, make no such admissions[2]. Instead they propose new policies only for non-violent offenders, say that current policies cost too much, and promote policies said to save money and reduce recidivism. Former Texas governor Rick Perry observed, "There are thousands of non-violent offenders in the system whose future we cannot ignore." Former Drug Czar William Bennett declared: ""Conservatives are known for being tough on crime, but we must also be tough on criminal justice spending. That means demanding more cost-effective approaches." The Right on Crime Statement of Principles, endorsed by, among many others, Perry, Bennett, former House Majority Leader Newt Gingrich, former Attorney General Edwin Meese, and former Florida Governor Jeb Bush, lists five objectives of the criminal justice system: "protecting the public, lowering crime rates, reducing re-offending, collecting victim restitution, and conserving taxpayers' money." Fairness, equality, proportionality, and parsimony are conspicuously absent. Many liberal reformers are similarly silent (e.g., Alexander 2012). They evade facing up to the needs to acknowledge that American punishment policies are fundamentally unjust and to call for changed policies affecting all, including violent and repeat, offenders.

There is no free lunch. Sentences for non-violent first offenders and admissions to prison of people whose parole or probation was revoked did not quintuple America's imprisonment rate

[2] The quotations in this paragraph may be found at the Right on Crime website.

and make it the world's highest. Changing only those policies will be good for people they affect but will not make much difference in the numbers of people sentenced to prison or held there. Meaningful changes will require greatly reduced use of prison sentences, and much shorter ones, for nearly all offenders, whether or not they are first-timers, and whatever their offenses. The changes must encompass repeat and violent offenders. That's the reality.

For the past 40 years, most liberal advocates made the fundamental mistake of arguing disingenuously. Instead of saying that current harsh policies are unjust, and should be changed for that reason, they usually argued that current policies—which they usually believed to be unjust—should be changed because they were ineffective or too costly. Supporters of correctional alternatives, exemplified by most reentry initiatives, for example, usually claim that their use will reduce costs and lower recidivism rates. This is no doubt true for some programs but as a broad generalization, it is a mistake. Thirty years of program evaluations have shown that most "alternatives" cannot keep their promises, and reduce reoffending rates if at all by no more than a few percentage points.

Some well-managed, well-funded, well-targeted programs with especially effective or charismatic leaders can divert offenders from prison, save money, and significantly reduce reoffending, but few real-life programs are like that. Bureaucratic inertia sets in, key staff leave, and budgets get cut, making program integrity difficult to sustain. Even among treatment programs that are evaluated, "implementation failure" remains the most common finding (Kleiman 2009). Although literature reviews and meta-analyses regularly conclude that programs reduce reoffending, they suffer from "publication bias." Most programs are never evaluated. Evaluations that find no effect are seldom published, which means that the published literature represents mostly the unknown percentage of evaluations that find positive effects. Some

correctional programs no doubt produce significantly better results than the norm, but it is unreasonable to assume that most do.

The strategy of disingenuous argument failed because it does not acknowledge that adoption of current sentencing policies was not motivated primarily by concerns about cost savings or effectiveness. Mandatory minimum, three-strikes, truth-in-sentencing, "dangerous offender," "sexual psychopath," and LWOP laws were enacted not on the basis of research findings, cost-benefit studies, impact projections, or meta-analyses, but because policy makers believed them to be intuitively plausible, morally appropriate, or politically expedient. Their proponents believed that "we" deserve protection from "them," and that "they" have forfeited any claim to have their interests or human rights taken into account. Instrumental arguments about costs and effectiveness, especially weak ones, seldom win over people motivated by moral beliefs. Few supporters of capital punishment, for example, change their views when they learn there is no convincing evidence that the death penalty deters killings. The ultimately moral arguments about disproportionate punishments, ruined lives, and social injustice must be made explicitly, and convincingly, if hearts and minds are to be changed.

It oversimplifies to characterize views about crime control and punishment policies in terms of conservatives and liberals, but those categories are commonly used and capture at least central tendencies among people who fit into them. For 40 years, conservative policy advocates made normative claims: Offenders deserve to be severely punished, procedures that let guilty people off are wrong, "lenient" sentences depreciate the seriousness of crimes, victims' needs and interests are more important than those of offenders, and severe policies do and should denounce wrongful conduct.

Liberals typically ducked the normative claims and responded with instrumental ones, arguing that particular policies and practices are ineffective, cost too much, and divert funds from more important public needs. Or, accepting conservative assumptions and values, liberal advocates argued that their policy proposals do what conservatives wanted done, but better. The programs they proposed, they said, cost less than imprisonment and reduced recidivism rates more. That's the central claim, and the Achilles heel, of "justice reinvestment" initiatives in many states (Austin et al. 2013).

Normative arguments concerning criminal justice policy have generally defeated instrumental ones since the mid-1970s. During the late 1970s and early 1990s recessions that made Jimmy Carter and George H. Bush one-term presidents, liberal law reformers in countless legislative hearing rooms—I was one of them—argued that severe sentencing and corrections policies were unwise. They were unaffordable and would force unwanted budgetary trade-offs between prisons and K-12 schools, higher education, and highways. The arguments fell on deaf ears. In the political climates of both of those deep recessions, the movement toward harsher sentencing policies accelerated. During and after the 2009 recession, politicians' support for harsh sentencing policies did not diminish. If it had, many severe sentencing laws would have been repealed or substantially amended. Didn't happen.

During that recession and the following years of slow economic growth, policy makers in some states made modest changes to sentencing and corrections policies. That's good. That is more than happened during the Carter and Bush I administrations, and may along with the emergence of Right on Crime and similar developments portend a change in the political climate. When the good times once again convincingly roll, however, as they were beginning to in 2015 and 2016, changes that are adopted primarily to save money, improve efficiency, or reduce

recidivism, rather than because they are the right things to do, are not likely to last, especially if crime rates begin to increase.

No one should be surprised that normative arguments trump instrumental ones. The proposition that punishments should be harsher because that will better acknowledge victims' suffering is a normative claim about what is due victims. The proposition that violent or repeat offenders have forfeited any right to have their interests considered is a normative claim about appropriate consequences of wrongful behavior. The proposition that laws that punish minor offenses disproportionately severely are unjustifiable is a normative claim about unjust punishment. The proposition that laws that punish minority offenders unduly severely are unjustifiable is a normative claim about social justice. The proposition that no punishment should be so severe that it ignores possibilities of redemption is a normative claim about human dignity. The proposition that just sentencing systems must be individualized to take account of the details of offenses and the characteristics and culpability of individual offenders is a normative claim about punitive justice.

Those six propositions are in the abstract irreconcilable. Different people subscribe to different of them in different degrees. I described the claims as normative. Others would describe them as moral. No matter how they are described, those claims express deeply held beliefs about how offenders should be treated and about the weight that should be given to their interests in deciding how to respond to crimes they committed.

Given a choice between doing what seems morally right and doing something else, most people prefer the morally satisfying choice, even if it costs more. If the morally preferable choice is rejected because it seems unaffordable, it is with a feeling of regret, an uncomfortable sense of

doing the wrong thing for the wrong reason. Given the chance later on to do the right thing, most people jump at it.

To the extent that contemporary crime control policies are based on normative beliefs, their proponents and supporters are unlikely to repudiate them for instrumental reasons. Those policies will be repudiated, or support for them weakened, only if enough people can be persuaded that they are unjust and morally objectionable. That will not happen unless normative disagreements are brought into the open and engaged directly. Sometimes, at least, when that happens, minds change. Lawrence Bobo and Victor Thompson (2006, 2010) found, for example, that whites' support for the federal 100-to-1 law that punished crack cocaine offenses much more severely than powder cocaine offenses plummeted when they learned about its disproportionate effects on black offenders. The successful 2012 and 2014 referenda narrowing California's three-strikes laws were built on claims that punishments for many offenders were unjustly severe and ruined lives to no good purpose. The proposals that follow are premised on the view that many contemporary policies must be changed because they are morally wrong. Before setting out those proposals, I briefly summarize the evidence on the deterrent and incapacitative effects of punishment to show that it does not support a straight-faced claim that current policies are justifiable because they are effective crime prevention measures.

II. The Effects of Sanctions

In 2017, it is not controversial to assert that the crime prevention effects of mass incarceration have been much less than many people supposed or hoped, that there is little or no reason to believe that harsher punishments have greater deterrent effects than milder punishments, that incapacitating people by locking them up for lengthy periods is an ineffective crime prevention

strategy, or that the experience of imprisonment makes many offenders more not less likely to commit crimes later in their lives. The National Academy of Sciences Committee on the Causes and Consequences of High Rates of Incarceration reached all those conclusions and explored and explained the evidence justifying them in detail (Travis, Western, and Redburn 2014, chaps. 3 and 5).

Those conclusions are not novel, though they are based on much more, and scientifically more rigorous, evidence than was available in earlier times. A series of National Academy of Sciences panels in the 1970s and 1980s that surveyed the evidence then available on deterrence, incapacitation, sentencing, and criminal careers offered much the same conclusions[3].

There is, however, one subject on which knowledge of the effects of criminal justice programs has changed radically in the last 30 years. Two early NAS panels reviewed the evidence on the effectiveness of correctional rehabilitation programs. They concluded, consistent with the "nothing works" conventional wisdom of the time, that little credible scientific evidence showed treatment programs to be effective at reducing reoffending (Sechrest, White, and Brown 1979; Martin, Sechrest, and Redner 1981). Since then masses of experimentation and research have combined to show that many well designed, targeted, and run correctional programs can reduce reoffending. A recent National Academy of Sciences report so found (Petersilia and Rosenfeld 2007). So have many recent surveys of the relevant evidence (e.g., Cullen 2013; Cullen, Jonson, and Mears 2017). Many things can "work." Better programs can reduce reoffending no less effectively than does mass incarceration, and at substantially lower cost.

[3] The conclusions on the effects of sanctions in the 2014 report are consistent with the findings of National Academy of Sciences panels on deterrence and incapacitation (Blumstein, Cohen, and Nagin 1978); sentencing including mandatory penalties (Blumstein, Cohen, Martin, and Tonry 1983), and criminal careers (Blumstein, Cohen, Roth, and Visher 1986). Cohen (1983) provided an exhaustive survey of the chastening evidence on the effectiveness of incapacitative crime prevention strategies.

Doing them well on a large scale will, however, require substantially greater public investment and a determination to bring better management to correctional programs than has in recent decades occurred. That is why I earlier urged caution and discouraged over-claiming, and warned about the challenges involved in "going up to scale," implementing programs throughout a jurisdiction (e.g., U.S. Surgeon General 2001; Kleiman 2009).

Social science evidence has been conspicuously absent from legislative policy making since the early 1980s. Legislatures enacted many hundreds of state and federal laws through the mid-1990s that mandated long prison sentences ostensibly aimed at preventing crime through deterrence and incapacitation. These included mandatory minimum sentence and LWOPs laws in every state and the federal system, three-strikes and truth-in-sentencing laws in more than half the states and the federal system, and the U.S. Sentencing Commission's "mandatory" guidelines. Although there is no basis for believing these laws played a significant causal role in the last 25 years of declining crime rates, the evidence is compelling that they are a major reason why American imprisonment rates have long been four to five times higher than they were from the 1930s to the early 1970s (Raphael and Stoll 2013; Travis, Western, and Redburn 2014, chaps. 2 and 3).

For much of the century before 1975, faith in good will and good effects, not research findings, underlay indeterminate sentencing. If major developments since 1975 had been predicated on widely accepted research findings, imprisonment rates and patterns and criminal justice policies would have evolved very differently or, as has been true of most other developed countries, not have changed much at all.

