MASS INCARCERATION, PENAL MODERATION, AND BLACK PRISONERS SERVING VERY LONG SENTENCES: THE CASE FOR A TARGETED CLEMENCY PROGRAM

*Antje du Bois-Pedain**

The prevalent criminal justice practices in the U.S. have produced levels and patterns of incarceration that fewer and fewer politicians, scholars, and citizens care to support. There seems to be widespread consensus that the system is indicted as unjust by its outcomes no matter how these outcomes came about. But if that is so, how can it be turned back? Who should be eligible for release, and on what grounds? This article addresses the position of black prisoners serving very long sentences. Many of these prisoners are at risk of missing out under current legislative and administrative proposals designed to reduce overall levels of imprisonment. Partly this is due to the fact that the wrong of mass incarceration is often understood as a wrong suffered at the collective level by what has come to be referred to as "overpunished communities." It is unclear how the existence of that collective wrong affects the permissibility of continued punishment at the individual level. This article develops an argument that, at the individual level, being a black prisoner serving a very long sentence gives rise to a moral entitlement for a review of the need and justification for continued incarceration. The article outlines the basic shape of a clemency scheme devised especially for these prisoners as a moral imperative for a reform process intended to remedy penal injustice.

Keywords: *mass incarceration, black prisoners, clemency, excessive punishment, antiblack racism in criminal justice*

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Professor du Bois-Pedain's incisive article represents the seventh—and last—contribution to the *New Criminal Law Review*'s special issue on "New Topics in Sentencing Theory." The other articles, which appeared in the prior issue of this journal, include arguments in favor of algorithmic sentencing, concentrating mercy powers in local prosecutors, and recognizing an individual's post-offense conduct when determining their treatment; analyses of impermissibly degrading punishment and "expressive" corporate punishment; and an internal critique of "limiting" retributivism. It is my hope that this special issue can contribute to the still young field of sentencing theory and thereby help discover the set of reasons that ought to calibrate and constrain state punishment.

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INTRODUCTION

Consider the astonishing life story of Messiah Johnson who, having been convicted in 1997 of armed robbery of a beauty salon and sentenced to 132 years in prison, was released in 2018 on a conditional pardon after the Innocence Project at UVA Law School had, by a mixture of good luck and tenacious investigation, identified the real perpetrator who had even been willing to admit to the crime.[1] Messiah Johnson's conviction was based on unreliable eyewitness evidence; his alibi was not believed. The police had not bothered to look for other suspects. The prosecution had offered him a three-year plea deal, which he hadn't taken, insisting he was innocent.[2] Undoubtedly this is the stuff of great real-life drama—one human being's tragic misfortune turned around against all odds. But does it hold any lessons about the criminal justice system, lessons that extend beyond wrongful convictions to the system's treatment of the "properly convicted"? If it does, it must be central to them that the exoneree is black. How, other than by pointing out that Messiah Johnson was a young black man in a certain place at a certain time, can one even begin to explain the

1. Eric Williamson, *Freed UVA Innocence Project client Messiah Johnson heads home* (Apr. 28, 2018), https://www.law.virginia.edu/news/201804/freed-uva-innocence-project-client-messiah-johnson-heads-home.

2. Jessica Larche, *News 3 interview with Messiah Johnson*, WKTR.COM">http://WKTR.COM">WKTR.COM (Jul. 23, 2017), https://www.wtkr.com/2017/07/23/only-on-3-man-serving-132-years-for-robbery-speaks-out/.

staggering length of the sentence he was given?[3] Even the governor signing his release order couldn't help observing that the sentence was "far outside what should have been adequate to keep Virginia safe."[4] But one also has to wonder whether, earlier in the process, the racial and socio-economic group he belonged to influenced the police's disregard for the alibi he'd provided and their uncritical acceptance of a wobbly identification, the prosecutor's charging decision, and the sentence he received. He was already stamped a criminal before he got connected to this particular crime.

The criminal justice practices in the U.S. have produced levels and patterns of incarceration that fewer and fewer politicians, scholars, and citizens care to support. There seems to be widespread consensus that the system is indicted as unjust by its outcomes no matter how these outcomes came about. But if that is so, how can it be turned back? Simply waiting for existing prisoners to complete their sentences, and for sentencing and other reforms to reduce new intake and bring down length of stay for those newly imprisoned, will not reduce imprisonment levels to anything near the levels that U.S. history, and the comparison with other nations, suggest are sufficient for crime control.[5] Fixing the problem of mass incarceration will therefore require active efforts to release large numbers of prisoners earlier than their current release date. This raises questions of who should be eligible for release, and on what grounds. Although the phenomenon labelled "mass incarceration"—an outrageously high absolute number and population-based proportion of incarcerated individuals that also shows a stark racialized pattern, with extremely disproportionate imprisonment levels among black men—undeniably *affects* a far greater proportion of

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3. Johnson was 24 at the time.

