
A PRINCIPLED STRATEGY FOR ADDRESSING THE INCARCERATION CRISIS: REDEFINING EXCESSIVE IMPRISONMENT AS A HUMAN RIGHTS ABUSE

Mirko Bagaric, Sandeep Gopalan & Marissa R. Florio[†]

In July 2015, Barack Obama became the first sitting U.S. President to visit a U.S. prison. The visit was largely symbolic. What is not symbolic is the reason for the visit. Sentencing policy and practice in the United States is fundamentally broken, to the point that it is an intellectual and normative wasteland. This has resulted in the United States becoming the world's most (gratuitously) punitive country. The imprisonment of over two million Americans is perhaps the most pressing domestic moral issue of our time. Further, the prison system is in a state of crisis due to the unsustainable cost of imprisoning at such high quantities. It was inevitable that the U.S. sentencing system would reach a crisis point. Criminologists and legal scholars have for several decades noted that mass incarceration is a flawed strategy. Despite this, prison numbers have continued to grow. Academic and intellectual discourse has proven ineffectual in influencing the direction of sentencing policy. The sole reason for the current political and societal focus on prison policy is the practical reality that the United States cannot continue to spend \$80 billion on corrections each year. This pragmatic reason provides no basis for confidence that sentencing policy will finally become a fair and efficient practice. Sentencing is not generally considered to involve fundamental human rights considerations. This Article suggests that in order for principled reform to occur, the sentencing system needs to be fundamentally changed. In particular, the framework against which the system is evaluated should assume a human rights orientation. Examined closely, imprisonment infringes cardinal human rights including the rights to procreation, family, work, privacy, and physical security. Collectively, the denial of these rights is so oppressive that it would be untenable for a democratic government to pass a law denying these rights. The fact that these deprivations occur in a prison, which involves a fundamental violation of the right to liberty, makes them even more morally repugnant. Until sentencing practice and policy is viewed through the prism

[†] Mirko Bagaric is a professor of law and Director of the Evidence-Based Sentencing and Criminal Justice Project, at Swinburne University, Melbourne, Australia. Professor Sandeep Gopalan is the Dean of Law at Deakin University, Melbourne, Australia. Marissa R. Florio is an Associate at White & Case L.L.P. in Frankfurt, Germany.

of human rights discourse, it will likely continue to be influenced and driven solely by populist sentiment, leading to perpetual policy disfigurement. This Article bridges the gap between human rights and sentencing by restructuring the ideological and intellectual platform through which sentencing is evaluated. In doing so, it also advances concrete reforms necessary to improve the sentencing system.

TABLE OF CONTENTS

INTRODUCTION	1664
I. THE (GIANT) PROBLEM—UNABATED TOUGH ON CRIME LEADS TO UNAFFORDABLE PUBLIC FINANCIAL CRISIS	1670
II. WHERE IT WENT WRONG: UNABATED PUNITIVENESS WITHOUT A DEMONSTRATED OBJECTIVE.....	1679
III. HUMAN RIGHTS DISCOURSE.....	1685
IV. HUMAN RIGHTS INFRINGEMENTS STEMMING FROM IMPRISONMENT	1693
A. <i>Discrete Human Rights Violations</i>	1693
B. <i>It Is Irrelevant that Human Rights Violations Are Incidental as Opposed to Intentional</i>	1706
C. <i>It Is Not Realistic to Argue that Prison Could Be Made Less Harsh</i>	1708
D. <i>Imprisonment Which Is Disproportionate to the Seriousness of the Crime Constitutes Punishing the Innocent</i>	1710
V. WHAT A HUMAN RIGHTS RESPECTING SENTENCING SYSTEM WOULD LOOK LIKE.....	1712
A. <i>The (Appropriate) Aims of Sentencing</i>	1712
B. <i>How Much to Punish</i>	1712
C. <i>What Type of Punishment Is Appropriate</i>	1721
CONCLUSION.....	1723

INTRODUCTION

Criminal sanctions normally involve the deliberate infliction of suffering and pain.¹ Sentencing is the forum in which the community acts in its most punitive manner against its fellow citizens. The United States inflicts more deliberate institutionalized suffering on its people in

¹ The extent of the hardship obviously varies considerably, ranging from capital punishment to far softer sanctions, such as probation.

this way than any other country on earth, and by a large margin.² More than two million Americans are currently in prisons and jails, a higher number than any other country.³ The imprisonment rate in the United States exceeds that of all but one other country.⁴ Remarkably, it is ten times higher than in some other developed countries.⁵

The incarceration crisis that the United States is experiencing did not occur suddenly or unexpectedly. It is the result of a forty-year “tough on crime” campaign, which has resulted in a quadrupling of the prison population.⁶ The fact that the United States has become the world’s largest incarcerator has not troubled the general community. The rise in prison numbers has continued unabated, without an effective public countermovement. Recently this has changed. The prison over-population problem is now regularly the subject of mainstream media coverage and political discussion.⁷

That the U.S. sentencing system would reach a crisis point was inevitable. Criminologists and legal scholars have for several decades noted that mass incarceration is a flawed strategy. Despite this, prison numbers kept growing.⁸ Academic commentary has been strikingly impotent in influencing sentencing policy and practice. Several days after his visit to a prison, commentators noted that U.S. President Barack Obama was

² See Nick Wing, *Here Are All of the Nations that Incarcerate More of Their Population than the U.S.*, HUFFINGTON POST (Aug. 13, 2013, 8:21 AM), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html.

³ *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited Feb. 24, 2017); see *infra* Part I.

⁴ *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Apr. 17, 2017). The only other country with a higher imprisonment rate than the United States is Seychelles, a country of only approximately 93,000 people. *Id.*; see *The World Factbook: Seychelles*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/se.html> (last updated Jan. 12, 2017); see also Wing, *supra* note 2.

⁵ *Highest to Lowest—Prison Population Rate*, *supra* note 4. Denmark, Sweden, Finland, Japan, and Iceland (and a number of unexpected *developing* countries such as South Sudan, Tanzania, Syria, and Yemen) each have an imprisonment rate less than ten times that of the United States. *Id.*

⁶ Michael Jonas, *Rethinking Tough-on-Crime*, COMMONWEALTH MAG. (July 7, 2015), <http://commonwealthmagazine.org/criminal-justice/rethinking-tough-on-crime-2>.

⁷ See *infra* Part I.

⁸ See generally NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis et al. eds., 2014); Cassia Spohn, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 CRIMINOLOGY & PUB. POL’Y 535, 536 (2014); Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503 (2014).

echoing what liberal criminologists and lawyers have long charged. [Criminologists] blame our prison boom on punitive, ever-longer sentences tainted by racism, particularly for drug crimes. Criminologists coined the term “mass incarceration” or “mass imprisonment” a few decades ago, as if police were arresting and herding suspects en masse into cattle cars bound for prison. Many blame this phenomenon on structural racism, as manifested in the War on Drugs.⁹

The reason for the current mainstream focus on the incarceration crisis is singular: it has nothing to do with the rights or interests of those most affected by sentencing policy or practice, and it has everything to do with money. The fiscal burden of imprisoning nearly one adult person in every thousand is weighing heavily on even the world’s largest economy.¹⁰ The United States spends approximately \$80 billion annually on corrections.¹¹ This is not readily sustainable. It has caused policy makers to at least start discussing the need to lower prison numbers and reform the sentencing system.¹² No principled options for systematically reducing prison numbers are currently in the process of being implemented, and they are not likely to occur if they are simply motivated by a desire to reduce prison numbers. Pragmatically motivated reform is likely to produce expedient solutions, which will exacerbate the United States’ sentencing crisis. A durable and reasoned solution is necessary. This Article proposes such a solution.

We suggest a two-pronged approach. First, it is necessary to align sentencing practice within an appropriate normative and evaluative framework. Sentencing courts normally impose hardships on offenders. The most serious sanction imposed on serious offenders, apart from the

⁹ Stephanos Bibas, *The Truth About Mass Incarceration*, NAT’L REV. (Sept. 16, 2015, 4:00 AM), <http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform>. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

¹⁰ See *Gross Domestic Product 2015*, WORLD BANK (Apr. 17, 2017), <http://databank.worldbank.org/data/download/GDP.pdf>.

¹¹ Aimee Picchi, *The High Price of Incarceration in America*, CBS MONEYWATCH (May 8, 2014, 5:53 AM), <http://www.cbsnews.com/news/the-high-price-of-americas-incarceration-80-billion/>; see also MELISSA S. KEARNEY ET AL., *THE HAMILTON PROJECT, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES 1* (2014), https://www.brookings.edu/wp-content/uploads/2016/06/v8_THP_10CrimeFacts.pdf. More recently, it has been calculated that (including the incidental costs of incarceration) the cost of incarceration is in fact much higher and could be more than one trillion dollars annually, which equates to six percent of the gross domestic product. See Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S. 2* (Inst. for Advancing Justice Research & Innovation, Working Paper No. AJI072016, 2016), <https://advancingjustice.wustl.edu/SiteCollectionDocuments/The%20Economic%20Burden%20of%20Incarceration%20in%20the%20US.pdf>.

¹² See *infra* Part I.

death penalty,¹³ is imprisonment. This involves a direct and significant violation of several cardinal human interests. The most obvious is the right to liberty. But in fact, the deprivations caused by imprisonment go far beyond limiting the movement and choices of offenders.

From a hardship perspective, some of these other deprivations are arguably even more burdensome than the deprivation of liberty: Prisoners cannot procreate. They cannot engage in meaningful family relationships. They have virtually no privacy. They are far more likely to be beaten or raped than other members of the community and hence their right to sexual and physical security is diminished.¹⁴ Further, their ability to secure employment after release is diminished, as are their lifetime earnings.¹⁵

These deprivations raise profound human rights concerns. This is underscored, for example, by the inevitable strong concerns that would be raised towards a law that prohibited offenders from having children (for a finite period or forever). The former “one child” policy in China is widely condemned by human rights groups.¹⁶ A “no child” policy is immeasurably worse. Yet, this is precisely the effect of long prison terms. Adding to the example, the denial of any privacy (which is a necessary incident of incarceration) for many years is also in itself a harsh penalty. The inability to engage in intimate relationships for years, decades, and in some cases a lifetime would be a penalty which, if imposed directly, would almost certainly be met with loud calls as being an intolerable violation of human sexual autonomy. The fact that a rights infringement occurs in the prison setting does not excuse it; rather, it makes it worse because it cumulates the pain stemming from the deprivation of liberty.

The incidental but almost unavoidable hardship stemming from imprisonment is an area that is under-researched and under-appreciated from a human rights perspective.¹⁷ In this Article, we argue

¹³ As noted below, in absolute terms, this is rarely invoked and is not considered further in this Article.

¹⁴ See *infra* Section IV.A.

¹⁵ *Id.*

¹⁶ See, e.g., Cheryl Wetzstein, *U.N. Urged To Probe China's 1-Child Policy*, WASH. TIMES (Aug. 9, 2012), <http://www.washingtontimes.com/news/2012/aug/9/un-urged-to-probe-chinas-1-child-policy>; see also Dai Qing, Opinion, *Relaxing China's One-Child Policy*, N.Y. TIMES (June 12, 2015), https://www.nytimes.com/2015/06/13/opinion/relaxing-chinas-one-child-policy.html?_r=0.

¹⁷ CONNIE DE LA VEGA ET AL., UNIV. OF S.F. SCH. OF LAW, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT (2012) (stating that sentencing practices in the United States breach human rights standards, but not going into depth in explaining the human rights violations that supposedly occur, apart from the fact that many sentences are too harsh); *Human Rights in Criminal Sentencing Project*, U.S.F. SCH. L., <https://www.usfca.edu/law/academics/centers/human-rights-in-criminal-sentencing-project> (last visited Nov. 25,

that the enormity of many of the discrete deprivations stemming from imprisonment would by themselves constitute suffering that is commensurate with the seriousness of the offenses for which many offenders are sentenced. When these discrete deprivations are added together, however, their combined effects may be disproportionately burdensome as compared with the seriousness of offenses. Against a human rights backdrop, the burden of imprisonment assumes greater magnitude, thereby compelling a move to a reduction in the resort to imprisonment and a lessening in the length of most prison terms. We propose a new ideological and intellectual platform for assessing sentencing policies and practices: a platform built on human rights considerations.¹⁸

The reality and significance of human rights incursions stemming from imprisonment have not typically ignited human rights concerns: scholars, judges, legislatures, and the general community do not view sentencing law and practice from the human rights perspective. This exposes a fundamental and damaging deficit in our collective psyche. With little risk of exaggeration, it is likely that the gravest and most wide-ranging human rights violations that occur in the contemporary United States are perpetrated by the sentencing system.

It is unclear why sentencing has not been evaluated by reference to human rights ideology.¹⁹ We suggest it is because the finding of criminal guilt marks an individual out as deserving of suffering. This reflexively forestalls any meaningful recognition of, or concern for, the fact that pain and suffering come in vastly different degrees—so much so that the fundamental character often changes from a normatively appropriate

2015) (“Unlike other areas of penal reform, such as prison conditions, fair trial standards, and racial discrimination, criminal sentencing remains an area rarely viewed through a human rights lens. In the United States, harsh sentencing practices such as life without the possibility of parole, consecutive sentences, mandatory minimums, ‘three-strike’ laws, and juveniles tried as adults all contribute to one of the country’s major human rights issues—a flawed penal system.”); see also Michael Tonry, *Crime and Human Rights—How Political Paranoia, Protestant Fundamentalism, and Constitutional Obsolescence Combined to Devastate Black America*, 46 *CRIMINOLOGY* 1, 7 (2008) (noting that the American criminal justice system violates human rights in a number of respects, but not elaborating at length regarding the nature of these breaches so far as sentencing is concerned—apart from the death penalty and life without parole, which the author suggests breach the basic human right of a belief in the possibility of a better life).

¹⁸ As noted in a report by the U.S. National Academy of Sciences in 2014, such a shift is well overdue given that since the 1970s most jurisdictions in the United States have moved towards harsher sentencing policies. See NAT’L RESEARCH COUNCIL, *supra* note 8, at 4–6.

¹⁹ It has been suggested that reforms in this area should become a new civil rights movement. See, e.g., Douglas A. Berman, *Should Criminal Justice Reform be the New Civil Rights Movement?*, SENT’G L. & POL’Y (Jan. 16, 2006, 7:09 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2006/01/should_criminal.html.

deprivation to one which is oppressive and morally unjustified.²⁰ Irrespective of the reason for the gulf, this Article ends the separation between sentencing law and human rights discourse and, in doing so, establishes that human rights ideology provides an alternative, more effective prism through which to evaluate sentencing policy and practice. A human rights oriented sentencing perspective will also provide a more persuasive and durable basis for consolidating the current perceived necessity for sentencing reform and provide a normative framework for implementing constructive reform.

The second part of our proposal is to sketch out the contours of a more just and efficient sentencing system. In doing so, we suggest a vastly different regime. In particular, we propose a bifurcated system whereby offenders who commit harms that cause considerable damage to their victims are treated differently than less serious offenders. Essentially, this would result in imprisonment being limited to serious sexual and violent offenders. Perpetrators of other forms of crime, such as fraud, property, and drug offences, should generally be dealt with by alternative (less harsh) sanctions.

In Part I of this Article, we examine the current sentencing landscape in the United States, with a focus on the incarceration crisis. In Part II, we provide an overview of the reasons for the current failings of sentencing law and policy. This is followed, in Part III, by a discussion of conventional moral theory in the form of human rights discourse, with a focus on the capacity of such an ideology to shape and guide public opinion. Part IV of the Article identifies clear human rights breaches that arise in sentencing practice. In Part V, we set out how the arguments in this domain should be recalibrated. We sketch out the contours of a fairer sentencing system in Part VI.²¹

²⁰ For other plausible explanations, see Tonry, *supra* note 17, at 9.

²¹ A caveat to the scope of this Article is that we do not consider the desirability of capital punishment. The United States is the only developed nation apart from Japan that still imposes the death penalty. The death penalty, because of its extreme nature, raises for discussion a number of different human rights and normative considerations. Indeed, the literature and analysis regarding the desirability of the death penalty is voluminous. It can only be examined in the context of a stand-alone dissertation focusing on this issue. This is not a meaningful limitation to this Article given that not all states impose a death penalty and, since 1976, there have been less than 1450 executions. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Apr. 7, 2017). There are thirty-one states that still have the death penalty. *Id.*

I. THE (GIANT) PROBLEM—UNABATED TOUGH ON CRIME LEADS TO UNAFFORDABLE PUBLIC FINANCIAL CRISIS

Sentencing in the United States is broken. Broadly, it suffers from two main failings. The first is the unaffordable and unsustainable financial cost of imprisonment. The second is that it is morally unsound: the United States has witnessed a “divorce[] between sentencing policy and either evidence or normative theory.”²² Before analyzing the normative problem, we set out in greater detail the nature and extent of the fiscal burden caused by the current prison situation.

More than two million Americans are in federal prisons, state prisons, and local jails.²³ This is an imprisonment rate of approximately 700 adults for every 100,000 of the national population.²⁴ This rate has increased more than four-fold over the past forty years.²⁵ The United States now has the highest incarceration rate in developed world,²⁶ and by a considerable margin. The imprisonment rate in most developed countries is five to ten times less than the United States’²⁷ and on average is six times that of a typical nation in the Organization for Economic Co-Operation and Development (OECD).²⁸

It is now widely accepted in academic and international circles that the United States has a “serious over-punishment” and “mass incarceration” problem.²⁹ Vivien Stern, former Secretary General of

²² Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 146 (2013).

²³ By year end 2015, the exact number of prisoners had dropped slightly to 2,173,800. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 250374, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 1 (2016), <https://www.bjs.gov/content/pub/pdf/cpus15.pdf>. For a breakdown of the incarceration numbers, see Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2015*, PRISON POL’Y INITIATIVE (Dec. 8, 2015), <http://www.prisonpolicy.org/reports/pie2015.html>.

²⁴ *Highest to Lowest—Prison Population Rate*, *supra* note 4.

²⁵ NAT’L RESEARCH COUNCIL, *supra* note 8, at 8–9.

²⁶ Wing, *supra* note 2; *Criminal Justice Facts*, SENT’G PROJECT, <http://www.sentencingproject.org/criminal-justice-facts> (last visited Mar. 15, 2017). Current incarceration rates are historically and comparatively unprecedented. The United States has the highest incarceration rates in the world, reaching extraordinary absolute levels in the most recent two decades. NAT’L RESEARCH COUNCIL, *supra* note 8, at 68.

²⁷ NAT’L RESEARCH COUNCIL, *supra* note 8, at 2.

²⁸ KEARNEY ET AL., *supra* note 11, at 8, 10. Rates in the OECD range from forty-seven to 266 per 100,000 adult population. *Id.* at 10; see also Wing, *supra* note 2 (“At 716 per 100,000 people in 2013, according to the International Centre for Prison Studies, the U.S. tops every other nation in the world. Among OECD countries, the competition isn’t even close—Israel comes in second, at 223 per 100,000.”).

