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Less Prison Time Matters: A Roadmap to Reducing the Discriminatory Impact of the Sentencing System Against African Americans and Indigenous Australians

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LESS PRISON TIME MATTERS: A ROADMAP TO REDUCING THE DISCRIMINATORY IMPACT OF THE SENTENCING SYSTEM AGAINST AFRICAN AMERICANS AND INDIGENOUS AUSTRALIANS

Mirko Bagaric,* Peter Isham, Jennifer Svilar,***
& Theo Alexander******

ABSTRACT

The criminal justice system discriminates against African Americans. There are a number of stages of the criminal justice process. Sentencing is the sharp end of the system because this is where the community acts in its most coercive manner by intentionally inflicting hardships on offenders. African Americans comprise approximately 40% of the incarcerated population yet only about 13% of the total population. The overrepresentation of African Americans in prisons is repugnant. Despite this, lawmakers for decades have been unable or unwilling to implement reforms which ameliorate the problem. This is no longer politically or socially tolerable in light of the groundswell of support for the Black Lives Matter movement following the killing of George Floyd.

This Article proposes a number of principled reforms that will immediately reduce the incarceration levels of African Americans and assist to overcome the systemic biases against this group. One of our key recommendations is for the immediate release from incarceration of all African Americans who have served three-quarters or more of their sentence. This reform builds on the early release concept underpinning the First Step Act, which

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commenced in December 2018, but applies it specifically to African Americans.

A number of other reforms are suggested to redress the wider causes of discrimination against African Americans in the sentencing system, including placing less emphasis on the prior convictions of offenders in the sentencing calculus and improving the educational outcomes of African Americans. Discrimination faced by the most socially and economically vulnerable groups in society is not limited to the United States. Indigenous Australians are overrepresented in prisons at an even higher rate than African Americans. We argue that the solutions to ameliorating the unfair burdens on African Americans are equally appropriate in the Australian context.

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INTRODUCTION

A. *The Problem: Disproportionate Criminal “Justice” Burden
Inflicted on African Americans*

African Americans have long been discriminated against in the criminal justice system. These communities are over-policed; they are over-charged by prosecutors; they are disproportionality killed by police officers; and they have the highest incarceration rate in the United States.¹ These injustices are well-known. Lawmakers have been either unwilling or unable to put in place reforms to ameliorate these problems. This is no longer tolerable.

B. *The Catalyst to Taking the Problem Seriously: Black Lives
Matter and George Floyd*

The brutal murder of George Floyd by white police officer Derek Chauvin provided the flashpoint for racism against African Americans and raised the Black Lives Matter movement to the forefront of the national psyche.² Following the murder of Floyd on May 25, 2020, demonstrations erupted in cities big and small throughout the United States as both veteran and new activists rallied

1. See, e.g., E. ANN. CARSON, U.S. DEP’T OF JUST., NCJ 253516, PRISONERS IN 2018, at 1 (2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf> [<https://perma.cc/72TV-X626>] (“In 2018, the imprisonment rate of black males was 5.8 times that of white males . . . [A]n estimated three-fifths of [B]lacks and Hispanics (61% each) and nearly half of whites (48%) were serving time for a violent offense.”); SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 6 (2008); Julie Tate et al., *950 People Have Been Shot and Killed by Police in the Past Year*, WASH. POST, <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [<https://perma.cc/7YSE-27GY>] (July 8, 2021) (“Black Americans . . . account for less than 13 percent of the U.S. population, but are killed by police at more than twice the rate of white Americans [37 per million and 15 per million, respectively].”); Timothy Williams, *Black People Are Charged at Higher Rate than Whites. What If Prosecutors Didn’t Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html> [<https://perma.cc/WSS7-H7A8>] (“Although African-Americans make up only about 6 percent of San Francisco’s population, they accounted for 41 percent of those arrested, 43 percent of those booked into jail, and 38 percent of cases filed by prosecutors between 2008 and 2014, according to the city.”).

2. Elliot C. McLaughlin, *How George Floyd’s Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN, <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/DKE6-Q75G>] (Aug. 9, 2020, 11:31 AM).

against racial injustice.³ Although most of the demonstrations were peaceful, they cumulatively resulted in the greatest civic unrest in America since Martin Luther King, Jr. was assassinated in 1968.⁴ Protesters burned down a police precinct in Minneapolis, set fire to police cars in Los Angeles and Atlanta, and were sprayed with tear gas and rubber bullets by riot police in Tulsa and Madison.⁵

By June 2, the National Guard was deployed in at least twenty-eight U.S. states, while dozens of cities imposed mandatory curfews in an effort to combat looting, arson, and outbreaks of violence.⁶ Ironically, though perhaps unsurprisingly, the anger and rage that has spilled into American streets followed a two-and-one-half month period when the streets were near-empty, the country plagued by COVID-19. And African Americans, a population already subject to undisputed broad racial inequality, have been hit hardest. African Americans account for 13% of the U.S. population, but according to the Centers for Disease Control and Prevention (CDC)—as of June 2020—22% of those diagnosed with COVID-19 and 23% of those who have died from it are Black.⁷ “Some 44% of African Americans say they have lost a job or have suffered household wage loss” as a result of COVID-19, and “73% say they lack an emergency fund to cover expenses.”⁸ The increased hardships that COVID-19 has thrust on the Black community have surely accelerated the urgency of the protests and the importance of the Black Lives Matter movement: “[I]t’s either COVID is killing us, cops are killing us or the economy is killing us,” remarked Priscilla

3. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020, 6:49 AM), <https://time.com/5847967/george-floyd-protests-trump/> [<https://perma.cc/D6H4-VZYE>].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*; see also Mark Hugo Lopez et al., *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RSCH. CTR. (May 5, 2020), <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/> [<https://perma.cc/8YUX-XV4Q>].

Borkor, a 31-year-old social worker, during Black Lives Matter demonstrations in Brooklyn on May 29, 2020.⁹

Black Lives Matter was created in 2013 in response to the acquittal of George Zimmerman, a white volunteer “neighborhood watch” member who shot and killed Trayvon Martin, an unarmed Black teenager on his way home from a store, in February 2012.¹⁰ The phrase “Black lives matter” originated in July of 2013 in a Facebook post from activist Alicia Garza titled “a love letter to Black people,” as an affirmation for an oppressed community concerned about Zimmerman’s acquittal.¹¹ Over the last seven years, Black Lives Matter has evolved into a broad movement focused on criminal justice reform and related causes,¹² including ending mass incarceration, dismantling structural racism, and ending the police killings of African Americans.¹³ Though the activists appear committed to similar goals, there is not necessarily consensus on the means to achieve those goals. Some activists have taken a reformist position, successfully lobbying police officers to be equipped with body-worn cameras, making implicit bias training a requirement for law enforcement personnel and encouraging community policing.¹⁴ But other activists view those measures as not enough and have pressed for bolder reforms that curtail policing and police numbers and resources.¹⁵

More specifically, Black Lives Matter activists can be categorized into three groups. The first advocates for reforms aimed at increasing police department accountability and stringently regulating police use

9. Altman, *supra* note 3.

10. Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 14, 2016), <https://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [<https://perma.cc/J8BS-D4G9>]; Seal Illing, *How Black Lives Matter Fits into the Long History of American Radicalism*, VOX (July 2, 2020, 8:50 AM), <https://www.vox.com/policy-and-politics/21306771/black-lives-matter-george-floyd-protest-michael-kazin> [<https://perma.cc/65LX-5ABL>].

11. Cobb, *supra* note 10.

12. Illing, *supra* note 10.

13. Charlotte Alter, *Black Lives Matter Activists Want to End Police Violence. But They Disagree on How to Do It*, TIME (June 5, 2020, 3:54 PM), <https://time.com/5848318/black-lives-matter-activists-tactics/> [<https://perma.cc/FQN4-MHKT>].

14. *Id.*

15. *Id.*

of force.¹⁶ The second concentrates on defunding police departments by rerouting public resources from law enforcement and funneling them instead toward social services that benefit Black communities.¹⁷ The third group aims to defund police departments as well, but views the defunding as a step toward abolishing policing altogether.¹⁸

Campaign Zero, a reform camp founded after the August 2014 protests in Ferguson, Missouri (where a white police officer killed a Black man during a physical struggle) and that is supported by and closely aligned with Black Lives Matter, has outlined a set of goals that fall within the first of the aforementioned three groups.¹⁹ According to co-founder Deray McKesson, reforms, such as increasing police body worn cameras, augmenting mental health resources for police officers, requiring implicit bias training, and employing more officers of color, “don’t work” because they “don’t actually result in fewer people being killed by police,” and thus, Campaign Zero instead focused on strategies that both “reduce the power” and “shrink the role” of police departments.²⁰ One step is eliminating police union contracts, which arguably often “protect bad cops and prevent police chiefs and mayors from making significant reforms.”²¹

Moreover, “Campaign Zero has identified a set of eight specific use-of-force policies” that could, according to the group, “reduce police violence by more than 70%.”²² The eight reforms are:

[B]anning chokeholds and strangleholds; requiring de-escalation; requiring officers to issue a warning before shooting; exhausting all other means before shooting; requiring officers to intervene and stop excessive force by

16. *Id.*

17. *Id.*

18. *Id.*

19. *We Can End Police Violence in America*, CAMPAIGN ZERO, <https://www.joincampaignzero.org/#vision> [https://perma.cc/TLG4-TLU9].

20. Alter, *supra* note 13.

21. *Id.*; see also Dhammika Dharmapala et al., *Collective Bargaining Rights and Police Misconduct: Evidence from Florida* 20 (Univ. of Chi. Pub. L. Working Paper, Paper No. 655, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3095217 [https://perma.cc/BDC7-D9LV].

22. Alter, *supra* note 13; Dharmapala et al., *supra* note 21.

other officers and report them immediately; banning shooting at moving vehicles; developing regulations governing when force can be used; and requiring officers to file reports every time they use force.²³

In an effort to publicize and draw attention to the eight specific policies, the hashtag #CantWait has gone viral, and major celebrities including Oprah Winfrey and LeBron James have publicly supported the effort.²⁴

But other activists argue that taxpayer dollars spent on policing should be redirected to social programs that could empower Black communities and reduce violence.²⁵ Alicia Garza, one of the women who coined the “Black lives matter” phrase, argues that “even after [twenty-six] criminal-justice reform laws passed in [forty] states since 2013, ‘not much has changed.’”²⁶ In one sense, she is right—about 1,000 people are killed every year by the police, and the victims of the killings are disproportionately Black.²⁷ And that is why Garza believes true change will require slowing the flow of taxpayer money to police, reasoning that “[o]verwhelmingly, the largest percentage of most city budgets and state budgets is relating to policing and militarism” and instead that money “could be used for affordable housing, coronavirus testing and resilience support.”²⁸ This line of thought has support from some of the biggest civil rights groups in the world—for example, the American Civil Liberties Union (ACLU) recently called to defund law enforcement and invest in communities of color.²⁹ And there are signs that governments are listening, at least in America’s two largest cities: New York City cut

23. Alter, *supra* note 13.

24. *Id.*

25. *Id.*

26. *Id.* (quoting Alicia Garza).