4. Eric Williamson, *UVA's Innocence Clinic Wins Release of Man Convicted of Armed Robbery* (Jan. 12, 2018), https://www.law.virginia.edu/news/201801/innocence-clinic-wins-release-man-convicted-armed-robbery. Although the precise basis of the sentencing decision in Johnson's case cannot be gleaned from the available information, one does wonder whether white defendants have been receiving comparable sentences for similar crimes. The UVA Innocence Project's website includes an exoneration success for a white client (Gary Bush) who in 2007 was convicted and sentenced for two bank robberies he did not commit. This client's sentence was five years for the first and seven years for the second robbery. UVA Innocence Project, *Client Victories*, http://innocenceprojectuva.org/client-victories.

5. A question not addressed in this article is what the target figure for imprisonment levels should be, and on what basis it should be set. For some pertinent discussion, see Todd R. Clear, *Decarceration Problems and Prospects*, 4 Ann. Rev. Criminology 239, 248–50 (2021).

black men than any other sub-group of America's population, the attempts to address the phenomenon by legal-institutional means often do not appear to be expressly designed to particularly benefit black male prisoners.[6] At the same time, the very project of accounting for the extreme racial distribution of imprisonment in a way that ignores the potential influence of race-based discrimination seems an implicit commitment to continued discrimination.[7] This becomes clear when one considers the four explanatory frameworks or "articulations" that Paul Butler identifies as relevant to political discourses about race and policing: "black male culture and black criminality," "underenforcement of law [against criminal justice agents]," "relation[s] between the police and [affected] communities," and "[attitudes and practices of] white supremacy and antiblack racism."[8] Assuming that these articulations are equally applicable to discourses about race and criminal punishment, they serve as a reminder why explanations of mass incarceration must take race-based discrimination seriously as a possible contributing factor: any attempt to bypass race-based explanations would admit only the first and possibly the second, but not the third and certainly not the fourth articulation into the analysis. The working hypothesis on which this article rests is that all four articulations have some significance in explaining the current levels and patterns of incarceration, and should influence the design of remedies. This article's focus is specifically on African-American male prisoners—in part because the quantitative data regarding this group is most extreme, and in part because some explanatory frameworks that apply to this group of prisoners may be inapplicable or play a weaker role in respect of other racially, culturally, or ethnically distinct groups of prisoners.[9]

6. One early attempt to do so, by Paul Butler (*Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997)), never gained political traction. Reading his proposals nearly 25 years on, one is struck by how much injustice could have been prevented, had there been political uptake at the time.

7. For a broader argument to this effect, see Naomi Murakawa, *Racial Innocence: Law, Social Science, and the Unknowing of Racism in the US Carceral State*, 15 ANN. REV. L. & SOC. SCI. 473 (2019).

8. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1427 (2016).

9. Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. U. L. REV. 1625, 1636 (2017) claims that "from the beginning of the Republic, the organisation of legal authority [in the U.S.] . . . has been an outgrowth of the need for a race-based system of

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The article proceeds as follows:

Part I sets out the main lines of explanation for the staggeringly high levels of imprisonment of black men. It also aims to identify indicators that, amongst black prisoners serving very long sentences, there may be a particularly high proportion of individuals whose imprisonment is unjust because they are guilty but excessively punished, or even factually innocent.[10] Drawing on data analyses provided by a variety of government sources, observer groups, and criminal justice scholars, it presents the understanding of mass incarceration and its causes that underpins the normative arguments and policy suggestions to which this article builds up.

Part II explores the connection between attempts to capture the injustice of mass imprisonment through the prism of "overpunished communities" and the legitimation of punishment of individuals from these communities. Drawing on discussions of mass imprisonment and punishment theory by Vincent Chiao,[11] Ekow N. Yankah,[12] and Hamish Stewart,[13] it develops Stewart's point that mass punishment is wrong because it is "inconsistent with the idea of the rightful condition."[14] By reflecting on what the absence of a rightful condition means for those expected to abide by the law, the article argues—*contra* Stewart, who takes it to be the case that this

social control that could turn general laws of the state into the precise instruments of a defense of whiteness, whether against black, Mexican, Chinese, or Native American peoples as needed by location." Certainly, the historically well documented deliberate use of criminal conviction to suppress black citizens' voting rights in the postbellum American South is distinctive of the *black* historical experience of criminal law enforcement, as are early practices of convict labor. For an analysis that sets black ghetto-dwellers' relations to criminal justice functionally apart, see Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95 (2001).

