

# KEEP ON KEEPING ON: MAINTAINING MOMENTUM FOR CRIMINAL JUSTICE REFORM DURING THE TRUMP ERA

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## INTRODUCTION

President Donald Trump and his Attorney General, Jeff Sessions, have swiftly and starkly distinguished their criminal justice rhetoric and policies from those of their predecessors. President Trump and Attorney General Sessions have traded on racist stereotypes and notions that criminals have been emboldened in recent years in the wake of the Obama Administration's purported lenience in law enforcement and sentencing. In doing so, the Trump Administration has heightened the imperative for criminal justice reform, particularly for policies designed to reduce the numbers of people in jails and prisons, the most urgent civil rights and racial justice issue of the past forty years.

To begin with, President Trump and Attorney General Sessions have thrown a tough-on-crime gauntlet down on what they have claimed, contrary to data, are rising crime rates.<sup>1</sup> In fact, violent crime has fallen sharply in the past twenty-five years, since its peak in the early 1990s.<sup>2</sup> Violent and property crime

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1. See Louis Nelson, *Trump Says He's Sending Feds to Chicago to Help With Crime Problem*, POLITICO (June 30, 2017), <https://www.politico.com/story/2017/06/30/donald-trump-chicago-crime-federal-help-240131>; Mark Berman, *Violent Crimes and Murders Increased in 2016 for a Second Consecutive Year, FBI Says*, WASH. POST (Sept. 25, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/09/25/violent-crime-increased-in-2016-for-a-second-consecutive-year-fbi-says/?utm\\_term=.5e15591239bb](https://www.washingtonpost.com/news/post-nation/wp/2017/09/25/violent-crime-increased-in-2016-for-a-second-consecutive-year-fbi-says/?utm_term=.5e15591239bb); Aaron Rugar, *Trump Keeps Lying About Crime in America. This is The Truth.*, THINKPROGRESS (Aug. 29, 2016), <https://thinkprogress.org/donald-trump-keeps-lying-about-crime-in-america-89e06c1d14c7/>.

2. See John Gramlich, *Five Facts About Crime in the U.S.*, PEW RESEARCH CTR. (Jan. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/01/30/5-facts-about-crime-in-the-u-s/> (citing FBI statistics showing a 48% decline in violent crime rates between 1993-2016, using statistics that include homicides, and Bureau of Justice statistics showing a 74% decline during the same period, not including homicides).

rates have declined to levels unseen since the late 1960s.<sup>3</sup> Meanwhile, the nation's imprisonment rate fell 11% from 2008-2016.<sup>4</sup> During the same period, thirty-five states cut crime and imprisonment rates simultaneously.<sup>5</sup> In 2016, the federal prison population declined by 4% from the previous year, and 2,200 fewer people entered federal prisons, accounting for 96% of the decline in new admissions in state and federal facilities at the year's end.<sup>6</sup> As of the beginning of February 2018, there were 6,000 fewer people incarcerated in federal prisons than there were in 2017, a decline of just over 3%.<sup>7</sup> Given mass incarceration's disproportionate impact on African Americans, it is welcome news that falling prison rates have included a 29% drop in the rate at which African-American adults have been incarcerated over the past decade.<sup>8</sup> Progressive criminal justice reformers must remain vigilant against threats to these modest and woefully incomplete rollbacks of mass incarceration's grave injustice, particularly when Attorney General Sessions has redoubled his commitment to policies designed to put more people behind bars.<sup>9</sup>

The most prominent substantive directive on federal sentencing issued by the Trump Administration is Attorney General Sessions's May 2017 memorandum to United States Attorneys requiring federal line prosecutors to pursue the most serious provable charges against defendants.<sup>10</sup> Any decision to

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3. See Adam Gelb & Jacob Denney, *National Prison Rate Continues to Decline Amid Sentencing, Re-Entry Reforms*, PEW CHARITABLE TRUSTS (Jan. 16, 2018), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms>.

4. See *id.*

5. See *id.*

6. See E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 251149, PRISONERS IN 2016 1 (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

7. See BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE ONE YEAR INTO THE TRUMP ADMINISTRATION 8 & 16 n.80 (Feb. 2018) (citing other sources), [https://www.brennancenter.org/sites/default/files/publications/Criminal\\_Justice\\_One\\_Year\\_Into\\_the\\_Trump\\_Administration\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Criminal_Justice_One_Year_Into_the_Trump_Administration_0.pdf).

8. See U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 BOOKER REPORT 2 (Nov. 14, 2017), <https://www.ussc.gov/research/research-reports/demographic-differences-sentencing> (reporting that Black men received federal prison sentences 19.1% longer than similarly situated White men between fiscal years 2012 and 2016); ASHLEY NELLIS, SENTENCING PROJECT, THE COLOR OF JUSTICE, 3 (June 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> (reporting that African Americans are incarcerated in state prisons at a rate 5.1 times that of Whites); Gelb & Denney, *supra* note 3.

9. See Jeff Sessions, U.S. Att'y Gen., Remarks at the Reagan Alumni Association's Celebration of President Reagan's Birthday (Feb. 6, 2018), in DEP'T JUST. NEWS, <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-reagan-alumni-associations-celebration> (lauding the elimination of federal parole, elimination of bail during federal appeals, enactment of mandatory minimum sentences, and "[getting] tough on drug abuse" as critical to "re-establishing law and order").

10. Memorandum from Jeff Sessions, U.S. Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors, Department Charging and Sentencing Policy 1 (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download>.

deviate from this mandate requires approval by the chief federal prosecutor of the judicial district.<sup>11</sup> The same supervisory approval is required for prosecutorial decisions to depart downward from the federal sentencing guidelines.<sup>12</sup> The memorandum also directs federal prosecutors to partner with local law enforcement agencies to identify and prosecute suspects believed responsible for “significant violent crime.”<sup>13</sup> In addition, the memo rescinds then-Attorney General Eric Holder’s 2013 directive that federal prosecutors should avoid charges to which mandatory minimum sentences would apply to certain low-level non-violent drug offenders.<sup>14</sup> Executive-branch policy aside, Sessions has remained staunchly opposed to legislative sentencing reform, even when his stance puts him at odds with congressional Republicans and other conservatives.<sup>15</sup> For example, during President Trump’s first year in office, Republican Senator Charles Grassley introduced a criminal justice reform bill that included provisions curtailing the applicability of mandatory minimums and reducing enhanced penalties for previous drug crimes.<sup>16</sup> Attorney General Sessions, citing concerns about rising violent crime rates, wrote Grassley a letter calling the bill a “grave error.”<sup>17</sup> In addition, the Attorney General operationalized his own enthusiasm for aggressive drug prosecutions, an enthusiasm which the President shares, by issuing a memorandum “strongly encourag[ing]” United States Attorneys to pursue the death penalty in drug trafficking and related prosecutions.<sup>18</sup> The Attorney General’s zeal for

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*; Memorandum from Eric Holder, U.S. Att’y Gen., U.S. Dep’t of Justice, to U.S. Att’y’s and Assistant Att’y Gen. for the Crim. Div., Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>; *see also* Memorandum from Eric Holder, U.S. Att’y Gen., U.S. Dep’t of Justice, to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> (setting policy of individualized considerations during charging, plea bargaining, and sentencing).