27. *Id.* (citing *Police Have Killed 530 People in 2021*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org> [<https://perma.cc/JCG9-PSRR>]).

28. *Id.* (quoting Alicia Garza).

29. *Divest from the Police. Invest in Black and Brown Communities.*, ACLU, <https://action.aclu.org/petition/divest-police-invest-black-and-brown-communities> [<https://perma.cc/Q6EC-2NB6>].

the NYPD budget by \$1 billion in May 2020, and Los Angeles cut the LAPD budget by \$150 million in June 2020.³⁰

Racial disparities in the United States have existed for an embarrassingly long time, and they continue to persist today. By contrast, at just seven years old, the Black Lives Matter movement is a nascent one. And, by stark contrast, the immense momentum Black Lives Matter has gained since the murder of George Floyd in May 2020 is so brand new that the myriad proposed reforms the movement has pushed to the forefront are a rough draft work-in-progress, full of promise but yet to be implemented for any period of time (or at all) meaningful enough from which to measure results. The activists leading the charge recognize this. Jessica Byrd, who heads the electoral-justice project at the Movement for Black Lives, knows these changes will take time because the reforms require a “radical shift in policing” and “a radical shift in the way we think about protecting our communities and public safety.”³¹

Regardless of what group of or specific Black Lives Matter reforms one subscribes to, the ultimate goal is universal: end police violence.³² By extension, proposals, such as defunding the police, no new jails, decriminalizing low-level offenses (e.g., sex work), police-free schools, ending cash bail, and banning stop-and-frisk policing,³³ would inevitably lead to fewer arrests.

Fewer overall arrests mean significantly fewer arrests of African Americans—the most disproportionately arrested, prosecuted, and killed-by-law-enforcement group in the nation—which means fewer incarcerated African Americans. It also signifies a good start, but it

30. *In the Face of an Economic Crisis, Mayor de Blasio Announces Budget That Prioritizes Safety, Police Reform, Youth Services, and Communities of Color*, NYC.GOV (June 30, 2020), <https://www1.nyc.gov/office-of-the-mayor/news/487-20/in-face-an-economic-crisis-mayor-de-blasio-budget-prioritizes-safety-police> [<https://perma.cc/WSH5-GWQW>]; David Zahniser et al., *Los Angeles Cuts LAPD Spending, Taking Police Staffing to Its Lowest Level in 12 Years*, L.A. TIMES (July 1, 2020, 2:42 PM), <https://www.latimes.com/california/story/2020-07-01/lapd-budget-cuts-protesters-police-brutality> [<https://perma.cc/E9KE-CZU9>].

31. Alter, *supra* note 13 (quoting Jessica Byrd).

32. *Id.*

33. Martin Austerhuhle, *Here's What Black Lives Matter D.C. Is Calling for, and Where the City Stands*, NPR (June 9, 2020), <https://www.npr.org/local/305/2020/06/09/872859084/here-s-what-black-lives-matter-d-c-is-calling-for-and-where-the-city-stands> [<https://perma.cc/BY5T-DXJ6>].

only addresses the first piece in the pipeline: the entry of African Americans into the criminal justice system. And nowhere in the United States does systemic racial injustice persist more than within our criminal justice system.³⁴ Attention and reforms are badly needed there too, and they are needed urgently. Thus, we now turn our attention to the inner workings of the system and one of the last and most important pieces in the pipeline: criminal sentencing.

C. *The Acute Part of the Problem: Sentencing*

It has always been morally unacceptable to not redress the discrimination faced by African Americans in the criminal justice system. It is now no longer socially and politically acceptable for this to occur. There is an urgent need to implement measures that will demonstrably ameliorate the disproportionate burden shouldered by African Americans in the criminal justice system.

The criminal justice system has a number of stages. Sentencing is the sharp end of this process because it is the step where the state imposes hardships on offenders. It is in this forum where the community imposes its most coercive measures against its citizens. The most serious criminal sanction is imprisonment—with the obvious exception of capital punishment, which is rarely utilized.³⁵ Failings at the sentencing stage have resulted in African Americans being imprisoned at rates more than three times higher than the rest of the community.³⁶ More than one in fifty African Americans are currently incarcerated.³⁷

34. See generally NAZGOL GHANDNOOSH, SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM (2015), <https://sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf> [<https://perma.cc/D5AR-KS6N>].

35. The United States is the only developed nation apart from Japan that still imposes the death penalty. See *Japan Executes First Foreigner in Years, a Chinese Man Who Killed a Family*, REUTERS, <https://www.reuters.com/article/us-japan-deathpenalty/japan-executes-first-foreigner-in-years-a-chinese-man-who-killed-a-family-idUSKBN1YU07N> [<https://perma.cc/YL2B-KM2W>] (Dec. 26, 2019, 12:03 AM). The death penalty, because of its extreme nature, raises for discussion a number of different human rights and normative considerations, and can only be examined in the context of a stand-alone dissertation.

36. See *infra* Part II.

37. See *infra* Part II.

This Article proposes a two-pronged solution to this injustice. The most acute part of the solution involves releasing African American offenders early from prison. African Americans who have served three-quarters or more of their sentence should be immediately released from prison. Ostensibly, this might seem like a drastic approach. However, the proposal is consistent with reforms that have been introduced relatively recently in the U.S. federal jurisdiction. The First Step Act was passed in December 2018 and has facilitated the early release of thousands of offenders from federal prisons.³⁸ Many Black offenders have been part of the early release process; however, this has only arisen incidentally when they have happened to fit the general early release criteria that has been established by the Act. In this Article, we propose that it is necessary to ensure that more targeted reforms are implemented to achieve the objective of immediately reducing the excessive incarceration levels of African Americans. An important safeguard to this proposal is that prisoners who are released early and who may constitute a risk to public safety should be monitored by means of electronic surveillance.³⁹

In addition to this, a number of broad-ranging measures should be introduced to negate the more subtle and wide-ranging factors that account for the discrimination that African Americans face in the sentencing system. These measures need to focus on the reasons underpinning the overrepresentation of African Americans in prisons and jails. To this end, three additional reforms are proposed.⁴⁰ The first is that less weight should be accorded to prior convictions when determining the appropriate sanction that should be imposed by sentencing courts. It is unjust that offenders should receive a sizeable

38. *See infra* Part IV.

39. *See infra* Part IV.

40. Two of these proposals (less weight accorded to prior convictions and a sentencing discount) were first raised by one of us. *See generally* Mirko Bagaric, *Three Things That a Baseline Study Shows Don't Cause Indigenous Over-Imprisonment; Three Things That Might but Shouldn't and Three Reforms That Will Reduce Indigenous Over-Imprisonment*, 32 HARV. J. ON RACIAL & ETHNIC JUST. 103 (2016) [hereinafter Bagaric, *Three Things*]; Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 LAW & INEQ. 1 (2015) [hereinafter Bagaric, *Rich Offender, Poor Offender*] (discussing the connection between race and education). The proposals in this Article build on the reform proposals from these two prior articles, including the new proposal of releasing all African Americans who have served at least three-quarters of their prison sentence.

recidivist loading for offenses for which they have already been sentenced. This reform proposal applies to all offenders but will disproportionately benefit African Americans given that they typically have more prior convictions than other offenders. Secondly, African Americans should receive a numerical discount, in the order of 25%, when they are sentenced. This is necessary to negate the unconscious bias of many judges that often results in African Americans receiving harsher prison terms than other offenders. Third, and the most wide-ranging proposal in this Article, it is imperative that African Americans have increased opportunities to enhance their level of educational attainment. The empirical data establishes there is a striking connection between educational level and involvement in the criminal justice system. Individuals with a college education are ten times less likely to be incarcerated.⁴¹

The reforms suggested in this Article also have implications for other sentencing systems, and in particular that of Australia, where there are many sentencing parallels with the United States.

The Black Lives Matter movement gained momentum internationally following the killing of George Floyd, including in Australia. This is perhaps not surprising given that the burdens imposed by the Australian criminal justice system on Indigenous Australians are similar to the problems faced by African Americans.⁴² There is no pattern of systematic killing of Indigenous Australians by police, but Indigenous Australians are imprisoned at a much higher rate than the rest of the community. In fact, in relative terms, they are imprisoned at a much higher rate than African Americans, and they are possibly the most mass incarcerated race on earth. Indigenous Australians are imprisoned at a rate fourteen times higher than the rest of the Australian community.⁴³ Incredibly, this in fact dwarfs the level of overrepresentation of African Americans in U.S. prisons and jails.

41. *See infra* Part IV.

42. *See infra* Part II.

43. *See infra* Part II.

The sentencing systems in the United States and Australia differ considerably in that the courts in Australia have largely unfettered discretion when sentencing offenders while sentences are much more prescriptive in the United States.⁴⁴ However, it is illuminating that in both contexts the most socially disadvantaged groups in the community are the most incarcerated. This comparison is important because it debunks the proposition that a tenable solution to reducing African American prison numbers is to confer greater discretion on courts in the United States in sentencing offenders. The only path forward to ensure reductions in the incarceration levels for African Americans and Indigenous Australians is by implementing binary measures that will lower these numbers. As it transpires, the same reform recommendations will be effective in both the United States and Australia.

In the Part I, we provide an overview of the manner in which African Americans and Indigenous Australians are treated in their respective criminal justice systems. This is followed in Part II by an overview of the frameworks of the respective systems. An explanation of the reasons for the disproportionate burdens on African Americans and Indigenous Australians is set out in Part III. Solutions to the problems are discussed in Part IV. The key reform recommendations are summarized in the Conclusion.

I. THE (DISPROPORTIONATE) MASS INCARCERATION OF AFRICAN AMERICANS AND INDIGENOUS AUSTRALIANS

The United States imprisons more of its people than any other country.⁴⁵ The prison population is receding, but slowly.⁴⁶ In the United States, incarcerated offenders are held in two forms of detention: prisons and jails. Prisons are long-term confinement institutions run by state or federal governments, which hold offenders

44. *See infra* Part II.

45. *See generally* ROY WALMSLEY, INST. FOR CRIM. POL'Y RSCH., WORLD PRISON POPULATION LIST (2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf [<https://perma.cc/VS4U-37DW>] (providing statistics for prison populations by nation).