²⁹ See, e.g., SASHA ABRAMSKY, *AMERICAN FURIES: CRIME, PUNISHMENT, AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT* (2007); ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* (2008); Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295 (2013); Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the*

Penal Reform International, states: “Among mainstream politicians and commentators in Western Europe, it is a truism that the criminal justice system of the United States is an inexplicable deformity.”³⁰

The main downside of imprisonment from the community perspective is the financial cost. Costs have been rising gradually over the past few decades, and in recent years the tipping point of sustainability and affordability has been reached. The money spent on prisons is now so considerable that it has become patently evident that every dollar spent on prisons is a dollar lost for spending on activities such as health and education. It costs taxpayers in the United States on average approximately \$31,000 in direct expenditures to house a prisoner for one year.³¹ Total spending on corrections is now over \$80 billion annually.³²

In the thirty years from 1980 to 2010, public expenditure on corrections has more than quadrupled.³³ Per capita expenditure tripled in those thirty years, even taking into account the growing population.³⁴ In real terms, spending has increased from \$77 yearly by each U.S. resident in 1980 to \$260 in 2010.³⁵ The scale of this spending, even for the world’s largest economy, is considerable:

Iron Law of Prison Populations, 3 HARV. L. & POL’Y REV. 307 (2009); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27 (2011); Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 96 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 GA. ST. U. L. REV. 965 (2012); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011); Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423 (2013). The problem is so acute that even a “Reverse Mass Incarceration Act” has been proposed. See generally LAUREN-BROOKE EISEN & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, THE REVERSE MASS INCARCERATION ACT 1 (2015), https://www.brennancenter.org/sites/default/files/publications/The_Reverse_Mass_Incarceration_Act%20.pdf; U.S. JUSTICE ACTION NETWORK, REFORMING THE NATION’S CRIMINAL JUSTICE SYSTEM: THE IMPACT OF 2015 AND PROSPECTS FOR 2016, at 4–8 (2015), <http://www.justiceactionnetwork.org/wp-content/uploads/2015/12/Justice-Action-Network-Year-End-Report.pdf> (discussing the Sentencing Reform and Corrections Act of 2015, which gained bipartisan support in both the House of Representatives and the Senate but was not enacted).

³⁰ Vivien Stern, *The International Impact of U.S. Policies*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 279, 280 (Marc Mauer & Meda Chesney-Lind eds., 2002).

³¹ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9–10 (2012), <http://archive.vera.org/sites/default/files/resources/downloads/price-of-prisons-updated-version-021914.pdf>. While the average cost is approximately \$31,000 per prisoner, the cost is higher in some states and cities: e.g., in New York State the average cost is approximately \$60,000 per year. *Id.*

³² KEARNEY ET AL., *supra* note 11, at 2, 13.

³³ *Id.* at 13.

³⁴ *Id.* at 13, 17.

³⁵ *Id.* at 13.

Budgetary allocations for corrections have outpaced budget increases for nearly all other key government services (often by wide margins), including education, transportation, and public assistance. Today, state spending on corrections is the third highest category of general fund expenditures in most states, ranked behind Medicaid and education. Corrections budgets have skyrocketed at a time when spending for other key social services and government programs has slowed or contracted.³⁶

A recent report by the Center on Budget and Policy Priorities notes that eleven states spend more on prisons than on higher education:

Growth in corrections spending has outpaced growth in expenditures in other critical areas of state budgets, such as K-12 and higher education. State spending on higher education—that is, money spent through the state budget, not by students and families through tuition—rose by less than 6 percent between 1986 and 2013, after adjusting for inflation. State support for K-12 education grew by 69 percent over this period. But corrections spending jumped by *141 percent*. Eleven states spent more general funds on corrections than on higher education in 2013; Oregon spent more than twice as much. In 12 other states, corrections spending was at least 70 percent of state support for higher education.³⁷

There is now considerable political momentum toward reducing incarceration numbers. The former U.S. Attorney General, Eric Holder, said while in office, “too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason. It’s clear, at a basic level, that 20th-century criminal justice solutions are not adequate

³⁶ NAT’L RESEARCH COUNCIL, *supra* note 8, at 314 (footnote omitted) (citation omitted); *see also* KEARNEY ET AL., *supra* note 11, at 13.

³⁷ MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. ON BUDGET & POL’Y PRIORITIES, CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION 8 (2014) (footnote omitted), <http://www.cbpp.org/sites/default/files/atoms/files/10-28-14sfp.pdf>. Reduced investment in education is also occurring at the more junior education level:

In recent years . . . states have cut education funding, in some cases by large amounts. At least 30 states are providing less general funding per student this year for K-12 schools than in state fiscal year 2008, before the Great Recession hit, after adjusting for inflation. In 14 states, the reduction exceeds 10 percent. The three states with the deepest funding cuts since the recession hit—Alabama, Arizona, and Oklahoma—are among the ten states with the highest incarceration rates.

Id. at 10 (footnote omitted); *see also* Beatrice Gitau, *The Hidden Costs of Funding Prisons Instead of Schools*, CHRISTIAN SCI. MONITOR (Oct. 3, 2015), <http://www.csmonitor.com/USA/Justice/2015/1003/The-hidden-costs-of-funding-prisons-instead-of-schools> (noting that eleven states spend more on prisons than universities: Michigan, Oregon, Arizona, Vermont, Colorado, Pennsylvania, New Hampshire, Delaware, Rhode Island, Massachusetts, and Connecticut).

to overcome our 21st-century challenges.”³⁸ More recently, former Deputy Attorney General, Sally Quillian Yates, has echoed similar sentiments:

These days, there’s a lot of talk about criminal justice reform. We are at a unique moment in our history, where a bipartisan consensus is emerging around the critical need to improve our current system. About a month ago, a coalition of republican and democratic senators unveiled a bill—called the sentencing reform and corrections act—to address proportionality in sentencing, particularly for lower level, non-violent drug offenders. In short, we need to make sure that the punishment fits the crime.³⁹

The shortcomings of mass incarceration have finally transcended academic discourse and become a common theme in the mainstream media. *Rolling Stone* magazine published a major report in October 2014 focusing on the injustice associated with long jail terms for drug offenders. The sentiment of the report is conveyed in the following passage: “Widely enacted in the Eighties and Nineties amid rising crime and racially coded political fearmongering, mandatory penalties—like minimum sentences triggered by drug weight, automatic sentencing enhancements, and three-strikes laws—have flooded state and federal prisons with nonviolent offenders.”⁴⁰ The report adds: “For decades, lawyers, scholars, and judges have criticized mandatory drug sentencing

³⁸ Press Release, U.S. Dep’t of Justice, Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> (“While the entire U.S. population has increased by about a third since 1980, the federal prison population has grown at an astonishing rate—by almost 800 percent. . . . [F]ederal prisons are operating at nearly 40 percent above capacity. Even though this country comprises just 5 percent of the world’s population, we incarcerate almost a quarter of the world’s prisoners. More than 219,000 federal inmates are currently behind bars. Almost half of them are serving time for drug-related crimes, and many have substance use disorders. Nine to 10 million more people cycle through America’s local jails each year. And roughly 40 percent of former federal prisoners—and more than 60 percent of former state prisoners—are rearrested or have their supervision revoked within three years after their release . . .”).

³⁹ Press Release, U.S. Dep’t of Justice, Deputy Attorney General Sally Quillian Yates Delivers Remarks on Criminal Justice Reform at Columbia Law School (Oct. 29, 2015), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-criminal-justice-reform>; see also Ken Cuccinelli, Opinion, *Criminal Justice Reform: Conservative States Have a Record of Success. So Why Ignore It?*, FOX NEWS (Nov. 5, 2015), <http://www.foxnews.com/opinion/2015/11/05/critics-federal-criminal-justice-reform-ignore-decade-long-success-in-conservative-states.html>.

⁴⁰ Andrea Jones, *The Nation’s Shame: The Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014), <http://www.rollingstone.com/politics/news/the-nations-shame-the-injustice-of-mandatory-minimums-20141007>.

as oppressive and ineffective. Yet tens of thousands of nonviolent offenders continue to languish behind bars.”⁴¹

A recent report in the *New York Times* notes that America now spends more on prisons than food stamps.⁴² Proposed new federal sentencing laws aimed at lowering sentences for some non-violent offenders were the subject of an extensive editorial in the *New York Times* in October 2015.⁴³ There are ongoing calls for lighter sentencing.⁴⁴

In July 2015, Barack Obama became the first sitting U.S. President to visit a U.S. prison when he visited a medium-security prison in central Oklahoma.⁴⁵ Following the visit, the President “called for lowering—if not ending—mandatory minimum sentences for nonviolent drug offenses, restoring the voting rights of ex-felons, revisiting hiring practices that require applicants to list criminal activity, and expanding job training programs so inmates are better prepared to reintegrate into society.”⁴⁶ President Obama also mentioned the need for sentencing reform in his 2015 State of the Union address.⁴⁷

In September 2015, HBO screened a program titled *Fixing the System* which focused on the high incarceration rate and the urgent need to remedy the criminal justice system.⁴⁸ Alex Lichtenstein, writing in *The Atlantic*, has even suggested that mass incarceration is mainly a form of welfare spending:

⁴¹ *Id.*

⁴² See Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), <https://www.nytimes.com/2014/04/30/business/economy/in-the-us-punishment-comes-before-the-crimes.html>.

⁴³ Editorial, *Toward Saner, More Effective Prison Sentences*, N.Y. TIMES (Oct. 3, 2015), https://www.nytimes.com/2015/10/04/opinion/sunday/toward-saner-more-effective-prison-sentences.html?_r=0.

⁴⁴ See, e.g., Editorial, *Cut Sentences for Low-Level Drug Crimes*, N.Y. TIMES (Nov. 23, 2015), <https://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html>.

⁴⁵ Sabrina Siddiqui, *'An Injustice System': Obama's Prison Tour Latest in Late-Term Reform Agenda*, GUARDIAN (July 16, 2015, 6:43 PM), <https://www.theguardian.com/us-news/2015/jul/16/barack-obama-prison-tour-criminal-justice-race-reform>.

⁴⁶ *Id.*

⁴⁷ Inimai M. Chettiar & Abigail Finkelman, *If You Blinkered, You Missed when Obama Made Criminal Justice Reform History*, BRENNAN CTR. FOR JUSTICE (Jan. 13, 2016), <https://www.brennancenter.org/analysis/if-you-blinkered-you-missed-when-obama-made-criminal-justice-reform-history>.

⁴⁸ VICE *Special Report: Fixing the System* (HBO television broadcast Sept. 27, 2015); Editorial, *Watch VICE's Historic Conversation with President Obama*, VICE (Sept. 20, 2015, 10:31 PM), https://www.vice.com/en_us/article/fixing-the-system-prisons-obama-shane-smith-hbo; see also Gregory Korte, *Obama Launches Criminal Justice Tour: 'Something I'll Keep Fighting For'*, USA TODAY (Oct. 17, 2015, 7:25 PM), <http://www.usatoday.com/story/news/politics/2015/10/17/obama-criminal-justice-reform-tour-charleston-heroin/74090902>.

Mass incarceration is not just (or even mainly) a response to crime, but rather a perverse form of social spending that uses state power to address a host of social problems at the back end, from poverty to drug addiction to misbehavior in school. These are problems that voters, taxpayers, and politicians—especially white voters, taxpayers, and politicians—seem unwilling to address in any other way. And even as this spending exacts a toll on those it targets, it confers economic benefits on others, creating employment in white rural areas, an enormous government-sponsored market in prison supplies, and cheap labor for businesses. This is what the historian Mike Davis once called “carceral Keynesianism.”⁴⁹

Sentencing reform was a topic in the 2016 Presidential campaign. Democratic candidate Hillary Clinton called for concrete changes to “end the era of mass incarceration.”⁵⁰ This is a sentiment shared by several of her Republican rivals.⁵¹ Democratic candidate Bernie Sanders even declared that, if he were elected President, “at the end of my first term, we [would] not have more people in jail than any other country.”⁵²

The *New York Times* in April 2015 noted that:

The last time a Clinton and a Bush ran for president, the country was awash in crime and the two parties were competing to show who could be tougher on murderers, rapists and drug dealers. Sentences were lengthened and new prisons sprouted up across the country.

But more than two decades later, declared and presumed candidates for president are competing over how to reverse what they see as the policy excesses of the 1990s and the mass incarceration that has followed. Democrats and Republicans alike are putting forth ideas to reduce the prison population and rethink a system that has locked up a generation of young men, particularly African-Americans.⁵³

In October 2015, Law Enforcement Leaders to Reduce Crime and Incarceration, a group consisting of 130 police chiefs, prosecutors, and

⁴⁹ Alex Lichtenstein, *Mass Incarceration Has Become the New Welfare*, ATLANTIC (Sept. 16, 2015), <https://www.theatlantic.com/politics/archive/2015/09/mass-incarceration-has-become-the-new-welfare/404422>.

⁵⁰ Hillary Clinton, *Criminal Justice Reform*, HILLARY FOR AM., <https://www.hillaryclinton.com/issues/criminal-justice-reform> (last visited Mar. 21, 2017).

⁵¹ Evan Halper, *Clinton's Call for Easing Harsh Sentencing Laws Is Echoed by Republican Rivals*, L.A. TIMES (Apr. 29, 2015, 6:48 PM), <http://www.latimes.com/nation/politics/la-pn-clinton-prison-reform-20150429-story.html>.

⁵² German Lopez, *Bernie Sanders Just Set an Impossibly Ambitious Goal to Reverse Mass Incarceration*, VOX (Feb. 11, 2016, 9:55 PM), <http://www.vox.com/2016/2/8/10937468/bernie-sanders-mass-incarceration>.

⁵³ Peter Baker, *2016 Candidates Are United in Call to Alter Justice System*, N.Y. TIMES (Apr. 27, 2015), https://www.nytimes.com/2015/04/28/us/politics/being-less-tough-on-crime-is-2016-consensus.html?_r=1.

attorneys general from all fifty states, called for reforms to end unnecessary incarceration.⁵⁴ A press release by this group states:

“As the public servants working every day to keep our citizens safe, we can say from experience that we can bring down both incarceration and crime together,” said Law Enforcement Leaders Co-Chair Garry McCarthy, Superintendent of the Chicago Police Department. “Good crime control policy does not involve arresting and imprisoning masses of people. It involves arresting and imprisoning the right people. Arresting and imprisoning low-level offenders prevents us from focusing resources on violent crime. While some may find it counterintuitive, we know that we can reduce crime and reduce unnecessary arrests and incarceration at the same time.”⁵⁵

Thus, there is now an increasing recognition that something must be done to reduce incarceration levels.⁵⁶ Even members of the community are softening their views about criminals: the results of a poll published in October 2014 show that seventy-seven percent of Americans are in favor of abolishing mandatory minimum sentences for non-violent drug offenses.⁵⁷ The level of support for this proposal increased from seventy-one percent when the same question was polled in December 2013.⁵⁸

At the end of 2015, there were more than 2.1 million Americans in local jails or prisons.⁵⁹ This rate has been steadily increasing over the

⁵⁴ Douglas A. Berman, *Notable New Group Advocating for Sentencing Reforms: Law Enforcement Leaders to Reduce Crime and Incarceration*, SENT’G L. & POL’Y (Oct. 21, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/notable-new-group-advocating-for-sentencing-reforms-law-enforcement-leaders-to-reduce-crime-and-inca.html.

⁵⁵ Press Release, Law Enf’t Leaders to Reduce Crime & Incarceration, 130 Top Police Chiefs and Prosecutors Urge End to Mass Incarceration (Oct. 21, 2015), <http://lawenforcementleaders.org/wp-content/uploads/2015/10/Law-Enforcement-Leaders-Press-Release.pdf>.

⁵⁶ See Press Release, Bureau of Justice Statistics, U.S. Prison Population Declined for Third Consecutive Year During 2012 (July 25, 2013), <https://www.bjs.gov/content/pub/press/p12acpr.cfm>.

⁵⁷ REASON, REASON-RUPE PUBLIC OPINION SURVEY: OCTOBER 2014 TOPLINE RESULTS 4 (2014), <http://reason.com/assets/db/14128084586864.pdf>; see also Holly Harris & Andrew Howard, *Ryan’s Victory Trumps Justice Reform Opponents*, HILL (Aug. 15, 2016, 4:51 PM), <http://thehill.com/blogs/pundits-blog/crime/291500-ryans-victory-trumps-justice-reform-opponents>.

⁵⁸ REASON, *supra* note 57, at 4. A more recent poll (in October 2016) showed that the portion of Americans who believe that the criminal justice system is “not tough enough” has dropped from sixty-five percent to forty-five percent over the past decade. Justin McCarthy, *Americans’ Views Shift on Toughness of Justice System*, GALLUP (Oct. 20, 2016), <http://www.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx>.

⁵⁹ U.S. DEP’T OF JUSTICE, *supra* note 23, at 1.

past forty years⁶⁰ and has more than doubled over the past two decades.⁶¹ However, in recent year years, prison numbers have been on a generally downward trend—albeit ever so slightly. In 2011 and 2012, there was a small decrease in prison numbers.⁶² Incarceration numbers increased again in 2013,⁶³ before slightly declining in 2014⁶⁴ and 2015.⁶⁵ The continuing high prison numbers have prompted the implementation of measures to reduce prison numbers.

In November 2014, voters in California approved Proposition 47, Reduced Penalties for Some Crimes Initiative (2014),⁶⁶ which limited the operation of that state's harsh mandatory penalty regime by reducing some non-violent offenses from felonies to misdemeanors.⁶⁷ In

⁶⁰ In fact, during this period, it has quadrupled. See NAT'L RESEARCH COUNCIL, *supra* note 8, at 1.

⁶¹ *Id.* at 33.

⁶² *Id.*

⁶³ There was an increase of 4300 prisoners in 2013, compared with 2012. While the federal prison population decreased for the first time since 1980, it was more than offset by an increase in the state prison population (the first increase since 2009). See E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 247282, PRISONERS IN 2013, at 1 (2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf>.

⁶⁴ In 2014, there was a slight decrease in federal and state prison numbers, but this was partially offset by an increase in local jail numbers. See Matthew Friedman, *Just Facts: The U.S. Prison Population Is down (A Little)*, BRENNAN CTR. FOR JUSTICE (Oct. 29, 2015), <http://www.brennancenter.org/blog/us-prison-population-down-little>. State and federal prison numbers decreased by 15,400 people from December 31, 2013 to December 31, 2014. *Id.* However, county and city jail numbers increased by 13,384 inmates from mid-year 2013 to mid-year 2014. *Id.* While these time periods are not aligned, they are indicative of a larger trend. The increasing jail numbers are eclipsing the progress made by decreasing prison numbers.

⁶⁵ In 2015, the number of prisoners declined 51,300 to 2,136,600 (i.e., a drop of about 2.5%). U.S. DEP'T OF JUSTICE, *supra* note 23, at 1.

⁶⁶ In summary, the law brings about the following key changes:

Requir[ing] misdemeanor sentence[s] instead of felony for certain drug possession offenses[;] [r]equir[ing] misdemeanor sentence[s] instead of felony for the following crimes when [the] amount involved is \$950 or less: petty theft, receiving stolen property, and forging/writing bad checks[;] [a]llow[ing] felony sentence[s] for these offenses if [the] person has [a] previous conviction for crimes such as rape, murder, or child molestation or is [a] registered sex offender[;] [r]equir[ing] resentencing for persons serving felony sentences for these offenses unless [a] court finds [an] unreasonable public safety risk[;] [a]ppl[y]ing savings to mental health and drug treatment programs, K-12 schools, and crime victims.

CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 34 (2014), <http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf>.

⁶⁷ Kristina Davis, *Calif Cuts Penalties for Small Drug Crimes*, SAN DIEGO UNION-TRIB. (Nov. 4, 2014, 8:04 PM), <http://www.sandiegouniontribune.com/news/elections/sdut-prop-47-misdemeanor-law-vote-election-drug-2014nov04-story.html>. The law was passed with a majority of fifty-nine percent of voters in favor. *Id.*; see also *San Francisco Called a Model for Ending Mass Incarceration*, CRIME REP. (Dec. 1, 2015), <http://thecrimereport.org/2015/12/01/2015-12-san-francisco-called-a-model-for-ending-mass-incarce>. For an overview of the impact of the reform, see Rob Kuznia, *An Unprecedented Experiment in Mass Forgiveness*, WASH. POST

April 2014, the U.S. Sentencing Commission voted to reduce the sentencing guideline levels for most federal drug trafficking offences.⁶⁸ These changes will apply retroactively, meaning that over 46,000 prisoners are eligible to have their cases reviewed for a penalty reduction.⁶⁹ The average reduction in the penalty for each prisoner is estimated to be in the order of two years and one month.⁷⁰ The first tranche of these prisoners, totaling six thousand, was released in late 2015.⁷¹ Further, the Sentencing Reform and Corrections Act of 2015 aims to implement a number of other measures that will reduce prison numbers, including reduced sentences for drug offenders.⁷² While it now seems that Congress will not pass this bill,⁷³ the bipartisan support

(Feb. 8, 2016), https://www.washingtonpost.com/national/an-unprecedented-experiment-in-mass-forgiveness/2016/02/08/45899f9c-a059-11e5-a3c5-c77f2cc5a43c_story.html?utm_term=.6d13301fefff, and also see MAGNUS LOFSTROM, MIA BIRD & BRANDON MARTIN, PUB. POL'Y INST. OF CAL., CALIFORNIA'S HISTORIC CORRECTIONS REFORMS (2016), http://www.ppic.org/content/pubs/report/R_916MLR.pdf. Further, a report by the VERA Institute of Justice found that forty-six American states passed legislation in 2014 and 2015 that, in response to relevant empirical evidence, went some way towards introducing measures which could reduce prison numbers. REBECCA SILBER, RAM SUBRAMANIAN & MAIA SPOTTS, VERA INST. OF JUST., JUSTICE IN REVIEW: NEW TRENDS IN STATE SENTENCING AND CORRECTIONS 2014–2015, at 3, 7 (2016), <http://archive.vera.org/sites/default/files/resources/downloads/state-sentencing-and-corrections-trends-2014-2015.pdf>.

⁶⁸ Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Votes to Reduce Drug Trafficking Sentences (Apr. 10, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140410_Press_Release.pdf.

⁶⁹ Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences (July 18, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf. The first tranche of these prisoners (totaling approximately 6000 in number) was released in October 2015. Sari Horwitz, *Justice Department Set to Free 6,000 prisoners, Largest One-Time Release*, WASH. POST (Oct. 6, 2015), https://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html?utm_term=.1892d1429cf8; see also Erik Eckholm, *Thousands Start Life Anew with Early Prison Releases*, N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/us/with-early-release-thousands-of-inmates-are-adjusting-to-freedom.html?_r=0.

⁷⁰ Mirko Bagaric, *Prisons Policy Is Turning Australia into the Second Nation of Captives*, CONVERSATION (Apr. 9, 2015, 4:41 PM), <http://theconversation.com/prisons-policy-is-turning-australia-into-the-second-nation-of-captives-38842>. One bed year is equivalent to a prisoner being in jail for one year.

⁷¹ Horwitz, *supra* note 69; Richard L. Young, *Young: Federal Re-Entry Programs Continue to Benefit Community*, IND. LAW. (Jan. 13, 2016), <http://www.theindianalawyer.com/federal-re-entry-programs-continue-to-benefit-community/PARAMS/article/39193>.

⁷² For a summary of the provisions, see Douglas A. Berman, *Basic Elements of Sentencing Reform and Corrections Act of 2015*, SENT'G L. & POL'Y (Oct. 1, 2015), http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/basic-elements-of-sentencing-reform-and-corrections-act-of-2015.html; and also see Editorial, *supra* note 43 (lauding the Sentencing Reform and Corrections Act of 2015).

⁷³ Seung Min Kim & Burgess Everett, *Time Running Out for Major Criminal Justice Bill*, POLITICO (Apr. 20, 2016, 6:06 PM), <http://www.politico.com/story/2016/04/senate-justice-crime-bill-222225>.

it initially received reflects the current appetite for change. Measures of this type are to be commended but are ad hoc and will only have a minor effect in reducing prison numbers.⁷⁴ This Article proposes a more impactful and principled solution.

Prior to exploring how to fix the incarceration problem, we first look briefly at its causes.

II. WHERE IT WENT WRONG: UNABATED PUNITIVENESS WITHOUT A DEMONSTRATED OBJECTIVE

The National Research Council issued a report examining the rapid escalation in the imprisonment rate.⁷⁵ The report notes that changes to sentencing systems throughout the United States over the past few decades were precipitated by periods of rising crime and a growing politicization of the problem.⁷⁶ The main driver of sentencing change was a “tough on crime” agenda fueled by political pragmatism. There is no clear explanation for why political orthodoxy reverted to “tough on crime.” A number of theories have been suggested, each tying into the political environment of the time. In the 1960s and 1970s, there was growth in victims’ rights movements, women’s rights movements,⁷⁷ and,

⁷⁴ Another measure includes using “risk and needs assessment” (RNA) information at sentencing. *Sentencing Reform: Lessons from 10 Counties*, CRIME REP. (Nov. 24, 2015), <http://thecrimereport.org/2015/11/24/2015-11-sentencing-reform-lessons-from-10-counties>. However, it seems that the political momentum in favor of the reform has stalled. Editorial, *Holding Sentencing Reform Hostage*, N.Y. TIMES (Feb. 6, 2016), <https://www.nytimes.com/2016/02/07/opinion/sunday/holding-sentencing-reform-hostage.html>. For an overview of other recent reforms, some of which include penalty reductions in several states, see NICOLE D. PORTER, THE SENTENCING PROJECT, THE STATE OF SENTENCING 2015: DEVELOPMENTS IN POLICY AND PRACTICE (2016), <http://sentencingproject.org/wp-content/uploads/2016/02/State-of-Sentencing-2015.pdf>; THE SENTENCING PROJECT, U.S. PRISON POPULATION TRENDS 1999–2014: BROAD VARIATION AMONG STATES IN RECENT YEARS I (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/02/US-Prison-Population-Trends-1999-2014.pdf> (“[W]hile 39 states have experienced a decline since reaching their peak prison populations within the past 15 years, in most states this reduction has been relatively modest.”); and also see Adam Wisniewski, *Does Smarter Sentencing Equal Lower Prison Numbers?*, PRISON LEGAL NEWS (June 29, 2016), <https://www.prisonlegalnews.org/news/2016/jun/29/does-smarter-sentencing-equal-lower-prison-numbers>.

⁷⁵ NAT’L RESEARCH COUNCIL, *supra* note 8, at 2.

⁷⁶ *Id.* at 2–3.

⁷⁷ *Id.* at 117; see also Spohn, *supra* note 8; Tonry, *supra* note 22; Tonry, *supra* note 17, at 11 (“Four major reasons explain why American cultural attitudes and political practices in our time accord so little value to the basic human rights even of our own citizens. Two—the paranoid style in American politics and a Manichean moralism associated with fundamentalist religious views—are recurring cultural characteristics of American society. The third is the obsolescence of the American constitution and a political culture that allows raw public emotion to drive governmental policies. The fourth, aggravated by the first three, is the distinctive history of race relations in America.”).

perhaps most importantly, white backlash to the Civil Rights Movement.

Victims' rights groups sought punishment for criminals who victimized. Women's rights movements advocated for protection of and greater safety for women. Whites were anxious about rising crime and diminishing economic opportunities and blamed the Civil Rights Movement.

Some politicians based their "tough on crime" policies on race explicitly. This was labelled the "Southern Strategy." Barry Goldwater, a 1964 Presidential candidate employed the Southern Strategy. He capitalized on the political environment in a speech promoting "tough on crime" strategies by simultaneously capitalizing on fears and promoting the safety of women, claiming: "Our wives, all women, feel unsafe on our streets."⁷⁸

Richard Nixon, in an article published in *The Reader's Digest* two years before he was inaugurated as President of the United States, took a different position about why there was a need for "tough on crime" policies:

There has been a tendency in this country to charge off the violence and the rioting of the past summer solely to the deep racial division between Negro and white. Certainly racial animosities—and agonies—were the most visible causes. But riots were also the most visible causes. But riots were also the most virulent symptoms to date of another, and in some ways graver, national disorder—the decline in respect for public authority and the rule of law in America. Far from being a great society, ours is becoming a lawless society.⁷⁹

Nixon changed the conversation, so "tough on crime" policies were no longer about race; they were about the greater good for all society. Historians, sociologists, and political analysts continue to debate the exact reasons why American politics adopted a "tough on crime" approach and why it was such a successful campaign. What is less contestable is how this approach was operationalized.

Each jurisdiction in the United States has a distinctive sentencing system, but there are a number of key elements shared by all of the systems, which have resulted in high levels of incarceration. Central to this are fixed penalty regimes, which were rolled out during the 1980s and still operate in all U.S. states.⁸⁰ Fixed penalty systems typically

⁷⁸ Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 14 (2013).

⁷⁹ Richard Nixon, *What Has Happened to America?*, READER'S DIG., Oct. 1967, at 49, 50.

⁸⁰ NAT'L RESEARCH COUNCIL, *supra* note 8, at 3.

invoke a grid to determine the appropriate penalty. The grid normally utilizes two key variables—the first variable is the seriousness of the offence, and the second variable is the criminal history of the offender.⁸¹

The penalties set out in grids are severe. As noted by Michael Tonry:

Anyone who works in or has observed the American criminal justice system over time 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), LWOP [life without parole] laws (49 states), and truth-in-sentencing laws (28 states), in some places augmented by equally severe “career criminal,” “dangerous offender,” and “sexual predator” laws. These laws, because they required sentences of historically unprecedented lengths for broad categories of offenses and offenders, are the primary causes of contemporary levels of imprisonment.⁸²

This increasingly harsh sentencing regime was not supported by an overarching normative theory or an empirically-grounded approach to sentencing. The policies stemmed from “back-of-an-envelope calculations and collective intuitive judgments.”⁸³ Berman and Bibas correctly observe that “[o]ver the last half-century, sentencing has lurched from a lawless morass of hidden, unreviewable discretion to a sometimes rigid and cumbersome collection of rules.”⁸⁴ They add: “Modern sentencing reforms have repudiated rehabilitation as a dominant goal of sentencing. Many structured sentencing laws, including many guideline sentencing systems and severe mandatory minimum sentences, are designed principally to deter, incapacitate, and punish offenders.”⁸⁵ This resulted in “sentencing reform initiatives aimed at achieving greater severity and certainty of punishment—mandatory minimum sentences, truth-in-sentencing statutes, three-strikes sentencing provisions, life-without-the-possibility-of-parole (LWOP) laws, and overly punitive sentencing guidelines in which the

⁸¹ The criminal history of the offender is based mainly on the number, seriousness, and age of the prior convictions. See generally RICHARD S. FRASE ET AL., *ROBINA INST. OF CRIMINAL LAW & CRIMINAL JUSTICE, CRIMINAL HISTORY ENHANCEMENTS SOURCEBOOK* (2015).

⁸² Tonry, *supra* note 8, at 514 (citations omitted).

⁸³ Michael Tonry, *The Questionable Relevance of Previous Convictions to Punishments for Later Crimes*, in *PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES* 91, 93 (Julian V. Roberts & Andrew von Hirsch eds., 2010). For further criticism of the guidelines, see James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173 (2010) and Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005).

⁸⁴ Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 40 (2006).

⁸⁵ *Id.* at 48.

severity of the sentence is not proportionate to the seriousness of the crime.”⁸⁶ Some judges openly acknowledge that the penalties they implemented were too harsh. Former federal judge Nancy Gertner has recently stated: “Over a 17-year judicial career, I sent hundreds of defendants to jail—and about 80 percent of them received a sentence that was disproportionate, unfair, and discriminatory. Mass incarceration was not an abstraction to me. Sadly, I was part of it.”⁸⁷

The upshot of the changes was that more offenders were sentenced to prison and to longer terms of imprisonment.⁸⁸

The most analyzed prescribed penalty laws are found in the U.S. Sentencing Commission Guidelines Manual (Federal Sentencing Guidelines).⁸⁹ These guidelines are important because of the large number of offenders sentenced under this system and the significant doctrinal influence they have exerted at the state level.⁹⁰ The mechanics of the guidelines provide a ready snapshot of their severity.⁹¹

⁸⁶ Spohn, *supra* note 8, at 535; *see also* Tonry, *supra* note 8.

⁸⁷ Nancy Gertner, Opinion, *Undoing the Damage of Mass Incarceration*, BOS. GLOBE (Nov. 4, 2015), http://www.bostonglobe.com/opinion/2015/11/04/undoing-damage-mass-incarceration/9Ww80SKxQm9EbdHxmZG5sM/story.html?s_campaign=8315.

⁸⁸ *See* MITCHELL & LEACHMAN, *supra* note 37; *see also* *More Prison, Less Probation for Federal Offenders*, PEW CHARITABLE TRUSTS (Jan. 12, 2016), http://www.pewtrusts.org/~media/assets/2016/01/pspp_fs_moreprisonlessprobation_v1.pdf.

⁸⁹ *See* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM’N 2015), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf>.

⁹⁰ *See* Berman & Bibas, *supra* note 84, at 40. There are more than 200,000 federal prisoners. CARSON, *supra* note 63, at 2.

⁹¹ The Federal Sentencing Guidelines are no longer mandatory in nature following the Supreme Court decision in *United States v. Booker*, 543 U.S. 220, 264 (2005) (“The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.”); *see also* 18 U.S.C. § 3553(a)(4)–(5) (2012), *held unconstitutional by Booker*, 543 U.S. 220; *Pepper v. United States*, 562 U.S. 476 (2011); *Irizarry v. United States*, 553 U.S. 708 (2008); *Greenlaw v. United States*, 554 U.S. 237 (2008); *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007) (stating that a district court should begin all sentencing proceedings by correctly calculating the applicable Federal Sentencing Guidelines range). For a discussion about the impact of *Booker*, see Frank O. Bowman, III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUS. L. REV. 1227 (2014). In *Booker*, the Supreme Court held that aspects of the Federal Sentencing Guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial. *Booker*, 543 U.S. 220. Nevertheless, the guideline range remains a very influential sentencing reference point. Until recently, sentences within guidelines were still the norm. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1160 (2010); *see also* AMY BARON EVANS & PAUL HOFER, NAT’L SENTENCING RES. COUNSEL, LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION, at i (2010). For a discussion regarding the potential of mitigating factors to have a greater role in federal sentencing, see William W. Berry III, *Mitigation in Federal Sentencing in the United States*, in MITIGATION AND AGGRAVATION AT SENTENCING 247 (Julian V. Roberts ed., 2011). In 2014, for the first time, federal courts imposed more sentences that were outside the Federal Sentencing Guidelines than sentences that were within them. The margin is small (fifty-four percent to forty-six percent), but it does reflect a trend by the judiciary to view the Federal Sentencing Guidelines with fewer strictures

In terms of establishing the appropriate sentence, apart from the offence severity, the other key variable that determines the sanction in the Federal Sentencing Guidelines is the prior history of the offender.⁹² For many offences, a criminal history can more than double the presumptive sentence. For example, an offence at level 14⁹³ in the Federal Sentencing Guidelines carries a presumptive penalty for a first-time offender of imprisonment for fifteen to twenty-one months, which increases to thirty-seven to forty-six months for an offender with thirteen or more criminal history points.⁹⁴ For an offense at level 36, a first-time offender has a presumptive penalty of 188 to 235 months, which increases to 324 to 405 months for an offender with the highest criminal history score. Thus, a bad criminal history can add between 136 to 170 months (over fourteen years) to a jail term.

The penalties set out in the grid were, in general, far higher than previous sanctions. Analysis of federal sentencing patterns showed that:

The average length of time served by federal inmates more than doubled from 1988 to 2012, rising from 17.9 to 37.5 months. Across all six major categories of federal crime—violent, property, drug, public order, weapon, and immigration offenses—imprisonment periods increased significantly. For drug offenders, who make up roughly half of the federal prison population, time served leapt from less than two years to nearly five.

....

Two factors determine the size of any prison population: how many offenders are admitted to prison and how long they remain. From 1988 to 2012, the number of annual federal prison admissions almost tripled, increasing from 19,232 to 56,952 (after reaching a high of 61,712 in 2011). During the same period, the average time served by released federal offenders more than doubled, rising from 17.9 to 37.5 months. These two upward trends . . . caused a spike in the overall federal prison population, which jumped 336 percent,

than previously. U.S. SENTENCING COMM'N, U.S. SENTENCING COMMISSION FINAL QUARTERLY DATA REPORT 1 tbl.1 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014_Quarterly_Report_Final.pdf.

⁹² Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1109–10 (2008) (highlighting the importance of a defendant's criminal history in assessing his sentence).

⁹³ U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, Sentencing Table. The offense levels range from 1 (least serious) to 43 (most serious). Examples of level 14 offenses are criminal sexual abuse of a ward, failure to register as a sex offender, and bribery (if the defendant is a public official). *Id.* §§ 2A3.3, 2A3.5, 2C1.1.

⁹⁴ *Id.* at ch. 5, pt. A, Sentencing Table. The criminal history score ranges from zero to thirteen or more (worst offending record). *Id.*

from 49,928 inmates in 1988 to an all-time high of 217,815 in 2012. One study found that the increase in time served by a single category of federal offenders—those convicted of drug-related charges—was the “single greatest contributor to growth in the federal prison population between 1998 and 2010.”⁹⁵

Some of the harshest types of mandatory sentencing laws are the three-strikes laws, which have been adopted in over twenty states.⁹⁶ The Californian three-strikes laws⁹⁷ are the most well-known.⁹⁸ Prior to recent reform,⁹⁹ offenders convicted of any felony who had two or more relevant previous convictions were required to be sentenced to between twenty-five years to life imprisonment. The importance attributed to previous convictions was exemplified by the fact that the third offence did not have to be a serious or violent felony—any felony would do. This meant that some offenders were sentenced to decades of imprisonment for relatively minor crimes: defendants have been sentenced to twenty-five years to life where their last offence was a minor theft (which, prior to the three-strikes regime, would normally have resulted in a non-custodial sentence). For example, Jerry Dewayne Williams, a twenty-seven-year-old Californian, was sentenced to a term of twenty-five years to life without parole for stealing a slice of pepperoni pizza from a group of four youths, based on his previous convictions.¹⁰⁰ Another example is the case of Gary Ewing, who was sentenced to twenty-five years to life for stealing three golf clubs, each of which was worth \$399.¹⁰¹ Prior to that, he had been convicted of four serious or violent felonies.¹⁰²

⁹⁵ PEW CHARITABLE TRUSTS, PRISON TIME SURGES FOR FEDERAL INMATES 1–2 (2015) (footnotes omitted), http://www.pewtrusts.org/~media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf.