15. *See* Taylor Dolven, *Jared Kushner’s Prison Reforms Hit a Brick Wall Called Jeff Sessions*, VICE NEWS (Jan. 17 2018), [https://news.vice.com/en\\_ca/article/wjpkey/jared-kushners-prison-reforms-hit-a-brick-wall-called-jeff-sessions](https://news.vice.com/en_ca/article/wjpkey/jared-kushners-prison-reforms-hit-a-brick-wall-called-jeff-sessions) (“Attorney General Jeff Sessions opposes reforming mandatory minimum sentencing and effectively blocked it from becoming part of the White House [criminal justice] reform agenda . . . .”); *id.* (exhibiting Sessions’s commitment to mandatory minimums as contrary to those of Republican Senators Chuck Grassley and Sam Brownback as well as those of some Republican governors).

16. *See* Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. (2017).

17. Letter from Jeff Sessions, U.S. Att’y Gen. U.S. Dep’t of Justice, to Senator Charles Grassley on the Sentencing Reform and Corrections Act of 2017 1 (Feb. 14, 2018), <https://www.politico.com/f/?id=00000161-966d-da6b-ade9-fefd38e20001>.

18. *See* Memorandum from Jeff Sessions, U.S. Att’y Gen., U.S. Dep’t of Justice, to U.S. Att’y’s on Guidance Regarding Use of Capital Punishment in Drug-Related Prosecutions (Mar. 20, 2018), <https://www.justice.gov/file/1045036/download>; Kevin Johnson & Gregory Korte, *Attorney General Jeff Sessions: Feds Should Pursue Death*

maximum penalties is also sharply out of step with evolution in public opinion on criminal justice policy over the past thirty years, though the Reagan era is one to which he has explicitly anchored his positions.<sup>19</sup>

Attorney General Sessions's resistance to bipartisan sentencing reform and departure from Obama-era prosecution policies certainly might grow the rolls of people sent to federal prisons, which had begun to fall during the previous Administration. In fact, even those efforts left nearly half of all remaining federal prisoners to serve time for drug offenses, and ratcheting up federal drug prosecutions seems like a sure-fire way to refill emptying federal prison beds.<sup>20</sup> Another policy likely to return people to federal prisons is Sessions's Bureau of Prisons' restriction of resources for federal halfway houses and community corrections.<sup>21</sup> In response to that directive, a bipartisan coalition of senators urged maintaining resources for community-based services, recognizing that challenges with housing and employment for incarcerated people returning to their communities drive recidivism.<sup>22</sup> Moreover, slashing contracts with post-release transitional housing facilities stands in sharp contrast with President Trump's modest statements supporting enhancing opportunities for prisoners' successful reentry.<sup>23</sup>

The Trump Justice Department's policies, and the rhetoric behind them, are without a doubt a threat to criminal justice reform and to the Obama Administration's rollback of charging and sentencing policies that have fueled mass incarceration.<sup>24</sup> These policies will also reinforce the racial disparities

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*Penalty in Some Cases*, USA TODAY (Mar. 21, 2018), <https://www.usatoday.com/story/news/politics/2018/03/21/attorney-general-jeff-sessions-feds-should-pursue-death-penalty-some-drug-cases/445591002/> (describing the Attorney General as “[f]ollowing President Trump’s lead” on urging capital prosecution of some drug cases).

19. See *id.*; Amelia Thomson-Deveaux, *Jeff Sessions Is Trying to Take Criminal Justice Back to the 1990s*, FIVETHIRTYEIGHT (Feb. 7, 2018), <https://fivethirtyeight.com/features/jeff-sessions-is-trying-to-take-criminal-justice-back-to-the-1990s/> (comparing Attorney General Sessions's commitment to mandatory minimums, the death penalty, and drug policy to public opinion polling on the issues).

20. CARSON, *supra* note 6, at 1 (reporting this statistic as of September 2016, the last date from which data was available).

21. See NATHAN JAMES, CONG. RESEARCH SERV., RL34287, OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 1 (Jan. 12, 2015), <https://fas.org/sgp/crs/misc/RL34287.pdf>.

22. See Eli Watkins, *Bureau of Prisons Ending Contracts with Sixteen Halfway Houses*, CNN (Nov. 20, 2017), <https://amp.cnn.com/cnn/2017/11/20/politics/bureau-of-prisons-mark-inch-jeff-sessions/index.html>.

23. See President Donald Trump, State of the Union 2018 (Jan. 30, 2018), <https://www.cnn.com/2018/01/30/politics/2018-state-of-the-union-transcript/index.html> (promising prison reform to help “former inmates who have served their time get a second chance”); Matt Ford, *A Chance for Criminal Justice Reform Under Trump*, NEW REPUBLIC (Feb. 5, 2018), <https://newrepublic.com/article/146940/chance-criminal-justice-reform-trump> (citing President Trump's comments during the 2018 State of the Union commending criminal justice reform efforts at the state level designed to reduce recidivism).

24. See U.S. DEP'T OF JUST., OFFICE OF THE INSPECTOR GEN., REVIEW OF THE DEPARTMENT'S IMPLEMENTATION OF PROSECUTION AND SENTENCING REFORM PRINCIPLES

that have flourished even under previous, less explicitly punitive, administrations.<sup>25</sup> On the other hand, focus on federal executive branch directives risks distracting energy that progressives should continue to pour into supporting criminal justice reforms proposed by people and agencies across the political spectrum, particularly in the states, where 87% of people incarcerated in America's prisons serve time.<sup>26</sup> Moreover, tough-on-crime rhetoric such as the Trump Administration's is often deployed in the name of crime victims. Some crime victims do support punitive policies as a basis for redressing their harms or protecting their safety. However, for reasons I explain below, criminal justice reformers, including defense lawyers, must engage crime victims meaningfully to counter unwarranted or overly simplistic reliance on incarceration as a universal salve for the very real fissures that crime visits on too many communities.

