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### Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities

Douglas A. Berman\*

Progressives have long played a leading role in reforming punishment practices and sentencing norms in the United States. In the nineteenth century, progressives pioneered a move away from brutal physical punishments toward the development of penitentiaries focused on the spiritual rehabilitation of lawbreakers.<sup>1</sup> In the twentieth century, progressives complained about the failure to devote sufficient resources to humane prison programming and about the tendency of rehabilitative ideals to be corrupted in practice.<sup>2</sup> Over the last two centuries, progressives have also frequently expressed concerns about sentencing disparities rooted in racial, ethnic and socio-economic discrimination.<sup>3</sup>

Today, progressives continue to express concerns about punishment practices and sentencing norms. But I fear that many progressives have failed to update their reform concerns and advocacy in light of twenty-first century realities. We primarily hear progressive voices speaking out against the death penalty and lamenting wrongful

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\* William B. Saxbe Designated Professor of Law, The Ohio State University Moritz College of Law.

<sup>1</sup> See generally David J. Rothman, *Perfecting the Prison: United States, 1789-1865* in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111 (Norval Morris & David J. Rothman eds., 1995) [hereinafter THE OXFORD HISTORY OF THE PRISON].

<sup>2</sup> See generally Edgardo Rotman, *The Failure of Reform: United States, 1865-1965* in THE OXFORD HISTORY OF THE PRISON, *supra* note 1, at 169; AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE (1971).

<sup>3</sup> See generally MARC MAUER, RACE TO INCARCERATE, (2d ed. 2006) (discussing causes of disparity in imprisonment and the impact of the drug war on the African American community); Becky Pettit & Bruce Western, *Mass Imprisonment And The Life Course: Race And Class Inequality In U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004) (describing racial inequalities in imprisonment); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311 (1997) (identifying disparities in the criminal justice system arising from cumulative disadvantage); see also *supra* sources cited note 2.

convictions and racial disparities in criminal justice systems. Over the last decade, for example, the American Bar Association and other organizations have produced massive reports urging execution moratoriums and major reforms to the administration of capital punishment.<sup>4</sup> The Innocence Project and other organizations have spotlighted common causes of wrongful convictions and have urged states to establish innocence commissions.<sup>5</sup> Given the stunning and unprecedented expansion of modern American imprisonment rates, however, the problems and consequences of mass incarceration should become the new preeminent concern for progressives. Indeed, as explained below, the failure of progressives to adapt their criminal justice advocacy for modern times may indirectly contribute to the status of the United States as the world's leader in imprisonment.

The recent Presidential election of Senator Barack Obama — the first major candidate in recent memory to criticize the harshness of modern American criminal justice systems while on the campaign trail<sup>6</sup> — excites many about the possibility of the United States entering a new era for criminal justice law and policy. I fear, however, that this excitement for criminal justice change could be a curse rather than a blessing if progressives do not refine their policy aspirations and legal advocacy in light of twenty-first century criminal justice realities.

With the recent election results in mind, my goal in this modest essay is to review twenty-first century punishment practices in order to encourage progressives to (1) soberly reflect on modern political and practical dynamics and (2) strategically reorient their criminal justice reform agendas. By recognizing some hard truths about the limitations and unintended consequences of certain reform efforts, progressives can develop a more effective blueprint for initiating desperately needed changes to modern American criminal justice systems.

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<sup>4</sup> See generally ABA Death Penalty Moratorium Implementation Project, <http://www.abanet.org/moratorium/home.html> (last visited on Nov. 24, 2008); The Constitution Project's Death Penalty Initiative, <http://www.constitutionproject.org/deathpenalty/index.cfm?categoryId=2> (last visited Nov. 24, 2008).

<sup>5</sup> See generally The Innocence Project, <http://www.innocenceproject.org> (last visited Nov. 24, 2008); The Center on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions> (last visited Nov. 24, 2008).

<sup>6</sup> See Senator Barack Obama, Remarks at Howard University Convocation (Sept. 28, 2007), [http://www.barackobama.com/2007/09/28/remarks\\_of\\_senator\\_barack\\_obam\\_26.php](http://www.barackobama.com/2007/09/28/remarks_of_senator_barack_obam_26.php) (calling for review of “the wisdom of locking up some first-time, non-violent drug users for decades” and pledging to “review [long mandatory prison] sentences to see where we can be smarter on crime and reduce the blind and counterproductive warehousing of non-violent offenders”).

**I. TAKING STOCK OF AMERICA'S MODERN INCARCERATION EXPLOSION**

**A. Some quantitative realities**

Anecdotal stories of crime and punishment have always been part of popular discourse. But America's troublesome affinity for locking humans inside cages has not yet become a regular aspect of political and public dialogues. However, leading academics and public policy groups are now starting to discuss modern mass incarceration more regularly. For example, Professor Franklin Zimring recently made this observation:

The last quarter of the twentieth century stands out as the most remarkable period of change in American penal policy even when the entire history of the United States is considered. Nothing in the two centuries before 1975 would prepare observers to expect that a long run of stable rates of incarceration would shift to a fourfold expansion of rates of imprisonment in less than three decades.<sup>7</sup>

A recent report from the Vera Institute of Justice provides this more precise quantification of America's growing eagerness for locking up its populace:

Between 1970 and 2005, state and federal authorities increased prison populations by 628 percent. By 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails. By the turn of the 21st century, more than 5.6 million living Americans had spent time in a state or federal prison — nearly 3 percent of the U.S. population.<sup>8</sup>

There is no sound reason to believe that the recent increase in prison populations will reverse course anytime soon. In fact, the overall population of incarcerated individuals nationwide hits record highs nearly every year, and sophisticated projections suggest that the extraordinary number of persons locked behind bars is likely to continue to increase in coming years.<sup>9</sup> The success of Democrats in federal elections in 2006 and 2008 might

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<sup>7</sup> Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 323 (2005).