10. Relevant comparisons are made to white male American prisoners. The article does not address to what extent other racial minorities are affected by discriminatory treatment. Nor does it discuss the situation of female black prisoners. This is not to suggest that the factors explored in relation to black men do not apply to black women, but merely to emphasize that there may still be different or additional dynamics at work that explain the rise in imprisonment of black women. The terms "black" and "African-American" prisoners are used interchangeably in this article.

11. Vincent Chiao, *Mass Incarceration and the Theory of Punishment*, 11 CRIM. L. & PHIL. 431 (2017).

12. Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185 (2020).

13. Hamish Stewart, *The Wrong of Mass Punishment*, 12 CRIM. L. & PHIL. 45 (2018).

14. Stewart, *id.* at 56.

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explanation of the wrong of mass imprisonment can sit together with an assumption that each individual prisoner is being justifiably punished on retributive grounds—that the case against the system that produces mass incarceration reaches down to the justification of the punishment of individuals, placing the justice of their individual punishment in doubt.

What, however, follows from this weakened justification for the punishment of individual disadvantaged African-Americans? Although Yankah has offered a forward-looking suggestion that consists in giving shorter sentences to members of disadvantaged communities,[15] backward-looking implications have not been explored. Part III develops the moral case for a clemency scheme focused on black prisoners serving very long sentences. This case is based on three elements: (1) the moral significance of eligible prisoners' ethnic-social group's overrepresentation in the system (the "overpunished community" point); (2) the de facto linkage between such overrepresentation and the heightened risks of prejudice/discrimination, miscarriage of justice, and sentence inflation that prisoners in this sub-group faced, grounding an "assumption of overpunishment" for these prisoners; and (3) a harm-reduction priority that calls for giving attention to those who, if their punishment is indeed unjust, have already suffered a lot and are at risk of suffering the most if the injustice is allowed to continue. An individual's early release thus ought to be based on the strength of indicators that this prisoner's continued imprisonment is unjust. A sensible method by which to gauge the strength of an individual prisoner's case for early release can work with "flags" that indicate the potential presence of injustice (either in the form of unjust punishment of an innocent or in the form of overpunishment even if guilty). Sensitive to each of the explanatory frameworks highlighted by Butler, such flags should track factors that suggest the presence of injustice; and the more flags a particular prisoner's case raises, the stronger that prisoner's moral claim to early release.

An assumption made at the outset of the policy-focused section is that the institutional actors best placed to remedy the individual injustice of mass incarceration for black prisoners serving very long sentences are clemency-competent actors.[16] Although other strategies such as sentence

15. Yankah, *supra* note 12.

16. The term "clemency-competent actor" is kept deliberately unspecific and used as a generic term for anyone who is presently constitutionally empowered to release prisoners on exceptional—not necessarily exclusively mercy-based—grounds (e.g., state governors),

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reviews by courts should not be dismissed, the important point is that (whatever the possibilities for court-based or prosecutor-led reductions of sentences) the program suggested falls within the competence of the executive to develop.[17] Moreover, the situation of black prisoners serving very long sentences is sufficiently distinct, and priority-deserving, to require governmental action separate from, and potentially additional to, other avenues for early release.

I. RACE, CRIME, IMPRISONMENT, AND DISCRIMINATION

It is well known that black men make up an extremely high proportion of serving prisoners sentenced to at least one year of imprisonment in the United States[18]—a proportion completely out of kilter with the percentage of black men in the general population.[19] In absolute as well as in relative terms, the figures are simply staggering. An African-American man born in the late 1970s who did not get a high school diploma faces an estimated 68 percent chance that he will be imprisoned at some point during his life.[20]

or who will come to be empowered to do so in the future (say, a newly created Commission). It includes actors to whom such powers are granted by statute or delegated.

17. The article will not address questions such as whether legislation would be necessary to create pertinent regulatory-administrative schemes, or what existing institutions and bodies could be drawn on to identify black prisoners for early release through a program such as the one proposed.