These principles suggest a way forward for criminal justice reform in the Trump era. To borrow a phrase from the civil rights workers who put their bodies on the line to dismantle Jim Crow, criminal justice progressives seeking to dismantle mass incarceration need to "keep on keeping on."<sup>27</sup> They must remain aware of threats to their momentum while maintaining steadfast commitment to their missions. A three-point strategy provides a practical, though by no means exhaustive, framework for progress: First, reward, replicate, and expand bipartisan reform efforts at the local level; second, maintain a reform agenda that addresses violent crime; and third, engage crime

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UNDER THE *SMART ON CRIME* INITIATIVE (June 2017), <https://oig.justice.gov/reports/2017/e1704.pdf> (finding that Attorney General Holder's *Smart on Crime* Initiative resulted in significant reduction of mandatory minimum sentences imposed on drug offenders, including those with two criminal history points, and in a reduction in the application of recidivist sentencing enhancements); Letter from Federal Public & Community Defenders to Senators Chuck Grassley and Dianne Feinstein re: Sentencing Reform and Corrections Act of 2017 (S. 1917) and Smarter Sentencing Act of 2017 (S. 1933) (Oct. 31, 2017), <http://blog.federaldefendersny.org/wp-content/uploads/2017/11/Letter-to-Senators-Grassley-and-Feinstein-re-Sentencing-Reform.10.31.17.pdf> (citing statistics showing that since Congress enacted mandatory minimum sentences in 1986 to its highest point in 2013, the federal prison population quintupled).

25. See Hon. Lynn Adelman, *How Congress, the U.S. Sentencing Commission and Federal Judges Contribute to Mass Incarceration*, LITIG., Fall 2017, at 8; see U.S. SENTENCING COMM'N, *supra* note 8 (finding that drug mandatory minimums continued to result in long federal prison sentences and that racial disparities persist in sentence length in cases with mandatory minimum).

26. See German Lopez, *The Case for Optimism on Criminal Justice Reform - Even Under President Trump*, VOX (Nov. 10, 2016), <https://www.vox.com/policy-and-politics/2016/11/10/13580644/president-trump-criminal-justice-2016>; see also JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 13 (2017).

27. See, e.g., Bill Chappell, *Integrating A Southern Giant: A Pioneer Looks Back*, NATIONAL PUBLIC RADIO (Jan. 7, 2011), <https://www.npr.org/2011/01/07/132712913/a-pioneer-looks-back-50-years-after-making-history> ("When asked how she would like people in 2011—especially today's college students—to view the civil rights era, [Charlayne] Hunter-Gault says, 'I think that the thing that we learned back in the day of the civil rights movement is that you do have to keep on keeping on.'").

victims and formerly incarcerated people as co-architects of a new framework for justice.

### I. THREE PROPOSALS

#### A. Reward, Replicate, and Expand Local Reforms

The building blocks of mass incarceration were laid by countless state and federal politicians, policymakers, prosecutors, and judges for the past four decades.<sup>28</sup> By the same token, unraveling mass incarceration will depend on state and local reforms. This is because, of the approximately 2.2 million people incarcerated in American prisons and jails, two million are serving time in state facilities, and only about 200,000 in federal penitentiaries.<sup>29</sup> The good news for progressives is that new initiatives have begun in many places, and federal policy will have little, if any, detrimental effect on most state and local reforms.<sup>30</sup>

For example, starting in 2007, Texas enacted a series of bills that have collectively reduced its incarceration rate by an estimated 20% and saved \$4 billion.<sup>31</sup> Texas's crime rate has fallen by 30% during the same period.<sup>32</sup> In 2017, Louisiana, which voted for President Trump by 58% and has the highest incarceration rate in the world, passed a bipartisan suite of bills aimed at reducing the state's prison population by 10% and the parole and probation population by 12% over the next decade.<sup>33</sup> Louisiana's new laws reclassify some felonies, increase judicial discretion in sentencing, reduce post-release supervision times for some offenses, and ease collateral consequences on people released from prison.<sup>34</sup> Pushback from Louisiana law enforcement groups curtailed additional reforms that would have applied to more people

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28. See PFAFF, *supra* note 26, at 128-34; JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 13-14, 148 (2017).

29. See E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 248955, PRISONERS IN 2014 (Sept. 2015), <https://www.bjs.gov/content/pub/pdf/p14.pdf>; WORLD PRISON BRIEF, UNITED STATES OF AMERICA, <http://www.prisonstudies.org/country/united-states-america> (last accessed Jan. 4, 2018).

30. See Lopez, *supra* note 26; SENTENCING PROJECT, TOP TRENDS IN STATE CRIMINAL JUSTICE REFORM, 2017 (Jan. 2018), <https://www.sentencingproject.org/publications/top-trends-state-criminal-justice-reform-2017/>.

31. Lorelei Laird, *States Featuring Bipartisan Support Rally for Criminal Justice Reform*, ABA JOURNAL (Dec. 2017), [http://www.abajournal.com/magazine/article/criminal\\_justice\\_reform\\_louisiana\\_alaska](http://www.abajournal.com/magazine/article/criminal_justice_reform_louisiana_alaska).

32. *Id.*

33. CNN POLITICS ELECTION 2016, LOUISIANA RESULTS, <http://www.cnn.com/election/results/states/louisiana> (last accessed Apr. 1, 2018); Julia O'Donoghue, *Louisiana Criminal Justice Reform: What You Need to Know About the Changes*, TIMES-PICAYUNE (June 29, 2017), [http://www.nola.com/politics/index.ssf/2017/06/louisiana\\_criminal\\_justice\\_ref\\_1.html](http://www.nola.com/politics/index.ssf/2017/06/louisiana_criminal_justice_ref_1.html).

34. *Id.*

convicted of violent crimes.<sup>35</sup> The bills, which included some protections for crime victims, nevertheless passed with bipartisan support and are expected to save the state \$252 million over 10 years, 70% of which will be reinvested in crime-prevention initiatives.<sup>36</sup>

In New Mexico and Oklahoma, Election Day 2016 also brought progressive criminal justice reforms.<sup>37</sup> New Mexico passed a constitutional amendment that no one may be jailed because of inability to afford bail.<sup>38</sup> Oklahomans, who voted for President Trump by 65.3%, at the same time voted to reduce prison sentences by reclassifying certain offenses from felonies to misdemeanors as well as to establish a rehabilitation fund for mental health and drug abuse treatment.<sup>39</sup>

In the past six years, Connecticut also has put into place several reforms aimed at reducing mass incarceration. The state abolished the death penalty and legalized small amounts of marijuana. Moreover, it enacted “Second Chance” legislation that eases the way for people convicted of nonviolent crimes to apply for pardons and parole and reduces penalties for drug possession. Finally, new policies curbed the use of solitary confinement for juveniles in state prisons.<sup>40</sup> During Governor Dannel Malloy’s tenure, the number of men in Connecticut prisons has fallen by 20%, and the number of incarcerated women has fallen by 7%.<sup>41</sup> At the same time, the state has led the nation in declining violent crime, which went down by 20% from 2012 to 2016.<sup>42</sup>

These results from multiple states, including states that went red in 2016, strongly suggest that people across the political spectrum support common-sense initiatives to reduce jail and prison populations.