⁹⁶ See Tonry, *supra* note 83, at 93; James Austin et al., *The Impact of ‘Three Strikes and You’re Out’*, 1 PUNISHMENT & SOC’Y 131, 133, 134 tbl.1 (1999); Kelly McMurry, *‘Three-Strikes’ Laws Proving More Show than Go*, TRIAL, Jan. 1997, at 12, 12.

⁹⁷ See CAL. PENAL CODE § 667 (West, Westlaw through ch. 4 of 2017 Reg. Sess.).

⁹⁸ The Supreme Court has held that California’s “three-strikes” laws do not violate the Eighth Amendment prohibition against cruel and unusual punishment. See *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003).

⁹⁹ See *supra* Part I.

¹⁰⁰ Phil Reeves, *‘Life’ for Pizza Theft Enrages Lawyers*, INDEPENDENT (Mar. 4, 1995), <http://www.independent.co.uk/news/world/life-for-pizza-theft-enrages-lawyers-1609876.html>.

¹⁰¹ Ewing appealed his sentence to the Supreme Court, which upheld the validity of the legislation. *Ewing*, 538 U.S. at 30–31. For a discussion of the case, see Sara Sun Beale, *The Story of Ewing v. California: Three Strikes Laws and the Limits of the Eighth Amendment Proportionality Review*, in CRIMINAL LAW STORIES 427 (Donna Coker & Robert Weisberg eds., 2013), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2953&context=faculty_scholarship.

¹⁰² *Ewing*, 538 U.S. at 30–31.

The California three-strikes laws were softened somewhat in 2012, and now a term of at least twenty-five years would only be required where the third offence was a serious or violent felony.¹⁰³ In such cases, offenders continue to receive a significant premium—they must be sentenced to double the term they would have otherwise received for the instant offence.¹⁰⁴ Thus, despite the softening of the laws, serious and violent offender third-strikers are still subject to severe penalties. As noted above, amendments in 2014 have further reduced the harshness of this regime.¹⁰⁵

Even without the benefit of hindsight, most mandatory penalty regimes seem harsh. Scholars have subjected them to extensive analysis and critique.¹⁰⁶ The criticisms of the law are searching and powerful. They were undertaken by some of the most influential scholars in the United States, and yet nothing changed, apart from the continued increase in prison numbers. Rather than continuing with the trend of orthodox sentencing analysis (and criticism of such laws), we suggest an alternative reference point, which is likely to gain more traction with law-makers and the wider community for correcting distortions in the sentencing system and implementing fair and efficient reforms. The alternative perspective upon which sentencing law and practice should be evaluated is human rights discourse. Before placing sentencing practices in a human rights construct, we provide an overview of the concept of human rights.

III. HUMAN RIGHTS DISCOURSE

For centuries, societies have recognized that human beings have rights. This notion was present in ancient Babylonian, Greek, Roman, and Chinese thought, as well as in the *Old Testament*, the Magna Carta, and the writings of philosophers such as St. Thomas Aquinas, John Locke, Montesquieu, and Rousseau.¹⁰⁷ In recent times, however, the

¹⁰³ Three Strikes Reform Act of 2012, 2012 Cal. Legis. Serv. Prop. 36 (West) (codified as amended CAL. PENAL CODE § 667 (West, Westlaw through ch. 4 of 2017 Reg. Sess.)).

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* Part I for a discussion relating to California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014).

¹⁰⁶ See, e.g., MICHAEL TONRY, SENTENCING MATTERS 134 (1996); NAT'L RESEARCH COUNCIL, *supra* note 8, at 116–17, 121–22; Alschuler, *supra* note 83, at 92–93; Berman & Bibas, *supra* note 84; Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative To What?*, 89 MINN. L. REV. 571 (2005); Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363 (1997); Spohn, *supra* note 8; Tonry, *supra* note 8; Tonry, *supra* note 17.

¹⁰⁷ Hilary Charlesworth, *No Principled Reason*, EUREKA STREET, Nov. 1997, at 24, 25.

amount of discourse framed in the language of rights has grown enormously.

Human rights discourse is now the most widespread and popular moral currency. It permeates the value and belief system of most contemporary developed societies, including the United States. This is a relatively new phenomenon. Human rights as moral trumps emerged from the ashes of the atrocities of World War II. Following World War II, some parts of the world resolved to avoid the repetition of similar atrocities in the future. As the world vowed “never again,” human rights were the most obvious moral choice to give grounding to this commitment.¹⁰⁸ The view was taken that if morality is principally governed not by the pursuit of collective goods, but rather by the recognition that each individual has certain innate (near inviolable) rights, this would make it less likely that individuals would be subject to the types of egregious abuses that occurred in the war.

The atrocities of World War II also spawned the United Nations, which in turn was the driving force toward a number of international documents, variously called Bills, Charters, Declarations, Covenants, or Resolutions, which set out certain rights. The main three are the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social, and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR). There are dozens of rights prescribed by these documents. These include what can be described as basic protections, such as the right to life,¹⁰⁹ liberty and security of person,¹¹⁰ and to be free from torture or cruel, inhuman, or degrading treatment or punishment.¹¹¹ Additionally, there are the somewhat more nebulous rights, such as the right to the economic, social, and cultural rights indispensable for one’s dignity and the free development of one’s personality,¹¹² and the right to be free from the arbitrary interference with one’s privacy, family, home, or correspondence and attacks upon one’s honor and reputation.¹¹³ Lastly, there are rights which are somewhat more ambitious because they are contingent on the resources and willingness of governments to accord

¹⁰⁸ Tom Campbell, *Introduction: Realizing Human Rights*, in *HUMAN RIGHTS: FROM RHETORIC TO REALITY* 1, 13 (Tom Campbell et al. eds., 1986).

¹⁰⁹ G.A. Res. 217A (III), art. 3, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; G.A. Res. 2200A (XXI), art. 6, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

¹¹⁰ UDHR, *supra* note 109, art. 3; ICCPR, *supra* note 109, art. 9.

¹¹¹ UDHR, *supra* note 109, art. 5; ICCPR, *supra* note 109, art. 7.

¹¹² UDHR, *supra* note 109, art. 22; G.A. Res. 2200A (XXI), arts. 9, 15, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR].

¹¹³ UDHR, *supra* note 109, art. 12; ICCPR, *supra* note 109, art. 17.

them: these include the right to rest and leisure;¹¹⁴ and the right to a standard of living adequate for the health and well-being of oneself and his or her family, including food, clothing, housing, medical care, and necessary social services.¹¹⁵

In addition to formal documents, there has also been an immense increase in “rights talk,”¹¹⁶ both in the number of supposed rights and in the total volume of that “talk.” The rights doctrine has progressed a long way since its original aim of providing “a legitimization of . . . claims against tyrannical or exploiting regimes.”¹¹⁷ As Tom Campbell points out: “The human rights movement is based on the need for a counter-ideology to combat the abuses and misuses of political authority by those who invoke, as a justification for their activities, the need to subordinate the particular interests of individuals to the general good.”¹¹⁸

Charges of this nature have been extremely influential. There is now, more than ever, a strong tendency to advance moral claims and arguments in terms of rights.¹¹⁹ The main argument in support of rights-based moral theories is aptly stated by John Rawls, who claims that only rights-based theories take seriously the distinction between human beings and protect certain rights and interests that are so paramount that they are beyond the demands of net happiness.¹²⁰ Assertion of rights has become the customary means to express our moral sentiments. As Sumner notes, “there is virtually no area of public controversy in which rights are not to be found on at least one side of the question—and generally on both.”¹²¹ The domination of rights talk is such that protecting human rights has at least temporarily replaced maximizing utility as the leading philosophical inspiration for political and social reform.¹²²

¹¹⁴ UDHR, *supra* note 109, art. 24; ICESCR, *supra* note 112, art. 7(d).

¹¹⁵ UDHR, *supra* note 109, art. 25; ICESCR, *supra* note 112, art. 11.

¹¹⁶ See TOM D. CAMPBELL, *THE LEGAL THEORY OF ETHICAL POSITIVISM* 161 (1996) (discussing the near universal trend towards Bills of Rights and constitutional rights as a focus for political choice).

¹¹⁷ S. I. Benn, *Human Rights—For Whom and for What?*, in *HUMAN RIGHTS* 59, 61 (E. Kamenka & A. E. Tay eds., 1978).

¹¹⁸ Campbell, *supra* note 108, at 13. Campbell also makes the important point that whether or not human rights are intellectually defensible, they are still needed as a source of protection of important human interests. CAMPBELL, *supra* note 116, at 165–66.

¹¹⁹ See L. W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* 1 (1987) (noting that it is not unthinkable to propose that the “escalation of rights rhetoric is out of control”).

¹²⁰ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

¹²¹ SUMNER, *supra* note 119, at 1.

¹²² H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 196–97 (1983). While rights discourse is an effective moral lever, this is not to state that at the jurisprudential level the concept of human rights as it is conventionally expressed is necessarily coherent or persuasive. Broadly, there are two types of normative moral theories. Consequential moral theories claim

In the United States, rights discourse is commonplace and has been assisted (if not prompted) by the rights set out in the Constitution's Bill

that an act is right or wrong depending on its capacity to maximize a particular virtue, such as happiness. Non-consequential (or deontological) theories claim that the appropriateness of an action is not contingent upon its instrumental ability to produce particular ends, but follows from the intrinsic features of the act. Thus, the notion of absolute (or near absolute) rights, which now dominates moral discourse, is generally thought to sit most comfortably in a non-consequentialist ethic. However, from this perspective human rights claims are vacuous because deontological theories cannot provide persuasive answers to central issues such as: What is the justification for rights? How can we distinguish real from fanciful rights? Which right takes priority in the event of conflicting rights? See MIRKO BAGARIC, PUNISHMENT AND SENTENCING: A RATIONAL APPROACH 51 (2001); Mirko Bagaric, *In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent and the Compatibility of Utilitarianism and Rights*, 24 AUSTL. J. LEGAL PHIL. 95, 121–43 (1999); see also TOM CAMPBELL, JUSTICE 54 (2d ed. 1988). When examined closely, it emerges that the concept of non-consequentialist rights is vacuous at the epistemological level. It has been argued that attempts to ground concrete rights in virtues such as dignity, integrity or concern, and respect are unsound because resort to such ideals is arbitrary and leads to discrimination against certain members of the community (for example, those with severely limited cognitive functioning) or speciesism (the systematic discrimination against non-humans). See, e.g., Michael Tooley, *Abortion and Infanticide*, in APPLIED ETHICS 57, 70–71 (Peter Singer ed., 1986); see also Peter Singer, *All Animals Are Equal*, in APPLIED ETHICS 215 (Peter Singer ed., 1986). Ultimately, a non-consequentialist ethic provides no method for distinguishing between genuine and fanciful rights claims and is incapable of providing guidance regarding the ranking of rights in event of clash. We do not, however, seek to question that there is an ongoing need for moral discourse in the form of rights: “[W]hether or not . . . rights are intellectually defensible or culturally tolerant, we do have a need for them, at least at the edges of civilisation and in the tangle of international politics.” Stanley I. Benn, *Rights*, in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 196 (Paul Edwards ed., 1967). Rather, our criticism is with *deontological* rights-based moral theories (with their absolutist overtones). Rights do have a concrete underpinning, but it is only against the backdrop of a utilitarian ethic. Utilitarianism provides a sounder foundation for rights than any other competing theory. For the utilitarian, the answer to why rights exist is simple: recognition of them best promotes general utility. According to Mill, rights reconcile justice with utility. Justice, which he claims consists of certain fundamental rights, is merely a part of utility. And “[t]o have a right, then, is . . . to have something which society ought to defend . . . [if asked why] . . . I can give him no other reason than general utility.” John Stuart Mill, *Utilitarianism*, in UTILITARIANISM AND ON LIBERTY 181, 226 (Mary Warnock ed., 2003). The content of rights lies in the pursuit of happiness. Their content is discovered through empirical observations regarding the patterns of behavior which best advance the utilitarian cause. The long association of utilitarianism and rights appears to have been forgotten by most. However, over a century ago it was Mill who proclaimed the right of free speech, on the basis that truth is important to the attainment of general happiness and this is best discovered by its competition with falsehood. *Id.* at 190–212. Difficulties in performing the utilitarian calculus regarding each decision make it desirable that we ascribe certain rights and interests to people, which evidence shows tend to maximize happiness—even more happiness than if we made all of our decisions without such guidelines. Rights save time and energy by serving as shortcuts to assist us in attaining desirable consequences. By labelling certain interests as rights, we are spared the tedious task of establishing the importance of a particular interest as a first premise in practical arguments. See JOSEPH RAZ, THE MORALITY OF FREEDOM 180–81 (1986). Raz also provides that rights are useful because they enable us to settle on shared intermediary conclusions, despite considerable dispute regarding the grounds for the conclusions. *Id.* at 181.

of Rights.¹²³ This catalogue of rights is not stagnant. In *Obergefell v. Hodges*, the Supreme Court stated:

The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, “has not been reduced to any formula.” Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.¹²⁴

The breadth of the rights that are recognized in the United States far exceeds the rights that are legally protected. Rights language is prominent in most areas of social engagement, which have a normative dimension, thus we see that it arises in relation to issues such as abortion,¹²⁵ euthanasia and assisted suicide,¹²⁶ gender and sexual equality,¹²⁷ and racial equality.¹²⁸

In the past, human rights talk was subtler. The language used was more specific: “women’s rights,” “civil rights,” and the like. Martin Luther King, Jr., in May 1967, declared: “We have moved from the era of civil rights to the era of human rights.”¹²⁹ Hillary Clinton, in 1995, stated: “Women’s rights are human rights.”¹³⁰ Today, the umbrella of

¹²³ The relevant rights are: freedom of religion, freedom of speech, freedom of the press, freedom to peaceably assemble; right to bear arms; protection against unreasonable searches and seizures; protection from warrants without reasonable cause; right to a trial by an impartial jury; protection against self-incrimination; protection from the deprivation of life, liberty, or property without due process; right to a speedy and public trial; right to an attorney; and protection against cruel and unusual punishments. U.S. CONST. amends. I–X.

¹²⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

¹²⁵ The key rights in this debate are the right of women to control their bodies, the right to privacy, and the right to life (of the fetus). See generally *Roe v. Wade*, 410 U.S. 113 (1973); DOROTHY E. MCBRIDE, *ABORTION IN THE UNITED STATES* (2008).

¹²⁶ The key rights in this debate are the right to life and the right to autonomy. See generally *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990); MIRKO BAGARIC & KUMAR AMARASEKARA, *EUTHANASIA, MORALITY AND THE LAW* (2002).

¹²⁷ In recent years, the main social issue in this area has focused on the rights of gay and lesbian people to marry each other. See, e.g., *Obergefell*, 135 S. Ct. 2584; JASON PIERCESON, *SAME-SEX MARRIAGE IN THE UNITED STATES* (4th ed. 2013).

¹²⁸ See generally MICHAEL J. KLARMAN, *UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY* (2007); PHILIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (1999). For a chronology of the development of human rights in the United States, see *Chronology of Human Rights in the U.S.*, HUMANRIGHTS.GOV, <https://www.humanrights.gov/references/chronology-of-human-rights-in-the-us.html> (last visited Jan. 4, 2016), and also *Human Rights in the United States: Beginning at Home*, NAT’L ECON. & SOC. RTS. INITIATIVE, <https://www.nesri.org/human-rights/human-rights-in-the-united-states> (last visited Jan. 4, 2016).

¹²⁹ NAT’L ECON. & SOC. RTS. INITIATIVE, *supra* note 128.

¹³⁰ HUMANRIGHTS.GOV, *supra* note 128.

human rights encapsulates a number of different issues within the political arena, the main forum for social change.

Some human rights discourse is over hotly contested and politicized issues. Often, the parties on each side of the debate claim that they are in defense of a particular human right. This is the case for abortion, euthanasia, and healthcare.

One of the most highly politicized issues within the United States is abortion. Abortion has been legal in the United States since 1973, but the debate over its morality wages on today. Both sides of the debate invoke human rights as the crux of their arguments for social change. Those who are “pro-life” (against abortion) invoke the “right to life” of the fetus. Those who are “pro-choice” (in favor of abortion) invoke the woman’s right to control her own body. The Supreme Court has recognized a right to “bear or beget” a child¹³¹ (within the right to privacy) and concluded that the decision of whether or not to get an abortion is within a woman’s right to privacy.¹³² This right to privacy outweighs the right to life of the fetus, because while international human rights law recognizes a right to life for all humans, it is generally accepted that this right begins at birth.¹³³ Therefore, internationally, abortion is seen as a human right. The United Nations Human Rights Committee has “held a country [Peru] accountable for failing to ensure access to safe, legal abortion.”¹³⁴

In the same vein as the “right to life” debate regarding abortion, a debate regarding whether euthanasia is a human right has recently begun in the United States. Opponents of euthanasia argue that people have a right to life, and allowing euthanasia would lead to a slippery slope toward involuntary euthanasia of vulnerable people.¹³⁵ Proponents of euthanasia argue that people have a right to die, implied from the right to life, the right to privacy, and the freedom of belief.¹³⁶ Thirty-seven states have passed laws prohibiting euthanasia and three states

¹³¹ Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

¹³² Roe v. Wade, 410 U.S. 113, 154 (1973) (“We, therefore, conclude that the right of personal privacy includes the abortion decision . . .”).

¹³³ CTR. FOR REPROD. RIGHTS, WHOSE RIGHT TO LIFE?: WOMEN’S RIGHTS AND PRENATAL PROTECTIONS UNDER HUMAN RIGHTS AND COMPARATIVE LAW (2014), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3%2014%2012.pdf.

¹³⁴ David A. Grimes, *United Nations Committee Affirms Abortion as a Human Right*, HUFFINGTON POST (Jan. 25, 2016, 11:47 AM), http://www.huffingtonpost.com/david-a-grimes/united-nations-committee-affirms-abortion-as-a-human-right_b_9020806.html?section=women&.

¹³⁵ *Anti-Euthanasia Arguments*, BBC, http://www.bbc.co.uk/ethics/euthanasia/against/against_1.shtml (last visited Jan. 22, 2016).

¹³⁶ *Pro-Euthanasia Arguments*, BBC, http://www.bbc.co.uk/ethics/euthanasia/infavour/infavour_1.shtml (last visited Jan. 22, 2016).

have outlawed it through the courts.¹³⁷ Currently, six states in the United States allow euthanasia: California, Colorado, Montana, Oregon, Vermont, and Washington.¹³⁸ However, even these states have restrictions and regulations that reflect certain moral beliefs. For example, physicians are never obligated to participate in writing a prescription.¹³⁹ The right not to be killed is a major facet: in Oregon, the terminally ill person must take the pill on her own, with no physical assistance from others.¹⁴⁰

Beyond the right to life, Americans also generally recognize the right to a *decent* life: the right to be free from discrimination and to be treated equally regardless of race, gender, or sexual orientation. Talk of these rights is similarly divisive, but human rights talk is a focus on only one side of the debate, not both.

