

PUNISHING VIOLENT CRIME

RUSSELL PATTERSON*

Beginning in the 1970s, politicians and the public began to view individuals who committed violent offenses as irredeemable dangers to the public whose incarceration was necessary to ensure the public's safety. As a result, state legislators enacted sentencing statutes that increased the punishment of violent crimes, which include offenses such as murder, rape, and robbery. This Note explores what led lawmakers to adopt sentencing statutes that single out individuals convicted of committing violent offenses for enhanced punishment and then shows that those lawmakers operated on the basis of inaccurate or incomplete conceptions of violent crime. Drawing on recent sociological and other empirical work, it shows that there is no neat dividing line between people who commit violent and non-violent offenses and argues that lawmakers made their decisions on the basis of false or incomplete information. In response, this Note advocates for the elimination of sentencing statutes that impose enhanced sentences on individuals convicted of violent crimes. Lawmakers should instead determine the appropriate criminal punishment for those convicted of violent crimes through the holistic, evidence-based approach that has become popular in the last decade with respect to non-violent crimes.

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INTRODUCTION

Recent public opinion polling indicates that the overwhelming majority of Americans now support some form of criminal justice reform.¹ Most people want less incarceration, shorter custodial sentences, and expanded social services for those who might otherwise be sentenced to time in jail or prison.² Yet, a closer look at those polls reveals that the particular question asked matters a great deal in determining what Americans want from their criminal legal system. It turns out, in fact, that the public supports scaling back criminal punishment of *non-violent* offenses.³ Drug possession, small-time theft, and other misdemeanors and low-level felonies are no longer viewed as warranting the kind of time in jail or prison that we have become accustomed to.⁴ But what does the public think of those who have

¹ Memorandum from Robert Blizzard, Public Opinion Strategies, to Interested Parties on National Poll Results 1 (Jan. 25, 2018), <https://www.politico.com/f/?id=00000161-2ccc-da2c-a963-efff82be0001> (“By a 76%-21% margin, voters believe the country’s criminal justice system needs significant improvements”); *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, AM. CIVIL LIBERTIES UNION (Nov. 16, 2017), <https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [hereinafter ACLU] (“91 percent of Americans say that the criminal justice system has problems that need fixing, 71 percent say it is important to reduce the prison population in America”); see also Justin McCarthy, *Americans’ Views Shift on Toughness of Justice System*, GALLUP (Oct. 20, 2016), <https://news.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx> (“45% [of Americans now] say the justice system is ‘not tough enough’—down from 65% in 2003 Americans are now more likely than they have been in three prior polls to describe the justice system’s approach as ‘about right’ (35%) or ‘too tough’ (14%).”).

² See ACLU, *supra* note 1 (finding that seventy-one percent of Americans believe it is important to reduce the prison population and eighty-four percent “believe that people with mental health disabilities belong in mental health programs instead of prison”); 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> (discussing support for reducing the prison sentences of non-violent criminal offenders).

³ Lopez, *supra* note 2 (finding that seventy-eight percent of people support “reducing prison time for nonviolent criminal offenders” who “have a low risk of committing another crime”).

⁴ See, e.g., ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 2* (2018) (“[W]hat is interesting about this world of subfelony enforcement is that a substantial number—perhaps even the majority—of actions terminate in a disposition that involves no jail time,

been convicted of *violent* offenses? If an answer is given at all, it seems to be that we should continue doing what we are doing.⁵

Low levels of support for reducing punishment of violent crime is a barrier to the kind of reform that advocates envision. Decarceration—at least on the order required to return the United States to the level of incarceration it experienced prior to the rapid increase in jail and prison populations beginning in the mid-1970s, or to bring it in line with most modern liberal democracies—is not possible without reducing the number of people who are in prison as a result of violent crime convictions or the length of their sentences.⁶ The numbers on this front are clear: Between 1980 and 2017, the state prison population increased from 294,000⁷ to 1.3 million, with fifty-five percent of those individuals—710,900 in all, or more than double the *total* state prison population in 1980—serving time for a violent crime conviction.⁸

and, quite often, not even a criminal conviction.”); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1069 (2015) (“Seen as a potential cure for an outsized incarcerated population, an unwieldy criminal code, and an overburdened defense bar, decriminalization has become popular both as a way of improving systemic fairness and as a cost-cutting measure.”).

⁵ See Lopez, *supra* note 2 (finding that only 29% of all voters, 42% of liberals, and 23% of conservatives support reducing prison sentences for people who have committed violent crimes); see also President Barack Obama, Remarks at the NAACP Annual Convention (July 15, 2015), <https://www.naacp.org/latest/remarks-by-the-president-at-the-naacp-annual-convention> (“Murderers, predators, rapists, gang leaders, drug kingpins — we need some of those folks behind bars. Our communities are safer, thanks to brave police officers and hardworking prosecutors who put those violent criminals in jail.”); cf. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 13 (2019) (“If anyone suggested rolling back the punishment or collateral consequences for offenses involving violence . . . they would likely be voted out of office.”).

⁶ See Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent> (explaining how “any serious attempt to halve the number of prisoners” must include reforms targeting offenders convicted of violent crimes); cf. Kevin R. Reitz, *American Exceptionalism in Crime and Punishment: Broadly Defined*, in AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT 1, 3–4 (Kevin R. Reitz ed., 2017) (“[I]n order to downsize to the same incarceration rate as England and Wales—one of western Europe’s leaders in per capita imprisonment—the United States would have to release more than 1.8 million inmates . . .”). Moreover, racial disparities cannot be reduced without addressing violent crime. Seventy-three percent of those who are in prison for violence are people of color. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 at 22 tbl.13 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

⁷ John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. LEGIS. 173, 181 (2015).

⁸ BRONSON & CARSON, *supra* note 6, at 3, 15. Incarceration, for the most part, is a state matter; nearly ninety percent of all prison inmates are housed in state prisons. *Id.* at 3 tbl.1. Whether or not a specific criminal offense constitutes a “violent crime” varies from state to state. See *infra* Section I.A.

For those who wish to see the United States reduce its prison population, reducing the amount of time people spend in prison for drug and other low-level offenses is too small a solution for too massive a problem.⁹ Violent crime cannot be sidestepped on the path to reform. “Assume that in 2013 we released half of all people convicted of property and public-order crimes, 100 percent of those in for drug possession, and 75 percent of those in for drug trafficking,” writes John Pfaff.¹⁰ “Our prison population would have dropped from 1.3 million to 950,000. . . . 950,000 prisoners is still more than three times the prison population we had when the boom began.”¹¹ Thus, in order for the United States to achieve a fifty percent or comparable reduction in its prison population, it must reduce either the number of people convicted of violent crimes or the length of their prison sentences.¹²

There is a reason why violent crime is not at the center of the current reform movement: it is difficult to talk about and harder still to imagine addressing through means other than incarceration.¹³ But both are possible. Although state criminal codes sometimes define violent crime to include behavior that most would not consider vio-

⁹ See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 5 (2015) (“Even if we could release all drug offenders today, without other major changes in U.S. laws and penal policies and practices, the United States would continue to be the world’s warden”); cf. Campbell Robertson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html> (quoting Professor Rachel Barkow as saying that “[i]f we keep working on the kinds of criminal justice reforms that we’re doing right now, it’s going to take us 75 years to reduce the population by half”).

¹⁰ JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 185 (2017).

¹¹ *Id.* Indeed, only fifteen percent of state prisoners’ most serious charge is a non-violent drug offense. BRONSON & CARSON, *supra* note 6, at 22 tbl.13.

¹² While scholars and advocates have not reached a consensus on the ideal prison population, a number of activists have identified a fifty-percent reduction as the appropriate target for their efforts. See, e.g., *About*, DREAM CORPS: #CUT50, <https://www.cut50.org/our-programs/cut50/about> (last visited June 7, 2020); see also NAZGOL GHANDNOOSH, *THE SENTENCING PROJECT, CAN WE WAIT 75 YEARS TO CUT THE PRISON POPULATION IN HALF?* 1 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/03/Can-we-wait-75-years-to-cut-the-prison-population-in-half.pdf> (“If states and the federal government maintain their recent pace of decarceration, it will take 75 years—until 2093—to cut the U.S. prison population by 50%.”). “Half of the state prison population is serving time for a violent crime . . . [and] harsher sentencing policies are resulting in longer prison terms for violent crimes than in the past.” *Id.* at 4.

¹³ Cf. Josie Duffy Rice, *My Brother, the Violent Offender*, SLATE (Aug. 14, 2017, 9:00 AM), <https://slate.com/news-and-politics/2017/08/the-criminal-justice-system-treats-violent-offenders-as-irredeemable-theyre-not.html> (arguing that the criminal justice reform movement has split offenders into two categories: non-violent offenders and “‘violent’ types who are generally considered beyond redemption or mercy”).

lent, violent crime most often does mean what first comes to mind: homicide, rape, assault, and so on.¹⁴ These sorts of crimes have a profound impact not just on those who experience them but on entire communities.¹⁵ Indeed, one of the central failures of criminal law and those who enforce it is that the communities who have felt the brunt of mass incarceration have at the same time experienced disproportionate levels of unaddressed violence.¹⁶ It is critical that an examination of the criminal law's punishment of violent crime take these harms into account.

To recognize the consequences of violence is not to abandon the belief that both the public and the criminal law express mistaken views about the people who commit violent acts and how incarceration can address their behavior.¹⁷ This Note will argue that the punishment of violence arises out of a belief that those who commit violent *acts* reveal themselves to be violent *offenders*: dangers to the public who the criminal law is responsible for locking up. This belief, in turn, helps to maintain support for the long-term incarceration of those individuals, dividing prison populations between the non-violent and violent, the low-risk and dangerous, the redeemable and irredeemable.¹⁸ Refashioning the criminal law to reduce the amount of time people spend in prison will therefore require more than advocating for changes to state sentencing schemes. It will require a concerted effort to upend prevailing beliefs about who commits violent crimes and how the criminal law should address their behavior.

As extensive scientific and sociological studies demonstrate, violence is far more complex than politicians, the media, and state criminal codes make it out to be. Age, gender, mental illness, and interpersonal relationships are just some of the factors that influence whether or not someone engages in violent behavior.¹⁹ Not reducible

¹⁴ See *infra* Section I.A (defining violent crime).

¹⁵ See generally PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* (2018) (exploring the effect of violence on life and social outcomes in American cities).

¹⁶ See Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1724 (2006) (“For a constellation of reasons, including under-funding, lack of political will, and poor police-community relations, serious crimes in inner cities often go unaddressed.”); Wesley Lowery, Kimbriell Kelly, Ted Mellnik & Steven Rich, *Murder with Impunity: Where Killings Go Unsolved*, *WASH. POST* (June 6, 2018), <https://www.washingtonpost.com/graphics/2018/investigations/where-murders-go-unsolved> (describing “dozens of American cities where murder is common but arrests are rare”).

¹⁷ Cf. BRUCE WESTERN, *HOMeward: LIFE IN THE YEAR AFTER PRISON* 185 (2018) (“Criminal justice is a poor instrument for social policy because at its core, it is a blaming institution.”).

¹⁸ See *infra* Part II.

¹⁹ See generally Michael Tonry, *Can Deserts Be Just in an Unjust World?*, in *LIBERAL CRIMINAL THEORY: ESSAYS FOR ANDREAS VON HIRSCH* 141, 147–52 (A.P. Simester, Antje

to a moral choice between good and evil, violent behavior is the product of a complex, interdependent, and often inextricable combination of competing influences. This is not to reject individual free will or the need to repudiate and deter violence through criminal punishment. Rather, the fact that these complex webs of social and environmental factors constrain the choices available to certain individuals and contribute to their decision to engage in violent behavior calls into question lawmakers' approach to punishing violent crime as a matter of individual character and inherent nature. To impose an appropriate level of punishment that rejects violence, recognizes the moral and practical limits of criminal punishment, and serves the needs of the public will require lawmakers to account for these more complex empirical realities.