Research has interacted with policy in several ways in the past 40 years. The developments during the sentencing reform period from 1975 through the mid-1980s provided a

classic example of evidence-based policy making. Pilot studies suggested federal parole guidelines might work. Federal guidelines were developed, implemented, and evaluated. They made policies explicit, reduced disparities, increased consistency, and made decisions more predictable. Drawing on that experience, voluntary sentencing guidelines were developed (Gottfredson, Wilkins, and Hoffman 1978). They proved unsuccessful, but were succeeded by presumptive sentencing guidelines which achieved their primary goals of rationalizing sentencing, reducing unwarranted disparities, making processes fairer and more transparent, and making judges accountable for their decisions (Tonry 1996, chap. 2).

That instance of admirably evidence-based policy making proved short-lived. By the mid-1980s, credible evaluations showed that voluntary sentencing guidelines had little effect on sentencing patterns and did not reduce disparities (e.g., Rich et al. 1982). By contrast, presumptive sentencing guidelines developed by a sentencing commission reduced racial and other unwarranted disparities, brought greater consistency to plea bargaining, and enabled states to improve resource planning (e.g., Knapp 1984). From an evidence-based policy perspective, the implications were straightforward: parole and presumptive sentencing guidelines work, voluntary guidelines do not. Nonetheless, parole guidelines, despite their successes, withered away, the movement toward adoption of presumptive sentencing guidelines stalled, and voluntary sentencing guidelines became the industry standard.

Mandatory minimum sentence, three-strikes, truth-in-sentencing, and LWOP laws offer a diametrically opposed example of the limited influence of research findings. Little solid evidence justified their enactment or survival. During the 1980s and early 1990s, however, they were the most commonly adopted sentencing policy changes.

A. Deterrence

Many of the harshest laws were ostensibly premised on beliefs or assumptions about the deterrent effects of mandatory and severe punishments. From a crime control perspective, those beliefs and assumptions were misguided.

Steven Durlauf and Daniel Nagin in an influential article examined evidence on the deterrent effects of sanctions and the effects on crime of imprisonment and policing. About deterrence, they concluded: "In summary, the literature on whether increases in prison sentence length serve as a deterrent is not large, but several persuasive studies do exist. These studies suggest that increases in the severity of punishment have at best only a modest deterrent effect" (Durlauf and Nagin 2011, p. 31). They also concluded that the effects of imprisonment on prisoners were on average criminogenic rather than crime-preventative (e.g., Nagin, Cullen, and Lero Jonson 2009) but that a sizable literature indicates that police actions have preventive effects. They concluded that prison use should be greatly reduced and saved funds be transferred to more effective and less costly police crime-prevention efforts.

The National Academy of Sciences has repeatedly constituted panels to examine scientific evidence on the preventive effects of sanctions. Each cautioned skepticism. I've described the skeptical findings of the 2014 report of the Committee on the Causes and Consequence of High Rates of Incarceration. Two years earlier, the National Academy of Sciences Panel on Deterrence and the Death Penalty concluded that there is no credible evidence that the death penalty is a more effective deterrent to homicide than other sanctions that might be imposed (Nagin and Pepper 2012).

These conclusions, however, are not novel. After the most exhaustive examination of the subject ever undertaken, the 1978 National Academy of Sciences Panel on Research on Deterrent

and Incapacitative Effects concluded, “In summary … we cannot assert that the evidence warrants an affirmative conclusion regarding deterrence” (Blumstein, Cohen and Nagin 1978, p. 7).

The National Academy of Sciences Panel on Understanding and Controlling Violence reached a similar conclusion in 1993. After documenting that prison sentence lengths per violent crime tripled between 1975 and 1989, the panel asked, “What effect has increasing the prison population had on violent crime?” Its answer: “Apparently very little” (Reiss and Roth 1993, p. 10). The major scholarly evaluations over the past 40 years concur (Cook 1980, p. 215; Pratt et al. 2006, p. 379; Nagin 2013).

Surveys of the evidence by bodies created by governments of other countries have reached the same or stronger negative conclusions (e.g., Canadian Sentencing Commission 1987; Home Office of England and Wales 1990; Törnudd 1993 [Finland]; von Hirsch, Bottoms, Burney, and Wikström 1999 [England and Wales]; Germany 2006; Australia 2013). The Canadian Supreme Court in 2015, declaring mandatory minimum sentence laws unconstitutional, observed, “The empirical evidence is clear: mandatory minimum sentences do not deter more than less harsh, proportionate, sentences” (*R. v. Nur*, 2013 SCC 15 [2015]).

B. Incapacitation

Research on incapacitation provides no firmer underpinnings to the proliferation of laws mandating lengthy prison sentences. Some were honestly or ostensibly premised on beliefs or assumptions about incapacitation. Three major strands of evidence are particularly relevant: on “replacement effects” and, from work on criminal careers, on “age crime curves,” and “residual career lengths.” All three offer strong evidence that locking up large numbers of people to

incapacitate them is not an effective crime prevention strategy (Piquero, Farrington, and Blumstein 2003, 2007).

1. Replacement Effects. For some categories of offenders, an incapacitation strategy necessarily failed because most or all of those sent to prison were rapidly replaced in the criminal networks of which they were a part. Locking them up did not diminish future offending. Drug trafficking is the paradigm case. It is part of a large complex illegal market with low barriers to entry. The net earnings of street-level dealers are low and the probabilities of eventual arrest and imprisonment are high (Levitt and Venkatesh 2000; Cook et al. 2007). Even so, arrested dealers are quickly replaced by new recruits (Smith and Dickey 1999; Dills, Miron, and Summers 2008).

The impression that drug dealing will enable a disadvantaged young man or woman to live the good life can be strong. Such young people tend to overestimate the benefits and to underestimate the risks (Reuter, MacCoun, and Murphy 1990; Kleiman 1997). The likelihood of arrest for any individual sale of crack, cocaine, heroin, or methamphetamine is low—estimates range between one in 500 transactions and one in 1000—but the likelihood of eventual arrest and imprisonment is very high (Caulkins and MacCoun 2003). The arrests and imprisonments of street-level dealers create illicit opportunities for others. At least in recent decades sadly too many young people have seized that "opportunity."

Similar analyses apply to deviant youth groups and gangs. Social pressures encourage participation. It offers opportunities for peer approval, recognition, and participation that are not otherwise readily available in socially disorganized neighborhoods. The teenage years are for most people a time for risk-taking. Young people drive recklessly, experiment with drugs, and in the teenage years commit crimes at peak rates (Zimring 2014). In some inner-city areas of large cities, so many young men have been arrested and gone to prison that those things bear little

stigma. As gang members and even leaders are arrested and taken out of circulation, successors are ready, willing, and available to step into their shoes.

2. Criminal Careers: Age-Crime Curves. Research on "criminal careers" provides other reasons to be skeptical that imprisoning offenders for long periods is a cost-effective crime prevention strategy. Many of those confined would have ceased offending long before their prison terms expire. Criminal careers were a major focus of federally funded crime research in the 1980s and the subject of a National Academy of Sciences panel report (Blumstein et al. 1986). One strand of that literature documented "age-crime curves" (Farrington 1986).

That work shows that very large percentages of young people commit offenses; rates peak in the mid-teenage years for property offenses and the late-teenage years for violent offenses, followed by rapid declines (e.g., Farrington 1986; Sweeten, Piquero, and Steinberg 2013). A process of natural desistance results in cessation of criminal activity by most offenders in the late teens and early 20s. As people enter their twenties, they increasingly have interests and stakes—intimate relationships, marriages, children, jobs, career prospects, hopes for a better life—that are too important to risk. Important causes of desistance include getting a job, entering into an important personal relationship, and finding God or experiencing other spiritual awakenings. Confining people after they would have desisted from crime is inefficient. It is also destructive. Because spending time in prison increases the likelihood of later offending, the end result is that criminal careers are extended of people who otherwise would have settled down into conventional lives.

3. Criminal Careers: Residual Career Lengths. "Residual career length" is the period during which an active offender continues to commit offenses (Blumstein, Cohen, and Hsieh 1982). Most desist in their teenage years or early twenties. Even the most active desist at relatively early ages—typically in their thirties (Farrington 2003). Thus most—even active—criminal careers are short. In the federal system and most states, however, repeat offenders are punished much more severely than first offenders. Under three-strikes laws, dangerous offender statutes, and all sentencing guidelines, criminal history considerations substantially increase sentence lengths, often doubling or tripling them (e.g., Reitz 2010). In Oregon, Pennysylvania, Washington, Utah, and Kansas, criminal history increases guideline sentences by 8 or more times (Frase et al. 2015, table 2.2). Under three-strikes and "career criminal" or "dangerous offender" laws the multiplier is often vastly greater. The short residual career lengths of most offenders mean that there is little incapacitative gain to be realized from imprisoning people for lengthy periods, and especially for sentencing repeat offenders to increasingly long terms. Imprisonment of most people over 35 is, from a crime prevention perspective, a waste of money.

[li #]

The implications of the literatures on deterrence and incapacitation are straightforward: fewer convicted offenders should be sent to prison and for shorter times. There are no evidence-based grounds for believing the use of prison sentences generally and lengthy ones in particular have significant crime-preventive effects. There is good evidence that imprisonment fails to reduce later offending and may increase it. There is good evidence that well-designed, well-targeted, well-resourced, and well-run treatment programs can modestly reduce later offending. Treatment programs cost much less to operate than prisons, and are less likely themselves seriously to damage offenders' likelihood of living better lives later on. The conclusion to be

drawn: as is current practice in most other Western countries, American criminal justice systems should use prisons much more sparingly than they now do. For purposes both of norm reinforcement and social justice, many suspected offenders should be diverted from the criminal justice system into mediation, treatment, and social services programs. Many who now wind up in prison should be sentenced instead to community penalties and programs (Cullen, Jonson, and Mears 2017). Many drug dependent offenders would be much more constructively referred to treatment than to prosecution (Pollack 2017). Many mentally ill defendants are much more sensibly and effectively dealt with by mental health than criminal justice professionals (Mulvey and Schubert 2017).

Evidence had little influence in recent decades on American sentencing laws and policies. Things other than evidence drove sentencing policy. The winds of change, however, may be blowing, and evidence may begin to count for something. If so, the American criminal justice system could be very different in coming years.

III. Building Just and Effective Sentencing Systems

The short-term goal should be to reduce the national imprisonment rate by half by 2020, essentially to turn the clock back to where things stood in the mid-1980s. The longer-term goal should be to regain by 2030 an imprisonment rate of 160 per 100,000. That was the American norm for half a century before 1973, when the 35-year period of continuous increase began. Reaching the 1973 level would not by international standards make the United States "lenient." The imprisonment rate would remain two-and-a-half times that of the Scandinavians and fifty percent more than the modern average of 100 per 100,000 in other Western countries (Council of Europe 2014).

Proposal 1. Prison Population Goals: The total national imprisonment rate for federal and state prisons and local jails should be reduced by 2020 to the mid-1980s level of approximately 350 per 100,000 and by 2030 to the 1973 rate of 160 per 100,000.

A. Police and Prosecutors

No system of sentencing built on the four principles of punitive justice can succeed unless there are just and effective systems of policing and prosecution. Police and prosecutors inevitably exercise discretion, and are ethically obliged to enforce law consistently and even-handedly. There can be no perfect resolution between the needs to respond to unique circumstances of particular cases appropriately and wisely and to treat cases evenhandedly. For less serious behaviors, informal dispositions of some kinds of cases are inevitable. Police decide whether to take a young suspect home to his or her parents or to the police station. They decide whether to give an intoxicated driver a warning, and follow him or her home in their car, or to make an arrest. Similar decisions are made about drug sales, drunken fights, domestic incidents, and a wide range of everyday breaches of public order. Tax authorities and regulatory agencies must decide which few among many thousands of comparable prima facie cases of tax evasion to refer to prosecution and which to handle civilly.

