

# Guns, Mass Incarceration, and Bipartisan Reform: Beyond Vicious Circle and Social Polarization

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*Gun violence in modern America persists in the face of irreconcilable views on gun control and the right to bear arms. Yet one area of agreement between Democrats and Republicans has received insufficient attention: punitiveness as a means of gun control. The United States has gravitated toward a peculiar social model combining extremely loose regulations on guns and extremely harsh penalties on gun crime. If someone possesses a gun illegally or carries one when committing another crime, such as burglary or drug dealing, draconian mandatory minimums can apply. These circumstances exemplify root causes of mass incarceration: overreliance on prisons in reaction to social problems and unforgiving punishments for those labeled as “violent” criminals. Contrary to widespread misconceptions, mass incarceration does not primarily stem from locking up petty, nonviolent offenders caught in the “War on Drugs.” Most prisoners are serving time for violent offenses. Steep sentence enhancements for crimes involving guns illustrate how American justice revolves around counterproductive, costly practices that disproportionately impact minorities.*

*This multidisciplinary Article envisions future reforms with the capacity to transcend America’s bitter polarization. A precondition to change is not for conservatives and liberals to wholeheartedly agree on issues like systemic racism or the right to bear arms. Rather, possibilities for penal reform are likelier when each side can come to the negotiating table for its own reasons. A paradigm shift in conservative America may prove especially indispensable, as Republicans tend to be more supportive of harsh punishments, and Democrats are unlikely to achieve reform nationwide on party-line votes. This shift has already occurred to an extent, given the rise*

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*of penal reform in red states. But both conservatives and liberals have failed to significantly reduce mass incarceration by recurrently excluding “violent” offenders from reform initiatives.*

*The Article explores how conservatives and liberals could gradually converge toward sentencing reform on gun crime. This could ultimately have a ripple effect on American sentencing norms, leading them closer to those of Western democracies with more effective and humane penal systems. Such bipartisanship is less elusive than it might seem. A rehabilitative approach toward gun crime fits with the evolution of American conservatism, which believes that guns should not be vilified since they are part of the nation’s identity. Similarly, the rehabilitation of people convicted of gun crime is consistent with cornerstones of modern American liberalism, namely stricter gun control and opposition to mass incarceration as an unjust, racist system. As opposite sides will probably retain much of their worldview even if their perspectives evolve to a degree, new ways of thinking could help bring reformers together. These social transformations cannot be predicted but should be theorized.*

## I. INTRODUCTION

In the wake of relentless mass shootings<sup>1</sup> and rising murder rates,<sup>2</sup> American society has been mired in a longstanding gridlock over both gun reform and criminal justice reform.<sup>3</sup> Yet if efforts to enhance firearm regulations<sup>4</sup> and reshape the penal system<sup>5</sup> have both been limited in scope,

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1. See, e.g., Arelis R. Hernández et al., *A Grisly Checklist and a Sickening Rampage: Inside the Uvalde Massacre*, WASH. POST (May 25, 2022), <https://www.washingtonpost.com/nation/2022/05/25/reconstruction-timeline-uvalde-school-shooting/> [https://perma.cc/U2TS-LGDC] (recounting the shooting of nineteen children and two teachers at Robb Elementary School in Uvalde, Texas).

2. JOHN HOPKINS CTR. FOR GUN VIOLENCE SOLUTIONS, *A YEAR IN REVIEW: 2020 GUN DEATHS IN THE U.S.* 4 (2022) (“Gun homicides rose dramatically across the country, increasing by 35% in just one year. Nearly 5,000 more lives were lost to gun homicide in 2020 than in 2019.”).

3. See generally Ashley Parker & Michael Scherer, *Inside Mitch McConnell’s Decades-Long Effort to Block Gun Control*, WASH. POST (May 28, 2022), <https://www.washingtonpost.com/politics/2022/05/28/mcconnell-guns-mass-shootings/> [https://perma.cc/5HXX-AE59].

4. See generally Alan Fram, *Senators Strike Bipartisan Gun Deal*, CHI. TRIB., June 13, 2022, at 1 (describing “modest” reforms to improve school safety and mental health programs following chronic mass shootings).

5. See generally Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL’Y REV. 1, 9 (2022) (discussing how between 2006 and 2016 the federal government and many states enacted decarceration policies with a modest scope); Nazgol Ghandnoosh, *U.S.*

Democrats and Republicans have generally agreed upon at least one thing in past decades—long prison sentences for gun crime.<sup>6</sup>

Modern America has gravitated toward a peculiar social model combining extremely loose regulations on firearms and extremely punitive sentences on gun crime. These circumstances reflect a vicious circle: the proliferation of firearms facilitates gun crime, which commonly results in draconian punishments, which in turn contribute to overcrowded, criminogenic prisons ill-suited to rehabilitation.<sup>7</sup> This vicious circle reinforces singular features of the United States. It has the highest number of guns per capita<sup>8</sup> and practically the highest incarceration rate of any country worldwide.<sup>9</sup> Even though various developing nations have higher murder rates, the United States has by far the highest murder rate in the Western world.<sup>10</sup> This is tied to easy access to guns, which constitute the vast majority of murder weapons in America. In 2020, 79 percent of all homicides were by firearm—the highest proportion by firearm in U.S. history.<sup>11</sup> While U.S. crime rates overall are not extraordinary, the gun-related murder rate stands out dramatically compared to peer nations.<sup>12</sup> All of these features exemplify “American exceptionalism”

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*Prison Decline: Insufficient to Undo Mass Incarceration*, SENT’G PROJECT (May 19, 2020), <https://www.sentencingproject.org/publications/u-s-prison-decline-insufficient-undo-mass-incarceration/> [https://perma.cc/7H7G-VM48] (“At the pace of decarceration since 2009, averaging 1% annually, it will take 65 years—until 2085—to cut the U.S. prison population in half.”).

6. See *infra* Section II.A.

7. See *infra* Section II.

8. AARON KARP, ESTIMATING GLOBAL CIVILIAN-HELD FIREARMS NUMBERS, SMALL ARMS SURVEY 4 (2018).

9. *Prison Population Rate*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) [https://perma.cc/NX8Y-XT2N].

10. *Homicide Country Data*, U.N. OFF. DRUGS & CRIME, <https://dataunodc.un.org/content/homicide-country-data> [https://perma.cc/NZE9-Q2YL]. See also Amanda L. Robinson & Christopher D. Maxwell, *Typifying American Exceptionalism: Homicide in the USA*, in *THE HANDBOOK OF HOMICIDE* (Fiona Brookman, Edward R. Maguire & Mike Maguire eds., 2017).

11. JOHN HOPKINS CTR. FOR GUN VIOLENCE SOLUTIONS, *supra* note 2, at 11.

12. Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015*, 123 PREVENTIVE MED. 20 (2019). In addition, consult the comparative data on homicide, serious assault, and robbery collected by the United Nations. *dataUNODC*, U.N. OFF. DRUGS & CRIME, <https://dataunodc.un.org/> [https://perma.cc/6JT9-GNR6].

in the comparative definition of the phrase, namely that the United States is an “exception,”<sup>13</sup> especially within the West.<sup>14</sup>

These problems appear to be worsening. The homicide rate surged by 35 percent between 2019 and 2020.<sup>15</sup> The rise in homicides was driven predominantly by a rise in firearm deaths.<sup>16</sup> Gun sales also reached a new record in 2020. “Tens of thousands of these new guns turned up at crimes scenes across the country—almost twice as many as in 2019,” according to the John Hopkins Center for Gun Violence Solutions.<sup>17</sup> But federal and state legislators have struggled to find genuine solutions due to irreconcilable views about the nature of the problem.<sup>18</sup> In any event, the U.S. Supreme Court’s controversial *Bruen* decision<sup>19</sup> suggests that future legislative

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13. The primary definition of “American exceptionalism” is that the United States is an “exception.” This definition is not normative and has historically been used by scholars in numerous fields of comparative research. It differs from a separate definition of “American exceptionalism” equating the phrase with a faith in American superiority. This nationalistic understanding, which has become popular in modern times, reflects the conviction that America is “exceptional” in the sense of magnificent or outstanding. *See generally* JACK P. GREENE, *THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1492 TO 1800* 4–7 (1993); MUGAMBI JOUET, *EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER* 22–27 (2017); SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 18 (1997); CHARLES LOCKHART, *THE ROOTS OF AMERICAN EXCEPTIONALISM: INSTITUTIONS, CULTURE AND POLICIES* (2003); AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT 1 (Kevin R. Reitz ed., 2017).

14. The “Western world” is commonly understood as the United States, Canada, Australia, New Zealand, and European nations with the exception of Russia and states aligned with Russia. *See generally* Benjamin Herborth & Gunther Hellmann, *Introduction, in* USES OF ‘THE WEST’ 1, 1 (Herborth & Hellmann eds., 2017).

15. JOHN HOPKINS CTR. FOR GUN VIOLENCE SOLUTIONS, *supra* note 2, at 4. At the time of writing the last year for which comprehensive data were available was 2020.

16. *Id.* at 11 (indicating that 68 percent of homicides in 2011 were by firearm, compared with 79 percent in 2020).

17. *Id.* at 4 (citing Champe Barton, *New Data Suggests a Connection Between Pandemic Gun Sales and Increased Violence*, THE TRACE (Dec. 8, 2021), <https://www.thetrace.org/2021/12/atf-time-to-crime-gun-data-shooting-pandemic/> [<https://perma.cc/RA36-ZLSX>]).

18. *See, e.g.*, Fram, *supra* note 4 (noting the limitations of the rare bipartisan reform on gun violence that Congress adopted in 2022).

19. *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022) (holding that the Second and Fourteenth Amendments create an individual right to carry a handgun for self-defense outside the home). On the polarized reaction to *Bruen*, see generally Henry Olsen, *Why the Supreme Court’s Gun Ruling Is an Entirely Reasonable One*, WASH. POST (June 24, 2022), <https://www.washingtonpost.com/opinions/2022/06/24/supreme-court-gun-ruling/> [<https://perma.cc/PEQ7-9NY5>]; Michael Waldman, *The Most Dangerous Gun Ruling in History, at the Worst Possible Time*, WASH. POST (June 23, 2022), <https://www.washingtonpost.com/opinions/2022/06/23/bruen-supreme-court-gun-rights-dangerous/> [<https://perma.cc/QR3E-6QYW>].

reforms concerning gun violence may be found unconstitutional under the Second Amendment.<sup>20</sup>

Although the social debate about guns in America is as lively as ever, it has hardly encompassed sentencing reform, just as the social debate about sentencing reform has usually excluded gun crime.<sup>21</sup> Long prison terms as a means of gun control have been a rare area of common ground between Democrats and Republicans.<sup>22</sup> Prospects for a less punitive and more effective approach are currently imperiled by another trend that may halt penal reform altogether by reviving the “tough-on-crime” movement of past decades. American society is experiencing a relative resurgence of political rhetoric impugning actual or perceived opponents as “soft on crime.”<sup>23</sup> Notwithstanding social concern about excessive leniency, the United States nearly leads all countries in incarcerating the highest proportion of its population.<sup>24</sup>

All of these trends should still be kept in perspective. Homicide and violent crime rates remain below the peak modern-era levels of the nineties.<sup>25</sup> In 2020, the violent crime rate rose by 4.7 percent, much less than the murder rate, whereas property crime plummeted by 8.1 percent.<sup>26</sup> Meanwhile, the harshness of modern American justice has been tempered by the significant decline of capital punishment, as death sentences and executions nationwide

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20. See *McDonald v. City of Chicago*, 561 U.S. 750 (2010) (plurality opinion) (holding that the Second Amendment applies to the states under the doctrine of incorporation); see also *District of Columbia v. Heller*, 554 U.S. 570 (2008) (striking a federal handgun ban in the District of Columbia by finding that the Second Amendment protects an individual right to bear arms).

21. See generally Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173 (2016) (arguing that numerous pitfalls and inequities of the “War on Drugs” also exist for gun crime, which has garnered far less attention among reformers).

22. See *infra* Section II.A.

23. This trend was exemplified by the confirmation hearings of Justice Ketanji Brown Jackson, who was vehemently accused of being “soft on crime.” Melissa Quinn, *Jackson Confirmation Furthers GOP’s Tough-on-Crime Narrative Ahead of Midterms*, CBS NEWS (Apr. 14, 2022), <https://www.cbsnews.com/news/supreme-court-ketanji-brown-jackson-gop-tough-on-crime-midterm-elections/> [<https://perma.cc/9DMM-8JN7>]. See also Jerry Iannelli, *Los Angeles Democrats Embrace the Tough-on-Crime Backlash*, THE APPEAL (Mar. 15, 2022), <https://theappeal.org/los-angeles-democrats-george-gascon-karen-bass-tough-on-crime-backlash> [<https://perma.cc/YCM5-GLCE>] (describing a relatively bipartisan recall campaign against George Gascón, who was elected Los Angeles District Attorney after promising less punitive practices).

24. WORLD PRISON BRIEF, *supra* note 9.

25. *Homicide Trends: What You Need to Know*, COUNCIL ON CRIM. JUST. (Oct. 5, 2021), <https://counciloncj.org/homicide-trends-report> [<https://perma.cc/KQ5D-TDCA>].

26. *Id.*

have reached historic lows.<sup>27</sup> Just as twenty-three states have abolished the death penalty,<sup>28</sup> twenty-eight had abolished life without parole for juveniles as of mid-2023.<sup>29</sup> The movement to eliminate the very harshest punishments has made strides over the past decade,<sup>30</sup> yet it may wither in a climate of fear and instability.

Guns and criminal justice have become extremely divisive issues in the United States,<sup>31</sup> further capturing how another key facet of modern American exceptionalism is acute societal polarization.<sup>32</sup> Calls for stricter gun control in the wake of tragic mass shootings have been matched by an uncompromising defense of the right to bear arms as a cornerstone of American national identity.<sup>33</sup> Guns are likewise a central question in divisive debates over policing that again relate to key dimensions of American exceptionalism. The rate of police shootings of civilians in the United States is indeed far higher than in other Western democracies, just as the rate of shootings of police by civilians.<sup>34</sup> In the age of the Black Lives Matter movement, demands to “defund” or “abolish” the police are intertwined with demands that prisons be abolished, too.<sup>35</sup> Concerns about rising crime levels in cities like Chicago,<sup>36</sup> including what has been termed the “Ferguson

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27. DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN 2021: YEAR END REPORT* 1–4 (2020).

28. *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [<https://perma.cc/N3T2-AUBP>].

29. *Which States Ban Life Without Parole for Children?*, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, <https://cfsy.org/states-that-ban-life-without-parole-lwop-sentences-for-children/> [<https://perma.cc/7YCQ-YAKZ>].

30. *See generally* Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence in an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703 (2019); DEATH PENALTY INFO. CTR., *supra* note 27.

31. *See generally* Mugambi Jouet, *Guns, Identity, and Nationhood*, 5 NATURE – PALGRAVE COMMUNICATIONS 1 (2019).

32. *See generally* ALAN ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* (2018); MARC HETHERINGTON & JONATHAN WEILER, *AUTHORITARIANISM AND POLARIZATION IN AMERICAN POLITICS* (2009); JOUET, *supra* note 13; NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA* (2d ed. 2016); *SOLUTIONS TO POLARIZATION IN AMERICA* (Nathaniel Persily ed., 2015).

33. *See generally* Jouet, *Guns, Identity, and Nationhood*, *supra* note 31.

34. *See* FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 87–88 (2017); *see also* Paul J. Hirschfield, *Lethal Policing: Making Sense of American Exceptionalism*, 30 SOC. F. 1109 (2015).

35. *See generally* *Prison Abolition: Introduction*, 132 HARV. L. REV. 1568 (2019).