46. *See infra* Part II.

with sentences that are typically longer than one year in duration.⁴⁷ Jails are temporary detention facilities, operated by a sheriff, police chief, or city or county administrator, and generally hold offenders who are sentenced to a term of one year or less.⁴⁸

In March 2020, approximately 1,517,000 Americans were incarcerated in state and federal prisons and an additional 631,000 prisoners were held in local jails, equating to a total of nearly 2,300,000 incarcerated people.⁴⁹ Total incarceration numbers peaked at 2,310,000 in 2007.⁵⁰ Leading up to 2007, prison numbers increased nearly four-fold in four decades.⁵¹ The incarceration rate in the United States has dropped in recent years and is currently at its lowest level since 1995–1996.⁵² Between 2006 and 2018, the rate fell by 17% from 666 prisoners per 100,000 residents who were incarcerated in federal and state prisons in 2006, to 555 sentenced prisoners per 100,000 residents in 2018.⁵³ Between 2017 and 2018, the total prison population decreased by 1.6%.⁵⁴ Notwithstanding the overall trend toward decarceration, this change has occurred slowly. At the current pace of decarceration, it is estimated that it will take up to forty years to return to the rate of imprisonment in 1971.⁵⁵

47. DANIELLE KAEBLE & MARY COWHIG, U.S. DEP'T OF JUST., NCJ 251211, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 5 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [<https://perma.cc/AWA3-4ATW>].

48. *Id.*

49. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/8UR2-27EP>].

50. Press Release, Bureau of Just. Stat., U.S. Dep't of Just., Prison and Jail Incarceration Rates Decreased by More than 10% from 2007 to 2017 (Apr. 25, 2019), <https://bjs.ojp.gov/content/pub/press/p17ji17pr.pdf> [<https://perma.cc/7XTH-XV3A>].

51. Albert R. Hunt, *A Country of Inmates*, N.Y. TIMES (Nov. 20, 2011), <https://www.nytimes.com/2011/11/21/us/21iht-letter21.html> [<https://perma.cc/9N4F-L38L>].

52. CARSON, *supra* note 1; see also John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [<https://perma.cc/YHX5-Z2QZ>].

53. Gramlich, *supra* note 52.

54. CARSON, *supra* note 1.

55. Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. FOR JUST. (Aug. 6, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem> [<https://perma.cc/24NT-A2HH>]. 1971 was the last time the crime rate was as it is today. *Id.*

The reductions in incarceration rates are not consistent across all social groups. African Americans experienced the highest decline in prison numbers, with a 34% drop since 2006, compared to a reduction in the incarceration rate of 26% of Hispanic and 17% of white residents over the same period.⁵⁶ Nevertheless, the gap between the number of African American inmates and other prisoners remains disproportionately wide. In March 2020, African Americans made up approximately 40% of the incarcerated population, yet they made up only about 13% of the total U.S. population.⁵⁷ The likelihood of imprisonment of African American males changed depending on their age; for instance, about one in twenty African American males between ages thirty-five and thirty-nine were imprisoned in 2018.⁵⁸ There has been a similar trend in jails; despite an overall decrease in the total jail population, the rate of incarceration of African Americans in jails is still nearly four times as high as that of white and Hispanic individuals as of mid-2018.⁵⁹

The incarceration rate in Australia is 213 prisoners per 100,000 adults.⁶⁰ While this is much lower than in the United States, there are three notable similarities between sentencing outcomes and objectives in these two countries. First, the Australian prison rate has more than tripled in the past three decades.⁶¹ This is a striking parallel with the situation in the United States, where (as noted *supra*) the prison rate quadrupled in the four decades leading up to 2007. Second, the sentencing objectives in Australia are the same as those in the United States—namely, community protection, general deterrence, specific deterrence, retribution, and rehabilitation.⁶²

56. Gramlich, *supra* note 52.

57. See Sawyer & Wagner, *supra* note 49.

58. Gramlich, *supra* note 52.

59. ZHEN ZENG, U.S. DEP'T OF JUST., NCJ 253044, JAIL INMATES IN 2018, at 4 (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf> [<https://perma.cc/Q6MY-N2PN>].

60. *Corrective Services, Australia*, AUSTL. BUREAU OF STAT. (June 6, 2021), <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0> [<https://perma.cc/VLL5-S9F4>].

61. Katharine Murphy, *Australia Entering 'Second Convict Age' As Imprison Rates Soar*, THE GUARDIAN (Aug. 25, 2019, 2:00 PM), <https://www.theguardian.com/australia-news/2019/aug/26/australia-entering-second-convict-age-as-imprisonment-rates-soar>.

62. See generally Mirko Bagaric et al., *United States Sentencing Developments: The World's*

Lastly, the sentencing outcomes in these two countries have resulted in prison populations that disproportionately comprise of individuals from the most socially and economically disadvantaged communities: African Americans and Indigenous Australians.⁶³ In Australia, Indigenous Australians are imprisoned at approximately fifteen times the rate of other Australians.⁶⁴ Indigenous Australians comprise only 2% of the Australia population, yet constitute 28% of inmates in Australian prisons. In absolute terms, African Americans and Indigenous Australians have strikingly similar rates of incarceration, at around 2,000 per 100,000 population.⁶⁵

Prior to considering reform proposals to ameliorate this situation, we provide an overview of the sentencing systems in the United States and Australia.

Largest Mass Incarcerator Goes into Decarceration Mode, 43 CRIM. L.J. 130 (2019).

63. In *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, it is noted that:

It is manifestly clear that in Australia the Indigenous community is the worst off according to a large range of measures of flourishing. The Indigenous have the lowest life expectancy in Australia, with the gap between Indigenous males and non-Indigenous males estimated at 11.5 years, and 9.7 years for females. In 2012, infant mortality was almost twice as high for Indigenous infants compared to non-Indigenous infants. The rate of high school completion for non-Indigenous students was 81%, but only 51% for Indigenous students. Indigenous Australians are far less likely to be employed, with their unemployment rate at 17% compared to 4% for non-Indigenous Australians. The Indigenous homeless rate is fourteen times that of non-Indigenous Australians, and the average income for Indigenous Australians is 0.7 that of non-Indigenous Australians. A similar situation of relative disadvantage exists in the United States in relation to African Americans. In relation to income and poverty measures, the bleakness of the situation is highlighted by a report noting that the wealth disparity has not improved over the past fifty years and is in fact worsening. The unemployment rate of African Americans is approximately double that of White Americans. The median household income of African Americans is \$32,068, while for White Americans it is \$54,620. The African American poverty rate is nearly three times that of White Americans: 28% compared to 10%. White Americans live, on average, 3.8 years longer than African Americans. The high school completion rate of African Americans is approximately 62% compared to 80% for Whites.

Bagaric, *Rich Offender, Poor Offender*, *supra* note 40, at 6–7 (footnotes omitted).

64. *Id.* at 8.

65. ANDREW LEIGH, *THE SECOND CONVICT AGE: EXPLAINING THE RETURN OF MASS IMPRISONMENT IN AUSTRALIA* 31 (2020).

II. OVERVIEW OF THE SENTENCING SYSTEM

To contextualize the recommendations in the Article, we explain the frameworks of the sentencing systems in the United States and Australia.

A. *The United States' Sentencing Framework*

Sentencing is the means by which the states impose sanctions on criminal offenders. The U.S.' federal jurisdiction and each of the states have different sentencing systems;⁶⁶ however, the broad objectives in each jurisdiction (namely, community protection, general deterrence, specific deterrence, rehabilitation, and retribution) are similar.⁶⁷ The most important of these aims is community protection.⁶⁸ This is illustrated by the fact that prescriptive sentencing laws that impose harsh penalties apply to some degree in all American jurisdictions.⁶⁹

The U.S. Sentencing Commission's (USSC) *Guidelines Manual* (*Guidelines*) provides a good example of the way in which a prescriptive sentencing system operates. Pursuant to the *Guidelines*, the penalties are determined principally by two considerations, namely the offender's prior criminal history and the perceived

66. Sentencing (and more generally, criminal law) in the United States is mainly the province of the states. *See* United States v. Morrison, 529 U.S. 598, 613 (2000) (citing United States v. Lopez, 514 U.S. 549, 564 (1995)).

67. The sentencing goals that they share are community protection (also known as incapacitation), general deterrence, specific deterrence, rehabilitation, and retribution. *See* U.S. SENT'G COMM'N, UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL 2 (2018), <https://www.usc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf> [<https://perma.cc/6WDA-2UT8>].

68. NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 68 (Jeremy Travis et al. eds., 2014).

69. NAT'L RSCH. COUNCIL, *supra* note 68, at 325. Twenty of the United States' jurisdictions in fact have extensive guideline sentencing systems: Alabama, Kansas, Oregon, Alaska, Maryland, Pennsylvania, Arkansas, Massachusetts, Tennessee, Delaware, Michigan, Utah, District of Columbia, Minnesota, Virginia, Federal (U.S. courts), North Carolina, Washington, Florida, and Ohio. *See* Richard S. Frase & Kelly Lyn Mitchell, *What Are Sentencing Guidelines?*, U. MINN.: ROBINA INST. CRIM. L. & CRIM. JUST. (Mar. 21, 2018), <http://sentencing.umn.edu/content/what-are-sentencing-guidelines> [<https://perma.cc/B2VL-ZPEQ>]. For the purposes of clarity, harsh prescriptive sentencing laws come under the terminology of fixed or standard penalties in this Article.

severity of the crime.⁷⁰ There are also dozens of other factors that can influence the sanction that is imposed.⁷¹ Additionally, courts can go outside the scope of a guideline penalty range where mitigating or aggravating considerations, in the form of “adjustments” and “departures,”⁷² are applicable. While, the *Guidelines* are only advisory,⁷³ approximately half of all sentences handed down are within the range set out in the *Guidelines*.⁷⁴ However, sentencing practices are by no means uniform. A 2019 report released by the USSC noted a significant difference in sentencing patterns across the thirty cities that were analyzed.⁷⁵ The most telling finding from the report was that “[i]n most cities, the length of a defendant’s sentence increasingly depends on which judge in the courthouse is assigned to his or her case.”⁷⁶ Thus, although the *Guidelines* are relatively prescriptive, there remains ample scope for the individual sentiments of judges to impact the sentence that is imposed.⁷⁷

B. *The Australian Sentencing Framework*

At the broadest level, the Australian sentencing system is similar to that in the United States because it seeks to achieve the same key

70. See Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1113 (2008).

71. AMY BARON-EVANS & PAUL HOFER, NAT’L SENT’G RES. COUNS., LITIGATING MITIGATING FACTORS: DEPARTURES, VARIANCES, AND ALTERNATIVES TO INCARCERATION, at i (2010), https://static1.squarespace.com/static/551cb031e4b00eb221747329/t/5883e40717bffc09e3a59ea1/1485038601489/Litigating_Mitigating_Factors.pdf [<https://perma.cc/YYQ6-KGUW>].