<sup>8</sup> DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME (2007), available at [http://www.vera.org/publication\\_pdf/379\\_727.pdf](http://www.vera.org/publication_pdf/379_727.pdf). See also THE PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT, ONE IN 100: BEHIND BARS IN AMERICA 2008 (2008), available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf).

<sup>9</sup> THE PEW CHARITABLE TRUSTS, PUBLIC SAFETY PERFORMANCE PROJECT, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011

prompt some to believe that changing political winds could portend changing incarceration trends. But even though the 2008 election cycle seemed to be all about change, some ballot initiatives at the state level that could contribute to increased levels of incarceration won voter approval, while other initiatives aimed at reducing incarceration levels failed.<sup>10</sup>

The unprecedented growth in U.S. imprisonment is especially stunning when placed in a global perspective. A far higher proportion of American adults is imprisoned than in any other country. Our incarceration rate — which is nearly 750 individuals per 100,000 in the population — is now roughly 5 to 10 times the rate of most other Western industrialized nations. Indeed, our prison population and incarceration rates surpass even those of countries that have long been viewed as uniquely disrespectful of human rights:

The U.S. imprisons significantly more people than any other nation. China ranks second, imprisoning 1.5 million of its much larger citizen population. The U.S. also leads the world in incarceration rates, well above Russia and Cuba, which have the next highest rates of 607 and 487 per 100,000. Western European countries have incarceration rates that range from 78 to 145 per 100,000.<sup>11</sup>

While these statistics reveal the basic dimensions of modern mass incarceration in the United States, drilling deeper into the numbers provides an even more disconcerting snapshot of America's affinity for extreme imprisonment. A study by The Sentencing Project, for example, documents an extraordinary growth in offenders serving life terms:

The 127,677 lifers in prison [as of 2003] represent an increase of 83% from the number of lifers nationally in 1992, which in turn had doubled since 1984. During the 1990s the growth of persons serving life without parole has been even more precipitous, an increase of 170%, between 1992 and 2003. Overall, one of every six lifers in 1992 was serving a sentence of life without parole. By 2003, that proportion had increased to one in four.

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(2007), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based\\_policy/PSPP\\_prison\\_projections\\_0207.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_policy/PSPP_prison_projections_0207.pdf).

<sup>10</sup> See Editorial, *The Criminal Mischief Of Measure 57*, THE OREGONIAN, Nov. 7, 2008, at D4 (lamenting the fiscal consequences of a state ballot initiative approved in Oregon requiring “tougher sentences for repeat offenders”); Andy Furillo, *Crime Victims Pleased by Proposition 9 Win*, SACRAMENTO BEE, Nov. 6, 2008 (discussing the approval of a state ballot initiative in California which limits parole eligibility and the rejection of another ballot initiative that would have emphasized treatment instead of incarceration for drug offenders).

<sup>11</sup> THE PEW CHARITABLE TRUSTS, *supra* note 8, at 1.

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In addition, the number of long-term prisoners is considerably greater than just the total of lifers, and contributes to the population of what can be considered “virtual lifers.” These are persons serving very long sentences, or consecutive sentences, that will often outlast the person’s natural life. One 2000 study estimated that more than one of every four (27.5%) adult prisoners was serving a sentence of 20 years or more. And data from the Department of Justice show that as of 2002, state and federal prisons held 121,000 persons age 50 or over, more than double the figure of a decade earlier.<sup>12</sup>

These statistics indicate there are now more individuals nearly certain to die in American prisons than there were in the total U.S. prison population just a generation ago. Furthermore, juvenile offenders, female offenders, non-violent drug offenders, and mentally ill offenders have now become a significant portion of the population sentenced to life terms.<sup>13</sup> For progressives especially concerned with the lives and legal fates of vulnerable populations, the composition of the population now sentenced to extremely long prison terms should be particularly alarming.

These emerging punishment practices seem especially extreme and internationally aberrant when one focuses on the sentencing of juveniles for certain crimes. Specifically, a recent report from Human Rights Watch and Amnesty International documents the remarkable and unique willingness of American jurisdictions to sentence juvenile offenders to life without the possibility of parole:

[T]here are currently at least 2,225 people incarcerated in the United States who have been sentenced to spend the rest of their lives in prison for crimes they committed as children . . . Before 1980, life without parole was rarely imposed on children. . . .

. . . .

Virtually all countries in the world reject the punishment of life without parole for child offenders. At least 132 countries reject life without parole for child offenders in domestic law or practice. And all countries except the United States and Somalia have ratified the Convention on the Rights of the Child, which explicitly forbids “life imprisonment without possibility of release” for “offenses committed by persons below eighteen years of age.” Of the 154 countries for which Human Rights Watch was able to obtain data, only three currently have people serving life without parole for crimes they committed as children, and it appears that those three countries combined have only about a dozen such cases.<sup>14</sup>

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<sup>12</sup> MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 11 (2004), *available at* [http://www.soros.org/initiatives/usprograms/focus/justice/articles\\_publications/publications/lifers\\_20040511/lifers.pdf](http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/lifers_20040511/lifers.pdf).

<sup>13</sup> *Id.* at 1.

<sup>14</sup> HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 1, 2, 5 (2005), *available at* <http://www.hrw.org/en/reports/2005/10/11/rest-their-lives>.