36. U.N. OFF. DRUGS & CRIME, *GLOBAL STUDY ON HOMICIDE 2019: HOMICIDE TRENDS, PATTERNS AND CRIMINAL JUSTICE RESPONSE* 57–59 (2019).

effect,” have led to opposite demands for more forceful policing.<sup>37</sup> On one side of this debate, gun crime evokes unarmed Black men callously killed by police officers. On the other side, gun crime evokes predominantly Black criminals whom police should target aggressively.<sup>38</sup>

These divides are only part and parcel of modern America’s hyper-polarization. A host of fundamental issues bitterly divide the nation, such as abortion, health care, wealth inequality, taxation, government spending, climate change, and foreign policy.<sup>39</sup> Polarization further encompasses whether the United States should remain a democracy or adopt authoritarian populism.<sup>40</sup> These divides have culminated in the bitter debate over the assault on the Capitol on January 6, 2021 by pro-Trump protestors, some of whom were armed with guns and other weapons.<sup>41</sup> Both Donald Trump and the bulk of the Republican Party have publicly embraced or condoned this attack.<sup>42</sup> Their opponents have cast the invasion of the Capitol and the related disinformation about a “stolen election” as grave threats to American democracy.<sup>43</sup> Diverse scholars and social critics have theorized worst-case scenarios in which hyper-polarization and dysfunction could lead to the

37. David C. Pyrooz, Scott H. Decker, Scott E. Wolfe & John A. Shjarback, *Was There a Ferguson Effect on Crime Rates in Large U.S. Cities?*, 46 J. CRIM. JUST. 1, 1–2 (2016). See also Paul G. Cassell & Richard Fowles, *What Caused the 2016 Chicago Homicide Spike? An Empirical Examination of the “ACLU Effect” and the Role of Stop and Frisks in Preventing Gun Violence*, 2018 ILL. L. REV. 1581 (2018); Willard M. Oliver, *Depolicing: Rhetoric or Reality?*, 28 CRIM. JUST. POL’Y REV. 437 (2017); Evelyn Skoy, *Black Lives Matter Protests, Fatal Police Interactions, and Crime*, 39 CONTEMP. ECON. POL. 280 (2021); Roman G. Rivera & Bocar A. Ba, *The Effect of Police Oversight on Crime and Allegations of Misconduct: Evidence from Chicago* (unpublished article) (on file with author), <https://www.dropbox.com/s/z073gtxmbuyuvv3x/Rivera%20and%20Ba%20%282022%29.pdf>.

38. Social science indicates that public support for harsh punishments increases the more offenders and prisoners are perceived to be Black. See Rebecca Hetey & Jennifer Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCHOL. SCI. 1949 (2014); Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006).

39. See generally *supra* note 32.

40. See generally TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (Penguin 2017); TIMOTHY SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* (2017); CAN IT HAPPEN HERE?: *AUTHORITARIANISM IN AMERICA* (Cass Sunstein ed., 2018).

41. Samantha Putterman, *Tucker Carlson Is Wrong. Firearms, Other Weapons Were Found at the Capitol on Jan. 6.*, POLITIFACT (June 13, 2022), <https://www.politifact.com/factchecks/2022/jun/13/tucker-carlson/tucker-carlson-wrong-firearms-other-weapons-were-f/> [<https://perma.cc/3NFQ-9AAQ>].

42. See Jonathan Weisman & Reid J. Epstein, *G.O.P. Declares Jan. 6 Attack ‘Legitimate Political Discourse’*, N.Y. TIMES (Feb. 4, 2022), <https://www.nytimes.com/2022/02/04/us/politics/republicans-jan-6-cheney-censure.html> [<https://perma.cc/4G6N-WTCC>].

43. See *id.*

erosion of the United States as a constitutional democracy or its collapse as a country, if not another civil war.<sup>44</sup>

This Article flips the script by exploring prospects for sentencing and gun reform under another scenario: a relatively less polarized America where greater bipartisanship might reemerge someday. We will especially consider intriguing reasons why the sentencing of gun crime is an issue on which bipartisan penal reform might prove feasible. If so, it may provide a template to find greater common ground on other areas of divide. The Article therefore projects itself in the future to explore paradigm shifts that might be conceivable years or decades from now. This approach does not seek to minimize the magnitude of modern America's polarization.<sup>45</sup> Rather, the Article eschews the reductive opposition between optimism and pessimism by pragmatically analyzing how reforms might materialize in one of several possible futures.

A starting premise for our analysis is that one cannot predict the future but that three general scenarios are conceivable. First, polarization may keep worsening and lead the United States to become increasingly disunited. Second, the status quo may last indefinitely. Third, polarization may abate as Americans eventually become less divided over their fundamental values and worldview. This third scenario may be the only environment in which mass incarceration could disappear or markedly diminish in the future. It is also perhaps the only environment in which gun safety could substantially improve.

While a bipartisan consensus tends to already exist on sentencing gun crime, it has been a consensus on ruinous, counterproductive policies that hinder public safety. Indeed, draconian punishments for violent crime, including firearm offenses,<sup>46</sup> is a matter on which U.S. conservatives and liberals have atypically agreed in past decades. Although citizens can diverge on which policies should be a priority in handling crime, 81 percent of Republicans and 50 percent of Democrats support stricter sentences for

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44. *See generally* MADELEINE ALBRIGHT, *FASCISM: A WARNING* (2018); STEPHEN MARCHE, *THE NEXT CIVIL WAR: DISPATCHES FROM THE AMERICAN FUTURE* (2022).

45. *See generally supra* notes 32, 39 and accompanying text.

46. Even though they are commonly treated as violent persons who deserve harsh sentences, some gun offenders may be officially classified as nonviolent because infractions like unlawful gun possession can be categorized as “public-order” offenses that are technically ranked lower than property or drug crimes. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 188 (2017). *See also* DAVID A. SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIME AND WHAT IT MEANS FOR JUSTICE* 215 (2021) (“Gun violations typically are treated as violent crimes, which means that they serve as predicates for additional terms of imprisonment . . .”).



violent crime.<sup>47</sup> Making matters worse, the public is critical of mass incarceration but mistakenly thinks that the problem is largely due to the “War on Drugs,”<sup>48</sup> whereas most prisoners are actually serving time for violent offenses.<sup>49</sup> This underscores why rethinking the punishment of violent crime is indispensable to ending mass incarceration, which brings us back to why guns could offer a surprising way forward.

In practice, both Democratic and Republican public officials have treated guns as aggravating circumstances that can lengthen sentences by years and sometimes decades.<sup>50</sup> If a defendant carries a gun when committing another crime (e.g., assault, trespass, burglary, drug dealing, etc.), prosecutors and judges typically have the discretion to seek dramatically longer sentences or are bound to do so under mandatory minimums.<sup>51</sup> That practice reflects a logic of risk-management and prevention.<sup>52</sup> Blurring the harm principle, it entails the incapacitation of persons who have never fired a weapon or physically harmed anyone.<sup>53</sup>

The possession of a gun is a legitimate aggravating circumstance in a functional penal system, yet this approach has deleterious effects in a modern America where sentencing practices have become extraordinarily punitive by both U.S. historical standards and Western standards.<sup>54</sup> In this context, sentencing schemes that are already very harsh for ordinary crimes lead to even more ruthless punishments if a gun was involved, even if it was not used. As we shall see, extremely long sentences do not deter crime but hinder rehabilitation while contributing to the human and financial costs of prison over-population.<sup>55</sup>

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47. Jennifer de Pinto, Fred Backus & Anthony Salvanto, *CBS News Poll: In Economic Views, Inflation Outweighs Jobs*, CBS NEWS (Apr. 11, 2022), <https://www.cbsnews.com/news/cbs-news-poll-inflation-outweighs-jobs-on-economic-views-prices-force-cutbacks/> [<https://perma.cc/KS4E-K5NN>].

48. German Lopez, *Want to End Mass Incarceration? This Poll Should Worry You.*, VOX (Sept. 7, 2016), <https://www.vox.com/2016/9/7/12814504/mass-incarceration-poll> [<https://perma.cc/9ESJ-3TCH>].

49. BUREAU JUST. STAT., *Prisoners in 2020 – Statistical Tables 28* (2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf> [<https://perma.cc/YPE8-7ZTR>]. See also PFAFF, *supra* note 46, at 187 (stressing that “the incarceration of people for violent crimes has always been at the center of contemporary prison growth”).

50. See *infra* Section II.A.

51. *Id.*

52. See Levin, *supra* note 21, at 2214 (“As a category of criminal offenses defined by sentencing enhancements, mandatory minimum sentences, and predicting future threats, possessory gun crimes embody many of the reigning pathologies of criminal law.”).

53. See *id.* at 2214, 2217.

54. See *infra* Section II.A.

55. See *infra* Section II.B.

The Article explores how U.S. conservatives and liberals could gradually converge toward a different bipartisan consensus on guns and sentencing, which would both improve gun safety and help dismantle mass incarceration. Such bipartisanship is less elusive than it may seem at first glance. A moderate, rehabilitative approach toward gun crime fits with the evolution of modern American conservatism, which emphasizes the right to bear arms and gun culture as cornerstones of national identity.<sup>56</sup> By the same token, the rehabilitation of people convicted of gun crime is consistent with two cornerstones of modern American liberalism, namely stricter gun control and opposition to mass incarceration as an unfair, discriminatory system.<sup>57</sup>

To reenvision legal change, we must sometimes delve beyond the law. Alongside criminology, we will therefore draw upon political science to offer new perspectives on penal reform. One feature of hyper-polarization in modern America is strong group identification and distrust, if not animosity, toward political opponents.<sup>58</sup> The decline of mutual trust in American political life encompasses the erosion of shared aspirations, as “superordinate goals are no longer powerful enough to bring the parties together,” writes the political scientist Lilliana Mason.<sup>59</sup> “The challenge, then, is to find any goal that could unify Democrats and Republicans and not simply cause more harm than good.”<sup>60</sup> This Article argues that sentencing reform for gun crime could be such a goal and that it could have a ripple effect on the wider evolution of American criminal justice.

Change is already happening, as demonstrated by how the bipartisan First Step Act of 2018<sup>61</sup> significantly reduced mandatory minimums for gun crime under 18 U.S.C. § 924(c).<sup>62</sup> Table 1 captures the reform to the practice of

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56. See generally Jouet, *supra* note 31.

57. See generally 2020 DEMOCRATIC PARTY PLATFORM 7, 35–39, 47–48 (2020), <https://democrats.org/where-we-stand/party-platform/> [<https://perma.cc/Q8Y5-M66Z>].

58. See LILLIANA MASON, UNCIVIL AGREEMENT: HOW POLITICS BECAME OUR IDENTITY (2018).

59. *Id.* at 134.

60. *Id.* at 135.

61. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, 34, and 42 U.S.C.).

62. Overall, the First Step Act especially “reduced the scope and severity of certain enhanced recidivist penalties for some drug offenders; broadened the existing safety valve [eliminating the mandatory minimum for certain drug offenses under] 18 U.S.C. § 3553(f); limited ‘stacking’ of the 25-year penalty imposed for multiple weapon offenses; applied the Fair Sentencing Act of 2010 retroactively; and authorized the defendant to file a motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A).” U.S. SENT’G COMM’N, THE FIRST STEP ACT OF 2018: ONE YEAR OF IMPLEMENTATION 50 (2020) [hereinafter FIRST STEP ACT AT ONE YEAR].

“stacking” consecutive 25-year terms,<sup>63</sup> which had led to sentences spanning dozens or even hundreds of years, including in cases where defendants had not physically harmed anyone.<sup>64</sup> This reform has so far resulted in “a considerable decrease in the average sentence length.”<sup>65</sup> Surely, post-reform sentences remain very long. This reform is also non-retroactive so far.<sup>66</sup> However, the First Step Act shows that sentencing reform can encompass serious offenses alongside nonviolent drug infractions. Redemption is not merely a theme in perhaps the most popular movie of all time, *The Shawshank Redemption*, whose appeal demonstrates that people can identify with prisoners once they are given a human face.<sup>67</sup> Redemption is equally a principle that has garnered growing interest among conservatives and liberals,<sup>68</sup> finding concrete application in a rare Trump-era reform acclaimed by both Democrats and Republicans.<sup>69</sup>

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63. As the U.S. Sentencing Commission explains, “[t]he First Step Act limited the application of the 25-year penalty by providing that it applies only to defendants whose instant violation occurs after a prior section 924(c) conviction has become final (and not to multiple section 924(c) counts in the same case).” U.S. SENT’G COMM’N, *COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC* 33 (2022).

64. See Tana Ganeva, *743 Years and 3 Months. 117 Years. 51 Years. Why Are These Men’s Sentences So Long?*, REASON (Mar. 15, 2021), <https://reason.com/2021/03/15/743-years-and-3-months-117-years-22-years-why-are-these-mens-sentences-so-long/> [<https://perma.cc/X9QX-H8PT>].

65. U.S. SENT’G COMM’N, *FIRST STEP ACT AT ONE YEAR*, *supra* note 62, at 35. In particular, “[f]or offenders convicted of multiple counts under section 924(c), the average sentence length was more than ten years shorter [by the end of the First Step Act’s first year in December 2019], decreasing from 408 months in fiscal year 2018 to 281 months (a difference of 127 months).” *Id.* at 38.

66. U.S. SENT’G COMM’N, *COMPASSIONATE RELEASE* *supra* note 63, at 34. In addition, a recent circuit split has emerged on “whether reasons related to sentence length—and, in particular, the effect of nonretroactive changes in law [for section 924(c)]—are a permissible basis for a sentence reduction under section 3582(c)(1)(A),” known as the compassionate release provision. *Id.* at 9.

67. *The Shawshank Redemption*, which recounts the redemption of both guilty and innocent prisoners, is the most popular film of all time according to a key benchmark in the film industry. IMDB, *Top 250 Movies*, [https://www.imdb.com/chart/top/?ref\\_=nv\\_mv\\_250](https://www.imdb.com/chart/top/?ref_=nv_mv_250) [<https://perma.cc/DK83-JL4P>] (last visited Jan. 27, 2023). See also MARK KERMODE, *THE SHAWSHANK REDEMPTION* (2003).

68. See generally DAVID DAGAN & STEVEN M. TELES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* 44–51 (2016) (discussing the growing influence of redemption in the conservative and evangelical penal reform movements); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327 (2009) (theorizing how to empirically measure the redemption of people who have abandoned crime). See also *infra* note 326 (describing the growing influence of human dignity as a legal principle).

69. The First Step Act passed both chambers of Congress by wide margins: a 358-36 vote in the House and 87-12 vote in the Senate. Tim Lau, *Historic Criminal Justice Reform*

But the greatest prospects for change probably lie at the state level since only a segment of criminal cases arise in federal court.<sup>70</sup> For example, in 2018, California adopted legislation providing that, “in the interest of justice,” a court may “strike or dismiss” the enhancement of three, four or ten years that a defendant would otherwise face for using a firearm in the course of a felony or attempted felony.<sup>71</sup> An intertwined statutory section stipulates that “the court shall consider and afford great weight to evidence offered by the defendant to prove that any of the mitigating circumstances [enumerated in the statute] are present.”<sup>72</sup> This reform is encouraging in reconsidering long sentence enhancements for crimes involving guns, and in facilitating the consideration of mitigating evidence presented by defense counsel.<sup>73</sup>

**Table 1: Reduction in Mandatory Minimums Under 18 U.S.C. § 924(c)**<sup>74</sup>

Counts Per Indictment	Pre-First Step Act	Post-First Step Act
One Count	Mandatory Minimum: <b>5 years</b>	Mandatory Minimum: <b>5 years</b>
Two Counts	Mandatory Minimum: <b>30 years</b> (5 + 25 years)	Mandatory Minimum: <b>10 years</b> (5 + 5 years)
Three Counts	Mandatory Minimum: <b>55 years</b> (5 + 25 + 25 years)	Mandatory Minimum: <b>15 years</b> (5 + 5 + 5 years)

Building on this momentum, the Article describes how reformers could rethink and reshape harsh sentencing practices that have led to mass

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*Legislation Signed into Law*, BRENNAN CTR. (Dec. 21, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law> [<https://perma.cc/Z52Y-WEUW>].

70. See PFAFF, *supra* note 46, at 13, 189.

71. CAL. PENAL CODE § 12022.5 (West 2018). The legislation entered into force on January 1, 2018 pursuant to California Senate Bill 620. See 2017 Cal. Legis. Serv. Ch. 682 (S.B. 620).

72. CAL. PENAL CODE § 1385 (West 2022). This statutory language regarding mitigation entered into force on January 1, 2022. See 2021 Cal. Legis. Serv. Ch. 721 (S.B. 81).