72. *Id.* Adjustments are considerations that increase or decrease a penalty by a designated amount. These are set out in Chapter 3 of the U.S. Sentencing Guidelines. U.S. SENT’G COMM’N, *supra* note 67. Departures more readily enable courts to impose a sentence outside the applicable guideline range. *Id.* at 457; see also *id.* § 1A4(b).

73. *United States v. Booker*, 543 U.S. 220, 245 (2005). In *Booker*, the Supreme Court held that aspects of the Guidelines that were mandatory were contrary to the Sixth Amendment right to a jury trial. *Id.*

74. U.S. SENT’G COMM’N, ANNUAL REPORT 2016 (2016), <http://www.ussc.gov/about/annual-report-2016> [<https://perma.cc/RCT7-XKW4>]; U.S. SENT’G COMM’N, ANNUAL REPORT 2017 (2017), <http://www.ussc.gov/about/annual-report-2017> [<https://perma.cc/MJD5-MVAY>]; U.S. SENT’G COMM’N, ANNUAL REPORT 2018 (2018), <https://www.ussc.gov/about/annual-report-2018> [<https://perma.cc/B7R4-A3UD>].

75. U.S. SENT’G COMM’N, INTRA-CITY DIFFERENCES IN FEDERAL SENTENCING PRACTICES 7 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190108_Intra-City-Report.pdf [<https://perma.cc/6UVV-MJRZ>].

76. *Id.*

77. See *infra* Part III.

objectives in the form of community protection, general deterrence, specific deterrence, rehabilitation, and retribution. A key contrast with the sentencing system in the United States is that there are few prescriptive penalties in Australia.⁷⁸ Rather, Australia sentencing is largely a discretionary process. The methodology adopted in Australia for determining sentences is known as the “instinctive synthesis.”⁷⁹ This term was first used by the Full Court of the Supreme Court of Victoria in *R v Williscroft*, where the court stated: “Now, ultimately, every sentence imposed represents the sentencing judge’s instinctive synthesis of all the various aspects involved in the punitive process.”⁸⁰

In applying the instinctive synthesis, judges identify the relevant sentencing considerations, prioritize them, and then balance them against one another to ascertain the appropriate sanction. In doing so, they are not permitted to state how much weight they accorded to any particular sentencing factor.⁸¹ Though this process has been criticized as lacking transparency and consistency,⁸² it remains the orthodox approach for reaching sentencing decisions.

The incarceration numbers and patterns in the United States and Australia demonstrate that, despite the fact that neither systems have formal discriminatory elements to them and irrespective of whether a sentencing system is largely mandatory or discretionary, mass incarceration and disproportionate numbers of disadvantaged people in prison can result nonetheless.

78. See generally Mirko Bagaric, *An Argument for Uniform Australian Sentencing Law*, 37 AUSTL. B. REV. 40 (2013).

79. *Id.*

80. [1975] VR 292, 300 (Austl.).

81. The only exceptions are the discounts for pleading guilty and cooperating with authorities. See Mirko Bagaric, *Abolishing the Curious Sentencing Anomaly Between the Voluntary Disclosure of One’s Own Offending and Assisting Authorities with the Offending of Others*, 43 MONASH U. L. REV. 299, 299–330 (2017).

82. See, e.g., Samantha Jeffries & Christine Bond, *Does Indigeneity Matter? Sentencing Indigenous Offenders in South Australia’s Higher Courts*, 42 AUSTL. & N.Z. J. CRIMINOLOGY 47, 49 (2009). See generally T. VINSON ET AL., CRIMINOLOGY RSCH. COUNCIL, ACCOUNTABILITY AND THE LEGAL SYSTEM: DRUG CASES TERMINATING IN THE DISTRICT COURT 1980–1982 (1986); Austin Lovegrove, *An Empirical Study of Sentencing Disparity Among Judges in an Australian Criminal Court*, 33 APPLIED PSYCH. 161 (1984).

III. REASONS FOR THE MASS INCARCERATION OF AFRICAN AMERICANS AND INDIGENOUS AUSTRALIANS

A. *Extent of the Problem*

There are a number of reasons that explain the disproportionate number of African Americans in prisons and jails. The first is unconscious bias by judges.⁸³ Studies have established that offenders from minority groups, and especially African Americans, often receive harsher sanctions than white offenders who have committed similar crimes.⁸⁴ By way of example, one study that analyzed sentences handed down on more than 77,000 offenders in the United States established that Black offenders received prison terms that were 12% longer than those of white offenders with similar criminal histories and who committed the same offenses.⁸⁵

Similar findings emerged from a study undertaken by a Working Group on Racial Disparity, which looked at sentences imposed pursuant to the *Guidelines*.⁸⁶ The research established that between 2005 and 2012,⁸⁷ Black offenders received prison terms approximately 5% to 10% longer than the prison terms imposed on white offenders who had committed similar crimes.⁸⁸ The report noted:

We are concerned that racial disparity has increased over time since *Booker* [which held that the *Guidelines* were advisory not mandatory]. Perhaps judges, who feel increasingly emancipated from their guidelines restrictions,

83. For a more detailed discussion regarding unconscious bias in judges, see Mirko Bagaric, *Sentencing: From Vagueness to Arbitrariness: The Need to Abolish the Stain That Is the Instinctive Synthesis*, 38 U. NEW SOUTH WALES L.J. 76, 76–109 (2015).

84. Rose Matsui Ochi, *Racial Discrimination in Criminal Sentencing*, 24 JUDGES J. 6, 8 (1985).

85. David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 350 (2012); Ronald S. Everett & Roger A. Wojtkiewicz, *Difference, Disparity, and Race/Ethnic Bias in Federal Sentencing*, 18 J. QUANTITATIVE CRIMINOLOGY 189, 198 (2002).

86. William Rhodes et al., *Federal Sentencing Disparity: 2005-2012*, at 1–2 (Bureau of Just. Stat. Working Paper Series, Working Paper No. 2015:01) (documenting previous studies in the United States, which support the conclusion that unconscious bias causes racial disparity in sentencing).

87. *Id.* at 23.

88. *Id.* at 41.

are improving justice administration by incorporating relevant but previously ignored factors into their sentencing calculus, even if this improvement disadvantages [B]lack males as a class. But in a society that sees intentional and unintentional racial bias in many areas of social and economic activity, these trends are a warning sign. It is further distressing that judges disagree about the relative sentences for white and [B]lack males because those disagreements cannot be so easily explained by sentencing-relevant factors that vary systematically between [B]lack and white males. . . . We take the random effect as strong evidence of disparity in the imposition of sentences for white and [B]lack males.⁸⁹

Even though imprisonment rates for Black offenders have declined, they still end up spending more time behind bars than their white counterparts.⁹⁰ According to a 2017 study conducted by the USSC, Black men who committed the same crime as white men received, on average, a sentence nearly 20% longer than the one given to white men.⁹¹ A 2014 University of Michigan Law study determined that insofar as mandatory minimum sentences are concerned, “the presence of a mandatory minimum is positively correlated with both sentence length and being [B]lack,” where all other factors are equal.⁹² Moreover, Black offenders

89. *Id.* at 68; Elizabeth Johnson et al., *Black Defendants Get Longer Sentences in Treasure Coast System*, DAYTONA BEACH NEWS-J., <http://www.news-journalonline.com/news/20161218/black-defendants-get-longer-sentences-in-treasure-coast-system> [https://perma.cc/AZ8Y-DYZ3] (Dec. 19, 2016, 1:09 PM).

90. Weihua Li, *The Growing Racial Disparity in Prison Time*, THE MARSHALL PROJECT (Dec. 3, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/12/03/the-growing-racial-disparity-in-prison-time> [https://perma.cc/9JFK-2NH5].

91. Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime As a White Person, Study Finds*, WASH. POST (Nov. 16, 2017) (citing GLENN R. SCHMITT ET AL., U.S. SENT’G COMM’N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf [https://perma.cc/G9P2-65QM]), <https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/> [https://perma.cc/3BUT-WS76].

92. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1345 (2014).

disproportionately serve sentences of life, life without parole, and “virtual life sentences” (meaning sentences of fifty years or more).⁹³ Considering only virtual life sentences, more than half of that population is African American.⁹⁴ As of 2016, Black people made up 48% of this prison population, while white people made up 32%, and Hispanics made up 16%.⁹⁵ On death row, Black people and white people each make up roughly 42% of the population.⁹⁶ However, Black people are still overrepresented on death row because they only make up about 13% of the overall population, whereas white people make up about 60% of the population.⁹⁷ The fact that roughly the same percentage of each race exists on death row further shows the disparity between the two races. Black men and women are also overrepresented in solitary confinement. Black men make up 46% of the solitary population (compared to 43% of the total prison population), while Black women make up 40% of the solitary population (compared to only 23% of the total prison population).⁹⁸

In Australia, there exists a similar pattern of harsher penalties being imposed on Indigenous offenders. It has been shown that the main reason for the overrepresentation of Indigenous offenders in prison relates to the decision of whether to impose a prison term. In this regard, Indigenous offenders are more than twice as likely to be sentenced to prison than non-Indigenous offenders when they are sentenced.⁹⁹

The fact that sentencing decisions involve harsher penalties against certain groups in the community stems in part from the broader reality that discretionary decisions will invariably lead to sentences being based on the personal sentiment of judges. All human beings have preferences and biases. Judges, like others, view themselves as

93. See Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POLICY INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [https://perma.cc/3FBH-2FEX].

94. SENTENCING PROJECT, ANNUAL REPORT 2019, at 6 (2019), <https://www.sentencingproject.org/wp-content/uploads/2020/03/Annual-Report-2019.pdf> [https://perma.cc/T5D6-TTR8].

95. Sawyer, *supra* note 93.

96. *Id.*

97. *Id.*

98. *Id.*

99. Bagaric, *Three Things*, *supra* note 40.

fair and objective, but they have biased blind spots with respect to their own decision-making.¹⁰⁰ Numerous organizations and studies have called attention to this blind spot.

B. *Judicial Unconscious Bias*

The American Bar Association (ABA) has identified judicial bias as a significant issue. In 2016, the ABA gathered fifty federal and state judges for a workshop titled *Implicit Bias and De-Biasing Strategies*, where Judge Donald of the U.S. Circuit Court of Appeals for the Sixth Circuit told attendees that “all of us are impacted by biases and stereotypes and other cognitive functions that enable us to take shortcuts in what we do.”¹⁰¹ Retired Judge Posner of the U.S. Circuit Court of Appeals for the Seventh Circuit agrees. Posner, in his influential book *How Judges Think*, noted that humans “use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others.”¹⁰² The problem here is two-fold. First, people tend to “assume that their judgments are uncontaminated” by unconscious bias.¹⁰³ Second, “judges are inclined to make the same sorts of favorable assumptions about their own abilities that non-judges do.”¹⁰⁴ But the truth is that *all* people are shaped by their own life experience and “are more favorably disposed to the familiar, and fear or become frustrated with the unfamiliar.”¹⁰⁵ Thus the notions of human introspection and behavior that Posner described mean judges too are susceptible to contamination and an exaggerated sense of objectivity. Indeed, the ABA has informed judges that unconscious biases “predict and

100. See generally Jennifer K. Robbenolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 MONITOR ON PSYCH. 24 (2010).

