# Mass Incarceration at Sentencing

ANNE R. TRAUM*

*Courts can address the problem of mass incarceration at sentencing. Although some scholars suggest that the most effective response may be through policy and legislative reform, judicial consideration of mass incarceration at sentencing would provide an additional response that can largely be implemented without wholesale reform. Mass incarceration presents a difficult problem for courts because it is a systemic problem that harms people on several scales—individual, family, and community—and the power of courts to address such broad harm is limited. This Article proposes that judges should consider mass incarceration, a systemic problem, in individual criminal cases at sentencing. Sentencing is well suited to this purpose because it is a routine phase of a criminal case when courts have great flexibility to individualize punishment based on individual and systemic factors. In this phase, judicial discretion is at its highest, the judges' contact with defendants is most direct, and the court can consider the broadest information relevant to sentencing options and impacts. Mass incarceration can be viewed as a systemic concern that is relevant to both the defendant's history and the traditional sentencing purposes—including the need to benefit public safety and to ensure that sentences are fair and just. Information about mass incarceration would enhance courts' understanding of the impacts of sentencing on the defendant and others in the local community. This Article articulates how this can be accomplished in federal sentencing and suggests doctrinal and practice changes that would enhance courts' capacity to consider and mitigate the harms of mass incarceration in individual cases.*

* Associate Professor, William S. Boyd School of Law, University of Nevada, Las Vegas. Dean John Valery White provided financial support for this project. I am grateful for comments and encouragement from Richard Frase, Gabriel J. Chin, Christopher Blakesley, Kate Kruse, Sharon Dolovich, Shima Baradaran, Bret Birdsong, Cara H. Drinan, Laura Appleman, Giovanna Shay, and participants in the ABA-AALS Criminal Justice Section Academic Workshop on "Reducing Reliance on Incarceration."

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## INTRODUCTION

What can courts do to redress mass incarceration? The term mass incarceration refers to high incarceration rates concentrated within disadvantaged communities, and its harms include the destabilizing impacts of imprisonment on the inmate, his family, and his community during and after the prison term. Scholarly attention on mass incarceration has focused on its causes and impacts, as well as on policy reforms intended to slow or reverse the trend. Few have articulated the aim of this Article: a pathway for redressing mass incarceration in the courts within a criminal case.[1] Situating mass incarceration analysis as a concern within a criminal case may not achieve what legislative reform could do, but it offers an approach for courts to redress mass incarceration under existing legal structures.

This Article argues that courts have the authority to consider the harms of mass incarceration at criminal sentencing under existing law and proposes measures to enhance court capacity to recognize and minimize those harms. Courts are on the front line of deciding who goes to prison and for how long, and they routinely tailor punishment based on individualized factors and systemic concerns, including fairness and public safety. Mass incarceration harms are relevant to the defendants' history and the systemic purposes of sentencing, including whether the sentence will enhance public safety and foster respect for the law. Incorporating analysis of mass incarceration harms analysis at sentencing would build on courts' sentencing expertise and add an important dimension to the sentencing justification. With proper information and guidance, courts could tailor sentences with an eye toward decreasing the harms of mass incarceration.

Part I describes some of the causes and harms of mass incarceration. The criminal justice system has in the past three decades increasingly relied on incarceration as a form of punishment, resulting in many more people going to prison or jail and serving longer sentences. The harms of mass incarceration occur at the individual, family, and community levels, and they extend into the future after release from prison. By understanding these harms, courts may consider them when sentencing an individual defendant. Part II argues that sentencing is the best time for courts to redress mass incarceration. All courts, state and federal, balance individual and systemic factors when tailoring a sentence to an individual defendant and routinely consider the four major purposes of sentencing (retribution, deterrence, incapacitation, rehabilitation), as well as proportionality. Part II argues that this traditional analysis can

1. *See, e.g.*, Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010).

include mass incarceration impacts and that courts can individually tailor sentences to eliminate or mitigate such harms. This Part focuses on federal sentencing, which represents a small fraction of all criminal cases, but the analytical approach is broadly applicable to any sentence in which a court exercises discretion.[2] Part III discusses both how courts can consider mass incarceration impacts in federal sentencing and the judicial reforms that would aid this project.

## I. Mass Incarceration and Its Harms

Mass incarceration is a product of our criminal justice system, yet our criminal adjudication process is awkwardly suited to redress the problem. The phenomenon is chronicled in a range of academic scholarship in law,[3] political science,[4] economics,[5] and sociology.[6] Awareness of these issues has been raised by media reports on the high rates of incarceration (1 in 100 men,[7] or 2.3 million people, are in jail or prison), the release of prisoners due to overcrowding,[8] and the lengths of prison terms.[9] This Part aims to identify some key features of this societal problem with an eye toward how it might be addressed by courts.

In its most generic form, the term "mass incarceration" typically is used to describe both the trend toward historically high incarceration

2. Federal cases comprise only a fraction of all criminal cases. *See* Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 Fla. L. Rev. 683, 684–85 (2009) (observing that 95% of criminal cases arise and are sentenced in state courtrooms). In most federal cases, courts enjoy considerable discretion at sentencing despite the prevalence of statutory minimum sentences. *See* U.S. Sentencing Comm'n, Overview of Statutory Mandatory Minimum Sentencing 1 (2008) [hereinafter Mandatory Minimum]. In 2008, 28.6% of federal defendants were convicted under a mandatory minimum statute, meaning that in over 70% of cases the court's discretion at sentencing was not constrained by a mandatory minimum statute. *Id.*

3. *See generally* David Cole, *Turning the Corner on Mass Incarceration?*, 9 Ohio St. J. Crim. Law 27 (2011); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 Ohio St. J. Crim. Law 133 (2011).

4. *See generally* Vanessa Barker, The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders (2009); Lisa L. Miller, The Perils of Federalism: Race, Poverty and the Politics of Crime Control (2008).

5. *See, e.g.*, Do Prisons Make us Safer? The Benefits and Costs of the Prison Boom, (Stephen Raphael & Michael Stoll eds., 2009); Glenn C. Loury, *Crime, Inequality & Social Justice*, Daedalus, Summer 2010, at 134–40.

6. *See* Bruce Western & Christopher Wildeman, *Punishment, Inequality and the Future of Mass Incarceration*, 57 U. Kan. L. Rev. 851, 857–66 (2000). *See generally* Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 Daedalus 20 (2010); Christopher Wildeman, *Imprisonment and (Inequality in) Population Health*, 41 Soc. Sci. Res. 74 (2012).

7. Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.: Inmate Population Is Highest in the World*, N.Y. Times, Feb. 29, 2008, at A14.

8. *See* Brown v. Plata, 131 S. Ct. 1910, 1923 (2011); *see also* Adam Liptak, *Justices, 5–4, Tell California to Cut Prisoner Population*, N.Y. Times, May 24, 2011, at A1.

9. *See* Solomon Moore, *Study Finds Record Number of Inmates Serving Life*, N.Y. Times, July 23, 2009, at A24.

rates in the United States and the causes and effects of that trend. David Garland is credited with coining the term "mass imprisonment," which he defined as having two distinct characteristics: (1) unusually and historically high imprisonment rates, and (2) heavy concentration on certain demographic groups.[10] As Garland describes, "[m]ass imprisonment implies a rate of imprisonment . . . that is markedly above the historical and comparative norm for societies of this type,"[11] and "it ceases to be the incarceration of individual offenders and becomes the systemic imprisonment of whole groups of the population."[12] This definition identifies mass incarceration as a group and systemic problem, not merely an individual problem.

The term "mass incarceration" has sparked academic debate. But even the critiques highlight the serious, systemic, and community nature of its impacts. Professors Robert Weisberg and Joan Petersilia suggest that the term is "melodramatic" because it carries connotations of governmental conspiracy and suggests the existence of an "epidemic" or self-generating phenomenon beyond our control.[13] Yet they recognize that mass incarceration has led to a "structural change in our social, economic, and familial life."[14] Professor Loïc Wacquant argues that "mass incarceration" wrongly implies a problem affecting the masses, that is, that it affects large swaths of citizenry, across social and physical space, in broad and indiscriminate ways.[15] To the contrary, Wacquant argues, incarceration growth rates have "been finely targeted," by class, race, and geography.[16] This concentration has led to the "hyperincarceration" of disadvantaged urban black men, while leaving the rest of society relatively untouched.[17] These critiques underscore some salient features of mass incarceration: It is a systemic problem stemming from the cumulative societal impacts of individual imprisonment, these impacts are significant, and they (along with high incarceration rates) are concentrated in certain disadvantaged communities.

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10. *See* David Garland, *Introduction: The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1–2 (David Garland ed., 2001).

11. *Id.* at 1.

12. *Id*. at 2.

13. Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, 139 DAEDALUS 124, 124 (2010).

14. *Id.*; *see also id.* at 131 (arguing that the problem stems more mundanely from the accumulation of misguided policies, and may be redressed by focusing on reducing "unnecessary incarceration," for example, by developing a "what works" literature on prison alternatives to guide sentencing).

15. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 78 (2010); *see* Sampson & Loeffler, *supra* note 6, at 25 ("[T]he concept of 'mass' incarceration is potentially quite misleading, for its instantiation is experienced at highly local level.").

16. Wacquandt, *supra* note 15, at 74, 78.

17. *Id.* at 78.

### A. Imprisonment Growth and Its Causes

Growth in incarceration rates is commonly traced to a range of legal policies, which have increased both the likelihood of imprisonment and the lengths of prison terms.[18] Professors Todd Clear and James Austin have described "the iron law of prison populations" as the result of two factors—how many people go to prison and how long they stay.[19] Which factor is the more important is open to debate: Some contend it is prison admissions,[20] while others argue that the number of long sentences make U.S. prison rates unique.[21] It is clear, however, that a reduction in incarceration rates requires fewer prison admissions, shorter prison terms, or both.[22]

The scale of the prison system is usually measured by the incarceration rate. The per day incarceration rate measures the number of people in prison per day per 100,000 of the population.[23] The United States now has the highest incarceration rate in the world, peaking at over 750 persons incarcerated per 100,000, roughly seven times the rate in Western Europe.[24] Though recent budgetary constraints have caused incarceration rates to dip in most states, the federal rate of incarceration has continued to grow, and the numbers overall remain high.[25] But the daily incarceration rate tells only part of the story. It neither fully captures the duration of sentences nor reflects the toll of those sentences on defendants and persons not in the system.[26]

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18. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 Harv. L. & Pol'y Rev. 307, 312 (2009).

19. *Id*. For statistics on how many and how long, see Keith Reitz, *Don't Blame Determinacy: U.S. Incarceration Rates Have Been Driven by Other Forces*, 84 Tex. L. Rev. 1787, 1787 (2006).

20. Wacquant, *supra* note 15, at 75.

21. *See* Reitz, *supra* note 19, at 1788 ("[T]he essential attribute . . . is in its duration . . . ."); Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. Times, Apr. 23, 2008, at A1 (explaining that "the mere number of sentences imposed here would not place the United States at the top of the incarceration lists. . . . [because] annual admissions to prison per capita[] [in] in several European countries [are higher]," but rather, it is the duration of American prison stays that make our total incarceration rate higher).

22. Clear & Austin, *supra* note 18, at 312.

23. Western & Wildeman, *supra* note 6, at 857.

24. Bureau of Justice Statistics, Facts About Prisons and Prisoners, The Sentencing Project (July 2008), *available at* http://www.ala.org/ala/aboutala/offices/olos/prison_facts.pdf; *see also* Ashley Nellis & Ryan S. King, The Sentencing Project, No Exit: The Expanding Use of Life Sentences in America (July 2009).

25. Cole, *supra* note 3, at 27; Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, The Great Recession & Penal Reform*, 139 Daedalus 62, 62 (2010) (stating that while the prison population in 2008 and 2009 edged downward in twenty-seven states, it grew in twenty-three states, and the federal prison population increased by 7%).

26. Reitz, *supra* note 19, at 1788. Highlighting sentence duration, Professor Keith Reitz has charted prison growth in "person-years." *Id.* In Reitz's chart, a comparison of per day incarceration snapshots showed an increase of 744,413 inmates from 1990 to 1999. *Id.* at 1788–89. In person-years, this growth was even more dramatic. *Id.* Assuming no growth in incarceration, the system would have

The causes of this explosive growth, though debated, are generally identified as several legal developments over the past four decades that have resulted in more prison sentences and longer terms. Beginning in the 1970s, there was an increase in the commitment of "marginal felons" to jail and prison for low-level felonies like drunk driving, drug possession, and parole violations.[27] Incarceration, rather than rehabilitation, became the preferred sanction.[28] The war on drugs, beginning in the 1980s, vastly expanded drug crime prosecutions and made prison sentences for drug offenses routine.[29] From 1980 to 2007, there was a roughly twenty-fold increase in the number of federal offenders imprisoned for drug offenses—from 4900 in 1980[30] to 98,675 in 2007.[31] During the same period, the number of arrests for sale and manufacture of drugs more than doubled.[32] Drug offenders began to receive longer sentences than before.[33] State and federal laws created stiff mandatory minimum sentences for many drug offenses.[34]

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dispensed 11.5 million person-years of confinement, but it actually dispensed 15.3 million person-years of incarceration—a 50% increase in lost liberty. *Id.* at 1789.

27. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 90 (1991) (noting that imprisonment is now viewed "as an appropriate punishment for all types of offense"). *Cf.* Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, *in* MASS IMPRISONMENT, *supra* note 10, at 145, 145–46 (describing three distinct phases of prison growth: first, the period from 1973 to the mid-1980s, when "the emphasis was on general increases in the commitment of marginal felons to prison"; second, the period from 1985 to 1992, when the emphasis switched to drugs; and finally, the period from 1992 onward, when imprisonment rates continued to grow very substantially despite rapidly decreasing crime rates).

28. *See* J. Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 261–62 (2009); *see also* Marc Mauer, *Why Are Tough on Crime Policies so Popular?*, 11 STAN. L. & POL'Y REV. 9, 11 (1999) ("[E]very state and the federal government has some kind of mandatory sentencing law.").

29. *See* Sentencing Memorandum of Myles Haynes at 9, United States v. Haynes, 557 F. Supp. 2d 200 (D. Mass. 2008) (No. 06-10328-NG), 2006 WL 5283198.

30. RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 9 (2007).

31. *See* Sentencing Memorandum of Myles Haynes, *supra* note 29, at 10.

32. *Id.* (noting that drug arrests jumped from 137,900 arrests in 1982 to 337,900 arrests in 2005).

33. Today in the federal system the average drug offender sentence is nearly twice as long as in 1983. *Compare* MARGARET W. CAHALAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 102529, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984 162–63 (1986) (in 1983, a federal drug offender served on average forty-four months in prison), *with* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 231822, FEDERAL JUSTICE STATISTICS, 2008—STATISTICAL TABLES, tbl.5.2 (2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1745 [hereinafter 2008 FEDERAL JUSTICE STATISTICS] (in 2007, a federal drug offender served on average eighty-five months in prison).

34. Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, *in* MASS IMPRISONMENT, *supra* note 10, at 4, 6 (citing a record 1.6 million drug arrests in 1998, and noting the mandatory prison sentences at the federal and state levels, including the Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988, which imposed a five-year mandatory minimum sentence for possession of as little as five grams of crack cocaine, and Michigan's "Public Act 368 of 1978," which imposed a mandatory life without parole sentence, even for first time offenders, for the sale of 650 grams of heroin or cocaine).

New repeat offender statutes and "truth in sentencing" laws also resulted in longer prison sentences.[35] Laws like California's Three Strikes and You're Out resulted in severe penalties, often mandatory, for repeat offenders.[36] Some attribute the increase of incarceration and lengthening of prison terms to "truth in sentencing" laws, such as the federal Sentencing Reform Act of 1984, which aimed to increase uniformity in sentencing but in doing so resulted in more prison sentences and longer prison terms.[37] These evolutions in sentencing law and practice dramatically impacted who went to prison and the length of prison terms. As discussed in Part II, these changes also transformed the judicial role in sentencing.

These changes have increased both the number of people going to jail or prison and the number serving long and extremely long terms.[38] Today, the average felony prison sentence is over four years, and only 28% of felons avoid jail or prison time.[39] At the high end, there has been a dramatic increase in the number of prisoners serving sentences of life or life without parole.[40] Beyond prison walls, the correctional system also

35. Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1223 (2004) (considering the Sentencing Reform Act of 1984). In fact, probation has been nearly eliminated as a sentence. *Id.* at 1212; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1453 (2008).

36. ZIMRING & HAWKINS, *supra* note 27, at 147; *see also* Ewing v. California, 538 U.S. 11, 15 (2003) ("Between 1993 and 1995, 24 States and the Federal Government enacted three strikes laws.").

37. *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS 5 (1998) ("Before the Guidelines, 50 percent of all federal defendants received nonimprisonment sentences; in the last decade, that percentage has dropped to less than 15 percent.").

38. The per day incarceration rate jumped from 133 per 100,000 in 1980 to 387 per 100,000 in 1994, and then to 762 per 100,000 in 2008. CAHALAN, *supra* note 33, at 29; Press Release, U.S. Dep't of Justice, The Nation's Prison Population Grew Almost 9 Percent Last Year (Aug. 9, 1995), http://bjs.ojp.usdoj.gov/content/pub/press/PI94.PR; BUREAU OF JUSTICE STATISTICS, *supra* note 24. In the early 1980s, most state felony offenders served, on average, sixteen to seventeen months before release. CAHALAN, *supra* note 33, at 54 tbl.3-24. In 2006, the average felony sentence in state court exceeded four years. THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 13 (2010); *see also* ZIMRING & HAWKINS, *supra* note 27, at 120 fig.5.1; Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 225 (2009) ("Because the system of criminal sentencing had come to rely so heavily on incarceration, an arrest in the late 1990s was far more likely to lead to prison time than at the beginning of the prison boom in 1980."). *See generally* PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS (2010).

39. *See* COHEN & KYCKELHAHN, *supra* note 38, at 13. The average sentence for violent felonies is ninety-four months. *Id.*

40. Nationally, as of 2009, one in eleven prisoners is serving a life sentence; in California, the rate is one in five prisoners. NELLIS & KING, *supra* note 24, at 3. The number of prisoners serving life sentences has quadrupled since 1984. *Id.* at 7. Twenty-nine percent of those serving life sentences are serving life without the possibility of parole. *Id.* at 3. The number of life without parole sentences climbed 22% in the past five years. *Id.*

includes nearly five million people under parole or probation,[41] both of which often function as a pathway to or back to prison.[42]

Though alarming, none of these metrics adequately captures the dynamic impact of imprisonment on inmates and others outside the criminal justice system.

## B. The Broader Harms of Mass Incarceration

Understanding how mass incarceration fits within the sentencing picture requires consideration of its harms, that is, whom it impacts and how. A growing body of literature is beginning to quantify the human toll of mass incarceration. At least two salient harms of mass incarceration warrant special concern: It harms persons both in the system and outside it (inmates and non-inmates), and it disproportionately impacts disadvantaged communities without making them safer.[43] The harm of mass incarceration starts at the individual level and then reverberates to the family[44] and the community.[45] Certain factors of disadvantage predict who is more at risk of going to prison and who will be impacted by a prison sentence.[46] Disadvantaged communities disproportionately bear the brunt of high incarceration rates by enduring the strain and destabilization caused by the absence and return of prisoners.[47] There is evidence that incarceration—even short-term incarceration—causes

41. Western & Wildeman, *supra* note 15, at 858–59. This brings the total number of persons under correctional supervision to more than 7.1 million, or about 3.1% of all adults in the United States. *Id.* at 859.

42. For decades, California required supervision of all released inmates and mandated prison sentences for even minor parole violations, swelling prisons with relatively low-risk offenders. *See* Robert Rogers, *Parole Violations Feed Prison's Revolving Door*, The Bay Citizen (Aug. 10, 2010), http://www.baycitizen.org/crime/story/look-prisons-revolving-door. A recent change in law in January 2011 permits focus on more serious parole violations. *See* Sara Mayeux, *"Prison Without Walls" and the Special Case of California*, Prison Law Blog, (Aug. 16, 2010, 6:53 PM), http://prisonlaw.wordpress.com/2010/08/16/prison-without-walls-and-the-special-case-of-california.

43. Western & Wildeman, *supra* note 38, at 233–39 (noting the effects on families and communities, along with the possibility of producing a more violent post-incarceration individual).

44. *See* Marc Mauer, *Thinking About Prison and Its Impact in the Twenty-First Century*, 2 Ohio St. J. Crim. L. 607, 611–12 (2005).

45. *See* Weisberg & Petersilia, *supra* note 13, at 131. *See, e.g.*, Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1276, 1281–85 (2004); Jeffrey Fagan & Valerie West, *Incarceration and the Economic Fortunes of Urban Neighborhoods* 6–9 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 11-266, 2010), *available at* http://ssrn.com/abstract=1772190. *See generally* Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 Just. Q. 33 (2003) (further investigating this phenomenon).

46. *See* Western & Wildeman, *supra* note 15, at 857–66. *See generally* Bruce Western, Punishment and Inequality in America 11–33 (2006).

47. Western & Wildeman, *supra* note 38, at 230 (describing how the stigma of a prison record creates legal barriers and how former prisoners are less likely to get married).

lasting harms.[48] Courts have reason to be concerned about such harms during the sentencing process.

### *1. Individual Impacts*

At the individual level, a prison sentence, even a short one, can have lasting detrimental effects that may not be accounted for in the sentencing process. The prison sentence and subsequent supervision restrictions are hardships that are expressly contemplated at sentencing. After completing his sentence, the individual may face additional civil consequences that are not always expressly mentioned in the criminal case. Convicted felons, for example, routinely suffer significant civil consequences as a result of conviction: Felons often cannot vote or serve on a jury, are disqualified from receiving welfare benefits and federal educational assistance, and may no longer qualify for certain jobs or licensed occupations.[49]

For many disadvantaged individuals, especially young black men, prison has become a "regular, predictable part of experience, rather than a rare and infrequent event."[50] Inmates are mostly black or Latino,[51] young,[52] less educated, and underemployed.[53] For many, the risk of going to prison has become an ordinary aspect of life:[54] One in eight black men in their twenties is in prison or jail on any given day,[55] and 69% of black high school dropouts are imprisoned over their lifetime,[56] compared with just 15% for white high school dropouts.[57] These racial disparities reflect a historic shift from a time when 70% of prisoners were white,[58] and these disparities increase with the severity of the punishment.[59]

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48. *See* Sampson & Loeffler, *supra* note 15, at 29; Fagan & West, *supra* note 45, at 6–9.

49. *See* Mauer, *supra* note 44, at 610; Western & Wildeman, *supra* note 38, at 230.

50. MASS IMPRISONMENT, *supra* note 10, at 2; *see* Western & Wildeman, *supra* note 38, at 231 (noting that for young black men imprisonment is a "routine life event" on the pathway to adulthood).

51. *Racial Disparity*, THE SENTENCING PROJECT, http://www.sentencingproject.org/template/page.cfm?id=122 (last visited Dec. 7, 2012). *See* PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 201677, PRISONERS IN 2004, at 8 (2005) (reporting that in 2004, one in three black adult men thirty-five years or younger were in the "system," that is, either in prison or jail or under correctional supervision).

52. Western & Wildeman, *supra* note 38, at 228 (noting that about two-thirds of adult state prisoners are thirty-five years of age or younger).

53. *Id.*

54. Adam Gopnik, *The Caging of America*, NEW YORKER, Jan. 30, 2012, at 72.

55. Western & Wildeman, *supra* note 38, at 228 (statistics as of 2004). Racial disparities in prison rates are unmatched by other metrics like unemployment, infant mortality, and wealth. *Id.*

56. This figure is five times the rate for that group fifty years ago. *Id.*

57. For black men who finished high school without further schooling, the lifetime risk of imprisonment is 18%. *Id.*

58. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, *in* MASS IMPRISONMENT, *supra* note 10, at 82, 82.

59. NELLIS & KING, *supra* note 24, at 14 ("African-Americans comprise 12% of the general population but represent 28% of total arrests and 38% of persons convicted of a felony in a state

Imprisonment, with its collateral consequences, is a "turning point" in the lives of these young men because it has lasting political, economic, and social detrimental consequences. Positive life events, such as marriage, military service, high school graduation, and college,[60] are associated with the process of becoming an adult and leading a stable life,[61] and they serve as important markers of a non-criminal lifestyle.[62] Prison is not only a defining experience, but it diminishes the likelihood of stabilizing life events later on.[63]

For individuals, prison is destabilizing long after the sentence ends. Importantly, these lasting harms are not limited to the inmate sentenced, but extend to others. These "secondary effects" of incarceration have amounted to a "structural change in our social, economic, and familial life."[64]

### 2. *Family Impacts*

Because most prisoners are parents,[65] prison is detrimental to families and children.[66] Children of inmates are at higher risk of future incarceration.[67] Incarceration isolates parents from their children, removes financial and caregiving support for the children, and imposes on the family the cost, time, and stress of maintaining a relationship with an incarcerated parent.[68] The non-inmate parent may have less money and less time to invest in the children, and older children may shoulder greater responsibilities by having to care for siblings or get a job.[69] These

court."). Two-thirds of people with life sentences are non-white, and nearly half are African-American, while 77% of juveniles sentenced to life are non-white. *Id.* at 3, 11, 12 tbl.3.

60. Western & Wildeman, *supra* note 38, at 231–33.

61. *Id*. at 229.

62. *Id.*

63. *See* Brett C. Burkhardt, *Criminal Punishment, Labor Market Outcomes, and Economic Inequality: Devah Pager's* Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration, 34 LAW & SOC. INQUIRY 1039, 1043–45 (2009) (noting that employment opportunities for former prisoners, especially black former prisoners, are bleak); Western & Wildeman, *supra* note 38, at 230; *id.* at 234 (noting that marriage rates among prisoners and former prisoners are low); *id.* at 233–36 (noting that former prisoners are less likely to marry or cohabit with the mothers of their children); *id.* at 237 (noting that incarceration strains couples and families during and after prison).

64. Weisberg & Petersilia, *supra* note 13, at 124.

65. *See* Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 179, 181 (2009); Western & Wildeman, *supra* note 38, at 236 (noting that about half of fathers and two-thirds of mothers were living with their children when they were sent to prison, and that even those not living with their children may have contributed valuable caregiving and/or financial support before going to prison).

66. *See* Roberts, *supra* note 45, at 1282.

67. *Cf.* Western & Wildeman, *supra* note 38, at 241 ("If the children of the prison boom . . . are more involved in crime themselves, they too will risk following their parents into prison.").

68. Roberts, *supra* note 45, at 1282; Western & Wildeman, *supra* note 38, at 240.

69. Foster & Hagan, *supra* note 65, at 183.

forces result in lower educational achievement for the children, which, in turn, may increase their own risk of incarceration.[70] Children and spouses also may experience the stigma of prison even more intensely than the prisoner.[71] The parent's return from prison may only partially relieve the harm to the child, as inmates return with diminished earning power and social status, and increased strain.[72]

Finally, black families disproportionately bear the brunt of these impacts. Black children are nearly eight times more likely than white children to have a father in prison.[73] As Western and Wildeman note, "[j]ust as incarceration has become a normal life event for disadvantaged young black men, parental incarceration has become commonplace for their children."[74]

### *3. Community Impacts*

Communities with high incarceration rates disproportionately bear the brunt of incarceration but are not necessarily safer. Paradoxically, more incarceration does not make neighborhoods safer, and it may lead to higher crime and higher incarceration.[75] Some may argue that removing "bad seeds" from the community is beneficial to the family and community.[76] But this calculus is different if removal of the person will harm the community more than help it.[77] Sociological studies show that,

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70. *Id.* at 184.

71. Western & Wildeman, *supra* note 38, at 238. *See generally* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008).

72. *See* Dina R. Rose & Todd R. Clear, *Incarceration, Reentry, and Social Capital: Social Networks in the Balance*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 313, 324–26, 334–35 (Jeremy Travis & Michelle Waul eds., 2003).

73. Western & Wildeman, *supra* note 38, at 235. Nationwide in 2000, nearly 3% of all children had a father in prison or jail. *Id.* For whites, the rate was 1.2%, while for blacks the rate was one in eleven (approximately 9.1%). *Id.* For an African-American child, the risk of parental imprisonment before the child is age fourteen was 25%. *Id.* at 236. For an African-American child whose parent dropped out of high school, the number was twice as high, about 50%. *Id.*

74. *Id.*

75. *See generally* Todd R. Clear & Dina R. Rose, *Individual Sentencing Practices and Aggregate Social Problems*, *in* CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 27 (Darnell F. Hawkins et al. eds., 2003) (arguing incarceration only makes socially organized places safer, whereas incarceration has the opposite effect in socially disorganized places, e.g., urban ghettos).

76. Todd R. Clear, *The Problem with "Addition by Subtraction": The Prison-Crime Relationship in Low-Income Communities*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 181, 192–93 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("It seems beyond debate that any policy that removes people who do bad things [by incarcerating them] leaves those who remain better off . . . ."); Clear & Rose, *supra* note 75, at 27–28 (explaining that some attribute reductions in crime to the increase in incarceration); *see* Roberts, *supra* note 45, at 1286.

77. *See* Roberts, *supra* note 45, at 1283–84 (providing the examples of nonviolent first time drug offenders, mothers, and other caregivers).

because high incarceration rates are geographically concentrated in disadvantaged communities, those communities are harmed when prisoners are incarcerated and when they return with diminished political, economic, and social status.[78] These studies counter the common wisdom that locking up criminals is beneficial to crime-ridden communities.