In the past several years, prosecutors’ elections have also signaled a strong local appetite for criminal justice reform. Voters in Corpus Christi, Houston, Orlando, Philadelphia, Milwaukee, Chicago, and several other jurisdictions have elected prosecutors promising changes that will reduce the number of people their offices send to prison.<sup>43</sup> As candidates, they ran on platforms that

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35. Laird, *supra* note 31.

36. *Id.*

37. Lopez, *supra* note 26.

38. *Id.*

39. See POLITICO, 2016 OKLAHOMA PRESIDENTIAL ELECTION RESULTS, <https://www.politico.com/2016-election/results/map/president/oklahoma/> (last accessed Jan. 4, 2018); Lopez, *supra* note 26.

40. Josh Jacobs, *How Long Can Connecticut’s Prison Reform Last?*, ATLANTIC (July 15, 2017), <https://www.theatlantic.com/politics/archive/2017/07/connecticut-prison-malloy/533565/>.

41. *Id.*

42. Jake Kara, *Connecticut Crime Report: Murders Down a Lot, Violent Crime Up a Bit*, CT MIRROR, (Sept. 27, 2017), <https://ctmirror.org/2017/09/25/connecticut-crime-report-murders-down-a-lot-violent-crime-up-a-bit/>.

43. Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCI. MONITOR (July 17, 2017), <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor>; David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 UC DAVIS L.

included declining to prosecute minor offenses, channeling drug offenders to rehabilitation programs, ending cash bail, and opting against capital prosecutions.<sup>44</sup>

These developments in the states and counties, which are, after all, where the vast majority of criminal justice is dispensed, prove that momentum continues toward reforms designed to reduce the number of people in prison.<sup>45</sup> As noted above, Attorney General Sessions's directives may very well have a serious impact on federal prosecutions and cause many thousands to spend more time in prison than they would have if his predecessors' policies were still in place. That is certainly cause for serious concern. At the same time, it is critical to keep sight of the strong signals that voters are sending to their local elected officials to resist policies contributing to over-incarceration. Voters are also maintaining the pressure on members of Congress, many of whom are taking notice. As noted, *supra*, in 2017, bipartisan senators and members of the House introduced the Sentencing Reform and Corrections Act and the Smarter Sentencing Act, which proposed to increase judicial discretion, expand the use of probation, expand funding for community policing and crime-reduction initiatives, and reduce mandatory minimums.<sup>46</sup>

Progressives should remain clear-eyed about challenges posed by the federal executive while rewarding local officials who implement a reformist agenda, replicating those agendas by organizing around them, and supporting those who build upon them in other parts of the country.

## B. Maintain a Reform Agenda that Addresses Violent Crime

In light of the Trump Administration's portrayal of a nation threatened by rising violence as justification for its punitive directives, an examination of current crime statistics is a sound place to begin.<sup>47</sup> The homicide rate indeed increased by nearly 20% from 2014 to 2016.<sup>48</sup> However, it remains at half of

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REV. 25, 25-27 (2017).

44. Gass, *supra* note 43.

45. See Kelly Cohen, *Criminal Justice Reform Poised to Take Off in 2018*, WASH. EXAMINER (Dec. 30, 2017), <http://www.washingtonexaminer.com/criminal-justice-reform-poised-to-take-off-in-2018/article/2644603>.

46. John Bowden, *Bipartisan Duo Offer Criminal Justice Reform Legislation*, HILL (Nov. 7, 2017), <http://thehill.com/homenews/house/359122-reps-look-to-scale-back-criminal-justice-system-with-bipartisan-legislation>.

47. See German Lopez, *Trump: The Murder Rate is at a 45-Year High. Actual Statistics: That's Not Remotely True*, VOX (Feb. 7, 2017), <https://www.vox.com/2016/10/12/13255466/trump-murder-rate> (reporting that President Trump stated incorrectly that the murder rate in February 2017 was at a 45-year high; in fact, it was at 4.9 per 100,000 people; in 1970, it was at 7.9 per 100,000).

48. See Press Release, Federal Bureau of Investigation, FBI Releases 2016 Crime Statistics (Sept. 25, 2017), <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-crime-statistics>; FEDERAL BUREAU OF INVESTIGATION UNIFORM CRIME REPORTING, CRIME IN THE U.S. BY VOLUME AND BY RATE PER 100,000 INHABITANTS, 1996-2015, <https://ucr.fbi.gov/crime-in-the-u.s./2015/crime-in-the-u.s.-2015/tables/table-1> (last accessed

the peak it reached in the 1990s, and most of the increase was concentrated in a few cities.<sup>49</sup> Moreover, experts disagree about whether violent offenses other than homicides have risen over the same period, and statistics establish that violent crime continues to fall substantially in some major cities.<sup>50</sup> For example, 2017 statistics show that New York City's crime rate fell 6% across each major felony category, from an already historic low in 2016.<sup>51</sup> This reduction took place during years in which New York City's police made fewer arrests, curtailed their use of stop-and-frisk practices deemed unconstitutional, and reduced their use of deadly force.<sup>52</sup>

Recent crime statistics aside, it is indisputable that the majority of American prisoners are serving time for violent offenses and that any meaningful dismantling of mass incarceration will need to reckon with punishment for violent offenses.<sup>53</sup> As noted, Trump and Sessions have invoked the purported uptick in violence to justify across-the-board aggressive prosecution.<sup>54</sup> Yet, meaningfully reducing America's prison population requires resisting the urge to limit reform agendas to non-violent offenders. This has proven challenging even to policymakers supportive of reducing incarceration rates.<sup>55</sup> For example, New York Governor Andrew Cuomo

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Apr. 1, 2018).

49. See Hanna Kozłowska, *The US Murder Rate Was Up Again—and 20% of the National Increase Came in Chicago*, QUARTZ (Sept. 25, 2017), <https://qz.com/1086403/fbi-crime-statistics-us-murders-were-up-in-2016-and-chicago-had-a-lot-to-do-with-it/>.