101. Terry Carter, *Implicit Bias Is a Challenge Even for Judges*, A.B.A. J. (Aug. 5, 2016, 10:58 PM), http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges [https://perma.cc/M96W-S5DL].

102. RICHARD A. POSNER, *HOW JUDGES THINK* 121 (2010).

103. Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 185, 190 (Thomas Gilovich et al. eds., 2002).

104. Jeffrey J. Rachlinksi et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1228 (2009).

105. Ochi, *supra* note 84, at 53.

determine our actions and decisions more than our explicit values” do.¹⁰⁶

The evidence of judicial bias is significant. Many personal characteristics have been shown to influence sentencing. In one study, 77% of physically unattractive people received a prison term compared with 46% of attractive defendants for the same offense.¹⁰⁷ Put another way, unattractive people are roughly 50% more likely to be sentenced than attractive people. Gender is another sentence influencer. One U.S. study examined over 20,000 records indicating more lenient treatment of women than of men in terms of sentence length for similar offenses.¹⁰⁸

And judicial bias extends beyond factors such as physical appearance, gender, and race. Victim traits also impact criminal sentences. In one study, Black offenders received heavier penalties when the victim was white than when the victim was Black.¹⁰⁹ This presumably happened because “the judges were also [w]hite, and their in-group or worldview was more threatened by criminal conduct against persons from their in-group.”¹¹⁰ Research has also shown that judges are influenced at sentencing by their political preferences, by their comfort or stress level when imposing a sentence, and by numbers they are exposed to in the form of recommended or requested sentence lengths.¹¹¹

Moreover, socioeconomic status can trigger judicial bias. One analysis of child custody cases found that judges favored wealthy litigants to impoverished ones, resulting in worse outcomes for low-income individuals.¹¹² That means worse outcomes for African

106. Carter, *supra* note 101.

107. John E. Stewart, *Defendant’s Attractiveness As a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. APPLIED SOC. PSYCH. 348, 354 (1980).

108. Darrell Steffensmier & Stephen Demuth, *Does Gender Modify the Effects of Race-Ethnicity on Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants*, 22 J. QUANTITATIVE CRIMINOLOGY 241, 241 (2006).

109. Siegfried L. Sporer & Jane Goodman-Delahunty, *Disparities in Sentencing Decisions*, in SOCIAL PSYCHOLOGY OF PUNISHMENT OF CRIME 379, 390 (Margit E. Oswald et al. eds., 2009).

110. *Id.*

111. See Bagaric, *supra* note 83.

112. See generally Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013).

Americans, who as a population are disproportionately poor. In the United States, 39% of African American children and adolescents are living in poverty, more than twice the 14% poverty rate for their white counterparts; African American unemployment rates are approximately double that of white Americans; and African American men who work full-time earn only 72% of the average earnings of comparable white men.¹¹³

Thus, while there are no formal sentencing laws that make race a consideration in sentencing, it is clear that the manner in which courts often apply these laws leads to heavier sanctions being imposed on African Americans and Indigenous Australians.

C. Disproportionate Weight Accorded to Prior Convictions

The second reason that offenders from certain groups receive harsher penalties is structural and relates to the weight accorded to prior convictions in the sentencing calculus. The prior criminal history of an offender is in fact the second most important sentencing consideration, after offense seriousness, in all common law countries.¹¹⁴ As we saw *supra* in Part II, prior criminal history is a very important consideration in sentencing grids like the *Guidelines*. The impact of this factor is very important given that most offenders have at least one prior conviction.¹¹⁵

The burden of a heavy emphasis on prior convictions is most heavily felt by disadvantaged offenders who have more prior convictions and hence are disproportionately subjected to a recidivist sentencing premium.¹¹⁶ For example, an analysis of California

113. *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS'N, <https://www.apa.org/pi/ses/resources/publications/minorities> [<https://perma.cc/2UAJ-49UL>].

114. Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 304 (1997) (discussing the role of prior convictions in sentencing). The recidivist premium extends beyond the common law world to countries such as Korea and Israel.

115. See Richard S. Frase, *Prior-Conviction Sentencing Enhancements: Rationales and Limits Based on Retributive and Utilitarian Proportionality Principles and Social Equality Goals*, in PREVIOUS CONVICTIONS AT SENTENCING: THEORETICAL AND APPLIED PERSPECTIVES 117, 133 (Julian V. Roberts & Andrew von Hirsch eds., 2010).

116. Frase, *supra* note 115, at 132; Brett E. Garland et al., *Racial Disproportionality in the American Prison Population: Using the Blumstein Method to Address the Critical Race and Justice Issue of the 21st Century*, 5 JUST. POL'Y J. 1, 5 (2008). See generally Todd R. Clear, *The Effects of High*

correctional statistics found a significant racial disparity in sentencing with African Americans being sent to prison more than thirteen times as often as whites.¹¹⁷ In Washington, it emerged that African Americans who are about 13% of the state's population were approximately 40% of three-strikes casualties.¹¹⁸

A similar picture emerges in Australia. The portion of prisoners who had been jailed previously is 59%; however, it is 52% for non-Indigenous offenders and 77% for Indigenous offenders.¹¹⁹ One possible explanation for this is that Indigenous offenders have more prior convictions. A Victorian study showed the Indigenous offenders that were imprisoned had on average 3.9 prior convictions, compared to 2.9 for other offenders.¹²⁰

Thus, there are at least two reasons that explain the over-imprisonment of African American and Indigenous Australian offenders: the unconscious sentiments of judges and the substantial weight attributed to prior convictions in the sentencing calculus. Reforms that are needed to reduce the undue carceral burden on African Americans and Indigenous Australians need to address these considerations and a number of other matters, to which we now turn.

IV. SOLUTIONS TO THE OVER-IMPRISONMENT OF AFRICAN AMERICANS AND INDIGENOUS AUSTRALIANS

A. *Immediate Reduction of Incarceration Numbers: Release African Americans and Indigenous Australian Inmates Who Have Served Three-Quarters of Their Sentence*

There have been a large number of proposals advanced to ameliorate the disadvantage experienced by African American and

Imprisonment Rates on Communities, 37 CRIME & JUST. 97 (2008).

117. Kelly McMurry, 'Three-Strikes' Laws Proving More Show than Go, 33 TRIAL 12, 12 (1997).

118. *Id.* at 13.

119. AUSTRAL. BUREAU OF STAT., 4517.0 PRISONERS IN AUSTRALIA tbl.8 (2014).

120. *Id.* These findings are consistent with earlier research. For example, in 2006, 75% of Indigenous offenders in a sample had prior convictions, compared to 42% of non-Indigenous offenders; further, Indigenous offenders were more likely to have five or more prior convictions (22% compared to 7%). Lucy Snowball & Don Weatherburn, *Indigenous Over-Representation in Prison: The Role of Offender Characteristics*, 99 CONTEMP. ISSUES CRIME & JUST. 1, 13 (2006).

Indigenous Australian offenders in the criminal justice system.¹²¹ None have proven to be effective, and the situation is now desperate. A two-pronged solution is necessary. The first part calls for immediate action. The second relates to more durable reform. We commence with the immediate reforms.

All offenders who have served at least three-quarters of their term should be released. This might ostensibly seem crude, but it is in fact moderate and empirically based. The concept of retrospectively reducing sentences to provide for the early release of prisoners is ostensibly radical. But if it is done for a principled reason and in an organized manner, it can be effective. This is in fact precisely what is currently occurring with thousands of federal prisoners pursuant to the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (First Step) Act.

The First Step Act, which commenced in December 2018, has resulted in a significant reduction in federal prison numbers.¹²² The Act accomplishes this by various mechanisms that reduce the punitiveness of sentencing. A number of offenses, including drug crimes, attract reduced sanctions; the manner in which criminal history impacts sentences has been changed and more prisoners are eligible for early release.¹²³ “Low risk” offenders are eligible for home detention once they have served the majority of their sentence.¹²⁴ Further, offenders over sixty years of age who have

121. For example, the Royal Commission into Aboriginal Deaths in Custody was established in 1987, and in 2015, the Australian Senate referred to a legislative Committee a matter for inquiry and report regarding “the reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles.” See PARLIAMENT OF AUSTRALIA, ABORIGINAL AND TORRES STRAIT ISLANDER EXPERIENCE OF LAW ENFORCEMENT AND JUSTICE SERVICES 1, 141 (2016), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/LegalAssistanceServices/Report [<https://perma.cc/3D7B-MDJC>].

122. *Press Release – President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer*, AM. PRESIDENCY PROJECT (Dec. 21, 2018), <https://www.presidency.ucsb.edu/documents/press-release-president-donald-j-trump-secures-landmark-legislation-make-our-federal> [<https://perma.cc/Q8YR-486J>].

123. Gina Martinez, *The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here’s How Their Lives Will Change*, TIME (Dec. 20, 2018, 4:21 PM), <http://time.com/5483066/congress-passes-bipartisan-criminal-justice-reform-effort/> [<https://perma.cc/EC36-LZT4>].

124. Brandon Sample, *The First Step Act Bill Summary Explained: A Comprehensive Analysis*, SENTENCING.NET (Dec. 19, 2018), <https://sentencing.net/legislation/the-first-step-act-2018-summary> [<https://perma.cc/LUZ3-NNA3>].

completed at least two-thirds of their sentences are also eligible to apply for “Elderly Home Detention.”¹²⁵ By early 2020, over 3,000 non-violent prisoners had already been released pursuant to the Act.¹²⁶ A further 2,471 prisoners had received sentence reductions, and approximately 2,000 were placed on home confinement.¹²⁷

A June 2019 USSC report indicated that roughly 91% of the individuals who received sentence reductions were Black.¹²⁸ Though the First Step Act has resulted in a large number of African American inmates being released early, this result is only incidental to the criteria for the Act.¹²⁹ Our proposal adopts the broad schema of the First Step Act but applies it solely to African American offenders. The rationale for the early release of African Americans and Indigenous Australians is even more powerful than that underpinning the First Step Act.

A 25% decrease in prison length is to some extent an arbitrary figure, but evidence from Australia shows that it is a meaningful discount and does not undermine the integrity of the sentencing system.¹³⁰ In Australia, pleading guilty to an offense attracts a numerical discount in the order of 25%. The evidence has shown that this is a meaningful discount because it encourages offenders to plead

125. *Id.*

126. See Press Release, U.S. Dep’t of Just., Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation (Jan. 15, 2020), <https://www.justice.gov/opa/pr/departement-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act> [https://perma.cc/Y5KR-JNM9].