For very serious harms such as homicides, rapes, and armed robberies, there will seldom be much doubt about arrests and prosecutions. In many less serious cases, special circumstances may justify a decision not to prosecute. In legal systems governed by the "expediency principle," such as in the English-speaking countries and the Netherlands, prosecutors are allowed discretion to decide what should be done (Tonry 2012).

Some legal systems attempt to regulate police and prosecution decisions tightly. Many continental European systems are guided by a "principle of legality" which on its face forbids exercises of discretion in individual cases and directs police and prosecutors simply to enforce and apply the law evenhandedly. The principle is derived from the European concept of the *Rechtsstaat*, the state which treats every citizen equally under the law (Pifferi 2012).

Prosecutors in legality principle countries such as Germany or Sweden are expected to deal with cases only on their merits and under established rules. Cases may be dismissed because of doubts about a suspect's guilt or about the adequacy of the evidence or under diversion policies applicable to all qualifying cases, but not simply because the individual prosecutor decides that prosecution is inappropriate for a particular case or suspect. Sweden's rules and policies are among the most developed in any country. Defendants or victims who believe a prosecutor is handling their case inappropriately may file an administrative appeal within the prosecution system. There are no negotiated charge dismissals or plea bargains and the judge is not bound by the prosecutor's charging decision. The defendant may be convicted of an offense less or more serious than the formal charge. The aim is to assure that the state deals with every citizen under particular circumstances in the same way (Asp 2012).

In many European systems, whether or not prosecutors are subject to the legality principle, police investigations are overseen by prosecutors. European prosecutors are often members of the judiciary with the same obligations of neutrality, objectivity, and impartiality as judges (Jehle, Smila, and Zila 2008), or they are separately organized but bound by the same ethical principles as judges (e.g., in the Netherlands: van de Bunt and van Gelder 2012). In the Netherlands, police are authorized to dispose of some kinds of cases informally, but under rules developed and overseen by the prosecution service.

Equivalent legal and conventional constraints on the powers of police and prosecutors do not exist in the United States. Police are almost always organized at municipal levels with chiefs appointed by the mayor or city council. Except for abuses of authority, excessive use of force, corruption, and actions motivated by invidious bias, police decisions are effectively unreviewable. Most American chief prosecutors are locally elected at county level. The U.S. Supreme Court, in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) and *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), held that their discretionary decisions are largely immune from judicial review. To the (unknown) extent that strong equal treatment and fairness norms motivate police and prosecution decision making in the United States, it is only because local officials have chosen to establish and enforce them and individual practitioners to observe them (Wright 2017).

The American prosecution system is characterized by a powerful ideology of local autonomy. Prosecutors typically pride themselves on reflecting prevailing attitudes, preferences, and beliefs in their communities (Boerner 2012; Miller and Caplinger 2012; Wright 2012). They resist efforts from outside to create general rules or policies guiding their decisions and practices (Wright 2013).

Criminal courts everywhere can resolve only the cases prosecutors bring before them. However, differences in how prosecutors operate have important implications for thinking about how judges ought to sentence convicted offenders. In principle, and probably also in practice in legality principle countries such as Germany and Sweden, it is reasonable to suppose that all mentally competent people who have been identified and apprehended by the police for allegedly committing a moderate or high severity crime will be prosecuted and, if probative evidence is available, convicted. In such places, the proposition that treatment as an equal requires imposition of comparable punishments for comparable crimes makes sense.

Most continental European legal systems have established diversionary systems for consistent handling of large numbers of less serious cases. They often are used in 30 to 40 percent of all cases resulting in sanctions. German-speaking countries use "conditional dismissals" in which charges are suspended and suspects are offered opportunities without pleading guilty to pay the fine, make restitution, or perform the community service that would have been ordered following conviction. If the undertakings are performed, the charges are dismissed (Weigend 2001, 2016). The Dutch and Belgians operate "transactions" systems that work much the same way. Offenders are offered, under detailed prosecution guidelines, the opportunity to accept the financial penalties that would have been ordered had they been convicted. They need not plead guilty and charges are dismissed if the penalties are paid (Tak 2001; Snacken 2007; van de Bunt and van Gelder 2012). Minor offenders in Scandinavian countries and elsewhere in Europe are offered pre-trial opportunities to accept "penal orders" which require a guilty plea and acceptance of financial and community penalties that would have been imposed following a conviction in a trial (Asp 2011; Lappi-Seppälä 2016). All of these systems are managed by prosecutors. Nothing equivalent to routine American plea bargaining exists. The proposed sanctions are offered on a take-it-or-leave-it basis. Most suspects to whom they are offered accept, and most perform the agreed sanction. These policies save time and money, reinforce social norms by attaching consequences to criminal acts, and enable many suspects to avoid the stigma and collateral consequences of criminal convictions.

The organization of American police and prosecutors, and the constitutional independence of prosecutors, make widespread adoption of statutory European-style controls on their behavior unimaginable in any foreseeable future. Even so, police and prosecutors can

change their procedures and adopt rules to make their decisions fairer and more transparent and reduce the use of imprisonment.

American police, under prosecutorial supervision, and prosecutors should adopt organized systems for informal disposition as office policy, with agreed sanctions or treatment obligations, for many minor and moderately serious criminal cases. For less serious offenses, including most misdemeanors and minor drug, property, and public order felonies, defendants should not be required to plead guilty. Criminal charges could be filed against defendants who do not perform what they agreed to do.

For more serious offenses, guilty pleas could be required, but this should be a last resort for reasons related to the specific character of American legal systems. In most European countries, records of criminal convictions are not publicly available and are not routinely available to prospective employers (Jacobs 2015). There are no "ban the box" initiatives because employment applications seldom have a criminal record box to check. This means that even convictions do not have the stigmatizing effects they have in the United States where the information is readily available and substantially lessens offenders' employment prospects. Convictions also trigger major collateral consequences in the United States such as disenfranchisement, disqualification from occupations, and ineligibility for a wide range of social welfare programs.

Proposal 2. Prosecutorial Dispositions: Prosecutors should establish, and police and prosecutors should implement, structured programs for disposition of criminal cases, usually without formal guilty pleas, by means of defendants' agreements to pay financial penalties, participate in mediation, make restitution, and perform community service.

B. Sentencing Systems

Sentencing systems can be devised that incorporate the four principles of punitive justice. The principles can also serve as a frame of reference for assessing existing systems. Assuming an adequate body of substantive criminal law, and a fair system of adjudication, specifying the contours of just sentencing systems should be straightforward. Knowledge concerning how institutions such as plea bargaining operate in practice, however, needs to be taken into account.

A. Repealing Rigid and Unjust Laws

Anyone familiar with American sentencing can repeat the litany of tough-on-crime sentencing laws enacted in the 1980s and the first half of the 1990s: mandatory minimum sentence laws (all 50 states), three-strikes laws (26 states), life without parole laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally or more severe "career criminal," "dangerous offender," and "sexual predator" laws.

Some of these laws were not unprecedented in their nature but in their severity. Mandatory minimum sentence laws have long existed. Many states enacted "habitual offender" laws in the 1920s and 1930s, usually targeting chronic property offenders, but by the 1980s prosecutors seldom sought to apply them (Tappan 1949). "Sexual psychopath" laws were enacted in several waves before the 1980s, but they were typically narrowly defined, infrequently applied, and seldom mandated decades-long or life sentences (Sutherland 1950*a*, 1950*b*; Jenkins 1998). LWOPs and truth-in-sentencing laws by contrast are largely a development of the 1980s and 1990s (Sabol et al. 2002; Ogletree and Sarat 2012)

Three things make the modern laws unprecedented. The first is their severity. When the 1980s began, mandatory minimum sentence laws seldom required more than one or two years in

prison (Shane-DuBow, Brown, and Olsen 1985). LWOPs require lifetime imprisonment. Three-strikes laws require a 25-year minimum sentence, and often life. Many mandatory minimum sentence laws for drug and violent offenses require 10, 20, or more years' imprisonment. Few require fewer than five years.

The second distinctive characteristic of modern laws is their breadth. California's three-strikes law applied to any third felony, and some gross misdemeanors, if the defendant had two previous felony convictions for any of a long list of offenses. Many states' mandatory LWOP laws apply to offenses other than homicide (Nellis 2013). Until the U.S. Supreme Court in *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), declared mandatory LWOPs for juveniles unconstitutional, they applied to minors. Many mandatory minimum sentence laws apply to relatively low-level offenses: the numerically most important examples are the 5, 10, and 20 year minimum sentences often mandated for low-level drug dealers. Truth-in-sentencing laws apply to wide swathes of drug and violent offenses and usually forbid parole release before 85 percent of the nominal sentence has been served.

The third distinctive characteristic is that modern laws flatly defy conventional notions of proportionality. California's three-strikes law required minimum 25-year sentences for property felonies and gross misdemeanors (Zimring, Hawkins, and Kamin 2001). Famous third strikes involved thefts of pizza slices, three golf clubs, and several blank CDs. Drug laws often require longer sentences for trafficking in minor amounts than are required for offenses almost anyone would consider much more serious. Consider table 1 which shows guidelines sentences prescribed in the 2013 edition of the U.S. Sentencing Commission's *Guidelines Manual*.

[table 2 about here]

Sale of 28 grams of crack cocaine was a level 26 offense subject to a 63-78 month sentence. Until 2010, sale of five grams, a trivial amount, a sixth of an ounce, triggered that sentence. Most such sellers are young, disadvantaged, minority, and often drug-dependent. The recommended sentence is slightly less than for assault with intent to kill, and the same as for robbery involving use of firearms. It is greater than for theft of $1,000,000; robbery; aggravated assault in which a firearm was discharged; stalking or domestic violence; or sexual abuse of a dependent minor. Although the United States Supreme Court decision in *Booker v. United States*, 543 U.S. 220 (2004), case made the federal guidelines "advisory," which means judges can impose other sentences, federal statutes mandate a minimum 60 month sentence for the crack seller.

Go figure. Very few people consider a small, unadorned street level drug sale to be more serious than a robbery or a serious assault with a firearm. It is hard with a straight face to argue that selling a small quantity of drugs for $20 or $30 is more serious than stealing $1,000,000 or sexually abusing a minor. Gross disproportionality like that is reconcilable with no mainstream theory or principle of punishment.

All mandatory minimum sentence, three-strikes, and LWOP laws should be repealed. They require unjustly and disproportionately severe punishments, to no significant crime-preventive effects. Their existence empowers prosecutors to make *in terrorem* threats to defendants that effectively coerce many to plead guilty, including some who are innocent or have valid defenses but conclude that pleading guilty is better than risking decades-long or life sentences. The late Harvard Law School professor William Stuntz observed that "outside the plea bargaining process, such threats would be deemed extortionate" (2011, p. 260). They result in widespread circumvention by judges and prosecutors who want to avoid imposing unjustly

severe sentences. And, because circumvention is neither certain nor in some places common, they result in massive differences in the sentences received by otherwise comparable defendants who do and don't come before sympathetic judges and prosecutors (Tonry 2009).