50. See Timothy Williams, *Violent Crime Rises in U.S. for Second Straight Year*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/violent-crime-murder-chicago-increase-.html>; Jeff Asher, *Why We Can't Be Sure Violent Crime Is on the Rise*, FIVETHIRTYEIGHT (Dec. 7, 2017), <https://fivethirtyeight.com/features/why-we-cant-be-sure-if-violent-crime-is-on-the-rise/>; Keith Humphreys, *We Were Told Violent Crime Rose in 2016. That May Not Be True*, WASH. POST (Dec. 7, 2017), [https://www.washingtonpost.com/news/wonk/wp/2017/12/07/we-were-told-violent-crime-rose-in-2016-that-may-not-be-true/?utm\\_term=.a9e59d5444e8](https://www.washingtonpost.com/news/wonk/wp/2017/12/07/we-were-told-violent-crime-rose-in-2016-that-may-not-be-true/?utm_term=.a9e59d5444e8).

51. See Ashley Southall, *Crime in New York City Plunges to a Level Not Seen Since the 1950s*, N.Y. TIMES (Dec. 27, 2017), <https://www.nytimes.com/2017/12/27/nyregion/new-york-city-crime-2017.html>.

52. *Id.*

53. See CARSON, *supra* note 29, at 1 (“Violent offenders made up 54% of the state male prison population at yearend 2013 . . . .”); Pfaff, *supra* note 26, at 3, 5-6, 11-12.

54. Williams, *supra* note 50.

55. See President Barack Obama, Remarks at the NAACP Conference (July 14, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> (noting the human and fiscal cost of America's high incarceration rate and describing bipartisan efforts to reduce prison populations in state and federal prisons, yet asserting that violent criminals belong behind bars, even though “[t]hey may have had terrible things happen to them in their lives”); Holder Mandatory Minimum Memorandum (2013), *supra* note 14; Karoun Demirjian, *Bipartisan Senate Group Unveils Latest Attempt at Sentencing Overhaul*, WASH. POST (Oct. 4, 2017), [https://www.washingtonpost.com/powerpost/bipartisan-senate-group-unveils-latest-attempt-at-sentencing-reform/2017/10/04/71d5ccea-a94b-11e7-850e2bdd1236be5d\\_story.html?utm\\_term=.871407661a55](https://www.washingtonpost.com/powerpost/bipartisan-senate-group-unveils-latest-attempt-at-sentencing-reform/2017/10/04/71d5ccea-a94b-11e7-850e2bdd1236be5d_story.html?utm_term=.871407661a55) (reporting on bipartisan mandatory minimum reform bill and noting that it aims to reduce penalties for non-violent offenders and offenders with limited criminal histories, while focusing the penalties on violent criminals and ones with longer records).

proposed a suite of criminal justice reforms aimed at reducing incarceration and recidivism, but limited a major component, elimination of cash bail, to defendants facing misdemeanor or non-violent charges.<sup>56</sup> In contrast, Alaska has adopted bail reform that will use a two-tiered point system, applicable to all defendants, to assist judges' assessments of suitability for pre-trial release without cash bonds.<sup>57</sup>

In addition to bail reform, innovations that encourage proportionate sentencing for all defendants, and the availability of appropriate post-conviction remedies for all prisoners, remain crucial to reducing prison populations.<sup>58</sup> Promoting individualized sentencing and supporting policies that afford people convicted of offenses defined as violent meaningful shots at parole and other post-conviction relief are essential to unwinding mass incarceration.<sup>59</sup> Permitting avenues for sentencing and post-conviction relief that consider the circumstances of the offender and not only the offense are crucial to evolving the understanding of root causes of crime.<sup>60</sup> This is so because competent sentencing and post-conviction advocacy requires investigation into defendants' or prisoners' backgrounds to uncover interdisciplinary explanations for why they broke the law and of their prospects for, or progress toward, rehabilitation.<sup>61</sup> For this reason, universal eligibility for individualized sentencing criteria and post-conviction remedies, informed by robust defense advocacy, has the potential to shift judges', parole boards', and policymakers' conceptions of deserts and punishment.

Specific proposals for legal reform that should apply to all defendants or prisoners include the following. First, lawmakers ought to pass legislation repealing mandatory minimum laws and affording judges discretion in sentencing for all categories of offenses.<sup>62</sup> Second, state and federal legislators should pass bills fortifying habeas corpus and other post-conviction remedies that would permit prisoners, regardless of offense, to challenge the

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56. See Press Release, Office of New York Governor Andrew Cuomo, Governor Cuomo Unveils 22nd Proposal of 2018 State of the State: Restoring Fairness in New York's Criminal Justice System (Jan. 3, 2018), <https://www.governor.ny.gov/news/governor-cuomo-unveils-22nd-proposal-2018-state-state-restoring-fairness-new-yorks-criminal>.

57. See James Brooks, *Goodbye Bail: Alaska Switches to New System of Criminal Justice*, JUNEAU EMPIRE, (Jan. 1, 2018), <http://juneauempire.com/state/news/2017-12-20/goodbye-bail-alaska-switches-new-system-criminal-justice>.

58. See Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 45-48 (2013).

59. See Michael Tonry, *Making American Sentencing Just, Humane, and Effective*, 46 CRIME & JUST. 441, 487 (2017).

60. See Gohara, *supra* note 58, at 65-68.

61. *Id.* at 57-62.

62. U.S. SENTENCING COMM'N, 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 81 (2011) (reporting that the number of federal prisoners serving mandatory minimum sentences rose by 155% from 1995 to 2010); see also LEIGH COURTNEY ET AL., URBAN INSTITUTE, A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA'S PRISONS (July 2017), [http://apps.urban.org/features/long-prison-terms/a\\_matter\\_of\\_time.pdf](http://apps.urban.org/features/long-prison-terms/a_matter_of_time.pdf).

constitutionality of their convictions and sentences and would afford both state and federal courts substantive review. Third, state lawmakers ought to reform parole processes that, regardless of evidence of rehabilitation, rubber-stamp denials for prisoners convicted of serious offenses.<sup>63</sup> Fourth, governors should comprise parole boards of members who are qualified to assess prisoners' readiness for successful release and who serve determinate terms that insulate them from political backlash.<sup>64</sup> Additionally, parole revocation procedures should include a right to counsel for indigent parolees and substantive criteria requiring hearing examiners to consider mitigating evidence as well as evidence of innocence of the alleged parole violation.<sup>65</sup>

Reforming sentencing and post-conviction laws is essential to dismantling mass incarceration. However, even within existing legal frameworks, lawyers play an essential role in ensuring that sentences are proportionate, regardless of the offenses for which they are imposed. Prosecutors of course wield wide discretion in making charging decisions and sentencing recommendations that impact how much time defendants will serve.<sup>66</sup> But since the middle of the last century, dedicated and vigilant defense lawyers have been an important check on a system increasingly bent on imposing lengthy prison terms.<sup>67</sup> As I have written elsewhere, one way of changing judges', prosecutors', and policymakers' understanding of the circumstances of people charged with serious, including violent, offenses is through robust defense sentencing practice.<sup>68</sup> Defense teams' deep sentencing advocacy, including detailed and interdisciplinary presentations of their clients' mitigating circumstances, effectively erodes the notion that people who commit offenses classified as violent are undeserving of mercy.<sup>69</sup>

For example, students in Yale Law School's Challenging Mass Incarceration Clinic, in partnership with the federal defender's office for the

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63. ELIZABETH PELLETIER, URBAN INSTITUTE, *ASSESSING THE IMPACT OF SOUTH CAROLINA'S PAROLE AND PROBATION REFORMS* (Apr. 24, 2017), [https://www.urban.org/sites/default/files/publication/89871/south\\_carolina\\_jri\\_policy\\_assessment\\_final\\_1.pdf](https://www.urban.org/sites/default/files/publication/89871/south_carolina_jri_policy_assessment_final_1.pdf).