127. *Id.*

128. U.S. SENT’G COMM’N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT 6 tbl.4 (June 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/201900607-First-Step-Act-Retro.pdf?utm_medium=email&utm_source=govdelivery [https://perma.cc/HQA3-FA2P]; see also Michael Harriot, *91 Percent of Inmates Freed by First Step Act Were Black. Should We Give Republicans Credit?*, THE ROOT (June 10, 2019, 5:56 PM), <https://www.theroot.com/91-percent-of-inmates-freed-by-first-step-act-were-black-1835387925>.

129. Harriot, *supra* note 128 (“Before we applaud the GOP for reducing sentencing disparities, one should understand that the provision that released these hundreds of [B]lack inmates was not included in the first draft of the First Step Act. It did not address the crack vs. cocaine disparity. It didn’t address drug sentencing. It didn’t address sentencing reform at all. These amendments were only included when dozens of organizations like the Color of Change and the Prison Policy Initiative urged Democratic lawmakers to vote against the bill unless Republicans agreed to include prison and sentencing reform initiatives.”).

130. Parsimony should be ignored as a recommendation because it is too obscure.

guilty, but at the same time, it is not so high that it impedes the achievement of other sentencing objectives.¹³¹

The main problem associated with the early release proposal is that some of these offenders present a risk to public safety. The risk of this, however, can and should be mitigated by electronic monitoring.¹³² As of 2016, approximately 130,000 inmates were subjected to electronic monitoring in the United States.¹³³ Though the current tally is unknown, “data from several cities—Austin, Texas; Indianapolis; Chicago; and San Francisco—show that this number continues to rise.”¹³⁴ There is no universal criteria for how a prisoner in the United States can receive electronic monitoring, but generally, it is only for offenders who have not committed a serious violent or sexual offense.¹³⁵ Electronic monitoring works by fixing a transmitter to the offender, which then sends a pulse to the local authorities, allowing them to monitor his or her position. GPS and radio frequency are both used to track the offender and trigger an alert when offenders leave their designated areas.¹³⁶ These tracking

131. See Bagaric, *Three Things*, *supra* note 40.

132. For an overview of the use of electronic monitoring in the United States, see MATTHEW DEMICHELE & B.K. PAYNE, U.S. DEP’T OF JUST., OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY: COMMUNITY CORRECTIONS RESOURCE 10–12, 14, 16–17, 20 (2009), https://www.appanet.org/eweb/docs/APPA/pubs/OSET_2.pdf [<https://perma.cc/QN75-RPWX>]; Mike Nellis, *Electronic Monitoring: Exploring the Commercial Dimension*, 58 CRIM. JUST. MATTERS 12, 12 (2008).

133. This number has grown from 53,000 in 2005. *Use of Electronic Offender-Tracking Devices Expands Sharply*, PEW CHARITABLE TRUSTS (Sept. 7, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply> [<https://perma.cc/BT8U-A3TY>]; see also *Street-Level Surveillance: Electronic Monitoring*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/pages/electronic-monitoring> [<https://perma.cc/XT39-9UQR>] (July 12, 2019) (noting that the number of electronic monitoring devices in use is about 125,000).

134. Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, PROPUBLICA (July 3, 2019, 5:00 AM), <https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt>.

135. See, e.g., WASH. REV. CODE § 9.94A.734 (2018); Juliet Lapidos, *You’re Grounded! How Do You Qualify for House Arrest?*, SLATE (Jan. 28, 2009, 6:05 PM), http://www.slate.com/articles/news_and_politics/explainer/2009/01/youre_grounded.html [<https://perma.cc/ZV5P-TL3E>]; Brandon Martin & Ryken Grattet, *Alternatives to Incarceration in California*, PUB. POL’Y INST. OF CAL. (Apr. 2015), http://www.pplic.org/main/publication_quick.asp?i=1146 [<https://perma.cc/P749-4FHD>]. See generally ROBERT PATTON, OKLA. DEP’T OF CORR., ELECTRONIC MONITORING PROGRAM (EMP) – OKLAHOMA (2014), <https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-06/op061002.pdf> [<https://perma.cc/9SGH-DWNU>]

136. PATTON, *supra* note 135, at 9.

devices are typically fitted into ankle bracelets and are charged by a twenty-four-hour battery. Monitors consist of a hard plastic shell containing a GPS chip and a fiber-optic cable, and are affixed to the offender's ankle with a rubber strap.¹³⁷ Any attempt to tamper with or remove the bracelet will result in a notification sent to the local enforcement authorities monitoring the device.¹³⁸

Tracking bracelets are six to ten times less expensive than typical imprisonment of offenders.¹³⁹ The benefits of GPS monitoring are not merely confined to direct cost savings compared to prison—several studies have shown that the reduction in recidivism levels of offenders through electronic monitoring is between 25% and 50%, far lower than the rates of imprisonment.¹⁴⁰

B. Long Term Solutions: 25% Reduction of Sentences, Reduced Weight to Prior Convictions, Negate Unconscious Bias, and Greater Emphasis on Education

1. Twenty-Five Percent Reduction in Sentences for African American and Indigenous Australian Offenders

The reform discussed *supra* would result in a meaningful reduction in the number of African Americans and Indigenous Australians in prison, yet there remains the problem of how to deal with systemic

137. Mark Morri, *New Electronic Anklets a Tougher Collar for Prisoners*, DAILY TEL. (Dec. 11, 2014, 10:41 AM), <http://www.dailytelegraph.com.au/news/nsw/new-electronic-anklets-a-tougher-collar-for-prisoners/news-story/c2e00e5356bbf7a8e7596d4285df4971> [<https://perma.cc/R9CG-KPJT>].

138. *See id.*

139. *Use of Electronic Offender-Tracking Devices Expands Sharply*, *supra* note 133. “A review in 2006 of the electronic monitoring of offenders found that the cost is about one-fifth that of imprisonment and ‘robust’ in detecting violations of the term of the order.” Mirko Bagaric et al., *Technological Incarceration*, 108 J. CRIM. LAW & CRIMINOLOGY 73, 100 n.139 (2018).

140. OFF. OF JUST. PROGRAMS, U.S. DEP’T OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM 2 (2011), <https://www.ojp.gov/pdffiles1/nij/234460.pdf> [<https://perma.cc/U5M4-6CZ5>]; *see also* RAFAEL DI TELLA & ERNESTO SCHARGRODSKY, CRIMINAL RECIDIVISM AFTER PRISON AND ELECTRONIC MONITORING 69 (2010); Fredrik Marklund & Stina Holmberg, *Effects of Early Release from Prison Using Electronic Tagging in Sweden*, 5 J. EXPERIMENTAL CRIMINOLOGY 41, 53, 59 (2009); Stuart S. Yeh, *The Electronic Monitoring Paradigm: A Proposal for Transforming Criminal Justice in the USA*, 4 LAWS 60, 64 (2015). *See generally* WILLIAM BALES ET AL., U.S. DEP’T OF JUST., A QUANTITATIVE AND QUALITATIVE ASSESSMENT OF ELECTRONIC MONITORING (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf> [<https://perma.cc/BL3Z-P8BR>].

racism in the criminal justice system against these cohorts of offenders.

The first prong to a longer-term approach requires the entrenchment of a standard penalty reduction for African Americans and Indigenous Australians.¹⁴¹ The rationale underpinning this recommendation has in fact already been endorsed by the High Court of Australia in relation to Indigenous offenders in its 2013 decision of *Bugmy v The Queen*; in that case, the appellant was an Aboriginal man who had experienced a deprived social and economic upbringing.¹⁴² In allowing the offender's appeal after he was sentenced to imprisonment for five years for assaulting a prison officer, the court stated that offenders who have been raised in disadvantaged circumstances could be less culpable because their development may have been impaired by adverse influences that, in turn, diminished their moral culpability.¹⁴³ It was held that social deprivation can constitute a basis for all offenders who have had a disadvantaged upbringing—not just Aboriginals.¹⁴⁴ The majority held that:

The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. . . . Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. . . . An offender's

141. This was first discussed by one of us in Bagaric, *Three Things*, *supra* note 40.

142. (2013) 249 CLR 571, 584 (Austl.).

143. *Id.* at 594.

144. *Id.* at 593.

childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.¹⁴⁵

Thus, the Court stated that an offender's deprived social background can lead to a penalty reduction because this can diminish his or her culpability, irrespective of the offender's cultural background. However, these same circumstances that can justify a penalty reduction can also have the opposite effect and result in an increased penalty. If a court considers that an offender's deprived social background diminishes his or her capacity to make prudent decisions and inclines him or her more strongly toward criminal activity, it may attach substantial weight to the sentencing objectives of community protection and specific deterrence.¹⁴⁶

The rationale underpinning *Bugmy* is sound, but the implementation is lacking. Indigenous incarceration levels have increased since this decision was handed down. To remedy this, African American and Indigenous Australians should receive a mathematical reduction of 25% in their sentence. This is justified on the basis of the connection between disadvantage and crime. Previously, one of us has suggested that any reduction in penalty of this nature should not apply to offenders who have committed sexual or violent offenses.¹⁴⁷ This recommendation needs to be revisited given the urgent need to address the situation. Moreover, the major concern that underpinned not including this cohort for the discount was community safety. However, as noted *supra*, this can be addressed in large part by placing offenders who are at risk of

145. *Id.* at 594–95.

146. *See generally Munda v Western Australia* (2013) 249 CLR 600 (Aust.). This judgment was handed down on the same day as *Bugmy v The Queen* (2013) 249 CLR 571.

147. Bagaric, *Three Things*, *supra* note 40.

reoffending on electronic surveillance for what would be the remaining part of their prison term.

The risk of reoffending can be further reduced by applying a risk and needs assessment tool to offenders. At the outset, it is important to acknowledge that criticisms have been leveled against these instruments on the basis that they discriminate against minority groups.¹⁴⁸ However, properly designed tools can ameliorate this risk.¹⁴⁹ This amelioration can be achieved by ensuring that the instruments are transparent in relation to the considerations they adopt and by “ensur[ing] that individuals are not treated differently on the basis of membership in a protected class.”¹⁵⁰ And in fact, these instruments, properly designed, have reduced racial disparity in sentencing.¹⁵¹

A good example of a sophisticated risk assessment tool is the instrument used to implement the First Step Act.¹⁵² The U.S. Department of Justice (DOJ) has developed the Prisoner Assessment Tool Targeting Estimated Risk and Needs program.¹⁵³ A key feature of the tool is that it includes static factors, such as criminal history, but also integers that are dynamic, such as the behavior of offenders during their period of incarceration.¹⁵⁴ The tool contains fifteen factors in total (eleven of which are dynamic, and the remaining four are static).¹⁵⁵ The algorithm expressly aims to be racially neutral.¹⁵⁶ The tool involves undertaking a risk and needs assessment of all

148. Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680, 680 (2016).