**B. Some qualitative realities**

Of course, the story of mass incarceration is about more than many persons in prison for long terms. The conditions of modern imprisonment have also changed, and not generally for the better. As the number of prisoners has increased dramatically, the rehabilitative programming provided to prisoners has decreased. The myriad problems resulting from prison overcrowding have become a facet of nearly every penal system.<sup>15</sup> A recent blue-ribbon report examining the conditions of modern imprisonment in the United States summarized some of its many sobering findings this way:

The majority of prisons and many jails hold more people than they can deal with safely and effectively, creating a degree of disorder and tension almost certain to erupt into violence. Similarly, few conditions compromise safety more than idleness. But because lawmakers have reduced funding for programming, prisoners today are largely inactive and unproductive.<sup>16</sup>

Reflecting on these realities, Professor Craig Haney has recently described “the current crisis in American corrections” as including “a lack of effective programming and treatment, the persistence of dangerous and deprived conditions of confinement, and the widespread use of forceful, extreme, and potentially damaging techniques of institutional control . . . .”<sup>17</sup>

While imprisonment is grim and often unsafe for the more than 2 million persons housed in standard prisons and jails, a subgroup of tens of thousands of prisoners is confined in a new kind of “supermax” prison<sup>18</sup> that involves deprivation of liberty to a

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<sup>15</sup> See generally COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS, VERA INSTITUTE OF JUSTICE, *CONFRONTING CONFINEMENT* (2006) (discussing the prevalence of violence, disease, and isolation in American prisons) [hereinafter *CONFRONTING CONFINEMENT*]; LITTLE HOOVER COMMISSION, *SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT* (2007) (discussing problems related to overcrowding in California prisons).

<sup>16</sup> *CONFRONTING CONFINEMENT*, *supra* note 14, at 12.

<sup>17</sup> Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J. L. & POL’Y 265, 266 (2006).

<sup>18</sup> The precise number of prisoners housed in federal and state supermax facilities is difficult to determine, in part because of the exact nature and population of these facilities varies over time. See *CONFRONTING CONFINEMENT*, *supra* note 14, at 52-62 (discussing the challenge of quantifying supermax data and noting that “On June 30, 2000, when the Federal Bureau of Justice Statistics last collected data from state and federal prisons, approximately 80,000 people were reported to be confined in segregation units”). See also Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax*

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degree that is perhaps unprecedented in American history. Consider this National Public Radio account of the nature of a supermax facility:

Everything is gray concrete: the bed, the walls, the unmovable stool. Everything except the combination stainless-steel sink and toilet. You can't move more than eight feet in one direction . . . . The cell is one of eight in a long hallway. From inside, you can't see anyone or any of the other cells. This is where the inmate eats, sleeps and exists for 22 1/2 hours a day. He spends the other 1 1/2 hours alone in a small concrete yard. . . .

One inmate known as Wino is standing on just behind the door of his cell. It's difficult to make eye contact, because you can only see one eye at a time. . . . Wino is a 40-something man from San Fernando, California. He was sent to prison for robbery. He was sent to the [Security Housing Unit] SHU for being involved in prison gangs. He's been in this cell for six years. "The only contact that you have with individuals is what they call a pinky shake," he says, sticking his pinky through one of the little holes in the door. That's the only personal contact Wino has had in six years. . . .

Inside the SHU, there's a skylight two stories up. But on an overcast day, it's dark, and so are the cells. There are no windows here. Inmates will not see the moon, stars, trees or grass. They will rarely, if ever, see the giant, gray building they live in. Their world — 24 hours a day, seven days a week, every day of the year — is this hallway.<sup>19</sup>

Significantly, such extreme punishments and novel forms of liberty deprivation in the United States are not limited to the more than 2 million persons confined in prison or jail cells. There are now over 5 million persons serving probation, parole or some other form of post-release supervision.<sup>20</sup> Moreover, certain particular offenders have become modern pariahs subject to new types of extreme social control. Hundreds of thousands of sex offenders, for example, not only must register their movements to authorities, but now also are literally being banished from ever living or even coming near many regions of the country.<sup>21</sup>

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*Prisons*, 28 CRIME & JUST. 385 (2001) (estimating that state-operated supermax facilities housed nearly 20,000 beds at the end of the 1990s).

<sup>19</sup> Laura Sullivan, *At Pelican Bay Prison, a Life in Solitary* (NPR radio broadcast July 26, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5584254>.

<sup>20</sup> LAUREN E. GLAZE & THOMAS P. BONCZAR, PROBATION AND PAROLE IN THE UNITED STATES, 2006, at 1 (Bureau of Justice Statistics, 2007).

<sup>21</sup> See Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007); see also Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Exclusion Zones*, 92 IOWA L. REV. 1 (2006).

In addition to the huge number of persons formally subject to criminal justice control in the United States, former offenders in virtually every American jurisdiction are subject to a range of punitive collateral consequences that serve as a persistent sort of shadow incarceration. As a recent report explains:

In every U.S. jurisdiction, the legal system erects formidable barriers to the reintegration of criminal offenders into free society. When a person is convicted of a crime, that person becomes subject to a host of legal disabilities and penalties under state and federal law. These so-called collateral consequences of conviction may continue long after the court-imposed sentence has been fully served . . . [and] a criminal record can be grounds for exclusion from many benefits and opportunities, including in employment, education, health care, and transportation. . . . These legal barriers are always difficult and often impossible to overcome, so that persons convicted of a crime can expect to carry the collateral disabilities and stigma of conviction to their grave, no matter how successful their efforts to rehabilitate themselves.<sup>22</sup>

The quantitative and qualitative dynamics of modern mass incarceration and extreme social control in the United States noted here only partially showcase the concerns that motivate this essay. While others continue the enormous task of systematically describing and assessing all facets and consequences of America's modern incarceration explosion,<sup>23</sup> my goal here is principally to emphasize these critical punishment realities in order to encourage progressives to take a sober look at how we got here and how we can move forward with needed reforms.

## II. THE DISTRACTING (AND COUNTER-PRODUCTIVE) FOCUS ON INNOCENCE, DEATH AND DISPARITIES

Many intersecting social and political dynamics contribute to the problem of mass incarceration in the United States, and other authors have examined various forces that account for "tough-on-crime" rhetoric and legal doctrines.<sup>24</sup> What has not been generally

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<sup>22</sup> MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2006).

<sup>23</sup> See, e.g., MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003); Marc Mauer, *Thinking About Prison and its Impact in the Twenty-First Century*, 2 OHIO ST. J. CRIM. L. 607 (2005).