Mass imprisonment may be counterproductive if it harms communities in ways that ultimately sustain crime and poverty.[79] High imprisonment rates can disrupt social order,[80] "undermine the building blocks of social order,"[81] and destabilize community life.[82] Professor Dorothy Roberts has described how mass incarceration "damages social networks," starting at the family level and then "reverberat[ing] throughout communities where the families of prisoners are congregated."[83] While one family can bear the strain of a family member's imprisonment by relying on "networks of kin and friends," multiple families relying on the same network eventually strain and weaken the community.[84] The absence of family members also means fewer people in community groups that "enforce informal social control."[85] Communities that are destabilized by high incarceration rates cannot thrive and are not safer.

Disadvantaged communities suffer high incarceration rates in ways that cannot be explained by crime.[86] In a recent study of crime and incarceration rates in Chicago,[87] Professors Robert J. Sampson and Charles Loeffler found that high incarceration rates are geographically concentrated in "hot spots" that are "hardly random."[88] Rather, these hot spots are "systematically predicted by key social characteristics" correlating to urban disadvantage,[89] including poverty, unemployment, family disruption (e.g., single-parent, female-headed families), and racial isolation.[90] Areas with "concentrated disadvantage"—that is, where these

78. *See* Sampson & Loeffler, *supra* note 13, at 29 ("High levels of concentrated imprisonment . . . seem unlikely to contribute to . . . healthy communities."). *See generally* Todd R. Clear et al., *Incarceration and Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQUENCY 335 (2001).

79. Clear, *supra* note 76, at 193; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 213 (1998); Roberts, *supra* note 43, at 1285–86.

80. Roberts, *supra* note 45, at 1285.

81. Clear, *supra* note 76, at 183.

82. *Id.* at 193.

83. Roberts, *supra* note 45, at 1282.

84. *Id.*

85. *Id.* at 1285 (including neighborhood associations, churches, and social clubs).

86. *See* Sampson & Loeffler, *supra* note 15, at 21.

87. *Id*. at 21–22 (describing how Chicago trends have mirrored national trends in crime and incarceration).

88. *Id.* at 21.

89. *Id.* at 21, 26.

90. *Id.* at 21.

factors are clustered[91]—correlated to higher incarceration rates but not higher crime.[92] Incarceration may be necessary and beneficial in some cases, and its relationship to crime control is complex.[93] Still, the data suggest there may be a tipping point when incarceration becomes so heavily concentrated in disadvantaged communities that it works against the safety and well-being of that community.

Recognizing the full range of direct and collateral harms of incarceration, especially as it affects communities with concentrated levels of disadvantage, can aid courts in redressing mass incarceration. But this information is only helpful to informing judicial decisionmaking if it is relevant to a legal claim or decision process that courts are actually capable of redressing. Criminal sentencing provides an opportunity for courts to consider and analyze the harms of mass incarceration in tailoring a sentence for an individual defendant. Though mass incarceration is a systemic and diffuse problem, courts are uniquely situated to redress it case by case using traditional sentencing purposes as a framework.

## II. Conceiving a Judicial Response

Judges have great power to shape sentencing. Because courts administer the criminal justice system, they are frontline participants to the problem of mass incarceration and provide a location and an opportunity to redress it. In examining whether courts have a role to play in slowing or mitigating the harms of mass incarceration, three questions are relevant: Do courts have the authority to intervene? Should they intervene? And, finally, how should they intervene? In thinking about those questions, it is helpful to recognize that there is a "mismatch" between mass incarceration, which is a systemic problem stemming from the aggregate impact of criminal enforcement decisions, and our case-by-case system of criminal adjudication. Recognition of this mismatch helps to highlight those features of mass incarceration that distinguish it from the issues typically adjudicated in criminal cases or in related civil litigation. Understanding the mismatch helps to craft the way that consideration of mass incarceration might fit into judicial decisionmaking.

In light of the "mismatch," this Part explores the reasons for a judicial response to mass incarceration and proposes that criminal sentencing presents the best opportunity for such a response. Though civil litigation is generally better suited to redress systemic wrongs, the absence of a cause of action for mass incarceration means that any civil

91. *Id.* at 26.

92. *Id.* at 28 ("[W]hile crime leads to incarceration up to a point, there is much more 'input' to the system in the way of social cues and systematic community-level or contextual effects [that account for the inequality in incarceration rates].").

93. *See id.* at 22.

remedy can address the problem only indirectly. And while other judicial and prosecutorial reforms within the criminal adjudication process could ameliorate mass incarceration and its harms, many would require a greater adjustment of existing institutional roles through legislative reform (most obviously, perhaps, by rolling back stricter sentencing statutes). In contrast, sentencing is a venue where mass incarceration harms could be considered in a way that would directly impact outcomes under existing legal doctrine. Specifically, at the sentencing phase, courts have direct contact with the defendant and others, the flexibility to gather and consider a wide range of information, and the discretion to tailor a sentence based on a combination of individual and systemic concerns. Courts can leverage traditional sentencing factors for this purpose to gather information and individually tailor sentences in light of real world concerns that could impact the kind, length, and severity of the sentence.

### A. The Mismatch: Redressing a Systemic Problem in Individual Cases

Mass incarceration is a systemic problem that does not fit neatly into the criminal adjudication model. Our criminal justice system is focused on moving single defendants[94] through the criminal process from charging to sentencing.[95] In that process, courts primarily focus on the adjudication of guilt and sentencing based on individual facts, while protecting legal rights before[96] and during the court process.[97] Mass incarceration, by contrast, is a widespread social problem that results from, and is recognized as, the aggregation and concentration of many convictions and sentences. It is the systemic manifestation of criminal adjudication and sentences, repeated millions of times across the system.[98] Though mass

94. While multiple defendants may be charged, processed, and tried together, critical aspects of the procedure, like the adjudication of guilt and the sentencing, are individualized. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 323–24 (1979) (requiring at conviction that each element be proved beyond a reasonable doubt); *In re* Winship, 397 U.S. 358, 361 (1970) (requiring proof beyond a reasonable doubt as to each element for a juvenile adjudication); Boykin v. Alabama 395 U.S. 238, 242–44 (1969) (holding that the court is charged with determining on the record that an individual guilty plea is knowing, intelligent, and voluntary); Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (providing a felony defendant the right to assistance of counsel).

95. *See* Fed. R. Crim. P. 1(a) (defining the rules applicable to federal court proceedings).

96. *See* U.S. Const. amend. IV (right against unreasonable search and seizure); U.S. Const. amend. V (right to due process, right against self-incrimination, right to a grand jury in federal criminal cases).

97. *See* U.S. Const. amend. VI (right to counsel, right to jury trial, right to summon and confront witnesses); U.S. Const. amend. VIII (right against excessive bail and cruel and unusual punishment).

98. *See Key Facts at a Glance*, Bureau of Justice Statistics, http://bjs.ojp.usdoj.gov/content/glance/felconv.cfm (last visited Dec. 7, 2012) ("Over 1 million adults were convicted of a felony in state courts in 2006."); *see also* Clear & Austin, *supra* note 16, at 312. *See generally* Lauren E. Glaze, U.S. Dep't of Justice, Bureau of Justice Statistics, NCJ 231681, Correctional Populations in the

incarceration is the aggregate product of the criminal justice system, its features are quite distinct from the issues adjudicated in individual criminal cases.

In criminal adjudication, courts typically resolve individual cases, not systemic wrongs.[99] The facts of a criminal case, especially the nature of the crime and the defendant's culpability, drive the charges, the plea, and the sentence.[100] Prosecutors exercise broad discretion in deciding whether to prosecute and what charges to press,[101] negotiating a plea bargain,[102] and recommending a sentence.[103] Relief in criminal cases usually focuses on prejudicial legal error in the adjudication of guilt[104] or sentencing,[105] and is thus case and fact specific. If a criminal defendant is actually guilty, admits guilt, and receives a lawful sentence, that person has little basis in the law to complain about the result.[106] Ninety-five percent of criminal convictions are obtained by guilty plea.[107] A defendant who pleads guilty typically waives all non-jurisdictional claims to defect,[108] and commonly waives the right to appeal.[109] Thus, most defendants will not or

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UNITED STATES, 2009, at 1–2 (2010) (considering the growth in population prisons experienced over the time period studied).

99. *See* Brandon Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 393 (2007) (describing how criminal law "lacks mechanisms to remedy systemic violations of criminal defendants' core constitutional rights," including "the right to effective assistance of counsel, the right to have exculpatory evidence disclosed, and the right to be free from suggestive eyewitness identifications, coerced custodial interrogations and the fabrication of evidence").

100. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 116–19, 126 (1975) (holding that probable cause must exist on each case's facts); FED. R. CRIM. P. 11 (stating that every guilty plea must be supported by proper facts); *accord* Henderson v. Morgan, 426 U.S. 637, 644–47 (1976).

101. *See* Wayte v. United States, 470 U.S. 598, 607 (1985).

102. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (allowing prosecutors to threaten more serious charges if the defendant does not plead guilty, so long as the prosecutor has probable cause to support the charges).

103. *See* Santobello v. New York, 404 U.S. 257, 262 (1971) (enforcing the prosecutor's promise regarding sentencing recommendation as a bargained-for term of the plea agreement).

104. *See* 28 U.S.C. § 2111 (2006) (error not affecting substantial rights must be disregarded); FED. R. CRIM. P. 52(a); Kyles v. Whitley, 514 U.S. 419, 435 (1995) (discovery violation prejudicial if the error undermined confidence in the verdict); Strickland v. Washington, 466 U.S. 668, 696 (1984) (counsel ineffective if, but for the error, it is reasonably likely the result would have been different); Chapman v. California, 386 U.S. 18, 23–24 (1967) (harmless error analysis requires a court to balance the nature of the error against the facts of the case in order to determine whether the error was prejudicial).

105. Appellate courts review sentences for abuse of discretion. *See* Gall v. United States, 552 U.S. 38, 51 (2007).

106. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("[A guilty plea] is itself a conviction; nothing remains but to give judgment and determine punishment."). Federal rules allow a defendant to make a conditional plea of guilty by reserving the right to appeal an adverse ruling on a pretrial motion, such as a motion to suppress, and, if successful, withdraw the plea. FED. R. CRIM. P. 11(a)(2).

107. COHEN & KYCKELHAHN, *supra* note 38, at 10. In 2008, 95% of federal convictions were obtained by guilty plea. *See* 2008 FEDERAL JUSTICE STATISTICS, *supra* note 33, at tbl.4.2.

108. United States v. Doyle, 348 F.2d 715, 718–19 (2d Cir. 1965).

109. FED. R. CRIM. P. 11(b)(1)(N) specifically contemplates that defendants may waive "the right to appeal."

cannot challenge their conviction and sentence once it is final.[110] Courts have long recognized the "mutuality of advantage"[111] afforded by guilty pleas as a result of plea negotiations. Defendants may benefit from a reduced charge, lower sentence, and avoiding the uncertainty of trial.[112] Prosecutors likewise gain the certainty of conviction and avoid the risk and burden of trial.[113] Courts merely enforce[114] and review the lawfulness of a guilty plea.[115] So long as those underlying convictions and sentences are lawful,[116] the aggregate impact of lawful convictions and sentences is presumably also lawful.

The features of mass incarceration and the persons it impacts are quite different. The harm of mass incarceration affects persons both within the system (inmates) and outside it (their children, families, and communities).[117] Mass incarceration affects a "far broader class" than the discrete set of criminals that are convicted and incarcerated.[118] The harms of concentrated incarceration rates are not necessarily tethered to the criminal law or the limited set of responses it provides, which focus on the defendant's crime, culpability, and procedural rights.[119] In its very conception, mass incarceration refers to the concentration of high rates of incarceration of certain demographic groups, usually disadvantaged minorities. Its harms—such as diminished social and economic status, family disruption, political isolation and disenfranchisement, and increased

110. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (finding that defendants waived the right to appeal in nearly two-thirds of plea agreements in a nationwide sample).

111. Brady v. United States, 397 U.S. 742, 752 (1970).

112. *Id.* at 751–52.

113. *Id.* at 751. Prosecutors may use plea bargaining to reward a defendant for cooperation in an investigation or at trial. *See* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 13–14 (1992).

114. *See* Santobello v. New York, 404 U.S. 257, 262 (1971) (enforcing the prosecutor's promise regarding sentencing recommendation as a bargained-for term of the plea agreement).

115. The defendant's guilty plea must be knowing, voluntary, and supported by the facts. *See* Henderson v. Morgan, 426 U.S. 637, 644–47 (1976); Boykin v. Alabama 395 U.S. 238, 242–44 (1969). The defendant has the right to effective assistance in entering a guilty plea, which includes understanding the consequences of conviction. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010); Hill v. Lockhart, 474 U.S. 52, 56 (1985).

116. Plea agreement procedures are intended to withstand appellate review and preclude collateral review. *Boykin*, 395 U.S. at 242–44 (stating that the voluntariness of the plea agreement cannot be presumed from a "silent record" and requiring a record demonstrating that the defendant has a "full understanding of what the plea connotes and of its consequence," to preclude "the spin-offs of collateral proceedings that seek to probe murky memories").

117. *See* Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097, 2113–14, 2118, 2121 (2006) (including increased police presence and enforcement in poor urban neighborhood communities). *See generally* DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2004) (recounting experiences of the families of prisoners); INVISIBLE PUNISHMENT, *supra* note 76 (providing a collection of works covering the effects of mass imprisonment).

118. Braman, *supra* note 117, at 2121.

119. *See* Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1383 (2002).

risk of criminal offending—are not issues that are suited to fruitful airing in individual criminal cases.

Several features of mass incarceration make it difficult to redress under existing law. These features include the aggregate nature of mass incarceration, its impacts on third parties, the lack of a clearly recognized legal right against mass incarceration harms, and its temporal reach. Our criminal system is not set up to aggregate claims, even where clear legal violations exist.[120] Professor Brandon Garrett has described how, in criminal law, courts rarely aggregate related legal claims in order to redress systemic wrongs.[121] Instead, criminal adjudication centers on individualized adjudication, on the premise that every defendant deserves his "day in court."[122] The absence of aggregation is partially explained by the powerful role of institutional actors in criminal law—courts, prosecutors, and public defenders, who as repeat players systemize the handling of individual cases without aggregation procedures.[123] These institutional actors influence the processing and outcomes of cases on a systemic scale by coordinating, channeling, and settling cases one by one.[124] Though aggregation could be useful to redress systemic wrongs—such as for recurring constitutional violations—and to achieve institutional reform, Professor Garrett has shown that courts rarely aggregate criminal cases.[125] The systemic nature of mass incarceration presents challenges beyond common legal claims.

Most persons harmed by mass incarceration have no related legal claim to assert. Unlike common legal wrongs, individuals do not have a clearly recognized legal right against mass incarceration or its harms. So persons impacted by mass incarceration—inmates and third parties such as families and communities—have neither statutory nor constitutional rights to assert. Inmates may challenge the legality of their conviction, sentence, and prison conditions.[126] Former inmates have few avenues to

120. Garrett, *supra* note 99, 393–94 (stating that criminal law "lacks mechanisms to remedy systemic violations of criminal defendants' core constitutional rights," which include the "right to effective assistance of counsel, the right to have exculpatory evidence disclosed, and the right to be free from suggestive eyewitness identifications, coerced custodial interrogations and the fabrication of evidence").

