

To the Texas Law Faculty:

Thanks for allowing me to present portions of my book, which identifies various failed criminal justice policies and approaches if the goal is maximizing public safety, explains that political dynamics produce these outcomes, and offers structural changes to curb those dynamics. I have provided the introduction so you can see the broad outlines of my argument as well as the introduction to the section of the book proposing structural changes so you can see the menu of changes I'm proposing. But my focus in the talk will be on the chapter that looks to changes in the composition of the judiciary as a key part of a reform strategy. I am focusing on this chapter because I would like to spin off this topic and analyze it in greater detail for a law review article, so I am interested in your feedback on areas I've missed or any comments on the ones I've included.

- Rachel

**PRISONERS
OF
POLITICS**

*Breaking the Cycle
of Mass Incarceration*

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INTRODUCTION

FEW PEOPLE WOULD want to establish air pollutant limits or workplace safety conditions by popular vote. Instead, most people prefer to trust experts with specialized knowledge to set policies based on studies of what maximizes public safety and an analysis of the costs and benefits of different courses of action. This is now the well-established path for just about every public health and safety area in American life because we recognize that the typical voter lacks the requisite data and knowledge to make the best decisions in these areas. We understand that we would get inferior outcomes if instead we relied upon the emotional preferences of the body politic or politicians' intuitive guesses about what is likely to work.

Yet that is precisely what we do when it comes to decisions about public safety and crime control. We do not rely on experts or use studies and rational assessment to minimize crime. Instead, criminal justice policy in the United States is set largely based on emotions and the gut reactions of laypeople. We have been doing this for decades, with the public and politicians reacting to stories or panics about crime with ill-informed laws and punitive policies that extend far beyond the high-profile event that sparked them and without much thought about whether the response will promote public safety. Donald Trump's rise to the presidency follows this tradition and provides a vivid example of how public fear based on misinformation translates into policy. Trump campaigned on the false idea that we have record-high homicide rates and that crime is rampant throughout America, with violent gangs of illegal immigrants roaming the streets and torturing innocent citizens. He misleadingly described inner-city neighborhoods in places like Chicago as areas where people cannot walk down the street without being shot. This rhetoric, with its racist overtones, appeals to voters

who are already prone to punitive approaches, and it primes others to support harsh punishments and tactics—and the candidates who endorse them—because the public is ill-informed about actual crime rates or what works to prevent crime. Voters assume incorrectly that violent crime is rising, even as it has plummeted. Politicians eager for votes therefore pursue ever-tougher policies.¹

We have seen this kind of tough-on-crime rhetoric for decades, by both Republicans and Democrats. Bill Clinton spoke in similarly sweeping and ill-informed tones about drug dealers and sought to create a tough-on-crime image for himself, going out of his way to return to Arkansas from the campaign trail to be present in the state for the execution of an intellectually impaired man. Every recent president has spoken of the need to take a harsh approach to violent crime and criminals. The story has been largely the same at the local level.

The result is that jurisdictions throughout America have produced the highest incarceration rate in the world among major nations, with more than 2.2 million people incarcerated in prisons and jails, and with 1 in 3 adults in America possessing a criminal record.² Millions more are on probation or parole and living with onerous supervision conditions.³ Our policies are unquestionably tough on budgets, tough on individuals, and tough on communities, but are they really tough on crime itself? Is our current approach the best way to reduce crime and improve public safety? Politicians and members of the public who support the most punitive approaches intuitively think that they work and make us safer, thus justifying their human and economic costs.

In fact, many of America's criminal justice policies have little to no effect on crime.⁴ They take limited public funds that could be better spent on more effective measures for improving public safety. Even worse, many of our crime policies *increase* the risk of crime instead of fighting it—all while producing racially discriminatory outcomes and devaluing individual liberty. Unfortunately, counterproductive policies like these are not rare; they abound in every jurisdiction in the United States.

If we want better outcomes that will improve public safety, we need to change the institutional framework we currently use to make criminal justice policy. Instead of policies designed to appeal to the emotions of voters who lack basic information about crime, we need to create an institutional structure that creates a space for experts who look at facts and data to set policies that will improve public safety outcomes, even if they are not easily reduced to sound bites or fail to provide emotional appeal.

This institutional model is a well-traveled path for better outcomes. Indeed, this is the model we use in most other areas of governance, from fiscal

policy to environmental regulation. We do not have our elected officials set policies based on their intuitive reactions to outlier stories that make the news and arouse the public. We do not, for instance, jettison a therapeutic drug based on one bad outcome. We do not abolish all air travel because of one accident. Instead, we rely on expert agencies to set policies based on the best data available to minimize risks and achieve the greatest benefits at the lowest costs. But all too often crime policy in America is based on a reaction to a single crime without any evaluation of overall programs or approaches. People who care about reducing mass incarceration and want to improve criminal justice thus need to push for a model of criminal justice decision-making that looks more like the way we make policy in other regulatory areas where expertise plays a more significant role.

This is not to say that a shift from policy by populism to expertise will be easy or completely transformative. There is an anti-elite, anti-expert sentiment in America, and large segments of the public are likely to be particularly resistant to the idea that crime policy is something for experts instead of the regular man or woman on the street.⁵ If criminal justice were just a matter of achieving retributive justice—of determining what someone morally deserves as punishment for a crime—then a model that relies on the public's emotional reaction might make more sense. But that is not the only goal of criminal punishment. The public and policy-makers often emphasize that the aim of criminal justice policy is the utilitarian goal of maximizing public safety and making the most of limited resources; to the extent that is the goal, we could be doing much better. We have data and evidence about better approaches that would give us better safety outcomes with our limited resources and that would result in less human suffering by individuals currently facing excess punishments. We know that policies that satiate punitive desires in the short term sometimes come with longer-term hits to public safety. If that is the trade-off we want to make as a society, we should be doing so explicitly, instead of often incorrectly assuming that the toughest responses that feel good in the here and now are also the best strategies for long-term public safety. If it turns out that the harsh collateral consequences of convictions or longer terms of confinement make reentry too difficult, thus prompting people to commit more crimes when they finish serving their sentences, we should decide openly whether it is worth paying that price in exchange for whatever retributive impulse those policies are serving. But we cannot evaluate that trade-off if we do not even know that we are making it. And that is often the case right now, because no one is paying attention to the costs and benefits of different policy options. The key to making better decisions about public safety and the use of our limited resources is to create a decision-making structure

where we no longer ignore evidence about what does and does not work and at what cost.

To be sure, a new institutional model for making decisions about criminal justice policies will not be the answer to everything that ails criminal justice policy-making in America. Experts do not have all the answers about criminal justice and sometimes disagree among themselves about the best approach. There are limits to what data can tell us about reducing crime and promoting public safety, so policy calls sometimes have to be made on the best evidence available, even if it is incomplete. Any effort at crime control must also be cabined not only by rational analysis of the data but also by what would be retributively just. No one should get more than their just deserts no matter what the data says. And there will be times, perhaps not infrequently, when the public's moral and retributive desires will outweigh utilitarian goals and lead to longer sentences or harsher policies than the utilitarian framework would yield. That is, even if a particular punishment is likely to produce long-term negative effects on public safety, and that is made clear to the public, the public may nevertheless prefer it because of the immediate emotional satisfaction it brings. Sometimes public emotions will be so strong that they will overcome whatever institutional architecture is in place for expert judgment. And of course many of the worst policies in criminal law stem from racism and bias, and it would require sweeping changes in cultural attitudes to get at those root causes.⁶ Experts cannot lead a cultural revolution. Moreover, criminal law itself can only do so much to prevent and minimize crime. Other social policies, from education to health care to employment programs, may do more to prevent crime than crime policies themselves. As author James Forman Jr. puts it in his terrific book, *Locking Up Our Own*, we should adopt an all-of-the-above approach to crime prevention and not just rely on a criminal justice response.⁷ These are important caveats to what a model grounded in rational decision-making can achieve.

But change must always start somewhere, and there is no more important place to start when it comes to criminal justice reform than with the flawed institutional architecture for making criminal justice policy decisions that got us to where we are today. If the definition of insanity is doing the same thing over and over again but expecting different results, it would seem to be insane to rely on our current political system and institutional structures to meaningfully address problems with criminal justice and mass incarceration in America. Laypeople will always have a visceral reaction to particular high-profile crimes that will prompt them to support an ever-more-punitive response without sufficient attention to details. Politicians, for their part, will consistently seek to gain an electoral advantage by ca-

tering to these instincts and pandering to public anxiety and intuitions with ever-more-severe policies instead of pursuing policies that would be more effective at maximizing public safety.⁸ Criminologists have labeled this setting of policy based on the emotional response of the public "penal populism," and it is an embedded feature of U.S. politics.⁹ Penal populism, like populism more broadly, rests on the "disenchantment and disillusionment" with established experts.¹⁰ The public is moved by "feelings and intuitions" rather than evidence, and "the authority and influence of the criminal justice expert has been decried and reduced."¹¹ The unfortunate result of a process fueled by ignorance of data and analysis is an excessive reliance on incarceration that is counterproductive instead of employing better strategies for reducing crime and protecting the public.