<sup>24</sup> For just a sample, see sources cited *supra* note 22 and Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47 (2008);

analyzed or even acknowledged, however, is the way that some efforts to identify and address injustices in the current legal system may contribute to the incarceration explosion. Indeed, as explained below, I fear that progressive criminal justice reform efforts concerning innocence issues, abolition of the death penalty, and sentencing disparities may contribute to, and even exacerbate, the forces that have helped propel modern mass incarceration.

Consider first progressives' recent advocacy efforts regarding wrongful convictions. Two decades ago, wrongful convictions were thought to be rare and were not the subject of serious academic or public policy concern. Then, exonerations of the wrongfully convicted became more common, and more commented upon, with the aid of advancements in DNA technology. In 1992, civil rights attorneys Barry Scheck and Peter Neufeld established The Innocence Project at the Cardozo School of Law and thereby helped found a grass-roots movement dedicated to exonerating the innocent through post-conviction DNA testing.<sup>25</sup> In 1998, concerns about wrongful convictions focused on capital punishment when the Northwestern University School of Law brought together dozens of innocent former prisoners from around the country whom had been sentenced to death for crimes they did not commit.<sup>26</sup> The synergy of this conference, the expanded efforts of The Innocence Project, and a number of high-profile death row exonerations in Illinois and elsewhere helped create an "innocence revolution" that has influenced criminal justice laws and policies in many ways.<sup>27</sup>

While the innocence movement has successfully called public attention to the need for certain reforms in the criminal justice system, the hyper-awareness of innocence issues has produced may have some surprising adverse consequences for criminal defendants and their advocates. For example, in a recent commentary, Professor David Dow has explained how an emphasis on innocence has negatively affected his efforts to resist the death penalty more generally. Here is an extended passage from his commentary:

[T]he focus on innocence has insidiously distracted the courts. When I represent a client in a death penalty case, judges want to know whether

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Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693 (2006); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51 HASTINGS L.J. 829 (2000); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9 (1999); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

<sup>25</sup> See About the Innocence Project, <http://www.innocenceproject.org/about> (last visited Nov. 24, 2008).

<sup>26</sup> See About the Center on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions/aboutus/> (last visited Nov. 24, 2008).

<sup>27</sup> Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573 (2004).

there is any chance that client is innocent. If he isn't, then they are not much concerned about anything else I have to say. Oh, so blacks were excluded from the jury? So what, he's guilty; any jury would have convicted him. Oh, so police hid evidence? Big deal, there was plenty of other evidence that he did it. Oh, so his lawyer slept through trial? Why does that matter? Clarence Darrow himself couldn't have kept him from the gallows. . . .

[T]he Supreme Court itself is partly to blame. In the recent case of *Kansas v. Marsh*, Justices Antonin Scalia and David Souter engaged in an extraordinary debate over . . . whether any innocent person has been executed in the modern death penalty era. Of course, only the most naive person — or perhaps the most disingenuous — would think that we miraculously identify everyone who is innocent just in the nick of time. But what was even more astonishing about this debate was that the arcane legal issue in *Marsh* had absolutely nothing to do with the question of whether *Marsh* was innocent or even with the issue of innocence in general.

Innocence is a distraction because most people on death row are not in fact innocent, and the possibility of executing an innocent man is not even remotely the best reason for abolishing the death penalty.<sup>28</sup>

Professors Dow's central point is both astute and troubling: an excessive focus on innocence issues in the debate over the death penalty desensitizes criminal justice participants to the many other forms of injustice that pervade the administration of capital punishment. Moreover, this problem of desensitization to injustices other than wrongful convictions surely permeates all aspects of, and all actors within, the criminal justice system.

Professor Dow suggests that courts in capital cases now seem less concerned about legal "technicalities" if and when a defendant's guilt is not in dispute. In my experience, this desensitization problem is even more acute outside the death penalty context: in many criminal cases, police and prosecutors will often refuse to address or even admit error when they are convinced of a particular defendant's guilt. Thus, the emphasis on innocence may reinforce an "ends-justify-the-means" mentality at various stages of a criminal proceeding. Furthermore, because innocence issues have such salience for politicians and voters across the political spectrum, reforms focused on preventing wrongful convictions are placed at the top of legislative agendas and other needed criminal justice reforms languish.

Our nation's commitment to protecting individual liberty and limiting government power should prompt concerns about excessive punishment of the guilty that are comparable to our concerns about wrongful punishment of the innocent. Yet this sentiment does not typically find expression either in our policy debates or in our legal

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<sup>28</sup> David R. Dow, *Death by Good Intentions*, WASH. POST, Oct. 15, 2006, at B07.

doctrines. While defendants' pretrial and trial rights have long received much attention from courts and commentators, their sentencing rights and the unique sentencing dynamics that affect defendants' interests have not. Defendants at sentencing are situated quite differently from those awaiting trial: at the sentencing phase, a judge or jury has already found the defendant guilty beyond a reasonable doubt or the defendant has admitted guilt through a plea. The only issue remaining is how the state will treat the proven wrongdoer.<sup>29</sup> Legislatures, courts, and prosecutors tend to feel more comfortable with procedural shortcuts at sentencing because safeguards for the innocent are no longer essential and because conviction of the innocent is no longer a hazard.<sup>30</sup> As the "distraction" of innocence fades during the transition from trial to sentencing, coercive power starts to favor the state both formally and informally, and even seemingly neutral sentencing rules often end up tilting the system toward extreme terms of imprisonment.

The charge of "insidious distraction" against the innocence movement can also be lodged against abolitionist death penalty advocacy more generally. Death penalty abolitionists often are admired for waging a sustained campaign against capital punishment; I cannot readily fault those who view state-sponsored killing as a unique moral harm for their seemingly tireless efforts to impede the administration of the death penalty. I fear, however, that much of modern advocacy against the death penalty produces unintended consequences that are detrimental for criminal defendants as a whole. First, it seems to distract would-be reformers from recognizing and assailing broader extreme punishment problems. Second, it tends to desensitize moderates and conservatives to serious, broader problems throughout the criminal justice system.