Scholars, advocates, and criminal justice reform organizations have begun to focus on the issue of violence, but few have offered concrete proposals for a new approach to the punishment of violent crime.²⁰ In particular, these scholars and advocates have not offered a framework for amending the criminal law to reflect new insights into violent behavior and the limits of criminalization.²¹ What is the appro-

du Bois-Pedain & Ulfrid Neumann eds., 2014) (summarizing relevant research findings on factors correlated with crime and anti-social behavior); David P. Farrington, *Developmental and Life-Course Criminology: Key Theoretical and Empirical Issues—the 2002 Sutherland Award Address*, 41 *CRIMINOLOGY* 221 (2002) (examining the effect of age and other life events on criminal activity); Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 *CRIME & JUST.* 359 (2003) (exploring the relationship between crime and age).

²⁰ See generally JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2018) (examining the causes and consequences of violent crime in Black communities, and its connection to mass incarceration, and emphasizing the difficulty of dismantling the diffuse system that reproduces them); GOTTSCHALK, *supra* note 9 (discussing the political hurdles impeding reforms that address offenders of violent crimes); PFAFF, *supra* note 10 (discussing the need to tackle prosecutorial power in order to reduce the prison population); DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* (2019) (arguing that reducing the prison population by addressing offenders of violent crimes would require abandoning the moralistic narrative about violence and addressing the country's history of violence against people of color); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 *HARV. L. REV.* 1613, 1628 (2019) (discussing prison abolitionist projects that have "develop[ed] alternative means of preventing [and responding to] violence," such as "provid[ing] alternative first responders, mediation support, or other forms of mutual aid to those who would otherwise likely be subject to victimization, arrest, possible police violence, or incarceration"); Michelle Alexander, *Reckoning with Violence*, *N.Y. TIMES* (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> ("[I]f we fail to face violence in our communities . . . our nation will never break its addiction to caging human beings.").

²¹ Cf. Adam Gopnik, *Who Belongs in Prison?*, *NEW YORKER* (Apr. 8, 2019), <https://www.newyorker.com/magazine/2019/04/15/who-belongs-in-prison> ("What do we do about the violent carjacker, the armed robber, the brutal assailant? Such people exist, of all kinds

priate sentence for murder? For rape, sexual assault, or robbery? And more broadly, what is the role of the criminal law in responding to violent behavior? This Note fills the gap in the existing literature by focusing on the state sentencing statutes that determine the punishment of violent crime. It draws on the normative beliefs that led to, and continue to drive support for, violent crime statutes—retribution, incapacitation, and deterrence—to propose amending those statutes to reduce sentence lengths for those who have been convicted of violent crimes.

Part I of this Note describes how state criminal codes define and punish violent crime and then discusses the relationship between the punishment of violent crime, the incarceration rate, and the overall state prison population. Part II explores the social and political circumstances that led to the creation of violent crime statutes and challenges the belief that these statutes can be justified by reference to the penological ends of incapacitation, deterrence, and retribution. Part III proposes a new violent crime sentencing statute framework for state legislators who wish to reduce the number of people in their prisons. Taking second-degree murder as an example, it applies that framework to show that the penological rationales of incapacitation, deterrence, and retribution could be served by a sentencing statute that incorporates a fifteen-year maximum sentence.

I

MASS INCARCERATION AND THE PUNISHMENT OF VIOLENCE

A number of scholars have begun to focus on the harsh punishment of violent crime as an underexplored but critical driver of mass incarceration.²² What, though, *is* violent crime? And what is the relationship between the criminal punishment of violence and the nation's incarceration rate? This Part answers those questions. Section I.A reviews how states define violent crime. Section I.B explores the range of consequences that flow from a violent crime conviction.

A. *Defining Violent Crime*

“Violent crime” does not refer to a specific substantive criminal offense but instead to a collection of offenses—such as murder, rape, and assault—that state criminal codes categorize as violent for the purpose of imposing sentencing enhancements. Thus, an individual

and colors, and wishing away the problem of impulsive evil by assimilating it to the easier problem of our universal responsibility for social inequities doesn't help solve it.”).

²² See *supra* note 20.

cannot be arrested and convicted for violating a state's law against violent crime. Rather, an individual who has been convicted of a violent crime is someone who has been convicted of a particular substantive offense that the state defines as a violent crime in a separate sentencing statute.

What is or is not defined as a violent crime depends in large part on the jurisdiction, context, and time period in which the term is being used.²³ The Bureau of Justice Statistics (BJS), which collects and compiles the state corrections demographic data discussed throughout this Note, defines violent crime as murder, manslaughter, rape or sexual assault, robbery, and aggravated or simple assault.²⁴ Thus, the 710,000 individuals who are incarcerated in state prisons for committing a violent crime have been convicted of one of those enumerated offenses.²⁵ BJS's use of these categories generally tracks the Federal Bureau of Investigation's Uniform Crime Reports (UCR), a standard criminal data source that collects data from state and local police departments and is often used in the media and academic studies.²⁶ The UCR's list of "index" crimes includes homicide, rape, robbery, aggravated assault, burglary, larceny, motor vehicle theft, and arson.²⁷ While the BJS and UCR datasets are valuable sources of information, both of them understate the number of people who are serving time for violent offenses. State criminal codes are often far more expansive in their definitions of "violent crime" than either source.²⁸

²³ See JUSTICE POLICY INSTITUTE, *DEFINING VIOLENCE: REDUCING INCARCERATION BY RETHINKING AMERICA'S APPROACH TO VIOLENCE* 5 (2016), http://www.justicepolicy.org/uploads/justicepolicy/documents/jpi_definingviolence_final_report.pdf ("Each state has the ability to determine what is and is not violent crime, and whether it will be classified as a felony, a misdemeanor offense, and the consequences a conviction for these offenses will carry.")

²⁴ *Violent Crime*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=TP&tid=31> (last visited June 6, 2020).

²⁵ See BRONSON & CARSON, *supra* note 6, at 15.

²⁶ *Uniform Crime Reporting (UCR) Program*, CRIM. JUST. INFO. SERVS., FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/services/cjis/ucr> (last visited June 6, 2020).

²⁷ *UCR Offense Definitions*, UNIFORM CRIME REPORTING STAT., <https://www.ucrdatatool.gov/offenses.cfm> (last visited June 6, 2020) (explaining that these particular offenses "were chosen because they are serious crimes, they occur with regularity in all areas of the country, and they are likely to be reported to police").

²⁸ In New York, for example, Penal Law 70.02, titled "Sentence of imprisonment for a violent felony offense," defines and authorizes the punishments for violent offenses. N.Y. PENAL LAW § 70.02 (McKinney 2020). It includes four categories of violent offenses that range from Class B to Class E violent felonies. Murder, sexual assault, and the illegal sale of a weapon are among the enumerated Class B violent felonies. *Id.* § 70.02(a). While burglary in the second degree, hindering prosecution of terrorism in the second degree, and assault on a peace officer, police officer, firefighter, or emergency medical services professional are among the Class C violent felonies. *Id.* § 70.02(b). And Class D and E violent felonies include filing a false report and persistent sexual abuse. *Id.* § 70.02(c)-(d).

The separation of violent crime as something separate and apart from other crimes expresses a belief that the law should take special account of both violence and those who engage in it. State violent crime sentencing statutes suggest that there is something that distinguishes violent from non-violent crimes and that the former should be punished more punitively than the latter. Although the act of dividing criminal offenses between the violent and non-violent might seem uncontroversial and straightforward, state sentencing statutes did not make such distinctions until the mid-1970s.²⁹ Alice Ristroph makes this point well when she writes, “Violence is a concept both intuitively familiar and highly manipulable Across time and jurisdictions, the criminal law has constructed violence differently.”³⁰ As Section I.B will demonstrate, shifts in the construction of violence have had a significant impact on the number of people incarcerated in American prisons.

B. *Punishing Violent Crime*

The designation of a particular crime as “violent” often results in the offense receiving a longer sentence and altered terms of imprisonment relative to non-violent offenses. In addition to determining how the criminal legal system treats the person while he is incarcerated, this designation also sends a signal to actors outside of the legal system that the person is a violent *individual*, leading to a particular set of civil collateral consequences, such as exclusion from public benefits, that continue to affect the individual after he is released from prison.³¹

To see how sentencing practices differ between non-violent and violent offenses, take for example the crime of aggravated criminal possession of a weapon, a class C felony in New York. Under New York’s general sentencing statute, class C felonies are subject to an indeterminate period of incarceration (i.e., the judge will set the minimum and maximum terms of incarceration, but the State’s parole board will determine when the individual is released) of at least three

Other state criminal codes, with some variation, follow a similar practice. *See, e.g.*, CAL. PENAL CODE § 667.5(c) (West 2020); FLA. STAT. § 775.084 (2019); OHIO REV. CODE ANN. § 2923.132(A)(2) (West 2019).

²⁹ *See infra* Section II.A.1.

³⁰ Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 574–75 (2011).

³¹ *See* NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, THE NEXT STEP: ENDING EXCESSIVE PUNISHMENT FOR VIOLENT CRIMES 36–37 (2019), <https://www.sentencingproject.org/wp-content/uploads/2019/04/The-Next-Step.pdf> (discussing collateral consequences of a violent crime conviction).

and not more than fifteen years.³² Because New York defines aggravated criminal possession of a weapon as a class C *violent* crime, however, the offense is instead sentenced under New York's violent crime statute.³³ Rather than an indeterminate sentence of three to fifteen years, the defendant is subject to a determinate sentence (i.e., the judge will set the exact amount of time the individual will be incarcerated for, meaning he will not be eligible for parole) of at least five but not more than fifteen years.³⁴ The designation of aggravated criminal possession of a weapon as a violent offense thus transforms both the kind of sentence (from an indeterminate to a determinate one) and the minimum length of the sentence (from three to five years).

In addition to setting baseline sentences for violent offenses, sentencing statutes also tailor the term of incarceration to individuals' previous convictions, leading to even longer sentences for those who have been convicted of multiple violent crimes. New York's criminal code includes two such provisions. The first, Penal Code 70.04, authorizes the sentencing of a "second violent felony offender."³⁵ If the person has been convicted of a violent felony in the past, a second violent felony conviction will result in an enhanced sentence. The mandatory minimum and maximum for a second-time convicted offender, compared to those for first-time offenders, are as follows: 10–25 years for a class B felony (up from 5–25 years); 7–15 years for a class C (3.5–15); 5–7 years for a class D (2–7); and 3–4 years for a class E (1.5–4).³⁶

Similarly, the second provision, Penal Code 70.08, provides for the sentencing of a "persistent violent felony offender," which the statute defines as someone who "stands convicted of a violent felony offense . . . after having previously been subjected to two or more predicate violent felony convictions"³⁷ The statute sets the max-

³² N.Y. PENAL LAW § 70.00 (McKinney 2019). Although this provision of the penal law is set to expire in September 2021, when it will be replaced by a determinate sentencing framework, it is unlikely that such a change will in fact occur. The New York Legislature has repeatedly extended this provision over the past three decades. See N.Y. STATE PERMANENT COMM'N ON SENTENCING, A PROPOSAL FOR "FULLY DETERMINATE" SENTENCING FOR NEW YORK STATE: A RECOMMENDATION TO THE CHIEF JUDGE OF THE STATE OF NEW YORK at 16 (2014), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-12/Determinate%20Sentencing%20Report%20Final%20Delivered.pdf> (cataloguing the renewals).