Truth-in-sentencing laws should be repealed for reasons that are similar and reasons that are different. At a time when long sentences are common, and appellate sentence review is almost non-existent except in a few states, truth-in-sentencing laws requiring service of 85 percent of nominal sentences assure that many offenders receive unjustly long sentences that cannot be remedied. Were sentences typically measured in months and no more than a few years, as in most Western European countries, the analysis might be different, and the arguments in favor of greater transparency might be stronger. Table 3 shows for seven European countries the lengths of prison sentences imposed in 2010. In four countries, less than ten percent of convicted offenders received any sentence of confinement (these data include all confinement, including the equivalent of U.S. jail terms). Sentence lengths refer only, of course, to those who were sentenced to prison. Thus the 3.8 percent of German offenders receiving sentences of 5 years or longer are 3.8 percent of the 5.4 percent who receive any prison sentence at all; in other words, only 0.17 percent of convicted Germans received such terms. In all the countries together, sentences of 5-10 years are rare and those over ten years are exceedingly uncommon.

[table 3 about here]

The American reality is vastly different. In 2009, the mean average prison sentence for all felonies was 52 months; the averages for property and violent crimes were 40 and 91 months (Reaves 2013, tables 24-26). Sentences of 10, 20, and more years are common. A 10-year sentence covered by a truth-in-sentencing law means an irremediable 8.5 years behind bars and

20 years means 17. Truth-in-sentencing laws are thus similar to mandatory minimum, three-strikes, and similar laws because the key problems are undue severity and rigidity.

There are three major arguments for their repeal. The first is that many prison sentences now being served must be shortened, if mass incarceration is to be unwound. Truth-in-sentencing laws preclude that.

The second is that truth-in-sentencing laws were a product of the same politics and ways of thinking that gave rise to mandatory minimum, three-strikes, LWOP, and similar laws. They always were a bad idea.

When something as important as a human being's liberty is at stake, any human system needs redundancy so that multiple decision makers can protect against one anothers' unjust decisions. Under indeterminate sentencing, prosecutors decided what charges to file, but judges decided what sentence to impose. For convicted offenders sentenced to imprisonment, parole boards had the last word on release dates and if they believed the sentence was too severe, could release the prisoner especially early. Truth-in-sentencing partly ended that by eliminating the parole board role. In an era when most serious crimes are subject to mandatory minimum and three-strikes laws, truth-in-sentencing eliminated the judicial role. More than a decade ago Federal Court of Appeals Judge Gerald Lynch observed that

"The prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court but to a prosecutor…. Mitigating information, similarly, is argued not to the judge but to the prosecutor, who decides what sentence the defendant should be given….. (Lynch 2003, pp. 1403–04)

The rhetorical case for truth-in-sentencing laws sometimes centered on transparency and consistency, but politicians' substantive goals were to send more people to prison and hold them there longer. One need only read former Attorney General William Barr's *The Case for More Incarceration* to see that: "The truth [is that] we are incarcerating too *few* criminals…. We are not over-incarcerating. In fact, we could reduce crime by simply limiting probation and parole—by putting criminals in prison for a greater portion of their sentences" (Barr 1992, p. v; emph. in orig.). Truth-in-sentencing assured both excessive severity and stark inconsistencies.

The third argument for repeal, even assuming truth-in-sentencing laws were proposed in good faith, is that critical assumptions that would have underlain the proposals proved wrong. In the early 1990s, it was widely believed that correctional treatments programs are ineffective, which was understood to mean that nothing that happened in prison could significantly alter individuals' proclivities for future offending. We now know that belief to be wrong (e.g., Cullen 2013). A second common belief was that the only reliable factors germane to predictions of future offending are, such as criminal history, static and unchangeable. We now know that many important factors, including cognitive skills, self-control, drug dependence, and employment skills, are "dynamic." They can be changed, which means that prisoners seeking release may in important respects be different and better socialized than when they entered prison (e.g., Monahan and Skeem 2014).

There is nothing radical about a proposal for repeal of mandatory minimum sentence and similar laws. Every major criminal law reform proposal of the last 50 years including the *Model Penal Code* (American Law Institute 1962), both editions of the *Model Sentencing Act* (Advisory Council of Judges 1963, 1972), the American Bar Association *Standards on Sentencing Alternatives and Procedures* (1994), and the *Model Penal Code—Sentencing* (American Law

Institute 2011), has opposed their adoption and favored their repeal. So have innumerable organizations including the President's Commission on Law Enforcement and Administration of Justice (1967), the Commission on Reform of Federal Criminal Laws (1971), the National Advisory Commission on Criminal Justice Standards and Goals (1973), and the Uniform Law Commissioners (1979).

If any mandatory minimum, three-strikes, LWOP, and truth-in-sentencing laws are not repealed, but are simply narrowed in scope, the four principles of punitive justice require that several other changes be made.

1. Discretion to Disregard. Such laws inevitably sometimes apply literally to defendants to whom they should not. In most other Western countries, there are no mandatory minimum sentence laws. The criminal codes of many continental European countries specify minimum sentences for specific offenses, but judges always have authority to impose a lesser sentence if he or she believes justice so requires. They are not mandatory in the American sense. Other English-speaking countries' criminal laws contain some, usually a handful, of "mandatory minimum sentence" laws but, with some exceptions for homicide (with opportunities for parole release), only in the United States do the words mean what they say. In Australia, England and Wales, and South Africa they contain clauses allowing judges to impose some other sentence in—the typical phrase—"the interest of justice" (Tonry 2009; Ashworth 2015).

There is relatively little discordance among the legal systems of Western countries other than the United States about this. Statutory provisions on minimum sentences elsewhere nearly always create presumptions that can be overcome. The purposes of mandatory minimum sentence laws can be more justly achieved by establishment of presumptive sentencing guidelines systems that set appropriately severe punishments for serious crimes but allow judges,

for reasons stated, to impose lesser punishments. Prosecutors can appeal sentences with which they disagree.

2. Sunset Laws. Mandatory minimum sentence and similar laws were enacted at times when policy makers meant to be highly punitive and when being "tough on crime" was politically expedient (Windlesham 1998; Gest 2001). Fear of being labeled "soft on crime" is a major reason why almost no severe sentencing laws have been repealed and why most recent sentencing law changes have focused on first offenders and minor changes to parole and probation revocation procedures and eligibility. If prevailing attitudes are changing, the time may come when repeals of the severest laws become more likely. That will be much easier for risk-averse politicians to do so if it happens automatically. This can be done by means of "sunset laws" that automatically lapse unless reenacted. The federal Patriot Act enacted shortly after the 9/11 attacks on the World Trade Center and the Pentagon contained a sunset clause. They should be a standard element of all severe sentencing laws.

3. LWOPs and Capital Punishment. Insofar as life sentences remain lawful, judges and juries will have authority to impose them on people who commit the most heinous offenses. In many other Western countries, the maximum sentence for any one crime, including murder, is 20 years or less. In the United States, Canada, and other English-speaking countries, however, life sentences have traditionally been possible for some homicides. That being so, many US jurisdictions are likely to retain life sentences. In almost all Western countries, however, including the United States before 1980, people sentenced to life imprisonment are eligible for parole release. That should be true in the United States in the twenty-first century. All LWOP laws should be repealed.

Some people, for example the draftsmen of the *Model Penal Code—Sentencing* believe LWOPs are morally and political necessary as an alternative sentence for people who otherwise might be sentenced to death (American Law Institute 2011, pp. 13-15). That argument lacks facial plausibility in a country that executes 50 people a year but holds nearly 50,000 in prison serving LWOPs (Nellis 2013). Very few if any of them were spared death sentences. Even if a capital punishment alternative is believed to be strategically necessary to minimize executions, there can be no basis for making LWOPs applicable to other than death-eligible defendants. They should be amended to apply only to defendants charged with capital felonies for whom there is a realistic possibility of a death sentence, which as a constitutional matter means only first-degree murder cases.

Proposal 3. Repeal Mandatory Minimum and Comparable Sentencing Laws. All three-strikes, mandatory minimum sentence, life without parole, truth-in-sentencing, and comparable laws should be repealed. If not repealed, they should be fundamentally narrowed in scope and severity and be amended to include (A) provisions authorizing judges in every case to impose some other sentence "in the interest of justice" and (B) sunset provisions specifying that the laws will automatically lapse five years after enactment unless reenacted by the legislature and signed into law by the executive. Any retained life without parole laws should be amended to apply only to people charged with capital crimes for whom there is realistic possibility of imposition of capital punishment.

B. Building Just Sentencing Systems. Just systems have two fundamental characteristics. They operate under published criteria for imposition of punishments in individual cases and, since human institutions predictably sometimes work badly, they contain fail-safes to minimize

risks of injustice. Sentencing criteria can be expressed in a number of ways, including statutory provisions, presumptive guidelines, voluntary guidelines, appellate case law, and various combinations. In practice in the United States only presumptive sentencing guidelines have so far been shown to be effective. Fail-safes can, however, be built into the architecture of the sentencing standards, appellate sentencing appeal processes, and parole board release decisions.

1. Sentencing Standards. A fair, accountable, transparent sentencing system requires rules that specify what kinds of sentences should typically be imposed in ordinary cases. Assuring that individuals' interests are treated with respect and concern requires that the rules be sufficiently flexible to allow ethically important differences between cases to be taken into account. Unless there are rules, judges will not be able to test their own intuitions against general standards. Unless defendants and their counsel know what the rules are, they will not know how to promote the defendant's interests. Unless onlookers know what the rules are, they will not be able to know whether processes are operating in appropriate ways and to form their own views of whether justice is being done. Unless onlookers believe that institutions operate as they should, public perceptions of the legitimacy of the courts will suffer.

Showing respect and concern to all defendants requires that opportunities be available at sentencing and on appeal to argue that their cases are not typical. Otherwise they will be unable to explain why their cases warrant special treatment, and to receive it if their arguments are persuasive.

Evidence is not available to offer very confident generalizations about how well existing systems do this. Standards for sentences in ordinary cases are commonplace, but empirical research on compliance with them, or on unwarranted sentencing disparities, is not. Court

systems in many countries operate under statutes or conventions that establish standards for ordinary cases. In continental European countries, statutes often indicate minimum sentences which judges may disregard for good reasons (e.g., Lappi-Seppälä 2016; Weigend 2016). In the Netherlands, guidelines for prosecutors' sentencing recommendations are detailed and are commonly said to have substantial influence over judges (van de Bunt and van Gelder 2012). In England and Wales, the American federal system, and some American states, voluntary sentencing guidelines set standards for sentencing (e.g., Frase 2013; Roberts 2015). In Minnesota, Washington, Oregon, North Carolina, and Kansas, presumptive sentencing guidelines set standards.

Only for some of the last five jurisdictions is there convincing empirical evidence that judges generally comply with applicable standards. It is likely that they do so in most continental European countries where prosecutors and judges are career civil servants, prison sentences are usually short, and commitment to the legality principle requiring equal treatment of comparable cases is strong. Empirical evidence demonstrating this is not abundant. The best evidence in England and Wales is that unwarranted disparities are common and extreme (Hough, Jacobson, and Millie 2003; Roberts 2013; Pina Sanchez 2015).

In other jurisdictions, including Canada, Australia, and American states that have not established sentencing guidelines, there is little reason to believe either that there are jurisdiction-wide standards or if there are that they are generally complied with. In American jurisdictions before 1975 when indeterminate sentencing systems were ubiquitous, the prevailing system of individualized, case-by-case, decision making did not imply or operate under general standards. No American state still generally honors the rehabilitative premises of indeterminate sentencing, but many have retained its institutions—broad unstructured judicial discretion, minimum and

maximum sentences, parole release—under an overlay of mandatory minimum, truth-in-sentencing, and LWOP laws.