121. *Id.* at 393.

122. *Id.*

123. *Id.* at 393, 396.

124. *Id.* at 393 ("Repeat players, such as criminal courts, prosecutors and public defenders, can achieve economies of scale without aggregation, by coordinating, channeling and settling cases, all in the shadow of strict sentencing rules that routinize outcomes.").

125. *Id.* at 447.

126. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.) [hereinafter PLRA]. A prison official's conduct violates the Eighth Amendment in the context of prison conditions when he has acted with "'deliberate indifference' to inmate health or safety" by "posing a substantial risk of serious harm" to the prisoner. Farmer v. Brennan, 511 U.S. 825, 834 (1994); *see* Brown v. Plata, 131 S. Ct. 1910, 1946–47

challenge collateral consequences of their convictions, including disenfranchisement, loss of benefits, stigma, diminished social status, and unemployment.[127]

Mass incarceration is also different from routine criminal claims because it significantly affects third parties. Third parties, namely, the children, spouses, and communities whose lives are deeply shaped and transformed by incarceration, have no legal claim to redress those harms.[128] And unlike defendants or victims, third parties harmed by mass incarceration have no clear-cut role in the criminal adjudication system.[129] A defendant's own children, who may not be victims of the crime but will be harmed directly and significantly by the defendant's incarceration, may not appear in court or have any rights to assert.[130] On a discretionary basis, third-party interests are sometimes considered by the prosecutor in charging or by a court in sentencing, but they are not part of routine criminal adjudication, which focuses on the individual defendant's crime, culpability, and rights.[131]

The temporal reach of mass incarceration extends beyond the life of a criminal case and prison sentence. Though many inmates may anticipate that some civil disabilities flow from a felony conviction, at the time of conviction they may not know or understand the full extent and lasting impact of those civil sanctions.[132] For some family members, the primary and immediate harm of a prison sentence is temporary, such as the absence of parental care and support during a prison term, coupled with the strain and expense of maintaining a relationship with the incarcerated parent. Though the temporary harm ends with release, other harms persist as a result of the stigma, diminished stability, and socioeconomic status

(2011) (affirming an order pursuant to the Prisoner Litigation Reform Act requiring California to reduce its prison population to remedy unconstitutional conditions in its correctional facilities). *See generally* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1663 fig.IV.E (2003) (detailing trends in inmate litigation before and after the Prisoner Litigation Reform Act).

127. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM L. & CRIMINOLOGY 1213, 1214, 1223–24 (2010). *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (illustrating the collateral consequences of deportation for the conviction of an immigrant defendant).

128. *See* Brown, *supra* note 119, at 1385 (defining third parties as those, other than the victim and defendant, whose interests in criminal law are explicit, and describing the role of third-party interests in charging and sentencing).

129. *Id.*

130. *See generally* John Hagan, *The Next Generation: Children of Prisoners*, J. OKLA. CRIM. JUST. RES. CONSORTIUM, *available at* http://www.doc.state.ok.us/offenders/ocjrc/96/The%20Next%20Generation.pdf (last visited Dec. 7, 2012); Chesa Boudin, Comment, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011) (describing the myriad impacts of parental incarceration on children).

131. Brown, *supra* note 119, at 1386–90.

132. *See* NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010).

that result from a conviction and prison sentence, with lasting impacts on the inmate, his children, family, and community.[133]

The "mismatch" is that our criminal justice system, which plays an important role in producing prisoners and monitoring them after prison,[134] is not set up to remedy the systemic problem of mass incarceration. Instead, our system provides limited remedies to individuals who face criminal adjudication and have experienced constitutional violations. While these remedies might bring relief to those criminal defendants with the opportunity and means to raise meritorious claims, they are mostly unhelpful to abating the harms of mass incarceration. This mismatch between mass incarceration and our system of individualized adjudication makes it difficult to know where mass incarceration concerns might fit into judicial decisionmaking under existing or proposed legal doctrine. Judges' involvement in every criminal case gives them a unique vantage point, and criminal sentencing is one place where they traditionally individualize case outcomes in light of broader systemic concerns.

### B. Judicial Intervention

There are strong historical, political, and practical justifications for a judicial response to mass incarceration. The salient facts about mass incarceration hint at three possible judicial responses: one patterned on systemic civil litigation, one patterned on criminal rights, and one patterned on sentencing. The prospect of systemic civil litigation is limited absent legislation authorizing a specific cause of action related to mass incarceration. Because mass incarceration arises from the criminal adjudication system, it makes sense to respond to mass incarceration within the criminal adjudication process. But this approach returns us to the mismatch described earlier, namely, that criminal adjudication is focused on individual culpability and rights, not systemic wrongs. Reforms at the charging, pretrial, or guilt phases of criminal adjudication could ameliorate mass incarceration, but many would require a significant departure from the courts' traditional role. Finally, thinking about mass incarceration concerns after sentencing is too late. This Part examines these alternatives before proposing that courts should consider mass incarceration impacts at sentencing.

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133. *See* Western & Wildeman, *supra* note 38, at 230.

134. The budget for corrections is the fastest growing in the United States' budget, second only to Medicaid. Christine S. Scott-Hayward, Ctr. on Sentencing & Corrections, The Fiscal Crisis in Corrections: Rethinking Policies and Practices 3 (2009). Further, over 5 million people in the United States are on probation, parole, or correctional supervision. *Id.* at 7.

### *1. Systemic Civil Litigation*

Three kinds of civil suits—those focused on civil rights, prisoner conditions, and indigent defense—come to mind as possible avenues for redressing mass incarceration. None of these is ideal because each involves complex litigation that is difficult to mount, and the specific focus of each is not aimed at actually reducing mass incarceration or its harms. As a result, these suits are likely to redress mass incarceration only indirectly.

While many describe mass incarceration as a civil rights issue, the promise of a civil rights response in the courts appears limited under current law.[135] Professor Michelle Alexander argues that mass incarceration is a system of racial control and legalized inequality, which, like Jim Crow laws, is premised on racialized politics, legalized discrimination, and political disenfranchisement for millions of black men.[136] Professor Alexander urges broad scale political and cultural reform to reverse mass incarceration, not isolated victories in legislatures or courtrooms.[137] Entrenched policies and interests support high incarceration rates,[138] and the prospect for broadscale political reform appears limited.[139] Absent specific authorizing legislation, a civil rights strategy in the courts would likely rely on the Equal Protection Clause to claim that criminal enforcement policy or incarceration disproportionately impacts racial

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135. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4, 11 (2010); *see* Bryan Stevenson, Exec. Dir., Equal Justice Initiative of Ala., Keynote Address at the DePaul Law Review Symposium: Race to Execution (Oct. 24, 2003), *in* 53 DEPAUL L. REV. 1699, 1703 (2004) (identifying slavery, reconstruction, Jim Crow, and mass incarceration as the four defining experiences in African-American history); *see also* Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 858 (2010) (describing the disparity between the sentencing guidelines for powder cocaine and crack cocaine).

136. ALEXANDER, *supra* note 135, at 11.

137. *See id.* at 4, 11.

138. *See* MARC MAUER, THE RACE TO INCARCERATE 10–11 (2006) (estimating that over 600,000 persons work in prisons as guards, administrators, and service workers); *see also* ALEXANDER, *supra* note 135, at 218 (arguing that the criminal justice bureaucracy—i.e., police, judicial, and legal services required to process criminals—provides some 2.4 million jobs).

139. *See, e.g.*, Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1282 (2005) (describing how prisoners and their families "currently do not have a strong voice in the political process," especially when they are pitted against powerful "tough on crime" and pro-prison interest groups); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973–74 (2008) (arguing that racially disproportionate imprisonment rates stem from the decline in locally self-governing justice systems in high-crime cities). However, political support for lower sentences exists. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010) (eliminating the mandatory minimum sentence for possession of crack and reducing the crack-cocaine disparity under statutory sentencing laws from 100:1 to 18:1). Reductions in prisoner numbers are commonly prompted by fiscal or liability concerns and have marginal or mixed impacts on incarceration rates overall. *See* Brown v. Plata, 131 S. Ct. 1910, 1944 (2011) (ordering reduction in prisons due to unconstitutional conditions); Clear & Austin, *supra* note 18, at 308.

minorities.[140] Such claims are difficult to bring because they require proof of racially discriminatory intent—that the state acted with the intent (not merely the effect) of harming a racial group.[141] Many regard mass incarceration as the unintended product of many laws, rather than a single or coordinated racist scheme.[142] Beyond the problem of identifying and then proving a claim under a civil rights theory, practical questions await about who could bring a claim and what remedy would be available.

Suits focused on inadequate prison conditions and indigent systems offer another, albeit an indirect, opportunity to redress mass incarceration through systemic litigation. In *Brown v. Plata*, the Supreme Court affirmed the district court's order under the Prison Litigation Reform Act requiring California to reduce its prison population in order to remedy unconstitutional conditions in its correctional facilities.[143] The focus of this complex and lengthy litigation was inadequate prison conditions due to overcrowding, not specifically mass incarceration. Still, the case highlights the capacity of courts, aided by experts and special masters, to examine the prison system in detail and conclude that releasing prisoners would not adversely impact public safety.[144] Systemic litigation challenging the adequacy of indigent defense services shares some similar features in that it is difficult to mount successfully and any relief would redress mass incarceration harms only indirectly.[145]

### 2. *Intervention in a Criminal Case*

Responding to mass incarceration within a criminal case seems like a logical choice because the defendant is already in court, involved in a

140. *See* Whren v. United States, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). To prove selective prosecution based on race, a defendant must present clear evidence to dispel the presumption that the prosecutor has not violated the Equal Protection Clause. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that courts presume prosecutors properly perform their official duties).

141. Braman, *supra* note 117, at 2122.

142. *See id.* at 2098, 2121–23 (describing the failure of equal protection theory to redress harms of mass incarceration on inmates and their families). Braman observes that Equal Protection claims involve detailed factual analysis and that courts uniformly rejected such challenges to the federal 100-to-1 crack-cocaine disparity. *Id.* at 2098; *see also* United States v. Moore, 54 F.3d 92, 97 (2d Cir. 1995) ("Every circuit court that has addressed this issue has held that there is no evidence of a racially discriminatory purpose behind the ratio.").

143. *Brown*, 131 S. Ct. at 1937–45 (affirming an order to release prisoners due to unconstitutional conditions caused by overcrowding).

144. *Id.* at 1941–44.

145. *See, e.g.*, Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 444–48 (2009) (describing the proliferation of lawsuits alleging that indigent defense providers systematically violate the Sixth Amendment).

case that will likely determine his future. Before and during trial, the court's role is to protect the defendant's constitutional and statutory rights.[146] The criminal rights revolution of the 1960s transformed adjudication by recognizing and protecting individual constitutional rights.[147] These protections reflected systemic concerns about poor defendants, especially blacks, who, without counsel, were convicted after warrantless searches and seizures, incommunicado detention, and coercive interrogation.[148] Though these constitutional protections reflect systemic concerns, rights-based criminal litigation is highly individualized, case-specific, and offers few opportunities to consider systemic concerns like mass incarceration, which is not tethered to a constitutional right.[149] The criminal rights revolution had little impact on sentencing, a phase when courts consider individual and systemic factors.[150] As a practical and theoretical matter, the only real opportunity to incorporate mass incarceration considerations is at sentencing. Before sentencing is usually too early, and after sentencing is too late.

#### *a. Before Sentencing, Courts Mainly Protect Individual Rights*

In the early stages of criminal adjudication it may be premature for courts to assess mass incarceration, and doing so would diverge from the court's traditional oversight function of ensuring that defendants have their day in court, are guaranteed their constitutional rights, and understand the process.[151] Before sentencing, the most powerful person

146. *See* STITH & CABRANES, *supra* note 37, at 28.

147. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY 83–84 (2007); *cf.* Stuntz, *supra* note 139, at 1973.

148. *See* Chimel v. California, 395 U.S. 752, 762–63 (1969) (holding that a warrantless search incident to arrest is limited to the arrestee's person and reach area); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (requiring officers to give warnings before custodial interrogation, including the rights to remain silent, consult attorney, and counsel appointed); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (applying the exclusionary rule for Fourth Amendment violation to states); Spano v. New York, 360 U.S. 315, 324 (1959) (invalidating a conviction based on the defendant's coerced confession).

149. Some argue that the expansion of criminal rights caused a backlash against judges and their discretion. *See* Naomi Murakawa, *The Racial Antecedent to Federal Sentencing Guidelines: How Congress Judged the Judges from* Brown *to* Booker, 11 ROGER WILLIAMS U. L. REV. 473, 479–80 (2006) (linking backlash to support for the Sentencing Reform Act of 1984); Justice John Paul Stevens, *On the Death Sentence*, THE NEW YORK TIMES REVIEW OF BOOKS (2010) (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)) (describing backlash to the liberal Warren Court decisions protecting the rights of criminal defendants and minority voters). Critics also argue that the criminal rights approach failed to protect local communities affected by crime. *See* Braman, *supra* note 117, at 2097.

150. *See* STITH & CABRANES, *supra* note 37, at 27–37; Carissa B. Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 56–74 (2011) (identifying aspects of sentencing where constitutional protections are inapplicable).

151. As others have suggested, many opportunities for reform exist before and outside the criminal adjudication process, including indirect efforts to reduce criminal behavior, changes in policing

in a criminal case is not the judge, but the prosecutor, who determines whether to charge, what charges to bring, what plea deals to offer, and what sentence to recommend.[152] The court's role is primarily limited to screening charges,[153] apprising defendants of their rights,[154] reviewing pretrial motions,[155] and determining who should be detained pending trial.[156] The main event is adjudication of guilt by plea or at trial, neither of which provides an opportunity to redress mass incarceration impacts. Courts are essential to the plea hearing,[157] but often play a perfunctory role as all participants are invested in ensuring that the plea is accepted.[158] At trial, courts act as referees to ensure that the trial is fair and the government has met its burden of proof.[159]

Systemic factors influencing mass incarceration are clearly present during these stages of the criminal process, but incorporating concerns about mass incarceration could create tension with the focus on guilt and individual rights.[160] The detention hearing is critical to the defendant in

practices, and changes in prosecutorial decisions. *See* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153–54 (1998) (describing changes in urban policing practices); Sampson & Loeffler, *supra* note 15, at 25 (linking decreased crime and incarceration rates in areas with urban redevelopment); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2380–81 (2008) (discussing the benefits of the neighborhood grand jury or grand jury by zip code).

152. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 15 (2007) (arguing that prosecutors have escaped the kind of scrutiny and accountability demanded of other institutional entities); Miller, *supra* note 35, at 1252 (stating that the federal sentencing guidelines pre-*Booker* gave "virtually absolute power" over federal prosecutions and sentencing to prosecutors); *see also* Wayte v. United States, 470 U.S. 598, 607 (1985) (explaining why prosecutors are given such broad discretion on whether to charge a defendant).