64. See Stefan J. Bing, *Reconsidering State Parole Board Membership Requirements in Light of Model Penal Code Sentencing Revisions*, 100 KY L.J. 871 (2011); Maura Ewing, *Why So Few Violent Offenders Are Let Out on Parole*, ATLANTIC (Aug. 29, 2017), <https://www.theatlantic.com/politics/archive/2017/08/why-so-few-violent-offenders-are-let-out-on-parole/538305/>.

65. See ASLI BASHIR ET AL., SAMUEL JACOBS CRIMINAL JUSTICE CLINIC, JEROME N. FRANK LEGAL SERVICES ORGANIZATION, *PAROLE REVOCATION IN CONNECTICUT: OPPORTUNITIES TO REDUCE INCARCERATION* (Sept 2017), [https://law.yale.edu/system/files/area/clinic/document/cjc\\_parole\\_revocation\\_report.final.9.21.17.pdf](https://law.yale.edu/system/files/area/clinic/document/cjc_parole_revocation_report.final.9.21.17.pdf).

66. See David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 456 (2018).

67. See Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS., 81, 82 (1995).

68. See Gohara, *supra* note 58 at 83-84.

69. *Id.* at 54; Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing* (forthcoming), AM. J. CRIM. L. (2018).

District of Connecticut, are pioneering intensive mitigation practices that have changed the focus of sentencing hearings. Rather than permitting those hearings to center primarily on defendants' criminal behavior, the clinic, alongside the federal defenders, has shifted the focus to interdisciplinary records of defendants' histories of trauma, poverty, addiction, and the resulting behavioral difficulties that contributed to their offenses. Even in cases involving violent crimes or serious offenses such as firearm trafficking, this deep dive into social history mitigation has spared clinic clients years in prison, or resulted in application of the bare minimum mandatory punishment.<sup>70</sup> At the same time, the clinic's model is influencing local practice and enriching the baseline background judges are learning about defendants facing lengthy prison terms.<sup>71</sup> In addition, the comprehensive mitigation model of practice is pointing to social safety nets, medical care, addiction treatment, and anti-poverty programs as antidotes to offending.

This practice demonstrates why criminal justice reformers should not permit the Trump Administration's fear-inducing rhetoric to derail efforts at reforms that strike at the heart of inflated sentencing. Reformers would stray off course were they to limit their agendas only to low-level, nonviolent defendants or prisoners. Doing so would surely interrupt the slow but building movement toward a justice system that accounts for the humanity and rehabilitation that many defendants deserve, regardless of their offenses of conviction.

### C. Engage with Crime Victims and Formerly Incarcerated People as Co-Architects of a New Framework for Justice

Aside from a purportedly rising tide of violent crime, another pillar of the

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70. In the Challenging Mass Incarceration Clinic, we have been able to obtain reduced sentences for our clients by presenting a holistic picture of our clients' social histories to the Court. *See, e.g.*, Plea Agreement at 4, *United States v. James Cave*, No. 3:15-cr-00083-JAM (D. Conn. Nov. 5, 2015), ECF No. 28 (guidelines recommended sentence of 57 to 71 months' imprisonment for gun trafficking); Defendant's Sentencing Memorandum at 41, *Cave*, ECF No. 28 (defendant asked for sentence of time served and three years of supervised release based on history of trauma, drug and alcohol dependence, and evidence of rehabilitation); Judgment at 1, *Cave*, ECF No. 67 (entered sentence of 12 months and 1 day imprisonment). *See also* Plea Agreement at 5, *United States v. Thomas Recck*, No. 3:15-cr-00015-JAM (D. Conn. Feb. 4, 2015), ECF No. 4 (guidelines recommended sentence of 21 to 27 months' imprisonment); Defendant's Sentencing Memorandum at 4-5, *Recck*, ECF No. 30 (defendant asked for sentence of four to five years' probation based on client's history of trauma, addiction, and extraordinary rehabilitation); Judgment at 1, *Recck*, ECF No. 37 (entered sentence of five years' probation); Plea Agreement at 5, *United States v. Roberto Vasquez*, 3:14-cr-00107-JCH (D. Conn. May 3, 2016), ECF No. 80 (guidelines recommended sentence of 235 to 240 months' imprisonment for possession of a stolen firearm); Defendant's Sentencing Memorandum at 27-28, *Vasquez*, ECF No. 50 (defendant asked for below-guideline sentence based on history of child abuse, poverty, and mental and physical illness), Judgment at 1, *Vasquez*, ECF No. 109 (entered sentence of six years in prison, with credit for time served).

71. *See, e.g.*, *Cave*, *Recck*, and *Vasquez* Sentencing Memoranda, *supra* note 70.

Trump Administration's justification for aggressive law enforcement and prosecution is that they are essential to protecting victims.<sup>72</sup> In this regard, the President and Attorney General are neither innovative nor alone. For much of the past half century, policymakers and prosecutors of all political stripes have invoked crime victims' rights to support a belief that redressing their harms necessitates the harshest possible punishment applicable to a given offense.<sup>73</sup> In fact, protecting victims in the neighborhoods most impacted by crime has been a civil rights issue that some African-American politicians have used to denounce penalties—even for what many would now call low-level, non-violent drug offenses—they cast as too lenient.<sup>74</sup> The death penalty, America's anchor punishment, is often imposed in victims' names.<sup>75</sup> Yet capital defense teams have for decades engaged with their clients' victims' survivors to reach agreement that an execution is far from essential for justice.<sup>76</sup>

The more proximate criminal justice policymakers become to survivors of crime, the less possible it will be to ignore that more prison is not a true and lasting prescription for safety. This is because the underlying conditions that give rise to serious crime—concentrated poverty, dislocated parents, cycles of family abuse and addiction—are ones that prison only exacerbates.<sup>77</sup> In recent years, groups of crime survivors have begun to use their influence to urge another way forward to safety and justice.<sup>78</sup> Engaging with their organizations

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72. See, e.g., Jeff Sessions, Opinion, *Being Soft on Sentencing Means More Violent Crime. It's Time to Get Tough Again*, WASH. POST (June 16, 2017), [https://www.washingtonpost.com/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b\\_story.html?utm\\_term=.542027e20424](https://www.washingtonpost.com/opinions/jeff-sessions-being-soft-on-sentencing-means-more-violent-crime-its-time-to-get-tough-again/2017/06/16/618ef1fe-4a19-11e7-9669-250d0b15f83b_story.html?utm_term=.542027e20424) (“There are those who are concerned about the fate of drug traffickers, but the law demands I protect the lives of victims that are ruined by drug trafficking and violent crime infecting their communities. Our new, time-tested policy empowers police and prosecutors to save lives.”).