73. Future studies should assess the practical impact of this California legislation on sentencing outcomes.

74. FIRST STEP ACT AT ONE YEAR, *supra* note 62, at 34.

incarceration.<sup>75</sup> A precondition to change is not for U.S. conservatives and liberals to wholeheartedly agree on issues like the role of systemic racism<sup>76</sup> or the value of the right to bear arms.<sup>77</sup> As the political scientists David Dagan and Steven Teles underline, possibilities for penal reform have emerged when they have “allowed a genuine working relationship between left- and right-wing reformers to develop, based on the understanding that each side was coming to the table for its own reasons.”<sup>78</sup> As each side will probably retain much of its worldview even if its perspective evolves to an extent, new ways of thinking could help bring reformers together:

Changing policy in the coming decades, except in rare moments when one party has complete control, means changing minds—convincing the arbiters of ideological orthodoxy that they need to shift positions for their own reasons. Understanding when such changes are possible, and how they come about, is central to our ability to do politics effectively in an era when our older techniques for generating consensus have broken down.<sup>79</sup>

Possibilities for “bipartisan reform” discussed throughout this Article should be understood as changes that could gradually materialize with relative support from both Democrats and Republicans, liberals and conservatives. By “bipartisan reform,” I do not mean a full-blown consensus or a sweeping move toward penal reform and decarceration, which are unlikely to occur. Rather, a critical mass of Democratic and Republican officials will have to support reform; and this agenda will have to be substantively different from what they have usually proposed so far. Liberals,

75. This does not mean that long sentences per se are the fundamental cause of mass incarceration, which is driven by various factors. For example, John Pfaff has argued that its primary cause is harsher prosecutorial charges rather than longer sentences, although “by international standards our sentences *are* long, and if people spent less time in prison, obviously prison populations would decline.” PFAFF, *supra* note 46, at 6 (emphasis in original). *See id.* at 55–59, 64–65, 196 (discussing experts’ competing estimates of increases in the lengths of sentences and how this factor has contributed to mass incarceration).

76. *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* (2015); R.J. MARATEA, *KILLING WITH PREJUDICE: INSTITUTIONALIZED RACISM IN AMERICAN CAPITAL PUNISHMENT* (2019).

77. *See generally* ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* (2013); Jouet, *Guns, Identity, and Nationhood*, *supra* note 31.

78. DAGAN & TELES, *supra* note 68, at 142–43.

79. *Id.* at xiii.

who have generally spearheaded penal reform, will have to marshal more ambitious proposals instead of focusing primarily on the most sympathetic prisoners, such as petty drug offenders.<sup>80</sup> Conservatives will plausibly influence how far reform will go, as meaningful change nationwide is unlikely to occur on party-line Democratic votes or through impact litigation. For change to materialize, a non-negligible segment of conservatives will have to support reform or, at the very least, not thwart it through vehement criticism or legal obstructionism.<sup>81</sup> This is why the Article will devote attention to the conservative movement against mass incarceration that gained ground in the 2010s.<sup>82</sup> In a way, the First Step Act of 2018 was the culmination of this nationwide movement, although it should indeed be understood as a “first step,” not an end result.<sup>83</sup>

The experience of other Western democracies can help point the way forward, as they show that it is possible to address violent crime without institutionalizing the merciless, counterproductive, and financially costly practices found in modern America. To be sure, the sentencing of gun crime is a less ubiquitous issue elsewhere in the West where far fewer firearms are in circulation.<sup>84</sup> Still, the rate of non-lethal violent crime there is often relatively similar to the United States.<sup>85</sup> Peer Western democracies can accordingly shed light on how to tackle serious crime less punitively. While

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80. See generally RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 13 (2019) (“[C]riminal justice reform right now, to the extent it exists at all[, is] modest efforts that improve the status quo, mostly focused on drug sentencing and minor property crimes.”). See, e.g., SKLANSKY, *supra* note 46, at 42 (noting that, as San Francisco’s District Attorney in the 2000s, Kamala Harris argued against overreliance on long prison terms—except for violent offenders).

81. See, e.g., Carl Hulse, *Why the Senate Couldn’t Pass a Crime Bill Both Parties Backed*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html> [<https://perma.cc/E9HC-DTUG>] (describing the failure of federal sentencing reform after Mitch McConnell, the Senate Majority Leader, declined to allow a vote on legislation that would have passed “easily”); Seung Min Kim, *Senators Plan to Revive Sentencing Reform Push*, POLITICO (Jan. 4, 2017), <https://www.politico.com/story/2017/01/senate-criminal-justice-sentencing-reform-233071> [<https://perma.cc/9AX4-SFW3>] (indicating that federal sentencing reform was blocked by Senator McConnell and “law-and-order conservatives”).

82. See *infra* Section III.

83. See Justin George, *Okay, What’s the Second Step?*, MARSHALL PROJECT (Dec. 19, 2018), <https://www.themarshallproject.org/2018/12/19/okay-what-s-the-second-step> [<https://perma.cc/625G-CTAU>]; Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, BRENNAN CTR. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/H87U-BF5V>].

84. For a global survey of firearms, consult KARP, *supra* note 8.

85. See *supra* note 12 and accompanying text.

all have fully abolished the death penalty<sup>86</sup> and use long prison terms only in rare cases,<sup>87</sup> American society has faced a longstanding debate about whether executions and draconian prison terms deter crime.<sup>88</sup> Reputable experts do not find that they do so more than moderate punishments.<sup>89</sup> Scholars have otherwise offered different assessments of recidivism and whether lengthier sentences have reduced crime in modern America, such as through incapacitation.<sup>90</sup> Insofar as they may do so, the experience of other Western democracies demonstrates that long or unforgiving sentences are not necessary to keep a society safe.<sup>91</sup> This social outcome is possible with proportional, rehabilitative, and humane sentences, including for serious offenses, as well as attention to root causes of crime.<sup>92</sup> Responding to wrongdoing by normalizing harshness is a social choice, not a given. Comparatism has the capacity to open new possibilities by questioning our assumptions.

Rethinking the sentencing of gun crime could thus become an unexpected vehicle for a paradigm shift in American criminal punishment. To be clear, the point is not that most prisoners are locked up for gun crime. It is difficult to precisely determine the proportion of prisoners whose cases involved a gun but they do appear to be a substantial segment.<sup>93</sup> Nor is the point that rethinking the sentencing of gun crime will readily put an end to mass

86. *Abolitionist and retentionist countries (as of July 2018)*, AMNESTY INT'L (Oct. 23, 2018), <https://www.amnesty.org/en/documents/act50/6665/2017/en/> [<https://perma.cc/X23N-9MKU>].

87. Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 30, at 731–33.

88. *See generally* FRANK R. BAUMGARTNER ET AL., *DEADLY JUSTICE: A STATISTICAL PORTRAIT OF THE DEATH PENALTY* 307–20 (2018); FRANKLIN ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* 85–108 (2001); John J. Donohue, *Empirical Evaluation of Law: The Dream and the Nightmare*, 17 AM. L. & ECON. REV. 313, 323–43 (2015).

89. *See id.*

90. *See generally* BARKOW, *supra* note 80, at 42–44, 77; PFAFF, *supra* note 46, at 66–67; Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785 (2014); U.S. SENT'G COMM'N, *LENGTH OF INCARCERATION AND RECIDIVISM* 2-3, 28–31 (2022).

91. *See generally* JOUET, *supra* note 13, at ch. 7.

92. *See infra* note 195 and accompanying paragraphs.

93. Tallies of prisoners often separate those incarcerated primarily for weapons offenses like unlawful gun possession and those convicted of murder, assault, robbery, rape, and other crimes that may involve the use of a gun. *See, e.g.*, Carson, *supra* note 49, at 28, 32. Yet available data indicate that a significant proportion of homicides, aggravated assaults, and robberies are committed with firearms. *Expanded Homicide Data Table 7: Murder, Types of Weapons Used*, FBI: UCR (Uniform Crime Reporting) (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/expanded-homicide-data-table-7.xls> [<https://perma.cc/3AE4-9FVF>]; *Table 15: Crime Trends*, FBI: UCR (Uniform Crime Reporting) (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-15> [<https://perma.cc/RNM2-BLWJ>].

incarceration. Penal reform should be multi-faceted because the criminal justice system's ills are manifold.<sup>94</sup> Reformers should nonetheless aspire to expand progress from one type of case to another, such as by way of analogy, as encouraging sentencing principles have historically emerged in cases involving a variety of crimes.<sup>95</sup> For instance, rethinking the "War on Drugs" could have a broader impact in developing alternatives to incarceration that would apply beyond narcotics cases.<sup>96</sup> Similarly, shifts in juvenile justice can help identify sentencing principles relevant not only to juveniles but also adults.<sup>97</sup> Gun crime is only one of several areas to reconsider sentencing practices, albeit a promising one.

The Article is structured as follows. First, it surveys the vicious circle tying mass incarceration, gun crime, and counterproductive laws, policies, and social attitudes. Second, the Article describes how current sentencing reforms cannot end mass incarceration because they tend to focus on relatively minor offenders and exclude those convicted of more serious crimes—namely the majority of prisoners. Third, we explore how a bipartisan reform movement to reform the sentencing of gun crime could instead foster a virtuous circle by leading more and more prisoners to receive humane sentences that are proportional to wrongdoing, enhance rehabilitation, and make society safer. Absent such a paradigm shift, the status quo may last indefinitely. Should this vicious circle ultimately dissipate, new possibilities for American justice will materialize.

## II. A BLOODY, VICIOUS CIRCLE

The United States is stuck in a bloody vicious circle. Over the past four decades, over 1.3 million people have died from gun violence.<sup>98</sup> This appears to be a higher number than the Americans who have died in wars throughout

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94. See generally BARKOW, *supra* note 80; PFAFF, *supra* note 46; WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

95. See generally *Graham v. Florida*, 560 U.S. 48 (2010) (abolishing life without parole for juvenile non-homicide offenses, in the defendant's case an armed burglary and robbery); *Solem v. Helm*, 463 U.S. 277 (1983) (plurality opinion) (barring life without parole for issuing a false check worth \$100); *Weems v. United States*, 217 U.S. 349 (1910) (prohibiting sentence of hard labor in the Philippines, which then was under U.S. rule, for falsifying a public document).

96. A related consideration is whether the penal system should be routinely handling behavior shaped by drug addiction or mental illness, which may better be framed as a medical problem than a criminal one. See generally Nora D. Volkow et al., *Drug Use Disorders: Impact of a Public Health Rather Than a Criminal Justice Approach*, 16 *WORLD PSYCHIATRY* 213 (2017).

97. Mugambi Jouet, *Juveniles Are Not So Different: The Punishment of Juveniles and Adults at the Crossroads*, 33 *FED. SENT'G REP.* 278 (2021).

98. JOHN HOPKINS CTR. FOR GUN VIOLENCE SOLUTIONS, *supra* note 2, at 7.



the nation's history.<sup>99</sup> Compared to peer nations, guns are widely available and readily fired in America.<sup>100</sup> Firearms are much more used in all sorts of encounters and altercations, from those between the police and civilians to those among rival gang members, besides everyday crime and situations of domestic violence.<sup>101</sup> Following a captivating history,<sup>102</sup> firearms have come to assume an increasingly important symbolic role in modern America, severely undermining efforts to improve gun control.<sup>103</sup>

If gun control spells gridlock, gun crime spells prison. The narrative that nothing is done in response to pervasive gun violence can eclipse how American justice regularly metes out excessive or unforgiving sentences for gun crime. Fear of violent crime, which is partly associated with guns in the popular psyche, fuels support for harsh prison terms among both politicians and the general public. It simultaneously fosters immobilism or unambitious reforms because elected officials dread appearing “soft on crime.”<sup>104</sup>

99. *Id.* (citing Megan Crigger & Laura Santhanam, *How Many Americans Have Died in U.S. Wars?*, PBS (May 27, 2019), <https://www.pbs.org/newshour/nation/many-americans-died-u-s-wars> [<https://perma.cc/N64V-VRLX>]).

100. *See supra* note 11 and accompanying text.

101. In particular, “[r]esearch shows that access to firearms is one of the primary predictors of lethality in abusive relationships, and even when not used fatally, firearms are a tool for ongoing coercive control and threats.” JOHN HOPKINS CTR. FOR GUN VIOLENCE SOLUTIONS, *supra* note 2, at 7.

102. *See generally* SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); WINKLER, *supra* note 77.

103. *See, e.g.*, Richard Hofstadter, *America as a Gun Culture*, 21 *AM. HERITAGE* 6 (1970); Jouet, *Guns, Identity, and Nationhood*, *supra* note 31; Matthew J. Lacombe et al., *Gun Ownership as a Social Identity: Estimating Behavioral and Attitudinal Relationships*, 100 *SOC. SCI. Q.* 2408 (2019).

104. The fate of George Gascón, a Democrat who was elected District Attorney of Los Angeles County in 2020, illustrates this recurrent social dynamic. Gascón had campaigned on a reformist, anti-carceral ticket. He had strong credentials as a prior Los Angeles police chief and San Francisco District Attorney. Nevertheless, Gascón was vehemently accused of being “pro-crime” as detractors pointed to troubling, sensationalized cases where defendants allegedly were treated leniently. Gascón, who faced an unsuccessful recall campaign, was pressured into abandoning several reforms like his vow to prevent prosecutors from seeking life without parole in certain cases and from trying children as adults. Pressure came from both Democrats and Republicans, as well as the media, exemplifying circumstances that keep the nation locked in a vicious circle. *See* Iannelli, *supra* note 23; David Lauter, *George Gascón Recall Effort Had Good Chance to Win Had It Made the Ballot, Poll Finds*, *L.A. TIMES* (Aug. 26, 2022), <https://www.latimes.com/california/story/2022-08-26/failed-effort-to-recall-george-gascon-had-a-good-chance-of-winning-new-poll-shows> [<https://perma.cc/5JML-WT6K>]; Frank Stoltze, *LA DA Gascón Ends Ban on Seeking Life Without Parole for Some Defendants*, *LAIST* (Feb. 18, 2022), <https://laist.com/news/criminal-justice/la-da-gascon-ends-ban-on-seeking-life-without-parole-for-some-defendants> [<https://perma.cc/7TDE-CKFQ>].

*A. Ruining Lives and Budgets*

Amid societal polarization, merciless sentencing for gun crime has been a rare point of bipartisan convergence for decades.<sup>105</sup> While Democrats and Republicans have diverged on many areas of criminal justice, they have generally agreed that most people who commit violent crimes deserve extremely harsh sentences and are often beyond rehabilitation.<sup>106</sup> Gun crime effectively falls in this category.<sup>107</sup> By widely excluding people labeled as “violent” from sentencing reform, a pitfall described below,<sup>108</sup> both parties have contributed to the vicious circle at the heart of this Article. Indeed, extremely long sentences in overpopulated prisons hardly conducive to rehabilitation do not make society safer. This approach can exacerbate prisoners’ behavioral problems, hindering social reintegration upon release, and destabilizing the communities where prisoners come from. These phenomena have long been well documented but how gun crime fits in this picture has received insufficient attention.

To begin, the umbrella category of “violent crime” or the dichotomy between “violent” and “nonviolent” offenders are questionable in lumping or separating distinct offenders and behaviors.<sup>109</sup> A rowdy individual who punches someone in a bar may be convicted of assault and classified as a “violent offender,” just as someone who committed a premeditated murder.

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105. Statutes penalizing gun crime are a “rare moment of agreement” between the gun-control and gun-rights movements, as Benjamin Levin observes. In particular, “the NRA and other opponents of gun control regulation have frequently made an exception for criminal statutes” and have sought to focus the debate on “identifying bad actors and punishing them, rather than directly regulating [guns].” Levin, *supra* note 21, at 2222.

106. See generally de Pinto, Backus & Salvanto, *supra* note 47.

107. As discussed above, gun possession can technically be classified as a nonviolent “public-order” offense even though in practice it can be treated harshly like a violent offense. See *supra* note 46. See also Levin, *supra* note 21, at 2216–17 (discussing how courts have treated illegal gun possession as a violent crime); David Olson, *Illegal Firearm Possession: A Reflection on Policies and Practices that May Miss the Mark and Exacerbate Racial Disparity in the Justice System*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 19, 2022), <https://firearmslaw.duke.edu/2022/01/illegal-firearm-possession-a-reflection-on-policies-and-practices-that-may-miss-the-mark-and-exacerbate-racial-disparity-in-the-justice-system/> [<https://perma.cc/HPV9-XN4Q>] (“[W]hile clearly the commission of a violent crime with a firearm versus the possession of a firearm by someone not licensed/permitted to do so are substantively different behaviors, often the term ‘gun crimes’ conflates the two criminal offenses.”).