Every jurisdiction, however, should have some system of reasonably detailed standards for sentencing. Judges like everyone else are idiosyncratic and have personal intuitions about offense seriousness. Some are especially sympathetic toward offenders who are drug-dependent or come from deeply disadvantaged backgrounds and regard those as mitigating circumstances. Others consider those to be aggravating circumstances. Some believe that imprisonment is seldom or never an appropriate punishment for shoplifting and other minor property offenses. Some have strong negative visceral reactions to sex offenses and offenders that cause them to consider these cases especially heinous. Some abhor violence in any form, and react especially punitively to it. General standards for ordinary cases, whether expressed in statutes or guidelines, provide at least starting points which, if taken seriously, can moderate the influence of idiosyncratic views.

The evidence in the United States is overwhelming that presumptive sentencing guidelines promulgated by a sentencing commission are the most effective means available to establish enforceable standards for sentences in ordinary cases. Such systems have been shown to make sentencing more consistent and predictable and to reduce racial and unwarranted disparities. Some jurisdictions, most successfully North Carolina and Minnesota, operated under "prison capacity constraints" which obliged them to tailor guidelines to the rated capacity of existing and planned facilities. These policies worked and enabled those jurisdictions to manage their prison population size and improve facilities and financial planning (Frase 2013; Tonry 2016*a*, chap. 2).

Presumptive guidelines classify all felonies (and in some states, all misdemeanors) into ten to fifteen categories scaled to offense seriousness. Ranges of proportionate, authorized sentences are provided for each category. Judges are expected to impose sentences in ordinary cases in the authorized range, but may impose more or less severe sentences if they provide written reasons. Prosecutors and defendants may appeal the adequacy of the reasons given. Especially in Minnesota and Washington, appellate case law soon established a principled jurisprudence concerning departures from guidelines (Reitz 1997).

Presumptive sentencing guidelines have one great advantage that is usually not stressed. Under the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), they establish meaningful upper limits on the severity of sentences even if statutes do not. Guidelines usually specify ranges within which sentences should normally be selected. The Supreme Court held that the upper bound is equivalent to a statutory sentence maximum. A sentence exceeding a statutory maximum is per se unlawful; if the prosecution wants a defendant to be punished more severely, it must charge him or her with a more serious offense and prove it or persuade the defendant to admit it. Accordingly, no sentence more severe than the top of the applicable presumptive guidelines range may be imposed unless a judge or jury on a beyond-reasonable-doubt basis finds facts that might justify the harsher sentence, or the defendant admits them. Prosecutors and judges initially feared that *Blakely* would unduly complicate their work, but experience has shown that they were wrong (Frase 2013).

Presumptive sentencing guidelines should be established in every state and the federal system. Sentencing commissions, as Judge Frankel (1973) foresaw, are much better able than legislatures to develop, monitor, and over time improve sentencing standards. Well-designed, well-implemented presumptive guidelines improve consistency and predictability and reduce

racial and other unwarranted disparities. They improve transparency by making sentencing standards public, making decisions fairer, and making processes more regular. They make judges more accountable by requiring them to explain their decisions and thereby provide bases for appellate review. Adoption of a "capacity constraint policy" improves planning and management by making spending and facilities needs more predictable. By establishing meaningful upper limits on sentences that may constitutionally be imposed, presumptive guidelines prevent the imposition of grossly disproportionate sentences in individual cases.

Proposal 4. Presumptive Sentencing Guidelines: Every state which does not already have one should establish a sentencing commission charged to develop a system of presumptive sentencing guidelines.

2. Classification of Felonies. Just sentencing systems authorize maximum punishments that are meaningfully scaled to the seriousness of crimes. Retributive and consequentialist theories of punishment agree that offenders should never be punished more severely than they maximally deserve. Statutes that limit maximum lawful sentences are one protection against that happening. The punishment standards should be published and readily accessible in order to make the system transparent, give fair notice to citizens, and provide criteria according to which judges can be held accountable.

One straightforward protection against imposition of unjustly severe punishments is that offenses be divided into a sufficiently large number of categories, scaled in relation to the comparative seriousness of crimes. If for example the maxima for ordinary thefts, burglaries, and robberies are 1, 3, and 5 years, by definition longer sentences may not be imposed. In the United States, where maximums are often expressed in decades, there are no equivalent constraints.

Maximum authorized sentences should be relatively short, at least for ordinary cases (special provisions for extraordinary cases are discussed below).

Most American sentencing systems do not adequately classify offenses. Criminal codes have typically been developed by accretion over scores of years or centuries rather than through comprehensive overhauls. New criminal offenses have been added, old ones redefined, and sentencing provisions enacted and changed piecemeal in response to the emergence of particular issues, notorious cases, and moral panics (Schwartz 1983). Not surprisingly, provisions on maximum sentences are inconsistent and sometimes irreconcilable with proportionality values. This was a major focus of criminal code revision efforts in the 1950s and 1960s, including in the work of the National Commission on Reform of Federal Criminal Laws (1971). The drafters of the 1962 *Model Penal Code* sought to address it by dividing all offenses into three classes of felony.

Many states revised their criminal codes during the 1960s and 1980s, some importantly influenced by the *Model Penal Code*, but most did not adopt the code's provision that all felonies be divided into three classes. The code proposed this because it was developed during the indeterminate sentencing era and assumed its continuation (Tonry 1982, 1988). Under indeterminate sentencing, sentence lengths were mostly nominal and parole boards set release dates. In Washington and California, every prison sentence was for "one year to the statutory maximum." In some states, judges could set a maximum sentence lower than the statutory maximum but no minimum. In other states, the judge could set a maximum and a minimum, but often subject to a limit that the minimum be one-third or not more than one-third of the maximum. Both the maximum and the minimum were usually reduced by a third or more as a time-off credit for good behavior (Rothman 1971, 1980).

The *Model Penal Code* was meant to rationalize and systematize minimum and maximum sentences. It assumed that the identity of the conviction offense was not critically important since judges and parole boards were expected to individualize sentences in every case. Table 4 summarizes the proposals. It sets out three schemes. The draftsmen could not reach agreement between the first two and proposed them as alternatives. The "basic" and "alternative" schemes would apply to the vast majority of ordinary cases. The basic scheme would not allow judges to set maximum sentences, which would in every case be the applicable maximum. The "alternative" scheme would allow judges to set both maximums and minimums. The "extended" scheme applied to defined categories of people involved in organized crime, professional criminals, and especially dangerous offenders.

[table 4 about here]

By modern American standards, the maximums are short, though they resemble modern limits in most continental European countries. For Class 1 felonies, the most serious including murder, rape, and aggravated robbery, the minimum was one to ten years and the maximum life. For Class 2, which included most other serious felonies, the minimums were one to three years and the maximum ten. The one-year minimum is a product of the political organization of American states. Prisons typically have jurisdiction only over sentences of one year or more. Shorter sentences are served in county jails. For Class 3, minimums were one to two years, and maximums five. All of those are gross numbers; section 305.1 of the code contemplated that prisoners would ordinarily receive up to 12 days per month time-off credit for good behavior against both the maximum and minimum sentences. Section 305.9 created a presumption that

inmates would ordinarily be released when they first became eligible to apply for parole. All prison sentences were to be indeterminate with minimums not to exceed one-half the maximum.

Few states adopted the code's offense classification and parole eligibility provisions. If they had, the provisions would now be obsolete. The drafters assumed that indeterminate sentencing and the values associated with it would continue and that parole release would remain a component of American criminal justice systems[4]. That did not happen; 16 states and the federal system in 2015 did not have parole release systems. Many states that retain parole release enacted some or all of truth-in-sentencing, mandatory minimum, and LWOP laws that eliminate whole categories of prisoners from eligibility. Finally, the code's drafters assumed that policy makers, judges, and parole boards would continue to believe that rehabilitation was the primary aim of sentencing, that imprisonment should be imposed only as a last resort, and that prisoners should be released at the earliest opportunity. Given those provisions and those assumptions, maximum sentences were not very important.

Almost all of those assumptions proved to be wrong in the United States, and they were never widely held in most Western countries. Few people today believe that rehabilitation should be punishment's primary aim. Some people today believe imprisonment should be used only as a last resort no matter what the offense and that prisoners should be released as soon as possible, but many people believe otherwise. In any case, the *Model Penal Code*'s offense classification system is an anachronism: it contains too few categories to differentiate offense severities

[4] In addition to having authority to individualize sentences by imposing probation in any case and designating minimum sentences, the *Code* gave courts other powers. Although one year is typically the minimum term for a state prison sentence, section 7.08(2) provided that every sentence was tentative for one year, thus permitting petitions to be filed seeking reductions. Section 6.12 authorized the court to reduce the felony class of the conviction offense if the court concluded that it would be unduly harsh to sentence the offender in accordance with the sentencing options including minimum and maximum terms normally available.

adequately, and thus risks unwarranted parity: treating materially different cases as if they are the same.

The solution is straightforward. Offenses should be divided into many more categories than three, differentiated by their seriousness, with maximum lawful sanctions authorized for each. Reasonable people will differ on how many categories are appropriate, on whether increments of additional authorized punishment for each step on the scale should be the same or different, and on the maximum authorized sanctions for the most serious offenses. If there were ten felony classes, the maxima might be 1, 2, 3, 5, 7, 9, 11, 13, 15, and 20 years, plus life with eligibility for parole release for first-degree murder. In contemporary Europe, the top is usually 12 to 20 years (van Zyl Smit and Snacken 2009).

Maximum authorized sanctions by definition should apply only to the most aggravated instances of any particular offense. The fallibility of human institutions requires that there be mechanisms to assure that only the most serious crimes are punished especially severely. One first step toward doing this, as the Advisory Committee on the Penal System in England and Wales (1978) proposed, is to specify intermediate maximums for ordinary cases well short of the authorized statutory maximums and to establish criteria that must be satisfied before the intermediate maximum can be exceeded. The *Model Penal Code* did this by establishing separate maximum penalties for ordinary and exceptional kinds of cases. These proposals are discussed below.

Every state and the federal system should revise their criminal codes to classify all felonies on the basis of their seriousness into a set of categories specifying maximum authorized sentences. Many states have already created detailed classification systems, but not in their criminal codes. More than half of the states in the last forty years established systems of

voluntary or presumptive sentencing guidelines which classified all felonies by seriousness, usually into 10 to 15 categories. Those are plausible numbers and are validated by their widespread adoption. Because guidelines are not statutes and do not specify lawful maximums, however, except in the handful of states affected by *Blakely*, they do not set absolute limits. As a result, judges in other states who depart from guidelines can potentially impose sentences up to the statutory maximum. Since in many states these are 20, 25, or more years for many offenses, individual offenders can receive widely disparate sentences that bear no relationship to the seriousness of the crimes of which they were convicted. It is an obvious and rudimentary requirement of justice that criminal punishments be based on assessments of offenders' blameworthiness and not on the personalities and idiosyncrasies of the judges who impose them. *Proposal 5. Classification of Felonies: Legislatures should revise criminal codes to classify all offenses into 10 to 15 categories to distinguish meaningfully between the seriousness of crimes, thereby assuring proportionality in maximum sentences and reducing the likelihood that offenders receive unjustly severe punishments.*

3. Authorized Sanctions, Extraordinary Cases. Extraordinary cases are harder both because they often concern especially serious offenses and because they magnify the likely effects of judges' idiosyncratic views. This was recognized in the era of indeterminate sentencing in the United States and in England and Wales. The issues are general ones, though they are especially acute in the United States since especially severe sanctions are often imposed.