As its copious and complicated death penalty jurisprudence demonstrates, the U.S. Supreme Court has been quite attentive to progressive complaints about capital punishment over the last forty years. Indeed, as a result of Supreme Court doctrines requiring state reforms, the death penalty may now only be applied to a relatively small group of murderers, and only in those cases in which prosecutors, jurors and numerous judges have all concluded that death is not too severe a punishment.<sup>31</sup> But the largely

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<sup>29</sup> In this context, it is also critical to keep in mind that roughly nine of every ten criminal cases are resolved through guilty pleas, and thus sentencing typically serves as the only formal courtroom procedure that most criminal defendants experience. *See* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1149-50 (2001).

<sup>30</sup> *See generally* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771 (2003) (noting that only roughly half of all constitutional trial rights have been found to be applicable to sentencing proceedings).

<sup>31</sup> *See generally* *Tison v. Arizona*, 475 U.S. 1010 (1986) (limiting murders that can be subject to death penalty); *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (precluding non-murder crimes from being death eligible); *Roper v. Simmons*, 543 U.S. 551 (2005) (limiting age of offender subject to death penalty); *Atkins v. Virginia*, 536 U.S. 304 (2002) (precluding the mentally retarded from being subject to death penalty); *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (holding that death-row inmates have the right to litigate the matter of their competency rather than having it decided solely by court experts).

successful courtroom campaign against the death penalty has a problematic impact on continuing policy criticisms: abolitionists are now necessarily speaking on behalf of the least sympathetic defendants — namely, the worst group of convicted murderers. Their advocacy is likely to grate on those not categorically opposed to the punishment of death, especially since capital cases proceed toward an execution date only after many criminal justice actors have decided death is a fitting punishment for particular defendants.

By any measure, courts and commentators invest an extraordinary amount of time and attention to death penalty processes and defendants.<sup>32</sup> But all this time and attention is given only to a small group of the very worst murderers and in cases in which the alternative to execution is typically the (arguably more) extreme punishment of life imprisonment without the possibility of parole.<sup>33</sup> Significantly, many death penalty abolitionists now embrace and endorse life imprisonment without the possibility of parole (“LWOP”) as a sound alternative to the death penalty,<sup>34</sup> even though LWOP advocacy may directly or indirectly result in an increase the number of defendants serving life imprisonment.

In fact, a recent report by Penal Reform International has recently concluded that in the United States and in other nations, the “abolition of the death penalty has played a significant role in the increased use of life imprisonment sentences, and LWOP in particular.”<sup>35</sup> These dynamics were on ready display when a New Jersey commission in January 2007 recommended that the state abolish the death penalty and embrace LWOP as an alternative. An independent analysis of past New Jersey trials revealed that “scores of murderers would have been punished more harshly under the life-without-parole bill

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<sup>32</sup> See generally Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861, 869-76 (2008).

<sup>33</sup> Notably, 310 prisoners serving life sentences in Italy signed a letter sent to Italian President Giorgio Napolitano that asked him to seek to bring back the death penalty in 2007. See Christian Fraser, *Italy Inmates Seek Death Penalty*, BBC News (May 31, 2007), available at <http://news.bbc.co.uk/2/hi/europe/6707865.stm>. The letter said that the inmates were “tired of dying a little bit every day and wanted their sentences changed to death so that they could “die just once.” *Id.*

<sup>34</sup> See generally RICHARD C. DIETER, SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY (Apr. 2003), available at <http://www.deathpenaltyinfo.org/sentencing-life-americans-embrace-alternatives-death-penalty>; see also News and Developments 2006: Life Without Parole, <http://www.deathpenaltyinfo.org/news/past/52/2006> (last visited Nov. 24, 2008).

<sup>35</sup> PENAL REFORM INT’L, ALTERNATIVES TO THE DEATH PENALTY: THE PROBLEMS WITH LIFE IMPRISONMENT 1 (2007), available at <http://www.penalreform.org/resources/brf-01-2007-life-imprisonment-en.pdf>. This group has also documented that “[c]onditions of detention and the treatment of prisoners serving life sentences are often far worse than those for the rest of the prison population and more likely to fall below international human rights standards.” *Id.*

proposed by the Death Penalty Study Commission than they were when the death penalty was on the table.”<sup>36</sup> Putting innocence issues aside, abolitionist advocacy against the death penalty in its current form is, in essence, about trying to ensure that a small group of the worst convicted murderers are permitted to spend more time locked in a cage before they die.

Consequently, the death penalty becomes an “insidious distraction” for those concerned about the extremity of punishments exercised throughout the criminal justice system, because it diverts enormous energy and attention to the project of helping the worst criminals suffer a different sort of extreme punishment. Or, to paraphrase Professor Dow, the death penalty is a distraction because most people enduring excessive sentences are not on death row, and the possibility of excessive capital punishment for murderers is not the best reason for reforming the harshest aspects of federal and state criminal justice systems.

Last but not least, the law, policies and rhetoric that have been integral to modern non-capital sentencing reforms are also potential contributing factors to the problem of modern mass incarceration. Modern reforms have recast the concepts and culture of sentencing decision-making by (excessively) shifting sentencing power to *ex ante* rule-makers and (overly) emphasizing the goal of sentencing uniformity. This has directly and indirectly contributed to excessive imposition of extreme prison terms to too many people.

For the first three-quarters of the 20th century, vast and virtually unlimited discretion was the hallmark of the sentencing enterprise. Trial judges in both federal and state systems had nearly unfettered discretion to impose any sentence on a defendant as long as it was within the broad statutory range provided for the criminal offense charged.<sup>37</sup> During this period, punishment decisions and offender treatments were premised upon a rehabilitative model. Beginning in the late 1960s, however, criminal justice researchers and scholars began to assail the rehabilitative approach because of increasing concerns about the unpredictable and disparate sentences produced by such highly discretionary sentencing systems.<sup>38</sup>

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<sup>36</sup> Robert Schwaneberg, *When life without parole is worse than death: Analysis finds more than 100 murderers who might one day go free would face certainty of dying in prison*, NEWARK STAR-LEDGER, Feb. 4, 2007, at 25; see also MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 1732* (2006) (highlighting how “the emphasis on LWOP as an alternative to the death penalty appears to be legitimating the greater use of this sanction for noncapital cases, which emboldens the retributive tendencies that have contributed to the construction of the carceral state”).