108. See *infra* text accompanying notes 108–22.

109. See also SKLANSKY, *supra* note 46, at 74, 84 (describing how the definition of “violence” in U.S. criminal law can be vague and differ by jurisdiction).

Moreover, some persons presently serving time for nonviolent offenses were previously convicted of crimes categorized as violent.<sup>110</sup>

But the fundamental issue is not how the categories of “violent” and “nonviolent” offenders are drawn up, but rather the ubiquity of this framing in modern American justice. It did not emerge before approximately the 1970s, a period of rising urban crime and growing fear of victimization.<sup>111</sup> Until then American law had historically emphasized other classifications that would eventually diminish in importance, such as distinguishing “infamous crimes,” “vice,” and acts of “moral turpitude.”<sup>112</sup> David Sklansky has documented how the rise of mass incarceration “is in part a story about the growing importance of the category of violence in American criminal law, and about changing understandings of violent crime and violent criminals.”<sup>113</sup> “Over the past several decades criminal law also has come to reflect, more and more, a view of violence as characterological rather than situational—a property of individuals, not just of actions,” he adds.<sup>114</sup> Race has played an influential role in shaping these understandings, as modern sociopolitical discourse and media representations tend to suggest that violence is a trait inherent to Black criminals.<sup>115</sup> Characterological understandings of criminality not only raise concerns about discrimination, they also run afoul of a longstanding aspiration of criminal law—punishing people not for their supposed nature but for their acts.<sup>116</sup>

Classifying offenders as “violent criminals” has essentialist dimensions in reducing people to their worst act. Once that label is imposed it risks becoming permanent or at least unshakable for years or decades. Prolonged incapacitation through mechanisms like life without parole or draconian mandatory minimums thus seems sensible. The weight of this logic has become a feature of American exceptionalism that runs contrary to another trend in the historical evolution of Western democracies, namely the development of human dignity. This principle is rooted in the intrinsic worth of each person, who should not be equated with their wrongdoing but deemed capable of redemption.<sup>117</sup> While dignity has played a key role in barring

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110. In addition, “[a] person who is factually guilty of a violent act but pleads guilty to a nonviolent offense does not appear in the official statistics as someone in prison for a violent crime.” PFAFF, *supra* note 46, at 188.

111. SKLANSKY, *supra* note 46, at 45–46, 55, 61.

112. *Id.* at 45–51.

113. *Id.* at 3.

114. *Id.* at 8.

115. *Id.* at 61–63, 87. On race, see also sources cited *supra* note 76.

116. See SKLANSKY, *supra* note 46, at 86.

117. See *infra* note 196 and accompanying paragraph.

merciless punishments in Europe and Canada,<sup>118</sup> this principle has been progressing more slowly in contemporary America.<sup>119</sup> One obstacle to its development is the tendency to essentialize prisoners as mostly irredeemable criminals.

This has contributed to the type of gun control centered on harshness, as Jens Ludwig suggested in a lecture explaining how Chicago has relied excessively on long prison terms in reaction to gun violence. “You wouldn’t put somebody in prison for life if you thought they were capable of change,” Ludwig noted.<sup>120</sup> “The only reason you do that is you are convinced people are engaging in gun violence because that is the essence of their nature, that the only thing that you can do is take them off the street forever.”<sup>121</sup>

In practice, the umbrella category of “violent crime” is deliberately broad in encompassing concrete acts of violence and crimes involving a risk of or capacity for violence.<sup>122</sup> Tellingly, New York categorizes the illegal sale of a firearm as a violent offense.<sup>123</sup> The dichotomy between “violent” and “nonviolent” functions as a quick heuristic in a logic of risk management. Those labeled “violent” can readily be subjected to harsher sentences, denied parole, and excluded from reform initiatives.<sup>124</sup>

Steep sentence enhancements consequently apply to a broad range of gun crime, from genuine violence to any offense where a weapon is in the picture, irrespective of whether it was used or fired. In Florida, for example, armed burglary with assault or battery is a first-degree felony carrying a maximum

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118. See *infra* notes 197, 199 and accompanying paragraphs.

119. See Mugambi Jouet, *Death Penalty Abolitionism from the Enlightenment to Modernity*, AM. J. COMPAR. L. 1–2 (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3733016](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733016) [<https://perma.cc/5PMA-A5FK>].

120. Jens Ludwig, *Gun Violence in Chicago (and What Could Have Been)*, CITY CLUB OF CHI. (Mar. 10, 2022), at 07:38 <https://www.cityclub-chicago.org/video/3511/jens-ludwig> [<https://perma.cc/3LR5-CYN9>].

121. *Id.*

122. See generally SKLANSKY, *supra* note 46.

123. This includes criminal sale of a firearm in the third degree, namely when someone unauthorized to possess a firearm either: “(1) sells, exchanges, gives or disposes of a firearm or large capacity ammunition feeding device to another person; or (2) possesses a firearm with the intent to sell it.” N.Y. PENAL LAW § 265.11 (McKinney 2005). Criminal sale of a firearm in the third degree is a class D felony, which is classified as a violent felony entailing a minimum of two years in prison and up to seven years. N.Y. PENAL LAW § 70.02(1)(c), (3)(c) (McKinney 2020). As is the norm nationwide, minimum and maximum sentences can surge if the defendant has a prior record. See, e.g., N.Y. PENAL LAW § 70.10(2) (McKinney 2007).

124. See SKLANSKY, *supra* note 46, at 41, 66 (listing penalties and collateral consequences for violent offenders).

penalty of life without parole.<sup>125</sup> A young adult who heedlessly commits that crime armed with a weapon can be put away forever.<sup>126</sup> Short of lifelong imprisonment, enhancements can amount to many years. Georgia illustratively adds a consecutive sentence of five years for anyone who possesses a firearm when committing various crimes, from drug dealing to an unlawful entry into or theft from a building or vehicle.<sup>127</sup> Such consecutive terms are all the more significant given that the underlying offense may also carry a long sentence, not to forget that a prior criminal record can further enhance penalties. California,<sup>128</sup> Louisiana,<sup>129</sup> Michigan,<sup>130</sup> and North Carolina,<sup>131</sup> to name a few other states, have analogous sentence enhancements for crimes involving guns. In addition, recall that 18 U.S.C. § 924(c) imposes huge sentence enhancements for gun-related crimes.<sup>132</sup> This practice is starting to change given the legislative reform to § 924 under

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125. FLA. STAT. ANN. § 810.02(2)(b) (West 2021) (“Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . if, in the course of committing the offense, the offender . . . [i]s or becomes armed within the dwelling, structure, or conveyance, with explosives or a dangerous weapon.”).

126. This was the statute at issue in a landmark constitutional case where the defendant avoided life without parole only because he was under eighteen at the time of an armed burglary with assault or battery. The Supreme Court then abolished this punishment for juveniles in non-homicide cases. *See Graham v. Florida*, 560 U.S. 48, 82 (2010).

127. GA. CODE ANN. § 16-11-106(b) (West 2022).

128. *See, e.g.*, CAL. PENAL CODE § 12022.5(a) (West 2018) (“Except as provided in subdivision (b) [concerning assault weapons and machine guns], any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense.”). As discussed above, California passed legislation in 2018 that allowed judges to avoid this sentence enhancement. *See supra* note 71 and accompanying paragraph.

129. *See, e.g.*, LA. STAT. ANN. § 14:60(A)(1), (B) (2014) (“Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein . . . [i]f the offender is armed with a dangerous weapon. . . . Whoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years.”).

130. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.227b (West 2015) (“A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony and shall be punished by imprisonment for 2 years . . . . A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony and shall be served consecutively . . . . A term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section is not eligible for parole or probation during the mandatory term . . . .”).

131. *See, e.g.*, N.C. GEN. STAT. ANN. § 15A-1340.16A(c) (West 2013) (enhancing sentence if defendant committed a felony “by using, displaying, or threatening the use or display of a firearm or deadly weapon”).

132. *See supra* note 63 and accompanying text.

the First Step Act;<sup>133</sup> and recent Supreme Court decisions finding that the mere involvement of a gun does not fit the definition of violence.<sup>134</sup> For the time being, however, prosecutors at the federal and state levels still usually have the discretion to seek exceedingly long sentences whenever a gun is involved.

A *cause célèbre* in the movement for penal reform is best known as a case about the “War on Drugs” though it could also be framed as one about gun crime. Under the prior version of § 924(c), Weldon Angelos was federally sentenced to fifty-five years in prison in Utah for bringing a gun to two \$350 marijuana deals and for having another gun at home.<sup>135</sup> A hard-fought campaign ultimately led to Angelos’s release after over twelve years.<sup>136</sup> This favorable outcome reflected the enormous publicity that the case had garnered, whereas countless other prisoners languish in prison while serving comparably disproportionate sentences.<sup>137</sup>

George Floyd’s life further embodies how responding to gun crime with little more than punitiveness can perpetuate our vicious circle. A recent biography of Floyd offers a penetrating account of several generations of his family history and broader societal structures that led to his upbringing in Houston’s Third Ward—an impoverished, marginalized Black community.<sup>138</sup> After dashed hopes for a collegiate and professional football career, Floyd struggled to find his way and ended up selling drugs.<sup>139</sup> His multifaceted story may resonate with Americans of different stripes, as illustrated by how during a stint behind bars Floyd read *The Purpose Driven Life* by Rick Warren, the evangelical pastor.<sup>140</sup> For our purposes, the biography reveals how Floyd’s run-ins with the law involved a gun crime. Accounts diverge concerning his role in an armed robbery of a young mother

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133. *Id.*

134. In 2019, *United States v. Davis* held that the definition of a violent felony under the “residual clause” of 18 U.S.C. § 924(c)(3)(B) was unconstitutionally vague in imposing mandatory minimum sentences for using, carrying, or possessing a firearm during a crime of violence. 139 S. Ct. 2319, 2336 (2019). In 2022, *United States v. Taylor* equally found that attempted robbery under the federal Hobbs Act does not qualify as a crime of violence, notwithstanding the fact that a firearm was involved. 142 S. Ct. 2015, 2021 (2022).

135. *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004). *See also* BARKOW, *supra* note 80, at 40 (discussing Angelos’s case).

136. Pamela Manson, *Freed Early from a 55-Year Prison Term, a ‘Changed’ Weldon Angelos Is Rebuilding His Life One Brick at a Time*, SALT LAKE TRIB. (June 27, 2016), <https://archive.sltrib.com/article.php?id=4015537&itype=CMSID> [<https://perma.cc/FWK6-BY4A>].

137. BARKOW, *supra* note 80, at 40, 217 n.9 (2019).

138. ROBERT SAMUELS & TOLUSE OLORUNNIPA, *HIS NAME IS GEORGE FLOYD: ONE MAN’S LIFE AND THE STRUGGLE FOR RACIAL JUSTICE* (2022).

139. *Id.* at 106.

140. *Id.* at 132.

who was home with her children, including whether he was the gunman.<sup>141</sup> He pleaded guilty and received five years.<sup>142</sup> The biographers, Robert Samuels and Toluse Olorunnipa, do not minimize Floyd's responsibility but situate it in its social and historical context.<sup>143</sup> Their research further captures how imprisonment in Floyd's case amounted to the habitual form of warehousing inimical to rehabilitation.<sup>144</sup> Once out of prison, Floyd would eventually record a compelling message urging against gun violence: "I've got my shortcomings and my flaws and I ain't better than nobody else . . . I love you and God love you, man. Put them guns down . . ." <sup>145</sup> Given Floyd's tragic fate, this window into his life crystallizes how people with past convictions for gun crime should not be simply dehumanized and cast away from society.

Variations on this theme can be found in James Forman's narrative of his experience as a public defender in Washington, D.C.<sup>146</sup> A passage recounting the story of a teenager named Brandon captures how punitiveness is commonly the first and last response to gun crime:

I knew that probation was a long shot. The gun charge was serious. And worse, a report from the court's social worker had claimed that Brandon hung out with other kids who were involved in some recent neighborhood robberies.

But the robbery allegations were just rumors; Brandon hadn't been charged with that. As for the gun, well, Brandon lived in a terribly dangerous neighborhood, one where kids sometimes carried guns for self-defense. Most important, I had told Judge Walker, this was Brandon's first arrest, and he had great potential. His football coach and two of his teachers had written letters about his promise, his family was supportive, and he had recently enrolled in a tutoring program for at-risk students. And Brandon had pleaded guilty, accepted responsibility for his actions, and been remorseful. Juvenile court was supposed to offer second chances, and Brandon was a perfect candidate.

The prosecutor argued that Brandon should go to Oak Hill, D.C.'s juvenile detention facility. I had countered by pointing

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141. *Id.* at 99, 124–27.

142. *Id.* at 127.

143. SAMUELS & OLORUNNIPA, *supra* note 138.

144. *Id.*

145. *Id.* at 163–64.

146. FORMAN, *supra* note 76.

out what everybody knew: Oak Hill was a dungeon, with no functioning school, frequent incidents of violence, no counseling or mental health services worth the name, and no transition services for young offenders once they were released. Brandon would miss months of actual school while serving his sentence, and it was possible that the principal wouldn't take him back once he returned to his neighborhood. If this happened, there was no good alternative school he could turn to.<sup>147</sup>

Brandon's fate would indeed be a six-month sentence at Oak Hill.<sup>148</sup> While sentences for gun crime can be much longer, incarceration in derelict, violent facilities can have disastrous effects on juveniles,<sup>149</sup> increasing their odds of imprisonment as adults.<sup>150</sup> Forman observed that the judge "seemed like a man with no good alternatives, confronting a problem that was too big for him to solve."<sup>151</sup> Well-intentioned prosecutors can face the same quandary, as Paul Butler described: "The problem is that the prosecutor's instrument—prison—is too blunt. She needs a scalpel but she uses a sledge hammer."<sup>152</sup> In an America where ubiquitous firearms are a source of fear and at times bloodshed, stiff prison terms for gun crime are frequently assumed to be indispensable.<sup>153</sup> But if sentences regularly prove excessive and counterproductive, it is not merely a failure of implementation. Draconian punishments are commonplace in modern America partly because prosecutors tend to find them moral and effective,<sup>154</sup> just like many other social actors, from judges to politicians and rank-and-file citizens.<sup>155</sup>

Publicizing more stories like those of Weldon Angelos, George Floyd, and Brandon could convey how people can serve harsh sentences for conduct that

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147. *Id.* at 5.

148. *Id.* at 6.

149. Such negative effects are a feature of juvenile incarceration as a whole, not simply incarceration in the worst facilities. Elizabeth S. Barnert et al., *How Does Incarcerating Young People Affect Their Adult Health Outcomes?*, 139 PEDIATRICS, Feb. 1, 2017, at 7 ("Our results suggest that incarceration during adolescence and early adulthood is independently associated with worse physical and mental health outcomes during adulthood.").

150. Anna Aizer & Joseph J. Doyle, *Juvenile Incarceration, Human Capital, and Future Crime: Evidence from Randomly Assigned Judges*, 130 Q.J. ECON. 759, 784–86 (2015) (empirical study finding "a strong relationship between juvenile incarceration and adult incarceration").

151. FORMAN, *supra* note 76, at 4.

152. Paul Butler, *How Can You Prosecute Those People?*, in HOW CAN YOU REPRESENT THOSE PEOPLE? 15, 24 (Abbe Smith & Monroe H. Freedman eds., 2013).

153. *See generally supra* notes 116–129 and accompanying text.

154. Butler, *supra* note 152, at 15–26.

155. *See generally* JOUET, *supra* note 13, at ch. 7.



can widely diverge from what is typically understood as “violent crime” or “gun crime.” David Keene, who served as president of the National Rifle Association and American Conservative Union, came to experience this firsthand.<sup>156</sup> “In 2002, his 21-year-old son was sentenced to 10 years in federal prison for firing a gun during a road-rage incident, despite a history of mental illness,” as Dagan and Teles write. “In Keene’s telling, a hard-charging federal prosecutor threatened to pile on charges if his son rejected a plea deal.”<sup>157</sup> These circumstances reinforced Keene’s involvement in the conservative movement for penal reform.<sup>158</sup>

Although compelling stories of excessive sentences for gun crime can humanize prisoners, penal reform may eventually depend on the capacity to think about sentencing more systemically. After all, scores of prisoners serving unjust, counterproductive, and inhumane sentences will lack the means to challenge their sentences effectively and raise public attention to their predicament.<sup>159</sup> While strengthening indigent defense services would be part of the solution,<sup>160</sup> the status quo on sentencing may persist without a paradigm shift on sentencing norms.