18. As of Dec. 31, 2018, there were 1,249,700 prisoners serving a custodial sentence of at least one year under the jurisdiction of state correctional authorities, of whom 409,600 were black. In addition, as of Sept. 30, 2019, there were 158,107 federal prisoners serving sentences of at least one year, of whom 57,900 were black. Among the states the highest absolute numbers of black prisoners are found in Texas, Florida, California, and Georgia. E. Ann Carson, Prisoners in 2019, Bureau of Justice Statistics Ncj 255115 (2020), tables on pp. 21, 23, 36. The quoted figures are of male and female prisoners combined, but female prisoners amount to only a small fraction of the totals given. Because these datasets include only prisoners serving a custodial sentence of at least one year, the total is lower than the number of all persons in custody at a given time.

19. Most recent census figures put the proportion of black citizens in the general population at 13.4 percent. *See* U.S. Census, *QuickFacts*, https://www.census.gov/quickfacts/fact/table/US/PST045219.

20. National Research Council, the Growth of Incarceration in the United States: Exploring Causes and Consequences 68 (Jeremy Travis et al. eds., 2014).

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Indeed, among every 100,000 black male high-school drop-outs aged between 20 and 39 years—the group most likely to face the greatest levels of socio-economic deprivation and personal disadvantage (lack of skills, etc.) preventing entry into the labor market—an estimated 35,000 did find themselves in prison in 2010, whereas the comparable quota for white high-school drop-outs stood at around a third of this number.[21] When imprisonment is considered by residential area, imprisonment rates in predominantly black socio-economically weak communities are markedly higher than in other communities.[22] These shocking statistics reflect the fact that the "fivefold expansion of [the] rate of imprisonment in a single generation" between 1972 and 2007[23] was "concentrated among prime-age men with little schooling, particularly low-educated black and Hispanic men."[24]

Still, a 1970s "war on crime" politician beamed into the present day might initially try to insist that these statistics do not necessarily mean that the system punishes black men without good grounds—perhaps it just happens to be the case that black men commit that many crimes?[25] However, even though it is true that higher crime rates are a feature of many deprived neighborhoods, especially inner-city neighborhoods, and that these neighborhoods are to a larger-than-national-average proportion

21. National Research Council, *id.* at 65 (Fig. 2-15) and 66. Figure 2-15 shows estimates of incarceration rates for males in 2010 by ethnicity, and for the sub-group of males of that ethnicity without a college education (of which high-school dropouts are a subset). It shows that around 4 percent of white men without college education, around 4 percent of Hispanic men without college education, and around 15 percent of black men without college education were incarcerated in 2010.

22. For relevant data, see esp. National Research Council, *id.* at ch. 10 (concentrating on data for deprived neighborhoods in Chicago, Seattle, New York City, and Houston). Even more granular data showed certain "residential blocks in Brooklyn, NYC, [where] approximately 10 percent of men aged 16 to 44 were admitted to jail or prison each year" (*id.* at 287).

23. Franklin E. Zimring, The Insidious Momentum of American Mass Incarceration 10 (2020).

24. National Research Council, *supra* note 20, at 68, see also Fig. 2-16 at 67.

25. On the attitude to crime and hypotheses as to crime patterns prevalent in the late 1960s and early 1970s, see April D. Fernandez & Robert D. Crutchfield, *Race, Crime, and Criminal Justice: Fifty Years Since the Challenge of Crime in a Free Society*, 17 Criminology & Pub. Pol'y 397, 397 (2018) (pointing out that "the [President's 1967 Crime] Commission concluded that Blacks commit more crime as a consequence of Black people living in greater numbers in criminogenic 'slum' conditions").

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inhabited by black residents,[26] the assumption that the share of black men among those imprisoned simply reflects their share among the crime total does not stand up to scrutiny.[27] Even if one readjusts the expected level of imprisonment among black residents to take account of their presence in the most crime-ridden areas, their actual rate of imprisonment far exceeds statistical expectations.[28] A more granular statistical breakdown would, moreover, confront the time-travelling politician with uncomfortable reminders that the link between the incidence of crime and the size of the prison population is, in any event, not as tight as one might suppose. Various studies suggest that certain crimes (especially those linked to drugs) have been over-recorded in predominantly black poor neighborhoods due to an over-policing of these areas with regard to these crimes, and that black suspects have been over-prosecuted especially compared to white suspects.[29] Over time, certain constellations of political and social background factors correlate more strongly with the growth of imprisonment than shifts in violent crime rates do.[30]

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26. *See, e.g.*, Lauren N. Krivo, Ruth D. Peterson, & Danielle C. Kuhl, *Segregation, Racial Structure, and Neighborhood Violent Crime*, 114 Am. J. Soc. 1765 (2009). That said, even in disadvantaged neighborhoods, crime rates—especially violent crimes—have declined markedly over the last two decades. *See* Michael Friedson & Patrick Sharkey, *Violence and Neighborhood Disadvantage after the Crime Decline*, 660 Annals Am. Acad. Pol. & Soc. Sci. 341 (2015).