³³ N.Y. PENAL LAW § 70.02(1)(b).

³⁴ *Id.* § 70.02(3)(b).

³⁵ *Id.* § 70.04.

³⁶ Compare *id.* § 70.04(3) (enumerating the sentences for second violent felony offenders), with *id.* § 70.02(3) (enumerating the sentences for first-time violent felony offenders).

³⁷ *Id.* § 70.08.

imum sentence for a persistent violent offender at 25 years, regardless of the felony, and the minimum at 20 years for class B (up from 5 years for a first-time offender), 16 years for class C (3.5), and 12 years for class D (2) violent felonies.³⁸

Returning to the example of the aggravated criminal possession of a weapon, it is not immediately clear that whether a defendant receives a minimum sentence of three, five, or seven years, or whether he is eligible for parole or not, will have a measurable impact on the nation's overall incarceration rate. What difference do two extra years make when there are 50,000 people incarcerated in prisons in New York and 2.3 million in the United States as a whole?³⁹

The answer, it turns out, is that these differences in how states punish violent crime have made, and continue to make, a substantial difference in the size of state prison populations.⁴⁰ While some might find it hard to imagine, sentences of incarceration for violent offenses, including for the most serious crimes such as murder, used to be far shorter across the board.⁴¹ For example, the average time served for murder in 1981 was five years.⁴² As of 2000, it had increased to 16.9 years—an increase of 238% since 1981.⁴³ Similar increases occurred with respect to other traditional violent crimes, such as aggravated assault, burglary, and robbery. Between 1980 and 2000, the average time served for those offenses increased eighty-three, forty-one, and seventy-nine percent, respectively.⁴⁴

Moreover, the relationship between the punishment of violent crime and state prison populations has strengthened over time.⁴⁵ Between 1980 and 1990, the overall state prison population increased from 294,000 to 681,400.⁴⁶ In that same time period, the number of

³⁸ Compare *id.* § 70.08(3) (enumerating the sentences for persistent violent felony offenders), with *id.* § 70.02(3) (enumerating the sentences for first-time violent felony offenders).

³⁹ See *New York Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/NY.html> (last visited July 24, 2020); Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.

⁴⁰ While not the focus of this Note, these sentencing enhancements also have a substantial and permanent impact on the individuals who are sentenced under them—both during their time in prison and long afterwards. See generally WESTERN, *supra* note 17.

⁴¹ See generally NAT'L RESEARCH COUNCIL ET AL., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33–69 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter GROWTH OF INCARCERATION] (noting this fact and offering an account of its cause).

⁴² *Id.* at 53.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See PFAFF, *supra* note 10, at 187 (exploring the relationship over time).

⁴⁶ *Id.* at 33 tbl.1.2.

people serving time for violent offenses increased from 173,300 to 316,600.⁴⁷ Individuals convicted of violent offenses were therefore responsible for thirty-six percent of the overall increase in the prison population.⁴⁸ This trend continued at an even faster rate in the 1990s and through the 2000s. Between 1990 and 2009, the imprisonment of individuals convicted of violent offenses contributed to sixty percent of the overall increase in the state prison population.⁴⁹

If the goal is to scale back the reach of the American criminal justice system, the issue is clear: State prisons are full of people who have been convicted of violent offenses, and the length of their sentences means that those individuals will remain in prison for long periods of time to come. Understanding what led the public and lawmakers to support singling out violence for more punitive treatment in state criminal codes between the 1970s and 1990s provides insight into how that trend can be reversed. Part II of this Note turns to the political and social events that generated support for the creation of violent crime statutes and the imposition of ever-longer sentences in order to understand what lawmakers meant to achieve through violent crime statutes and to determine whether those statutes were necessary to achieve their goals.

II

LAWMAKERS' (MISTAKEN) NOTIONS OF VIOLENT CRIME

The modern prevalence of violent crime statutes and their intuitive appeal mask the fact that criminal codes, for the most part, did not impose sentencing enhancements for violent offenses until the 1970s and 1980s. Section II.A explores what led lawmakers and the public to believe that changes in the criminal law were needed to address violent crime and what lawmakers meant to achieve through the creation of violent crime statutes. Section II.B then shows how both the public and lawmakers relied on incomplete empirical and normative notions of who commits violent crimes and of the need for more punitive sentencing enhancements to provide retribution and ensure deterrence and incapacitation.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

A. Sentencing Reform and the Punishment of “Violent Offenders”

Prior to the mid-1970s, state criminal codes made little to no mention of “violent crime.”⁵⁰ States showed little interest in adopting sentencing statutes defining and punishing violence as a distinct social ill that required action in addition to the enforcement of preexisting prohibitions on murder, assault, and other such violent offenses. It was not until the mid-1970s and 1980s, at a time when the United States was experiencing rising crime rates and a series of radical transformations in its dominant penological theories and sentencing practices, that explicit sentencing enhancements for violent felonies began to enter state criminal codes.⁵¹ What events were responsible for these changes? Why did both the public and legislators believe that changes to state criminal codes were necessary to address violent behavior? And how did those beliefs shape the resulting statutes and the enhanced punishment of violence? This Section takes up those questions.

1. Ramping Up the Punishment of Violent Crime: 1960–2000

The United States experienced a dramatic rise in crime beginning in the 1960s and lasting until the mid-1990s.⁵² What seized the public’s attention, though, was not just a general increase in crime, but violent crime in particular.⁵³ In 1960, the national violent crime rate stood at 160.9 violent offenses per 100,000 residents; as of 1985 it had reached 558.1.⁵⁴ And in New York, a state of above-average levels of violence, the violent crime rate increased from 325.4 per 100,000 in 1965 to

⁵⁰ See David Alan Sklansky, *The Jurisprudence of Blood: How Law Thinks About Violence* 34–36 (Sept. 2018) (unpublished manuscript) (on file with author) (engaging in a historical analysis of the role that violence has played in criminal law); see also Ristroph, *supra* note 30, at 603–04 (noting a similar shift in federal sentencing statutes).

⁵¹ See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); Michael Tonry, *Sentencing in America, 1975–2025*, 42 *CRIME & JUST.* 141 (2013).

⁵² For a good overview of this phenomenon, see PFAFF, *supra* note 10, at 1–4, 8–9 (measuring increases in crime and punishment). See also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 246–49 (2011) (noting the rise in crime and discussing its relationship with the rise in criminal punishment).

⁵³ See Lisa L. Miller, *Making the State Pay: Violence and the Politicization of Crime in Comparative Perspective*, in *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT*, *supra* note 6, at 298, 311 (“[P]ublic and political attention to crime, as measured by congressional hearings on crime topics, rose dramatically with the significant increases in violence between the 1960s and 1980s.”); see also SHARKEY, *supra* note 15, at 115–45 (discussing the rise in violent crime and its social and political consequences).

⁵⁴ *State and National Crime Estimates by Year(s)*, UNIFORM CRIME REPORTING STAT., FED. BUREAU OF INVESTIGATION, <https://www.bjs.gov/ucrdata/Search/Crime/State/StateCrime.cfm> (last visited June 20, 2020).

1180.9 in 1990.⁵⁵ From 1987 to 1994, the number of murders and non-negligent manslaughters in New York did not dip below 2000.⁵⁶

As the number of violent crimes increased and a sense of disorder took hold across the nation, politicians made two significant and inter-related changes to criminal codes in an attempt to turn back the rising tide. First, legislators began to single out violent crime in state sentencing statutes as a distinct subset of criminal offenses. Second, once lawmakers defined violent crime in state sentencing statutes, their next move was to increase its punishment. Amending state sentencing practices enabled lawmakers to use the criminal code to communicate with their constituents, telling the public that the criminal law of old was failing them. Rehabilitation, indeterminate sentences, and the prevailing penological theories of experts and academics were rejected as no longer being up to the task of imposing order and protecting the public from so-called “violent offenders.”⁵⁷ Those theories, politicians argued, were based on inaccurate notions of crime, imposing light sentences of incarceration that allowed violent individuals to roam free and victimize communities time and time again.⁵⁸ Replacing those laws with far more punitive ones, based on theories of retribution, incapacitation, and deterrence, communicated to the voters that politicians shared their frustration and were doing something about it.⁵⁹

New York provides a useful illustration of the broader trend in the criminal punishment of violence during this time period. Prior to the 1970s, New York operated under a criminal code that was standard for the time: The code embodied the rehabilitative ideal—that the individual could be reformed through individualized attention and programming—by using indeterminate sentences that allowed professional state actors to work with inmates until the programming was

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See GARLAND, *supra* note 51, at 20 (describing the repudiation of expertise in criminal justice policymaking); Tonry, *supra* note 51, at 151 (“By the mid-1970s every major element of indeterminate sentencing was contested and all of its underlying premises were challenged.”).

⁵⁸ See Michael C. Campbell & Heather Schoenfeld, *The Transformation of America’s Penal Order: A Historicized Political Sociology of Punishment*, 118 AM. J. SOC. 1375, 1399 (2013) (“[Law enforcement and victims’ interest groups] argued that the only way to keep violent criminals off the streets was to build more prisons, that it was less expensive to house prisoners than let them roam the streets, and that the system protected criminals’ rights at the expense of victims.”).

⁵⁹ See *id.* at 1393 (“[L]awmakers across the states . . . agreed that the penal status quo was untenable and initiated a series of reform efforts aimed at strengthening the criminal justice system.”); see also Ristroph, *supra* note 30, at 618 (“Through the image of the victim, the specter of violent crime has become a form of governing.”).

deemed complete and the individual rehabilitated and ready for release.⁶⁰ “Penal welfarism,” as David Garland describes the dominant penological scheme of the time, “combin[ed] the liberal legalism of due process and proportionate punishment with a correctionalist commitment to rehabilitation, welfare and criminological expertise.”⁶¹

Beginning in the mid-1970s, however, state criminal codes came under attack from all sides. Among liberal reformers, a consensus began to form that state actors had too much power and discretion that enabled them to make racist and classist decisions about who should be punished and how.⁶² Conservative critics, on the other hand, saw rehabilitation as a failed experiment and pushed instead for sentencing based on just deserts, incapacitation, and deterrence principles.⁶³ James Q. Wilson, for instance, “argued that deterrent considerations should fix the general level of sentencing and that dangerous or repetitive criminals should be sentenced to extra-long, incapacitative sentences and[] in some cases to death.”⁶⁴ These two lines of criticism were part of a broader dissatisfaction with the administration of criminal justice. As Garland puts it, “Influenced by negative research reports and increasing crime rates, but also by a pervasive sense of disillusionment and pessimism, one institution after another began to be viewed as ineffective or counter-productive.”⁶⁵

In response to this growing dissatisfaction and unrest, states like New York discarded the indeterminate sentencing model in favor of “parole guidelines, voluntary and presumptive sentencing guidelines, determinate sentencing statutes, [and] appellate review of sentencing.”⁶⁶ These changes put retribution, incapacitation, and deterrence at the core of state correctional principles and transferred power over sentencing decisions from judges and parole boards to legislatures and prosecutors.⁶⁷ The Rockefeller drug laws, adopted in

⁶⁰ See N.Y. STATE COMM’N ON SENTENCING REFORM, *THE FUTURE OF SENTENCING IN NEW YORK STATE: A PRELIMINARY PROPOSAL FOR REFORM* 4–8 (2007) [hereinafter COMM’N ON REFORM].