Indeed, it is one of the great tragedies of American domestic policy that many of our strategies for combating crime ruin lives but are not necessary to improve public safety, and in many cases, we adopt policies that actually increase the risk of crime instead of fighting it. We are wasting billions of dollars on too many practices that achieve the worst of both worlds: they do not protect victims or increase public safety, while at the same time they have catastrophic effects on millions of individuals and entire communities, especially poor people of color. One could say our approach to crime is a failed government program on an epic scale, except for the fact it is not a program at all. It is the cumulative effect of many isolated decisions to pursue tough policies without analyzing them to consider whether they work or, even worse, are harmful.

We have these ill-considered policies because we have a pathological political process that caters to the public's fears and emotions without any institutional safeguards or checks for rationality to make sure these policies work or are the best approach to combating crime.¹² Although one might think the public is attuned to public safety outcomes and not simply rhetoric about being tough, the reality is different. Voters are susceptible to symbolic gestures that yield less than optimal results because the public is not well informed about crime in America. Voters tend to hear only about the worst crimes, priming them emotionally for responses that sound as tough as possible because they want to satiate their desire for vengeance and justice in the here and now. The public often has little if any knowledge of crime rates or the sentences attached to different crimes. Indeed, many people in America are completely unaware that almost every person in prison is ultimately released and that roughly ten thousand people return to society from a term of incarceration every week in the United States. But because this regular return of citizens is not news, the public has little interest in whether or how these individuals have been prepared to reenter

society or whether their time in prison has made them more likely to commit crimes.

The political process is also not equipped to discuss these issues in a reasoned way. Any discussion about overall strategies or long-term responses and results can be derailed with a single story. All it takes to kill a reform proposal's chances is one example of an individual convicted of a violent crime who would benefit from the proposed change. That one person ends up being the public's image of the reform, and if it looks like the law is going to coddle that individual, the public will resist, no matter what the overall benefits are.

Politicians know this dynamic well, at least since George H. W. Bush ran a successful campaign ad against former Massachusetts governor Michael Dukakis featuring Willie Horton, an individual on a furlough program in Massachusetts who committed a brutal rape and assault. Even though the furlough program in Massachusetts had a success rate greater than 99%, the public focused only on Horton's case. Bush defeated Dukakis, and no politician since has wanted to risk having their own Willie Horton moment. So even if a reform will bring more benefits than costs, including benefits in violent-crime reduction, politicians won't risk supporting it if their opponents can trot out a story of an individual who previously committed a violent act who would be let out early as a result of the change in policy.¹³ We saw this dynamic play out in Arkansas where the populist response to a single crime upended their entire parole program without any consideration of the program's overall costs and benefits. After a high-profile murder by a man with a history of parole violations, the state made sweeping changes to its parole practices, including revoking parole for technical violations. Predictably, the state's incarceration rates ballooned in the wake of the changes, but they did nothing to lower crime in the state and instead funneled tens of millions of dollars into incarceration costs when that money could have been spent on more valuable crime-fighting measures.

We unfortunately lack experts in our system who can keep an eye on decisions like these to make sure we are making the right calls to maximize public safety and are spending our limited resources most effectively. On the contrary, those responsible for law enforcement—the people who should be among the leading experts on public safety—often fail to advocate for policies that would benefit the overall public interest because their professional self-interest clouds their judgment. Soft-on-crime charges leveled at would-be reformers often come from those inside the law enforcement community—particularly prosecutors—because they benefit from the existing set of laws and practices and are all too willing to use high-profile cases to advance their agenda, even if it is not tied to proven public safety

outcomes. Prosecutors control the vast architecture of criminal law administration in the United States, and they benefit from the existing stable of broad laws with severe sentences because of the leverage it gives them to process their cases.¹⁴ They are often the first to complain about efforts to reform the system in ways that undermine their power, even if those reforms would better allocate limited resources and not increase crime. Nebraska prosecutors, for instance, ardently opposed a Nebraska law enacted in 2015 that reduced many maximum sentences for both violent and nonviolent crimes. "It's nothing but being soft on crime," said one career prosecutor, angry about losing the leverage that "will help you wrap up a case."¹⁵ In Louisiana, local prosecutors soundly defeated a 2014 bill that would have reduced Louisiana's draconian marijuana possession laws, under which a second possession charge is a felony and the third can land an individual up to 20 years in prison.¹⁶ A few years later, Louisiana passed criminal justice reforms with bipartisan support, but with one notable exception: the Louisiana District Attorneys Association.¹⁷ The organization actively lobbied against almost every suggestion.¹⁸ To take another example, the Indiana Prosecuting Attorneys Council lobbied against a bill that reduced the radius of drug-free school zones from 1,000 to 500 feet, despite evidence that the current law disproportionately impacted minorities living in urban areas by essentially encompassing entire regions of large cities like Indianapolis under the sentence enhancement.¹⁹ One prosecuting attorney argued that the 1,000-foot buffer was an "important tool" that makes prosecutors' cases "easier to prove."²⁰ At the national level, the National Association of Assistant United States Attorneys (NAAUSA), a group that represents federal prosecutors, sent an open letter to Attorney General Eric Holder expressing opposition to the 2013 Smarter Sentencing Act, which would have, among other things, reduced mandatory minimums for those convicted of nonviolent drug offenses.²¹ NAAUSA was explicit that its opposition was based on the fact the law would make their jobs more difficult because it would "prevent[] the government from obtaining benefits gained through concessions during bargaining."²²

Prosecutors typically claim they are the guardians of public safety when they advocate for longer sentences to stay on the books, even though longer sentences are not always best for public safety.²³ If prosecutors cared mainly about public safety instead of what made their professional life easier, they would be just as vocal about other issues that affect the successful reentry or reform of individuals who have committed crimes. But with the exception of a small cluster of prosecutors elected since 2016 who ran on a reform agenda, most prosecutors have instead been silent on these issues and have spoken out only on those issues that would affect the ease with which

they do their day-to-day jobs. NAAUSA, for example, has repeatedly provided congressional testimony and issued myriad press releases, open letters, and policy statements resisting even modest reductions in federal sentences, but it has not weighed in on the debate on collateral consequences or prisoner rehabilitation programming despite the importance of those issues for public safety.²⁴ In 2015, for example, the Obama administration announced the creation of the Second Chance Pell pilot program, which allowed some prisoners to obtain grants for postsecondary education. There was widespread and diverse support for the program, as well as for legislation that would reverse a 1994 law that made prisoners ineligible for Pell Grant funding (a law, it should be noted, that was itself the product of irrational tough-on-crime politics and was spearheaded by congressional Democrats and President Bill Clinton). The American Bar Association passed a formal resolution encouraging Congress to restore Pell funding.²⁵ Yet neither NAAUSA nor the National District Attorneys Association, the two leading prosecutor organizations in the country, released press reports or made any type of public showing in support of the policy.

Why are most prosecutors vocal about maintaining longer sentences even though studies show they fail to deter crime and at a certain point could even promote crime by making it more difficult for individuals to reenter society after serving their sentences? And why are prosecutors silent when it comes to a range of other policies that have been proven to promote public safety? A big part of the answer to these questions is that keeping sentences long and mandatory makes prosecutors' jobs easier because it gives them the leverage they need to get guilty pleas and avoid trials, and they believe they are achieving better outcomes with this power because they do not necessarily know about the trade-offs to their approach. Prosecutors may be unaware of other measures that have been shown to reduce recidivism, and they lack the incentives to focus on them because they do not get credit for doing so in the current political environment. Elected prosecutors have also resisted reforms that would lower sentences to forestall having political opponents attack them for being soft on crime. The result is that we lack influential forces to lobby for measured approaches that balance both the costs and the benefits of longer sentences, and we have a powerful prosecutor and law enforcement lobby that stands in the way of all but the most modest sentencing reforms.

This, in a nutshell, is the political dynamic that brought us to the state of mass incarceration and criminalization that we have now, which leaves so much human misery and racial injustice in its wake. Elected leaders fear being labeled as soft on crime, so they aim to appear as tough as possible, even if there is no empirical grounding for the approaches they endorse.

Members of the public respond positively to this posture because they do not understand the ways in which these various policies can backfire in the long run and make us less safe. And law enforcement officials stand ready to fight any significant changes that would undermine their almost complete discretion to operate this system to their own advantage. No one, it seems, is minding the store in the name of tangible public safety results and less costly options, so we have countless policies that undermine them.

If there is any good news in this grim picture, it is that a sizable number of people are finally paying attention to the fact that our approach to crime is misguided, and engaged and active citizens are fighting for change. Politicians across the political spectrum are also beginning to see that we need to do something to address the mass incarceration of Americans and the expansive reach of the criminal justice system.²⁶ This is thus the ideal time to pursue the kind of lasting institutional change that will produce better outcomes, and this book outlines the key institutional shifts that are necessary.