A place where bipartisan reform could move ahead is laws that treat guns as automatic aggravating circumstances which drastically enhance criminal penalties. For instance, “two men who participate in a drug transaction will both receive a greater sentence if the police find a firearm at the scene, even if the first person did not know that the second person had a gun,” as Rachel Barkow explains.<sup>161</sup> “In other words, the law lumps the person who carried a dangerous weapon in with the person who merely chose his partner unwisely.”<sup>162</sup>

The evolution of California’s three strikes law illustrates how legislative reform will likely remain limited in scope until a wider paradigm shift occurs. After its adoption in 1994 following a ballot initiative, three strikes stirred intense criticism from experts<sup>163</sup> and the general public<sup>164</sup> for allowing 25-years-to-life for petty recidivists, including people who stole pizza, cookies,

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156. DAGAN & TELES, *supra* note 68, at 17, 57.

157. *Id.* at 57.

158. *Id.*

159. *See generally* BARKOW, *supra* note 80, at 40, 217 n.9 (2019).

160. *See, e.g.*, BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* ch. 5 (2017) (documenting how improved indigent defense offices significantly contributed to the death penalty’s decline).

161. BARKOW, *supra* note 80, at 29.

162. *Id.* *See, e.g.*, *United States v. Martinez*, 924 F.2d 209, 210 (11th Cir. 1991).

163. *See, e.g.*, ZIMRING, HAWKINS & KAMIN, *supra* note 88.

164. *See, e.g.*, MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS AND THE ART OF BATTLING GIANTS* ch. 8 (2013).

a bicycle, golf clubs, or videotapes.<sup>165</sup> In 2012, a much-heralded reform limited the reach of the three strikes law but maintained a merciless scheme for violent crime in general and gun crime in particular.<sup>166</sup> Indeed, California removed the mandatory twenty-five year minimum for people whose third strike was not classified as “serious or violent.”<sup>167</sup> California notably retained twenty-five-years-to-life for offenses involving firearm possession.<sup>168</sup> As of 2021, California still had over 33,000 prisoners whose sentences were lengthened by three-strikes enhancements.<sup>169</sup>

Disregarding empirical evidence, legislators commonly treat guns as automatic aggravating circumstances warranting ruthless punishments, as reflected in a Congressman’s claim that a sentence enhancement for carrying a weapon would “persuade a man tempted to commit a federal felony to leave his gun at home.”<sup>170</sup> Such claims often rest on the premise that sentencing schemes in the United States are excessively *lenient* and that the solution to finally achieve deterrence is to make the law harsher. In reality, sentencing schemes in modern America are extraordinarily harsh by both U.S. historical standards and international standards.<sup>171</sup> Whenever social actors call for raising penalties, they do so from a baseline where the penalties are already remarkably punitive, even when guns are not involved.<sup>172</sup> If a prospective sentence of five or ten years in prison would not deter someone from committing a drug deal, for example, why would fifteen or twenty years in prison deter them more if the sentence was enhanced due to gun

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165. See generally *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion); *60 Archives: Steven Bell, the Bicycle Thief*, CBS NEWS (Apr. 7, 2019), <https://www.cbsnews.com/news/60-archives-steven-bell-the-bicycle-thief/> [<https://perma.cc/7T3G-9NG6>] (archival footage of *60 Minutes* program on three strikes law broadcasted in 2000).

166. Jack Leonard, *Prop. 36 Seeks to Ease California’s Three-Strikes Law*, L.A. TIMES (Oct. 27, 2012), <https://www.latimes.com/politics/la-xpm-2012-oct-27-la-me-prop36-3strikes-20121028-story.html> [<https://perma.cc/XKU3-5F2Q>].

167. BARKOW, *supra* note 80, at 12.

168. CAL. PENAL CODE § 667 (amended following Three Strikes Reform Act of 2012 passed by Proposition 36). See also BARKOW, *supra* note 80, at 12.

169. CA COMMITTEE ON REVISION OF THE PENAL CODE, ANNUAL REPORT AND RECOMMENDATIONS 41 (2021) [<https://perma.cc/VNV3-G4F5>]. See also Erwin Chemerinsky et al., *Op-Ed: California’s ‘Three Strikes’ Law Still Carries a Devastating Human and Financial Cost. End it Now.*, L.A. TIMES (Aug. 12, 2022), <https://www.latimes.com/opinion/story/2022-08-12/three-strikes-law-prosecutor-discretion-california-costs> [<https://perma.cc/HYF5-96XF>].

170. BARKOW, *supra* note 80, at 41 (quoting 114 Cong. Rec. 22,231–22,248 (1968) (Statement of Rep. Poff)).

171. See generally STUNTZ, *supra* note 94, at 46–50 (situating mass incarceration in historical and comparative context).

172. See *id.*

possession? Empirical studies demonstrate that draconian punishments are not merely ineffective but also counterproductive, as we shall now see.

### B. Beyond Dead Ends

Tying guns and mass incarceration together, Jens Ludwig has described how gun violence in America “is framed through the wrong lens,” namely that “[the] problem is due to bad people” who belong in prison.<sup>173</sup> A priority for half a century has consequently been to maximize sentences for gun crime.<sup>174</sup>

Extremely long sentences actually do not deter crime more than shorter sentences that are proportional to culpability.<sup>175</sup> The most compelling research on the subject may be studies on California’s original three-strikes law, which provided for ultra-draconian penalties of twenty-five-years-to-life for recidivists guilty of petty theft and other minor offenses.<sup>176</sup> Prominent scholars found virtually no deterrent effect.<sup>177</sup> It is hard to imagine a more repressive legislative scheme than the original three-strikes laws given its extreme severity for trifling infractions.<sup>178</sup> If it offered essentially no deterrence, it is doubtful that draconian sentencing schemes on guns and beyond would do so.

Another revealing study went even further in assessing whether sentence severity has any effect on the crime rate. The conclusion was that it has no effect.<sup>179</sup> Following a comprehensive review of the literature, the most prominent Canadian criminologists stressed: “We do not suggest that a one-dollar fine for armed robbery would be the same as a three-year prison sentence. Rather, we propose acceptance of the null hypothesis that variation within the limits that are plausible in Western countries will not make a difference.”<sup>180</sup>

This does not mean that the existence of the criminal justice system as a whole has no deterrent effect.<sup>181</sup> Indeed, functional law-enforcement mechanisms, criminal courts, and sentencing schemes plausibly dissuade

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173. Ludwig, *supra* note 120, at 5:51.

174. *Id.*

175. ZIMRING, HAWKINS & KAMIN, *supra* note 88; Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 143 (2003).

176. ZIMRING, HAWKINS & KAMIN, *supra* note 88.

177. *Id.*

178. *See supra* note 165 and accompanying text.

179. Doob & Webster, *supra* note 175, at 143.

180. *Id.* at 191.

181. *Id.* at 143–44.

wrongdoing.<sup>182</sup> This is relevant to ongoing debates about abolishing the police, prisons, or the entire criminal justice system. Even though calls to abolish these institutions are commonplace among activists and have garnered scholarly attention,<sup>183</sup> they seem to enjoy virtually no support among the American public<sup>184</sup> or among the Black community that has borne the brunt of the most inhumane, discriminatory, costly, and counterproductive criminal-justice policies.<sup>185</sup>

While no modern country appears to have simply abolished the police, prisons or penal system altogether, many are abolishing or abandoning draconian criminal punishments. All Western democracies, except the United States, have abolished the death penalty and consider it an affront to human dignity.<sup>186</sup> Over two-thirds of all countries worldwide have likewise repudiated capital punishment in law or practice.<sup>187</sup> Meanwhile, life without parole is increasingly recognized as another death penalty in condemning prisoners to die behind bars regardless of future remorse, rehabilitation, or lack of dangerousness.<sup>188</sup> In 2013, the European Court of Human Rights essentially abolished life without parole, which already was an unlawful or rare punishment throughout the continent.<sup>189</sup> Canada does not allow life

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182. *See id.*

183. *See generally* *Prison Abolition: Introduction*, *supra* note 35, at 1568.

184. A poll notably found that only 15 percent of Americans support abolishing the police altogether. In particular, “Black Americans (22%) and Hispanic Americans (20%) [are] somewhat more likely than White Americans (12%) to do so. Almost no Republicans (1%) support the idea, versus 27% of Democrats and 12% of independents.” Steve Crabtree, *Most Americans Say Policing Needs ‘Major Changes’*, GALLUP (July 22, 2020), <https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx> [<https://perma.cc/K48T-7LRY>].

185. Scholars have documented how the African-American community’s demands for penal reform coexist with relative support for punitive responses to crime. *See* FORMAN, *supra* note 76; FORTNER, *supra* note 76.

186. *See* AMNESTY INT’L, *supra* note 86.

187. *Id.*

188. *See generally* LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

189. *Vinter and Others v. United Kingdom*, 2013-III Eur. Ct. H.R. 319. The scope of the *Vinter* decision was limited by a subsequent, controversial ruling, *Hutchinson*, that allowed the retention of a “whole-life-order” scheme (i.e., life without parole) in the United Kingdom in the face of its continued defiance of the European Court of Human Rights. *Case of Hutchinson v. United Kingdom*, App. No. 57592/08, (Jan. 17, 2017), <https://hudoc.echr.coe.int/eng?i=001-170347> [<https://perma.cc/4Y7S-G4DW>]. *See also* Lewis Graham, *From Vinter to Hutchinson and Back Again?*, 3 EUR. HUM. RTS. L. REV. 258 (2018); Mark Pettigrew, *Politics, Power and Parole in Strasbourg*, 4 INT’L COMP. JURIS. 16 (2018); Mark Pettigrew, *Retreating From Vinter in Europe*, 25 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 260 (2017).

without parole.<sup>190</sup> Life without parole exists in New Zealand but appears to have never been genuinely inflicted.<sup>191</sup> And life without parole is rarely meted out in Australia.<sup>192</sup> Many Western democracies further emphasize alternatives to incarceration, such as fines and community-based programs, and generally avoid long sentences, including for violent or gun offenses.<sup>193</sup> Comparative research indicates that for equivalent crimes, people sentenced in the United States commonly receive sentences that are several times longer than in other Western societies.<sup>194</sup>

Fellow Western democracies have avoided American-style mass incarceration partly because they have evolved toward a far more holistic, individualized, and universalistic approach to sentencing. At the outset, this approach is holistic because it revolves around diverse sentencing goals in a relatively flexible manner, including deterrence, incapacitation, retribution, denunciation, rehabilitation, and, perhaps above all, proportionality—the notion that the punishment must fit the crime *and* the criminal.<sup>195</sup> Relatedly, individualization entails assessing both the aggravating and mitigating circumstances of a crime, as well as aggravating and mitigating circumstances in the defendant’s person, such as their criminal record or lack thereof. This multifaceted sentencing process encompasses consideration for victims, the offender’s level of dangerousness, evidence of remorse, and prospects for rehabilitation. Accordingly, this holistic, individualized analysis allows for harsher or more lenient punishments depending on the circumstances.

Most importantly, this approach tends to be universalistic in applying to all cases, from nonviolent to violent crimes. This universalism is commonly

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190. R. v. Bissonnette, [2022] S.C.C. 23 (Can.). *See generally* Amanda Coletta, *Canadian Supreme Court Rules All Killers Must Have Chance at Parole*, WASH. POST (May 27, 2022), <https://www.washingtonpost.com/world/2022/05/27/canada-supreme-court-life-without-parole-bissonnette/> [<https://perma.cc/6UEB-HNPH>].

191. DIRK VAN ZYL SMIT & CATHERINE APPLETON, *LIFE IMPRISONMENT: A GLOBAL HUMAN RIGHTS ANALYSIS* 159–60 (2019).

192. Andrew Dyer, *Irreducible Life Sentences: What Difference Have the European Convention on Human Rights and the United Kingdom Human Rights Act Made?*, 16 HUM. RTS. L. REV. 541, 555–58 (2016). *See generally* *Prisoners in Australia*, AUSTL. BUREAU JUST. STAT. (Dec. 9, 2021), <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#data-download> [<https://perma.cc/QGN7-4XJK>].

193. *See generally* JUST. POL’Y INST., *FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS* 24–25 (2011).

194. VERA INST. JUST., *SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES* 9–11 (2013). *See generally* JUST. POL’Y INST., *supra* note 193, at 22.

195. COUNCIL OF EUR., *EUROPEAN PRISON RULES* 106–11 (2006); Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 30, at 731–32. *See, e.g.*, Criminal Code, R.S.C. 1985, c C-46 § 718 (Can.) (defining the purposes of criminal sentencing).

rooted in human rights norms holding that human dignity is inalienable and cannot be forfeited by committing a crime—a conviction with a storied history partly traceable to the Renaissance and Enlightenment.<sup>196</sup> The European Court of Human Rights has gone the farthest in this direction, as demonstrated by its jurisprudence striking life-without-parole legislation in multiple countries.<sup>197</sup> “The obligation to offer a possibility of rehabilitation is to be seen as an obligation of means, not one of result,” the judges stressed.<sup>198</sup>

In a recent landmark decision, the Supreme Court of Canada converged with the European jurisprudence in striking *de facto* life without parole under a legislative scheme allowing consecutive sentences of twenty-five-years-to-life for first-degree murder.<sup>199</sup> The case concerned one of the worst mass shootings in Canadian history—an assault on a Quebec mosque by a radicalized nativist.<sup>200</sup> The Justices somberly acknowledged the horror of the crime<sup>201</sup> but found that it violated Canada’s constitutional prohibition on “cruel and unusual treatment or punishment”:<sup>202</sup>

It is difficult if not impossible to predict an offender’s capacity for reform over a period of 50 years or more, let alone to predict whether the offender will actually be able to reform during their many years of incarceration. By depriving offenders in advance of any possibility of reintegration into society, the impugned provision shakes the very foundations of Canadian criminal law.<sup>203</sup>

[T]he [Court’s] intent here is not to have the objective of rehabilitation prevail over all the others, but rather to preserve a certain place for it in a penal system based on respect for the inherent dignity of every individual. Where the offence of first degree murder is concerned, rehabilitation is already

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196. Jouet, *Death Penalty Abolitionism From the Enlightenment to Modernity*, *supra* note 119, at 46.

197. The United Kingdom is the main exception to this trend. Ergul Celiksoy, ‘UK Exceptionalism’ in the ECtHR’s Jurisprudence on Irreducible Life Sentences, 24 INT’L J. HUM. RTS. 1594, 1594 (2020). See also sources cited *supra* note 189.

198. Murray v. Netherlands, App. No. 10511/10, ¶ 104 (Apr. 26, 2016), <https://hudoc.echr.coe.int/eng?i=001-162614> [<https://perma.cc/YZX5-WCWN>].

199. R. v. Bissonnette, [2022] S.C.C. 23, para. 4 (Can.).

200. *Id.* at para. 1.

201. *Id.*

202. The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.), at § 12 (“Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”).

203. *Bissonnette*, S.C.C. 23 at para. 84.

subordinate to the objectives of denunciation and deterrence, as can be seen from the severity of the punishment [of twenty-five-years-to-life].<sup>204</sup>

None of this means that punitiveness, penal populism or mandatory minimums do not exist in Europe, Canada or other nations where incarceration rates are drastically lower than in the United States. Rather, American society has veered toward comparably extreme conceptions of what harshness means. On the surface, American sentencing may appear to likewise value diverse sentencing goals holistically and to assess aggravating and mitigating circumstances. In practice, however, both blue and red states have gravitated toward extraordinary punitiveness in past decades.<sup>205</sup> If American justice has always had harsh and discriminatory dimensions, prison population explosion is a fairly recent development. Mass incarceration emerged around the 1980s.<sup>206</sup> The United States previously had relatively similar sentencing norms to fellow Western democracies, if not more lenient ones.<sup>207</sup>

Draconian punishments for gun crime in the United States should be understood within this historical and comparative context. It may seem natural to routinely mete out long or permanent sentences to people guilty of gun crime or otherwise categorized as violent offenders, yet it is anomalous in the modern Western world.<sup>208</sup> To be sure, those who commit gun crime or violent acts may deserve harsher sentences, as these are legitimate aggravating circumstances in any Western democracy. But the concept of an aggravating circumstance loses much of its meaning in a system where baseline punishments are already extremely harsh.