Both the *Model Penal Code* and the *Report* of the British Advisory Council on the Penal System (1978) proposed that maximum sanctions for ordinary offenses be set, well below the

maximums authorized by law. Both proposed findings of fact relating to special dangers to the public that must be established before the normal limits may be exceeded.

Section 6.07 the Model Penal Code authorized longer minimums and maximums for persistent, professional, and dangerous, mentally abnormal person "whose commitment for an extended term is necessary for protection of the public" and for "multiple offender[s] whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted." These terms were defined closely and narrowly.

The Advisory Council proposed that maximum penalties for ordinary crimes be set at levels encompassing 90 percent of sentences imposed for that crime in a reference period, and that sentences for exceptional cases be indeterminate (though with parole release eligibility not later than expiration of the normal maximum, and with time-off credits for good behavior). The key recommendation: "Consequently we recommend that no court should pass a sentence of imprisonment exceeding the new maximum term unless, by reason of the nature of the offence and the character, conduct, and antecedents of the offender, the court is of the opinion that a custodial sentence of exceptional length is necessary for the protection of the public against serious harm" (1978, p. 92).

Even extraordinary sentences should be bound by the retributive and consequentialist injunction that no sentence may be imposed that is longer than the maximum allowable proportionate sentence. That is one of the four principles of punitive justice.

Applicable laws should provide that extraordinary sentences may be imposed only when statutory preconditions have been shown to be present on the basis of proof beyond a reasonable doubt. This is the standard the U.S. Supreme Court set in *Blakely* for sentences longer than specified in applicable presumptive guidelines ranges. It is also the standard set in other Common Law

countries, including Australia and England and Wales, for any increase in sentences on the basis of aggravating circumstances (Freiberg 2014; Ashworth 2015)[5].

Proposal 6. Extraordinary Sentences: Legislatures should revise criminal codes to provide standards for imposition of sentences more severe than are authorized for ordinary cases that (A) provide explicit criteria for imposition of such sentences, (B) forbid imposition or punishments more severe that the maximum proportionate sentence for the offense or offenses of conviction, and (C) following the U.S. Supreme Court decision in ***Blakely v. Washington****, 542 U.S. 296 (2004), require that statutory criteria for exceptional sentences be shown to have been met on the basis of proof beyond a reasonable doubt.*

4. Criminal History. Criminal history counts for much too much in American sentencing. That needs to change. In extreme cases, as for example concerning shoplifting under California's three-strikes law before 2012, prior convictions could increase sentences by 10, 20, or more times. Under many sentencing guidelines systems, prior convictions increase sentence lengths by three to eight times (Frase et al. 2013). Those huge differences are hard to justify in principle and are primary causes both for the extreme lengths of American sentences and for mass incarceration.

[5] No standard of proof need normally be met concerning sentencing in American courts No American jurisdiction requires factual findings germane to sentencing to be proven beyond a reasonable doubt. The US Supreme Court in *U.S. v. Blakely*, 542 U.S. 296 (2004), observed: "Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all" (pp. 332-33). A majority of jurisdictions have no evidentiary standard at all in relation to sentencing, not even the civil law "more probable than not" standard (Reitz 2011; Tonry 2016*b*).

These things happen because Americans have not traditionally thought much about the subject or developed policies concerning it. Other western countries have explicit policies. In Scandinavian countries, with minor exceptions, prior convictions are considered irrelevant when imposing a sentence for a new crime. The logic is that the punishment for the earlier convictions has already been meted out suffered; any additional punishment on the basis of the earlier conviction would be double counting and therefore unjust (Asp 2010). In England and Wales, prior convictions may be taken into account only when, in statutory language, they are "recent" and "relevant" to the new offense (Baker and Ashworth 2010). In other English-speaking countries and most Western European countries, prior convictions are taken into account but subject to limits, usually modest, on how much a sentence can be increased because of them (Hinkkanen and Lappi-Seppälä 2011). No American jurisdiction during the indeterminate sentencing period, and only some of those with sentencing guidelines in 2015, had statutory rules or judicial standards concerning the weight to be given to prior convictions.

Little principled analysis on whether and how to account for prior convictions has been done in the United States. Most people who write about punishment theories and policies, including philosophers and lawyers, pay attention almost exclusively to first offenders. That makes analyses easier but it means that theorizing overlooks a large majority of sentencing decisions. In principle, at least, most people intuitively believe that punishments should be proportionate to the seriousness of crimes. That calculation is easy to make concerning first offenders. All else being equal, armed robberies warrant severer sentences than robbery, robbery than major thefts, and major thefts than shoplifting. That analytical tidiness disappears in relation to the vast majority of offenders who are not first offenders. In 2009, the most recent year for which national data are available, 75 percent of felony defendants had at least one prior arrest, 60

per had at least one prior conviction, and 43 percent had multiple prior convictions. The typical defendant is thus not a first offender but someone with a prior criminal record, half of the time a substantial one (Reaves 2013, tables 7 and 10).

That reality makes comparison of sentences, and theorizing about principled approaches to sentencing recidivists, difficult. It is not obvious how to assess the appropriateness of a sentence for a shoplifter with two prior convictions for shoplifting and one for drug selling compared with those of a burglar who has one prior conviction for prostitution and an unarmed robber with no prior convictions at all. Except in some guidelines states or under three-strikes and similar laws, decisions about the weight if any to be given to prior convictions is entirely within the discretion of individual, inevitably idiosyncratic judges. Researchers, of course, have tried to model sentencing to explain differences. Almost always they conclude that prior record and the seriousness of the current offenses are the most heavily weighted factors (e.g., Spohn 2008). However, those are averages and provide no insight into the appropriateness or consistency of sentences in individual cases.

Reasonable people differ over the relevance of prior criminality to imposition of just punishments. Some believe prior criminality is irrelevant. If the offender was convicted of a prior offense and has completed the prescribed punishment, that book should be closed. The debt to society has been paid. Like any other citizen convicted of a crime, a recidivist should be punished only as much as is deserved for the new crime (e.g., Fletcher 1978; Singer 1979).

Other people believe, for reasons that are seldom adequately explained, that prior crimes justify additional increments of deserved punishments. Ambitious, but tortured and unsuccessful, efforts have been made to develop retributive explanations based on the recidivist's special duty to behave, disrespect for the state, or failure to learn a punitive lesson (Bennett 2010; Lee 2010).

The answer to them is that all citizens have a general duty of law-abidingness and that the criminal law punishes defined proscribed behaviors committed with defined mental states of intention, knowledge, recklessness, or negligence. Being of "bad character" is not a criminal offense. Citizens in a free society are allowed to be eccentric, unconventional, or disrespectful.

The preceding arguments are based on retributivist ideas about deserved punishments. Claims are sometimes made that past offending is the best predictor of future offending and that increasing penalties because of prior convictions will control crime through incapacitation. That is only true if we want to confine large numbers of people for lengthy periods in order to prevent minor drug and property crimes. In 2009, only a quarter of state felony defendants were charged with violent crimes (Reaves 2013). More than seventy percent were charged with drug, property, motor vehicle, and public order offenses. Only 29 percent of people admitted to state prisons in 2011 had been convicted of violent crimes (Carson and Golinelli 2013, table 4). Imprisonment is an expensive and unjust way to punish shoplifting, theft, prostitution, and retail drug dealing.

Nor is there a much stronger case to be made about violence. Even individualized predictions of dangerousness are notoriously unreliable. Increasing all offenders' sentences because of prior convictions is an indiscriminate and wasteful blunderbuss strategy. That is why "selective incapacitation" crime control strategies lost credibility after testing in the 1970s and 1980s (Chaiken and Chaiken 1982; Cohen 1983).

The evidence on violence prediction, however, provides little basis for individualization. The evidence has changed little since the 1970s (e.g., Morris 1974). For all but tiny categories of offenders, principally members of organized crime and some pathologically disturbed people, predictions of future violence are wrong at least two-thirds of the time. Most people predicted to be violent prove not to be (Tonry 1987).

The preceding assertions are not inconsistent with the conventional claim that as many as two-thirds of released prisoners reoffend. The two-thirds claim is misleading because it entangles people sent to and released from prison (Tonry 2004; Rhodes et al. 2015). Of those sent to prison for the first time, one third or less commit new offenses. Of those released from prison in a particular year, disproportionately chronic property and drug offenders, as many as two-thirds reoffend. The difference exists because most of those released in a year are chronic offenders serving short sentences. The vast bulk of crimes are property and drug offenses typically committed at high rates by troubled and often mentally ill or drug dependent people living disorganized lives. These unfortunates cycle in and out or courts, jails, and prisons. It is difficult to imagine that increasing punishments on the basis of criminal history can meaningfully address the social problems they embody.

Some supporters of indeterminate sentencing believed that concern for public safety justified holding people convicted of minor crimes for extended periods including lifetimes if they were believed to be dangerous (Rothman 1971; Pifferi 2012). This was one reason why the *Model Penal Code* classified felonies into only three classes and authorized longer sentences in extraordinary cases. Parole boards could delay a prisoner's release until the last minute of the maximum sentence for incapacitative reasons, irrespective of the offense of which he or she was convicted. In our time, most people believe that punishments must be deserved in a retributive sense and that lengthy confinement for minor crimes is unjust.

At least in English-speaking countries, however, most people including offenders and judges believe that recidivist offenders deserve progressively harsher punishments (Roberts 2008). It is a pre-rational belief that is seldom challenged and never justified except on characterological grounds that ought not to count. It is a pre-rational belief that should be resisted

and cabined by rules. Intuition unguided by rational reasons, for example in earlier times about the inferiority of black people, the emotionalism of women, and the sexual preferences of gays and lesbians, is an inadequate justification.

There is an additional reason why the effects of criminal history on sentences should be tightly constrained. Richard Frase (2009) has shown that, in Minnesota, enhancement of sentences on the basis of prior convictions is the principal cause of racial disparities in imprisonment. Likewise three-strikes laws, which are premised on the idea that people with prior convictions should receive substantially longer sentences. These laws target violent and drug offenders, disproportionate numbers of whom are black and Hispanic. Enacting and applying those laws increased racial and ethnic disparities.

Substantially reducing the weight given to criminal history will save money, reduce prison populations, and alleviate racial disparities. This should be done directly by repealing three-strikes, career criminal, dangerous offender, and similar laws and enacting statutes limiting the weight of criminal history in sentencing. Sentencing commissions should revise guidelines to reduce the importance of criminal history and primarily base punishments, as they always should have been, on the offense or offenses of which the offender was convicted. This would to a significant extent occur indirectly if my early proposal to divide felonies into a much larger number of categories with proportionate maximum sentences is adopted. The existence of maximums measured in decades made possible the inordinate weight given to prior convictions in sentencing. Much shorter maximums tailored to offense seriousness will limit it.

Proposal 7. Criminal History: Standards should be established limiting the weight given in sentencing to prior convictions, including (A) statutory provisions limiting the extent to which a sentence may be increased on account of prior convictions, and (B) provisions directing

sentencing commissions to limit the weight given to criminal history in determination of authorized guidelines sentences. Criminal history enhancements should never result in a sentence more than 1.5 times that which could otherwise have been imposed on a first offender.

5. Appeals. Any system recognizing the four punitive justice principles of fairness, equality, proportionality, and parsimony must provide mechanisms and opportunities for individuals to contest decisions that affect their interests. Human institutions malfunction. Officials make idiosyncratic, mistaken, and unreasonable decisions. In a just system, individuals should be able to challenge adverse decisions at every stage of the process, as Swedish defendants and victims can in relation to prosecutorial and judicial decisions (Asp 2011).