153. Absent indictment by grand jury, a court holds a preliminary hearing to determine whether probable cause supports the charges. FED. R. CRIM. P. 5.1(e).

154. *Id.* at 5(d)(1)(B).

155. *Id.* at 12(b) (requiring that certain motions be presented before trial, including those alleging non-jurisdictional charging defects, to suppress evidence, to sever charges or defendants, and for discovery).

156. *See* Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (stating that probable cause review should be conducted within forty-eight hours of arrest); Gerstein v. Pugh, 420 U.S. 103, 125–26 (1975) (noting that state pretrial detention requires a timely judicial determination of probable cause before or promptly after arrest); *see also* FED. R. CRIM. P. 5(a)(1)(A) (requiring a defendant to be brought before a magistrate judge without unnecessary delay after arrest).

157. *Cf.* Shima Baradaran, *Restoring the Presumption of Innocence* 72 OHIO ST. L.J. 723, 725 n.5 (2011).

158. Only the court can accept a guilty plea, and it must be satisfied on the record that the defendant's plea is voluntary, that his admissions and any proffered evidence satisfy the requisite elements of the crime, and that the defendant understands the terms and consequences of his guilty plea. Santobello v. New York, 404 U.S. 257, 261–62 (1971).

159. *See* Garrett, *supra* note 99, at 397 (describing criminal trials as "island[s] of technicality in a sea of discretion").

160. Because some 30% of initial charges do not result in conviction, increased judicial attention before sentencing may be inefficient. *See* COHEN & KYCKELHAHN, *supra* note 38, at 1. Statistics show that out of 100 felony defendants, 8% of cases are resolved through diversion or other outcome, 23%

ways that influence the later guilt and sentencing determinations, but it is often informal, brief, and done when the court and defense counsel know relatively little about the defendant or the crime.[161] Because the guilty plea is often aimed at securing a particular sentence, through charge-bargaining and prosecutor recommendations, greater judicial oversight during that phase could enhance sentencing discretion and minimize some mass incarceration harms.[162] Because the court's role before sentencing centers on process and guilt adjudication, shifting that focus to the consequences of conviction at this point in the process would represent a more dramatic departure than doing so at sentencing.

### *b. After Sentencing, Courts Review Legal Error*

Thinking about mass incarceration after sentencing is too late. Criminal appeals and post-conviction procedures are of little practical use to most defendants because most plead guilty[163] and thus cannot appeal,[164] lack a viable legal claim, or lack the time needed to pursue those procedures.[165] Court involvement in these cases is restricted to fixing prejudicial legal errors, and courts mostly affirm.[166] The statistics on appeals and post-conviction actions confirm that few sentences are modified after the sentencing phase. Because there is no legal protection

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are dismissed, and 69% are prosecuted. *Id.* at 1 fig.1.

161. *See* Baradaran, *supra* note 157, at 725–26, 754. The high detention rates for non-violent and low-level offenders raise concerns about fairness and influence case outcomes. *See, e.g.*, Mosi Secret, *Low Bail, but Weeks in Jail Before Misdemeanor Trials*, N.Y. TIMES, Dec. 3, 2010, at A27 (reporting that many low level defendants lack the funds to post bail and are detained before trial).

162. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (suggesting judicial supervision during the guilty plea colloquy could avoid prejudice due to ineffective assistance of counsel); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2474–75 (2004). *See generally* Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293 (2005).

163. *See* 2008 FEDERAL JUSTICE STATISTICS, *supra* note 31, at tbl.4.2 (finding that over 96% of felony convicts pled guilty during the period from 2007–2008); Hessick & Hessick, *supra* note 150, at 56 n.43 (noting that in 2000, federal courts had a conviction by guilty plea rate of 95% or higher, and in 2002 the state conviction by guilty plea rate was 95%).

164. *See* King & O'Neill, *supra* note 110, at 212 (finding, based on a research sample, that defendants waive appeal in nearly two-thirds of plea agreements nationwide).

165. The time needed to litigate a federal habeas action, roughly five to six years, far exceeds the median sentence of about two years and the average sentence length of about four years. NANCY J. KING ET AL., NAT'L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 55, 56 tbl.13 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (finding that, on average, it takes federal habeas petitioners over five years to file a petition in federal court and another year for the court's decision).

166. Michael Heise, *Federal Criminal Appeals: A Brief Empirical Perspective*, 93 MARQ. L. REV. 825, 829 tbl.1, 829–30 (2009) (finding that appellate courts affirm over 70% of sentences); *see* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 2009 fig.M, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOC09.htm (last visited Dec. 7, 2012) (81,350 convictions, 8,774 appeals, and 82.9% of appeals affirmed in 2009).

against mass incarceration or its harms, redressing this systemic concern during error-review litigation is not feasible.

### *c. Mass Incarceration Impacts Can Be Considered at Sentencing*

Sentencing affords the best opportunity for courts to redress mass incarceration for practical and doctrinal reasons. Aside from trial, sentencing is the phase of a criminal case when judges are most active and engaged.[167] Before sentencing, the prosecutor directs the case toward conviction while the court ensures the process is fair.[168] But the duty to impose a sentence falls on the court, which individualizes punishment based on a range of individual and systemic factors. At sentencing the court assesses the defendant as a person—based on his history, character, background, and future prospects—and is free to consider any relevant information in doing so.[169] Courts must also weigh systemic factors, including public safety, just punishment, and respect for the law, in tailoring the defendant's sentence.[170] Sentencing provides the opportunity to consider mass incarceration impacts because it permits broad development of information relevant to the defendant including the long-term, third party, and systemic impact of his punishment. Though many of these points apply to sentencing generally,[171] the following discussion focuses on federal sentencing, in which traditional sentencing factors are embedded in a statutory scheme. It concludes by describing how courts could consider mass incarceration impacts at sentencing by leveraging their broad capacity to gather and consider information in the sentencing process and reframing traditional sentencing factors, including public safety and proportionality, to include mass incarceration harms. Part III shows how those features might operate in a federal case and proposes several reforms to better equip courts to do this analysis.

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167. Hessick & Hessick, *supra* note 150, at 56 n.43 (noting that the conviction by guilty plea rate is 95% or higher in federal and state courts).

168. STITH & CABRANES, *supra* note 37, at 81. The prosecutor's charging and plea choices as well as her recommendations at sentencing may influence or even determine the available sentencing options. *See* Miller, *supra* note 35, at 1252; *see also* DAVIS, *supra* note 152, at 5 ("Prosecutors are the most powerful officials in the criminal justice system."). But this extension of prosecutorial power into sentencing, while it might limit discretion, does not negate the fact that sentencing is the stage of adjudication in which judicial discretion is greatest.

169. *See, e.g.*, 18 U.S.C. § 3661 (2006).

170. *See, e.g.*, *id.* § 3553(a)(2).

171. *See, e.g.*, Marc Mauer, *Sentencing Reform: Amid Mass Incarceration—Guarded Optimism*, A.B.A. CRIM. JUST. MAG., no. 1, Spring 2011, at 27, 32 (stating that federal sentencing has placed restrictive limitations on a judge's ability to consider personal characteristics of a defendant at sentencing, while state sentencing systems generally afford judges greater sentencing discretion).

### *i. At Sentencing, Courts May Consider All Relevant Information*

Sentencing is a stage when information about mass incarceration impacts can be shared and, more importantly, linked to sentencing factors routinely applied by courts. The sentencing hearing is unique from other court proceedings before and after it. It is more flexible and less formal than other hearings, and fewer procedural protections apply.[172] The sentencing hearing is a face-to-face encounter between the court and the defendant in a relatively non-adversarial setting in which the goal is to assess punishment. Fewer rigid procedures leave courts more free to consider any information that might be useful to individualizing punishment based on the defendant's criminal behavior, other conduct, character, and personal history.[173] The sentencing process allows for the court to gather the broadest range of information about the defendant before imposing sentencing.[174]

Because courts can rely on a wide range of information at sentencing, they can consider relevant information about mass incarceration harms that might impact the defendant and others as a result of his sentence. The Supreme Court recently reiterated in *Pepper v. United States* the traditional sentencing principle that "the punishment should fit the offender and not merely the crime,"[175] and it noted that the sentencing court has "wide discretion in the sources and types of" information used to determine the kind and extent of punishment.[176] Such information would include the "fullest information possible concerning the defendant's life and characteristics."[177] The Court stated in *Pepper*: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[178] This "largely unlimited" inquiry appears to permit courts to consider information about mass incarceration that is

172. *See* STITH & CABRANES, *supra* note 37, at 28–29 (noting that constitutional procedural requirements during the adjudication phase do not apply at sentencing); Hessick & Hessick, *supra* note 150, at 57–73, 92–94 (arguing constitutional protections should apply at sentencing).

173. *See* STITH & CABRANES, *supra* note 37, at 78.

174. *See* FED. R. CRIM. P. 32(c)–(d) (detailing information required in presentence report, including guideline calculations of offense level and criminal history, factors relevant to appropriate sentence, "defendant's history and characteristics," victim information, and non-prison resources available to the defendant).

175. Pepper v. United States, 131 S. Ct. 1229, 1240 (2011) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

176. *Id.* (quoting *Williams*, 337 U.S. at 246).

177. *Id.* (quoting *Williams*, 337 U.S. at 247).

178. *Id.* (quoting 18 U.S.C. § 3577 (1970)).

relevant to the defendant's background and the court's task of imposing an "appropriate sentence."[179]

### *ii. Judicial Discretion at Sentencing*

The discretion courts exercise at sentencing situates them to consider mass incarceration impacts on a case-by-case basis, as they blend systemic and policy concerns into this highly individualized determination. Since courts already consider systemic and policy concerns at sentencing, considering mass incarceration impacts is simply adding new information to a traditional analysis of sentencing purposes and concerns, including respect for the law, deterrence, public safety, and proportionality.

Today courts exercise broad discretion at sentencing and are uniquely situated to assess mass incarceration harms. In the over 70% of federal cases in which a statute does not impose a minimum sentence, this discretion is unbounded on the low end.[180] Federal courts are required to consider a range of sentencing purposes that reflect both individual and systemic concerns and must impose a sentence that "fit[s] the offender and not merely the crime,"[181] and which is "sufficient, but not greater than necessary" to serve those various purposes.[182] Not only do district courts possess sentencing expertise, they are local, and thus may repeatedly sentence defendants from the same communities within their districts. This proximity, coupled with courts' information-gathering capacity, can support the meaningful consideration of mass incarceration harms at sentencing.

The sentencing discretion courts enjoy today is broad, but not boundless. Before the wave of sentencing reforms in the 1980s, the sentencing judge had virtually unfettered discretion to impose a sentence within the statutory maximum set by the legislature.[183] Courts exercised

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179. *Id.* (citations omitted). The Sentencing Commission incorporated the statute's language into the sentencing guidelines. *Compare* 18 U.S.C. § 3661 (2006) *with* U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (2010). The only firm limitations on the court's discretion to consider information are those imposed by constitutional constraints, so a court cannot consider the defendant's race, nationality, or gender. *Pepper*, 131 S. Ct. at 1240 n.8; Carissa Byrne Hessick, *Race and Gender as Explicit Sentencing Factors*, 14 J. GENDER RACE & JUST. 127, 127 (2010).

180. *See* 18 U.S.C. § 3553(a) (2006); MANDATORY MINIMUM, *supra* note 2, at 1.

181. *Pepper*, 131 S. Ct. at 1240 (quoting *Williams*, 337 U.S. at 247).

182. 18 U.S.C. § 3553(a).

183. *See* Bullington v. Missouri, 451 U.S. 430, 443 n.16 (1981) ("Sentencing and parole release decisions in this country have largely been left to the unfettered discretion of the officials involved. Legislatures have traditionally set high maximum penalties within which judges must choose specific sentences, but generally have provided little guidance for the exercise of this choice. . . . In effect, sentencing policymaking has traditionally been delegated to a multitude of independent judges to be exercised in the context of individual cases." (quoting Peter B. Hoffman & Michael A. Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 HOFSTRA L. REV. 89, 96 (1978) (footnotes omitted))).

this discretion "virtually free of substantive control or guidance."[184] Congress rarely specified a minimum term,[185] and judges could decide whether to send a defendant to prison at all and, if so, for how long.[186] This left sentencing policy in the hands of judges in individual cases,[187] and their decisions generally were not reviewable on appeal.[188]

Federal sentencing reforms beginning in the 1980s significantly constrained judicial discretion at sentencing. Most significantly, the Sentencing Reform Act of 1984 created the Federal Sentencing Commission and authorized it to create sentencing guidelines. The Guidelines established sentencing ranges based primarily on the type of offense and the defendant's criminal history.[189] The Guidelines contained a technically complex set of rules that ascribed points based on offense level, with various aggravating and mitigating adjustments based on the defendant's conduct.[190] Points were also assigned to the defendant's criminal history. The applicable sentencing range can be located on the sentencing table, which contains a criminal history axis along the top and offense level along the side.[191] Before 2005, courts were required to apply the Guidelines,[192] and their sentencing decisions could be appealed.[193] Downward departures from the Guidelines ranges were relatively rare: The Guidelines discouraged them except in extraordinary cases, the reasons for departure had to be justified on the record, and departures were scrutinized on appeal.[194] This rigid scheme constrained judicial discretion at sentencing, as courts faithfully applied the mandatory Guidelines.

Congress also enacted mandatory minimum sentences for a range of offenses, which curtailed judicial discretion to impose lower sentences. Mandatory minimums most significantly impacted punishments for drug trafficking offenses.[195] In 2008, approximately 28% of all federal

184. *Id.* at 444 (quoting Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 916 (1962)).

185. STITH & CABRANES, *supra* note 37, at 20. Further, parole boards decided whether to release a defendant short of the full term. *Id.*

186. *Id.*

187. *Bullington*, 451 U.S. at 443 n.16.

188. Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 4 (2008) ("For the greater part of American history, appellate review of federal criminal sentences was non-existent in most cases.").

189. *See* 18 U.S.C. §§ 3551–53 (2006).

190. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 179, § 1B1.1.

191. *See id.* at 393.

192. *See* 18 U.S.C. § 3553(b), *see also* United States v. Booker, 543 U.S. 220, 234 (2005) (observing that the statute required courts to impose a sentence within the applicable guidelines range).

193. *See* 18 U.S.C. § 3742(a); *see also Booker*, 543 U.S. at 233.

194. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667–75 (2003).

195. *See* MANDATORY MINIMUM, *supra* note 2, at 9–10 (finding that, in 2008, 82.5% of persons

defendants were convicted under a mandatory minimum statute.[196] Since courts may impose sentences without regard to the mandatory minimum on narrow statutory grounds, not all of these defendants actually receive the mandatory minimum sentence.[197] Hence, despite mandatory minimum statutes, courts enjoy low-end sentencing discretion in the vast majority of cases.