⁶¹ GARLAND, *supra* note 51, at 27, 38.

⁶² See Tonry, *supra* note 51, at 151 (“Broad, unregulated discretions were said to permit idiosyncratic, arbitrary, and racist decisions.”).

⁶³ See *id.* (“Indeterminate sentencing was widely thought . . . to be predicated on a capacity to rehabilitate offenders that did not exist.”).

⁶⁴ GARLAND, *supra* note 51, at 60.

⁶⁵ *Id.* at 61.

⁶⁶ Tonry, *supra* note 51, at 149.

⁶⁷ See Ronald F. Wright, *Charging and Plea Bargaining as Forms of Sentencing Discretion*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 247, 259–60 (Joan Petersilia & Kevin R. Reitz eds., 2012) (concluding that “[s]tructured sentencing laws do appear to increase the power of prosecutors”); COMM’N ON REFORM, *supra* note 60, at 8 (“Rehabilitation was cast aside in favor of retribution and incapacitation as the most valid purposes of sentencing.”); Katherine Beckett & Bruce Western, *Governing Social*

New York in 1973, embodied the emerging attitudes toward criminal sentencing policies. In addition to requiring incarceration for all drug offenses, the drug laws imposed, for the first time, mandatory determinate sentences on second felony offenders.⁶⁸

Speaking on the New York Senate floor five years after the Rockefeller drug laws were enacted, state Senator Barclay remarked that, “[h]ardly a day goes by without reports of murder, rape, muggings and other vicious violent crimes Our present law cannot cope with these problems. The result is that the adult offender and juvenile offenders are returned to the streets time and time again to resume this heinous conduct.”⁶⁹ In short order the New York legislature enacted the three violent crime sentencing statutes discussed in Part I, which introduced into New York’s criminal code a list of “violent felony offenses” and authorized enhanced sanctions for individuals convicted of multiple violent offenses.⁷⁰

The New York Legislature amended its violent crime statute in 1995 and 1998, increasing sentence lengths and imposing determinate sentences for all violent felonies.⁷¹ In a press release discussing these reforms, Sheldon Silver, the Democratic Speaker of the New York Assembly, declared: “[T]he New York State Legislature has enacted the toughest crime laws in a generation.”⁷² Silver stressed that “[t]he New York State Assembly is committed to ensuring that violent criminals receive severe punishments, and that all New Yorkers feel safer—whether they’re on the streets, at home, at school, or in the workplace.”⁷³ His press release went on to note that the new “laws have given prosecutors new tools to put violent offenders behind bars

Marginality: Welfare, Incarceration, and the Transformation of State Policy, 3 PUNISHMENT & SOCIETY 43, 46 (2001) (“[T]he goals of incapacitation, deterrence and retribution have enjoyed something of a renaissance, and the US penal system has expanded dramatically.”).

⁶⁸ Comm’n on Reform, *supra* note 60, at 8.

⁶⁹ Act of July 18, 1978, Bill Jacket, N.Y. Laws, Ch. 481, 285–86 (1974) (statement of Senator Barclay), *quoted in* Charles McKenna, *Penal Law § 70.08: Multiple Prior Sentences and Not Convictions Are Required Before a Defendant May Be Sentenced as a Persistent Felony Offender*, 59 ST. JOHN’S L. REV. 185, 186 n.107 (1984).

⁷⁰ COMM’N ON REFORM, *supra* note 60, at 8–9. Violent crime also became a national political issue. *See* President William J. Clinton, State of the Union Address (Jan. 25, 1994), *available at* <https://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou94.htm> (“Violent crime and the fear it provokes are crippling our society.”).

⁷¹ COMM’N ON REFORM, *supra* note 60, at 11–13.

⁷² Press Release, Sheldon Silver, Joseph Lentol & Daniel Feldman, The Toughest Crime Laws in a Generation: A Summary of Recent Significant Criminal Justice Laws Passed by the New York State Assembly (Apr. 1997), <https://assembly.state.ny.us/Reports/Codes/199704>.

⁷³ *Id.*

and victims the knowledge that violent offenders can be incarcerated for a significant period of time.”⁷⁴

As the above discussion makes clear, changes to state sentencing practices expressed certain social values and beliefs. During this time, race was often used to build and maintain support for severe sentences for people convicted of violent crimes. From then-candidate George H.W. Bush’s “Willie Horton” advertisement to Hillary Clinton’s “superpredators” remark, politicians sought to associate in the public’s mind the image of a black male with the threat of violence.⁷⁵ And, as Rachel Barkow has persuasively documented, the news media helped to support this political project.⁷⁶ More recently, James Forman has provided an essential account of the relationship between violent crime, race, and the punishment of violence during this period. Forman’s work rejects the one-dimensional, racist tropes that President Bush and others relied on to drive support for more severe criminal punishments, noting instead that “the same low-income young people of color who disproportionately enter prisons are disproportionately victimized by crime.”⁷⁷ But this scholarship also complicates the popular belief that black communities uniformly resisted enhancing criminal punishments in response to rising rates of violent crime.⁷⁸ For the purposes of this Note, the critical point is that race is an important, but not dispositive, factor in explaining the rise in support between the 1970s and 1990s for the enhanced punishment of individuals who had been convicted of violent crime.

More broadly, the amendments and circumstances surrounding them reflect the legislators’ belief that criminal law enforcement had failed to address violence—that existing sentencing laws were based on a previous generation’s flawed assumption that people convicted of crimes could be rehabilitated and then released back into the public. Politicians rejected that belief, using the adoption of new criminal sentencing statutes to express their view that criminal punishment should

⁷⁴ *Id.*

⁷⁵ See *This 1988 Ad About Convicted Felon Willie Horton Inspired the GOP’s Latest Attack on Tim Kaine*, WASH. POST (Oct. 3, 2016, 11:39 AM), https://www.washingtonpost.com/video/national/this-1988-ad-inspired-the-gops-latest-attack-on-tim-kaine/2016/10/03/c74931f8-8980-11e6-8cdc-4fbb1973b506_video.html (Willie Horton); *Hillary Clinton Campaign Speech*, C-SPAN (Jan. 25, 1996), <https://www.c-span.org/video/?69606-1/hillary-clinton-campaign-speech> (superpredators).

⁷⁶ See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 749 (2005) (“[B]ecause law enforcement is the media’s main source of information on crime, government officials can prompt the media to focus on those areas it wants to highlight.”).

⁷⁷ James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 50 (2012).

⁷⁸ See generally FORMAN, *supra* note 20, at 119–50 (documenting how the war on crime was supported by leaders in the Black community).

be used to manage the risk that violent individuals pose to the public, responding to violence with the retributive and incapacitative power of imprisonment.⁷⁹ Violent crime became a core focus of criminal law-making, and lawmakers saw long-term sentences of incarceration as their most effective tool.

2. *Modern Beliefs: 2000–2019*

Perhaps as a result of significant decreases in the national rate of violent crime since the 1990s—which experts attribute less to increases in incarceration and more to a combination of economics and social factors, such as changes in average income and age⁸⁰—the notion that individuals who commit violent crimes should continue to be sentenced to long terms of incarceration remains popular.⁸¹ A 2016 Vox/Morning Consult poll, for instance, found that only twenty-nine percent of registered voters support reducing prison time for “[p]eople who committed a violent crime and have a low risk of committing another crime.”⁸² The fear of violence and the individuals responsible for it that took hold in the 1970s and 1980s remains powerful in the popular imagination.

This view of violence enables it to serve an important function in political rhetoric. According to Alice Ristroph, “Through the image of the victim, the specter of violent crime has become a form of governing.”⁸³ Illustrating this approach to governance, Senator Tom

⁷⁹ See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350–51 (1997) (arguing that “[t]he public expects criminal law to protect it from harm, but it also understands the kinds of things the law punishes, and how much, to express shared valuations”).

⁸⁰ See Inimai M. Chettiar, *The Many Causes of America’s Decline in Crime*, ATLANTIC (Feb. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364> (finding that the “growth in incarceration was responsible for approximately 5 percent of the drop in crime in the 1990s” and that “increases in incarceration [since the 1990s] have had essentially zero effect on crime”); see also WESTERN, *supra* note 17, at 178 (“[T]he fourfold growth in incarceration rates from the 1970s to the 2000s reduced crime only slightly, accounting for perhaps just 10 percent of the 1990s crime decline.”).

⁸¹ See STUNTZ, *supra* note 52, at 244–45 (“In the 1990s and early 2000s, America’s rate of violent crime fell by more than a third. We live in a safer country than the one our predecessors knew We also live in a more punitive country—by a huge margin—than at any time in American history.”).

⁸² MORNING CONSULT, NATIONAL TRACKING POLL #160812 at 51 tbl.VX4_3 (Sept. 1–2, 2016), https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7052005/160812_crosstabs_Vox_v1_AP.0.pdf. By contrast, that same poll found that seventy-eight percent of registered voters support reducing sentence lengths for non-violent offenders who have a low risk of committing another crime. *Id.* at 45 tbl.VX4_1.

⁸³ Ristroph, *supra* note 30, at 618; see also JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (making this point more broadly).

Cotton warned of the consequences of a statute that would reduce sentences for certain individuals: “If the [federal First Step Act] is passed, thousands of federal offenders, including violent felons and sex offenders, will be released earlier than they would be under current law. Whatever word games the bill’s proponents use will make no difference to the future victims of these felons.”⁸⁴ Donald Trump, while running for president in 2016, echoed Senator Cotton’s sentiment when he warned that Hillary Clinton’s criminal justice agenda was “to release the violent criminals from jail. She wants them all released.”⁸⁵

On the other end of the spectrum, a number of politicians see the looming need to reform how the nation punishes violence but have made a conscious choice to contrast non-violent offenders with violent ones in order to secure political benefits for the former. For example, President Barack Obama, discussing the relationship between the punishment of violent crime and current prison populations, remarked:

I think it’s smart for us to start the debate around non-violent drug offenders. You are right that that’s not going to suddenly hal[ve] our incarceration rate, but if we get that . . . then that becomes the foundation upon which the public has confidence in potentially taking a future step and looking at [violent crime] sentencing changes down the road.⁸⁶

President Obama is not alone in believing in the “low-hanging fruit” approach to criminal justice reform—the view that reform efforts will first have to address the punishment of non-violent offenders before moving on to violent ones.⁸⁷ This belief in incremental change, starting with “nonviolent, nonserious, and nonsexual offenders”—what Marie Gottschalk terms the “non, non, nons”—is common among politicians.⁸⁸

⁸⁴ Tom Cotton, *What’s Really in Congress’s Justice-Reform Bill*, NAT’L REV. (Nov. 26, 2018, 10:48 AM), <https://www.nationalreview.com/2018/11/first-step-criminal-justice-reform-bill-whats-in-it/> (discussing the First Step Act of 2018).

⁸⁵ Louis Jacobson, *Donald Trump Wrong that Hillary Clinton Wants to Release All Violent Criminals from Prison*, POLITIFACT (May 26, 2016), <https://www.politifact.com/truth-o-meter/statements/2016/may/26/donald-trump/donald-trump-wrong-hillary-clinton-wants-release-a/> (debunking the statement).

⁸⁶ President Barack Obama, Remarks by the President in Arm Chair Discussion on Criminal Justice with Law Enforcement Leaders (Oct. 22, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/10/22/remarks-president-arm-chair-discussion-criminal-justice-law-enforcement>.

⁸⁷ See FORMAN, *supra* note 20, at 229 (“Defenders of the nonviolent-offenders-only approach suggest that it is just a start. Reform must begin with nonviolent offenders, they say, but others might benefit later.”).