One key pillar of reform is to institute greater checks on prosecutors. Prosecutors have taken over large swaths of criminal justice decision-making even though they are not well suited to make policies across a range of issues because of their professional conflict of interest. They should not be in charge of policies related to forensics or prisons or clemency because prosecutors have a stake in those decisions that is not in line with the public interest. Prosecutors also need to face a check on their decisions related to charging and sentencing, which means judges must have the discretion to make sentencing decisions without having prosecutors tie their hands. Mandatory sentencing guidelines and mandatory minimum laws create an imbalance of power in favor of prosecutors that leads to unchecked abuses. It is also important for prosecutors' decisions to be reevaluated because our knowledge about individuals and criminal behaviors grows over time, and our criminal justice policies should account for new information. That means it is important to take second looks at sentences, whether through parole or a robust clemency process. It is also important to give prosecutors the right incentives to make the most of limited resources. We need to put in place caps on the resources prosecutors can use so that they do not overuse state prisons when cheaper options would produce the same or better results. We can use a variety of other checking mechanisms as well, from the elimination of cash bail (to avoid having prosecutors seek excessive pretrial detention) to organizational changes within prosecutors' offices that will ensure greater compliance with ethical rules. We can also employ better metrics for assessing prosecutors than simply looking at conviction rates or outcomes in high-profile cases. Instead, we should be asking

prosecutors to find ways to lower crime and incarceration rates (which we know can be done together because jurisdictions have done it), to minimize pretrial detention, to adopt better reentry practices so that people leaving prisons are less likely to recidivate, and to divert cases from the criminal justice realm when there are better options. As highly-mobilized and better informed voters in some communities are paying closer attention to prosecutor elections, these metrics can help them identify prosecutors who are truly committed to results and distinguish them from those who speak the rhetoric of reform but continue with the same failed policies of their predecessors.

While demanding more from prosecutors is a necessary step in achieving greater public safety and real reform, it is not sufficient. Prosecutors are powerful, but they do not control all criminal justice policies. The second critical avenue of institutional reform is to create expert agencies and commissions that are charged with using data and facts to make and recommend policies that maximize public safety. Critically, we need to design these agencies so they do not become tools of politicians and end up being used as just another avenue for instituting harsh policies that are not based on data or rational assessment. There are ways to set up agencies so that they can better withstand political pressures if they adopt policies that, on the surface, do not seem sufficiently tough. For example, these agencies should be subject to statutory requirements to stay within certain prison population caps and expenditure limits, which in turn will give these agencies the ability to produce better outcomes and push back against ill-informed populist impulses when those impulses would balloon the prison population or cost too much. These agencies should also be required to have diverse members who are attuned to all the relevant interests in criminal justice administration and who are well connected to key legislators so that their policies will have political support. Of course agencies will still be susceptible to some populist pressures, but these design traits will maximize their ability to resist them. Indeed, we know from the experience of expert criminal justice agencies that already exist that they can and have been successful in making fundamental changes to criminal justice policies that have resulted in better public safety outcomes, lower incarceration rates, cost savings, and far less human misery. The U.S. Sentencing Commission, for example, is not particularly well designed to resist political pressures and has often been used by Congress as just another avenue for increasing punishments. But even that agency was able to reduce more than 30,000 drug sentences retroactively based on its evaluation of data and recidivism studies. Those sentencing reductions caused the federal prison population to drop considerably and freed up resources for other public safety initiatives. And

it was possible because the Sentencing Commission is at least somewhat insulated from political pressures and is designed to rely on data and studies. It could have been even more effective with a better design, as we have seen in states that have more successful sentencing commissions. We need to empower more agencies to make important criminal policy decisions and design them so that their expertise, not ill-informed emotional responses, guides their policy-making.

The use of commissions and so-called managerial justice has a bad reputation in some circles because it has been associated with more punitive sentences, but the use of the agency model *per se* has not been the problem; the problem has been the politics that have overwhelmed these agencies. All too often agencies have been poorly designed to withstand political pressure, and politics overpowered them. It is possible to create better models and achieve better results. We can require agencies to demonstrate that their policies are cost-benefit justified and represent the best options for achieving public safety. And we can and should insist that the agencies responsible for criminal justice policy-making, like other regulatory agencies, face judicial review of their decisions to make sure they are consistent with a statutory mandate to promote public safety and are not arbitrary and capricious. This is the standard model for other regulatory agencies, and it should be used for criminal justice agencies as well. Indeed, it is all the more important to use it in an area where so much is at stake.

That brings us to the third key avenue of reform: the courts. Courts are critical checks on criminal law excess. Judges should be policing prosecutors and criminal justice agencies to make sure they are complying with their statutory mandates and the Constitution. It is critical to have a bench up to the task. If you care about criminal justice reform, you must pay attention to who occupies the bench, and you must support the election and appointment of judges who are committed to reinvigorating constitutional protections that have largely been ignored. The biggest drop in incarceration at the state level—California's reduction in prison population—came about because of a Supreme Court decision that finally put some teeth into the Eighth Amendment in a context outside of the death penalty, where the Court has devoted almost all its Eighth Amendment oversight. Supreme Court appointments matter greatly for the fate of criminal justice reform, but all too often voters and criminal justice groups concerned about those issues have ignored those appointments and what they mean for mass incarceration. Other judges—federal and state—matter, too, because they are guardians of constitutional protections and because their discretionary decisions (especially on sentencing) affect millions of cases and lives.

If we are serious about achieving better criminal justice policies and addressing mass incarceration, we must pay attention to these key aspects of institutional change. If we keep the existing decision-making structure in place—with traditional tough-on-crime politicians and prosecutors setting our policies—we will achieve little more than token reforms that only tinker around the edges of bad policies. At most, the existing political process is capable of producing only modest changes, focused predominantly on the harshest punishments for nonviolent drug and property offenders who do not have much in the way of a criminal record. These are the types of reforms we have seen thus far. For example, jurisdictions have repealed certain mandatory minimum sentences for nonviolent offenses, as South Carolina did in 2010 when it eliminated mandatory minimums for first-time drug convictions, including the 10-year minimum for selling drugs within a half-mile radius of a school, park, or playground.²⁷ Only Alabama had defined “school zone” more broadly, so curbing this mandatory minimum in South Carolina was hardly revolutionary.²⁸ Other jurisdictions have reduced sentences for low-level felonies, such as Missouri, which changed its maximum for low-level felonies from 5 years to 4 years, or Iowa, which reduced sentences for burglaries of cars and boats.²⁹ Some states have touted alternatives to incarceration, such as drug treatment programs for nonviolent drug offenders or those convicted of DUIs.³⁰ States that passed tough three-strikes laws have modified them to allow those whose strikes consisted of property and drug crimes to earn good-time credits in prison for earlier release, but the core of those three-strikes laws otherwise remained unchanged. For example, in response to some high-profile examples of egregiously long sentences for minor misconduct—one man received a sentence of 25 years to life for stealing videotapes worth \$150, and another received the same sentence for stealing one pair of socks—California passed a law to remove the mandatory 25-year sentence for those whose third strike is not deemed “serious or violent.”³¹ But even while it made that change, California still permitted the 25-years-to-life penalty if the third strike was for “certain non-serious, non-violent sex or drug offenses or involved firearm possession.”³²

Reforms like these are laudable and important, and I do not mean to suggest we should not keep striving to achieve more like them. But efforts like these, which are representative of the kinds of changes we are seeing in the name of criminal justice reform these days, will not make much of a dent in the overall sweep of incarceration or criminal punishment in the United States. As the Sentencing Project recently documented, at our current pace of reform and decarceration, it will take 75 years to cut the prison population in half.³³

This is largely the state of criminal justice reform right now, to the extent it exists at all: modest efforts that improve the status quo, mostly focused on drug sentencing and minor property crimes. Individuals serving time for drug convictions make up only 15% of those in prison.³⁴ Even if reformers expanded their efforts to include a rollback of sentence lengths for additional nonviolent offenses, that still would cover a fraction of the people who are incarcerated.³⁵ And the reforms we have seen thus far for even these groups of people are incremental, not sweeping. Jurisdictions still impose substantial punishments on these offenses, typically resulting in time in jail and prison. Very few people are diverted outright from the criminal justice system. Instead, many churn in and out of the system repeatedly, such that even when incarceration rates fall, prison admission rates in many places are rising.³⁶ None of these reforms should be mistaken for reforms that will address mass incarceration and criminalization in any meaningful way or that represent a wholesale evaluation of policies to maximize public safety and make the best use of limited resources. But these are the only kinds of reforms that will pass, given the populist politics of criminal law. If anyone suggested rolling back the punishment or collateral consequences for offenses involving violence, for example, they would likely be voted out of office. So the reform proposals remain modest because that is, at best, all the current system is capable of producing.