149. Bagaric, *Three Things*, *supra* note 40, at 105–06.

150. Crystal S. Yang & Will Dobbie, *Equal Protection Under Algorithms: A New Statistical and Legal Framework*, 119 MICH. L. REV. 291, 291 (2020).

151. Ochi, *supra* note 84.

152. *Id.*

153. OFF. OF THE ATT’Y GEN., U.S. DEP’T OF JUST., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM 26 (2019), https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf [<https://perma.cc/XE3Q-XS2W>].

154. *Id.*

155. OFF. OF THE ATT’Y GEN., U.S. DEP’T OF JUST., THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM – UPDATE 10, 10–11 (2020), <https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf> [<https://perma.cc/P7L2-JFZY>]. Dynamic factors include drug treatment while incarcerated and education score; static factors include age at time of assessment and criminal history. *Id.*

156. OFF. OF THE ATT’Y GEN., *supra* note 153, at 28.

prisoners; improving the needs assessment system; bringing the earned time credit system into operation; making the workflow automatic; and bringing into effect policies that incite prisoners to participate in programs that can reduce their risk of reoffending and thus maximize their chances of early release.¹⁵⁷ To ensure that the tool achieves its objectives, it is subject to continual updating and re-validation.¹⁵⁸

2. *Less Weight Accorded to Prior Convictions*

Another reform that is necessary to redress the over-imprisonment of African American and Indigenous Australian offenders is to reduce the weight that is accorded to prior convictions in the sentencing calculus.¹⁵⁹ One of us has examined at length the appropriateness of recidivist loading and concluded that, as a general rule, there is no justification for its retention.¹⁶⁰ This is because the rationales underpinning loading in the form of general deterrence and specific deterrence are largely unattainable.¹⁶¹ Further, increasing the severity of punishment on the basis of an offender's criminal history involves an element of double punishment and punishing people for their character.¹⁶² Though there is evidence that serious sexual and violent offenses are disproportionately committed by offenders with prior convictions for these offenses,¹⁶³ this justifies a loading of 20%–50%, but only for such offenses,¹⁶⁴ as opposed to the “super premiums” that are often currently imposed. Ultimately, the level of

157. *See id.* at 71–72.

158. *Id.*

159. *See* Elaine R. Jones, *The Failure of the “Get Tough” Crime Policy*, 20 U. DAYTON L. REV. 803, 804 (1995) (arguing that tougher penalties have not solved the problem of violent crime); Nkechi Taifa, *“Three-Strikes-and-You’re-Out”—Mandatory Life Imprisonment for Third Time Felons*, 20 U. DAYTON L. REV. 717, 717 (1995) (arguing that three-strikes laws are against public policy).

160. *See generally* 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 (2014).

161. *See supra* Part IV.

162. Bagaric, *supra* note 160, at 415

163. *Id.* at 416.

164. *Id.*

“the punishment should fit *the crime*, not the antecedent actions of the person who committed the crime.”¹⁶⁵

Placing undue emphasis on prior convictions constitutes indirect discrimination (because, as we have seen, disadvantaged offenders often have more prior convictions),¹⁶⁶ and hence, significantly less weight must be attached to this consideration in the sentencing calculus. Disadvantaged offenders might still appear in court more frequently than other offenders, but this reform would ensure that when they do, the severity of their punishment would generally be far less than is currently the case.

3. *Elimination of Implicit Bias by Judges*

As we saw *supra* in Part III, a key reason for the disproportionate incarceration burden of African American and Indigenous Australians is because of the unconscious bias experienced by many judges. Judges need to undertake formal and effective training to negate this process.

To date, most studies on reducing unconscious bias—sometimes referred to as “prejudice reduction”—are not scientifically validated.¹⁶⁷ However, an emerging body of laboratory-based research indicates that there are a number of strategies for regulating unconscious biases. *Change-based* approaches seek to alter associations that underpin implicit biases,¹⁶⁸ while *control-based* approaches seek to prevent these associations from impacting one’s behavior.¹⁶⁹

165. *Id.* at 345–46 (emphasis added).

166. This was first raised by one of us in Bagaric, *Three Things*, *supra* note 40; see also *Bugmy v The Queen* (2013) 249 CLR 571, 584 (Austl.).

167. Michael Brownstein, *Implicit Bias*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/implicit-bias/#pagetopright> [https://perma.cc/C9CU-V25M] (July 31, 2019).

168. Calvin K. Lai et al., *Reducing Implicit Prejudice*, 7 SOC. & PERSONALITY PSYCH. COMPASS, 315, 315 (2013); Saaid A. Mendoza et al., *Reducing the Expression of Implicit Stereotypes: Reflexive Control Through Implementation Intentions*, 36 PERSONALITY & SOC. PSYCH. BULL. 512, 521 (2010); Brandon D. Stewart & Brian K. Payne, *Bringing Automatic Stereotyping Under Control: Implementation Intentions As Efficient Means of Thought Control*, 34 PERSONALITY & SOC. PSYCH. BULL. 1332, 1332 (2008).

169. Brownstein, *supra* note 167.

Change-based strategies can include the following: *intergroup contact*, where interaction between members of different social groups appear to reduce implicit bias; *approach training*, where “participants repeatedly ‘negate’ stereotypes and ‘affirm’ counter-stereotypes by pressing a button labeled ‘No!’ when they see stereotype-consistent images . . . or ‘YES!’ when they see stereotype-inconsistent images,” or where “participants push a joystick away from themselves to ‘negate’ stereotypes and pull the joystick toward themselves to ‘affirm’ counter-stereotypes”; *evaluative conditioning*, a broadly used technique “whereby an attitude object (e.g., a picture of a [B]lack face) is paired with another valenced attitude object (e.g., the word ‘genius’), which shifts the valence of the first object in the direction of the second”; and *counter-stereotype exposure*, which increases individuals’ “exposure to images, film clips, or even mental imagery depicting members of stigmatized groups acting in stereotype-discordant ways (e.g., images of female scientists).”¹⁷⁰

Control-based strategies can include the following: *implementation intentions*, such as “‘if-then’ plans that specify a goal-directed response that an individual plans to perform on encountering an anticipated cue” (e.g., “in a ‘Shooter Bias’ test, where participants are given the goal to ‘shoot’ all and only those individuals shown holding guns in a computer simulation, participants may be asked to adopt the plan, ‘if I see a [B]lack face, I will think “safe!””); *cues for control*, where participants are taught “techniques for noticing prejudiced responses, in particular the affective discomfort caused by the inconsistency of those responses with participants’ egalitarian goals”; and *priming goals, moods, and motivations*, where “priming egalitarian goals, multicultural ideologies, or particular moods can lower scores of prejudice on implicit measures.”¹⁷¹

170. *Id.*; see also Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCH. 828, 828 (2001); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCH. 800, 801 (2001).

171. Brownstein, *supra* note 167; see also Jeffrey R. Huntsinger et al., *Affective Regulation of Stereotype Activation: It’s the (Accessible) Thought That Counts*, 36 PERSONALITY & SOC. PSYCH.

There is some skepticism about both types of strategies.¹⁷² Ultimately, the majority of most of the research on interventions like these is recent, so it is not yet known which strategy or strategies will or will not prove effective.¹⁷³ But some scholars have expressed optimism about the role that change-based or control-based lab strategies like these can play as components of broader efforts to negate prejudice and discrimination by combating unconscious bias.¹⁷⁴ In any event, it is imperative that judges undergo the best training available to reduce their unconscious biases. This training must be rolled out in a systematic fashion.

4. *Improve Educational Outcomes for African Americans and Indigenous Australians*

Nevertheless, there are still deeper problems relating to the supposed connection between crime and race. And this takes us to the most wide-ranging reform recommended in this Article. The most important trait that insulates against involvement with crime is education. There is a striking connection between the level of educational attainment and criminal justice outcomes.

Although wide-ranging social reform is beyond the ambit of most criminal justice reform recommendations, it is now timely to raise express awareness in favor of more wide-reaching reforms given the current strong community sentiment stemming from the Black Lives Matter movement for effective changes to the system.¹⁷⁵

The benefits of education, leading to individual flourishing and community prosperity, are clear. Less clear is the connection between

BULL., 564, 566 (2010); Nikki H. Mann & Kerry Kawakami, *The Long, Steep Path to Equality: Progressing on Egalitarian Goals*, 141 J. EXPERIMENTAL PSYCH. 187, 190 (2011); Gordon B. Moskowitz & Peizhong Li, *Egalitarian Goals Trigger Stereotype Inhibition: A Proactive Form of Stereotype Control*, 47 J. EXPERIMENTAL SOC. PSYCH. 103, 103 (2011).

172. Mendoza et al., *supra* note 168; Stewart & Payne, *supra* note 168.

173. Brownstein, *supra* note 167 (citing Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCH. 1267 (2012)).

174. See generally Daniel Kelly et al., *Getting Rid of Racism: Assessing Three Proposals in Light of Psychological Evidence*, 41 J. SOC. PHIL. 293 (2010); Alex Madva, *Biased Against De-Biasing: On the Role of (Institutionally Sponsored) Self-Transformation in the Struggle Against Prejudice*, 4 ERGO 145 (2017).

175. This was first raised by one of us in Bagaric, *Rich Offender, Poor Offender*, *supra* note 40.

education and involvement in the criminal justice system. Education is probably the single most important variable that contributes to reducing the likelihood of imprisonment. The most recent DOJ report about the education levels of prisoners was conducted in 2003.¹⁷⁶ It found that 68% of incarcerated people in the United States had not earned a high school diploma, that less than 23% had obtained a high school diploma, and that less than 13% had received a secondary education.¹⁷⁷ A high school education reduces the likelihood that a person will be imprisoned five-fold.¹⁷⁸ The reduction is double (ten-fold) for a college education.¹⁷⁹

The educational attainment of Americans grew from 1980 to 2009; however, during the same period, the population of incarcerated individuals with less than a high school diploma also grew.¹⁸⁰ The worsening education gap is supported by more recent reports at the state level. For instance, a 2014 report from the Minnesota Department of Corrections showed that over 74% of incoming prisoners did not have a high school diploma and that only 17% had a postsecondary education.¹⁸¹ A 2016 report from the Georgia Department of Corrections showed that more than 50% of new prisoners did not have a high school diploma and less than 10% had attended college.¹⁸²

More fully, reducing incarceration rates through educational reforms should focus on two separate but overlapping populations: those who have never been incarcerated, and those who are currently

176. See generally CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., EDUCATION AND CORRECTIONAL POPULATIONS (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf> [<https://perma.cc/EV45-VRY2>].