⁸⁸ GOTTSCHALK, *supra* note 9, at 165.

As Gottschalk has argued, there is a risk that the low-hanging fruit approach will undermine the long-term goal of decarceration that it purports to aim for, by perpetuating a false divide between the non, non, nons and violent offenders. Gottschalk has documented the effect of this approach through what she terms “split verdicts”—instances in which voters approved laws scaling back punishment for certain low-level offenses while also voting to *increase* punishment for violent offenses.⁸⁹ For example, in 2010 South Carolina enacted sentencing reforms:

equalizing the penalties for possession of crack and powder cocaine, authorizing greater use of alternatives to incarceration for people convicted of nontrafficking drug offenses, and reducing the maximum penalty for burglary. However, South Carolina lawmakers also redefined twenty-two crimes as violent ones that qualify for enhanced penalties, expanded the list of crimes that are eligible for [life without parole] sentences, and further toughened up its habitual offender statutes.⁹⁰

More recently, the federal First Step Act made a number of reforms to the federal criminal justice system but excluded certain “violent offenders” from receiving benefits such as earned time credits.⁹¹ “The First Step Act reforms our federal justice system in a responsible way that will make our communities safer and keep violent criminals . . . off our streets,” the White House said in a statement released after President Trump signed the bill into law.⁹²

Gottschalk’s criticisms notwithstanding, the low-hanging fruit approach might be the inevitable next step in the evolution of carceral politics. At its core, reforming the nation’s criminal law is less about

⁸⁹ *Id.* at 165–95; see also Marie Gottschalk, *Are We There Yet? The Promise, Perils and Politics of Penal Reform*, PRISON LEGAL NEWS (Jan. 1, 2016), <https://www.prisonlegalnews.org/news/2016/jan/1/are-we-there-yet-promise-perils-and-politics-penal-reform> (“The 3-R [reentry, justice reinvestment, and recidivism] approach to limited penal reform has been unfolding alongside a growing push to banish certain individuals, in some cases permanently, including immigrants and people convicted of violent or sexual offenses.”).

⁹⁰ GOTTSCHALK, *supra* note 9, at 167. Similar results were reached in Florida and New York. *Id.* at 167–68.

⁹¹ See FAMILIES AGAINST MANDATORY MINIMUMS, FREQUENTLY ASKED QUESTIONS ON THE FIRST STEP ACT, S. 756 at 3, <https://famm.org/wp-content/uploads/First-Step-Act-FAQs.pdf> (noting this exclusion).

⁹² Press Release, White House, President Donald J. Trump Secures Landmark Legislation to Make Our Federal Justice System Fairer and Our Communities Safer (Dec. 21, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-secures-landmark-legislation-to-make-our-federal-justice-system-fairer-and-our-communities-safer>.

technocratic solutions than it is about political power.⁹³ It is improbable that reformers would have been able to spark a national conversation about the problems of over-criminalization and over-punishment by highlighting the fate of violent individuals rather than low-level drug users. If that is the case, then it might also be true that efforts to address the punishment of violence should focus first on restricting its definition rather than reducing its punishment. Restricting the definition of violence to the actual or threatened use of physical force could limit the number of people who are sentenced under harsh violent crime statutes. As John Pfaff has noted, however, restricting the definition of violence is unlikely to have a substantial impact on incarceration rates.⁹⁴ While that does not make revisiting state criminal codes' definitions of violence a misuse of time, it does serve as a reminder that achieving a substantial reduction in the national prison population will ultimately require reducing sentence lengths for even the most violent of violent crimes.

B. Toward a More Complete Account of Violent Behavior

Current criminal punishments fail to reflect the full state of modern scientific and sociological research about individuals who commit violent crimes and the limits of criminal punishment in addressing their behavior. This research has important implications for state criminal codes. As Section II.A demonstrated, lawmakers sought to create violent crime statutes that served the penological ends of retribution, incapacitation, and deterrence. This Section will explore whether those statutes and their normative underpinnings align with the empirical evidence about violent offending. Finding that the evidence is more complex than lawmakers have made it out to be, this Section suggests that the traditional theories of punishment support revising violent crime statutes to impose shorter sentences.

⁹³ Cf. Franklin E. Zimring, *Imprisonment Rates and the New Politics of Criminal Punishment*, 3 SOC'Y & PUNISHMENT 161, 165 ("It is probable that the politics of criminal punishment now play a much more important role in determining prison populations than in earlier eras."); Gottschalk, *supra* note 89 ("The fixation on emphasizing technocratic, expert-driven solutions to the problem of the carceral state denies the fundamental role of politics, emotion and culture in meting out punishment and in defining good and bad penal policy.").

⁹⁴ See PFAFF, *supra* note 10, at 187 ("300,000 people, or nearly one in four prisoners, [are] serving time for killing someone or for armed robbery.").

1. Incapacitation

“Wicked people exist,” James Q. Wilson wrote in 1975.⁹⁵ “Nothing avails except to set them apart from innocent people.”⁹⁶ Although pointed, Wilson’s view was and remains within the mainstream when it comes to people convicted of violent offenses. Indeed, incapacitative punishment—segregating people convicted of violent crimes from the public through long-term imprisonment—has been one of the strongest driving forces behind increased sentence lengths for individuals convicted of violent offenses.⁹⁷ Legislators and large portions of the public view individuals who commit violent crimes as posing an ongoing, existential threat to the public and thus as appropriate targets for long-term incarceration.⁹⁸ On this view, incapacitation is a logical response to violent offending. But is Wilson correct? According to social science research on criminal punishment and offending, the relationship between the two is more complicated than Wilson makes it out to be.

It is important to make clear at the outset that incapacitation *does* work, at least in one sense. Taking those who commit violent offenses off the streets prevents them from committing further violent crimes during their term of incarceration.⁹⁹ This observation is underscored, to some extent, in the relationship between the massive increases in incarceration and the reduction in violent crime between the mid-1970s and 1990s.¹⁰⁰ If one seeks to maximize short-term crime prevention to the exclusion of other societal values, imprisonment is an inefficient but effective means of accomplishing that goal. Given the benefits of incapacitative punishment, the question is to what extent lawmakers should consider competing values that cut against imposing long sentences of incarceration.

⁹⁵ JAMES Q. WILSON, *THINKING ABOUT CRIME* 248 (rev. ed. 2013).

⁹⁶ *Id.*

⁹⁷ See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 831 (2001) (“From Robert Kennedy’s war on organized crime and Lyndon Johnson’s war on poverty, crime and disorder, to Richard Nixon’s war of ‘the peace forces’ against ‘the criminal forces,’ ‘the enemy within,’ the war on crime evolved into an extended comprehensive police action to exterminate crime by incapacitating criminals.” (footnotes omitted)).

⁹⁸ See *supra* note 5 and accompanying text.

⁹⁹ See generally FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* (1995) (exploring the effectiveness of incapacitation).

¹⁰⁰ See BARKOW, *supra* note 5, at 45 (noting that “the increase in incarceration from the early 1970s to early 1990s may be responsible for between 6% and 25% of the crime reduction in that period”). Of course, incarceration does not eliminate violence altogether and unaddressed prison violence is a serious and ongoing concern. SERED, *supra* note 20, at 64–67, 75–77.

When New York State Assembly Speaker Silver boasted that the legislature was taking violent offenders off the streets,¹⁰¹ he was giving voice to a narrow view of incapacitation that fails to account for a number of important costs. To start, imprisonment doesn't put an end to violence. Individuals in prison are individuals who cannot commit crimes against the public, but that does nothing to prevent violence from occurring within prison walls.¹⁰² Legislators and the public might brush this off; after all, the purpose of incapacitative punishment is to make the *public*, not those who committed violent acts, safer. Perhaps more important, then, is the fact that incarceration might also put the public at greater risk in the long run. Around ninety-five percent of prisoners ultimately return home and their exposure to violence in prison, coupled with the lack of rehabilitation services and post-incarceration exclusion from social networks, often leads them to engage in more violent offending upon release.¹⁰³

Even assuming that incapacitation justifies incarcerating people until a risk assessment or some other predictive tool suggests that they will desist from committing future crimes, it is difficult to argue that current violent crime statutes are justified on an incapacitative basis. First, research has found that it is exceedingly difficult to identify the individuals who present long-term risks. Panel research has found that an individual's past criminal behavior serves as a poor predictor of his future conduct.¹⁰⁴ After "examin[ing] trajectories of offending over the life course of delinquent boys followed from ages 7 to 70," Robert Sampson and John Laub concluded "that childhood prognoses account poorly for long-term trajectories of offending."¹⁰⁵ In other words, it is difficult to predict an individual's propensity to continue to engage in criminal behavior based on the limited data available when that person is sentenced.¹⁰⁶

¹⁰¹ See *supra* notes 72–74 and accompanying text.

¹⁰² See SERED, *supra* note 20, at 64–67, 75–77 (discussing the pervasiveness of physical and sexual violence in prison).

¹⁰³ See BARKOW, *supra* note 5, at 56–72 (cataloging prison conditions and their consequences for public safety).

¹⁰⁴ See GOTTSCHALK, *supra* note 9, at 168 ("It is well established in the criminology literature that 'the current offense that one commits is a very poor predictor of the next offense.'" (quoting Robert J. Sampson, *The Incarceration Ledger: Toward a New Era in Assessing Societal Consequences*, 10 CRIMINOLOGY & PUB. POL'Y 819, 823 (2011))); PFAFF, *supra* note 10, at 192–93 (discussing this issue).

¹⁰⁵ Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 555, 555 (2003).

¹⁰⁶ Cf. Marc Morjé Howard, Opinion, *The Practical Case for Parole for Violent Offenders*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/opinion/violent-offender-parole-sentencing-reform.html> (arguing that individuals convicted of violent crimes should be given opportunities after sentencing to demonstrate their fitness for reentry into society).

Moreover, the premise that long-term incapacitation is needed to restrain a person from continuing to engage in violent acts is at odds with one of the better understood causal factors of criminal offending—the individual’s age.¹⁰⁷ In general, research has shown that “people age into and out of the risk of engaging in criminal or antisocial behavior.”¹⁰⁸ This relationship suggests that long-term incarceration serves less of an incapacitative purpose over time, as the likelihood that released individuals would commit further crimes decreases.

One should be cautious about drawing too definite a conclusion from these studies. Not all people age out of crime.¹⁰⁹ And a significant number of people convicted of violent crimes come to prison at a point when we would expect them to have already aged out of crime.¹¹⁰ These findings raise the question of what should be done with those who appear not to have desisted from criminal wrongdoing.

A rational calculation of the appropriate punishment for a certain offense would take all of this information into account. There are both costs and benefits to incapacitative punishment, and reaching an acceptable balance requires navigating contested values. For example, the fact that some number of individuals who have been convicted of violent crimes pose little to no risk of committing additional crimes once released puts lawmakers in the position of deciding whether continued incarceration of those individuals is worth the assurance that those who do pose an ongoing risk are also incapacitated. Resolving this sort of issue should be done with reference to a full accounting of the facts, not in the shadow of fear-based politics. This would allow, for example, for consideration of whether parole or other second-look opportunities could be used to release aging, non-threatening individuals. To that end, the simple act of posing and engaging the question

¹⁰⁷ See PFAFF, *supra* note 10, at 191 (“Most people who end up committing crimes commit few offenses when young, and the ones they do commit are relatively nonviolent; criminality and violence rise in the late teen years through the twenties or thirties; and thereafter, both criminality and violence subside.”).