Even more discouraging is that, even as this process gives modestly with one hand, it takes away with the other. Despite the rhetoric of bipartisan agreement to roll back mass incarceration, we continue to see the proposal and passage of new criminal laws and the extension of criminal sentences to address whatever the latest public panic happens to be, whether it is campus rape, sex offenses against children, the scourge of opioids and fentanyl, a new fraudulent scheme or practice, or crimes committed by undocumented immigrants. Prison populations have been growing in about half the states, even while they have declined in the other half.³⁷ If we continue to pursue substantive policy changes directly from elected officials, the results will continue to disappoint because populist political dynamics will take hold once anything moves beyond the most modest of changes.

Some politicians have tried to shift the rhetoric from “tough on crime” to “smart on crime,” but that rhetoric often means only minor changes to a small subset of crimes involving no violence or risk of violence. If these elected officials really want to get smart on crime, they need to create a space for the people who have actual knowledge and expertise to make key policy decisions. Put another way, if we want to be smart about public safety, we need to seek changes to the decision-making structure responsible for getting us to the sorry state we are in now—with emotional

responses to high-profile crime stories all too often setting policy instead of data and studies about what works best. If we are serious about tackling mass incarceration and preserving public safety, we need to minimize the direct role of politics in crime policy and create incentives for key decision-makers to be accountable for real results and not simply high-profile stories.

The path to better results requires us first to identify those policies that need to be fixed and would be changed if we had a better institutional architecture for making decisions. Part One thus begins by providing a range of specific illustrations to prove the point that many laws and policies generated by the current approach to crime are not achieving better public safety outcomes, use limited resources inefficiently, lead to unnecessary confinement, and produce gross disparities and disproportionate punishments that are not tied to culpability or risk. While the list is lengthy, it is not exhaustive. But it should provide enough of a flavor of the kinds of policies produced by populist pressures instead of rational reflection. These are the kinds of policies we can and should change and that would both lower incarceration rates and make us safer. They include, for example, our tendency to group together people of different culpability for the same punishment because we define a crime based on an outlier case that received media attention and did not focus on who would actually be affected by a change in the law. It also includes our reliance on long sentences without recognizing the trade-offs of this approach, and the fact that people coming out of prison from lengthy terms of incarceration have a much harder time adjusting, thus increasing their risks of recidivism. We make the same mistake with pretrial detention, holding people unnecessarily before their trials, even though doing so often means they lose jobs, child care, and other support mechanisms, which in turn places them at a greater risk of committing crime. We fail to pay attention to what happens to people while they are incarcerated, which often means they come out worse off than when they came in because they received no programming, even though we know that cognitive behavior therapy, vocational training, drug treatment, and educational offerings in prison all reduce crime later. We often fail to reevaluate sentencing and policy decisions, leading us to continue on ill-considered paths even when evidence becomes clear that we should be pursuing different sentences for individuals and types of crimes. And we impose harsh collateral consequences on people with criminal records that make it harder for them to successfully reenter society, again increasing the risk they will commit more crimes.

Part Two explains in greater detail the dysfunctional political and institutional dynamics that produce the failed policies outlined in Part One.

These political forces explain why state after state, along with the federal government, all end up reaching the same irrational decisions, even though jurisdictions have vastly different cultures and ideologies. It also explains the persistence of these policies, even when better approaches exist. It is critical to understand the mechanisms that create irrational policies because better policy-making will require us to move away from this failed paradigm.

Part Three outlines the institutional changes for prosecutors, expert agencies, and courts that will help break the hold of populism and this cycle of irrationality. The key is to create and foster an institutional framework that prioritizes data, not stories, to drive decision-making. The actors responsible for making criminal justice decisions must be held accountable for improving public safety and not simply using tough rhetoric. More attention needs to be paid to the costs and benefits of different policy approaches to find the approaches that minimize risk overall, and courts must insist on reasoned decision-making and actively police constitutional boundaries.

Change will not be easy because criminal justice policy-making cannot be completely removed from politics and the populist desire for severe responses to high-profile crimes. But there is a growing bipartisan consensus that we have gone off the rails in criminal law, and more and more people are focusing on criminal justice reform, so this is the best opportunity we have had in decades for real change. We have so many policies that are lose-lose for everyone: policies that are not necessary for and often undermine public safety and that lead to grave individual injustice and discriminatory effects. Rational reflection will lead to the conclusion that these approaches need to change, so we just need to get the institutional architecture in place that allows for that rational reflection to take hold instead of continually getting swept away by populist emotions that ultimately lead to decisions that undermine the very public safety goals that the public so urgently wants to achieve. We have recognized the need to defer to experts in other areas. We live longer and more productive lives because we recognize experts can set better policies than we could using our own gut instincts. This model is consistent with democracy because these experts are pursuing the goals set by the public. They are just using their expertise to identify the best strategies for achieving those goals. It is long past the time we recognized this same model is preferable when it comes to criminal law and policy. Here, too, we can get better outcomes if we think about the long-term goal of public safety, instead of short-term emotional catharsis, and if we let experts look at the entire set of crimes and people committing them, instead of just focusing on the grisliest crimes that make headlines. We can get better results if we consider costs and benefits of different options and balance

the risks of different strategies. This is that rare policy public space where we can achieve better outcomes across the board—those that make us safer, save money, reduce racial disparities, and bring families and communities closer together instead of tearing them apart. It is thus in all of our interest to demand more out of our criminal justice policies. One of the government's primary functions is keeping us safe, and we should make sure we are getting results and not rhetoric from our leaders. If we demand real accountability, the need for institutional reform will necessarily follow because that is the only way it will be achieved.

PART THREE

FOR THOSE AFFECTED BY MASS incarceration and the thousands of criminal laws and long sentences on the books, it is a cruel irony that we arrived at this point almost by accident. No central planner sat down to craft it as a solution to society's many ills. Indeed, we do not have anything remotely close to a central criminal justice system in the United States. We have 51 jurisdictions making criminal laws and more than 2,300 prosecutors' offices making their own decisions about how to enforce them.¹ Yet somehow these different sovereigns and government officials have all more or less coalesced around the same punitive policies.

To be sure, there is wide variation among states in incarceration rates and among localities in enforcement practices. Incarceration rates range from that of Oklahoma, which currently has America's highest incarceration rate of 1,079 persons for every 100,000 residents, to that of Massachusetts, which has the lowest rate of 324 individuals per 100,000 residents.² These rates reflect differences in various practices and policies, from how the jurisdiction treats juveniles who commit crimes to the way they charge recidivists. Nor is all the variation at the state level. Within each state, counties and districts differ from one another. For example, all of the executions since the death penalty was reinstated in 1976 have been carried out by only 15% of the counties in the United States.³ Communities in southern states that have higher income inequality, a larger number of evangelists and fundamentalists, and/or higher crime rates are particularly punitive.⁴

This variation reflects the fact that the politics and institutions in different states diverge. But even Massachusetts would lead most of the rest of the world in incarceration, so American jurisdictions have more in common with one another than with most other countries when it comes to crime policies.⁵

Indeed, most of the various irrational policies described in Part One have sprouted up everywhere in the United States—sometimes with jurisdictions deliberately

borrowing the same flawed ideas from other places. Political forces and emotional responses have taken charge throughout the nation, leaving any concern with rational evaluation to the side. Case by case, statute by statute, the carceral state metastasized, without anyone looking to see whether it made any sense overall or even policy by policy.

But it is not enough to point out the flaws. Reformers and critics have been shouting from the rooftops about many of the policies outlined in Part One, begging for reform. They are often shot down by the usual tough-on-crime rhetoric or dismissed as insufficiently attentive to public safety, even when the status quo is doing little to protect the public and often creates greater dangers in the long run.

The problem, as Part Two makes clear, is that the political system is not the right location for debating and addressing the flaws in criminal justice. The politics of fear take charge, and without institutional checks to inject rationality into the process and with prosecutors firmly in charge, we will continue to get the same irrational policies.

To get better outcomes, we need a better institutional structure and process. The Framers knew it. They worried that legislators would tend to excess, so they created significant constitutional checks for individual cases. But those checks are in disrepair. And even if they were working as intended, they would be insufficient because they tend to focus on checking abuses in individual cases and do not provide a safeguard against broader irrational policy decisions.

Because of the politics of criminal law, legislators often fail to assess the costs and benefits of particular policies. They focus only on the benefits of long sentences and severity without recognizing the trade-offs. They do a poor job assessing risk trade-offs, often opting for policies that serve a short-term retributive impulse to deprive offenders of some benefit (whether it is a lower sentence, programming in prison, or the opportunity for public benefits on release) but that over the long term increase the risks of crime.

The traditional checks of individualization do little to address these problems because the problem is at a higher level of policy-making. What are needed to check these flaws are different institutional actors that can assess the bigger policy calls and check them for irrationality.