177. *Id.*

178. See generally Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS, Summer 2010, at 8, <https://www.amacad.org/content/publications/pubContent.aspx?d=808> [<https://perma.cc/A2WH-49RY>].

179. *Id.*

180. See BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS 16 (2012).

181. Caitlin Curley, *How Education Deficiency Drives Mass Incarceration*, GENBIZ (Nov. 18, 2016), <http://www.genfkd.org/education-deficiency-drives-mass-incarceration> [<https://perma.cc/Z9ZT-VUB7>].

182. See generally GA. DEP'T OF CORR., INMATE STATISTICAL PROFILE: INMATES ADMITTED DURING FY2016 (2016), http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/profile_inmate_admissions_fy2016.pdf [<https://perma.cc/DW8Z-HN7R>].

incarcerated but will at some point finish their sentence and be released.

To this end, it is notable that minorities, including African Americans, are significantly more likely to live in poorer areas. Studies have shown that white and Asian neighborhoods have a much higher median income than other races and that the median wealth of white neighborhoods was thirteen times the median wealth of Black neighborhoods as recently as 2013.¹⁸³ Because minorities are more likely to live in low-income areas and because low-income areas are known to have lower-quality education,¹⁸⁴ it follows that access to education is highly racialized. It also follows that the factors leading to the incarceration of many African Americans in the first place—lack of academic experience, lack of employment experience,¹⁸⁵ and high poverty-levels—will make them likely to continue to be incarcerated throughout their lives. Thus, without educational reform before an individual's first instance of incarceration, the pattern of unemployment, poverty, and incarceration will continue.¹⁸⁶

As for currently incarcerated prisoners, governments should focus not on growing prison capacity but instead on supporting rehabilitation and reducing recidivism. It has been shown that offenders under twenty-one years of age who are released from federal prison are rearrested at higher rates than any other age group,

183. Sean F. Reardon et al., *Neighborhood Income Composition by Household Race and Income, 1990–2009*, 660 ANNALS AM. ACAD. 78, 85 (2015), <https://inequality.stanford.edu/sites/default/files/Neighborhood%20Income%20Composition%20by%20Race%20and%20Income.pdf> [<https://perma.cc/3J2E-N2DA>]; Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RSCH. CTR. (Dec. 12, 2014), <https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [<https://perma.cc/33UP-5FY7>].

184. Katie Peters, *STATEMENT: CAP's Brown on Department of Education Report Revealing More than 40 Percent of Low-Income Schools Don't Get a Fair Share of State and Local Funds*, CTR. FOR AM. PROGRESS (Nov. 30, 2011), <https://www.americanprogress.org/press/statement/2011/11/30/14903/s-tatement-caps-brown-on-department-of-education-report-revealing-more-than-40-percent-of-low-income-schools-dont-get-a-fair-share-of-state-and-local-funds/> [<https://perma.cc/N428-DWFL>].

185. See generally ANDREW SUM ET AL., PRISON POL'Y INST., *THE CONSEQUENCES OF DROPPING OUT OF HIGH SCHOOL* (2009), https://www.prisonpolicy.org/scans/The_Consequences_of_Dropping_Out_of_High_School.pdf [<https://perma.cc/6SUJ-DXQH>].

186. Caitlin Curley, *Mass Incarceration: How the US Prison System Creates a Cycle of Poverty*, GENBIZ (Apr. 5, 2016), <http://www.genfkd.org/mass-incarceration-cycle-poverty> [<https://perma.cc/5Y9Z-B9M4>].

with individuals who did not have a high school degree rearrested at the highest rate (60.4%), compared to those with a college degree rearrested at a rate of 19.1%.¹⁸⁷ And though adolescents and young adults are more likely to be rearrested, that figure can be combatted by providing them with educational opportunities while in prison.

Prisoners who participate in any type of educational program while incarcerated are 43% less likely to return to prison.¹⁸⁸ Research also shows that children whose parents have college degrees are more likely to complete college themselves,¹⁸⁹ which can foster social mobility. In addition, the substantial personal benefits of prison education include increased personal income, lower levels of unemployment, higher political engagements and improved physical and mental health.¹⁹⁰ Not having a high school diploma reduces opportunities for higher education, training, and employment, and for incarcerated individuals without a high school degree, the problem is heightened by numerous barriers to successful re-entry and stigmas they face while rejoining their communities and workforce.¹⁹¹ Indeed, formerly incarcerated individuals earn 11% less than those with no criminal record doing the same job,¹⁹² and they are 15% to 30% less likely to find a job to begin with.¹⁹³

187. KIM STEVEN HUNT & ROBERT DUMVILLE, U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 24 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [<https://perma.cc/W4Y4-9YDQ>].

188. Doug Irving, *The Case for Correctional Education in U.S. Prisons*, RAND CORP. (Jan. 3, 2016), <https://www.rand.org/blog/rand-review/2016/01/course-correction-the-case-for-correctional-education.html> [<https://perma.cc/8URC-JVBQ>].

189. *Expanding Access to Postsecondary Education in Prison: Fact Sheet for Corrections Leaders*, VERA INST. OF JUST. (Jan. 2017), <https://www.vera.org/publications/postsecondary-education-in-prison-fact-sheet-for-correction-leaders> [<https://perma.cc/KU4V-MXFH>].

190. See generally INST. FOR HIGHER EDUC. POL'Y, THE INVESTMENT PAYOFF: A 50-STATE ANALYSIS OF THE PUBLIC AND PRIVATE BENEFITS OF HIGHER EDUCATION (2005), <https://files.eric.ed.gov/fulltext/ED484570.pdf> [<https://perma.cc/7JBB-REJ2>].

191. Kathleen Bender, *Education Opportunities in Prison Are Key to Reducing Crime*, CTR. FOR AM. PROGRESS (Mar. 2, 2018, 9:00 AM), <https://www.americanprogress.org/issues/education-k-12/news/2018/03/02/447321/education-opportunities-prison-key-reducing-crime/> [<https://perma.cc/VPV5-RVU8>].

192. Greg Lorentzen, *Discrimination Against Formerly Incarcerated People*, S.F. LIVING WAGE COAL., <https://www.livingwage-sf.org/mass-incarceration/discrimination-against-formerly-incarcerated-people/> [<https://perma.cc/Z89J-EATA>].

193. See generally JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POL'Y RSCH., EX-OFFENDERS AND THE LABOR MARKET (2010), <https://cepr.net/documents/publications/ex-offenders-2010-11.pdf>

Investing in prison education programs will necessitate upfront funding, but the potential long-term economic benefits are significant. It costs taxpayers in the United States slightly over \$30,000 to house a prisoner for one year.¹⁹⁴ The total spending on prisons is more than \$80 billion annually.¹⁹⁵ Though the prison rate in Australia is considerably less,¹⁹⁶ the cost of imprisonment in Australia is more than triple that of the United States: \$110,000 per prisoner per year.¹⁹⁷ For every dollar spent on prison education, taxpayers are estimated to save four to five dollars that would otherwise be spent on incarceration.¹⁹⁸ Though this figure is somewhat crude, it has been shown that Missouri saved an average of \$25,000 per year for every incarcerated individual who did not return to prison, and nationally, the U.S. economy is estimated to lose about \$60 billion per year due to loss of labor from high rates of incarcerated persons.¹⁹⁹

Therefore, investing in prisoner education is good for the individual, good for decreasing recidivism, and good for local and national economies. Education gives individuals a voice, and it opens opportunities and doors to a better future. It can also repair damage to individual self-esteem and confidence.²⁰⁰ And ultimately, education is a better use of tax dollars than funding institutions and practices that result in high recidivism rates.

[<https://perma.cc/PQA9-K75Z>].

194. CTR. FOR LAW & GLOBAL JUST., UNIV. OF S.F. SCH. OF LAW, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 18 (2012), <https://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf> [<https://perma.cc/9MRU-HQUL>].

195. *Id.*

196. See AUSTL. BUREAU OF STAT., *supra* note 119.

197. See generally PRODUCTIVITY COMM'N, AUSTL. GOV'T, REPORT ON GOVERNMENT SERVICES 2019 (2019), <https://www.pc.gov.au/research/ongoing/report-on-government-services/2019> [<https://perma.cc/QK7R-B2WE>].

198. Lorentzen, *supra* note 192.

199. David Skorton & Glenn Altschuler, *College Behind Bars: How Educating Prisoners Pays Off*, FORBES (Mar. 25, 2013, 5:43 AM), <https://www.forbes.com/sites/collegeprose/2013/03/25/college-behind-bars-how-educating-prisoners-pays-off/#2e51742c2707> [<https://perma.cc/KX68-YQYF>].

200. Edward A. Parker, *The Social-Psychological Impact of a College Education on the Prison Inmate*, 41 J. CORR. EDUC. 140, 143 (1990).

CONCLUSION

The George Floyd killing has elevated the Black Lives Matter movement and the injustices experienced by Black Americans to the forefront of the national consciousness. In academic literature, it has been well-known for decades that African Americans have been discriminated against in the criminal justice system. Despite this, no significant reforms had been undertaken to ameliorate the situation.

However, as a result of the protests and the political capital that has been generated toward the imperative for reform, it is no longer tenable to continue to pay lip service to the discriminatory burdens imposed on African Americans by the criminal justice system. Research has shown that African Americans are discriminated against in many parts of the criminal justice system.

This Article focused on the over-imprisonment of African Americans. There are many components of the criminal justice system, including investigation, arrest, bail, trial, conviction, sentencing, and parole. The sharp end of criminal justice is sentencing because it is at this point that the community acts in its most coercive manner against offenders. The most punitive sanction (apart from capital punishment) is imprisonment. Hence, discrimination on this front has a particularly damaging impact on offenders. Thus, though the reforms proposed in this Article do not purport to address all of the many disadvantages experienced by African Americans in the criminal justice system, they do address a particularly damaging hardship inflicted on this group.

It transpires that the burden of excessive incarceration is not only experienced by African Americans, but it is felt even more acutely by Indigenous Australians. The killing of George Floyd also led to loud calls for justice in Australia.

The solutions proposed in this Article are applicable to both countries. They are comprised of short-term and wider-ranging solutions. The first element of the solution is to release from prison both African Americans and Indigenous Australians who have served at least three-quarters of their prison term. This would significantly

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reduce the extent of the disproportionate representation of these groups in their respective communities, while ameliorating the unfair sentences received by many of these offenders. This approach is consistent with the overall framework of the First Step Act.

The longer-term solution is four-pronged. The first part includes providing a 25% sentencing reduction to African Americans and Indigenous Australians. Second, less weight should be given to prior convictions in the sentencing calculus. Third, measures need to be implemented to eliminate or reduce the unconscious biases of judges. The key to long-term equality in the criminal justice domain for African Americans and Indigenous Australians is educational opportunity equality. It is only when this is achieved that substantive justice will exist for the most disadvantaged groups in the criminal justice domain.