¹⁰⁸ *Id.*; see also UNITED STATES SENTENCING COMMISSION, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS 3 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf (finding that “[o]lder offenders were substantially less likely than younger offenders to recidivate following release”).

¹⁰⁹ See E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, AGING OF THE STATE PRISON POPULATION, 1993–2013, at 1 (2016), <https://www.bjs.gov/content/pub/pdf/aspp9313.pdf> (finding that “[m]ore than four times as many prisoners age 55 or older were admitted to state prisons in 2013 (25,700) than in 1993 (6300)”).

¹¹⁰ See *id.* at 9 (finding that from 1993 to 2013 “more than 65% of state prisoners age 55 or older were sentenced for a violent offense,” which “was the highest percentage of all age groups” during that time).

in the frame outlined here, rather than how Speaker Silver presented it, is a step in the right direction. As Part III will show, this sort of evidence-based approach facilitates a more accurate and robust debate about those values, leading to a more rational end result.

2. *Deterrence*

Politicians who supported increasing sentences for violent crime believed that existing sentences were too low and that more severe criminal punishment was needed to deter individuals from continuing to offend. Implicit in this view is the belief that those who commit violent crimes are rational actors, weighing the costs and benefits of their behavior and the likelihood of criminal punishment. But is that accurate?

“The most common assumption that politicians make without much thought,” writes Rachel Barkow, “is the idea that longer sentences will deter crime.”¹¹¹ As Barkow notes, there is a substantial amount of evidence casting doubt on the extent of the deterrent effect of criminal punishment. In terms of general deterrence (the effect of criminal punishment on the decision to commit crime), research has found that there is deterrent value in having criminal punishment.¹¹² But this value, for the most part, is not a function of the *degree* of punishment.¹¹³ We should therefore expect that increasing (or decreasing) prison sentences for violent crime would have little effect on violent offending. Moreover, the marginal value of imprisonment decreases with the length of the sentence, meaning that there is less deterrent bang for each imprisonment buck.¹¹⁴

What does appear to have a substantial effect on criminal offending is the likelihood that the person will be apprehended and punished.¹¹⁵ As discussed earlier, however, violent crime goes undetected and is underenforced in large parts of the nation.¹¹⁶ Legislators who voted to impose longer sentences for violent crime but did little else to ensure that those who commit violent crimes are prosecuted

¹¹¹ BARKOW, *supra* note 5, at 41.

¹¹² See COUNCIL OF ECONOMIC ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 36 (2016) [hereinafter ECONOMIC PERSPECTIVES], <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf> (“Criminal sanctions have the capacity to reduce crime through deterrence . . .”).

¹¹³ *Id.* at 37 (“Research on the impact of sentence length has found that longer sentences are unlikely to deter prospective offenders or reduce targeted crime rates . . .”).

¹¹⁴ *Id.* at 36 (“[M]arginal increases in incarceration may have small and declining benefits.”).

¹¹⁵ *Id.* at 38.

¹¹⁶ See *supra* note 16 and accompanying text.

have therefore increased the prison population but failed to deter violent behavior in the first instance.

When it comes to the relationship between imprisonment and violence in particular, imprisonment might have even less of a deterrent effect.¹¹⁷ Danielle Sered—a restorative justice proponent who works with both those who have committed violent crimes and victims of violence—has shown that the context in which violence often occurs diminishes the power of punishment to alter individuals' cost-benefit calculations.¹¹⁸ Violent behavior can be cut off through incarceration but cannot be eliminated without developing means of working through tense interpersonal situations, skills to navigate stresses that are common where violence is common, and the perspective that comes from confrontation and resolution.¹¹⁹ In contrast with incarceration, this sort of restorative approach has been shown to reduce recidivism rates by as much as forty-four percent.¹²⁰

As with incapacitation, repeat offenders complicate the calculation. Individuals who continue to offend might be an appropriate target for increased punishment, as there is some contested evidence that repeat offender statutes do have a positive deterrent effect.¹²¹ Assuming the truth of these studies, the critical question becomes: at what point is additional deterrence not justified given the costs? Some might accept the declining marginal utility of punishment, as we do when it comes to almost all social programs. Should legislators punish until they reach zero or negative utility? Or should this be part of a broader calculation that accounts not just for deterrence levels but also for broader factors such as the foregone investment in more proven strategies of deterrence, such as increased law enforcement?¹²² There is no single, definitive answer. Rather, as Part III will demonstrate, legislators should take these uncertainties into account when determining how much weight to give deterrence in their decisionmaking.

¹¹⁷ See SERED, *supra* note 20, at 73–78 (discussing exposure to violence in prison and cycles of violence).

¹¹⁸ *Id.* at 76–77.

¹¹⁹ *Id.* at 73–74, 132–33.

¹²⁰ *Id.* at 133.

¹²¹ See ECONOMIC PERSPECTIVES, *supra* note 112, at 37 (“A number of studies using state-level data find mixed evidence that repeat offender laws and sentence enhancements reduce crime.” (citations omitted)).

¹²² *Cf.* BARKOW, *supra* note 5, at 45 (arguing that long sentences “cost[] the state money that could be better used for other law enforcement purposes”).

3. *Retribution*

Retribution—the “idea that what justifies criminal punishment is that it is *deserved* for past criminal wrongdoing”—has been a critical driver of the punishment of violence.¹²³ Lawmakers chose to respond to the rising levels of violence that the United States experienced from the 1970s through the 1990s in large part with the enactment of violent crime statutes that imposed long sentences of incarceration for those who were convicted of violent crimes. The choice to use the criminal law, rather than other available tools such as welfare spending, required legislators to place the blame for criminal violence not on the breakdown of social or penal institutions that could be reformed but on the individuals who chose to engage in violent acts and could be punished on that basis.¹²⁴ Politicians thus sought to mobilize support for their chosen prescription by creating the image of the violent offender as someone who made a calculated choice to commit a violent act, thereby isolating the person’s moral culpability as something that the criminal law could and should address.¹²⁵ As a result, the belief that those who engage in violent acts deserve severe treatment came to be seen as uncontroversial.¹²⁶

Although there is no mechanical formula for calculating how much punishment retribution justifies, the rhetoric politicians used when enacting and building support for violent crime statutes suggests that their conception of retribution was narrow and incomplete. Retribution is often thought to be more capacious than a simple calculation of the blameworthiness of a single act. It does not require lawmakers to view criminal behavior in isolation of the factors that give rise to it or to ignore the personal circumstances that underlie an individual’s

¹²³ R.A. Duff, *Responsibility, Restoration, and Retribution*, in *RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE?* 63, 63 (Michael Tonry ed., 2011) (emphasis added).

¹²⁴ See Beckett & Western, *supra* note 67, at 47 (“Politicians have made a concerted effort to promote conceptions of social marginality that imply the need for more exclusionary and security-minded responses to marginal groups and individuals.”); David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 *BRIT. J. CRIMINOLOGY* 445, 462 (1996) (“One might say that we are developing an official criminology that fits our social and cultural configuration . . .”).

¹²⁵ Cf. Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 *MERCER L. REV.* 443, 530–31 (1999) (“The American criminal justice system places great emphasis on the crime but increasingly little emphasis on the person accused or convicted of committing the crime. The emphasis on the sin and not the sinner has obscured the humanity of those accused . . .”).

¹²⁶ See, e.g., *Do the Crime, Do the Time*, *L.A. TIMES* (May 17, 1997), <https://www.latimes.com/archives/la-xpm-1997-05-17-me-59570-story.html> (“If you were smart enough to kill someone, then you are smart enough to do the time.”).

decision to engage in such behavior.¹²⁷ A more complete conception of retribution would instead seek to impose proportional punishment, taking into account both the full range of factors that influenced the individual's behavior and the full range of punishments that would flow from his incarceration.

Legislators and other officials often appear to adopt one conception of retribution for non-violent crimes and another for violent crimes. For an example of a more expansive form of retributive thinking, consider how some lawmakers and members of the public talk about people who commit so-called "crimes of poverty." "Criminalizing poverty is counter-productive for our community's health and safety," Dallas District Attorney John Creuzot wrote as he announced his decision to decline to prosecute certain theft offenses.¹²⁸ It is common for the discussion surrounding these sorts of crimes to focus not just on the individual's choice to break the law but also on the conditions in which such crimes occur.¹²⁹ And even when the discussion does turn to the criminal aspect of the behavior, it often does so in the context of calls to reduce the punitiveness of the criminal laws or to abolish them altogether.¹³⁰ It appears, then, that when it comes to some offenses, both lawmakers and the public engage in a holistic evaluation of the person and the offense in order to determine whether and what degree of criminal punishment is proportionate to the harm. There is no reason that this sort of holistic evaluation cannot be used in the context of violent offenses.

Moreover, this more capacious form of retributive thinking is consistent with how much of the public responds to information about criminal defendants and their punishments. A substantial amount of research has found that providing people with more information about the person and the range of possible sanctions for his behavior

¹²⁷ See Tonry, *supra* note 19, at 156 (arguing that "deeply disadvantaged offenders are subject to more powerful environmental and subcultural pressures to commit offences than are most other people, especially the privileged, and deserve as a class to be punished less severely when they do"); WESTERN, *supra* note 17, at 181 ("Social adversity mitigation admits the moral complexity of the social world and acknowledges that a defendant too has suffered harm.").

¹²⁸ Cassandra Jaramillo & David Tarrant, *How Dallas County's DA Shook—and Confused—Police and Politicians with Plan for 'Ending Mass Incarceration,'* DALL. NEWS (Apr. 19, 2019), <https://www.dallasnews.com/news/dallas-county/2019/04/20/dallas-countys-da-shook-confused-police-politicianswith-plan-ending-mass-incarceration>.

¹²⁹ See, e.g., ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 53 (2018) ("[T]he average criminal defendant is poorer, less educated, less employed, and less healthy than the average American.").

¹³⁰ See, e.g., *id.* at 235 (arguing that "[t]he misdemeanor system punishes people too heavily and in too many ways for minor, common, and often harmless conduct").

decreases their punitiveness, leading them to select less severe punishments.¹³¹ For example, when told about the requirements imposed on individuals on probation and parole, people become more supportive of imposing community sanctions in place of more punitive penalties such as incarceration.¹³² And there is some, albeit more mixed, evidence that this relationship holds even when individuals are asked about violent crimes such as murder.¹³³ These findings suggest that individual members of the public consider information about the person and the punishment he faces as important variables in the punishment calculus.

What would this sort of approach to retribution look like in the context of violent crime? As in the case of so-called “crimes of poverty,” legislators might look first to the causes of violent behavior to determine how culpable people are for their actions. There is a considerable amount of research finding that an individual’s decision to commit a violent crime is the product of numerous factors, including the person’s gender, age, race, and socioeconomic status.¹³⁴ These factors, of course, also influence non-violent criminal wrongdoing. More particular to violent offending are the environment in which the crime was committed and the repeated exposure to violence over time that is common among those who commit violent crimes. Recognizing that individuals who have been convicted of violent crimes are often both perpetrators and victims does not legitimate violence; instead, it highlights the complications inherent in a retributive punishment calculation. It is much like how labeling offenses like theft as “crimes of poverty” does not excuse the action but rather identifies its cause. As Bruce Western puts it:

Trying to divide the prison population into good people and bad, between violent and nonviolent, fundamentally misunderstands the nature of violence in poor family and neighborhood contexts. The division between the violent and the nonviolent is a moral distortion

¹³¹ See Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 67 (2000) (“In the end, public opinion is not an intractable barrier to developing a balanced, rather than a punitive, agenda for responding to offenders.”).

¹³² *Id.* at 44–45.