<sup>37</sup> See generally *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (discussing the “wide discretion” given to federal judges in ascribing sentences during this time); Michael H. Tonry, *Twenty Years of Sentencing Reform: Steps Forward, Steps Backward*, 78 JUDICATURE 169, 169-70 (1995).

<sup>38</sup> See generally Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 272-74 (1977); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal*

Criminal justice experts and scholars urged reforms in order to bring greater consistency and certainty to the sentencing enterprise.<sup>39</sup> Concerns about disparity and discrimination resulting from highly discretionary sentencing practices dovetailed with concerns about increasing crime rates and powerful criticisms of the efficacy of the entire rehabilitative model of punishment and corrections, and calls for reform were soon heeded. In the late 1970s and early 1980s, a few states enacted determinate sentencing schemes that abolished parole and created presumptive sentencing ranges for various classes of offenses.<sup>40</sup> Congress followed suit shortly after with the passage of the Sentencing Reform Act of 1984 (SRA), which created the U.S. Sentencing Commission to develop guidelines for federal sentencing.<sup>41</sup> Throughout the next two decades, many more states adopted some form of structured sentencing. Though some states enacted only a few mandatory sentencing statutes, many states created sentencing commissions to develop comprehensive guideline schemes.<sup>42</sup>

Repudiation of rehabilitation as a dominant sentencing purpose and a desire for increased sentencing uniformity were integral components of modern sentencing reform. Many early reformers clearly hoped that this shift in emphasis might result in an overall reduction of sentence severity.<sup>43</sup> However, legislatures and sentencing commissions generally embraced more severe and rigid sentencing rules across the board due to enhanced concerns about consistently imposing “just punishment” and deterring the most harmful crimes. Because legislatures and sentencing commissions made decisions about crime and punishment *ex ante*, they contemplated criminal offenders as abstract characters — the threatening figure of a killer or a sex offender or a drug dealer — rather than as individuals. Thus, their sentencing judgments tended to be more punitive.

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*Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 895-97 (1990).

<sup>39</sup> See, e.g., NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (1979); PIERCE O’DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977).

<sup>40</sup> See MICHAEL H. TONRY, SENTENCING REFORM IMPACTS 77-85 (1987); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 14-17 (1996).

<sup>41</sup> Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

<sup>42</sup> See BUREAU OF JUSTICE ASSISTANCE, *supra* note 40, at 14-17; DALE PARENT ET AL., NAT’L INST. OF JUSTICE, MANDATORY SENTENCING 1 (1997) (noting that “[b]y 1994, all 50 States had enacted one or more mandatory sentencing laws, and Congress had enacted numerous mandatory sentencing laws for Federal offenders”).

<sup>43</sup> See generally ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); DAVID FOGEL, “...WE ARE THE LIVING PROOF...”: THE JUSTICE MODEL FOR CORRECTIONS (2d ed. 1979) (1975).

## REORIENTING PROGRESSIVE PERSPECTIVES

Moreover, most structured sentencing reforms formally mandated (or at least informally encouraged) sentencing judges to focus principally on offense conduct. This was driven largely by concerns about the tendency for prosecutors and judges to show disproportionate leniency to favored individuals, but in effect it limited judges' ability to consider those aspects of a defendant's life and characteristics that had historically been used to justify mitigating a harsh response to an offense.<sup>44</sup>

These modern sentencing dynamics have been on special display in the federal criminal justice system over the last two decades. The U.S. Sentencing Guidelines and mandatory sentencing statutes have excessively focused attention on only offense conduct and have limited judges' opportunities to consider mitigating offender characteristics. Mandatory sentencing provisions and enhancement are triggered typically by particular offense conduct — e.g., a longer prison term for certain drug quantities or certain loss amounts or possession of a firearm. These provisions necessarily diminish the significance of offender characteristics in federal sentencing. Thus, though important and largely progressive goals initially fueled modern sentencing reforms, the emphasis on the goal of sentencing uniformity has fueled a “leveling up” dynamic. In nearly all efforts to make sentences more uniform, legal doctrines and policy decisions have resulted in making disparately lenient sentences more consistently harsh, and have rarely made disparately harsh sentences more consistently lenient.

Importantly, I do not mean to be unduly critical of all the passionate and committed progressives who have devoted time and energy toward reforming criminal justice problems such as wrongful convictions, unjust death sentences and disparate sentencing outcomes. But I do want to stress the hydraulic nature of legal institutions and the reactionary tendency of various criminal justice decision-makers. The examples I have described all suggest that concentrated focus and sustained advocacy on one particular type of criminal justice problem will necessarily draw attention away from other issues and will prompt reactions, both hoped-for and unexpected, that will ripple through criminal justice systems. Progressives must soberly reflect on the possibility that some reform efforts have played a role in the modern incarceration explosion and then seriously contemplate how best to reorient advocacy commitments in light of twenty-first century punishment realities.

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<sup>44</sup> Tellingly, the first four steps in the sentencing process described in the U.S. Sentencing Guidelines Manual are concerned exclusively with offense conduct, and the consideration of offender characteristics is relegated to a series of brief policy statements. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2008). *See generally* Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics*, 58 STAN. L. REV. 277, 285-87 (2005) (detailing how the federal guidelines prompted some sentencing judges to complain that they had been turned “into ‘rubberstamp bureaucrats’ and ‘judicial accountants’ in a sentencing process . . . drained of its humanity”).