Judicial discretion was significantly restored in 2005 when the Supreme Court's seminal decision in *Booker v. United States* made the Guidelines advisory.[198] The Court in *Booker* held that treating the Guidelines as mandatory violated the Sixth Amendment because they permitted judge-made findings to support a sentencing increase and violated a criminal defendant's right to a jury trial and proof beyond a reasonable doubt of each and every element of the crime.[199] As a remedy, the Court in *Booker* invalidated two provisions of the Sentencing Reform Act and instructed the district courts to treat the Guidelines as "effectively advisory."[200] Under *Booker*, district courts must impose a sentence based on a set of statutory factors contained in 18 U.S.C. § 3553(a), and appellate review of the sentence is for "reasonableness" under an abuse of discretion standard.[201]

After *Booker*, federal sentencing is essentially a hybrid system in which the Guidelines supply only part of the analysis.[202] The Guidelines still figure prominently: They must be given "respectful consideration,"[203]

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convicted under a mandatory minimum statute were convicted of drug offenses). Among these was the controversial 100-to-1 crack-cocaine disparity contained in the Anti-Drug Abuse Act of 1986, which imposed harsh mandatory minimum sentences for distribution of crack: five years for five grams, ten years for fifty grams. 21 U.S.C. § 841(b) (2006). This disparity was decreased in 2010. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (2010) (reducing the crack-cocaine disparity from 100:1 to 18:1, so that 28 grams (not 5 grams) triggers a five-year minimum prison term and 280 grams (not 50 grams) triggers a ten-year minimum prison term) The Act eliminated a mandatory minimum prison term for simple possession of less than 5 grams of crack cocaine. *Id.* § 3.

196. *See* MANDATORY MINIMUM, *supra* note 2, at 1 (finding that, in 2008, the Sentencing Commission identified 171 individual mandatory minimum provisions and, out of a total group of 73,497 cases, in 21,023 cases (28.6%) the person was convicted under a mandatory minimum statute).

197. *See id.* at 10 (finding that, in 2008, 55.9% of drug offenders convicted under a statute carrying a mandatory minimum were eligible to be sentenced without regard to and below the mandatory minimum based on substantial assistance to the government under 18 U.S.C. § 3553(e), or under the "safety valve," § 3553(f), which applies to the least culpable drug offenders).

198. *Booker*, 543 U.S. at 259–60.

199. *Id.* at 244.

200. *Id.* at 245 (invalidating 18 U.S.C. §§ 3553(b)(1) and 3742(e)).

201. *See* Pepper v. United States, 131 S. Ct. 1229, 1241 (2011).

202. *See* Gertner, *supra* note 28, at 261. "Hybrid" has also been used to describe the approach of "limited retributivism" in which guidelines supply an upper and lower limit on sentencing severity and other factors, including deterrence, incapacitation, rehabilitation, and "parsimony" (i.e., choosing the least severe sentence) are used to tailor the sentence. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 68 (2005).

203. Kimbrough v. Unites States, 552 U.S. 85, 101 (2007).

but they are neither binding nor presumed to be correct.[204] The court's first step in sentencing is to correctly calculate the applicable Guidelines, which provide the "starting point and initial benchmark."[205] Once the court determines the applicable Guidelines range, both parties have an opportunity to argue for whatever sentence they deem appropriate before the district court analyzes the § 3553(a) factors.[206] The district court cannot presume that a sentence within the Guidelines is reasonable. Rather, it must make an individualized assessment based on the facts presented.[207] That decision is accorded deference on appeal.[208]

In deciding how to apply the Guidelines at sentencing, courts consider systemic policy concerns and the facts of the case. The Supreme Court has held that sentencing courts are free to reject the applicable Guidelines range as excessive, either in an individual case or categorically, based on a policy disagreement.[209] In *Kimbrough* and *Spears*, for example, the Supreme Court affirmed that district courts may reject categorically the 100-to-1 crack-cocaine disparity in the Guidelines on policy grounds, as lacking empirical support, failing to achieve sentencing objectives, and fostering disrespect for the law.[210] When a district court rejects the Guidelines for failing to serve sentencing purposes, it is assessing systemic policy concerns through the lens of individual sentencing determinations.[211]

Courts also may reject the Guidelines as applied to an individual defendant because they fail to serve sentencing goals.[212] In *Gall v. United*

204. Dillon v. United States, 130 S. Ct. 2683, 2699 (2010) (Stevens, J., dissenting).

205. Gall v. United States, 552 U.S. 38, 49 (2007). The Guidelines are seen to "secure nationwide consistency," and are listed among the factors to be weighed at sentencing. *Id.*; *see* 18 U.S.C. § 3553(a)(4)–(5) (2006).

206. *See* 18 U.S.C. § 3553(a).

207. *Gall*, 552 U.S. at 51 (explaining that the appellate court, under the abuse of discretion standard, can presume that a Guidelines sentence is reasonable, but cannot presume that a non-Guidelines sentence is unreasonable).

208. *Id.*

209. *See* Spears v. United States, 555 U.S. 261, 265–66 (2009) (per curiam) (explaining that district courts could reject crack-cocaine Guidelines categorically on policy grounds, even in a mine-run case, without "individualized, case-specific reasons"); *Gall*, 552 U.S. at 46, 50–51 (requiring sufficient justification for non-Guidelines sentence based on facts presented in a particular case).

210. *See* Kimbrough v. United States, 552 U.S. 85, 92, 95 (2007) (explaining that the drug statute uses the weight of the drugs involved as the sole proxy to identify major and serious dealers); *see also Spears*, 555 U.S. at 265–66 ("[W]e now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines."); *Kimbrough*, 552 U.S. at 109–10 (explaining how drug Guidelines were based on statute, not "empirical data and national experience").

211. *See* Gertner, *supra* note 28, at 272 (referring to the court's rejection of the crack-cocaine ratio in *Kimbrough* on policy grounds as a "categorical challenge" and its reliance on individualized characteristics as an "as-applied approach"); Carissa B. Hessick, *Appellate Review of Sentencing Policy After* Kimbrough, 93 MARQ. L. REV. 717, 726, 731–32 (2010).

212. *Gall*, 552 U.S. at 53–56 (2007).

*States*, the defendant was a twenty-one-year-old college student when he participated in a drug distribution conspiracy for several months, withdrew from the conspiracy on his own, was indicted several years later, and pleaded guilty.[213] In sentencing the defendant to a three-year term of probation, the sentencing court rejected the Guidelines-recommended prison sentence of thirty months to thirty-seven months, noting that such a punishment would be "counter effective" because the defendant was neither likely to re-offend nor pose a danger to society.[214] The Supreme Court affirmed but required that a non-Guidelines sentence like Gall's must be reasonable and supported by a sufficient justification that is proportional to the degree of the variance.[215]

Under this modern system of regulated sentencing discretion, courts consider systemic and individualized factors when imposing a sentence, may be required to justify their sentences, and have considerable latitude to reject a sentence that either will not serve sentencing goals or is too severe.

### *iii. Courts Can Individualize Sentences Based on Systemic Factors*

Courts are authorized and well suited to consider mass incarceration impacts at sentencing under § 3553(a), which provides a framework for individualizing sentencing in light of systemic concerns. The overarching command of § 3553(a) is that a court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment described in the statute.[216] By its terms, the "parsimony clause" requires a court to select the least restrictive sentence that satisfies the sentencing purposes.[217] The parsimony clause also could be understood more broadly to avoid unnecessary harms to the defendant and secondary harms to his family and community.[218] Under either reading, the parsimony clause invites courts to consider whether a specific punishment is justified, and considering mass incarceration harms could influence that calculus. As a practical matter, mass incarceration considerations can be viewed as relevant to the defendant's history or relevant to the purposes of sentencing.

The sentencing statute requires courts to consider a range of factors in light of the four sentencing purposes: retribution, deterrence,

213. *Id.* at 42–43.

214. *Id*. at 44–45.

215. *Id.* at 50 (suggesting that a major departure requires more justification than a minor one). The district court's failure to properly calculate the applicable Guidelines may be reversible error. *See id.* at 51.

216. *See* 18 U.S.C. § 3553(a) (2006).

217. *See* United States v. Samas, 561 F.3d 108, 110 (2d Cir. 2009).

218. *See* Weisberg & Petersilia, *supra* note 13, at 124.

incapacitation, and rehabilitation.[219] These sentencing factors reflect the tradition of individualizing punishment to fit the offender[220] by considering "the nature of and circumstances of the offense and the history and characteristics of the defendant,"[221] the Guidelines,[222] and the kinds of sentences available.[223] This necessarily involves some comparative analysis in considering the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[224]

Importantly, these § 3553 factors must be considered in light of four sentencing purposes that correlate to the four traditional purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.[225] The first purpose embodies the concept of retribution: "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."[226] The second purpose reflects deterrence of criminal conduct.[227] The third purpose refers to incapacitation, namely, "to protect the public from further crimes of the defendant."[228] The fourth describes rehabilitation: "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[229]

Because the four purposes of sentencing incorporate systemic and public values like public safety, justice, and respect for the law, they provide an opportunity to consider mass incarceration impacts that touch on those common concerns. Societal values at stake in sentencing—"just punishment," "respect for the law," and "deterrence"—serve as a reminder that sentencing is not just about the individual defendant, but is also a public judgment intended to send a message to the defendant and others. Though retribution focuses on culpability and "respect for the law," and is often aligned with tough-on-crime rhetoric, these concepts

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219. *See* 18 U.S.C. § 3553(a)(1)–(7).

220. Pepper v. United States, 131 S. Ct. 1229, 1240 (2011) ("[T]he punishment should fit the offender and not merely the crime." (quoting Williams v. New York, 337 U.S. 241, 247 (1949))).

221. *See* 18 U.S.C. § 3553(a)(1).

222. *See id.* § 3553(a)(4) (considering "the kinds of sentence and the sentencing range established for . . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines"); *id.* § 3553(a)(5) (considering "any pertinent policy statement" by the Sentencing Commission "subject to any amendments made to such policy statement by act of Congress" at the time of sentencing).

223. *See id.* § 3553(a)(3) (considering "the kinds of sentences available"); *id.* § 3553(a)(7) (considering the "need to provide restitution to any victims of the offense").

224. *Id.* § 3553(a)(6).

225. *See id.* § 3553(a)(2); United States v. Tapia, 131 S. Ct. 2382, 2387 (2011) (describing four purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation).

226. 18 U.S.C. § 3553(a)(2)(A).

227. *Id.* § 3553(a)(2)(B) ("to afford adequate deterrence to criminal conduct").

228. *Id.* § 3553(a)(2)(C).

229. *Id.* § 3553(a)(2)(D).

also speak to the need for legitimacy and concern for public confidence in the criminal justice system. The Supreme Court in *Gall* acknowledged that overly harsh punishment might diminish respect for the law.[230] Arbitrary, discriminatory, or harsh punishments may erode the public's confidence that the system is fair and just.

Public safety is also a core goal of sentencing and a special concern of mass incarceration, since evidence suggests that high incarceration rates do not necessarily yield public safety benefits.[231] The goals of incapacitation, deterrence, and rehabilitation reflect a societal expectation that the criminal justice system will improve (not endanger) public safety. Incapacitation does so by preventing a defendant from reoffending during his incarceration.[232] Deterrence theory relies on the notion that the punishment meted out to an individual defendant will dissuade both him and others from committing such crimes in the future.[233] And rehabilitation, though directed at treating an individual defendant, reflects the societal goal that a punishment should result in the defendant being less (not more) likely to reoffend.[234]

Incapacitation through imprisonment is widely accepted as a valid sentencing purpose intended to improve public safety. The Supreme Court in *Ewing v. California* recognized that states have a valid public safety interest in incapacitating repeat offenders.[235] But the Court also acknowledged in *Brown v. Plata* that the imprisonment of offenders does not necessarily benefit public safety.[236] In *Brown*, the Court relied on lower

230. Gall v. United States, 552 U.S. 38, 54 (2007) (quoting the district court, which sentenced the defendant to a term of probation for a drug offense: "[A] sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing.").

231. *See* Sampson & Loeffler, *supra* note 15, at 21–22.

232. Ewing v. California, 538 U.S. 11, 24 (2003); *see* Frase, *supra* note 202, at 70.

233. Atkins v. Virginia, 536 U.S. 304, 320 (2002) ("The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct."); Frase, *supra* note 202, at 71 ("General deterrence seeks to discourage would-be offenders from committing further crimes by instilling a fear of receiving the penalty given to this offender.").

234. Frase, *supra* note 202, at 70 (explaining that rehabilitation "seeks to reduce the offender's future criminality" through education and treatment).

235. *Ewing*, 538 U.S. at 25 (observing that the California Legislature, in enacting the three strikes law, "made a judgment that protecting the public safety requires incapacitating criminals," and that "[s]tates have a valid interest in deterring and segregating habitual criminals").

236. Brown v. Plata, 131 S. Ct. 1910, 1954 (2010). In *Brown*, the lower court was required under the Prison Litigation Reform Act to "give substantial weight to any adverse impact on public safety" caused by court-ordered relief. *Id.* (quoting 18 U.S.C. § 3626(a)(1)(A) (2006)). The district court in *Brown* found "clear" evidence that prison overcrowding would "perpetuate a criminogenic prison system that itself threatens public safety," "reject[ed] the testimony that inmates released early from prison would commit additional new crimes," and found that "shortening the length of stay through earned credits would give inmates incentives to participate in programming designed to lower recidivism," that "slowing the flow of technical parole violators to prison, thereby substantially

court findings that prison overcrowding would "perpetuate a criminogenic prison system that itself threatens public safety," while shorter prison stays and non-prison community correctional programs would have beneficial effects on public safety.[237] Though rehabilitation is one of the purposes in § 3553(a), the Supreme Court has recognized that imprisonment "is not appropriate to promote rehabilitation."[238] Public safety is a systemic concern connected to mass incarceration that might cause judges to opt for non-prison or shorter prison sentences in some cases.

Sentencing permits what is otherwise absent in our criminal adjudication model, namely, linking the outcome of one case to a broader systemic context. The connection can be made under § 3553(a) because it authorizes courts to consider sentencing inputs and outcomes. The inputs include the broad informational scope of sentencing, including any information relevant to the defendant, and the societal purposes of sentencing. Importantly, the statute also requires courts to consider sentencing outcomes. The "parsimony clause" builds in a proportionality requirement to avoid unnecessary punishment; comparative analysis may help "avoid unwarranted sentencing disparities,"[239] and the sentencing purposes account for public concerns that the system is fair, just, and promotes public safety. Looking at outcomes enables courts to individualize punishment in light of these societal concerns. Courts can connect mass incarceration to the narrative of one individual defendant and assess the real impact of punishment on the life of that defendant, his family, and his community.

The advantages of looking at mass incarceration through the lens of an individual case are that district courts are local and have sentencing expertise. Courts are experts in individualizing punishment at sentencing because they do it frequently[240] and have special competence based on the "vantage point and day-to-day experience in criminal sentencing."[241] Courts have an experiential basis to compare criminal conduct, prosecutorial decisions, relative levels of culpability, and the personal

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reducing the churning of parolees, would by itself improve both the prison and parole systems, and public safety," that "the diversion of offenders to community correctional programs has significant beneficial effects on public safety," and that "additional rehabilitative programming would result in a significant population reduction while improving public safety." *Id.* (citations omitted).