The solution to the over-politicization of criminal law—and the corresponding lack of rational deliberation it brings—is thus to make sure that there are appropriate checks in individual cases *and* that there is better broadscale decision-making. The next three chapters take up the task of describing a better institutional model for criminal justice decision-making that insulates the worst self-destructive impulses of populism and injects rationality in the system so that public safety is maximized at the lowest cost and on the best available evidence. And it seeks to offer solutions that are feasible in the political environment we live in. Another way of achieving better outcomes would be to remove politics from the equation as much as possible, such as by eliminating elections for prosecutors and judges where they exist. But that kind of sweeping change is simply not feasible, at least in the foreseeable future. The reforms outlined here, in contrast, may also be diffi-

cult, but they are within the realm of the possible in the current climate of criminal justice reform. Although changes to policing practices should also be part of any criminal reform package, those issues merit their own book-length treatment, so I leave questions of policing policies and practices for others with the relevant expertise.

Chapter 8 begins by offering an administrative framework to replace the largely unchecked power that prosecutors currently exercise. No solution to criminal law's excesses can ignore the powerful role prosecutors play in the system, so one key is to reconceive that role and recognize its enormous power and scope—and then seek to make sure prosecutors exercise their powers rationally and responsibly. Voters have a big role to play here by electing district attorneys committed to more rational, data-driven decision-making instead of stale rhetoric about long sentences. While the punitive political dynamics discussed in Chapter 6 apply to district attorney elections, these local elections might be more likely to involve voters with more direct knowledge and experience with how crime-fighting strategies are working (or, more to the point, not working) in their communities. Thus a mobilized segment of this electorate can bring about change by electing district attorneys who are focused on real results instead of the usual tough-on-crime rhetoric that often yields poor outcomes for both crime and the people who live in these communities. But elections will only go so far precisely because the politics of fear and misinformation about crime policies is so entrenched, particularly when it comes to violent crime or people believed to be at a risk for violence. So other checks on prosecutors are needed, as well as other institutions to play a mediating role.

Chapter 9 explains the need for using an expert agency model to address criminal justice policy-making and to coordinate policies among key actors. These expert bodies should use empirical data and studies to guide their decisions about criminal justice policy to maximize public safety. At the same time, these agencies must be designed to withstand the political pressures they will inevitably face to adopt superficially tough, but actually ineffective, measures to address crime.

Chapter 10 then turns to the judiciary. The courts are critical checks on criminal law excess. At the federal level, the Supreme Court must reinvigorate the constitutional checks that already exist to police improper practices and to check excessive punishments. And at both the state and federal level, more attention needs to be paid to who occupies the bench. Currently, judges are overwhelmingly former prosecutors, making them particularly ill-suited to provide the meaningful second look of prosecutorial decision-making that is necessary to bring rationality to the system.

CATALYZING COURTS

IN CASTING INSTITUTIONAL BLAME for the irrational set of criminal justice policies we have, it is important not to overlook the role of judges. The federal courts in general and the Supreme Court in particular have weakened constitutional protections against government excess in criminal law and have failed to question, much less scrutinize, government punishment practices. State judges, too, have fallen short in policing constitutional bounds and have not used their discretion to curb the worst excesses of the system.

But court oversight practices are not set in stone, and renewed attention to the courts is one of the key institutional pillars for reform. Although it will be an uphill climb to change courts' perspectives on their role in policing government excess in criminal proceedings, the seeds are already there for what this kind of review would look like and the results it could help achieve.

Recall that the decline in California's prison population accounts for a full 40% of the drop in incarceration numbers in the United States.¹ That decline never would have happened but for the Supreme Court holding, in *Brown v. Plata*, that California's prison conditions violated the Eighth Amendment ban on cruel and unusual punishment because overcrowding prevented adequate medical and mental health care. The Court upheld a remedial order that required California to cap its prison population at 137% of design capacity, which meant that California had to reduce its prison population by about 35,000 people within 2 years.² It was "the largest court-ordered reduction in prison populations ever in the United States."³

California responded by passing the Public Safety Realignment Act, which aimed to place more individuals in local jails instead of state prisons, by

curbing the number of people sent to prison for technical parole violations, and by improving rehabilitation and decreasing recidivism.⁴ The state provided \$7 billion to 58 counties to administer the new regime and imposed few requirements as to how localities were to spend the money.⁵ Although the results vary by county, the California prison population has declined more than the local jail population has increased, thus the overall population of people incarcerated has been reduced by roughly 18,000 people.⁶ While there was an initial uptick in crime rates in 2012, they dropped in 2013 and 2014, so by 2015, property and violent crime rates were below pre-realignment levels (with the one exception being auto theft).⁷ Thus California has achieved a dramatically lower incarcerated population without suffering an increase in crime—and all because the federal courts did their job.

But currently *Brown v. Plata* stands out as the exception, not the rule. The federal courts have largely failed to protect constitutional guarantees across a range of doctrinal areas, thus allowing the government to run amok in criminal cases without a check. Judges stand as the last check against prosecutors to make sure they are not overstepping. They bear the responsibility for calling out their constitutional violations, such as the failure to disclose exculpatory evidence. And when they see unethical conduct, they have an obligation to do something about it. Moreover, they often have the leeway to determine a defendant's punishment. In the absence of a mandatory sentence, judges will have the freedom to sentence a defendant within a range, and how they exercise that discretion matters a great deal to what our overall criminal justice landscape looks like. Indeed, judges (federal and state) have discretion over a range of important criminal justice issues.

This chapter surveys the critical role of judges in any reform effort. First, to highlight those areas best suited for legal challenges, this chapter outlines the areas where federal courts have failed to live up to their constitutional responsibilities. It then notes where the doctrine has started to move, thus paving the way for more significant inroads. It then explains the discretionary responsibilities of judges that are so important for how criminal justice is administered in the United States. Finally, it turns to the critical question of how to change the bench at the federal and state level to improve criminal justice decision-making.

The Constitution in Waiting

The federal courts—led by the Supreme Court—have gutted many constitutional guarantees. Consider first the right to a jury trial. The Constitution guarantees jury trials in Article III and the Sixth Amendment.⁸ While

the Supreme Court has made clear that the government cannot condition the exercise of other constitutional rights on concessions to the government, it has, as Chapter 7 notes, allowed the government to put a heavy price tag on the exercise of the jury trial right by allowing prosecutors to threaten far more serious charges when a defendant opts to go to trial instead of pleading guilty.⁹ It has, for example, upheld a prosecutor's threat (which the prosecutor ultimately carried out) to charge the defendant under a repeat-offender law with a mandatory life sentence if the defendant refused to plead guilty and accept the prosecutor's initial offer to seek a 5-year sentence.¹⁰ The Court likewise allowed a prosecutor to threaten to bring a death penalty charge if a defendant refused a plea deal that would impose a 50-year sentence.¹¹ Lower courts have followed the Supreme Court's lead and have recognized that prosecutors can threaten sentences orders of magnitude higher than the plea deals they are offering if defendants opt to exercise their jury trial rights. Thus a defendant could lawfully receive a 55-year sentence because he opted to go to trial instead of accepting the prosecutor's offer of a 15-year sentence if he pleaded guilty to a charge of distributing marijuana while possessing a gun.¹²

By allowing the government to threaten severe punishments that are far greater if a defendant exercises his or her right to a jury trial, the Supreme Court has weakened the jury power to the point that it exercises little restraint on the government. The result is that prosecutors operate virtually unchecked when seeking pleas, creating the world we live in now where more than 95% of the cases that reach a disposition get there through a plea instead of a trial.

A second crucial area where the federal courts have effectively ceded their authority to police constitutional rights is the substantive review of punishments. The Eighth Amendment of the Constitution bars cruel and unusual punishments, but as Chapter 7 explains, the Supreme Court has done little to enforce that guarantee outside the context of the death penalty.¹³ The lower courts have taken the Supreme Court's cues and have similarly upheld egregiously long sentences. They have, for example, upheld a sentence of 71 years for a driver in four bank robberies who had no prior record and who cooperated with law enforcement.¹⁴ Courts have been just as reluctant to second-guess prison conditions, no matter how abhorrent. *Plata* was the rare case where overcrowding conditions had become so egregious that the federal courts drew a line. But in just about every other instance, no punishment length or condition of confinement is bad enough for a court to intervene.

A third important area where the judiciary has failed to check the government is its interpretation of criminal statutes. The rule of lenity is a ven-

erable canon of statutory construction that holds that ambiguities in statutes should be interpreted in favor of criminal defendants, not the government.¹⁵ The rule reflects the important separation of powers principle that legislators, not courts, should be making laws that impose punishment.¹⁶ So if a statute is not clearly applicable to a defendant's conduct, it should be up to the legislature to specify that it meant to include that conduct within the statute's ambit. Legislation that results in the loss of liberty should have to go through the appropriate legislative process. At the federal level, that means it must make its way through both houses of Congress and be signed by the president. Because bicameralism and presentment would be rendered meaningless if the legislation passed is ambiguous on its face and only receives its content when interpreted by the judiciary, the rule of lenity insists on resolving any uncertainty in favor of the defendant. The rule also reflects the reality that it is far easier for the government to go back to the legislature to fix an interpretation resolved against its interests than it is for criminal defendants to do so.¹⁷ And of course the rule of lenity protects the fundamental due process value of notice.¹⁸ But despite lenity's pedigree and importance, it is all too often ignored by the courts as they stretch to find clarity in favor of the government where none exists.