### C. Criminogenic Crime Policy

Prisons can become criminogenic environments that exacerbate offenders' behavioral problems and wrongdoing, if not keep them in the status quo. This problem is hardly limited to the United States as it has been documented in

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204. *Id.* at para. 88.

205. Franklin E. Zimring, *The Complications of Penal Federalism*, in AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT 181, *supra* note 13, at 186–89.

206. See Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 937 (2016) (describing how mass incarceration began in the 1970s and gained ground in the 1980s).

207. Mugambi Jouet, *Revolutionary Criminal Punishments: Treason, Mercy, and the American Revolution*, 61 AM. J. LEGAL HIST. 139 (2021); Michael Tonry, *Equality and Human Dignity: The Missing Ingredients in American Sentencing*, 45 CRIME & JUST. 459, 465 (2016); see Jouet, *supra* note 119.

208. See, e.g., Ludwig, *supra* note 120, at 7:00.

numerous societies.<sup>209</sup> Scholars have long debated whether prisoners themselves bring antisocial or violent behavior into prisons or whether prisons are institutions whose environments foster such behavior.<sup>210</sup> Both dynamics plausibly exist, thereby forming a vicious circle that keeps many prisoners in a cycle of criminality. In particular, prisons can struggle to rehabilitate offenders because “[t]here is an unavoidable, built-in contradiction between society’s motives for locking away a person and the desire to, at the same time, rehabilitate him to a normal life.”<sup>211</sup> This quotation from the prison and probation service of Sweden—one of the countries most committed to rehabilitation—reveals pragmatism. That does not mean that rehabilitation is a hopeless enterprise, a misconception at the heart of the “nothing works” doctrine that laid waste to American rehabilitation policies in the 1970s and 1980s.<sup>212</sup> Rather, prisons have inherent limitations as a solution to crime.

Rough prison conditions in the age of American mass incarceration can be particularly criminogenic. Legions of inmates are released after spending years in hostile, violent environments with few or no rehabilitation opportunities. Under such circumstances, the priority of overwhelmed prison administrators can quickly become crowd control, as depicted by the late Victor Hassine, a law-school graduate who was sentenced to life imprisonment and eventually became an award-winning writer.<sup>213</sup> Whereas Hassine recounted in excruciating detail the ubiquity of violence at Grateford, a maximum-security prison in Pennsylvania,<sup>214</sup> many U.S. correctional facilities are safer and better managed. Still, prison population explosion hinders rehabilitation. Prisons that are not overcrowded and that offer targeted services are better at facilitating social reentry and preventing recidivism.<sup>215</sup>

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209. See, e.g., ROSE RICCIARDELLI, *SURVIVING INCARCERATION: INSIDE CANADA’S PRISONS* 79–80 (2014).

210. *Id.* at 79–83.

211. COUNCIL OF EUROPE, *supra* note 195, at 109 (quoting the Swedish Prison and Probation Service).

212. DAVID GARLAND, *THE CULTURE OF CONTROL* 61–66 (2002) (describing zero-sum dynamics in criminal sentencing).

213. VICTOR HASSINE, *LIFE WITHOUT PAROLE* (3d ed. 2004).

214. *Id.*

215. According to “the largest-ever meta-analysis” on the subject up until then, prisoners participating “in correctional education programs have 43 percent lower odds of returning to prison than those who do not.” RAND CORP., *Education and Vocational Training in Prisons Reduces Recidivism, Improves Job Outlook* (Aug. 22, 2013), <https://www.rand.org/news/press/2013/08/22.html> [<https://perma.cc/75EA-EY2K>]. See also Bradley Ray et al., *Access to Recovery and Recidivism Among Former Prison Inmates*, 61 INT’L



The phenomenon of “institutionalization” or “prisonization” again cautions against locking up anyone for a long time. Prison can cause or exacerbate acute mental-health problems and, depending on conditions of confinement, make it harder to readjust to society upon reentering the free world. This phenomenon is well known not only in the United States but also in fellow Western democracies.<sup>216</sup> One distinction is that public officials elsewhere in the West are likelier to take such evidence into account in sentencing practices.<sup>217</sup>

Locking up far too many people for far too long can further hinder public safety by wrecking the communities where offenders come from. Children whose parents are incarcerated are likelier to struggle and become juveniles.<sup>218</sup> Being incarcerated as a juvenile is itself a strong predictor of being incarcerated as an adult.<sup>219</sup> The involvement of a gun or an allegation of violence are among the factors that have led scores of juveniles in the United States to be prosecuted as adults and receive unforgiving sentences.<sup>220</sup> Hence, prisons have diminishing returns if used excessively.

The over-incarceration of petty offenders can additionally undermine the system’s capacity to deal with gun crime. The more people are locked up, the less services, human resources, and funding are available to assist persons

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J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 874, 874 (2017) (“Agencies with more resources and a focus on prisoner reentry had better recidivism outcomes than those that focus only on substance abuse services.”); David P. Farrington & Christopher P. Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221 (1980) (finding no empirical evidence that prison size influenced behavior inside or outside prison, albeit evidence that overcrowded prisons have higher recidivism rates); Michael A. Ruderman et al., *Does Prison Crowding Predict Higher Rates of Substance Use Related Parole Violations? A Recurrent Events Multi-Level Survival Analysis*, 10 PLOS ONE 1, 2 (2015) (“Prison crowding predicted higher rates of parole violations after release from prison. The effect was magnitude-dependent and particularly strong for drug charges.”); U.S. DEP’T OF JUST., *Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons*, <https://www.justice.gov/archives/prison-reform> (Mar. 6, 2017) (“Research shows that recidivism risk can be effectively reduced through evidence-based programming that targets criminogenic needs, such as courses in cognitive behavioral therapy and other topics. Inmate programming also makes prisons safer because inmates occupied in productive activities are less likely to engage in institutional misconduct.”).

216. See generally BARKOW, *supra* note 80, at 44; RICCIARDELLI, *supra* note 209, at 79–85, 116–17.

217. See generally JOUET, *supra* note 13, at 203.

218. TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 95–97 (2007). See also BARKOW, *supra* note 80, at 47–49 (analyzing impact of incarceration on prisoners’ families and communities).

219. Aizer & Doyle, *supra* note 150, at 784–86.

220. Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, in *OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE* 801, 801–02 (Barry C. Feld & Donna M. Bishop eds., 2011).

guilty of more serious crimes, who end up being warehoused behind bars just like everyone else. American society should therefore expand alternatives to incarceration for more offenders, such as community-based treatment, counseling, education, and professional training.<sup>221</sup> Insofar as non-custodial programs are inadequate for persons who pose a genuine danger to society, prisons would be in a better position to rehabilitate them if they expanded access to these programs in smaller, better managed facilities.<sup>222</sup>

Throughout the West, social choices regarding prisoner reentry are also more similar than they may appear at first glance. In peer nations, the vast majority of prisoners are eventually released back into society.<sup>223</sup> And that is likewise the case in America.<sup>224</sup> Although the United States uses life without parole or otherwise permanent sentences to a far greater degree,<sup>225</sup> most of its prisoners are freed sooner or later. The key question then becomes under what conditions American prisoners reenter society upon serving far longer sentences on average.<sup>226</sup>

Distinguished Canadian scholars have suggested that U.S. mass incarceration paradoxically reflects “penal optimism,” a misplaced faith in the ability to resolve social problems by relying on prisons as much as possible.<sup>227</sup> By contrast, social actors in Canada have proved more pragmatic in their relative skepticism of imprisonment.<sup>228</sup> While Canadian justice has harsh, discriminatory, and counterproductive dimensions,<sup>229</sup> its incarceration

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221. *See supra* notes 193, 215.

222. *See supra* notes 194, 217.

223. More specifically, “in 2020 the estimated length of imprisonment in Europe was 8.9 months.” MARCELO F. AEBI ET AL., COUNCIL OF EUR. & U. LAUSANNE, PRISONS AND PRISONERS IN EUROPE 2021: KEY FINDINGS OF THE SPACE I REPORT 13 (2022). Comparably, roughly half of custodial sentences in Canada were of one month or less as of 2018–2019. PUB. SAFETY CAN., CORRECTIONS AND CONDITIONAL RELEASE STATISTICAL OVERVIEW: 2020 ANNUAL REPORT 16 (2022). While a segment of prisoners in Europe and Canada spend years in prison, including life sentences, they are usually released too. Recall that these jurisdictions are abandoning permanent imprisonment schemes. *See supra* notes 198, 199 and accompanying text.

224. *Incarceration and Reentry*, OFF. ASSISTANT SEC’Y PLAN. & EVALUATION, <https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0> [<https://perma.cc/Z2WV-JUYF>] (“Each year, more than 600,000 individuals are released from state and federal prisons. Another 9 million cycle through local jails.”).

225. Twenty-five times as many prisoners serve life without parole in the United States compared to Europe, despite the fact that Europe’s total population is over two times larger than that of the United States. VAN ZYL SMIT & APPLETON, *supra* note 191, at 94.

226. *See supra* note 194 and accompanying text.

227. Cheryl M. Webster & Anthony Doob, *Penal Optimism: Understanding American Mass Imprisonment from a Canadian Perspective*, in AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT 121, *supra* note 13.

228. *Id.*

229. *See generally* RICCIARDELLI, *supra* note 209.

rate remain six times beneath that of the United States.<sup>230</sup> Its murder rate is also over three times lower,<sup>231</sup> just as its number of guns per capita is over three times lower.<sup>232</sup>

In sum, a remarkable overreliance on prisons characterizes modern American justice. Both major parties have long converged toward punitiveness, although their approach is in tension with key conceptions of conservatism and liberalism. American conservatism has notably stressed its opposition to an oppressive and costly “big government.” And American liberalism has called for social and racial justice. Of course, these are not the only conceptions or components of conservatism and liberalism. But an ultra-punitive, unequal, bloated penal system with incarceration rates on practically world-record levels seems squarely inconsistent with the highest ideals of Americans on either side of the political spectrum.

### III. STATUS QUO OR PARADIGM SHIFT

A relatively important penal reform movement *has* developed in America. Whereas mass incarceration emerged approximately in the 1980s,<sup>233</sup> it had become a chronic matter of public debate and media coverage by the 2010s.<sup>234</sup> But this section further describes how the current movement may perpetuate the status quo by commonly excluding people convicted of violent offenses from reform proposals—that is to say, the majority of state prisoners.<sup>235</sup> Worse, politicians frequently use violent offenders as a foil, defending merciless penalties in their cases in order to gain the political capital to lessen those for drug or property offenders.<sup>236</sup>

Reformers have struggled to develop principles and rhetoric that will lead to the end of mass incarceration. As a result, despite years of ongoing reform, the decline of the U.S. incarceration rate has been limited<sup>237</sup> and it remains nearly the highest rate in the world.<sup>238</sup> Yet American exceptionalism is not synonymous with fatalism.

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230. *Prison Population Rate*, *supra* note 9.

231. *Homicide Country Data*, *supra* note 10.

232. KARP, *supra* note 8, at 4.

233. *See generally* Kleinfeld, *supra* note 206.

234. *See generally* DAGAN & TELES, *supra* note 68; PFAFF, *supra* note 46.

235. BUREAU JUST. STAT., *supra* note 49, at 28.

236. *See* PFAFF, *supra* note 46, at 186.

237. Ghandnoosh, *supra* note 5.

238. *Prison Population Rate*, *supra* note 9.

*A. The Need for a Broader Vision*

Insofar as America has known a bipartisan consensus on guns and sentencing in recent decades, we saw that it has been one on punitiveness. Two recent historical trends surrounding the evolution of mass incarceration help explain how this form of gun control materialized. The initial trend was to be much harsher toward practically all offenders. Once this approach predictably contributed to prison population explosion, the subsequent trend was to exclude violent crime from reform initiatives.

First, the advent of mass incarceration in the 1980s encompassed the normalization of harshness across the board, including for both violent *and* nonviolent offenses. The rise of “tough-on-crime” rhetoric as a political weapon led numerous politicians to try and outflank each other in ratcheting up criminal punishments.<sup>239</sup> By the nineties, both Democrats and Republicans thus converged in expressing support for punitiveness and skepticism of rehabilitation as a legitimate goal. Consider the case of Texas, which elected the Democrat Ann Richards as Governor in 1990. Despite being known as the only liberal to have held the position, her criminal-justice record encompassed attacking her predecessor, the Republican Bill Clements, for not building enough prisons. Once Governor, Richards further backed multi-billion dollar initiatives to expand Texas’s prison capacity.<sup>240</sup> In a 1994 campaign ad, she took a hard line:

People say to me, ‘Ann, what does it say about Texas that we got the largest prison system in the world when you get through building?’ And I say, ‘It says if you commit a crime in Texas we have a place to lock you up, that’s what it says.’<sup>241</sup>

Nevertheless, George W. Bush successfully painted Richards as “soft on crime.”<sup>242</sup> Texans voted him in and replaced Richards after a single term.<sup>243</sup> This climate was matched by the resurgence of the death penalty in Texas

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239. See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

240. DAGAN & TELES, *supra* note 68, at 79.

241. *Ann Richards 1994 Prison Ad*, C-SPAN (Oct. 16, 1994), <https://www.c-span.org/video/?c4605559/user-clip-ann-richards-1994-prison-ad> [<https://perma.cc/EL5E-ZWN8>]. See also Thomas B. Edsall, *Texas Democrats Fighting Back on Crime, Welfare, and Family Issues*, WASH. POST (May 8, 1994), <https://www.washingtonpost.com/archive/politics/1994/05/08/texas-democrats-fighting-back-on-crime-welfare-family-issues/5bbd5ad5-c7de-4b84-9e5b-c581f25e65c2/> [<https://perma.cc/ZC9B-5AFN>].

242. DAGAN & TELES, *supra* note 68, at 80.

243. *Id.* at 79–80.

and beyond, as the number of executions surged in the nineties.<sup>244</sup> Though capital punishment concerned only a small segment of prisoners, draconian sentencing schemes often shared the same goal of putting away incorrigible offenders to die on a grim cellblock. California's three-strikes law, which targeted small-time recidivists, epitomized the motto, "Lock them up and throw away the key."<sup>245</sup>

Second, a movement against mass incarceration has grown since the 2010s, although it has generally excluded from sentencing reform any offender labeled as "violent," which could encompass anyone convicted of a gun-related offense. Key dimensions of this movement nonetheless have been promising in demonstrating the potential for a social evolution. Public discourse increasingly expressed concern that mass incarceration was a failed, counterproductive, and discriminatory system. More and more politicians refrained from punitive rhetoric. In 2015, Hillary Clinton thus launched her second presidential campaign by promising to "end the era of mass incarceration," thereby distancing herself from the record of her husband Bill Clinton, who had proudly embraced the "tough-on-crime" movement as Governor of Arkansas and U.S. President.<sup>246</sup>

More and more Republicans likewise came to embrace penal reform. This movement was most impressive at the state level, as David Dagan and Steven Teles recount in their compelling book *Prison Break*.<sup>247</sup> Republican leaders in multiple states, such as Georgia and Texas, started reframing the debate by emphasizing that sentencing reform and decarceration were bona fide conservative causes.<sup>248</sup>

But this bipartisan reform movement widely centers on petty offenders and therefore cannot end mass incarceration. Most people in state prisons were convicted of crimes classified as violent, namely fifty-eight percent as of late 2019.<sup>249</sup> This is a basic fact that most of the public, including proponents of penal reform, is unaware of.<sup>250</sup> Ruthless sentences for drug crimes have certainly crushed countless prisoners, their loved ones, and communities. Still, no more than fourteen percent of state prisoners were serving time for drug offenses in late 2019.<sup>251</sup> The proportion of drug offenders is higher in federal prisons: "At fiscal yearend 2020, there were 11,300 persons in federal prison for a violent offense (almost 8% of the total

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244. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* ch. 10 (2003).

245. See *supra* note 168 and accompanying text.

246. JOUET, *supra* note 13, at 3, 200–01.

247. DAGAN & TELES, *supra* note 68.

248. *Id.*, *passim*.