Appellate sentence review has not been an important feature of American sentencing. During the indeterminate sentencing period, appellate review was rare. Judge Marvin Frankel in his 1973 book *Criminal Sentences—Law without Order* observed that, almost uniquely in American law, judges setting sentences were subject to no guiding rules or laws. That meant, among other things, that no criteria were available by which appellate judges could review the appropriateness of sentences in individual cases (e.g., Zeisel and Diamond 1977).

Several decades of experience with appellate sentence review have accumulated under state presumptive sentencing guidelines and in federal courts in applying the—for 18 years—"mandatory" federal guidelines. Because no other jurisdiction had comparable mandatory guidelines the federal experience is not generalizable. State systems which required that judges have "substantial and compelling" reasons for imposing sentences not indicated in applicable presumptive guidelines proved successful (Reitz 1997).

Appellate sentence review standards must necessarily differ depending on whether states have adopted presumptive sentencing guidelines. In those that have, *Blakely* has prohibited imposition of sentences more severe than guidelines authorize. For review of sentences authorized by guidelines, use of a version of the substantial and compelling standard to assess defendants' objections will generally result in deference to the sentencing judge but permit appellate reversal when under the particular circumstances of the case and the offender the appellate court concludes that the imposed sentence is unjustly severe.

In states without presumptive sentencing guidelines, things remain as Judge Frankel described them. Since no applicable standards exist for assessing the appropriateness of sentences imposed in individual cases, the most likely standard for review of appealed sentences is that the judge has abused his or her discretion and imposed a manifestly inappropriate sentence. Jurisdictions which in future create sentencing commissions and promulgate presumptive guidelines would then be covered by Part A of Proposal no. 8.

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Proposal 8. Appellate Sentence Review: Statutes should be enacted (A) in jurisdictions with presumptive sentencing guidelines providing that defendants may appeal any sentence on the basis that it is disproportionately severe or otherwise unreasonable in light of his or her offense and personal characteristics and circumstances and must show substantial and compelling arguments in support of his or her claims, and (B) in any other jurisdiction defendants may appeal any sentence on the basis that it is unreasonable in light of his or her offense and personal characteristics and circumstances.

6. Parole Release. Proposals for abolition of parole release in the 1970s and 1980s were predicated on an assumption that sentences would be imposed under statutory criteria or guidelines that would assure consistency and prevent unwarranted disparities (e. g., Morris 1974; von Hirsch and Hanrahan 1979). That did not happen except in a few states that adopted presumptive sentencing guidelines. Sentencing disparities are rife as a result of judicial idiosyncrasy and as a by-product of judges' and prosecutors' efforts to circumvent mandatory minimum sentence laws. Unwarranted disparities remain common.

Lengths of prison sentences in the United States are extraordinarily long, compared with those in other Western countries (see table 3). Sentences longer than one year are uncommon in most. Longer than three years is very uncommon and longer than five years is rare.

American sentences are much longer. In 2009, the most recent year for which national estimates are available, the mean maximum term for all offenders sentenced to prison in the 75 largest urban counties was 52 months and the median was 30 months. The means for murder, rape, robbery, and burglary were 373, 142, 90, and 52 months respectively. Ninety percent of murderers received sentences of 10 years or longer as did 42 percent of rapists and 20 percent of robbers. Sentences of six years or longer were received by 92 percent of murderers, 66 percent of rapists, 40 percent of robbers, and 17 percent of burglars (Reaves 2013, table 25).

Some device is needed to undo the effects of unwarranted sentencing disparities and re-examine the appropriateness of and continuing need for lengthy prison sentences. Reestablishing and reinvigorating parole release is the simplest. Appellate sentence review is the alternative, but in almost all states it is an unsatisfactory one—close to non-existent in most and cumbersome, expensive, and slow in the rest. Parole boards can do the job faster, more efficiently, and at much less cost.

The parole board's functions and the purposes of its guidelines would vary depending on the nature of the state's sentencing system. For states operating well-designed systems of presumptive sentencing guidelines, the function of parole guidelines would be small in relation to future prisoners (though it could be large in relation to current ones). If ranges of authorized guidelines sentences were, however, broad, for example 36–72 months, rather than narrow, say 36–42 months, prisoners might be authorized to petition for release when they have served the minimum authorized guidelines sentence. The principal function of parole release under presumptive guidelines would be to review the need for continued confinement of people serving especially long sentences imposed under the guidelines, from consecutive sentences imposed for multiple offenses, or from aggregate sentences imposed for different crimes on different occasions.

For states operating other sentencing guidelines systems or no guidelines at all, the principal function of the parole board would be to create and operate an effective system of standards for release. Well-developed, well-implemented presumptive sentencing guidelines have been a condition precedent in the United States for creation of robust systems of appellate sentence review (Reitz 1997). States lacking such systems need some other way to prevent unwarranted disparities and unduly long sentences. Evaluations of parole guidelines systems in the 1970s and 1980s showed that well-run parole guidelines systems can implement consistent policies, reduce disparities, and provide meaningful administrative appeals for contested cases (Wilkins, Gottfredson, and Hoffman 1977; Arthur D Little, Inc. 1981). Where presumptive or voluntary sentencing guidelines systems exist, one especially promising approach would be for the parole board to promulgate identical parole guidelines, thereby providing a powerful protection against unwarranted disparities.

Proposal 9. Every jurisdiction that does not already have a parole board should establish one and every state should establish a parole guidelines system.

IV. Unwinding Mass Incarceration

The proposals to this point concern prospective changes to American sentencing laws, policies, and institutions. They would if adopted greatly reduce the number of people in prison in future years, but their adoption would not significantly reduce the scale of imprisonment in 2020 or 2030. Substantially reducing the number of people in prison will require enactment of new laws authorizing reconsideration of most prison sentences now being served.

Something drastic needs to be done if imprisonment rates in the United States are to reach even the 255-315 per 100,000 rates in 2014 that characterized the Baltic countries of Latvia and Lithuania. These countries, former Socialist Soviet Republics, are admirable in many ways, but would not ordinarily be chosen as models for American emulation. The imprisonment rates in Western Europe, which average 100-110 per 100,000, or in the former Warsaw Pact nations of Eastern and Central Europe, which range between 160 and 205 per 100,000, however, are unattainable by 2020 (Council of Europe 2014; Tonry 2016*a*, table 1.1).

The mechanisms chosen to review the appropriateness of continued confinement of particular prisoners or categories of prisoners are less important than recognition of the need to create some system for shortening sentences of most people now serving long prison sentences. That will require decisions that are ultimately based on normative beliefs that too many people have been sent to prison for too long and that something must be done about it. The mechanics will not simply take care of themselves, but the normative change of heart will lay the necessary foundations.

Something similar happened with drug courts beginning in the early 1990s. They proliferated because many judges came to believe them to be the right thing to do, a better approach than lengthy prison sentences for dealing with drug-dependent offenders. A credible body of methodologically strong evidence showing that well-targeted and -managed drug courts can reduce drug dependence and crime has accumulated only in recent years, yet several thousand drug courts were established before the evidence was in (Mitchell 2011; Mitchell et al. 2012).

Likewise reentry programs. The term came into use only in the late 1990s (Travis 2000). Like most community corrections programs, many reentry programs are underdeveloped and underfunded (Jonson and Cullen 2015). They offer the same kinds of services to people released from prison as are offered in traditional probation and parole programs generally. Since a credible case can be made that many or most corrections programs are not adequately funded, especially well-managed, or conspicuously successful, there are same old, same old grounds for questioning the likely effectiveness of re-entry programs. Yet thousands have since been established. Corrections officials and other policy makers believe them to be the right thing to do.

The enormous reduction in the prison population that is needed could be done in any of several ways. Prison populations could be substantially reduced in one or more fell swoops by use of large-scale amnesties or commutations. They could be reduced by judges on a case-by-case basis. They could be reduced by a parole board or a special purpose administrative agency. Only the last of these is viable in the United States. It has a long and successful history. From the late 1870s through the 1980s, managing prison populations through strategic releases was one of the parole board's key functions (Messenger et al. 1985).

A. Amnesties and Mass Pardons

One or more large-scale amnesties or mass pardons could be used in each jurisdiction, as happens regularly in France and Italy and irregularly elsewhere (Whitman 2003; Lévy 2007). An Italian amnesty in 2006, an effort to reduce prison overcrowding, lowered that country's imprisonment rate by 40 percent. French collective pardons and amnesties often reduce the prison population by 20 percent. Typically they provide for release of all prisoners having unexpired terms of specified lengths, for example, 18 or 24 months, or all prisoners convicted of designated offenses. Amnesties and mass pardons need, however, not be blanket: they can exclude certain categories of prisoners, for example people convicted of especially violent or organized crime offenses. Or all sentences being served on a designated date could be shortened by a fixed period, say 18 months: anyone with fewer than 18 months to serve would be released and all other prisoners' release eligibility dates would be advanced by that much.

Large-scale amnesties and pardons, however, simple, effective, and efficient though they might be, are not a viable alternative in the United States. The ways of thinking associated with contemporary sentencing laws are too deeply entrenched. Policy makers would almost certainly want to require case-by-case review of prisoners to screen out any who might be deemed to present unacceptable public safety risks. The U.S. Sentencing Commission (2014), for example, delayed the effective date of retrospective changes to drug sentencing guidelines adopted in 2014 by 18 months to give federal judges plenty of time to review individual cases. U.S. Attorney General Eric Holder's initiative to increase recommendations of sentence commutations to the president is predicated on individualized assessments (Apuzzo 2014). Neither approach is likely to result in tens of thousands of releases of federal prisoners any time soon.

B. Judicial Resentencing

California voters in the 2012 and 2014 referenda authorized resentencing of three-strikes prisoners. It is also happening pursuant to retrospective changes to federal drug sentences adopted by the U.S. Sentencing Commission. Section 305.6 of the *Model Penal Code—Sentencing* has proposed that legislatures enact "second look" laws that would authorize "a judicial panel or other judicial decision maker" to consider the need for continuing confinement of prisoners serving long sentences (American Law Institute 2011). However, the proposal envisions that only "a small share of all prison sentences" would be affected, probably only those serving "pronounced terms of more than 20 years" (p. 78). Unsuccessful applicants would be allowed to reapply at intervals no greater than 10 years.

The *Model Penal Code—Sentencing* provision contemplates a new and expensive sentencing procedure with the full panoply of procedural provisions, victim notifications, and appeals that characterize initial sentencing hearings. It is fundamentally inadequate for two reasons. First, it accepts the legitimacy of sentences measured in decades and lifetimes, something that is rare to nonexistent in other Western countries. Second, it is not premised on the need to reduce mass incarceration and could play no useful role in substantial reduction of the number of people held in American prisons. Even if the minimum eligibility period were substantially reduced, say to five years, the provision's requirement of case-by-case judicial processes would make it impossibly slow, cumbersome, and costly. This is equally true of any system of case-by-case resentencing by individual judges.

C. Parole Boards and Other Administrative Agencies

Other possibilities exist in the executive branch. Parole boards with well-designed release guidelines created for prospective use, for example, could be given statutory authority to apply them retrospectively to all or designated current prisoners. There is a tidiness to this proposal since it would result in the even handed application of the same standards to current and future prisoners, thereby enhancing the prospects for consistency over time.

Alternatively, a new specially constituted agencies could be empowered to review the need for continued confinement of every inmate held in prison on a specified date. Decisions could be made according to rules but on a case-by-case basis, thereby allowing consideration of whether some individuals pose unacceptably high risks to public safety. The overriding criterion, however, for every case subject to review, should be whether a strong case can be made for continued confinement. Convincing empirical evidence of likely deterrent or incapacitative effects of continued confinement of individuals would seldom be available.