Courts have also given shoddy treatment to the related constitutional rule against vague criminal statutes that fail to give sufficient notice to defendants. One review of cases found that, in the 30-year period from 1960 to 1990, the Supreme Court held only about a dozen statutes to be unconstitutional because of vagueness concerns.¹⁹ The rarity of a successful vagueness challenge continues to the present day, with few statutes falling on that ground. In the majority of instances, vagueness arguments are given little weight—as one commentator has noted, “dismissal in one this-contention-is-without-merit sentence or even footnote.”²⁰

Federal courts have also made it almost impossible for defendants to bring actions against prosecutors for violation of their constitutional rights under the relevant statute, 42 U.S.C. §1983. Although the statute's plain language contains no bars against lawsuits against prosecutors, the Supreme Court has concluded that prosecutors should be entitled to absolute immunity from civil suits under §1983 for actions they take in their capacity as prosecutors (even if prosecutors intentionally violate someone's rights), and so-called qualified immunity for the actions they take as investigators, which requires someone challenging the action to show that prosecutors violated clearly established law.²¹ Scholars have debunked the Court's claims that these immunity doctrines are justified by historical practice and have persuasively argued that the Court should not have read them into the

statute.²² Additionally, although the Court allows individuals to sue municipalities for prosecutorial violations of constitutional rights when prosecutors act pursuant to official municipal policy, the Supreme Court rarely finds the requisite deliberate indifference to constitutional rights by the municipality, even in egregious cases.²³ For example, the Court failed to find deliberate indifference in the case of *Connick v. Thompson*, where no fewer than four prosecutors made intentional decisions not to disclose to Thompson exculpatory evidence that demonstrated that his blood type did not match the blood type of the perpetrator of the murder for which Thompson was accused. The district attorney failed to take actions to make sure prosecutors in his office understood their disclosure obligations, and he did not provide any training on those requirements. Thompson was almost executed for a crime he did not commit, and it was only through the chance discovery of the exculpatory evidence that he was taken off death row and finally exonerated after serving 18 years. Yet the Court ruled against Thompson.²⁴

Finally, courts have condoned imprisonment for defendants who fail to pay fees and fines that they cannot afford, in violation of due process and equal protection. Municipalities frequently impose fines as punishment for offenses not traditionally thought to merit incarceration, especially traffic offenses. Individuals can also face fees for jail and prison stays, probation supervision, and court costs.²⁵ Jurisdictions then often detain those defendants who fail to pay those fees and fines.²⁶ The Supreme Court recognized decades ago that “due process and equal protection converge” in failure-to-pay cases and that imprisoning someone who cannot afford to pay a fee or fine offends both the “fundamental fairness” that is the touchstone of due process and the equal treatment of the poor.²⁷ Thus, under Supreme Court case law, courts should consider whether a defendant has the ability to pay a fee or fine before incarcerating him or her for failure to pay. Specifically, a court must find that the failure to pay was “willful” or resulted from lack of “bona fide efforts” to avoid “punishing a person for his poverty.”²⁸ However, there is ample evidence that courts are simply not upholding these constitutional touchstones against state and local authorities.²⁹ This was demonstrated by the Department of Justice’s Ferguson report, which found that municipal courts were issuing warrants “without any ability-to-pay determination.”³⁰ This dereliction of constitutional duty is not confined to Ferguson, as the same problem exists in jurisdictions throughout the country.³¹ Even when judges do inquire into a defendant’s reasons for failing to pay fees or fines, they often have such a weak definition of “willful” or such a demanding definition of “bona fide efforts” as to render the inquiry almost meaningless.³²

The courts have taken the wrong legal turn in all of these areas, and the policy consequences of failing to uphold the law have been devastating. The net effect of courts failing to police these constitutional protections has been to enlarge government power and to create space for abuses in criminal matters. The courts have thus assisted in creating an irrational scheme that overcriminalizes and imposes excess punishment at a great cost to liberty and government budgets and without any tangible benefits to public safety. The Constitution and the rule of law demand far more of the courts and our government.

Hints of Change

Law is not stagnant, however, and the federal courts, including the Supreme Court, seem to be slowly realizing at least some of their doctrinal missteps. Consider first the Supreme Court’s treatment of the jury guarantee, which is starting to get more attention by the Court. Until 2000, it looked as if the Court would permit legislators to write laws to make just about anything that increased a defendant’s punishment into a sentencing factor to be decided by a judge by a preponderance of the evidence instead of treating such facts as offense elements that had to be decided by a jury beyond a reasonable doubt. In 2000, the Court began a major shift in course. It held that the Sixth Amendment places limits on the ability of legislators to create mandatory statutory sentencing factors that the government need prove only by a preponderance of the evidence in order for a defendant’s maximum punishment to increase. The Court held that any factor (other than a prior conviction) that increases the statutory maximum must be treated as an offense element that the jury must find beyond a reasonable doubt (or to which the defendant must plead guilty).³³ The Court continued down this path, finding that mandatory sentencing guidelines would be treated the same way, first striking down a Kansas state sentencing regime in *Blakeley* in 2004 and then ruling that the federal sentencing guidelines ran afoul of this principle in *Booker* in 2005.³⁴ In 2013, in *Allelyne*, the Court took yet another step, ruling that facts that trigger a mandatory minimum sentence must also be treated as offense elements that must be proven beyond a reasonable doubt to a jury.³⁵

It would be hard to overstate the significance of this line of cases. In the federal system, *Booker* made the federal sentencing guidelines advisory instead of mandatory, thus giving judges discretion to take into account individual facts in a case and ultimately resulting in a significant reduction in the length of federal drug sentences.³⁶ *Allelyne* then paved the way for

the Obama Justice Department's shift in its charging policy to bring fewer prosecutions that trigger a mandatory minimum and to reserve them for the most serious cases.³⁷ Although that policy shifted again under the Trump administration, with federal prosecutors being instructed to charge the most serious readily provable offense and without special instructions to limit charges in cases with mandatory minimums, the underlying Court holding still stands, so now the government will have to prove those facts that trigger a mandatory minimum sentence beyond a reasonable doubt.

This shift in doctrine was thus substantial, and it came about because of a Court that finally recognized that the jury had been unconstitutionally shut out of criminal cases.³⁸ The majority consisted of a mix of justices sensitive to the separation of powers and the Framers' commitment to the jury and those attuned to defendants' individual rights. Justices Scalia and Thomas represented the conservative flank of this coalition and did so because of their commitment to originalism and the Framers' conception of the jury trial right. Justices Stevens, Souter, and Ginsburg represented the liberal wing of this group because of their commitment to individual rights and the jury's crucial role in protecting defendants.³⁹ These justices restored the jury to its rightful position as a check on the exercise of government power in individual cases. The Framers recognized the importance of the jury check because they were aware that policy is made in the aggregate in the legislative process and inevitably gets swayed by the most extreme cases.⁴⁰ The judicial process, and the jury's role within it, provides a crucial corrective because of its focus on individual facts and circumstances.

This was not the only line of cases in which the Court has recently recognized that it must provide a more robust check against the government to comply with the Constitution. The Court also acknowledged, for the first time, that more checks are needed on the plea bargaining process than simply a defendant's ability to take his or her case to trial. In *Lafler v. Cooper* and *Missouri v. Frye*, the Court held that in cases in which a defendant does not accept a plea offer because of ineffective assistance of counsel, the fact that a defendant receives a fair trial does not remedy the ineffective assistance.⁴¹ The Court noted that the defendant received a more severe sentence as a result of going to trial, so that "far from curing the error, the trial caused the injury from the error."⁴² The Court rejected the government's argument that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining," because the government's "position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials."⁴³ The Court concluded that the remedy for this kind of ineffective assistance may be having the district

court conduct a hearing to determine whether, but for the error of the defendant's lawyer, the defendant would have accepted the plea. If such a showing is made, the court should then decide whether to give the defendant a new sentence. Another possible remedy may be to require the prosecution to reoffer the plea deal. This was a huge acknowledgment by the Court, and one that could pave the way for future regulation of the plea process.