249. BUREAU JUST. STAT., *supra* note 49, at 28.

250. See Grunwald, *supra* note 5, at 24–26.

251. BUREAU JUST. STAT., *supra* note 49, at 28.

federal prison population), compared to 67,400 prisoners serving time for a drug offense (47%).”<sup>252</sup> Overall, the “War on Drugs” contributes to mass incarceration but is not its main cause.

Tellingly, a 2016 poll found that sixty percent of Americans falsely thought that around half of all prisoners are incarcerated for drug offenses.<sup>253</sup> At the time, the actual proportion of people locked up for drug offenses was approximately 21 percent.<sup>254</sup> Some reformers have fostered this misconception by attributing mass incarceration to the “War on Drugs.”<sup>255</sup> Instead of developing principles and framings that will lead the United States away from mass incarceration, the bulk of politicians and much of civil society are shaping public misunderstandings that may only cement the problem.

A better understanding of the age-crime relationship could equally lead to more sensible sentencing. The crime rate generally peaks in the late teens and then gradually declines before becoming nearly flat by the fifties, thereby weighing against long sentences that keep people locked up well after they are likely to reoffend.<sup>256</sup> The “aging-out phenomenon” exists in the United States just as in other Western societies, yet the difference is again the willingness to consider this evidence in sentencing practices.<sup>257</sup>

As reductive references to “violent offenders” have become pervasive in the U.S. public debate,<sup>258</sup> reformers will have to promote better ways to think about the matter without minimizing serious crime.<sup>259</sup> For instance, John Pfaff has emphasized that in almost all cases “violence is not a defining trait but a transitory state.” The question is not “violent people” but people “going through a violent phase.” “[S]omeone who acts violently when he’s eighteen

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252. *Id.* at 32.

253. Lopez, *supra* note 48.

254. *Id.*

255. See generally PFAFF, *supra* note 46, at 187.

256. Jouet, *Juveniles Are Not So Different*, *supra* note 97, at 281. An empirical study found that people convicted of violent offenses take more time to desist from criminal behavior than those convicted of property offenses. Yet they eventually do so and sooner than one might think. Twenty-year-olds arrested for robbery took about four years to have a similar probability of arrest as their age cohorts in the general population. And those arrested for aggravated assault took about three years. Blumstein & Nakamura, *supra* note 68, at 338–39, 350.

257. See generally LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 88–89 (2014); Rolf Loeber & David P. Farrington, *Age-Crime Curve*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 12 (Gerben Bruinsma & David Weisburd eds., 2014); Mary Allen, *Young Adult Offenders in Canada, 2014*, 36 JURISTAT 1, 7–8 (2016).

258. See SKLANSKY, *supra* note 46, at ch. 2.

259. PFAFF, *supra* note 46, at 191.

years old may very well be substantially calmer by the time he's thirty-five."<sup>260</sup>

For now, barely twenty-nine percent of Americans support reducing prison time for “people who committed a violent crime and have a *low risk* of committing another crime.”<sup>261</sup> This includes only forty-two percent of liberals and twenty-three percent of conservatives.<sup>262</sup> No demographic group is supportive, as illustrated by how only twenty-eight percent of whites, thirty-five percent of African Americans, and forty-three percent of Hispanics are amenable to releasing people convicted of a violent offense with a low risk of recidivism.<sup>263</sup> Such findings speak to the need for improved public education on criminal justice. However, it is implausible that public opinion in any country will be highly knowledgeable about statistical data or criminological research.<sup>264</sup> Efforts toward penal reform seem doomed to fail in the United States unless more elected officials take the lead in pursuing laws and policies that will serve the greater good.

### B. Overcoming Chronic Pitfalls

Rachel Barkow, a law professor and former member of the U.S. Sentencing Commission, offered a road map away from mass incarceration in her book *Prisoners of Politics*. “Instead of policies designed to appeal to the emotions of voters who lack basic information about crime,” she writes, “we need to create an institutional structure that creates a space for experts who look at facts and data to set policies that will improve public safety outcomes . . . .”<sup>265</sup> Barkow urges public officials to pragmatically realize that solutions to mass incarceration cannot be “easily reduced to sound bites” and may lack “emotional appeal.”<sup>266</sup> This is all the more critical in an age where

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260. *Id.*

261. Lopez, *supra* note 48 (emphasis added).

262. *Id.*

263. *Id.* The data are available in the cross-tabulation results. MORNING CONSULT, NATIONAL TRACKING POLL #160812 CROSSTABULATION RESULTS (2016), [https://cdn3.vox-cdn.com/uploads/chorus\\_asset/file/7052005/160812\\_crosstabs\\_Vox\\_v1\\_AP.0.pdf](https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7052005/160812_crosstabs_Vox_v1_AP.0.pdf), [<https://perma.cc/6C6M-ZVG6>].

264. *See generally* ANDREW HAMMEL, ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE (2010) (arguing that Europe has abandoned the death penalty not because of public opinion but because of the leadership of public officials in promoting humane and effective sentencing practices).

265. BARKOW, *supra* note 80, at 2.

266. *Id.*

social media fosters disinformation and undermines thoughtful, nuanced public debate.<sup>267</sup>

*Prisoners of Politics* convincingly describes how American criminal justice is mired in extraordinarily counterproductive practices. They do not make society safer. Their human and financial costs are colossal. “Even worse, many of our crime policies *increase* the risk of crime instead of fighting it—all while producing racially discriminatory outcomes and devaluing individual liberty,” Barkow deplores.<sup>268</sup> Policy is commonly “based on a reaction to a single crime without any evaluation of overall programs or approaches.”<sup>269</sup> “Politicians and members of the public who support the most punitive approaches intuitively think that they work and make us safer, thus justifying their human and economic costs.”<sup>270</sup>

Greater reliance on the knowledge and experience of experts is among the reasons why other Western democracies have more sensible and less counterproductive penal systems than the United States.<sup>271</sup> Criminal law and policy in Europe, Canada, Australia, and New Zealand are far likelier to be crafted in partnership with experts, whose influence tends to check penal populism.<sup>272</sup>

The suspicion of experts that Barkow describes is actually a longstanding theme in American history. Richard Hofstadter, the eminent historian, explored the roots of the phenomenon in *Anti-Intellectualism in American Life*, which captured how the emergence of egalitarian ideals in the newly founded United States fostered an influential subculture that perceived “too much” education as a badge of elitism.<sup>273</sup> Generations of citizens came to perceive common sense, folk wisdom, and gut intuition as superior to refined knowledge or technical expertise. Since Hofstadter published his masterpiece in 1966, other scholars have analyzed the influence of anti-intellectualism over contemporary U.S. social, political, and legal culture.<sup>274</sup>

These circumstances help explain why the United States has experienced practically world-record imprisonment levels and by far the highest murder

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267. See generally Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCI. 1146 (2018).

268. BARKOW, *supra* note 80, at 2 (emphasis in original).

269. *Id.* at 3.

270. *Id.* at 2.

271. JOUET, *supra* note 13, at ch. 7.

272. *Id.*

273. RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (1966).

274. See, e.g., SUSAN JACOBY, *THE AGE OF AMERICAN UNREASON IN A CULTURE OF LIES* (2018); JOUET, *supra* note 13, *passim*; RICK SHENKMAN, *JUST HOW STUPID ARE WE? FACING THE TRUTH ABOUT THE AMERICAN VOTER* (2008).



rate in the West, besides countless other peculiar features.<sup>275</sup> The lack of elementary gun safety is another self-inflicted wound partly buoyed by disinformation, such as the misconception that America is safer than peer nations because in a society offering easy access to guns everyone can readily defend themselves.<sup>276</sup>

Relatedly, moneyed interests have long played an exceptional role in American politics.<sup>277</sup> Lobbies have contributed to gridlock, as groups like the National Rifle Association and Gun Owners of America have proved extremely successful in de-legitimizing experts and thwarting even moderate reforms to improve gun safety.<sup>278</sup> The outsized power of lobbies is intertwined with multiple institutional devices and super-majority requirements that have led American government to be plagued by an unparalleled degree of obstructionism and immobilism compared to other democratic societies.<sup>279</sup>

The pitfalls of ideology and electoral politics likewise help perpetuate a vicious circle on criminal punishment, guns, and beyond.<sup>280</sup> After rhetoric branding people “soft on crime” appeared to decline in the 2010s—a period of growing bipartisan support for penal reform<sup>281</sup>—such political attacks seem to be on the rise. For example, the confirmation hearings of Justice Ketanji Brown Jackson focused on Republican allegations that she was overly lenient in sentencing criminals as a federal judge.<sup>282</sup> These dynamics can also drive politics in blue states or cities, as demonstrated by the recall of the reformer Chesa Boudin as District Attorney in San Francisco—amid fierce disagreements over whether crime had risen or decreased during his tenure.<sup>283</sup> Fellow Western democracies do not face such plebiscites, as the

275. JOUET, *supra* note 13, at ch. 7.

276. *Id.* at 229.

277. See generally JACOB HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* (2010).

278. See MATTHEW J. LACOMBE, *FIREPOWER: HOW THE NRA TURNED GUN OWNERS INTO A POLITICAL FORCE* (2021).

279. See generally GINSBURG & HUQ, *supra* note 40, at ch. 7.

280. See *supra* Section II.

281. See generally DAGAN & TELES, *supra* note 68.

282. Quinn, *supra* note 23.

283. Megan Cassidy, *Chesa Boudin and San Francisco's Bitter Debate Over Crime*, S.F. CHRON. (May 4, 2022), <https://www.sfchronicle.com/bayarea/article/Chesa-Boudin-and-San-Francisco-s-bitter-debate-16394364.php> [<https://perma.cc/UK2K-VHY3>]. A news analysis found that the opposite sides in the recall campaign were “bitterly divided, unable to agree on much of anything.” *Id.* This partly reflected intricacies in the data: “In Boudin’s first year in office, overall reports of crime in San Francisco fell 23% compared with 2019, driven largely by a pandemic drop-off in opportunistic thefts such as auto break-ins. Reported robberies dropped 23%, assaults 14% and rape 45%. This year, overall crime reports are essentially flat—down an

United States is essentially the lone country worldwide to have judicial or prosecutorial elections.<sup>284</sup> But the status quo is not set in stone in America, as reform-oriented prosecutors have won reelection in other jurisdictions.<sup>285</sup>

An evolution in civic and media culture may be needed for public officials to better withstand pressure to embrace ruthless sentences, abandon reform proposals or irresponsibly paint opponents “soft on crime.” The media will likewise need to exercise better judgment since it has long overemphasized sensationalized violent crime stories in an effort to boost its ratings.<sup>286</sup> In the end, the decline of both gun violence and mass incarceration will be easier to envision if the present weight of authoritarianism, anti-intellectualism, populism, disinformation, and related mindsets diminishes in American society. “Nothing in politics is forever,” the political scientist Lilliana Mason reminds us; “party alignments change and move over time.”<sup>287</sup>

One key to reshaping the future may be the rise of a new generation of leaders who will develop the capacity to speak credibly about reform to both conservatives and liberals. This is why a paradigm shift on sentencing gun crime could provide a path forward.

#### IV. TRANSCENDING THE VICIOUS CIRCLE

Sentencing gun crime is a place where meaningful bipartisan reform toward decarceration may move forward. Notwithstanding their polarizing role in American society, guns are a subject on which conservatives and liberals, Republicans and Democrats may ultimately find common ground in the future. If this were to transpire, it might not be before years or decades given the magnitude of present-day polarization. Yet sentencing reform in this area could someday prove a stepping stone toward finally ending mass incarceration. Indeed, abandoning draconian punishments for gun crime in favor of more moderate sentences that are proportional to culpability and facilitate rehabilitation may have a ripple effect. It could demonstrate the fairness, effectiveness, and legitimacy of this approach for crime categorized

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additional 1% through early August. . . . The numbers in other crime categories are more mixed. With the city largely emptied of commuting workers and tourists last year, many smash-and-grab thieves turned to burglarizing homes and businesses and boosting cars. Reports of those crimes rose by 52% and 37%, respectively, in 2020.” *Id.*

284. Jouet, *Mass Incarceration Paradigm Shift*, *supra* note 30, at 740.

285. Shaila Dewan, *The Lessons Liberal Prosecutors Are Drawing From San Francisco’s Backlash*, N.Y. TIMES (June 15, 2022), <https://www.nytimes.com/2022/06/13/us/justice-reform-boudin-recall-san-francisco.html> [<https://perma.cc/L6VX-LP9Y>].

286. Michael O’Hear, *Violent Crime and Media Coverage in One City: A Statistical Snapshot*, 103 MARQ. L. REV. 1007, 1009–10 (2020).

287. MASON, *supra* note 58, at 139.

as “violent.” A paradigm shift is indispensable in this area because, as we saw, most prisoners are locked up for violent crime and commonly excluded from sentencing reform proposals that gravitate toward the most sympathetic nonviolent offenders.

Rehabilitating people convicted of gun crime could fit with the evolution of modern American conservatism, which stresses that guns should not be vilified. Guns have indeed become significant components of modern U.S. conservative identity.<sup>288</sup> They are objects that commonly foster a sense of belonging in a nation where the right to bear arms is perceived as sacrosanct.<sup>289</sup> These convictions did not always play such a significant role in the United States, although they have gained much traction in the conservative movement since the late 1970s.<sup>290</sup> Reformers could draw upon these convictions to foster the idea that guns should not readily result in merciless punishments that are ineffective and cost taxpayers millions of dollars.

Modern American liberalism should likewise be amenable to the idea that rehabilitating persons guilty of gun crime is a worthy social aspiration. This would be consistent with progressive concerns about endemic social and racial injustices surrounding mass incarceration. By the same token, rehabilitative, moderate sentences would be consistent with liberal America’s commitment to gun control and public safety. Indeed, we saw that ruthless punishments for gun crime regularly entail warehousing people for years in criminogenic prisons.

Diagram 1 represents the present situation in American society, namely a conservative-liberal divergence on fundamental ideas but convergence on draconian punishments for gun crime. It captures the bipartisan agreement on casting people away from society for extremely long periods, if not forever, so long as the crime is categorized as violent. Expressivist theories suggest that criminal laws and policies express values, mindsets, and worldviews.<sup>291</sup> One reading of Diagram 1 is that it conveys liberal expressivism in the sense that harshness may symbolize being “tough on guns” in addition to “tough on crime.” Conversely, the conservative position in the diagram does not encompass animosity toward guns but a narrower animosity toward criminals. But the bottom line is that conservatives and liberals converge on punitiveness.

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288. Jouet, *Guns, Identity, and Nationhood*, *supra* note 31, at 6.

289. *See id.* at 2.

290. *Id.* at 3–4; WINKLER, *supra* note 77, *passim*.

291. *See generally* RICHARD MCADAMS, *THE EXPRESSIVE POWERS OF LAW* (2015).