Racial equality in the United States has been a priority for decades, and the civil rights movement was perhaps the birthplace of modern human rights. The United States signed the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)¹⁴¹ in 1966 and ratified it in 1994,¹⁴² but “has failed to fully implement the treaty.”¹⁴³ Through this human rights treaty, states promise to end discrimination:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law¹⁴⁴

In 2014, the United Nations issued twenty-five concerns with U.S. compliance with CERD, including but not limited to problems with racial profiling tactics, treatment of immigrants, access to legal aid,

¹³⁷ *State-by-State Guide to Physician-Assisted Suicide*, PROCON.ORG, <http://euthanasia.procon.org/view.resource.php?resourceID=000132> (last updated Feb. 21, 2017, 12:58 PM).

¹³⁸ *Id.* Note that Montana has no law explicitly allowing or regulating euthanasia, but the Montana Supreme Court ruled that it was legal. *Baxter v. Montana*, 2009 MT 449, 354 Mont. 234, 224 P.3d 1211.

¹³⁹ See *State-by-State Guide to Physician-Assisted Suicide*, *supra* note 137; see also *Baxter*, 2009 MT 449, ¶¶ 49–50.

¹⁴⁰ See HOW TO DIE IN OREGON (Clearcut Productions 2011).

¹⁴¹ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

¹⁴² *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&clang=_en (last visited Jan. 10, 2017).

¹⁴³ *Human Rights and Racial Justice*, ACLU, <https://www.aclu.org/issues/human-rights/human-rights-and-racial-justice> (last visited Jan. 10, 2017).

¹⁴⁴ CERD, *supra* note 141, art. 5.

access to health care, discrimination and segregation in housing, and the right to vote.¹⁴⁵

Beyond racial equality, another human rights issue is gender equality. The United Nations Office of the High Commissioner for Human Rights states that, “[g]ender equality is at the very heart of human rights.”¹⁴⁶ In 1920, the United States granted suffrage to women through the Nineteenth Amendment to the U.S. Constitution.¹⁴⁷ Internationally, “[d]iscrimination based on sex is prohibited under almost every human rights treaty,” and “equal rights of men and women” is a fundamental principle under the 1945 United Nations Charter.¹⁴⁸

Gay marriage is another context in which human rights discourse has been evoked. The International Covenant on Economic and Social Rights (ICESCR) establishes the right to a family and freely contracted marriages.¹⁴⁹ The United States has signed but not ratified this treaty. Since 1970, people have been advocating for gay marriage rights in the United States.¹⁵⁰ Over time, societal opinions moved more in favor of the idea and began to see marriage as a human right.¹⁵¹ In 2015, the Supreme Court established that the right to marriage is protected by the Constitution of the United States under the Fourteenth Amendment.¹⁵²

Thus, human rights discourse has an entrenched and wide-ranging role in social and political debate and change in the United States. However, one area where human rights dialogue is virtually absent is sentencing, and in particular the nature and impact of imprisonment. This is curious given that, as we now discuss, sentencing involves serious and direct infringements of important rights.

¹⁴⁵ U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, U.N. Doc. CERD /C/USA/CO/7-9 (Aug. 29, 2014).

¹⁴⁶ *Women’s Human Rights and Gender Equality*, U.N. HUM. RTS.: OFF. OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/WRGSIndex.aspx> (last visited Jan. 10, 2017).

¹⁴⁷ U.S. CONST. amend. XIX.

¹⁴⁸ *Women’s Human Rights and Gender Equality*, *supra* note 146.

¹⁴⁹ ICESCR, *supra* note 112, art. 10.

¹⁵⁰ *Gay Marriage Timeline: History of the Same-Sex Marriage Debate*, PROCON.ORG, <http://gaymarriage.procon.org/view.timeline.php?timelineID=000030> (last updated Oct. 6, 2014, 10:27 AM).

¹⁵¹ *Id.*

¹⁵² *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

IV. HUMAN RIGHTS INFRINGEMENTS STEMMING FROM
IMPRISONMENT

Imprisonment is the harshest sanction in the U.S. system of law (with the obvious exception of capital punishment).¹⁵³ The reason that imprisonment is regarded as a considerable deprivation is because inmates are deprived of their liberty, which is widely considered one of the most coveted and important human rights. And perhaps because of the obvious and deliberate nature of the human rights infraction that is occasioned by imprisonment, the sanction is generally not analyzed more deeply from a human rights perspective. This shutting out of human rights considerations from evaluating the nature and duration of imprisonment is, however, flawed.

This is for two reasons. The first is that it discourages a proper evaluation of the appropriate length of imprisonment in any given case. The fact that offenders who are imprisoned have been found guilty of a crime seems to negate a considered analysis regarding how much imprisonment is morally justified. This is a crucial query given that, logically, every day spent in jail exceeding the appropriate level of punishment is morally akin to punishing the innocent.¹⁵⁴ Second, the rights deprivations that are a necessary incident of imprisonment are considerable and, in fact, cumulatively are perhaps more burdensome than the deprivation of liberty. We now examine the issue of the rights that are curtailed by prison before returning to the link between excessive punishment and the prohibition against punishing the innocent.

A. *Discrete Human Rights Violations*

The rights deprivations that are an incidental but virtually unavoidable aspect of imprisonment are a greatly unexplored area of research and jurisprudence. Before discussing these further, it is pertinent to note that while liberty is the most obvious deprivation associated with imprisonment, nearly all rights (except the right to life) come in degrees, and liberty is no exception. It is always curtailed by a prison term but almost never fully limited. Prisoners have varying degrees of freedom depending on the precise conditions under which

¹⁵³ As noted earlier, capital cases raise different jurisprudential and normative issues and, hence, are not addressed in this Article. See *supra* note 21.

¹⁵⁴ See *infra* Section IV.D.

they are detained.¹⁵⁵ Their liberty is obviously most constrained while they are locked in their cells. But even then, they normally are free to make choices regarding the manner in which they elect to occupy themselves; for example, whether to watch television or read a book. Outside of their cell, the options are wider and include choices regarding whom they associate with and which, if any, physical activities they elect to participate in. The extent to which prisoners are deprived of their liberty also turns on the type of detention to which they are subjected. This ranges from minimum security to confinement in super-maximum conditions, which generally involve profound limitations on physical movement and association with other people.¹⁵⁶ Thus, prison always involves a curtailment of liberty, which, while never total, is always considerable. Accordingly, there is no question that it involves a serious human rights violation, which of course is the intended outcome.

In contrast, many of the incidental denials that stem from incarceration are not intended as part of a prison term. From a human rights perspective, these additional deprivations are considerable,¹⁵⁷ verging on shocking. To understand this, it is illuminating to consider

¹⁵⁵ For an overview of the conditions in U.S. prisons, see generally MARY BOSWORTH, *EXPLAINING U.S. IMPRISONMENT* (2010).

¹⁵⁶ The harshest prison conditions are those found in super-maximum prisons. They have been defined as

a free-standing facility, or a distinct unit within a facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated. . . . [T]heir behavior can be controlled only by separation, restricted movement, and limited direct access to staff and other inmates.

Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 *PUNISHMENT & SOC'Y* 163, 170 (1999); see also U.S. DEP'T OF JUSTICE NAT'L INST. OF CORR., *SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS* 3 (1999). There is no question that harsh prison conditions are constitutionally valid:

Keyplock confinement, in and of itself, does not give rise to a liberty interest. In New York State prisons, "keeplock" is a form of administrative or disciplinary segregation, in which the inmate is confined to his own cell, deprived of participation in normal prison routine, and denied contact with other inmates. While package, telephone, and commissary privileges may be suspended, and the inmate is confined to his cell for 23 hours each day, in other respects, the privileges of an inmate in disciplinary keeplock are not those of prisoners confined in keeplock for administrative detention or protective custody.

Giano v. Goord, 9 F. Supp. 2d 235, 240–41 (W.D.N.Y. 1998) (citations omitted), *aff'd in part and vacated in part*, 250 F.3d 146 (2d Cir. 2001), *vacated on other grounds*, 380 F.3d 670 (2d Cir. 2004), *abrogated on other grounds by* *Ross v. Blake*, 136 S. Ct. 1850 (2016).

¹⁵⁷ For an overview of some of the pains of imprisonment, see GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1st Princeton Classic ed. 2007).

them not in the prison setting, but as hardships directly imposed as discrete forms of punishment.

First of all, let us consider a law, which prohibited (as punishment for a crime) individuals from procreating and/or otherwise forming and participating in a family structure. There would of course be difficulties in enforcing the law. However, they would not be insurmountable, as we have seen with the former One Child Policy in China.¹⁵⁸ If the U.S. government introduced a new sanction which suspended for a finite time or forever negated the right of criminal offenders to procreate and to foster family relationships, it would likely be regarded as cruel and unusual punishment and hence unconstitutional.¹⁵⁹

In relation to procreation alone (without focusing on the right of family engagement), the Supreme Court has recognized that this is a fundamental right, which “cannot be seriously questioned.”¹⁶⁰ Admittedly, the scope and content of the right is unclear:

There is a common thread in the ways U.S. constitutional law, international law sources, and Lockean natural law treat the procreative right. Despite suggestions in all of those sources of a broad right, when analyzed more closely these authorities merely provide for a right to continue the species, a right to perpetuate the race and have offspring, and the right to simply found a family, respectively. They recognize a special right, necessary for the continuation of society, and qualified by societal interests and the interests of prospective children.¹⁶¹

¹⁵⁸ See Calum MacLeod, *Pressure Mounts to Stop China's Forced Abortions*, USA TODAY (July 24, 2012, 6:20 PM), <http://usatoday30.usatoday.com/news/story/2012-07-25/China-forced-abortions/56465974/1>. For a different approach, see *Enforcing with a Smile: Enforcers of China's One-Child Policy Are Trying a New, Gentler Approach*, ECONOMIST (Jan. 8, 2015), <http://www.economist.com/news/china/21638131-enforcers-chinas-one-child-policy-are-trying-new-gentler-approach-enforcing-smile>. Pursuant to this approach, commencing January 1, 2016, couples can apply to have two children. See Stephen Evans, *China's One-Child Policy Ends*, BBC NEWS (Jan. 1, 2016, 1:22 GMT), <http://www.bbc.com/news/world-asia-china-35208488>.

¹⁵⁹ Certainly, it would be regarded as unethical. As noted by Carter J. Dillard, the U.S. Congress unequivocally condemned the One Child Policy and prescribed that people who had been subjected to the policy should be offered asylum and in this context have treated “procreation [a]s a meta-right, not in conflict with other fundamental rights and moreover unlimited.” Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 26 (2007).

¹⁶⁰ Johnson C. Montgomery, *The Population Explosion and United States Law*, 22 HASTINGS L.J. 629, 629 (1971); see also *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980).

¹⁶¹ Dillard, *supra* note 159, at 10–11.

The leading authority on the existence of a legally protected procreation right is *Skinner v. Oklahoma ex rel. Williamson*,¹⁶² where the Supreme Court held that a law which permitted that sterilization of offenders convicted of three or more felonies involving “moral turpitude” was unconstitutional because it violated the equal protection clause. In doing so, the Court stated: “This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.”¹⁶³ The Court added:

Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.¹⁶⁴

Further, in *Cleveland Board of Education v. LaFleur*, the Supreme Court struck down regulations compelling teachers to take unpaid leave five months before the expected date of childbirth on the grounds that they breach the Due Process provisions of the Fifth Amendment and the Fourteenth Amendment.¹⁶⁵ Justice Stewart stated:

This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. As we noted in *Eisenstadt v. Baird*, there is a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms.¹⁶⁶

¹⁶² 316 U.S. 535 (1942); Elaine E. Sutherland, *Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?*, 82 OR. L. REV. 1033, 1037–39 (2003).

¹⁶³ *Skinner*, 316 U.S. at 536.

¹⁶⁴ *Id.* at 541; *see also* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–2604 (2015).

¹⁶⁵ 414 U.S. 632 (1974).

¹⁶⁶ *Id.* at 639–40 (citation omitted); *see also* *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a Connecticut statute forbidding the use of contraceptives on the grounds that it violated the right to marital privacy, which is one of the guarantees contained in the Bill of Rights).

The right to procreate, like all rights, is not absolute.¹⁶⁷ This is manifested by the fact that it has been held lawful to forcibly sterilize certain mentally ill and disabled people.¹⁶⁸ Subsequent to *Skinner*, a number of cases have considered the procreation rights of prisoners and offenders. While the fundamental nature of the right has been endorsed in all these cases, the courts have held that legitimate restrictions may be placed on this right due to nature of incarceration and the objectives of probation.

In *Gerber v. Hickman (Gerber II)*, the Ninth Circuit held that procreation rights can be limited in prison and, in particular, that conjugal visits and childbirth could be defeated as a result of incarceration.¹⁶⁹ Similarly, in *Goodwin v. Turner*, the Eighth Circuit held that the right to procreate did not permit an inmate to send a sample of his sperm to his wife.¹⁷⁰ It was felt that this restriction reasonably stemmed from the objectives of imprisonment.¹⁷¹

In *State v. Oakley*, a requirement of probation was that an offender who victimized his nine children could not have more children until he could demonstrate that he could support them.¹⁷² The Supreme Court of Wisconsin held that this requirement was lawful because the restriction was necessary to prevent the offender from making victims of more children and was reasonably related to the goal of rehabilitation.¹⁷³ Thus, the court stated that it was constitutionally valid to essentially prevent “deadbeat parents” from having children as a condition of probation.¹⁷⁴ Justice Wilcox stated:

We emphatically reject the novel idea that Oakley, who was convicted of intentionally failing to pay child support, has an absolute right to refuse to support his current nine children and any future children that he procreates, thereby adding more child victims to the list.

¹⁶⁷ This is in line with the recent comments in *Obergefell v. Hodges* about rights in general. 135 S. Ct. at 2597–98. The majority stated that: “The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, ‘has not been reduced to any formula.’ Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.” *Id.* at 2598 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

¹⁶⁸ *Buck v. Bell*, 274 U.S. 200 (1927); see also Dillard, *supra* note 159, at 21.

¹⁶⁹ *Gerber v. Hickman (Gerber II)*, 291 F.3d 617, 620–23 (9th Cir. 2002) (“We hold that the right to procreate while in prison is fundamentally inconsistent with incarceration.”).

¹⁷⁰ 908 F.2d 1395 (8th Cir. 1990).

¹⁷¹ See Adam M. Breault, Note, “*Onan's Transgression*”: *The Continuing Legal Battle over Prisoners' Procreation Rights*, 66 ALB. L. REV. 289, 302–04 (2002).

¹⁷² 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200.

¹⁷³ *Id.* ¶ 1

¹⁷⁴ *Id.*

....

Furthermore, Oakley fails to note that incarceration, by its very nature, deprives a convicted individual of the fundamental right to be free from physical restraint, which in turn encompasses and restricts other fundamental rights, such as the right to procreate. Therefore, given that a convicted felon does not stand in the same position as someone who has not been convicted of a crime, we have previously stated that “conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person’s rehabilitation.”¹⁷⁵

The trend of cases supports the view that claims asserting constitutional rights to conjugal visits are generally disfavored.¹⁷⁶ The “unanimity of federal court rulings. . . reflect[s] the opinion that the penological interests asserted by the states are more compelling than the constitutional right to procreative liberty claimed by prisoners.”¹⁷⁷

Thus, courts in some circumstances have curtailed the right to procreation, but this does not detract from the existence of the right or its importance. This is a point recognized by Judge Bradley’s forceful dissent for the Wisconsin Supreme Court in *Oakley*, who stated:

I begin by emphasizing the right that is at issue: the right to have children. The majority acknowledges this right, but certainly does not convey its significance and preeminence. The right to have children is a basic human right and an aspect of the fundamental liberty which the Constitution jealously guards for all Americans.

....

The United States Supreme Court has described the right to have children as a “basic liberty” that is “fundamental to the very existence and survival of the [human] race.” The right is embodied in the sphere of personal privacy protected from unjustified governmental intrusion by the Due Process Clause of the Fourteenth Amendment.¹⁷⁸

¹⁷⁵ *Id.* ¶¶ 16–19 (footnotes omitted) (citations omitted) (quoting *Edwards v. State*, 246 N.W.2d 109, 111 (Wis. 1976)).

¹⁷⁶ See, e.g., *Block v. Rutherford*, 468 U.S. 576 (1984); *Gerber II*, 291 F.3d 617 (9th Cir. 2002); *Doe v. Coughlin*, 518 N.E.2d 536 (N.Y. 1987); see also *Research Finds that Conjugal Visits Correlate with Fewer Sexual Assaults*, PRISON LEGAL NEWS, May 2014, at 28, <https://www.prisonlegalnews.org/media/issues/05pln14.corrected.pdf> (“On February 1, 2014, Mississippi joined the 45 states that prohibit conjugal visits, halting the century-old practice due to what officials called budget issues and concerns about babies being born as a possible result of the visits.”).

¹⁷⁷ Breault, *supra* note 171, at 295–96, 309.

¹⁷⁸ *Oakley*, 2001 WI 103, ¶ 40–44 (Bradley, J., dissenting) (second alteration in original) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

As noted by Judge Bradley, the right to procreate is recognized by the Supreme Court as a fundamental right.¹⁷⁹ It is an interest that is cardinal to individual flourishing. Denial of this right is a significant deprivation. The fact that the right to procreate can, in limited circumstances, be curtailed does not undermine the importance of the interest or imply that loss of the right is not a considerable hardship.

Similar considerations apply to the right to foster family relationships and have intimate contact, although arguably neither of these rights has as firm a legal foundation as the right to procreation. The right to a family is not expressly subject to legal protection, but there are a number of references to it in Supreme Court dicta. In *Griswold*, the Court stated:

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so.¹⁸⁰

The most recent consideration by the Supreme Court of the importance of family relations is in *Obergefell v. Hodges*, where the Court held that state laws proscribing same-sex marriage were unlawful.¹⁸¹ While the case focused on the right to marry, the Court noted that this right stems in part from the importance of the family unit. The majority stated: “In *Maynard v. Hill*, the Court echoed *de Tocqueville*, explaining that marriage is ‘the foundation of the family and of society, without which there would be neither civilization nor progress.’”¹⁸²

The capacity of prisoners to maintain, foster, and promote family relationships is effectively dictated by the visitation rights of prisoners, their capacity to make telephone calls, and, to a lesser extent, their ability to send and receive mail. It has been held that the needs to maintain order and security in the prison are legitimate correctional

¹⁷⁹ See *Skinner*, 316 U.S. at 541.

¹⁸⁰ *Griswold v. Connecticut*, 381 U.S. 479, 495–96 (1965).

¹⁸¹ 135 S. Ct. 2584 (2015). These laws breached the Equal Protection Clause of the Fourteenth Amendment. *Id.*

¹⁸² *Obergefell*, 135 S. Ct. at 2601 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

objectives, and such needs can influence visitation and similar rights.¹⁸³ A recent report by Bernadette Rabuy and Daniel Kopf notes that visits by family members to prisoners are the exception, not the norm: less than thirty-one percent of prisoners receive a visit from a loved one each month, and only seventy percent make contact by telephone with a loved one on a weekly basis.¹⁸⁴ Part of the reason for these low visitor rates is likely distance: the average state prisoner is incarcerated 100 miles from home, and the average federal prisoner is incarcerated 500 miles from home.¹⁸⁵ Rabuy's and Kopf's report notes: "With all of these unnecessary barriers, state visitation policies and practices actively discourage family members from making the trip. The most humane and sensible government policies would instead be based on respect and encouragement for the families of incarcerated people."¹⁸⁶

Thus, there are no standardized protocols governing visitation rights. Further, it has been held in at least one state that Correctional Services can, in some circumstances, deny prisoners' requests to participate in family reunion programs.¹⁸⁷ A New York state court held: "Participation in [a] family reunion program is not a right, but a

¹⁸³ *Overton v. Bazzetta*, 539 U.S. 126 (2003); *Pell v. Procunier*, 417 U.S. 817 (1974). For a discussion of the legitimate restrictions that can be placed on the incoming and outgoing prisoners' mail, see COLUMBIA HUMAN RIGHTS LAW REVIEW, A JAILHOUSE LAWYER'S MANUAL, 506-17 (9th ed. 2011). For a discussion of visitation rights by family and other people, see *id.* at 526-30. The capacity to make telephone calls can be, and often is, severely limited. *Id.* at 530-31.