Indeed, state courts have already taken further steps to level the playing field in plea bargaining negotiations. For example, in 2015, the West Virginia Supreme Court held that prosecutors violate a defendant's due process rights when they do not provide exculpatory evidence during plea negotiations.⁴⁴ The defendant, Joseph Buffey, had pleaded guilty to rape and robbery in 2002, though at the time of the plea negotiation, prosecutors already had forensic lab reports concluding that Buffey was not the DNA source from the rape kit.⁴⁵ By extending *Brady v. Maryland* to the plea negotiation stage, the court paved the way for future defendants to "seek to withdraw a guilty plea based upon the prosecution's suppression of material, exculpatory evidence."⁴⁶

While these are important steps, complete reinvigoration of the constitutional jury guarantee would require the Court to recognize that allowing the government to impose vastly higher sentences on defendants who exercise their right to a jury trial is an unconstitutional condition on that critical right. While that would be a bold step from where the Court has been, it is consistent with the Court's unconstitutional conditions jurisprudence and would not necessarily mean having to overrule the Court's past decisions accepting plea bargaining, because even those decisions had caveats. In *Brady v. United States*, the Court cautioned:

We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In *Brady's* case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened *Brady* with a harsher sentence if convicted after trial in order to induce him to plead guilty.⁴⁷

It is thus entirely consistent with existing case law for the Court to start policing prosecutors to make sure they are not threatening defendants with longer sentences just to get them to plead guilty. This could be done, for example, by setting up a limit on the difference between the sentence offered and how much of a sentence the defendant faces if he or she goes to trial to limit the coercion of the plea offer.⁴⁸ Or courts could look to see if a sentence threatened is an outlier for the jurisdiction for similar cases. The

Court has not yet shown an interest in doing something like this, but it is the kind of policing that is necessary to make sure that prosecutors are not placing unconstitutional conditions on the exercise of the jury trial right. With the right litigation strategy and enough justices willing to rethink the Court's flawed plea bargaining jurisprudence, it could pose a needed corrective on prosecutorial interference with the jury guarantee, and given the Court's recent recognition of how important it is, it is not inconceivable that the Court will go down this path.

Another doctrinal area where some movement is being made and more could be done is in the Eighth Amendment context. Here, too, we have seen some modest inroads that could eventually pave the way for much more. Until 2010, the Supreme Court reviewed noncapital sentences with great deference to the government. As Chapter 7 explains, a defendant challenging a sentence as cruel and unusual would have to show, as a threshold matter, that the state lacked a reasonable basis for believing that the sentence would achieve any of the traditional purposes of punishment (i.e., deterrence, rehabilitation, incapacitation, or retributive justice).⁴⁹ It is almost impossible to meet that standard, because the state can almost always make a credible argument that it believed a sentence would incapacitate an individual from committing more crimes. It is hardly surprising that the Court did not strike down a single sentence under that inquiry. But in 2010, the Court seemed to change the test, at least in some cases. In *Graham v. Florida*, the Court held that life without the opportunity for parole was a disproportionate sentence for all juveniles who do not commit homicide. Instead of applying its usual threshold test, the Court applied a categorical test that had previously been used only in capital cases. Under this approach, the Court "first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine if there is a national consensus against the sentencing practice at issue." Then the Court must "exercise its own independent judgment whether the punishment in question violates the Constitution."⁵⁰ The Court followed up *Graham* 2 years later with *Miller v. Alabama*, in which the Court determined that mandatory life without parole (LWOP) sentences for juveniles are unconstitutional in all cases, including homicides, because a judge must make an individual determination that such a sentence is appropriate in a given case. The majority concluded that mandatory LWOP "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change.'"⁵¹ Thus in *Miller*, the Court borrowed from another line of death penalty cases that prohibited the mandatory imposition of the death penalty without individualized consideration of the defendant's characteristics and the details of the offense. These two decisions were ex-

pressly limited to juveniles, but one can imagine broadening them to other noncapital contexts as well, thus paving the way for more categorical challenges and striking down mandatory sentencing schemes in other contexts.

Indeed, if the Court continues to see that its approach to capital cases also should be applied to noncapital cases—as it did in *Graham* and *Miller*—it will see that it has an obligation under the Eighth Amendment to check mandatory sentences not only in capital cases and in LWOP cases involving juveniles, but in all cases. When the Court rejected mandatory death sentences, it noted that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."⁵² But of course that same "fundamental respect for humanity underlying the Eighth Amendment" applies to noncapital sentences as well and likewise calls for individualized assessment of whether the punishment fits the circumstances of the crime and the individual character and record of the person who commits it.⁵³ The Court has already acknowledged this when it comes to juveniles receiving LWOP sentences, but the concern cannot be cabined. Logical and doctrinal consistency should lead the Court to see that there is not one Eighth Amendment for death cases and one for everything else. Its principles should apply across the board, thus paving the way for abolition of all mandatory sentences that prohibit judges from taking into account an individual's circumstances.

Recent developments suggest there is an opportunity for progress on the fees and fines front as well. As noted, this is an area in which the doctrine is already clear that failure to pay fees and fines cannot be the basis for imprisonment where defendants are too poor to pay, but courts have weakly policed this area of law. As more attention has been paid to the abuses of criminal justice administration, federal district courts have started taking seriously challenges brought against municipalities for their policies of incarcerating indigent defendants for failure to pay fees and fines with no regard to their ability to pay. For example, claims against both Ferguson and New Orleans have moved past the motion-to-dismiss stage.⁵⁴ Despite a 2014 settlement purporting to end practices like these in Montgomery, Alabama, several new cases are currently moving forward there challenging "a series of interwoven policies designed to increase municipal budgets at the expense of members of the community."⁵⁵ A federal court has also preliminarily enjoined a Tennessee county's practice of jailing indigent probationers for failure to pay court fees with no regard to their ability to pay their bond.⁵⁶ Some state courts have recently moved to police these practices more closely as well.⁵⁷ Whether this litigation will ultimately lead the

way for even bolder decisions remains to be seen, but the seeds for change have been planted.

There is room for change, too, when it comes to the federal courts' approach to interpreting statutes—whether with respect to applying the rule of lenity or in relation to a constitutional vagueness challenge. Justice Antonin Scalia was a strong advocate for lenity on the Supreme Court and was willing to strike down laws as vague as well, even if meant individuals who committed violent crimes would benefit. His decision for the Court in *Johnson v. United States*, for example, struck down a clause of the Armed Career Criminal Act (ACCA) as vague.⁵⁸ Because that decision ultimately applied retroactively, it paved the way for at least several hundred of the estimated 6,000 to 7,000 individuals serving ACCA sentences to be released from prison earlier than their initial sentences.⁵⁹ Moreover, in response to *Johnson*, the U.S. Sentencing Commission deleted an identical “residual clause” from the sentencing guidelines, which ought to reduce by 2,000 the number of people receiving that enhancement each year going forward.⁶⁰ Although there are fewer signs of change in the area of immunity defenses, it is nonetheless possible that the Court will someday take a new look at those defenses in cases of prosecutorial misconduct, particularly as more and more cases of misconduct pile up.

The key takeaway is that none of these doctrinal doors are slammed shut for all time, and some have already been pried open. It is just a question of how much further the courts might be willing to go to protect constitutional guarantees that have for too long been dormant.

Judicial Discretion

Judges do more than just interpret and pronounce the relevant legal standards. They have tremendous discretion across a range of issues that are of critical importance to criminal law. In most cases, judges choose the sentences defendants will ultimately receive. Unless there is a mandatory sentence—usually a mandatory minimum—the judge will have the freedom to pick a sentence within a wide range. In states without sentencing guidelines, that range can be quite substantial. It is not uncommon, for example, for a judge to have the freedom to choose a sentence anywhere within a range of 0 to 20 years.⁶¹ Judges can even decide whether the automatic imposition of collateral consequences should affect the length of a term of confinement.⁶²

Judges make other key decisions as well, from evidentiary rulings to jury instructions. Since most cases get resolved by pleas, it is noteworthy that it is

up to judges whether to accept those pleas. Although judges typically accept the deal as long as the plea was knowing and voluntary, some judges push back when they see prosecutorial overreaching. For example, when he was serving as a federal judge, John Gleeson called out what he saw as excessive charging in the Eastern District of New York “in the hope that doing so might eradicate or reduce the number of such abuses.”⁶³ In one such instance, the government agreed to vacate convictions to allow an individual who had already served two decades of a more than 57-year prison sentence to be resentenced.⁶⁴ On the heels of broader criticisms by judges (including Judge Gleeson) about how federal prosecutors were charging defendants in drug trafficking cases involving mandatory minimums and enhancements for prior felonies, the Department of Justice (DOJ) altered its policies.⁶⁵ To be sure, one cannot know whether the judges' critiques caused the shift, but the timing suggests that DOJ heard the judges' concerns.