### III. IDEAS FOR REORIENTING PROGRESSIVE PUNISHMENT ADVOCACY

It is easier to spotlight the problem of mass incarceration than to set forth simple and effective remedies.<sup>45</sup> Nevertheless, arguments against mass incarceration are already simmering within our nation's traditions and within our current political and social dialogues. Progressives should synthesize these arguments, marshal the supporting evidence, and position themselves to initiate and lead a critical new public policy conversation about reforming punishment practices in America. Drawing on past experiences and modern realities, one can start to outline theoretical, political and practical ideas for seeking to reverse the incarceration explosion.

#### A. Some theoretical ideas for new progressive advocacy

Progressives can and should mine modern movements in Constitutional and political theory to make new kinds of attacks on mass incarceration and extreme prison punishments. Specifically, progressives ought to advance arguments based on our nation's traditions of seeking to limit governmental power and our nation's enduring commitment to protecting individual liberty. These traditions in part account for modern concerns about wrongful convictions, but they have not yet been carried over into a broader concern for excessive imprisonment. Criminal justice power is an extreme form of government power and mass incarceration is an oppressive form of big government. The Framers fully understood this when they enacted a Bill of Rights that is almost exclusively focused on limiting and regulating the exercise of police power.<sup>46</sup> Nine of the first ten Amendments to the Constitution set forth formal or informal safeguards against different possible forms of extreme uses of the police power. Given the Framers' fundamental commitment to personal liberty and individual freedom, I suspect they would be shocked and saddened that the United States has become the world's leader in locking individuals in small cages for long periods of time.

Disappointingly, few leading constitutional voices speak out against extreme imprisonment, despite a modern rejuvenation of originalist thinking in constitutional law and policy. Contemporary law reviews are filled with constitutional scholars actively writing about originalist views concerning gun rights under the Second Amendment, trial

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<sup>45</sup> See generally Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693,1705 (2006) (sensibly noting that “the construction of the carceral state was the result of a complex set of historical, institutional, and political developments. No single factor explains its rise, and no single factor will bring about its demise.”).

<sup>46</sup> Though the Fourth, Fifth, Sixth and Eighth Amendments are most commonly mentioned (and litigated) when considering limits on the operation of modern criminal justice systems, one might readily view every Amendment of the Bill of Rights save the Seventh as articulating a restriction on the operation of the police power. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 207 (3d ed. 2005) (noting that the “leaders of the Revolution . . . felt that the British had abused criminal justice” and that the “Bill of Rights . . . contained a minicode of criminal procedure”).

rights under the Sixth and Seventh Amendments, and broader liberties under the Ninth Amendments. Yet modern scholarship and jurisprudence still await a rejuvenation of originalist perspectives on mass incarceration and the huge growth of government structures devoted to criminal justice administration. A serious commitment to originalist views on human liberty and personal freedoms and to our nation's core founding principles should lead many more modern constitutional scholars to spotlight and rigorously question America's modern incarceration explosion.

Of course, there is considerable constitutional theorizing about modern criminal justice systems, but much of this work is subject to the distractions noted in Part II above. It is sometimes hard to find a volume of a major law review that does not include an article that presents some novel constitutional argument against death penalty administration or against criminal structures that might in part explain why innocents are sometimes wrongfully convicted. But it is equally as difficult to find a major law review that does include an article presenting novel constitutional arguments against sentencing non-violent offenders to life imprisonment or against long-term supermax confinement. Progressives should seriously consider whether some indirect responsibility for modern mass incarceration flows from the failure of modern constitutional scholars to develop claims that the Bill of Rights may place some restrictions on the extreme use of extreme prison punishments.

Moving from constitutional arguments to political theory, progressives can and should be aggressively reaching out to modern conservatives and libertarians in order to forge new coalitions to attack the many political and social forces that contribute to mass incarceration. Disconcertingly, we rarely hear modern conservatives and libertarians, when lamenting government interferences or the problem of big government, criticize or even discuss modern mass incarceration. If truly committed to their espoused principles of human liberty and small government, modern conservatives and libertarians should be willing and eager to join a serious campaign committed to reversing the incarceration explosion. Progressives, rather than categorically resisting calls for smaller government, should encourage modern conservatives and libertarians to turn their concerns and energies toward improving America's criminal justice systems. Areas where harsh criminal laws appear to be driven by government efforts to hyper-regulate often intangible harms, such as extreme mandatory sentencing statutes related to drug crimes and gun possession, seem especially likely settings for a convergence of views and new alliances for advocacy efforts. Specific, issue-based advocacy may allow progressives to forge coalitions with unexpected allies in order to work against some of the most unjust modern sentencing laws and policies.

## **B. Some practical ideas for new progressive advocacy**

Moving beyond modern political and social theory to more pragmatic issues, progressives should systematically assemble the ample and ever growing evidence that "tough on crime" imprisonment policies are costly and often ineffectual. Notably, many modern state-level sentencing decision-makers have recently and readily stressed that our old punishment paradigms are highly ineffectual (whether measured by recidivism rates or public expenditures); they sensibly urge that old approaches give way to new

paradigms with empirically-informed attention focused on public safety concerns.<sup>47</sup> Indeed, even when politicians and the public discuss other objectives for criminal justice systems, everyone still readily agrees as a practical matter that a principal goal of sentencing law and punishment policy is to enhance public safety. Given the broad political and social consensus committed to promoting safe communities, the obvious inefficiencies and problematic economics of extreme incarceration should help foster a dynamic new dialogue concerning alternative social and criminal justice interventions beyond incarceration.