¹⁸⁴ Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POL'Y INITIATIVE (Oct. 20, 2015), <http://www.prisonpolicy.org/reports/prisonvisits.html>.

¹⁸⁵ Nancy G. La Vigne, *The Cost of Keeping Prisoners Hundreds of Miles from Home*, URB. INST. (Feb. 3, 2014), <http://www.urban.org/urban-wire/cost-keeping-prisoners-hundreds-miles-home>.

¹⁸⁶ Rabuy & Kopf, *supra* note 184.

Despite the breadth of research showing that visits and maintaining family ties are among the best ways to reduce recidivism, the reality of having a loved one behind bars is that visits are unnecessarily grueling and frustrating. As a comprehensive 50-state study on prison visitation policies found, the only constant in prison rules between states is their differences. North Carolina allows just one visit per week for no more than two hours while New York allows those in maximum security 365 days of visiting. Arkansas and Kentucky require prospective visitors to provide their social security numbers, and Arizona charges visitors a one-time \$25 background check fee in order to visit. And some rules are inherently subjective such as Washington State's ban on "excessive emotion," leaving families' visiting experience to the whims of individual officers.

Id.

¹⁸⁷ *Philips v. Comm'r of Corr. Servs.*, 885 N.Y.S.2d 138, 138 (App. Div. 2009).

privilege, and the decision about whether an inmate may participate is 'heavily discretionary' and will be upheld if it has a rational basis."¹⁸⁸

Privacy is another right considerably limited by imprisonment. Privacy is a controversial right. The definition and justification of the right is unclear. Robert Post has lamented that "privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all."¹⁸⁹ Perhaps the most enlightening definition of privacy is simply "the right to be let alone."¹⁹⁰ The rationale for privacy is generally thought to stem from the broader virtues of autonomy and dignity.¹⁹¹

Despite doctrinal uncertainty regarding the nature and source of the right to privacy, the Supreme Court has acknowledged it as a legally protected interest. The right to privacy (so far as personal autonomy is concerned) has been mainly acknowledged in contexts relating to procreation and family relationships.¹⁹² In *Roe v. Wade*, for example, Justice Blackmun stated in his majority opinion:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment; in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.¹⁹³

The right to privacy, however, is virtually negated in the prison setting—even when prisoners are in their cells. In *Hudson v. Palmer*, the Court noted that it would not be possible to achieve many of the security objectives of prisons, which involve prohibiting the introduction of drugs and weapons into prisons, if prisoners retained

¹⁸⁸ *Id.* (quoting *Doe v. Coughlin*, 518 N.E.2d 536, 541 (N.Y. 1987)); see also *Giano v. Goord*, 9 F. Supp. 2d 235 (W.D.N.Y. 1998), *aff'd in part and vacated in part*, 250 F.3d 146 (2d Cir. 2001), *vacated on other grounds*, 380 F.3d 670 (2d Cir. 2004), *abrogated on other grounds by* *Ross v. Blake*, 136 S. Ct. 1850 (2016).

¹⁸⁹ Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001).

¹⁹⁰ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

¹⁹¹ VICTORIAN LAW REFORM COMM'N, WORKPLACE PRIVACY: ISSUES PAPER 17 (2002), <http://www.lawreform.vic.gov.au/sites/default/files/IssuesPaperfinal.pdf>.

¹⁹² See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁹³ *Roe*, 410 U.S. at 152 (citations omitted).

the right to privacy.¹⁹⁴ Thus, prisoners are subjected to deprivations of a number of important rights relating to procreation, family, and privacy.¹⁹⁵

Adding to the suffering that stems from the above rights violations is a considerable diminution in personal safety that stems from being imprisoned. This is not a direct and inevitable consequence of prison, unlike the above hardships, but it is nevertheless a real one.¹⁹⁶ Although prison officials cannot permit prisoners to be deliberately harmed, the reality is that prisoners are subjected to a far higher level of physical and sexual abuse than non-prisoners.¹⁹⁷ Officials are aware of this reality. A county judge in New Mexico, while sentencing a first-time offender for a robbery conviction in October 2015, warned him of this likelihood:

Do you know what would happen . . . to a young and dumb person in prison? Do you have any idea what would happen to you? . . . You would probably be raped every day, number one. You probably would be beat up every other day. . . . You're a young guy, and the trauma that that would cause you, you'll never get that out of your head.¹⁹⁸

¹⁹⁴ *Hudson v. Palmer*, 468 U.S. 517 (1984); *see also* *Giano v. Goord*, 9 F. Supp. 2d 235 (W.D.N.Y. 1998), *aff'd in part and vacated in part*, 250 F.3d 146 (2d Cir. 2001), *vacated on other grounds*, 380 F.3d 670 (2d Cir. 2004), *abrogated on other grounds by* *Ross v. Blake*, 136 S. Ct. 1850 (2016); *Williams v. Kyler*, 680 F. Supp. 172 (M.D. Pa. 1986).

¹⁹⁵ *See The Human Toll of Jail*, VERA INST. OF JUST. (2016), <http://humantollofjail.vera.org> (featuring firsthand accounts of those directly affected by the criminal justice system).

¹⁹⁶ *See Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994); *Vaughan v. Ricketts*, 859 F.2d 736, 741 (9th Cir. 1988), *abrogated on other grounds by* *Graham v. Connor*, 490 U.S. 386 (1989).

¹⁹⁷ *World Report 2014: United States*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2014/country-chapters/united-states> (last visited Apr. 12, 2017).

September 2013 marked the 10-year anniversary of the passage of the Prison Rape Elimination Act (PREA), which resulted in the development of national standards to detect, prevent, and punish prison rape. Implementation remains a challenge: approximately 4 percent of state and federal prison inmates and 3 percent of jail inmates report having experienced one or more incidents of sexual abuse in 2011–2012, and many incidents continue to go unreported. Transgender prisoners continue to experience high levels of violence in detention.

Many prisoners and jail inmates—including youth under age 18—are held in solitary confinement, often for weeks or months on end. In July, an estimated 30,000 inmates in California's prison system engaged in a hunger strike to protest conditions, including the use of solitary confinement. Prolonged solitary confinement is considered ill-treatment under international law and can amount to torture.

Id.

¹⁹⁸ Partial Transcript of Proceedings at 3, *New Mexico v. Gay*, No. D-202-CR-2014-01317 (D.N.M. Oct. 27, 2015), <http://www.kob.com/kobtvimages/repository/cs/files/gay-argyres-sentencing.pdf>; *see also* Rishi Iyengar, 'You Would Probably Be Raped Every Day' in Prison, Judge Warns 20-Year-Old Convict, *TIME* (Oct. 30, 2015), <http://time.com/4093974/new-mexico-judge-prison-rape-christina-argyres>.

Studies show that violence is a major hazard in jail, with a recent survey showing that about one third of state prisoners reported injuries, with causes ranging from accidents to intentional acts of violence.¹⁹⁹ Nearly one out of every twenty state and federal prisoners report being raped or sexually abused behind bars.²⁰⁰

There are still subtler, but nevertheless important, burdens associated with imprisonment. Imprisonment reduces life expectancy, earnings, and family harmony. A study examining the 15.5-year survival rate of 23,510 ex-prisoners in the U.S. state of Georgia found much higher mortality rates for ex-prisoners than for the rest of the population.²⁰¹ There were 2650 deaths in total, which was a forty-three percent higher mortality rate than normally expected (799 more ex-prisoners died than expected). The main causes for the increased mortality rates were homicide, transportation accidents, accidental poisoning (which included drug overdoses), and suicide.²⁰² The period immediately following release is especially precarious for offenders, with studies showing that in the two weeks following release, ex-prisoners are more than twelve times more likely to die than people in the general population.²⁰³

The suffering experienced by prisoners also extends to diminishing their career and earnings prospects. Most studies find that ex-prisoners find it more difficult to secure employment, and that they also have a considerably lower rate of lifetime earnings.²⁰⁴

[P]rison destroys [prisoners'] earning potential. Prisoners lose their jobs on the outside. Felony convictions also disqualify ex-cons from certain jobs, housing, student loans, and voting. Michigan economics professor Michael Mueller-Smith finds that spending a year or more

¹⁹⁹ Hung-En Sung, *Prevalence and Risk Factors of Violence-Related and Accident-Related Injuries Among State Prisoners*, 16 J. CORRECTIONAL HEALTH CARE 178, 178 (2010); see also SYKES, *supra* note 157.

²⁰⁰ *US: Federal Statistics Show Widespread Prison Rape*, HUM. RTS. WATCH (Dec. 15, 2007, 7:00 PM), <https://www.hrw.org/news/2007/12/15/us-federal-statistics-show-widespread-prison-rape>.

²⁰¹ Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479, 479 (2011); see also NAT'L RESEARCH COUNCIL, *supra* note 8, at 220–26.

²⁰² Spaulding et al., *supra* note 201, at 479. The higher mortality rates for ex-prisoners were consistent with findings in other reports, which are cited in the article. See *id.*

²⁰³ NAT'L RESEARCH COUNCIL, *supra* note 8, at 226.

²⁰⁴ *Id.* at 247. One study estimated the earnings reduction to be as high as forty percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 8, 13.

in prison reduces the odds of post-prison employment by 24 percent and increases the odds of living on food stamps by 5 percent.²⁰⁵

Former prisoners without strong social networks were especially economically vulnerable and often had difficulty meeting basic needs, such as the needs for food, shelter, and health care.²⁰⁶

Imprisonment also generally has disruptive and negative effects on the families of prisoners. Married men who have served time in jail are three times more likely to divorce than those who had been convicted of an offense but not incarcerated,²⁰⁷ and the families of prisoners have higher rates of homelessness than the general population.²⁰⁸ Moreover, studies report that “fathers’ incarceration is stressful for children, increasing both depression and anxiety as well as antisocial behavior.”²⁰⁹ Further, it has been noted that:

The cornerstone of a conservative criminal-justice agenda should be strengthening families. More than half of America’s inmates have minor children, more than 1.7 million in all; most of these inmates were living with minor children right before their arrest or incarceration. Inmates should meet with their families often. They should be incarcerated as close to home as possible, not deliberately sent to the other end of the state. Visitation rules and hours need to be eased, and extortionate collect-call telephone rates should come down to actual cost.²¹⁰

Thus, we see that the human rights incursions stemming from imprisonment include:

- the inability to procreate;
- a restriction on the right to family;
- a limitation of the right to engage in intimate relationships;
- a denial of the right to privacy;
- a curtailment of the right to sexual and physical integrity;
- a reduction in life expectancy; and
- an erosion of the right to work and earn a living.

In isolation, some of these restrictions and deprivations are regarded as being so harsh as to border on oppressive, so it follows that collectively

²⁰⁵ Stephanos Bibas, *The Truth About Mass Incarceration*, NAT’L REV. (Sept. 16, 2015, 4:00 AM), <http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform>.

²⁰⁶ MICHAEL ROGUSKI & FLEUR CHAUVEL, NAT’L HEALTH COMM., *THE EFFECTS OF IMPRISONMENT ON INMATES’ AND THEIR FAMILIES’ HEALTH AND WELLBEING* 60–61 (2009), http://www.antoniocasella.eu/salute/Roguski_2009.pdf.

²⁰⁷ NAT’L RESEARCH COUNCIL, *supra* note 8, at 265.

²⁰⁸ *Id.* at 267.

²⁰⁹ *Id.* at 270.

²¹⁰ Bibas, *supra* note 205.

they verge on inhumane. Cumulatively, they are perhaps even more oppressive than the mere denial of liberty that directly follows from imprisonment. If the above deprivations were imposed outside of the prison setting, they likely would run afoul of the constitutional prohibition against cruel and unusual punishment.²¹¹

It is not possible to directly test the hypothesis of whether the cumulative incidental effects of imprisonment are more burdensome than the loss of liberty, which directly flows from jail. One mechanism that can be used to indirectly test the hypothesis is to engage in a brief thought experiment. Let us imagine we have a choice between two punishments. We will call the first punishment the human rights sanction. This sanction involves living in a normal community setting with all of the typical amenities and liberties, but has restrictions attached that are normally an incidental consequence of prison. Thus, individuals cannot procreate, cannot have intimate relationships, cannot see family members more than once per month, and every moment of one's day is captured by CCTV (hence replicating as close as possible the absence of privacy that occurs in prison). Further, these individuals cannot work, are subjected to an increased risk of sexual abuse and assault, and have a lower life expectancy and income level than the general population.

The second sanction is what we will call the modified prison sanction. This sanction involves being confined in a correctional institution. The individual cannot leave the physical parameters of the facility. However, this is a profoundly well-resourced facility, where there are more guards than prisoners and space inside the facility is not strained. Prisoners can see family as often as family members wish to visit, and conjugal visits are permitted. Further, prisoners can work to the extent that this can be done in a prison setting (for example by being employed in an industry which is conducive to working from home), and they have no greater risk of being subjected to violent and sexual

²¹¹ The U.S. Supreme Court has considered the application of this prohibition in relation to sentencing in several circumstances. These are collated in DE LA VEGA ET AL., *supra* note 17, at 33, which notes that in *Brown v. Plata*, 563 U.S. 493 (2011), the Supreme Court stated that overcrowded prison conditions in California, which resulted in inadequate medical services, constituted cruel and unusual punishment. The Supreme Court has also held that apart from capital cases, disproportionate sentences (unless grossly disproportionate) are unlikely to constitute cruel and unusual punishment. *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003). But see *Graham v. Florida*, 560 U.S. 48 (2010) and *Solem v. Helm*, 463 U.S. 277 (1983), where it was held that life without parole for crimes other than homicide is unconstitutional in relation to juvenile offenders. Also, there is no violation of the Eighth Amendment for consecutive sentences. DE LA VEGA ET AL., *supra*, at 38; Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

crime than the mainstream community. In short, their only deprivation is the loss of liberty that stems from being confined to a designated geographical location.

Let us assume that both deprivations were to last for ten years. It is certainly not clear that most informed people would elect to be subjected to the human rights punishment over the modified prison sanction. This hypothetical demonstrates that it is necessary to fundamentally recalibrate the onerousness of prison. Imprisonment should no longer be regarded as solely, or even mainly, a deprivation of liberty. So far as suffering is concerned, it is more than that—in fact, much more. On many levels, prison is a human rights vacuum. This fact needs to be fully recognized and human rights must be incorporated into the sentencing calculus. A considerable premium should be accorded to the incidental but very notable deprivations that stem from the sanction of imprisonment in U.S. prisons and jails.

In the next two Sections of this Article, we rebut foreseeable objections to this analysis.

B. *It Is Irrelevant that Human Rights Violations Are Incidental as Opposed to Intentional*

While the incidental human rights deprivations set out above on any measure constitute a serious infringement on fundamental human rights, none of the deprivations (apart from the loss of liberty) are intentionally imposed. Instead, they are simply an unintended (albeit foreseeable) inevitability stemming from imprisonment. This is a likely counter to the argument that human rights deprivations should be factored into sentencing determinations. This form of argument has a long history and is known as the “doctrine of double effect.”

The doctrine of double effect provides that it is permissible to perform an act having two effects, one good (in this case the deprivation of liberty) and one bad (such as incidental human rights violations) where the good consequence is intended and the bad merely foreseen, there is proportionality between the good and bad consequences, and those consequences occur fairly simultaneously.²¹²

The doctrine is frequently appealed to as a purported justification for acts or practices which produce foreseen undesirable consequences. Under the doctrine of double effect, it is permissible to bomb an enemy’s ammunition factory in wartime even though it will result in the

²¹² THOMAS NAGEL, THE VIEW FROM NOWHERE 179 (1986).

certain death of civilians.²¹³ It justifies killing an unborn baby where necessary to save the mother.²¹⁴ It explains why self-defense is legitimate.²¹⁵ In the case of euthanasia, it is employed as a justification for alleviating pain by increasing doses of painkillers even when it is known that this will result in death—because the intention is to reduce pain, not to kill.²¹⁶

However, the moral significance of this doctrine is much in dispute. Jonathan Glover gives the example of a terrorist who, for the purpose of making a legitimate political protest, throws a bomb into a crowd and kills several people.²¹⁷ Glover notes the difficulty in ascertaining whether the deaths are intentional or merely foreseen. This alludes to the central flaw in the doctrine of double effect: it is not possible to provide a general account of the distinction between what is intended and what is merely foreseen, which applies in all circumstances.²¹⁸ It is illusory to claim that intentions are divisible along the lines of the good and bad consequences of an act.

The preferable view is that there is no inherent distinction between consequences that are intended and those that are foreseen. We are responsible for all the consequences we foresee but nevertheless elect to bring about. Whether or not we also “intend” them is irrelevant. Underlying the doctrine—and the only coherent basis for the distinction adverted to by the doctrine of double effect—is nothing more than the consequentialist view that it is permissible to do that which is “merely foreseen” if the adverse consequences of the act are outweighed by the good consequences that are “intended.”²¹⁹ From the perspective of an inmate whose human rights are significantly curtailed, it certainly does not matter whether her suffering is intentional or merely foreseen: it hurts just the same.

²¹³ See, e.g., Paul E. Mullen, *Euthanasia: An Impoverished Construction of Life and Death*, 3 J.L. & MED. 121 (1995).

²¹⁴ See, e.g., *id.*

²¹⁵ Note that there are also other justifications for the excuse of self-defense.

²¹⁶ See, e.g., Mullen, *supra* note 213.

²¹⁷ JONATHAN GLOVER, CAUSING DEATH AND SAVING LIVES 88 (1977). It could be argued that the doctrine does not apply in this situation because of a lack of proportionality between the good and bad effects of the act. However, this could be answered by altering the example so that only one person was killed in the explosion, and the protest was against a brutal regime which had a history of bowing to such acts of aggression.

²¹⁸ See also David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment*, 16 LAW & PHIL. 507, 512 (1997).

²¹⁹ JAMES RACHELS, THE END OF LIFE: EUTHANASIA AND MORALITY 94–96 (1986) (arguing that a person's intention is not relevant to determining whether an act is right or wrong, but instead is relevant to assessing the character of the person who does it; however, the difficulty with this is to coherently distinguish between the evaluation of the act and the agent: we normally judge people by their actions).