73. See Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 163-66 (1997); see also Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 669-72 (2000).

74. See, e.g., FORMAN, *supra* note 28, at 124-29; RANDALL KENNEDY, RACE, CRIME, AND THE LAW 10-12 (1997).

75. An anchor punishment is one that defines the scale of all other punishment in a given jurisdiction. The death penalty obscures the harshness of other penalties, such as life without the possibility of parole, that would, in the absence of capital punishment, stand out as their own human rights violations. See generally Markus Dirk Dubber, *Regulating the Tender Heart When the Axe Is Ready to Strike*, 41 BUFF. L. REV. 85, 86-92 (1993) (summarizing increasingly central role of victims' rights and participation in capital proceedings).

76. See Mickell Branham & Richard Burr, *Understanding Defense-Initiated Victim Outreach and Why It Is Essential in Defending a Capital Client*, 36 HOFSTRA L. REV. 1019, 1022-23 (2008).

77. See CRAIG HANEY, U.S. DEP'T OF HEALTH & HUMAN SERVS., URBAN INSTITUTE, “FROM PRISON TO HOME” CONFERENCE, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment* 15-16 (Jan. 2002), <https://aspe.hhs.gov/system/files/pdf/75001/Haney.pdf>

78. See, e.g., SUSAN BURTON & CARI LYNN, BECOMING MS. BURTON: FROM PRISON TO

promises to be a powerful antidote to the suggestion that victims' protection depends on putting defendants, many of whom have been serially victimized themselves, away for years, only to return to communities more deeply scarred and criminally savvy.<sup>79</sup>

In June 2017, two of my Yale Law students saw this principle in practice.<sup>80</sup> They represented a Connecticut prisoner who was eligible for parole under a statute that required reconsideration of lengthy sentences imposed on juveniles.<sup>81</sup> Our client had, at the age of fifteen, sexually assaulted a teenage woman he encountered on the street and followed home. A decade later, he was a person full of remorse for his terrible crime. His victim attended his parole hearing, and he apologized to her directly. A conversation with our co-counsel at the local public defender's office had given her a sense of our client's state of mind. She had called the public defender before the hearing with questions about our client and about the parole process. This defense contact with the victim proved pivotal at the hearing. She listened intently to our client's apology and to the description of his life at the time he assaulted her. She heard him describe his parents' abandonment, his becoming essentially homeless in his early teens, and his developing a raging drug addiction while living on the street. She then, through a victim's liaison, delivered a statement describing why she supported parole for her assailant. Among her many powerful expressions, she recounted that she, too, had been abandoned and was living alone when our client followed her home. While she did not see their similarity in circumstance as any excuse for the grievous harm our client caused her, she explained that his act caused her to dedicate her life to working with children whom she characterized as "just like us." Our client's victim's experience gave

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RECOVERY TO LEADING THE FIGHT FOR INCARCERATED WOMEN (2017) (recounting the story of a formerly incarcerated woman who became an advocate for criminal justice reform); CRIME SURVIVORS FOR SAFETY AND JUSTICE, <http://cssj.org> (last accessed Apr. 1, 2018) (organization of crime survivors advocating for less punitive criminal justice reform); COMMON JUSTICE, <http://www.commonjustice.org/> (last accessed Apr. 1, 2018) (organization promoting consensual mediation programs between victims and offenders as alternative to incarceration).

79. See ALLEN J. BECK ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12 6-7 (May 2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>; Jing Shi & Nancy Wolff, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORRECTIONAL HEALTH CARE 58, 64 (2009); Jamie Fellner, *Callous and Cruel: Use of Force Against Inmates with Mental Disabilities in US Jails and Prisons*, HUMAN RIGHTS WATCH (May 2015), <https://www.hrw.org/report/2015/05/12/callous-and-cruel/use-force-against-inmates-mental-disabilities-us-jails-and>; M. Keith Chen & Jesse M. Shapiro, *Does Prison Harden Inmates? A Discontinuity-Based Approach*, COWLES FOUND., Discussion Paper No. 1450, 2-3 (Jan. 2004), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=470301](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=470301) (finding that harsh prison conditions are correlated with increased likelihood of re-offending).

80. Facts from this section are supported by the transcript of our client's parole hearing, which are on file with the author. In order to protect the privacy of our client and his victim, no names or identifying information are provided.

81. CONN. GEN. STAT. § 54-91g (2016).

her the insight to know that additional prison time would serve no productive purpose for someone truly remorseful and already years removed from the damaged early life that mirrored her own.

As this case illustrates, defense lawyers and progressive reformers should take the time to listen meaningfully to what victims believe would provide them with true safety. Removing a single law-breaking person from a poverty-stricken community while doing nothing to address that community's deprivations will do little to improve the lives of those who continue to live there. That holds true whether they are the survivors of a criminal episode presently in question, or whether they are now defendants, having been victims many times well before they violated the law.<sup>82</sup>

The reality that imprisoned people are also disproportionately victimized by crime creates a powerful opportunity for crime survivors who have served time in prison to join forces with those who have not to identify a reform agenda that treats everyone swept into the criminal justice system with humanity.<sup>83</sup> Doing so will redefine accountability to crime survivors in a way that holds the people who have harmed them responsible while redressing (rather than exacerbating) the underlying social or medical conditions that so often explain why people break the law. A national survey of crime victims' views on crime and punishment shows that they prefer, by a margin of two-to-one, that the criminal justice system focus more on rehabilitation than on punishment.<sup>84</sup> They also prefer increased investment in mental health treatment over increased investment in prisons and jails by a margin of seven-to-one.<sup>85</sup>

Organizations such as Common Justice and Crime Survivors for Safety and Justice explicitly base their work on the premise that the needs of victims and those of people who break the law are often aligned.<sup>86</sup> They offer and advocate for alternatives to incarceration for people who have been victimized and who

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82. See James E. Reavis, *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?*, PERMANENTE J. Spring 2013, 44, 45; ROBERT L. LISTENBEE, JR., ET AL., REPORT OF THE ATTORNEY GENERAL'S TASKFORCE ON CHILDREN EXPOSED TO VIOLENCE 107 (Dec. 12, 2012), <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>; Laurie Whitten, *Addressing Trauma Among Incarcerated People*, NAT'L INST. CORRECTIONS (2012), <http://community.nicic.gov/blogs/mentalhealth/archive/2012/10/05/addressing-trauma-among-incarcerated-people.aspx>.