Everyone working “on the ground” in modern criminal justice systems recognizes how the expansion of incarceration has created a vicious cycle involving resource allocation and sentencing options. While three-fourths of offenders under supervision are currently out in the community on probation or parole, only one-tenth of correctional resources are devoted to agencies that seek to help offenders reenter the community. The result is high caseloads for those charged with supervising offenders on probation or parole and few resources to allow them to either supervise or support these offenders very effectively. This in turn causes sentencing judges and parole boards to lose confidence in these non-incarcerative options. Greater resources for community-based supervision would alleviate the imbalance in the system and lead to more effective sentencing options. Encouragingly, both major presidential candidates spoke out strongly in favor of devoting greater federal resources to effective reentry programming.<sup>48</sup> Consequently, the incoming Obama Administration ought to be able to forge bipartisan agreements to invest in reentry initiatives, and progressives ought to make extra certain this happens.

While reentry programming to facilitate prisoners’ return into the community has become an important and widely accepted policy commitment on both sides of the political aisle, progressives can and should engender a broader conversation about how best to keep individuals from exiting the community into prison in the first instance.<sup>49</sup> Though general advocacy for alternatives to incarceration in the abstract may still be a difficult sell politically, public understanding and political support for distinct offender groups is often feasible and more readily attainable. Voices often raised with knee-jerk

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<sup>47</sup> See, e.g., Michael A. Wolff, *Evidence-Based Judicial Discretion, Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. Rev. 1389 (2008); Roger K. Warren, *The Most Promising Way Forward: Incorporating Evidence-Based Practice into State Sentencing and Corrections Policies*, 20 FED. SENT'G REP. 322 (2008); Michael H. Marcus, *Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link*, 1 OHIO ST. J. CRIM. L. 671, 677-81 (2004).

<sup>48</sup> See generally International Association of Chiefs of Police, *2008 U.S. Presidential Candidates Respond to the IACP's Questions on Crime, Terrorism, and Homeland Security*, THE POLICE CHIEF, Oct. 2008, at 32, available at [http://www.theiacp.org/documents/pdfs/PressRelease/Candidates\\_Q&A\\_10-08.pdf](http://www.theiacp.org/documents/pdfs/PressRelease/Candidates_Q&A_10-08.pdf).

<sup>49</sup> See generally Robert C. “Bobby” Scott, *Tougher Federal Criminal Penalties versus More Crime Prevention Funding*, 20 FED. SENT'G REP. 299 (2008) (encouraging public policy makers to abandon the “tough on crime” approach to criminal justice and to pursue preventative strategies based on empirical evidence to reduce crime).

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“tough-on-crime” responses to crime issues will tend to be muted if progressives focus their advocacy for criminal justice reform on particularly sympathetic offender groups -- ranging from young juvenile offenders to women subject to abuse and poverty to individuals suffering from mental illness and substance addictions. Statistics regularly demonstrate that many offenders subject to harsh repeat-offender sentencing laws are caught in a cycle of drug addiction and dependency, and that significant numbers of offenders are mentally ill, come from abusive or poverty-stricken homes, or have learning disabilities. It is widely recognized that persons suffering from these kinds of social and personal problems do not regularly receive appropriate services, and these factors are not often considered for mitigating purposes in the court process. Yet these statistics are rarely cited during debates about crime rates and sentencing policies. Encouraging dialogue about crime and analyzing prison populations with an emphasis on vulnerable populations can and should help progressives develop a policy discussion that is problem-oriented rather than soundbite-driven.

Moreover, a pragmatic discussion of crime and punishment can and will necessarily draw attention to other issues that have long been an important part of progressive agendas. For example, consider the known relationship between education and crime, as recently summarized in a Justice Policy Institute report:

Overall, individuals incarcerated in U.S. prisons and jails report significantly lower levels of educational attainment than do those in the general population. Research has shown a relationship between high school graduation rates and crime rates, and a relationship between educational attainment and the likelihood of incarceration.<sup>50</sup>

These data can and should be used to help lawmakers appreciate that increases in educational attainment, rather than increases in imprisonment rates, may be the surest way in modern times to reduce crime rates. Similarly, there is considerable research suggesting an important relationship between employment, wages, and crime rates that should also help policymakers recognize that increased investments in employment opportunities can have a positive public safety benefit.<sup>51</sup>

Last but not least, progressives can and should be optimistic about the reformative power of enhancing public understanding through the dissemination of basic information. The incarceration explosion developed rapidly over the past thirty years, largely outside of the public eye, and not necessarily according to a common plan. Because these developments have been a relatively invisible feature of modern American social and political life thus far, there is reason to hope that a direct examination and sober debate about underlying causes and real-world consequences of mass incarceration might help

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<sup>50</sup> JUSTICE POLICY INST., EDUCATION AND PUBLIC SAFETY 1 (2007), *available at* [http://www.justicepolicy.org/images/upload/07-08\\_REP\\_EducationAndPublicSafety\\_PS-AC.pdf](http://www.justicepolicy.org/images/upload/07-08_REP_EducationAndPublicSafety_PS-AC.pdf).

<sup>51</sup> JUSTICE POLICY INST., EMPLOYMENT, WAGES AND PUBLIC SAFETY 1 (2007), *available at* [http://www.justicepolicy.org/images/upload/07\\_10\\_REP\\_EmploymentAndPublicSafety\\_AC.pdf](http://www.justicepolicy.org/images/upload/07_10_REP_EmploymentAndPublicSafety_AC.pdf).

reverse social and political trends that are still not widely appreciated or fully understood. The death penalty is dying a slow death in modern American life largely because more policy-makers and more member of the public have become focused on the many flaws evident in the modern administration of capital punishment. New information and attention given to issues like wrongful convictions and the costs and inefficiencies of capital punishment systems have reshaped public attitudes and spurred positive legal reforms. In similar fashion, simply calling more attention to the realities and costs of modern mass incarceration may be the critical first step toward creating an environment for effective change.

#### IV. CONCLUSION

Academics have given some attention to the dynamics of extreme incarceration, and they will continue to do so. My goal in this paper is to encourage progressives to adjust their perspective and align their advocacy strategies with the realities and challenges posed by twenty-first century criminal justice systems. Put simply, given the stunning and unprecedented modern expansion in American imprisonment rates, the problems and consequences of mass incarceration should be the preeminent concern for progressives moving forward.

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