237. *Id. See* Mark A. R. Kleiman & Kelsey R. Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89, 97–102 (2011) (critiquing the effectiveness of community corrections).

238. Tapia v. United States, 131 S. Ct. 2382, 2388–89 (2011) (citing 28 U.S.C. § 3582(a) (2006) and stating that rehabilitation cannot be considered in determining whether to imprison an offender or the length of term to give him).

239. *See* 18 U.S.C. § 3553(a)(6)(D).

240. Gall v. United States, 552 U.S. 38, 52 n.7 ("District judges sentence, on average, 117 defendants every year.").

241. Koon v. United States, 518 U.S. 81, 98 (1996).

histories of (common and unique to) the many defendants whom they have sentenced over the years. They also can gather information in order to compare the defendant to others.

Sentencing is a highly local event.[242] This is important because understanding how mass incarceration is relevant to an individual defendant is a highly localized inquiry. As Professor Kate Stith has observed, pre-*Booker* sentencing features fostered national sentencing uniformity and constrained judicial discretion at the local level.[243] *Booker*, Stith observes, restored sentencing to local judges, whose sentencing determinations are influenced by local prosecutors and defense counsel.[244] Courts now must impose a reasonable sentence, which need not follow the Guidelines, and their sentencing decisions are reviewed on appeal under the deferential abuse of discretion standard.[245] Because high incarceration rates are geographically concentrated and disproportionately affect disadvantaged communities, information about those affected families and communities is essential to understanding the harmful impacts of sentencing the defendant. A fuller understanding of the individual within this specific local context would enable courts to tailor punishment more effectively and consistent with the commands of § 3553(a).

Courts need not resolve the complex aspects of mass incarceration in order to consider its relevance to an individual defendant. The scholarly literature on mass incarceration points to the complex relationship between crime, disadvantage, incarceration, and recidivism.[246] For a court, the sentencing inquiry may focus somewhat more narrowly on who will be harmed by this sentence, how those persons will be harmed, and how those negative effects can be avoided or minimized. Such information may assist courts in their specific task of tailoring a punishment that is sufficient, but not greater than necessary, to achieve the statutory punishment objectives. This can be done by examining the harms that may result from incarceration in light of the statutory punishment objectives with the goals of avoiding unnecessary punishment and "unwarranted sentence disparities,"[247] and promoting justice, respect for the law, public safety, and individual rehabilitation.

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242. Stith, *supra* note 35, at 1427, 1495 (acknowledging that the *Booker* court "restored discretion, localized in judges and prosecutors" at the district court level.).

243. *See* United States v. Booker, 543 U.S. 220, 259 (2005) (severing 18 U.S.C. § 3742(e), which applied a de novo standard of appellate review to non-Guidelines sentences, as specified in the PROTECT Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 670–74 (2003)); Stith, *supra* note 35, at 1427, 1495 .

244. Stith, *supra* note 35, at 1495.

245. *Gall*, 552 U.S. at 46–47.

246. *See* Sampson & Loeffler, *supra* note 15, at 21; Wacquant, *supra* note 15, at 78.

247. 18 U.S.C. § 3553(a)(6).

## III. Considering Mass Incarceration Impacts at Sentencing

Thinking about mass incarceration at sentencing will pose some challenges for courts and advocates, even among those willing to consider it and do the necessary work. Some of these challenges revisit the difficulty of addressing a systemic concern in an individualized setting, and they present doctrinal, informational, and rhetorical barriers to factoring in mass incarceration concerns at sentencing. I offer three proposals to build the court system's capacity to consider mass incarceration harms in federal sentencing.

The first proposal seeks to change the manner in which the courts consider the Guidelines when determining the sentence. Under current law, the Guidelines bookend the sentencing analysis—they supply the "starting point" for the § 3553(a) analysis and the benchmark for evaluating sentences on appeal—and thus have a determinant effect on the sentence whether adhered to or not. Instead, courts should justify a sentence based on the § 3553(a) factors, considering the Guidelines policies and sentencing range in the mix with the other factors, as the statute directs. This approach is permissible under the statute, but would require a change in judicial doctrine.[248]

The second proposal aims to enhance the information at hand during sentencing to develop expertise about mass incarceration harms. Information about local community conditions, the defendant's family, and other defendants may not be readily available to courts. A family and community impact statement is one possible vehicle to educate courts about facts that may be relevant to sentencing under § 3553(a) but are not usually considered under the Guidelines. Better access to information about other defendants would aid courts in avoiding unwarranted sentencing disparities and support the court's justification for the sentence imposed.

Finally, the third proposal is directed to advocates, who must equip themselves to tell the mass incarceration narrative and illuminate its relevance case-by-case. Because courts are not accustomed to hearing about mass incarceration at sentencing, this strategy would represent a new approach and it could be risky to try it without knowing whether the judge will exclude the analysis or be persuaded by it. In many cases, telling the mass incarceration narrative could advance the overarching goal of enhancing the sentencing inquiry by educating the court about the lasting impact and significance of the sentence on the defendant and others.

These proposals are usefully considered in the context of a federal case example before their details are fleshed out below.

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248. *See infra* Part III.B.1.

### A. Myles Haynes, A Case Study

Consider a non-violent drug crime involving low-level street sales by an unemployed man with a prior felony conviction. Myles Haynes was arrested in 2006 for selling three to four grams of crack cocaine in a law enforcement sweep at the Bromley-Heath Housing Development in Boston's Jamaica Plain neighborhood that netted eighteen defendants.[249] Bromley-Heath that year was reported to be one of Boston's five crime "hotspots," collectively accounting for 25% of the city's fatal shootings and 40% of its non-fatal shootings.[250] Haynes grew up in Bromley-Heath and left as a young adult, but eventually returned there to live with relatives during an extended period of unemployment.[251] The investigation at the Bromley-Heath development focused on drug trafficking, gang activity, violence, and other crimes.[252] Though Haynes was not targeted in the months-long investigation, he was arrested after he participated in two sales to an undercover agent, charged with distributing crack cocaine in a public housing project, and pleaded guilty.[253]

Haynes was a somewhat typical defendant. Haynes had a criminal record and was unemployed at the time of his arrest.[254] He faced serious prison time (up to forty-one months) under the Guidelines, but avoided the then-mandatory minimum five-year sentence because he sold less than five grams of crack.[255] So, as in most state and federal cases, the court could exercise broad discretion at sentencing.[256] While the investigation at Bromley-Heath was aimed at combating gang warfare and violence,[257] drug trafficking laws provided the primary law enforcement tool.[258] All defendants netted in the sweep were charged with drug trafficking

249. United States v. Haynes, 557 F. Supp. 2d 200, 201–02 (D. Mass. 2008).

250. *Id.* at 206 (explaining that the government urged a Guidelines prison sentence because of the environment Haynes fostered by trafficking drugs). *See* Government's Sentencing Memorandum at 6–7, United States v. Whigham (2010) (No. 06-10328-NG), 2010 WL 2285619 (describing the criminal defendant's arrest, which arose from the same sting in which Haynes was caught).

251. *Haynes*, 557 F. Supp 2d at 203.

252. *Id.* at 202.

253. *Id.* at 201–02. Haynes was also charged with aiding and abetting the distribution of crack cocaine. *Id.* (listing violations of 21 U.S.C. § 841(a) (2006) (distributing controlled substances), 21 U.S.C. § 860(a) (distributing controlled substances within 1000 feet of a public housing facility), and 18 U.S.C. § 2 (aiding and abetting)).

254. *Id.* at 203.

255. At the time Haynes was convicted, distribution of five grams of crack yielded a five-year mandatory minimum prison term. *Id.* at 206 n.11. *But see* Mandatory Minimum, *supra* note 2 (noting the 2010 increase in crack quantity triggering five-year mandatory minimum).

256. Mandatory Minimum, *supra* note 2, at 5–6.

257. *See* John Ruch, *FBI, Police Charge 23 in Drug Bust*, Jamaica Plain Gazette, Oct. 20, 2006 (listing the addresses of arrestees and noting that eleven of the defendants had been banned from the development for trespassing).

258. *See id*.

offenses.[259] Penalties for dealing crack disproportionately impact minorities,[260] and penalties for selling drugs in close proximity to a housing project likely impact dealers living in and around the project, as was the case in the Bromley-Heath sweep.[261]

That Haynes had a compelling personal history was largely irrelevant to determining the applicable Guidelines range. He had graduated high school and left Bromley-Heath to get more education, and he served briefly in the military.[262] He was a committed father to his own two children, aged fourteen and eight, and his younger son's teenage half-siblings, aged thirteen and sixteen.[263] After serving a year-long sentence for a violent felony conviction nearly a decade earlier, Haynes successfully completed a five-year term of probation and had no arrests.[264] He trained as an emergency medical technician, but his licensing was stalled due to his prior conviction.[265] When he returned to Bromley-Heath, he stayed with his brother and cousin who both had steady jobs.[266]

Such positive aspects of Haynes' personal history are "not ordinarily relevant" to the applicable Guidelines range, which was primarily based on the drug amount and his criminal history.[267] Haynes faced a Guidelines range of thirty-three months to forty-one months, which was based on his criminal history, the drug quantity he sold (three to four grams of crack cocaine),[268] and the fact that he sold drugs near a housing project.[269] The range was then decreased for his having pleaded guilty.[270] Under the Guidelines, individual characteristics, including age, education, employment history, family ties and responsibilities, and community ties,[271]

259. *See id*.

260. Kimbrough v. United States, 552 U.S. 85, 98 (2007).

261. *See* Ruch, *supra* note 257.

262. United States v. Haynes, 557 F. Supp. 2d 200, 202 (D. Mass. 2008*)*.

263. *See* Sentencing Memorandum, *supra* note 29, at 5.

264. *Haynes*, 557 F. Supp. 2d at 203–04.

265. *Id.* at 204.

266. *See* Sentencing Memorandum, *supra* note 29, at 6.

267. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 179, §§ 5H1.2, 5H1.5.

268. *Haynes*, 557 F. Supp. 2d at 205 (describing how the Guidelines rely on drug quantity as a "proxy for culpability" even though the Guidelines do not explain how drug quantity is supposed to measure the seriousness of an offense). *See generally* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109 (2008) (describing how the Guidelines use bad acts as aggravating sentencing factors, but fail to credit good acts as mitigating sentencing factors).

269. *Haynes*, 557 F. Supp. 2d at 201 (referring to 21 U.S.C. § 860(a) (2006), which applies to drug distribution within 1000 feet of a public housing facility).

270. *Id.* at 201 (citing U.S. SENTENCING GUIDELINES MANUAL, *supra* note 179, §§ 2D1.1(c)(10), 2D1.2(a), 3E1.1(a)–(b)) (in order: drug table, two-level increase for drug distribution involving a protected location, and up to a three-level reduction for pleading guilty). The district court reduced his range to twenty-seven to thirty-three months because he was a minor participant in the crime. *Id.* at 205–06 (citing U.S. SENTENCING GUIDELINES MANUAL, *supra* note 179, § 3B1.2).

271. 28 U.S.C. § 994(e) (2006) ("The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the

are only relevant in "exceptional cases," if "present in the case to a substantial degree."[272] There was no doubt that Haynes' incarceration would bring hardship on his children and deny them financial and emotional support during their childhood and teenage years. But such impacts are ordinary, not exceptional, and thus would not be grounds for a lower Guidelines range.[273] Haynes' efforts to attain an education and vocational skills would also not be counted under the Guidelines.[274]

The failure of the Guidelines to consider many individualized factors means that a mass incarceration analysis, if done at all, gets shifted to the court's analysis of the § 3553(a) factors. Mass incarceration most acutely affects persons from disadvantaged communities, and the defendants from those communities often share common factors of disadvantage, including low education, joblessness, family instability, and poverty.[275] These factors are important to identifying a defendant in the context of the societal problem of mass incarceration. While these factors are generally excluded from the Guidelines analysis, they can be considered in individualizing the sentence under the § 3553(a) factors. The question then becomes how courts will gather, analyze, and apply this information. The following proposals address these concerns.

## B. Getting Courts to Consider Mass Incarceration Impacts

### *1. Start with the § 3553(a) Factors, Not the Guidelines*

Mass incarceration concerns could potentially justify a non-prison or shorter prison sentence if a court is willing to embrace its sentencing discretion and apply traditional sentencing factors in light of mass incarceration harms. One doctrinal barrier to this approach is that the Guidelines, which tend to yield significant prison terms, form the backdrop of the sentencing analysis under § 3553(a). This is because under current case law, the Guidelines supply the starting and ending point for sentencing analysis. Considering the Guidelines midstream in

general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.").

272. *See* U.S. Sentencing Guidelines Manual, *supra* note 179, § 5H1.1 introductory cmt.

273. *See id.* § 5H1.6(B) cmt. 1 (stating that family ties and responsibilities will not support a departure unless the defendant's sentence will cause a substantial, direct, and specific loss of caretaking or financial support, which exceeds the harm ordinarily incident to incarceration, and the defendant's support is irreplaceable to the defendant's family); *see also* Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. Ill. L. Rev. 1147, 1198 n.283 (2007) (suggesting that the harsh impacts of criminal laws on families could be redressed by policy changes, for example in drug enforcement statutes and sentencing policies that do not turn on family status). After *Booker*, courts have reviewed departures based on family ties for abuse of discretion. *See* United States v. Menyweather, 447 F.3d 625, 633 (9th Cir. 2006).

274. *See* U.S. Sentencing Guidelines Manual, *supra* note 179, § 5H1.2,1.5.

275. Sampson & Loeffler, *supra* note 15, at 21.

the sentencing analysis, like other factors, would better ensure that courts justify sentences under the statutory factors without giving undue weight to the Guidelines.

The Guidelines, though advisory, continue to have a significant effect on sentencing. The Supreme Court has instructed that the Guidelines calculation is "the starting point and the initial benchmark" for sentencing and precedes the 3553(a) analysis.[276] As the starting point, the Guidelines may have an "anchoring" effect in the § 3553(a) analysis.[277] As Judge Gertner has explained in the sentencing context, "anchoring" is a mental strategy used to simplify complex tasks, in which an initial starting value (i.e., the anchor, here the Guidelines range) may predict the outcome (i.e., the final sentence) because that anchor value is merely adjusted upward or downward to accommodate the particular details of the case.[278] In other words, the Guidelines range fixes the point against which discretion is exercised and measured. This anchoring happens as a matter of doctrine under § 3553(a) because courts must start with the Guidelines range and support a non-Guidelines sentence with a "sufficient" justification that is proportional to the degree of any deviation.[279] Because the Guidelines generally exclude individualized factors, especially mitigating factors,[280] which may be significant under § 3553(a), the Guidelines may skew toward harsher sentences than the statutory analysis would support.