When prosecutors engage in misconduct, such as by failing to disclose exculpatory *Brady* material, judges determine the remedy and whether prosecutors should be sanctioned. Some judges have been vocal about what they see as a pattern of prosecutorial misconduct or overreach and have used their position on the bench to seek to address it. Judge Emmet Sullivan, for example, appointed an outside attorney to investigate the failure of federal prosecutors to disclose exculpatory evidence in the prosecution of former Alaska senator Ted Stevens.⁶⁶ Alex Kozinski, a former federal appellate judge in California, has argued that judges need to publicly name prosecutors who engage in misconduct.⁶⁷ Other judges have likewise issued opinions or orders calling out prosecutorial misconduct. Sometimes they ask the government to conduct an internal investigation, and other times they refer the prosecutor involved for discipline.⁶⁸ In some cases, a judicial critique has sparked greater change in office practices.⁶⁹ Some judges, including Judge Sullivan, have put in place standing orders placing greater demands on prosecutors to turn over exculpatory evidence in proceedings before them.⁷⁰ At times, judges are concerned that prosecutors are not sufficiently vigorous in pursuing criminal activities, particularly when it comes to wealthy corporations. Thus judges have indicated a greater willingness to police settlements that appear too favorable to corporate defendants or that contain illegal or unethical settlement terms.⁷¹

Judges have also taken the lead in many cases in establishing alternatives to incarceration or treatment models in their courts because of their frustration with the “perceived inadequacies in the conventional criminal law administrative approach.”⁷² These so-called problem-solving courts seek to address some underlying problem of the defendant that has a nexus to his or her criminal activity (such as drug addiction or mental illness) in a

collegial, nonadversarial environment. Judges have similarly used their discretion to create so-called reentry courts, which aim to help defendants transition from terms of incarceration to jobs, educational opportunities, and housing.⁷³ There are thousands of problem-solving courts at the state level, and in recent years, federal courts have started to create such courts as well.⁷⁴ In many if not most cases, judges spearheaded the creation of these courts (with the consent of the parties) as a matter of discretion and took the lead in designing the courts, including setting the eligibility criteria and determining the effect of participation on a defendant's ultimate sentence.

Sometimes judges go beyond using their authority in the courtroom to effect change and use their stature to call attention to broader failings in the system. Justice Anthony Kennedy, for example, has spoken out against solitary confinement and the failure to rethink long sentences, noting in 2003 that "our resources are misspent, our punishments too severe, our sentences too long."⁷⁵ Judge Jed Rakoff of the Southern District of New York has called out the disproportionate share of power lodged in prosecutors, has criticized mass incarceration, and has urged other federal judges to speak out against the failings of the criminal justice system.⁷⁶ Several state judges have been advocating for bail reform. For example, Chief Justice Tani Cantil-Sakauye of the California Supreme Court publicly announced that she supported an overhaul of the state's pretrial system because it unfairly disadvantages low-income defendants.⁷⁷ Timothy Evans, the chief judge of the Circuit Court of Cook County, Illinois, recently issued an order requiring judges to set bail at an amount that the defendant can actually pay.⁷⁸

Even this relatively brief overview of judicial powers and discretion should make it plain that who sits on the bench makes an enormous difference in how criminal law looks in the United States, not only because these judges interpret criminal laws but also because of their vast discretion and the stature they have to urge changes. While it has been obvious to many criminal justice reformers to pursue a litigation strategy as part of their reform efforts, they have largely ignored judicial selection as a key area for pursuing change, but the selection of judges is critical for all the areas outlined here.

Selecting Judges

It is long past time for those interested in criminal justice reform to focus on the composition of the bench as part of their reform efforts. Although there has been a nascent movement focusing on prosecutor elections, judges

have thus far escaped attention. Reformers have also failed to pay much attention to the federal bench and appointments made by the president. This relative lack of interest was vividly demonstrated when Justice Scalia passed away, and President Obama had to name a successor to his seat on the Supreme Court. This vacancy should have been of central concern to those interested in criminal law, not only because the Court is responsible for policing constitutional guarantees in criminal cases, but also because Justice Scalia was often a crucial vote for protections for defendants.⁷⁹ On the modern Supreme Court, Justice Scalia was the greatest defender of both the rule of lenity and the rule against vagueness.⁸⁰ Justice Scalia was also committed to other substantive criminal law issues, including a defendant's right to confront witnesses against him or her and the jury guarantee, which led him to vote with the majority in a host of important sentencing decisions that gave greater discretion to judges and placed a greater check on the government.⁸¹

Given Justice Scalia's importance to many blockbuster criminal cases that protected defendants' rights, one might have expected criminal justice reform advocates to pay close attention to his replacement by President Obama. Black Lives Matter and other criminal justice reform advocates could have focused on the nomination to ensure that Justice Scalia's replacement would, at a minimum, share his commitment to constitutional rights that protect defendants—and indeed look for someone who would be more protective, as Justice Scalia was not uniformly protective of defendants' interests, all but ignoring the Eighth Amendment, for example.⁸²

There were some reports that President Obama had considered people with public defense in their background for the open seat, but there was little advocacy by criminal justice reformers around the issue or any noticeable attention by them to the type of justice who should be selected.⁸³ When President Obama announced his selection of Judge Merrick Garland, a former career prosecutor with a record of supporting the government in criminal cases, there was hardly a word from the criminal justice advocacy community.⁸⁴ If reformers want to achieve real substantive changes in criminal law, this must change, not only by paying attention to Supreme Court appointments but to all federal court appointments and judicial selection at the state level, too. Who serves in the judiciary is critical to the development of criminal law. Ironically, the judge ultimately selected to the open seat left by Justice Scalia, Justice Neil Gorsuch, might in the end be more likely to rule in favor of criminal defendants than Judge Garland because Justice Gorsuch seems to share Justice Scalia's commitment to lenity, textualism, and the separation of powers.⁸⁵ But if that occurs, it will largely be fortuity, as groups concerned with criminal justice failed to mobilize

around the issue of the Supreme Court appointment. Moreover, if groups had focused on the issue, it might have resulted in getting someone even more attuned to the need for robust protection of rights in criminal cases.

Reformers in other areas have recognized the importance of the courts to their agenda and have actively participated in the politics of judicial selection to make sure their positions are represented. Abortion-rights groups, for instance, were a driving force in the ardent Democratic opposition to the nomination of Justice Gorsuch, urging Democratic senators to filibuster a procedural vote by sending letters to the senators and organizing anti-Gorsuch protests around the country.⁸⁶ Liberal groups also strongly opposed President Obama's nomination of Michael Boggs, a conservative Democrat, to the U.S. District Court for the Northern District of Georgia, because of his opposition to same-sex marriage and his record supporting anti-abortion legislation.⁸⁷ Labor and environmental groups initially opposed President Obama's consideration of Judge Sri Srinivasan of the D.C. Circuit for a Supreme Court vacancy, voicing concerns over his representation of a mining company and Enron while he was an attorney at O'Melveny & Myers.⁸⁸ These other progressive groups have long recognized that judicial appointments are critical to their goals, and they have pushed Democratic politicians to put judges on the bench who will not be hostile to those goals.

Criminal justice reform advocates have been largely silent on judicial selection to this point, but if they want to achieve meaningful change, they, too, must pay attention to judicial appointments and elections. It is critical to change the composition of a bench dominated by prosecutors. Currently, the federal bench is overwhelmingly comprised of individuals with prosecution experience and has very few individuals with a public defense background. Almost half the active judges on the federal bench (43%) have prosecutorial experience, compared with only 10.4% with public defense experience.⁸⁹ Even with a president who proclaimed an interest in criminal justice reform, these numbers barely budged. Of President Obama's nominees, a full 41% had prosecution experience, and only 14% had public defense experience.⁹⁰ While President Obama appointed five of the current federal appellate judges with public defense backgrounds, that brought the total to just seven.⁹¹

The state court bench suffers from a similar skew. A survey of state supreme courts found that those with prosecution experience outnumbered those with a public defense background by a 2 to 1 margin.⁹² Lower courts often contain a disproportionate number of judges with prosecution backgrounds as well.⁹³ One county in Florida, for example, has a bench where 3 out of 4 judges has prosecution experience.⁹⁴

Although judicial doctrine is often slow to change, a bench with more diverse perspectives than those of government prosecutors is more likely to shift, both in terms of doctrine and in terms of those critical day-to-day findings of fact and exercises of discretion. Social scientists have long demonstrated that judicial backgrounds affect decisions.⁹⁵ One cannot expect much scrutiny of the government with a bench overwhelmingly occupied by prosecutors. Of course, people can and do obtain new perspectives and outlooks as they take on different roles, so some people who become judges with a professional background in prosecution may not simply defer to the government's claims and positions. But "it defies what we know about human nature and experience to think that someone's past experiences have no effect on their outlook. Because real criminal justice reform requires judges to check overreach by prosecutors and other law enforcement officials, it is critical that the bench reflect a range of professional backgrounds."⁹⁶

Thus if criminal justice reform groups want to make real changes in the system, they need to take that commitment to all areas, including the judiciary. That means taking an active role in policing who gets appointed to the federal bench and showing the same zeal they have started to apply to local prosecutor races and using it to address judicial elections in the states.