Administrative agencies, whether parole boards or special purpose emergency release agencies, are much more likely than courts to be effective. Well-run administrative agencies can establish general policies, rules, and guidelines, and enforce compliance with them faster, more effectively, and less expensively than can courts. Except under the special situation of the federal sentencing guidelines, American appellate courts have traditionally been loath to subject sentencing decisions by lower courts to close review. That is why meaningful appellate sentence review occurs only in a handful of states with presumptive guidelines systems. Judicial processes are expensive and, as commentary to the *Model Penal Code—Sentencing*'s second look provision points out, judges are exceedingly reluctant to take on new responsibilities when they believe courts to be underfunded, dockets overcrowded, and themselves overworked.

Legislation should be enacted that sets criteria to govern the emergency release authority of parole boards or special purpose release agencies. It should authorize the agency to disregard mandatory minimum, truth-in-sentencing, LWOP, and all similar laws. Inmates over a designated age, say 35, who have served more than a specified period, say 3 years, and every inmate who has served more than 5 years should be eligible to apply for release.

Those numbers are arbitrary but give an indication of what is needed if mass incarceration is to be unwound and prevented from recurring. The criminal careers research on natural desistance from crime and residual criminal career lengths suggests that few prisoners older than 35 are likely to present significant risks of serious future offending. Those who do need not be released. Prison sentences of five years real time are rare in all other Western countries. Nominal sentences of five years are rare and in most countries are automatically reduced by "remission" credits equivalent to American time-off for good behavior. Making all prisoners who have served more than five years eligible to apply for release does not mean that all will or need be released. For many long-term prisoners, though, parole boards may have difficulty finding that they can persuasively identify a "need for continuing confinement" beyond the five or more years already served.

Those minimum terms may seem modest in early twenty-first century America. They were not modest during the indeterminate sentencing era in the United States and they are not modest today in other English-speaking countries and Western Europe. Inge Johnson, initally an Alabama trial judge and later a federal district court judge, reflected on the disconnect between most peoples' senses of time in their own lives and the lengths of time taken away from offenders. In an article entitled, "'Time' for Prisoners and for Judges," she observed:

One colleague of mine was asked if he could think of a really LONG period of his life when he

could not do everything he would normally do or move about as he wished. He answered—the year he served in the American Armed Forces in Vietnam. That one year, he said, felt like an eternity.

We value time in our own lives differently from how we measure the length of prison terms. Think of the length of a college education. Think of nine months of a pregnancy…. Think about waiting for a meal when you are hungry. In all these examples, not one exceeded five years, the longest being an average college education of four years. Yet judges throughout the United States commonly mete out 5-, 10, and 20-year sentences. (1990, p. 8)

As judge Johnson said, American prison sentences are remarkably long.

Eligibility to apply for release does not mean release would be granted. A weak form of such legislation would merely make long-term prisoners eligible to apply for consideration for release. A stronger form would direct the appropriate authority to release any prisoner serving such a sentence on or after the release eligibility date unless an individualized finding was made of the existence of strong reasons for continued confinement. That was the parsimonious approach of the original *Model Penal Code* which created a presumption that all prisoners be released on parole when they first became eligible to apply.

Proposal 10. Parole boards or specially created administrative agencies should be given authority to consider the need for continuing confinement after five years of all prisoners serving fixed terms longer than five years, or indeterminate terms, and after three years of all prisoners aged 35 or over.

V. Moving Forward

It took less than 30 years, a surprisingly short time, for America's imprisonment rate to increase almost five-fold, from 160 per 100,000 population in 1973, not then the highest among Western developed countries, to 753 in 2007, a level four times that of any other country with which Americans would ordinarily want their country to be compared and almost eight times the average European level. That happened because legislatures enacted sentencing laws of historically unprecedented severity that were intended to send more people to prison for much longer periods than had previously been common in the United States.

The challenges now are to reverse America's extraordinary use of imprisonment and reestablish just sentencing systems. That will be vastly harder. During the period when rates rose, Americans generally supported calls for harsher punishments. Politicians were happy to oblige. Although in the 1970s many liberal politicians favored policies directed at the underlying causes of crime and aiming to develop better and stronger treatment and diversion programs, it became clear that few politicians could risk, or were willing to risk, the accusation of being soft on crime. By the late 1980s, a political stalemate had set in (Edsall and Edsall 1991). 1988 was the last presidential election in which crime was a major issue. Major tough-on-crime legislation was enacted federally and in all 50 states in 1984-96, and almost none after that. However, despite declining crime rates since 1991 and negligible voter interest in the subject, prison populations and rates peaked only in 2007.

I rehearse that depressing story to point out that there was little powerful political or sizable public opposition to the tough-on-crime legislation of 1984-96. Small wonder it passed and became increasingly more severe over time. In the intervening years, there has been precious little powerful political support for repealing the laws that led to mass incarceration. It is not

clear there is now. It is also likely that there will be major political opposition to measures meant to shorten sentences and substantially reduce the numbers in prison.

Unwinding mass incarceration will be much harder than creating it was. Little will happen unless powerful political groups want it to happen and are willing to spend political capital to make it happen. There are some signs that support for toughness at all costs is waning. The actions of voters in referendums and of judges striking down some sentencing laws offer one set of examples. The hundreds of legislative nibbles around the edges of tough-on-crime sentencing laws offer another set. Initiatives like the *Model Penal Code*'s "second chance" proposals and the federal commutation initiative illustrate yet another set. All are small steps in the right direction. By themselves they cannot roll back mass incarceration. Bigger steps could.

American mass incarceration, absolutely and in its effects on black and Hispanic people, will be seen by our descendants as an extraordinary moral failure, a classic instance of man's inhumanity to man. Americans did it and only Americans can undo it. It is time to start.

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Table 1

Reinventing American Sentencing

Proposal 1. Prison Population Goals: The total national imprisonment rate for federal and state prisons and local jails should be reduced by 2020 to the mid-1980s level of approximately 350 per 100,000 and by 2030 to the 1973 rate of 160 per 100,000.

Proposal 2. Prosecutorial Dispositions: Prosecutors should establish, and police and prosecutors should implement, structured programs for disposition of criminal cases, usually without formal guilty pleas, by means of defendants' agreements to pay financial penalties, participate in mediation, make restitution, and perform community service.

Proposal 3. Repeal Mandatory Minimums and Comparable Sentencing Laws. All three-strikes, mandatory minimum sentence, life without parole, truth-in-sentencing, and comparable laws should be repealed. If not repealed, they should be fundamentally narrowed in scope and severity and be amended to include (A) provisions authorizing judges in every case to impose some other sentence "in the interest of justice" and (B) sunset provisions specifying that the laws will automatically lapse five years after enactment unless reenacted by the legislature and signed into law by the executive. Any retained life without parole laws should be amended to apply only to people charged with capital crimes for whom there is realistic possibility of imposition of capital punishment.

Proposal 4. Presumptive Sentencing Guidelines: Every state which does not already have one should establish a sentencing commission charged to develop a system of presumptive sentencing guidelines.

Proposal 5. Classification of Felonies: Legislatures should revise criminal codes to classify all offenses into 10 to 15 categories to distinguish meaningfully between the seriousness of crimes, thereby assuring proportionality in maximum sentences and reducing the likelihood that offenders receive unjustly severe punishments.

*Proposal 6. Extraordinary Sentences: Legislatures should revise criminal codes to provide standards for imposition of sentences more severe than are authorized for ordinary cases that (A) provide explicit criteria for imposition of such sentences, (B) forbid imposition or punishments more severe that the maximum proportionate sentence for the offense or offenses of conviction, and (C) following the U.S. Supreme Court decision in **Blakely v. Washington**, 542 U.S. 296 (2004), require that statutory criteria for exceptional sentences be shown to have been met on the basis of proof beyond a reasonable doubt.*

Proposal 7. Criminal History: Standards should be established limiting the weight given in sentencing to prior convictions, including (A) statutory provisions limiting the extent to which a sentence may be increased on account of prior convictions, and (B) provisions directing sentencing commissions to limit the weight given to criminal history in determination of authorized guidelines

sentences. Criminal history enhancements should never result in a sentence more than 1.5 times that which could otherwise have been imposed on a first offender.

Proposal 8. Appellate Sentence Review: Statutes should be enacted (A) in jurisdictions with presumptive sentencing guidelines providing that defendants may appeal any sentence on the basis that it is disproportionately severe or otherwise unreasonable in light of his or her offense and personal characteristics and circumstances and must show substantial and compelling arguments in support of his or her claims, and (B) in any other jurisdiction defendants may appeal any sentence on the basis that it is unreasonable in light of his or her offense and personal characteristics and circumstances.

Proposal 9. Every jurisdiction that does not already have a parole board should establish one and every state should establish a parole guidelines system.

Proposal 10. Parole boards or specially created administrative agencies should be given authority to consider the need for continuing confinement after five years of all prisoners serving fixed terms longer than five years, or indeterminate terms, and after three years of all prisoners aged 35 or over.

Table 2. U.S. Sentencing Commission, Recommended Guidelines Sentences, 2013

Offense	Severity Level	Recommended Sentences
Assault, intent to kill	27	70-87 months
Sale of crack, 28 grams	26	63-78 months
Robbery, firearm used	26	63-78 months
Theft, more than $1,000,000	22	41-51 months
Robbery	20	33-41 months
Aggravated assault, firearm discharged	19	30-37 months
Stalking, domestic violence	18	27-33 months
Theft, more than $200,000	18	27-33 months
Sexual abuse of a ward	14	15-21 months

Source: US Sentencing Commission (2013)

Table 3. Length of Prison Sentences in Months, Selected European Countries, 2010

Country	Percent sentenced to prison	Of these, percent under 6 months	Of these, percent 6–12 months	Of these, percent 12–24 months	Of these, percent 24–60 months	Of these, percent 60–120 months	Of these, percent over 120 months
Austria	n.a.	56.1	16.7	11.9	2.0	1.2	…
Finland	3.1	61.2	15.5	11.4	9.3	1.8	0.3
France	17.8	57.2	20.3	17.3	2.8	1.4	1.0
Germany	5.4	24.1	28.6	18.8	24.4	3.5	0.3

Netherlands	23	74.1	10.8	6.3	4.9	1.2	0.4
Sweden	9.6	60.6	14.2	14.3	5.4	3.1	…
England	7.5	52.7	17.4	12.6	11.4	3.8	0.7

Source: Aebi et al. 2014, tables 3.2.3.1 and 3.2.7.1.

Table 4. *Model Penal Code* (1962), Minimum and Maximum Authorized Sentences

Offense class (section)		Minimum*		Maximum*
Felony 1 basic (§6.06 [1])		1 – 10 years		Life
Felony 1 alternative (§A6.06 [1])		1 – 10 years		up to 20 years, or life
Felony 1 extended (§6.07 [1])		5 – 10 years		Life
Felony 2 basic (§6.06 [2])		1 – 3 years		10 years
Felony 2 alternative (§A6.06 [2])		1 – 3 years		up to 10 years
Felony 2 extended (§6.07 [3])		1 – 5 years		10 – 20 years
Felony 3 basic (§6.06 [3])		1 – 2 years		5 years
Felony 3 alternative (§A6.06 [3])		1 – 2 years		up to 5 years
Felony 3 extended (§6.07 [3])		1 – 3 years		5 – 10 years

Sources: *Model Penal Code* (1962), Sections 6.06, A6.06, and 6.07.

* Subject to one-third reduction as time off for good behavior.