¹³³ See BARRY MITCHELL & JULIAN V. ROBERTS, EXPLORING THE MANDATORY LIFE SENTENCE FOR MURDER 116 (2012).

¹³⁴ See *supra* note 19 (collecting sources). Indeed, the complexities surrounding violence preclude even those who are responsible for it from understanding and explaining their behavior. See Reginald Dwayne Betts, *Could an Ex-Convict Become an Attorney? I Intended To Find Out*, N.Y. TIMES MAG. (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/magazine/felon-attorney-crime-yale-law.html> (“I couldn’t explain how a confluence of bad decisions and opportunity led me to become the caricature of a black boy in America.”).

of a complex social environment in which victims, witnesses, participants, and offenders are often one and the same individuals who suffer harm from each part they play in episodes of violence.¹³⁵

Cook County State's Attorney Kim Foxx has echoed Western's sentiment, remarking that, "[t]he defendants who we have in our courtroom, a good majority of them have also been victims of violent crime. We're talking about the same people. And our affection for victims in the prosecutor space is this false affection because next week they might be our defendants."¹³⁶

With these background factors in mind, legislators might then consider the full range of punishment that imprisonment imposes on individuals. The consequences of imprisonment cannot be captured in a single number. Exposure to violence, severed connections with families and communities, diminished marketable skills, and collateral consequences such as deportation, banishment from public housing, and disenfranchisement—these can all be traced to incarceration.¹³⁷ Moreover, these costs are not a linear function of the amount of time an individual spends in prison; increasing sentence lengths from five years to ten is not the equivalent of doubling the punishment.¹³⁸ Rather, the effects of imprisonment compound as those who are imprisoned are prevented from building their lives over time.¹³⁹ There is no indication that the legislators who wrote and enacted violent crime statutes accounted for these costs. But taking them into account is critical to assigning a proportional punishment.

While it is possible that sentence lengths would not have increased as much—and other means of combatting violence would have been pursued to a fuller extent—had these considerations been taken into account, there is also a risk that a more holistic evaluation of the person and his punishment would have justified *more* severe sentences of incarceration. It might be appropriate, for example, to sentence recidivist offenders to long terms of incarceration if their behavior is less a product of hardship than of a persistent disregard for

¹³⁵ WESTERN, *supra* note 17, at 81; *see also* Forman, *supra* note 77, at 50 (“[T]he same low-income young people of color who disproportionately enter prisons are disproportionately victimized by crime. And the two phenomena are mutually reinforcing.”).

¹³⁶ *Episode 16: A Conversation with Kim Foxx*, JUSTICE IN AMERICA (Feb. 20, 2019), <https://theappeal.org/justice-in-america-episode-16-a-conversation-with-kim-foxx>.

¹³⁷ *See* BARKOW, *supra* note 5, at 88–102 (describing the collateral consequences of incarceration); Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1662–83 (2019) (same).

¹³⁸ *See generally* Jacob Bronsther, *Long-Term Incarceration and the Moral Limits of Punishment*, 41 CARDOZO L. REV. 2369 (2020).

¹³⁹ *See generally id.*

others. Such cases, however, are not the norm, and legislators should refrain from adopting statutes based on outliers.¹⁴⁰ From the perspective of state legislators, the goal should be to avoid using a narrow conception of the individual or a presumed conception of their behavior when crafting state sentencing schemes. As Part III will demonstrate, the adoption of a more robust retribution-based approach to the punishment of violent crime would enable state lawmakers to punish violent behavior in proportion to its blameworthiness and focus their attention on its root causes and potential solutions.

There are good reasons for the public to support—and for legislators to pursue—this sort of retributive calculus. A more expansive conception of retribution would not just lead to proportional punishment; it would also seek to call people to account for their behavior and the harm their actions caused others. Consider Houston Police Chief Art Acevedo’s statement that, “most folks want violent offenders held accountable. Consequences must be commensurate with [the] seriousness of the offense and public safety risk posed by perpetrators.”¹⁴¹ Acevedo is voicing a commitment to incapacitating violent offenders in order to protect the public. But he is also speaking to the idea that severe punishments are imposed in proportion to the harm done to the victims of crime and in part to redress that harm. This latter notion suggests that the purpose of criminal punishment is not limited to inflicting pain on the individual but is also meant to provide some form of redress or compensation to the victim.

The belief that punishment should address the harm done to the victim fits well within the retributive framework discussed above. As R.A. Duff has argued in the context of criminal trials, “we should see the criminal trial as a formal process through which an alleged wrongdoer is called to answer to his fellow citizens by the court that speaks in their name.”¹⁴² Being called to account, being held responsible for one’s actions, is a powerful form of retributive punishment. It is also something that, as explored above, appears to have broad support among the public. By framing the issue not as the over-punishment of people who commit violent acts but as the failure to serve the needs of victims of violence, this sort of approach has the additional potential

¹⁴⁰ See *supra* note 19 and accompanying text; *infra* note 171 and accompanying text.

¹⁴¹ Chief Art Acevedo (@ArtAcevedo), TWITTER (May 21, 2019, 6:11 PM), <https://twitter.com/ArtAcevedo/status/1130959211163209729>.

¹⁴² Duff, *supra* note 123, at 76.

benefit of garnering political support for rethinking how legislators approach punishing violence.¹⁴³

More broadly, replacing a near-exclusive focus on incapacitation and the management of risk with the sort of retributive thinking outlined here could foster the conditions needed to advance a more honest, efficient, and effective approach to addressing violence. So long as the dominant purpose of punishment is framed in terms of incapacitation, the need for longer and longer sentences of incarceration will be self-reinforcing. If violent crime levels are low, it is because we are incarcerating most of the people who engage in violence and therefore need to maintain current levels of punishment; if they are high, it is because we are not punishing them harshly enough. By shifting the frame from incapacitation to retribution, the nation might come to view criminal punishment less as an expansive instrument of social control and more as a limited means of expressing societal disapproval and punishing those who have caused harm in proportion to that harm. Given what we know about the effectiveness of using criminal punishment alone to address crime and violence, such a shift would be a welcome one.¹⁴⁴

III OPERATIONALIZING A NEW APPROACH TO VIOLENT CRIME

Imagine a state legislator who comes to believe that the criminal punishment of violence has grown too severe.¹⁴⁵ As she studies her state's criminal code, she might ask herself what *is* an appropriate sentence of incarceration? How should a more robust conception of retribution, deterrence, and incapacitation shape the sentences for violent crimes? This Part takes up those important but unaddressed questions, using the crime of second-degree murder as a starting point for a larger project of thinking through how specific violent crimes should

¹⁴³ Whether or not this approach will be successful will depend on how exactly the issue is framed and discussed. For a more complete examination of the issue, see Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293 (2020).

¹⁴⁴ See, e.g., ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 76–156 (2013) (contrasting criminal and non-criminal means of addressing crime); NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, THE KERNER REPORT 16–30 (Princeton Univ. Press 2016) (1968) (proposing non-criminal law reforms to address issues of crime and disorder).

¹⁴⁵ Criminal justice reform is being pursued on a number of fronts, ranging from administrative agencies to bottom-up social movements. The fact is, however, that punishment decisions are for the most part made in the first instance by state legislators. This Part is addressed to the state legislators who seek to impose more sensible sentences for violent offenses and reduce their state prison populations.

be punished. Section III.A begins by stressing the need for state legislators to take on the task of drafting and enacting sentencing statutes that reject outdated thinking about violent crime and to move toward the adoption of statutes that reflect what we know about the people who engage in violent behavior and the role the criminal law should have in addressing their behavior. Section III.B then draws on the holistic framework discussed through Section II.B to propose an alternative sentencing scheme for murder. Finally, Section III.C briefly considers two potential barriers to achieving the kind of reform contemplated in this Note.

A. *How to Think About Sentencing Violence*

The first thing the legislator will need to do is to rethink how her state's penal code should approach the task of punishing violence. If her mission is to reduce the number of people in her state's prisons, she must abandon the previous generation's attempt to single out "violent offenders" for increased punishment. Whereas previous generations of lawmakers adopted sentencing statutes that singled out violent offenses for longer sentences and made statements that "violent offenders" were a unique subset of people, legislators today must recognize that there is little that is unique about someone who has been convicted of a violent offense. In doing so, the legislator should be guided by the theories of punishment and modern sociological and other empirical findings about the people who are convicted of violent crimes and the limits of the criminal law in addressing their behavior.

As discussed earlier, there are numerous reasons to reject the belief that an individual's conviction of a violent offense indicates that the person is a "violent offender." To start, most people who commit violent offenses are never convicted of a violent offense.¹⁴⁶ Few people who commit violent offenses commit only violent offenses; and many who commit non-violent offenses also commit violent offenses.¹⁴⁷ Moreover, people who commit violent crimes are not more likely than people who commit non-violent offenses to reoffend.¹⁴⁸ And finally, the people who are convicted of violent crimes are often the victims of violence.¹⁴⁹ It makes little sense, therefore, for the criminal law to seek to punish violent *offenders* rather than violent

¹⁴⁶ See *supra* note 16 and accompanying text.

¹⁴⁷ See, e.g., PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 9 tbl.10 (2002), <https://www.bjs.gov/content/pub/pdf/rpr94.pdf> (comparing rearrest rates of state prisoners convicted of violent and non-violent offenses).

¹⁴⁸ See *infra* notes 154–58 and accompanying text.

¹⁴⁹ See *supra* notes 135–36 and accompanying text.

acts. Violence is less a matter of individual nature than it is of an individual's circumstances. Once the legislator reorients herself to assigning punishment to acts rather than people, she will be more likely to propose a sentencing statute that is based on evidence rather than overheated calls for punishment.

B. Punishing Second-Degree Murder: A Sentence Proposal

This subsection serves as a case study in how state legislators should approach the task of enacting sentencing statutes for violent crimes. Second-degree murder accounts for a significant portion of the current state prison population, making it a natural starting point for a legislator seeking to reduce the number of people in her state's prisons.¹⁵⁰ Murder in the second degree, or non-premeditated homicide, is an intentional or reckless killing that is committed without premeditation.¹⁵¹ According to the Bureau of Justice Statistics, 182,400 individuals—or about 14.2% of all prisoners—incarcerated in state prison have been convicted of some degree of murder or non-negligent manslaughter.¹⁵²

The first thing the legislator should do is eliminate her state's sentencing statute that defines and punishes violent crime as something separate and apart from non-violent crime. As discussed above and as Section II.B demonstrated, there is no clear dividing line between those who commit violent crimes and those who commit non-violent crimes. The law should therefore discard statutes that suggest a different form of punishment is required when someone is convicted of a violent crime. Once her state's specific violent crime sentencing statute is eliminated, the legislator will still be able to determine the appropriate punishment for murder, just as she would for all other offenses.

This Section argues that the legislator, when deciding the appropriate sentence for second-degree murder, should engage in a holistic decisionmaking process that considers the risk of recidivism, the char-

¹⁵⁰ While the specific sentence might change depending on the offense being considered, this Part reflects the point made in Part II that the decisionmaking process should remain the same regardless of whether the crime is considered violent or not. Thus, the overarching framework of this Part is applicable to all violent and non-violent crimes. Nonetheless, second-degree murder is a useful case study because a large number of people have been convicted of it and because few would disagree that its commission involves violence.

¹⁵¹ While this is a standard definition of second-degree murder, states vary in how they define the substantive elements of the offense. *See, e.g.*, LA. STAT. ANN. § 14:30.1 (Westlaw through 2019 Reg. Sess.) (defining second-degree murder as “the killing of a human being . . . [w]hen the offender has a specific intent to kill or to inflict great bodily harm”).