The doctrine of double effect is devoid of an overarching justification and cannot be used to ignore the full impact of imprisonment. In assessing the impact that imprisonment has on offenders, it is necessary to take into account the full negative consequences that the sanction has on the well-being of offenders. This is the approach taken in assessing the utility and effect of other events, forms of behavior, and stimuli on individuals. For example, in evaluating the desirability of surgery, doctors and patients consider not only the intended outcomes of the procedure, but also unintended and unwanted but likely side-effects. Similarly, governments providing health messages to the community on matters such as the consumption of alcohol or fast food factor in the intended benefits of such consumption and also the unwanted possible health complications that arise. It would be absurd if in assessing the impact of events or activities on people, the only applicable consideration was the intended outcome of that event. Accordingly, lawmakers and courts need to pay regard to the cumulative likely impact of the deprivations to which prisoners are subjected, irrespective of whether or not the harms are deliberately inflicted.

C. *It Is Not Realistic to Argue that Prison Could Be Made Less Harsh*

The core nature of imprisonment could be altered in order to make it a less harsh sanction. In theory, family members could be permitted to visit as they pleased, privacy could be enhanced, and prison security could be tightened to make the environment safer for prisoners. Changes of this nature would largely negate the need to place more weight on the suffering caused by prison. In fact, in some parts of the world, something approaching this prison utopia exists. In Norway, Finland, and Sweden, cell sizes are much larger than in the United States and prisoners have the same access to health, social, and educational services as the general population.²²⁰ Moreover, conjugal relations are encouraged and most prisons provide accommodations where the partners and children of inmates can stay without charge for weekends.²²¹ Most prisons even provide solarium facilities to ensure prisoners do not become Vitamin D deficient.²²²

²²⁰ JOHN PRATT & ANNA ERIKSSON, CONTRASTS IN PUNISHMENT: AN EXPLANATION OF ANGLOPHONE EXCESS AND NORDIC EXCEPTIONALISM 125 (2013).

²²¹ John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess: Part I: The Nature and Roots of Scandinavian Exceptionalism*, 48 BRIT. J. CRIMINOLOGY 119, 122 (2007).

²²² *Id.*

The exemplar of the non-punitive, integrative approach to imprisonment is Halden Prison in Norway, which houses maximum-security prisoners. Each cell has unbarred windows, designer furniture, and an en-suite bathroom. Guards are not armed and prison conditions are assessed by inmates with the use of questionnaires regarding their experience in prison, and what can be done to improve it.²²³ The Governor of Bastoy Prison, also in Norway, states:

In the law, being sent to prison is nothing to do with putting you in a terrible prison to make you suffer. The punishment is that you lose your freedom. If we treat people like animals when they are in prison they are likely to behave like animals. Here we pay attention to you as human beings.²²⁴

As noted by John Pratt, the same approach applies in Finland. The Finnish Sentences Enforcement Act 2002 states: “[P]unishment is a mere loss of liberty. The enforcement of the sentence must be organized so that the sentence is only loss of liberty. Other restrictions can be used to the extent that the security of custody and the prison order require.”²²⁵

The aim of the Norwegian sentencing and prison system is to reduce the rate of re-offending and it is thought this is best achieved by making the prison experience as close as possible to living in the general community.²²⁶ It is achieving outstanding success, with recidivism as low as twenty percent.²²⁷

In theory, the United States could adopt similar incarceration practices in order to ameliorate human rights concerns regarding the treatment of prisoners. However, such a change would take decades to evolve and implement, and, in reality, is unlikely in the foreseeable future. The trend in the United States is, in fact, in the other direction—more and more prisons are imposing increasingly strict regimes to cater to the public appetite for retribution.²²⁸ Further, more humane prison

²²³ Sunanda Creagh, *Nordic Prisons Less Crowded, Less Punitive, Better Staffed*, CONVERSATION (Mar. 18, 2013, 6:49 PM), <http://theconversation.com/nordic-prisons-less-crowded-less-punitive-better-staffed-12885>.

²²⁴ Erwin James, *The Norwegian Prison Where Inmates Are Treated like People*, GUARDIAN (Feb. 25, 2013, 3:00 PM), <https://www.theguardian.com/society/2013/feb/25/norwegian-prison-inmates-treated-like-people>.

²²⁵ Pratt, *supra* note 221, at 120.

²²⁶ *Id.*

²²⁷ Jessica Benko, *The Radical Humaneness of Norway's Halden Prison*, N.Y. TIMES MAG. (Mar. 26, 2015), http://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html?_r=0; Council of Europe Annual Penal Statistics: Norway, COUNCIL OF EUR., <http://wp.unil.ch/space/publications/recidivism-studies> (last visited Apr. 12, 2017).

²²⁸ King, *supra* note 156, at 170.

conditions are not likely given the additional monetary injection that would be required to make prisons more accommodating and comfortable for prisoners.²²⁹

Further, in assessing any reform it is necessary to do so on the basis of the existing parameters, not by reference to some hypothetical idealized setting. Against this reference point, as we have seen, the cumulative rights deprivations stemming from imprisonment are oppressive.

D. *Imprisonment Which Is Disproportionate to the Seriousness of the Crime Constitutes Punishing the Innocent*

There is an additional argument for reducing the length of many prison terms and for utilizing prison less frequently. This argument stems from the abhorrence associated with punishing the innocent. The starting point in understanding this argument is the nature of criminal punishment itself. As explained further below, punishment by its nature involves the deliberate infliction of suffering. As a result, it is universally regarded as repugnant to punish innocent people. A famous illustration of the objection concerning punishing the innocent is H. J. McCloskey's famous small-town sheriff example²³⁰:

Suppose a sheriff were faced with the choice of either framing a[n] [African American] for a rape which had aroused white hostility to [African Americans] (this particular [African American] being believed to be guilty) and thus preventing serious anti-[African American] riots which would probably lead to loss of life, or of allowing the riots to occur. If he were . . . [a] utilitarian he would be committed to framing the [African American].²³¹

The proscription against punishing the innocent is so powerful that it is one of the reasons that utilitarianism has fallen out of favor as the most influential theory of punishment.²³² It is thought that any theory that commits us to such heinous outcomes—albeit in extreme situations, such as that in the above example—must be flawed.

²²⁹ According to a study by the Vera Justice Center, the average cost of a prisoner is \$31,000 per year. This is higher in some states and cities: e.g., in New York state the average cost is \$60,000 per year. HENRICHSON & DELANEY, *supra* note 31, at 9–10. In Norway, the cost of imprisonment is \$93,000 per prisoner, per year. Benko, *supra* note 227.

²³⁰ See also R. A. DUFF, TRIALS & PUNISHMENTS 154–55 (1986).

²³¹ H. J. MCCLOSKEY, META-ETHICS AND NORMATIVE ETHICS 180–81 (1969).

²³² Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124 (2000).

While the starkest case of violating the proscription against punishing the innocent would be unjustly punishing people that are *known* to be innocent, the prohibition also extends to accused persons who are wrongly convicted.²³³ Further, as Antony Duff points out, punishing the innocent also occurs where a person is punished more severely than is commensurate with the seriousness of the offense.²³⁴ This manifestation of the prohibition against punishing the innocent is the least obvious and the least powerful. This is not because this expression of the principle is unsound, but rather because of the vagueness associated with identifying when the objectives of punishment in relation to any particular sentence have been satisfied. The fact that the prohibition against punishing the innocent extends to excessive punishment is highlighted by the patent unfairness in an assertion that it is acceptable to continue the imprisonment of an offender, even though it is clear that the continued detention cannot advance any objective of punishment.

Offenders deserve to be punished, but punishment must be purposeful and must be linked to the seriousness of the crime and the goals of sentencing. If this link is severed, it becomes punishment merely for the sake of punishment and is, ultimately, a wanton imposition of suffering and is therefore manifestly immoral. There are two likely reasons that this objection has not been previously stated more forcefully in relation to many overly-long prison terms. The first is the lack of understanding regarding the full negative impact of imprisonment. This has been fully explored above. The second reason is that many of the orthodox objectives of sentencing which support harsher sentences are in fact flawed. The key sentencing aims that incline in favor of severe punishment are incapacitation, general deterrence, and specific deterrence. In theory, punishment in excess to the severity of the offense could be morally justified if it serves a greater community good, for example, by discouraging future crime. However, as discussed in the next Part of the Article, empirical data establishes that severe state-imposed punishment cannot effectively reduce crime. Prior to discussing this in greater detail, we first set out the appropriate aims of sentencing and the contours of proportionate sentences.

²³³ Hence the establishment of organizations such as the Bluhm Legal Clinic, Center on Wrongful Convictions. See *Bluhm Legal Clinic: Center on Wrongful Convictions*, NW. PRITZKER SCH. OF L., <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions> (last visited June 2, 2017).

²³⁴ DUFF, *supra* note 230, at 154–55.

V. WHAT A HUMAN RIGHTS RESPECTING SENTENCING SYSTEM
WOULD LOOK LIKE

A. *The (Appropriate) Aims of Sentencing*

A sentencing system informed by human rights considerations would have a profoundly different orientation and structure to the current system. However, it is important to keep in mind that human rights considerations are not the only important factors in establishing the framework of a sentencing regime. In fact, it would be flawed to contend that a human rights narrative should primarily drive a sentencing system.

Sentencing is a purposive endeavor with a number of different objectives. Ultimately, the main objective relating to all aspects of the criminal justice system is to stop or reduce crime. As we have seen, criminal sanctions involve public expenditure, and hence the second objective of the sentencing system is to implement the most economically efficient sanctions.²³⁵ Third, the sentencing system should aim to punish offenders appropriately. Finally, given that sentencing often involves the infliction of pain, it is important that it does not violate normative proscriptions.²³⁶ In short, the sentencing system should aim to achieve the following four key goals:

- 1) To stop or reduce crime;
- 2) To punish criminals appropriately;
- 3) To minimize the cost of the system; and
- 4) To ensure that the system does not violate important moral prescriptions.²³⁷

B. *How Much to Punish*

It is the final objective that imports human rights considerations: to ensure that the system does not violate important moral prescriptions. This consideration is important, but not necessarily cardinal, and needs to compete for relevance and priority with the other three considerations. For this reason, progressive prisons of the type in

²³⁵ See *supra* Part I.

²³⁶ See NILS CHRISTIE, LIMITS TO PAIN 19, 48 (1981); Anthony Duff, *Punishment, Citizenship & Responsibility*, in PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT 17, 18 (Henry Tam ed., 1996).

²³⁷ This is discussed further in Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349, 360 (2014).

Norway are not a tenable solution to the prison crisis: cost efficiency is an important limitation. The solution to appropriately accommodating human rights considerations into the sentencing system has a close overlap and synergy with the third objective: to punish criminals appropriately. The need to punish criminals appropriately is grounded in sentencing via the proportionality principle, which is, simply stated, the requirement that the punishment should fit the crime.²³⁸ More fully, it is the principle that the seriousness of the harm caused by the crime should be matched by the hardship of the sanction. Proportionality is a requirement of the sentencing regimes of ten states in the United States.²³⁹ It is also a core principle that informs (though it does not direct) the Federal Sentencing Guidelines.²⁴⁰

This proportionality principle, however, has not been effective at containing the growth in prison numbers. A key reason for this is that the content of the principle is obscure: proportionality exists in the abstract only, devoid of even the sparsest of detail. In order to operationalize the proportionality principle and thereby make sentencing more receptive to human rights considerations, it is important to give it substantive content.

The most obscure and unsatisfactory aspect of proportionality is that there is no stable and clear manner in which the punishment can be matched to the crime.²⁴¹ As noted by Jesper Ryberg, one of the key criticisms of the theory is that it “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”²⁴² As he further notes, to give content to the theory it is necessary to rank crimes, rank punishments, and anchor the scales.²⁴³

The vagaries are so pronounced that it is verging on doctrinal and intellectual fiction to suggest that an objective answer can be given to common sentencing dilemmas, such as how many years’ imprisonment is equivalent to the pain felt by an assault victim, or whether a robber should be dealt with by way of imprisonment or fine, or the appropriate sanction for a drug trafficker. There is no demonstrable violation of

²³⁸ Mirko Bagaric, *Injecting Content into the Mirage that Is Proportionality in Sentencing*, 25 N.Z.U. L. REV. 411 (2013).

²³⁹ See Gregory S. Schneider, Note, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241, 250–58 (2012) (focusing on the operation of the principle in Illinois, Oregon, Washington, and West Virginia).

²⁴⁰ See NAT’L RESEARCH COUNCIL, *supra* note 8, at 23.

²⁴¹ As noted in Part II of this Article, the courts have not attempted to define exhaustively the factors that are relevant to proportionality.

²⁴² JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION* 184 (2004).

²⁴³ *Id.* at 185.

proportionality if a mugger, robber, or drug trafficker is sentenced to either ten months' or ten years' imprisonment. The fact that the principle can be so flexible leads to the suspicion that it is no principle at all and is simply an expedient that is invoked by courts (and legislatures) as a means to justify their intuitive sentencing impulse.

As noted above, broken down to its core features, proportionality has two limbs: the seriousness of the crime and the harshness of the sanction. Further, the principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

This is a challenge noted by numerous scholars. However, in relation to the first limb—at least—it has been observed that a number of approaches have been applied. To this end, von Hirsch and Ashworth state: “How is crime-seriousness to be assessed? Ordinary people, various opinion surveys have suggested, seem capable of reaching a degree of agreement on the comparative seriousness of criminal offenses.”²⁴⁴

In a pragmatic sense, the problem is not insurmountable. Legislatures commonly set maximum penalties for offenses and this is a crude method for ranking offense seriousness. While the maximum penalty is not a defining criterion regarding the sanction in any particular case even when it comes to precisely prescribing a pre-determined sanction for an offense type, it has often been undertaken with little difficulty. This is an observation made by von Hirsch and Ashworth in relation to guideline penalty grids:

The rulemaking bodies that have tried to rank crimes in gravity have not run into insuperable practical difficulties, moreover. Several US state sentencing commissions (including those of Minnesota, Washington State and Oregon) were able to rank the seriousness of offenses for use in their numerical guidelines. While the grading task proved time consuming, it did not generate much dissension within these rule-making bodies.²⁴⁵

However, the fact that agreement can be, and has been, reached regarding the seriousness of certain crimes, whether by government

²⁴⁴ ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 143 (2005). Moreover, there seems to be a relatively high degree of consensus in relation to this. For an overview of Robinson's approach, see Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829 (2007); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089 (2011). But for a counter to this, see Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77 (2013).

²⁴⁵ VON HIRSCH & ASHWORTH, *supra* note 244, at 143–44.

institutions or within the general community,²⁴⁶ does not necessarily justify the outcome. As noted by Ryberg:

Even if it is correct that there is a general agreement between people as to how the seriousness of different crimes should be rated, this does not in itself show that the rating should be morally accepted. This would require an independent argument. Moreover, it is generally agreed that there might be a divergence between popular judgements and what is morally well-grounded. The need for a theoretical enquiry clarifying what is morally relevant in the comparison of crimes is, therefore generally acknowledged among proportionalists.²⁴⁷

A doctrinally sound approach is needed to define the criteria by which offense severity is defined.²⁴⁸ One of us has argued elsewhere that there is one criterion that should be used to measure offense severity and the hardship of a sanction²⁴⁹: individual well-being. The type and degree of punishment imposed on offenders should cause them to have their well-being set back to an amount equal to that which the crime set back the well-being of the victim.

The main difficulty with this approach relates to mapping and calculating the notion of well-being. There is admittedly a degree of approximation involved in such an assessment, but the level of accuracy in making such determinations is increasing. The concept of well-being is becoming so mainstream that in some contexts it is replacing or complementing conventional and widely-accepted economic indicia for evaluating human progress and achievement. The Organization for Economic Co-operation and Development (OECD) has developed a “Better Life Index,” which attempts to set out and prioritize the matters that are most essential for human “well-being.”²⁵⁰ The index lists eleven criteria for measuring life quality.²⁵¹ It allows nations to develop their social and economic priorities, and has distinguished between responses from men and women. It is apparent that men and women have near

²⁴⁶ Courts sometimes factor community sentiment into an assessment of offense severity. For example, see *Stalio v The Queen* [2012] VSCA 120, para. 72 (Austl.); *WCB v The Queen* [2010] VSCA 230 (Austl.).

²⁴⁷ RYBERG, *supra* note 242, at 60.

²⁴⁸ The approach below is similar in approach to the notion of “empirical desert” advanced in Robinson, *supra* note 244, but I adapt different criteria for informing the content of the principle.

²⁴⁹ Bagaric, *supra* note 238.

²⁵⁰ *Create Your Better Life Index*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/#/111111111111> (last visited Apr. 12, 2017). These measures are designed to be more informative than economic statistics, especially in the form of Gross Domestic Product (GDP).

²⁵¹ *Id.*

identical priorities. The order from most to least important is: life satisfaction, health, education, work-life balance, environment, jobs, safety, housing, community, income, and civic engagement.²⁵² In order to attain life satisfaction, key interests are the right to life, physical integrity, liberty, and the right to property.²⁵³

While relevant studies have not been conducted with a view to providing insight into calculations of offense seriousness or sanction severity, nevertheless, a number of tentative conclusions can be made regarding the relevance of the studies to proportionalism.

First, property offenses, which deprive victims of wealth as opposed to diminishing their personal security, are overrated in terms of their seriousness. Wealth has a far smaller impact on personal happiness than a range of other factors,²⁵⁴ and hence the criminal justice system should view these offenses less seriously. The main situation where property offenses make a *significant* adverse impact on victims is where they result in the victim living in a state of poverty. The second conclusion that follows from the above analysis is that offenses that imperil a person's sense of security, or otherwise negatively affect a person's health and capacity to lead a free and autonomous life, should be punished severely.

These conclusions are supported by studies that assess the impact of different forms of crime on victims. The available data suggests that victims of violent crime and sexual crime have their well-being more significantly set back than for other types of crime.²⁵⁵ For example, one study showed that victims of violent crime, and sexual crime in particular, have difficulty being involved in intimate relationships,²⁵⁶

²⁵² *Id.* This is among the thirty-five countries that are in the OECD. See *What Countries Does the Index Cover?*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/about/better-life-initiative/#question3> (last visited Mar. 21, 2017).

²⁵³ This is the trend of information emerging from the following works and extensive research data in these works. See, e.g., TIM KASSER, *THE HIGH PRICE OF MATERIALISM* (2002); DAVID G. MYERS, *THE PURSUIT OF HAPPINESS: DISCOVERING THE PATHWAY TO FULFILLMENT, WELL-BEING, AND ENDURING PERSONAL JOY* (1992); MARTIN E. P. SELIGMAN, *AUTHENTIC HAPPINESS* (2002); Michael Argyle et al., *Happiness as a Function of Personality and Social Encounters*, in 1 RECENT ADVANCES IN SOCIAL PSYCHOLOGY: AN INTERNATIONAL PERSPECTIVE 189 (J. P. Forgas & J. M. Innes eds., 1989); Martin. E. P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 AM. PSYCHOLOGIST 5 (2000). The results of these studies are summarized in Mirko Bagaric & James McConvill, *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, 10 DEAKIN L. REV. 1 (2005). Also, see generally this edition of the *Deakin Law Review*, which is a thematic edition regarding the link between law and happiness research.

²⁵⁴ *Money Can't Buy Happiness*, AM. PSYCHOL. ASS'N (June 14, 2011), <http://www.apa.org/news/press/releases/2011/06/buy-happiness.aspx>.

²⁵⁵ See, e.g., Rochelle F. Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189 (2010).