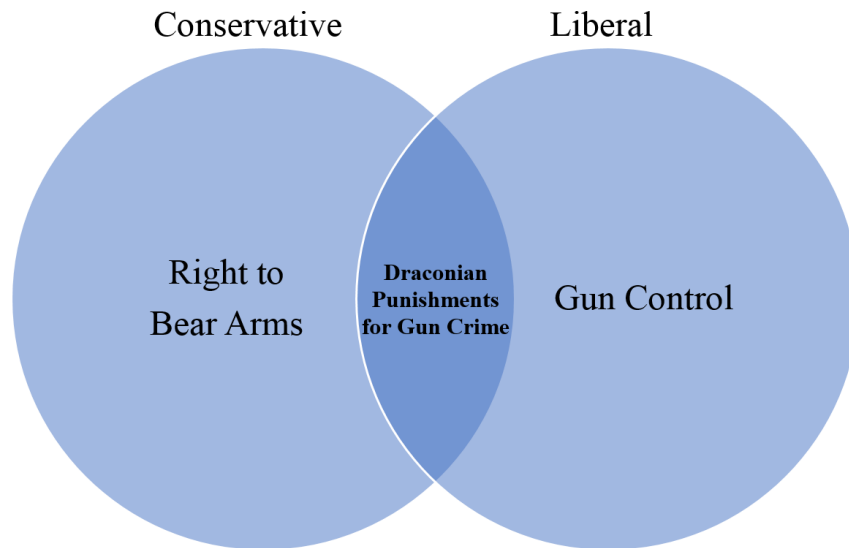
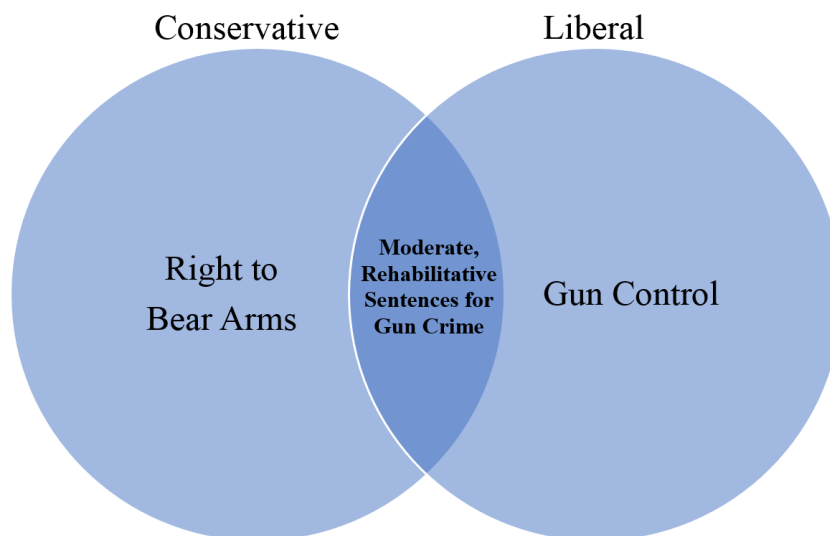
**Diagram 1: Present Attitudes Toward Guns and Criminal Punishment**

Diagram 2 envisions another model where partisan divergence and convergence would largely remain the same, although the convergence would shift from extreme punitiveness on gun crime to more moderate and rehabilitative policies. The aspirational model is deliberately modest in scope, as it does not envision a dramatic paradigm shift on partisan attitudes toward firearms in the foreseeable future. Yet, insofar as limited shifts are conceivable, Diagram 2 illustrates how they could be conceptualized.

**Diagram 2: Aspirational Attitudes Toward Guns and Criminal Punishment**

While these diagrams describe *what* the paradigm shift would be, it is harder to know *how* it could happen. How does America go from Point A to Point B, namely from the first to the second diagram? The humbling truth may be that we do not know well how people's views evolve. History, sociology, political science, psychology, and other fields can surely offer explanations, albeit partial and conflicting ones. Besides, no penal system is merely the fruit of straightforward, conscious decisions about how to approach crime or sentencing, as the law is shaped by multiple components and unintended effects.<sup>292</sup>

Notwithstanding our limited capacity to understand the penal system's intricate dynamics, David Dagan and Steven Teles's study of the conservative penal reform movement provides one of the richest accounts of how social actors can change their mind.<sup>293</sup> This topic is worth examining since a paradigm shift in conservative America may be especially critical if the nation is to move past gridlock. This is because Republicans tend to be more supportive of the "tough-on-crime" movement and skeptical of rehabilitation, prisoners' rights, and human rights norms on sentencing. One key to social change is therefore for Republicans to come to identify sentencing reform as a *conservative cause*. This has already occurred to an extent. In the early 2010s, a growing coalition of conservatives at the state and federal levels touted policies aiming to reduce imprisonment. Despite their limited impact, "these packages represent[ed] a fundamental shift in the definition of the problem."<sup>294</sup>

Just as its liberal counterpart, the movement for penal reform in conservative America does not fundamentally stem from new information but from how evidence previously available is now being processed and accepted.<sup>295</sup> "Our positions on social and political questions are shaped as much by who we think we are—our identity—as by what we know," Dagan and Teles explain.<sup>296</sup> "Because we become invested in the positions we hold, most of us filter out or struggle to discredit information that would make our beliefs seem suspect."<sup>297</sup> For decades, conservatives ignored what we saw above, namely that draconian sentences are costly, ineffective, and counterproductive. The two political scientists suggest that the belated

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292. See, e.g., Ronald J. Allen, *Taming Complexity: Rationality, the Law of Evidence and the Nature of the Legal System*, 12 L., PROBABILITY & RISK 99, 112 (2013) (positing that the legal system is "a complex adaptive system with emergent properties that are unpredictable from the underlying structure").

293. DAGAN & TELES, *supra* note 68.

294. *Id.* at 134.

295. *Id.* at 2.

296. *Id.* at 1.

297. *Id.*

acknowledgment of this reality can reflect how people answer the following question: “What is it that a person like me is supposed to think on this question?”<sup>298</sup> This will make people amenable to accepting factual evidence.<sup>299</sup>

A key is thus for conservatives and liberals to agree on penal reform but “for their own reasons.”<sup>300</sup> Supporters of penal reform must be able to join the movement “without being viewed as moving to the center ideologically,” especially in an age when “moderation or bipartisanship is political poison.”<sup>301</sup> For our purposes, this means that liberals can remain committed to their views on gun control and conservatives can remain committed to theirs on the right to bear arms. Each side could maintain its position and still reconsider the sentencing of gun crime. In particular, nothing in this Article suggests that gun control is illegitimate or that criminal prosecution cannot be a means of enforcing gun regulations. The question before us is the remarkably harsh and counterproductive approach to sentencing gun crime. Conservatives may notably be more willing to reconsider these practices if they could convey that “they have become more faithful to conservative identity, and indeed more committed to their original cause of fighting crime.”<sup>302</sup> As liberals likewise have to contend with public concern about gun violence,<sup>303</sup> they too could better convey how it is possible to fight crime without routinely meting out draconian sentences at taxpayer expense.

Paradoxically, conservatives in the reddest states can sometimes prove more amenable to relative decarceration. According to Dagan and Teles, these Republicans “have little effective political competition, and thus no fear of giving up on an issue that might provide ammunition with which to snipe at Democrats.”<sup>304</sup> Republicans in purple or blue states may be disinclined to go as far in refraining from attacking opponents as “soft on crime.”<sup>305</sup> Bipartisanship is further imperiled by G.O.P. attempts to take full credit for penal reform, especially in red states. If this has eclipsed the longstanding role of liberals dedicated to social change, it has also made various reforms

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298. *Id.* at 5.

299. *Id.*

300. *Id.* at 56.

301. *Id.* at 108.

302. *Id.* at 110.

303. See, e.g., Laura Washington, *Lori Lightfoot Has a Big Problem With Black Voters*, CHI. TRIB. (June 13, 2022) (“[T]he No. 1 criticism of the [Democrat] mayor is her failure to address the prevalent crime and violence, a deeply felt scourge in African American communities.”).

304. DAGAN & TELES, *supra* note 68, at 167.

305. *Id.* at 167–68.

politically feasible by allowing Republicans to “take ownership over the issue and claim that their shift was ideologically pure.”<sup>306</sup>

The conservative reform movement has predominantly focused on the penal system’s humongous cost. Prison could be understood as yet another wasteful, incompetent government program. Still, the considerable cost of the prison industrial complex had been obvious for decades by the 2010s, the period when the conservative penal reform movement made headway. This may have reflected the impact of the Tea Party movement that rose against the Obama presidency and created “a climate of permanent austerity” in red states, which “made the GOP’s longtime exemption for police and prisons ideologically and fiscally untenable.”<sup>307</sup> In Dagan and Teles’s account, however, fiscal conservatism or the over-criminalization of white-collar crime<sup>308</sup> was not the lone source of interest in prison reform. The evangelical movement and religious right, which have historically stressed retribution and punitiveness,<sup>309</sup> also took a more supportive stance toward rehabilitation. A criminal’s capacity for redemption is a dominant theme in Prison Fellowship, a relatively influential group spearheaded by the late Chuck Colson.<sup>310</sup> An aide to Richard Nixon who was imprisoned for his role in the Watergate criminal operation, Colson later declared himself a born-again Christian and became a respected figure in the conservative movement.<sup>311</sup>

Alongside liberal figures like Senator Cory Booker and Van Jones, the modern penal reform movement has drawn staunch conservatives like Newt Gingrich, Grover Norquist, Charles and David Koch, and Senator Rand Paul.<sup>312</sup> Paul even compared mass incarceration to Jim Crow.<sup>313</sup> The conservative movement for penal reform has partnered with organizations of different stripes, such as the Pew Charitable Trusts, Open Society Foundations, Vera Institute, Prison Fellowship, Right on Crime, Center for American Progress, Freedom Works, Americans for Tax Reform, American Civil Liberties Union (ACLU), American Legislative Exchange Council (ALEC), MacArthur Foundation, and Koch Industries.<sup>314</sup>

The achievements of the conservative penal reform movement nonetheless remain wanting, often mirroring the shortcomings of its liberal counterpart or rare bipartisan initiatives. This reflects the self-imposed limitations discussed

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306. *Id.* at 169.

307. *Id.* at 39.

308. *Id.* at 147–48.

309. JOUET, *supra* note 13, at 215–17.

310. DAGAN & TELES, *supra* note 68, at 44–51.

311. *Id.*

312. *Id.* at ix–x, 3–4, 128.

313. *Id.* at 3.

314. *Id.* at 44–51, 66–68, 72–75, 100–04, 163, 170.

earlier. Current sentencing reform proposals in the United States mostly are unambitious and focused on the most likable prisoners, such as petty drug offenders, thereby excluding almost everyone presently behind bars.<sup>315</sup> Incarceration rates in American society thus have only minimally declined over the past two decades.<sup>316</sup>

One key to a wider evolution may be the understanding of victims' rights, as draconian punishments in the United States are imposed in their name. A zero-sum relationship has contributed to the vicious circle at the heart of American justice today.<sup>317</sup> Respect for victims is often measured by harshness toward defendants or prisoners, whereas compassion for them is commonly equated with disrespecting victims. But certain victims' rights groups have effectively rejected this zero-sum relationship, as illustrated by FAMM (Families Against Mandatory Minimums)<sup>318</sup> or families of murder victims that oppose the death penalty.<sup>319</sup> It is indeed possible to value the human lives of both victims and offenders, to denounce wrongdoing and sentence mercifully.

If American society should reconsider draconian punishments, how long should sentences be? One way to approach this question is to recall that a holistic sentencing process allows the individualization of punishment, the weighing of aggravating and mitigating circumstances, and the satisfaction of diverse sentencing goals.<sup>320</sup> This approach has led fellow Western democracies toward sentencing practices that are more proportional to culpability, conducive to rehabilitation, and consistent with public safety.<sup>321</sup> Harsh norms, inflexible sentencing guidelines, and stiff mandatory minimums have instead precluded American judges from tailoring punishments to the crime and the person of the offender.<sup>322</sup>

Box 1 illustrates the type of paradigm shift on sentence length that could incrementally transform American justice. Rather than focus on whether a defendant should spend five, fifteen or fifty years in prison, the focus should turn to what the person will be doing in prison *and* after prison for any number

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315. *See id.* at 130–31, 149–50, 164–65, 175–76.

316. Ghandnoosh, *supra* note 5.

317. *See* GARLAND, *supra* note 212, at 11 (describing zero-sum dynamics in criminal sentencing).

318. *See* FAMM, 2021 ANNUAL REPORT (2021).

319. *See, e.g.*, TIM BUCKLEY & JANVIER SLICK, OREGONIANS FOR ALTS. TO THE DEATH PENALTY, NOT IN OUR NAME: MURDER VICTIMS' FAMILIES SPEAK OUT AGAINST THE DEATH PENALTY (2017), <https://www.oadp.org/sites/default/files/NION.pdf> [<https://perma.cc/3V5T-XQMV>].

320. *See supra* note 195 and accompanying text.

321. *Id.*

322. *Id.*



of years. These questions ultimately raise more questions, as democratic societies have long faced unavoidable, intractable debates about sentence length. Yet America largely stands out among Western democracies in neglecting these questions and readily inflicting long sentences.<sup>323</sup>

### Box 1: Sentencing Paradigm Shift

**From**  
*They should spend X years in prison.*

**To**  
*What will they do during X years in prison?*  
*What will they do after X years in prison?*  
*What will this accomplish?*

Should bipartisan reform on sentencing gun crime offer a way toward better sentencing practices overall, diverse stakeholders will have to mutually benefit from this reform. For instance, scholars have documented double standards in how the right to bear arms has historically excluded African Americans, ranging from prohibitions on slaves owning guns to modern incidents where lawful Black gun owners have faced repression.<sup>324</sup> These circumstances could raise understandable concerns that a rehabilitative approach toward sentencing gun crime would exclude African Americans, consistently with psychological studies finding that Black or dark-skinned people are likelier to be dehumanized as irredeemable, frightening criminals.<sup>325</sup> However, the development of human dignity as a principle in American law could serve as a bulwark against unequal and degrading sentencing practices harming the underprivileged, from racial and ethnic minorities to poor whites.<sup>326</sup>

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323. See text accompanying notes 82–84.

324. CAROL ANDERSON, *THE SECOND: RACE AND GUNS IN A FATALLY UNEQUAL AMERICA* (2021). See also JENNIFER CARLSON, *POLICING THE SECOND AMENDMENT: GUNS, LAW ENFORCEMENT AND THE POLITICS OF RACE* (2020) (social study on the interrelationship between policing, guns, and race); SKLANSKY, *supra* note 46, at 219 (discussing double standards in conceptions of gun rights).

325. See sources cited *supra* note 38.

326. See generally Jonathan Simon, *The Second Coming of Dignity*, in *THE NEW CRIMINAL JUSTICE THINKING* 275 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Leslie Meltzer

In the best-case scenario, American public officials who successfully pass ambitious penal reform may even benefit politically. Embracing decarceration would thereby shift from being a political liability to a political asset. This future appears implausible but, if it is to stand a chance, reformers may need to develop and disseminate a new language or way of thinking that transcends the dichotomy between “tough on crime” and “soft on crime.”<sup>327</sup> In this framing, “tough on crime” has the upper hand rhetorically because it can seem better to be “tough” than “soft.” If one accepts these terms of debate, opposing so-called “tough-on-crime” laws and policies makes one appear “pro-crime” or, at least, weak, naïve or incompetent in failing to keep society safe. Similarly, the rigid dichotomy between “violent” and “nonviolent” crime is a dead end. Far from being a vehicle to end mass incarceration, it reinforces the status quo.

A brighter future for American society may hinge upon rejecting the false choice between mass incarceration and public protection.<sup>328</sup> Elsewhere in the Western world, this would not be a hopeful aspiration but the present. If mass incarceration does not exist there, it has not always existed here. For a paradigm shift to occur, it is incumbent on reformers to offer a vision of the future where humanity and safety can thrive in a symbiotic relationship.

If bipartisanship can bring opposite sides together, a humane and effective penal system is ultimately not a partisan conservative or liberal idea, but one on which a democratic society should be able to agree upon. A normative evolution may someday transcend present divides.

#### CONCLUSION

This Article has projected itself into the future by exploring transformations that might come to pass in a less polarized America. This is one of several potential futures, as societal divide might persist or worsen in coming years or decades. But should this future be within reach, guns could evolve from a source of intense polarization to one of common ground. Indeed, moderate, rehabilitative, and proportional sentences for gun crime is an area where bipartisan convergence could materialize and have a ripple

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Henry, *The Jurisprudence of Dignity*, 160 PENN. L. REV. 169 (2011); Meghan J. Ryan, *A Catholic Perspective on Prison Conditions and Human Dignity*, in CATHOLICISM AND CRIMINAL LAW (forthcoming 2023-24), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4113456](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4113456) [<https://perma.cc/4G3S-LM9A>]; *Dignity and the Moral Rehabilitation of Prisoners*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/2014/09/dignity-and-the-moral-rehabilitation-of-prisoners/> [<https://perma.cc/V6C6-5KKZ>].

327. DAGAN & TELES, *supra* note 68, at 68.

328. See STUNTZ, *supra* note 94, at 61–62.

effect on sentencing norms nationwide. Conservatives could embrace this shift on the ground that the right to bear arms is an important principle and that guns are not inherently evil—meaning that people who commit gun crime should not be deemed beyond rehabilitation. Meanwhile, liberals could defend this shift by blending their support for gun control and opposition to mass incarceration. Overall, both conservatives and liberals could agree that gun crime warrants a meaningful response, albeit not merciless punishments that do not make society safer, waste a fortune in taxpayer dollars, and have disproportionate impacts on the underprivileged. If the bloody, vicious circle ruining American justice is someday broken, it will plausibly reflect a paradigm shift that cannot be predicted but should be theorized.