¹⁵² BRONSON & CARSON, *supra* note 6, at 21 tbl.12, 22 tbl.13.

acteristics of the people who are most likely to commit murders, the sentences imposed in other jurisdictions, and the effect that criminal punishment will have on addressing the harm caused by the murder. This holistic decisionmaking process is not new in criminal law. As Section II.B argued, this way of thinking about crime and the people who are convicted of it is often how we approach punishing non-violent crimes. But it is new in the context of punishing violent crime.

First, the legislator will want to make sure that her proposal does not risk increasing the number of murders in her district. To see how current sentences could be reduced without putting the public at greater risk, the legislator should consider the recidivism rates and characteristics of individuals who commit murder. According to recent data, 2.6% of individuals aged 18–29 admitted to prison in 2013 were charged with murder. The statistics for the 30–39, 40–54, and 55 and older age brackets were 1.8%, 1.7%, and 2.8%, respectively.¹⁵³ As discussed in Section II.B, most individuals age out of violent offending at some point in their thirties.¹⁵⁴ With respect to murder, however, there are a number of people who commit murders past the point when we would have expected them to age out of violent offending.¹⁵⁵ What should we make of this?

Data on recidivism can help illuminate whether the admission of older individuals who have been convicted of murder is due to a higher likelihood of persistent offending among those who commit murder or whether murder is often a one-off event that has less to do with one's age than other crimes. If the reason that people are being convicted of murder and admitted to prison in their forties, fifties, or later is because those individuals are not desisting from committing murders, then we would expect those people to have a high rate of recidivism. The data suggest the opposite is true. For example, a 1994 study of 300,000 recently released prisoners found that 67.5% of the prisoners were rearrested within three years.¹⁵⁶ The prisoners with the lowest rate of recidivism were those who had been convicted of homicide, of whom 40.7% were rearrested.¹⁵⁷ Of those who had been convicted of homicide and then rearrested for a new offense, only 1.2% of them were arrested for committing homicide.¹⁵⁸ Thus, whether because murder is most often a one-off event in the individual's life or because the length of incarceration means that those who have been

¹⁵³ CARSON & SABOL, *supra* note 109, at 16 tbl.11.

¹⁵⁴ BARKOW, *supra* note 5, at 45.

¹⁵⁵ See *supra* note 107.

¹⁵⁶ LANGAN & LEVIN, *supra* note 147, at 1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

convicted of murder will be released at an old age, there is a low likelihood that individuals convicted of one murder will commit a second.

Recognizing that sentence lengths could be reduced in most instances without contributing to a significant increase in the number of murders, the legislator should next consider whether current sentencing practices for individuals who have been convicted of second-degree murder are proportional. To do this, she should consider the impact of murders, the characteristics of individuals who commit them, those individuals' motivations, and the role of criminal punishment in addressing their behavior. If she were to do so, she would find that individuals who commit murder range from people who got caught up in the heat of a particular moment, to individuals who are suffering from mental illness, to people who acted with pure malice, to people who acted out of a combination of all of the above. Assigning appropriate punishment will therefore require her to account for these differences and their relationship to the person's blameworthiness.

The people convicted of committing murders are most often not cold-hearted killers who make a pre-meditated decision to target strangers but rather individuals who make poor split-second decisions or the husbands, fathers, or neighbors of their victims. Between 1995 and 2015, for example, 42% of homicide victims had a pre-existing relationship with the convicted individual.¹⁵⁹ Of those victims, 12.7% were related to the individual; 4.6% were married to the individual; and 3.1% were the children of the individual.¹⁶⁰ The most common pre-existing relationship between the individual and the victim, "acquaintance," which includes both same-sex partners and significant others, accounted for 25.6% of the relationships.¹⁶¹ As Bruce Western observes, these factors force those engaged in retributive calculations to confront difficult, fluid realities. "Life histories rooted in poverty and rich in experiences of victimization as well as offending defy the moral reckoning that splits the world into victims and perpetrators," he writes.¹⁶²

These statistics also reveal that a little over half of all convicted individuals had no pre-existing relationship or an unknown relationship with their victims and therefore their actions cannot be explained as the outgrowth of tense, complex relationships. Does this empirical

¹⁵⁹ 2017 *National Crime Victims' Rights Week Resource Guide: Homicide Fact Sheet*, OFFICE FOR VICTIMS OF CRIME, DEP'T OF JUSTICE, https://www.ncjrs.gov/ovc_archives/ncvrvw/2017/images/en_artwork/Fact_Sheets/2017NCVrw_Homicide_508.pdf (last visited July 5, 2020).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² WESTERN, *supra* note 17, at 63–64.

finding validate the powerful belief that there are so-called super-predators who “kill or maim on impulse, without any intelligible motive?”¹⁶³ Again, the evidence suggests that the truth is more complicated. Western argues that “[s]upporters of tough punishments may be morally simplistic, but liberal academic writing can also be naive.”¹⁶⁴ He pushes for recognition of the fact that “[v]iolence . . . is a dominating reality in environments of poverty and racial inequality.”¹⁶⁵ From Western’s point of view, it is an insufficient response to real trauma to either wave off murders as one-off events or to obscure root causes and pin the blame on a lack of control over one’s impulses. Rather, an appropriate response would be to recognize the fact that, as is true of other violent crimes, murders often occur in communities that lack needed investment in schools, jobs, and other social networks, and in which “the same low-income young people of color who disproportionately enter prisons are disproportionately victimized by crime.”¹⁶⁶ These facts do not diminish the wrongfulness of murder but instead help to illuminate the social and environmental factors that are often present where extreme acts of violence occur, suggesting that most murders are not the handiwork of superpredators but the end result of chronic underinvestment in public and civic spaces and institutions.¹⁶⁷

There are, of course, still other individuals whose decision to commit a murder cannot be explained as the product of a stressful moment or some other mitigating circumstance, leaving the legislator with the question of what the appropriate punishment is for someone who committed an unmitigated act of violence. When considering this subset of people as she develops her state’s sentencing scheme, the legislator should engage the problem in the same fashion that she seeks to assign punishment to all other individuals. This might require her to ignore the temptation to treat one individual as redeemable and the other as a lost cause—a temptation that is just a more granular version of the broader impulse to treat violence as requiring the most severe punishments. If a holistic evaluation of the harm done leads the legislator to authorize a longer sentence, then such a sentence is appropriate. The critical point is that the process leading to that result should follow the same holistic evaluation process.

¹⁶³ John DiLulio, *The Coming of the Super-Predators*, WKLY. STANDARD (Nov. 27, 1995), <https://www.weeklystandard.com/john-j-dilulio-jr/the-coming-of-the-super-predators>.

¹⁶⁴ WESTERN, *supra* note 17, at 64.

¹⁶⁵ *Id.*

¹⁶⁶ Forman, *supra* note 77, at 50.

¹⁶⁷ See generally SHARKEY, *supra* note 15 (making this point more broadly).

With a sense of the likelihood of reoffending and the characteristics of the individuals in mind, the legislator should then consider the full range of consequences that flow from incarceration. As discussed in Section II.B, the consequences of incarceration are borne not just by the person who is incarcerated but also by his family and his broader community. Moreover, recent work has explained how incarceration prevents true accountability and reconciliation between the individual and the victim.¹⁶⁸ By segregating the person from society, incarceration stands in the way of the kind of confrontation, restitution, and forgiveness that many victims say they need to heal. Retribution is meant to be grounded in both society's and the victim's interests, but neither is being served by extra-long sentences.

With all of this information in mind, the legislator should propose a sentencing scheme that engages with the limited and often conflicting information available to her. At the outset, it is important to make clear that the decisionmaking process is as important as the resulting sentencing statute. A shift from the kind of heated political rhetoric discussed in Section II.A to the kind of evidence-based analysis shown here would be a substantial improvement in how state legislators approach the task of determining sentence lengths.

If the decisionmaking process is to have a substantial impact on the number of people in prison, however, it must lead to a real reduction in average sentence lengths for violent individuals. Recognizing that all fifty states are unlikely to adopt the exact same sentencing range, this Note recommends that the legislator propose a fifteen-year maximum sentence for second-degree murder. This would send a clear signal that murder is not tolerated in her district while also recognizing that sentencing individuals to multiple decades does not provide much additional benefit in terms of deterrence or incapacitation. It would serve the purposes of retribution, incapacitation, and deterrence while reducing the length of time most people spend in prison for committing second-degree murders.

Regardless of the specific term of years, however, the most important thing the legislator can do is model the appropriate process of approaching this issue. Instead of giving into overheated political rhetoric and punishing so-called violent offenders with extreme sentences, the legislator should propose a sentencing statute that reflects all the available evidence and that balances the need to deter violent behavior with the recognition that current sentences cannot be justified according to the traditional theories of punishment. Whatever specific sentencing range is arrived at, such a process would

¹⁶⁸ See generally SERED, *supra* note 20.

constitute a significant first step toward reducing the number of people in state prisons across the nation.

C. *Potential Barriers to Meaningful Reform*

This proposal raises both theoretical and practical issues that should be addressed here. First, on the practical front, the fact is that not all people convicted of crimes serve the maximum possible sentence.¹⁶⁹ As a result, reducing the maximum for violent crimes might not lead to a substantial reduction in the number of people in prison.¹⁷⁰ However, this does not mean that top-end sentence lengths should not be reduced. Bringing down the maximums could help shift the public's perception of a "normal" sentence.¹⁷¹ In addition, changes to sentence lengths should be part of a broader program of reforming the punishment of violence, which would also include increasing second-look opportunities through probation, parole, and clemency.

On the theoretical side, there is the question of whether punishment should or can be separated from the local politics in the communities in which it occurs. Most Western liberal democracies impose shorter sentences than the United States, but can it be said that one form of punishment is correct and the other is not? The answer depends on one's view of criminal punishment. If punishment is viewed as a public good that legislators are responsible for distributing according to voter preferences, then it is natural and appropriate for legislators to respond to higher levels of homicide with increased punishments for convicted individuals. On the other hand, if punishment is viewed as a response meant to address an acute social problem, then it follows that the response should be calculated to fix that problem. Taking the latter view, it becomes important to evaluate whether violent crime statutes are designed to achieve their intended result. This Note has engaged in that evaluation and has found that the theories of punishment that animated lawmakers' decisionmaking counsel in favor of revisiting and reducing the punishment those statutes impose on individuals who have engaged in violent behavior.

CONCLUSION

History teaches that how we punish is a choice, not something fixed in stone. The United States became far more punitive in its pun-

¹⁶⁹ See GROWTH OF INCARCERATION, *supra* note 41, at 81–83 (summarizing research findings of the effects of truth-in-sentencing laws on time served).

¹⁷⁰ See PFAFF, *supra* note 10, at 55–59.

¹⁷¹ See Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489 (2014).

ishment of violent crime beginning in the mid-1970s; perhaps it can reverse course and become less punitive now. Stepping back from mass incarceration will require the United States to reduce either the number of people in prison for committing violent crimes or the amount of time those people are sentenced to serve. The former can be achieved through large-scale and long-term social investment; the latter with sufficient political will and a straightforward reduction of the extra-long sentences that have come to define America's approach to the punishment of violent crime. In order to convince lawmakers and the public that reducing sentence lengths for people convicted of violent offenses is both possible and in the public interest, reformers must demonstrate how a broader and more holistic approach to punishment serves the purposes of punishment and better reflects what we know about the individuals who are charged with violent crimes and the limits of criminal law in addressing their behavior. This Note has sought to take up that task and to make a small contribution to the much broader movement to make criminal punishment in the United States more sensible, humane, and just.