83. By some estimates, up to 75% of incarcerated men and women have experienced interpersonal violence, abuse, or childhood neglect. See LISTENBEE, *supra* note 82; Whitten, *supra* note 82. Statistics show that prisoners report rates of victimization by prior abuse up to twice that of the general population, and justice-involved youth experience chronic trauma at rates triple those of youth in the general population. See Whitten, *supra* note 82; Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIMINAL L. REV. 641, 654 (2016); LISTENBEE, *supra* note 82.

84. ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF CRIME VICTIMS' VIEWS ON SAFETY AND JUSTICE 15 (2016).

85. *Id.* at 19.

86. See Sarah Stillman, *Black Wounds Matter*, NEW YORKER (Oct. 15, 2015), <https://www.newyorker.com/news/daily-comment/black-wounds-matter> (describing the organizations Common Justice and Crime Survivors for Safety and Justice and their work).

later become violent offenders.<sup>87</sup> Crime Survivors for Safety and Justice, for example, has created a network of survivors that advocates for legislation diverting funds from prisons into mental health programs, drug treatment, and victims' services. The organization also advocates the creation of trauma centers in neighborhoods with high crime rates.<sup>88</sup> Common Justice also offers an initiative that provides intensive treatment to both crime survivors and the people who have harmed them.<sup>89</sup> Other reforms might include increasing community corrections resources so that while people are incapacitated following serious offenses, they are able to maintain ties to their children and families, thereby reducing remote parental incarceration, a major risk factor for future offending for children of parents who have served time.<sup>90</sup>

Progressives intent on reducing the cycle of harm that current criminal enforcement practices perpetuate ought to replicate these programs.<sup>91</sup> Bringing together formerly incarcerated people and crime victims to organize and build a reform platform that meets their shared needs is a crucial and potent antidote to the current administration's criminal justice agenda. After all, if crime survivors raise their voices to explain how their fortunes are so often indivisible from those of their neighbors who have broken the law, then policymakers' insistence that lengthy prison terms are necessary to protect victims will ring hollow.

#### CONCLUSION

The President and the Attorney General of the United States, under any administration, are standard bearers on issues ranging from responses to large-scale domestic attacks to quotidian prosecutions of relatively minor offenses. Their pronouncements and policies set the tone for law enforcement authorities, survivors of crime, defendants, and prisoners nationwide. There can be no question that we must take their platforms seriously. The Trump Administration has from its inception made plain its view that aggressive prosecution and lasting punishment are pillars of its criminal justice agenda.

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87. *See id.* (“[W]e must adjust our shared understanding of crime demographics to account for the fact that those most routinely portrayed as perpetrators are often at equal or greater risk of being victims.”).

88. Funding is available to support this work. *See id.* (describing Congressional allotment of \$1.6 billion in new funds to be deployed to local organizations serving survivors of crime).

89. *See* COMMON JUSTICE, *supra* note 78.

90. *See* Francis T. Cullen et al., *Reinventing Community Corrections*, 46 CRIME & JUST. 27, 29-30, 36-37 (2017); Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 478 (2005) (discussing various risk factors for children with incarcerated parents, including finding that they are five to six times more likely to be involved in the criminal justice system than other youth).

91. *See* DANIELLE SERED, VERA INST. JUST., YOUNG MEN OF COLOR AND THE OTHER SIDE OF HARM, 1, 2, 4 (Dec. 2014), <http://www.vera.org/sites/default/files/resources/downloads/young-men-color-disparities-responses-violence.pdf>.

For many committed to ending mass incarceration, these positions understandably trigger alarm. We must continue to protest directives that will increase incarceration rates, when plenty of evidence suggests that doing so is counterproductive and unnecessary to protect the public.<sup>92</sup> Indeed, the scope of public awareness and outcry by many, including a bipartisan group of politicians who uniformly agree that the new administration's policies are ill-advised and retrograde, is a genuine basis for hope.<sup>93</sup>

With that in mind, progressives must stay focused and remain resolute in promoting deep and enduring reforms to reduce prison populations. In order to do so, we must continue to take our cues from voters around the country who have pushed their legislators to enact laws shortening sentences, increasing judicial discretion, and opening doors for post-conviction relief. We must keep sight of the fact that prosecutors running on platforms that take explicit aim at mass incarceration are winning elections in red and blue localities alike.<sup>94</sup> We must not permit fearsome, inaccurate rhetoric about violent crime to derail policies that would ameliorate punishment of people convicted of offenses classified as violent. We must disprove the trope that the interests of survivors of crime and those of defendants are incompatible. Both are swept into the criminal justice system; protecting one does not require destroying the lives of the other. Rather, we must listen with humility when survivors of crime and formerly incarcerated people report their experiences and recommend reforms. We must build an enduring movement alongside them that will resist efforts to repopulate empty prison cells. We must build and support programs that will bring true and lasting safety and wellbeing to all communities and neighborhoods. That will be the most powerful safeguard against election of another administration that promotes and propagandizes heedless punishment.

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92. See DON STEMEN, VERA INST. JUST., *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 2* (July 2017), <https://www.vera.org/publications/for-the-record-prison-paradox-incarceration-not-safer>; Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 *CRIME & JUST.* 97, 118-20 (2008).

93. See Letter from Senators Cory A. Booker, Richard Durbin, Mike Lee, & Rand Paul to Attorney General Jeff Sessions (June 7, 2017), <https://www.scribd.com/document/350652153/6-7-17-Letter-to-the-Attorney-General-on-DOJ-Charging-and-Sentencing-Policy-FINAL-SIGNED>; Rand Paul, Opinion, *Sessions' Sentencing Plan Would Ruin Lives*, CNN (May 15, 2017), <http://www.cnn.com/2017/05/15/opinions/sessions-is-wrong-rand-paul-opinion/index.html>.

94. Maura Ewing, *The Progressive Civil-Rights Lawyer Philadelphia Wants for District Attorney*, ATLANTIC, (May 16, 2017), <https://www.theatlantic.com/politics/archive/2017/05/philadelphia-district-attorney-election-reform/526812/>; Gass, *supra* note 43.