The Guidelines also function as an important endpoint in the § 3553(a) analysis for two reasons. Courts must justify a non-Guidelines sentence to the extent of any deviation.[281] This is a confusing standard because although the court must not presume the Guidelines range to be reasonable, it must justify its § 3553(a) analysis in light of the Guidelines. The Guidelines also create a safe harbor for courts on appeal: Though all sentencing decisions are reviewed for abuse of discretion, a Guidelines sentence is "presumptively reasonable" and thus least likely to be reversed

276. Gall v. United States, 552 U.S. 38, 49 (2007) (stating that the Guidelines are seen to secure nationwide consistency and are listed among the factors to be weighed at sentencing).

277. Gertner, *supra* note 28, at 270 (describing the role of the guidelines after *Booker*: "Judges continued to use the numbers in the Guideline framework as a significant, even dispositive, point of reference, illustrating the phenomenon known to cognitive researchers as anchoring.").

278. *See* J. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 535 (2007); *see also* Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1536 (2001).

279. *Gall*, 552 U.S. at 46, 50 (suggesting that a major departure requires more justification than a minor one). The district court's failure to properly calculate the applicable Guidelines may be reversible error. *Id.* at 51.

280. *See* Hessick, *supra* note 268, at 1109–10. *But see* Gertner, *supra* note 28, at 272–74 (finding the new advisory mandate makes the guidelines more flexible, thereby allowing mitigation).

281. *Gall*, 552 U.S. at 46.

on appeal.[282] Requiring courts to begin and end sentencing analysis with the Guidelines calculations is a doctrinal barrier that may impede the exercise of discretion under § 3553(a).

Courts should instead consider the Guidelines midstream in the § 3553(a) analysis, like other factors. This approach is not currently allowed under the Supreme Court's decisions, but it is consistent with the Court's statements that the Guidelines factors under § 3553(a) are not elevated among the others,[283] and would be consistent with that statute. The statute requires courts to apply all the factors in light of the overarching command of § 3553(a) to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" described in § 3553(a)(2). Consistent with sentencing tradition and the statutory text, the starting point would be the nature and circumstances of the offense and the history and characteristics of the defendant.[284] Next, the court would consider the sentencing purposes, including just punishment, respect for the law, rehabilitation and deterrence,[285] and the sentencing alternatives.[286] Differently ordering the § 3553(a) analysis would allow courts to gauge under the statute the term and kind of sentence the defendant should serve. The Guidelines would be on equal footing with other factors and, appropriately, not pose a barrier to individualized sentencing. The Guidelines could still operate as a check on the proposed sentence, and may prompt a court to adjust its proposed sentence or better justify it.

There is little risk that this proposal would lead to arbitrary or more disparate sentencing, as some might argue.[287] Federal judges impose sentences below the Guidelines range in 40% of cases based on a range of mitigating factors, but only 10% of defendants receive a non-Guidelines sentences based on analysis of § 3553(a) factors.[288] The goal of the midstream approach is to assure that sentencing courts individualize sentencing and faithfully implement § 3553(a). Because the Guidelines weight certain factors and exclude others, they can mask important individual differences in culpability, dangerousness, and capacity for reform.[289] Integrating mass incarceration considerations will allow courts to know more about the defendant, see him in a broader context, consider the harms the sentence will cause to the defendant and others,

282. *Id.* at 40 ("[T]he court of appeals may presume that the sentence is reasonable.").

283. Pepper v. United States, 131 S. Ct. 1229, 1249 ("At root, *amicus* effectively invites us to elevate two § 3553(a) factors above all others. We reject that invitation.").

284. *See* 18 U.S.C. § 3553(a)(1) (2006); *Pepper*, 131 S. Ct. at 1239–40.

285. *See* 18 U.S.C. § 3553(a)(2).

286. *See id*. § 3553(a)(3).

287. *See Gall*, 552 U.S. at 49 (noting that the Guidelines are seen to "secure nationwide consistency").

288. *See* UNITED STATES SENTENCING COMM'N, POST-*Kimbrough*/*Gall* PATA REPORT (2008).

289. *Gall*, 552 U.S. at 55–56.

and appropriately tailor a sentence to achieve the statutory objectives and minimize those harms.

### 2. *Providing Informational Support for Mass Incarceration Analysis*

To gain expertise about the impact of mass incarceration on localities and the relevance of those impacts on the defendant, courts will need better and different information than they may currently have. This information generally falls into three categories: (1) background information about the defendant, his family, and his community; (2) comparison information about other defendants with similar records convicted of similar crimes; and (3) sentencing information, including effective non-prison sentences. A family and community impact statement would be one vehicle to fill this information gap at sentencing. Better access to sentencing data would help courts compare similar defendants and outcomes.

#### *a. Family and Community Information*

Because a key feature of mass incarceration is its concentrated impact on certain disadvantaged communities, courts will want to know more about such communities locally. A judge's local experience may make him or her familiar with certain neighborhoods that are poverty stricken, are high in crime, or produce many defendants. *Haynes* is an example in which law enforcement targeted a crime "hot spot," a gang- and violence-ridden housing project that was also likely a mass incarceration hot spot.[290] Elsewhere, identifying a mass incarceration hot spot may be more difficult and would be aided by better data on the socioeconomic status of defendants and mapping of incarceration rates locally.[291] Even judges familiar with their local crime hot spots may not know the geographic concentration of incarceration in those same areas and its destabilizing effects on public safety and children.[292]

To gain accurate information about such communities, courts may be aided by experts who map or describe community conditions (including incarceration rates) locally, community members, and the defendant's family.[293] A family and community impact statement is one vehicle to fill this gap. Patterned on the victim's impact statement, the idea is to inform the court about persons who are not party to the criminal proceeding but

290. United States v. Haynes, 557 F. Supp. 2d 200, 206–08 (D. Mass. 2008).

291. *See generally* Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31 (2011) (explaining that no complete data have been collected on the economic status of defendants in state or federal courts).

292. *See Haynes*, 557 F. Supp. 2d at 206–08.

293. Sampson & Loeffler, *supra* note 15, at 27.

have a stake in the outcome.[294] Alternatively, the court could allow family and community representatives to speak at the sentencing. Prosecutors might respond with a different view of how the defendant's punishment will impact his family and community. Bringing the voices of the community into the courtroom at sentencing would add a local dimension to sentencing that is often absent. Since the children, families, and communities do not have a right to speak at sentencing, these options would create a way of inviting their participation at sentencing.

Though the impact of incarceration on children is regular, widespread, and documented, these harms may not be routinely considered by courts at sentencing.[295] It is well known that children of incarcerated parents have greater risk of criminal involvement.[296] The harm to Haynes' children, as in most cases, was direct and concrete: Haynes maintained meaningful relationships with all of his children, especially his eight-year-old son, and separation would strain those relationships and deprive the children of valuable financial and emotional support. Haynes' incarceration would put his children at risk for future incarceration.

The community harm from incarcerating one person is more diffuse. Particularly in a community plagued by crime and other markers of disadvantage, a court might consider whether the community will be better served by a defendant's incarceration or release. Imprisoned criminals cannot commit local crime from prison, nor can they be community members that function "as parents, workers, consumers, or neighbors."[297] Removing community members can "undermine a community's ability to self-regulate and exercise informal social control over crime by further disrupting the creation of social and familial bonds."[298] In *Haynes*, the court concluded that Haynes's release likely would promote, not disrupt, public safety and enable him to move on as a citizen and a parent.[299]

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294. *See, e.g.*, Federal Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(4) (2000) (providing the right of a crime victim to be "reasonably heard" at sentencing); *see also* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 299–305 (2003) (identifying state laws that permit victims to testify at sentencing).

295. *See generally* Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793 (2011); Myrna S. Raeder, *A Primer on Gender-Related Issues That Affect Female Offenders*, CRIM. JUST., Spring 2005, at 4; Boudin, *supra* note 130 (describing the myriad impacts of parental incarceration on children).

296. Raeder, *supra* note 295, at 7 ("It is common knowledge that children of incarcerated parents have greater risk of offending. A study in Sacramento County, California, found that of all children arrested between the ages of nine and 12, 45 percent had an incarcerated parent.").

297. *Haynes*, 557 F. Supp. 2d at 207 n.12 (noting that in 2004, approximately 1.5 million children in the United States had a parent in prison) (citing JEREMY TRAVIS, BUT THEY ALL COME BACK 119 (2005)).

298. *Id*. *See* Clear, *supra* note 76, at 181.

299. *Haynes*, 557 F. Supp. 2d at 207–08 (prohibiting Haynes from returning to Bromley-Heath during his six-year supervised release).

### *b. Comparing Defendants*

Though § 3553(a) requires courts to compare the defendant to similarly situated defendants, gathering such information may be difficult. The Guidelines provide one convenient method of comparison but, as indicated, those calculations can mask important individualized differences from case to case and make defendants convicted of similar offenses look more similar than they really are.[300] Collecting real sentencing data locally is challenging due to the individualized handling of cases in different courts, by different counsel, as well as the lack of public access in many places about the reasons for sentences. Even in a single drug sweep like the one that netted Haynes, cases were prosecuted separately in different court rooms. This has practical consequences on the ability of courts to gather information on other defendants for sentencing purposes and outcomes.[301] In the Bromley-Heath sweep, eighteen defendants were prosecuted in federal court and five others were prosecuted in state court where they faced lower maximum penalties.[302] In federal court, cases from the sweep were assigned to different judges, and defendants were prosecuted singly or with co-defendants.[303]

Collecting sentencing data even within a single courthouse may prove elusive. The District of Massachusetts, where Haynes was sentenced, is unusual in that after sentencing it makes public the "Statement of Reasons," which contains data on how the court determined the sentence under the Guidelines and the § 3553(a) factors.[304] Because the timing of each case is different, these data may not be available at the time of sentencing for some defendants.[305] Elsewhere, secrecy about sentencing tends to be the norm,[306] and the separate prosecution of related cases can retard information gathering.[307]

300. United States v. Garrison, 560 F. Supp. 2d 83, 84–85 (D. Mass. 2008).

301. *See* Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 21–22 (2010) (analyzing inter-judge sentencing disparities from 2001 to 2008, based on sentencing data from the District of Massachusetts).

302. *Haynes*, 557 F. Supp. 2d at 204–05.

303. *Id.* at 204–06, 207 n.10.

304. *See* Scott, *supra* note 301, at 21.

305. *Haynes*, 557 F. Supp. 2d at 201 (noting that one of Haynes's co-defendants had been sentenced, but not the other).

306. *See* Scott, *supra* note 301, at 23 (acknowledging that the District of Massachusetts is an exception to the prevailing policies of secrecy regarding sentencing).

307. *See* United States v. Garrison, 560 F. Supp. 2d 83, 83 (D. Mass. 2008) (stating that in another drug trafficking sweep in the District of Massachusetts involving twenty-one federal defendants, the defendant was the sole defendant named in the indictment, and in the part of the presentencing report listing "related cases," the probation officer wrote "none.").

#### *c. Non-Prison Sentencing Options*

No-prison or reduced prison terms will be more attractive options if courts know they will be effective. Judge Gertner and Justice Wolff, among others, have called for the development of a "what works" literature and data on sentencing.[308] Advocates of evidence-based sentencing seek sentences that actually impede future criminal behavior by either selecting an appropriate prison stay, selecting a non-prison sentence, or choosing some combination.[309] Judge Gertner has called for the Sentencing Commission to redirect itself to be the repository of such information within the federal system.[310]

### *3. Telling the Mass Incarceration Narrative*

Courts may develop expertise on mass incarceration, but they will still rely on defense advocates to explain its relevance and propose sentencing options case by case. The mass incarceration narrative may be different than a typical sentencing strategy that focuses on individualized culpability, responsibility, and remorse, with a plea for leniency. A mass incarceration analysis allows a court to assess the defendant in a broader context by connecting the dots among many cases within the system and to the real world consequences of the sentencing for the defendants and others.

Telling this mass incarceration narrative may be risky as advocates test the waters on a new approach not knowing whether the court will consider the information, allow related testimony, or be persuaded that it should impact the sentencing decision. Gathering and presenting a mass incarceration narrative will require work—namely, creating maps, finding experts, witnesses, neighbors, and family members to explain how the conviction, any incarceration, and collateral consequences will affect them. Presenting this information could make for a longer sentencing hearing, and would require a judge willing to entertain this analysis. But this advocacy could yield favorable results and, over time, educate the court about common issues of local concern and help it tailor a sentence that minimizes mass incarceration harms to the defendant and others.

Evaluating a defendant in the context of mass incarceration can alter the significance of certain common characteristics. For a person like Haynes—unemployed, a convicted felon, living in the projects, and involved in low-level drug dealing—situating his case in the mass

308. *See* J. Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1412–15 (2008); *see also* Gertner, *supra* note 28, at 275–79.

309. *See* Gertner, *supra* note 28, at 278–79; Wolff, *supra* note 308, at 1412–13 (arguing that alternative courts and programs are effective in reducing recidivism).

310. *See* Gertner, *supra* note 28, at 262.

incarceration context turned those negative factors into part of a more complex story. His felony conviction diminished his work prospects, disrupted his family life, caused him to return to the projects to rely on relatives, and led to low morale and criminal behavior.[311] Despite these setbacks, Haynes remained a devoted father and tried to obtain employment. By putting a human face on mass incarceration, Haynes appeared as a father struggling to carve a meaningful life despite his criminal record.[312] The court was able to tailor a short sentence followed by a jobs program, which was aimed at returning Haynes to a productive life.[313]

Telling the mass incarceration narrative may empower advocates to reframe the relevance of factors common to many defendants as part of a larger story. In a broader, systemic context, markers of disadvantage—unemployment, criminal history, low education, family instability, racial or economic isolation—may signal that a defendant comes from an environment affected by mass incarceration. The outcome of his sentence is connected to the well-being and stability of his family and community, as well as public safety in the short and longer terms. Courts have the ability to consider these impacts in tailoring a sentence that fits the defendant and minimizes other harms.

## CONCLUSION

Courts can address the problem of mass incarceration on a case-by-case basis at sentencing with the goal of imposing just punishment and minimizing the collateral impacts of incarceration on the defendant and others. Mass incarceration is a complex societal problem arising from both the cumulative impact of many individual criminal cases and the lasting impacts of incarceration on the defendant and his family, children, and community. Sentencing is the best opportunity for courts to address mass incarceration concerns because it allows courts to individualize punishment in light of broad systemic concerns, which federal courts must do under 18 U.S.C. § 3553(a). Adding mass incarceration impacts to the sentencing analysis would enhance the court's understanding of the defendant and the real world consequences of his punishment, encourage respect for the law, reduce unnecessary incarceration, and minimize its harms, especially in those communities debilitated by incarceration. Although the systemic problem of mass incarceration may ultimately be redressed only through systemic reform, courts do not have to wait. They

311. United States v. Haynes, 557 F. Supp. 2d 200, 202–04 (D. Mass. 2008).

312. *Id.* at 205–06.

313. *Id.* at 207–08 (sentencing Haynes to thirteen months in prison and six years' supervised release, requiring him to participate in a jobs program, and forbidding him from returning to Bromley-Heath without permission).

can and should address mass incarceration at sentencing under existing legal frameworks with minimal changes to legal doctrine.