²⁵⁶ *Id.* at 190-91.

higher divorce rates,²⁵⁷ diminished parenting skills (although this finding was not universal),²⁵⁸ lower levels of success in the employment setting,²⁵⁹ and much higher levels of unemployment.²⁶⁰ Victims of property crimes likewise suffer reduced levels of well-being but at generally less pronounced rates than victims of sexual and violent crime.²⁶¹

While there has been some consideration given to measuring crime severity, there has been less attention given to the other side of the proportionality equation: measuring punishment severity. Ryberg contends this is because of the underlying belief that the “answer is pretty straightforward”²⁶² as imprisonment is clearly the harshest disposition. As Ryberg notes, the answer would seem to rest on “negative impact on the well-being of the punished.”²⁶³ Von Hirsch and Ashworth also believe that it is less complex to rank punishments because the appropriate reference point seems to be the degree of suffering or inconvenience caused to the offender. To this end, it is clear that imprisonment is the harshest commonly applied sanction. As noted above, it has a severe impact on the well-being of offenders. The extent of the pain caused by imprisonment has been considerably understated.

The final problem regarding proportionality is how to match the severity of the punishment with the seriousness of the offense. In light of the above discussion, in theoretical terms this is relatively straightforward. The type and degree of punishment imposed on offenders should cause them to have their well-being set back to an amount equal to that which the crime set back the well-being of the victim.²⁶⁴

The above approach assesses both the hardship of punishment and the severity of crime as they relate to well-being. This enables at least a

²⁵⁷ *Id.* at 191.

²⁵⁸ *Id.* at 190.

²⁵⁹ *Id.* at 191; see also MIKE DIXON ET AL., INST. FOR PUB. POLICY RESEARCH, THE UNEQUAL IMPACT OF CRIME 26 (2006), http://www.ippr.org/files/images/media/files/publication/2011/05/crimeshare_1500.pdf?noredirect=1.

²⁶⁰ Hanson et al., *supra* note 255, at 191; see also DIXON ET AL., *supra* note 259, at 26.

²⁶¹ See also Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT'L REV. VICTIMOLOGY 141, 155–56 (1998).

²⁶² RYBERG, *supra* note 242, at 102.

²⁶³ *Id.* at 102–03.

²⁶⁴ This is in keeping with the approach of some other theorists. Von Hirsch asserts that an interests analysis, similar to the living standard analysis he adopts for gauging crime seriousness, should be used to estimate the severity of penalties. Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 34–35 (1991). Ashworth states that proportionality at the outer limits “excludes punishments which impose far greater hardships on the offender than does the crime on victims and society in general.” ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 112 (4th ed. 2005).

crude match to be made, which stem from a number of premises. First, the crimes which have the most serious adverse consequences for victims are assault and sexual offenses. Second, the adverse effects of imprisonment seem to have been greatly undervalued. In light of this, a reasonable starting point is that, generally, imprisonment should be imposed only for sexual and violent offenses, and most prison terms should be reduced compared to those currently imposed. Of course, this says nothing about the appropriate length of imprisonment for certain categories of sexual and violent offenses. However, the default position should be that most prison terms for these offences should be less than is currently the norm given that current sentencing practices greatly underestimate the harshness of imprisonment.²⁶⁵

Proportionality, however, does not exhaust the range of orthodox or jurisprudentially desirable sentencing objectives. The three key sentencing aims that justify longer penalties are incapacitation, general deterrence, and specific deterrence. If these objectives are valid they can potentially justify sanctions which are harsher than the seriousness of the offence. There has been a voluminous amount of empirical research into the efficacy of state-imposed punishment to achieve these goals of incapacitation, general deterrence, and specific deterrence. It is beyond the scope of this Article to consider these findings at length. However, the trend of the findings is relatively consistent and hence it is possible to provide an overview of the relevant literature. In short, the weight of the current empirical evidence provides no basis for confidence that punishment is capable of achieving the goal of specific deterrence; demonstrates that general deterrence works only in the absolute sense; and finds incapacitation is only justified in relation to a small sub-set of offenders.

Specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and thereby convincing them that crime does not pay.²⁶⁶ It attempts to dissuade offenders from reoffending by inflicting an unpleasant experience (imprisonment) which they will seek to avoid in the future.²⁶⁷ The scientific data debunks specific deterrence as a plausible theory. The evidence does not establish that offenders who have been subjected to harsh punishment

²⁶⁵ See Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169 (2016) (suggesting that most offenses should be dealt with in a manner which does not involve a term of imprisonment and that imprisonment should be mainly reserved for serious sexual and violent offenses).

²⁶⁶ Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME & JUST. 115 (2009).

²⁶⁷ Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing*, 36 CRIM. L.J. 159 (2012).

are less likely to reoffend than identically placed offenders who are subjected to lesser forms of punishment.²⁶⁸ Thus, there is no basis for pursuing the goal of specific deterrence.²⁶⁹ It follows that sentences should not be increased in order to attempt to achieve this goal.

Similar considerations apply regarding general deterrence.²⁷⁰ There are in fact two forms of general deterrence. Marginal general deterrence is the theory that there is a connection between more severe penalties and lower crime, on the basis that potential offenders are dissuaded from committing by the prospect of a harsh sentence if they are apprehended.²⁷¹ This objective is unattainable. In the most recent extensive analysis of the relevant literature, the U.S. National Academy of Sciences notes: “The incremental deterrent effect of increases in lengthy prison sentences is modest at best. Because recidivism rates decline markedly with age, lengthy prison sentences, unless they specifically target very high-rate or extremely dangerous offenders, are an inefficient approach to preventing crime by incapacitation.”²⁷² It follows that marginal deterrence should be disregarded as a sentencing objective.²⁷³

Deterrence does however work in a more limited sense. Crime would escalate in the absence of the threat of *any* punishment for criminal conduct. Thus, general deterrence works in the absolute sense: there is *a connection* between the existence of some form of criminal sanctions and criminal conduct. This is known as the theory of absolute general deterrence.²⁷⁴ In order to achieve this goal, the hardship must be something that people would seek to avoid, such as a fine or a short

²⁶⁸ In fact, some studies show the rate of recidivism among offenders sentenced to imprisonment to be higher. See, e.g., Nagin et al., *supra* note 266, at 120.

²⁶⁹ See *id.* at 124–25.

²⁷⁰ For an overview of the literature, see NAT'L RESEARCH COUNCIL, *supra* note 8, at 90; NIGEL WALKER, SENTENCING IN A RATIONAL SOCIETY 60–61 (1969); Richard Berk, *New Claims About Executions and General Deterrence: Déjà Vu All Over Again?*, 2 J. EMPIRICAL LEGAL STUD. 303, 328 (2005); Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 APPLIED ECON. 569 (2001); John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 CRIMINOLOGY 107, 128–29 (1994); Dieter Dölling et al., *Is Deterrence Effective? Results of Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL'Y & RES. 201 (2009); Anthony N. Doob & Cheryl M. Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 177–78 (2004); Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163 (2004).

²⁷¹ See Mirko Bagaric & Theo Alexander, *(Marginal) General Deterrence Doesn't Work-- And What It Means for Sentencing*, 35 CRIM. L.J. 269, 270 (2011).

²⁷² See NAT'L RESEARCH COUNCIL, *supra* note 8, at 5.

²⁷³ See Bagaric & Alexander, *supra* note 271, at 282–83.

²⁷⁴ *Id.* at 270, 282.

term of imprisonment.²⁷⁵ The important point is that there is no need to impose a particularly onerous penalty.²⁷⁶ Given this, it follows that no penalties should be escalated on the basis of this objective.

Incapacitating offenders in prison is the most effective form of community protection given that offenders cannot commit crime in the community during their period of confinement. However, incapacitation is only necessary if the offender would have reoffended if he were not incarcerated. Incapacitation in its broadest sense (as being applicable to all offenders and all offence types) is flawed, since we are poor at predicting which offenders are likely to commit offences in the future (especially in relation to serious offences).²⁷⁷ And while incapacitation seems to work in the case of certain categories of minor offences, the cost of imprisoning minor offenders normally outweighs the seriousness of the offence.²⁷⁸ To the extent that incapacitation is justifiable, it should be confined to recidivist serious sexual and violent offenders, where a recidivist loading of twenty percent to fifty percent should be applied, given that this is consistent with their rate of reoffending.²⁷⁹

It follows that offenders should be punished commensurate with the seriousness of their crime and that the level of punishment should not be increased to satisfy common sentencing objectives in the form of general deterrence, specific deterrence, and incapacitation (except to a relatively minor extent regarding recidivist serious sexual and violent offenders). Proportionate sentences attuned to the human rights burden stemming from imprisonment and which are not compromised by the

²⁷⁵ *Id.* at 282.

²⁷⁶ *Id.*

²⁷⁷ See Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SECURITY RES. 317, 322–23 (2011). The most thorough treatment of the subject matter is DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE (Bernadette McSherry & Patrick Keyzer eds., 2011); see also BERNADETTE MCSHERRY & PATRICK KEYZER, SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE (2009).

²⁷⁸ See DON WEATHERBURN ET AL., NSW BUREAU OF CRIME STATISTICS & RESEARCH, NO. 93, HOW MUCH CRIME DOES PRISON STOP? THE INCAPACITATION EFFECT OF PRISON ON BURGLARY 1 (2006); NAT'L RESEARCH COUNCIL, *supra* note 8, at 4; Jacqueline Cohen, *The Incapacitative Effect of Imprisonment: A Critical Review of the Literature*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 209 (Alfred Blumstein et al. eds., 1978); William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 CRIME & JUST. 419, 420, 485 (2000); Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009); *Prison and Crime: A Complex Link*, PEW CHARITABLE TRUSTS (Sept. 11, 2014), <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/prison-and-crime>; see also THE CRIME DROP IN AMERICA (Alfred Blumstein & Joel Wallman eds., 2000).

²⁷⁹ Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 411 (2014).

pursuit of unattainable sentencing goals are essential to a human rights embracing sentencing regime.

C. *What Type of Punishment Is Appropriate*

While a proportionate sentence is a threshold requirement of a normatively sound sentencing system, it is not a sufficient criterion. Proportionality focuses only on the *amount*, not the *type*, of suffering that is inflicted. The pain stemming from, for example, corporeal punishment (such as whipping) could theoretically be matched to the severity of some forms of crime. In fact, the *lex talionis* approach to punishment—an eye for an eye, a tooth for a tooth—is strongly grounded in the proportionality principle.²⁸⁰ However, such forms of punishment are precluded by wider normative considerations.

Corporeal punishment is inappropriate because it sends a signal, however subtle, that there are circumstances in which it is permissible to violate the right to physical autonomy of others in order to get one's way.²⁸¹ Quite rightly, the human body is no longer regarded as an appropriate object of punishment²⁸² and over the past century or so there has been a pronounced movement from corporeal punishment to the greater use of imprisonment. This has been instrumental to the supposed "civilization" of punishment²⁸³: "Physical pain, the pain of the body itself, is no longer the constituent element of the penalty. From being an art of unbearable sensations punishment has become an economy of suspended rights."²⁸⁴

²⁸⁰ The *lex talionis* approach has no clear application in relation to many offences: "[W]hat penalty would you inflict on a rapist, a blackmailer, a forger, a dope peddler, a multiple murderer, a smuggler, or a toothless fiend who has knocked somebody else's teeth out?" JOHN KLEINIG, *PUNISHMENT AND DESERT* 120 (1973).

²⁸¹ For an overview of the advantages of corporeal punishment, see CHRISTOPHER HARDING & RICHARD W. IRELAND, *PUNISHMENT: RULE, RHETORIC, AND PRACTICE* 193 (1989), and also GRAEME NEWMAN, *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS* (1983) (arguing that corporeal punishment is not necessarily less parsimonious than imprisonment and makes out a case for punishment by electric shock).

²⁸² For discussion regarding the possible reasons for this view, see HARDING & IRELAND, *supra* note 281, at 188–92.

²⁸³ It has been contended that this civilization process is slowly being eroded with the employment of such measures as curfews, boot camps, chain gangs, and three strike laws. See John Pratt, *Towards the 'Decivilizing' of Punishment?*, 7 *SOC. & LEGAL STUD.* 487, 499–507 (1998).

²⁸⁴ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 11 (Alan Sheridan trans., 1977); see also John Kleinig, *The Hardness of Hard Treatment*, in *FUNDAMENTALS OF SENTENCING THEORY* 273, 278 (Andrew Ashworth & Martin Wasik eds., 1998).

Inflicting physical violence on an offender's family would also be a potentially efficient and potentially effective means of punishment; however, due to the proscription against punishing the innocent it, too, is disqualified as a means of inflicting pain on offenders.

Thus, wider human rights considerations operate to limit the type of punishment that is permissible. These considerations do not, however, rule out some suffering imposed on offenders. This is because, as noted above, punishment by its nature involves the infliction of some hardship. There is no universally accepted definition of punishment, but most influential definitions emphasize the link between punishment and hurt. Thus, Jeremy Bentham simply declared that "all punishment is mischief: all punishment in itself is evil."²⁸⁵ C. L. Ten states that punishment "involves the infliction of some unpleasantness on the offender or it deprives the offender of something valued."²⁸⁶ Andrew von Hirsch believes that "[p]unishing someone consists of visiting a deprivation (hard treatment) on him, because he supposedly has committed a wrong, in a manner that expresses disapprobation on the person for his conduct."²⁸⁷ Punishment has been described as pain delivery,²⁸⁸ and similarly it has been asserted that "the intrinsic point of punishment is that it should *hurt*—that it should inflict suffering, hardship or burdens."²⁸⁹ It follows that it is not tenable to suggest that the sentencing system should aim for human rights purity—it is untenable to suggest that no rights of offenders should be limited or curtailed. Punishment and suffering are co-existent and hence the sentencing system will invariably lead to some human rights deprivations. The key is defining the appropriate parameters of the human rights incursions. This has both a qualitative and quantitative component.

As we have seen, there are several other cardinal human interests that are incidentally but invariably curtailed by imprisonment, including the right to procreate and the right to a family. These are important interests, but it is not clear that they cannot be the proper subject of criminal sanctions. This is especially the case if what is being proposed is a mere limitation of such rights as opposed to a complete destruction of them. Life imprisonment can violate the right to a family permanently. Several years in prison merely disrupts and suspends this

²⁸⁵ JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 166 (Hayes Barton Press 2006) (1823).

²⁸⁶ C. L. TEN, CRIME, GUILT, AND PUNISHMENT 2 (1987).

²⁸⁷ ANTHONY ELLIS, THE PHILOSOPHY OF PUNISHMENT (2012) (ebook).

²⁸⁸ NILS CHRISTIE, THE LIMITS TO PAIN: THE ROLE OF PUNISHMENT IN PENAL POLICY 19, 48 (1981).

²⁸⁹ Duff, *supra* note 236, at 18.

right. However, the temporary nature of a several-years-long prison sentence does not negate the disruption to the point of irrelevance or insignificance. In fact, a twenty-year prison term can effectively totally negate the right to procreate (especially in relation to female prisoners), ruin an offender's family relationships, and result in the offender being subjected to numerous physical attacks during the term of confinement. A five-year term, by comparison, is far less damaging to these interests. Thus, we see that the quantitative and qualitative aspects of the human rights approach to sentencing are linked.

The broad contours of a human rights embracing sentencing system would acknowledge the reality that prison is a harsher form of punishment than has been previously understood. Moreover, the system must accept that the suffering caused by crime varies considerably and that the crimes that cause the greatest pain to victims are serious sexual and violent offenses. In practical terms, this would see a considerable reduction in the use of prison for a number of non-violent and non-sexual offences. Additionally, when prison is imposed for such offences, the terms should generally be much shorter. We have recently considered the ideal of length of prison terms in greater detail.²⁹⁰

In summary, prison should be reserved only for serious sexual and violent offenders. Other offenders should be normally dealt with by other sanctions, including GPS monitoring. Such a shift should be introduced gradually. As a starting point, sentences for non-violent and non-sexual offenders should be approximately halved.²⁹¹

This approach would accommodate the limitations that stem from applying a human rights orientation to sentencing law. The human rights of prisoners would still be breached but, generally, for far shorter periods. This would mean that most of these rights could continue to be exercised to a meaningful degree.

CONCLUSION

A human rights lens informs many aspects of social and legal discourse. Sentencing is an exception. The reason for this is not clear. It is most likely because criminals have no political capital and engender no empathy within the community. The enmity that is associated with a finding of guilt for a criminal offense seems to act as a repellent to a meaningful consideration of the way criminals are treated, and in

²⁹⁰ This has been done elsewhere. See Bagaric & Gopalan, *supra* note 265.

²⁹¹ For a different perspective regarding white collar crime, see *Is Prison Effective in Punishing White-Collar Crime?*, CRIME REP. (Nov. 26, 2015), <http://www.thecrimereport.org/news/articles/2015-11-is-prison-effective-in-punishing-white-collar-crime>.

particular how their community-imposed suffering aligns with human rights standards. This Article has suggested that this has resulted in runaway levels of hardship, verging on brutality, being inflicted on millions of inmates in American prisons.

An important, if not cardinal, reform necessary to address the incarceration crisis is to change the narrative regarding the manner in which sentencing law is evaluated. This applies from the perspective of both victims and offenders, though more so in the case of offenders as it is their suffering which has traditionally received the least attention.

It is untenable to suggest that sanctions should be softened to the point where none of the rights of offenders should be considerably curtailed, as punishment by its very nature involves the infliction of pain. However, the current hardships imposed on offenders often breach important rights and, in particular, rights which are often not immediately apparent from the nature of the sanction. These breaches mainly occur in relation to imprisonment. This Article has elucidated the incidental but unavoidable negative impacts associated with imprisonment. Viewed through the lens of human rights dialogue, it emerges that the suffering inflicted by imprisonment greatly exceeds a mere deprivation of liberty. The additional rights violations relate to a deprivation or limitation of the right to family, procreation, sexual autonomy, privacy, economic prosperity, and a significant reduction in safety and security. Individually, these rights deprivations constitute significant forms of suffering. Cumulatively, the suffering inflicted by these human rights violations profoundly diminishes human flourishing.

The suffering we inflict on prisoners is unacceptable from a human rights perspective. A theoretically plausible solution is to make the prison experience less burdensome, for example by allowing inmates more time with family members, allowing conjugal relations in order to form and maintain a family, and increasing security measures to ensure that the physical security of prisoners is not greatly undermined. This solution, however, is not likely to be pursued given that it would require the injection of vast sums of additional public resources into an already over-stretched prison system.

The most viable solution to the human rights crisis in American prisons is to attenuate the duration of prison terms. The splendor of reducing most prison terms is that the net pain inflicted on prisoners will be reduced, some forms of human rights violations are less likely to be permanent (such as the right to procreation), and the financial burden stemming from maintaining prisons will be reduced. As a crude measure, we have suggested that prison terms for most non-violent and non-sexual offences should be reduced by at least half. Ideally, in nearly all cases these offenders should be dealt with by other types of sanctions.

However, this shift is likely to be viewed as being too radical and hence as a starting point we recommend a halving of these prison terms.

Sentencing reform has proven to be a difficult process in the United States. Change normally occurs in a set direction: harsher penalties. There is currently some momentum for making progressive sentencing reform. Applying a human rights platform to deal with sentencing issues will consolidate and enhance this process. This change is imperative. As a society, we will continue to be morally deficit until human rights considerations inform the treatment of prisoners.