27. For an early exploration of the possibility of calculating crime share by race/ethnicity through correlating victimization data by race/ethnicity with data on reported or suspected perpetrator race/ethnicity, see Robert J. Sampson & Janet L. Lauritsen, *Racial and ethnic disparities in crime and criminal justice in the United States*, 21 Crime & Justice 311, 320–22, 327–29 (1997). For the years to which their data relates, the homicide rate in predominantly black neighborhoods was indeed much higher than elsewhere, supporting an assumption that the share of black perpetrators of "all homicides" was significantly greater than their share of the general population.

28. The National Research Council study (which treats arrest rate by ethnicity as a proxy for the "actual involvement in crime" rate by ethnicity) concludes that "[f]or 2004, 39 percent of overall disparities in imprisonment could not be explained by reference to arrests, and for 2008, 45 percent" (National Research Council, *supra* note 20, at 96 (with further references to data sources)). *See also* Allen J. Beck & Alfred Blumstein, *Racial disproportionality in U.S. state prisons: Accounting for the effects of racial and ethnic differences in criminal involvement, arrests, sentencing, and time served*, 34 J. Quantitative Criminology 853 (2018).

29. National Research Council, *supra* note 20, at 97.

30. *See generally* Michael C. Campbell, Matt Vogel, & Joshua Williams, *Historical Contingencies and the Evolving Importance of Race, Violent Crime, and Region in Explaining*

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Another line of response focuses on factors that would have made it more likely for black suspects to receive worse outcomes individually than white suspects. Among possible reasons why criminal justice actors may have been less willing to dismiss whole cases or particular charges against black suspects is the very belief that the imaginary time-travelling 1970s politician alluded to—a belief that blacks from certain neighborhoods are just more likely than other people to be involved in crime.[31] Some criminologists shared this belief as well.[32] Black criminality in particular was linked to pervasive social problems,[33] and even members of black communities looked askew at their young men as potential troublemakers to be kept in check.[34] David Kennedy describes his first encounter with a deprived black neighborhood in 1980s America thus:

> I've never been so scared in my life, before or since . . . young men selling drugs . . . the child lookouts and runners; the burnt, leathery crack monsters, many of them women, hollowed out by the pipe; old men fawning over young men for a dollar or a rock; dirt and trash and empty bottles; the cold thug bravado of the groups of young men . . . I had an absolutely visceral response.[35]

Mass Incarceration in the United States, 53 CRIMINOLOGY 180 (2015) (analysing data to track the relative importance of factors such as violent crime rate, minority population size, Republican party strength, and religious fundamentalism to explain imprisonment growth by time period and region). For a review of the relevant literature, see also Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post–Civil Rights Era*, 16 ANN. REV. L. & SOC. SCI. 433, 441–44 (2020).

31. Butler, *supra* note 8, at 1450, cites President Nixon's chief of staff who summarized Nixon's view as being "that you have to face the fact that the whole problem [of crime] is really the blacks," and that "[t]he key is to devise a system that recognizes this while not appearing to."

32. See the works cited by Fernandez & Crutchfield, *supra* note 25.

33. In what he calls his "biography of the idea of black criminality in the making of modern urban America," Muhammad writes that "[v]iolent crime rates in the nation's biggest cities are generally understood as a reflection of the presence and behavior of the black men, women, and children who live there." KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 1 (2010).

34. For further analysis and discussion of the social dynamics involved, see esp. JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017).

35. DAVID M. KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA 4, 6 (2011).

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Kennedy's visceral response was to think, "this is not ok," and he put himself at the forefront of positive intervention for community-based change. What he has achieved in this way could not be more impressive, but also not be more rare.[36] It doesn't take much imagination to see what the response of many law enforcers to the same observed misery and general social breakdown may have been: a readiness to believe the worst about any young black man who came on their radar and "fit the profile."[37] Soon enough, black young men were policed with greater energy than any other social group.[38] Criminal records built up quickly and fused with a sentencing culture that gave extraordinary weight to prior record.[39] Against such a backdrop it becomes difficult to evaluate whether policies targeting young black men and recidivists stemmed from a genuine desire to reduce levels of crime or aimed to exclude the targeted sub-group from society.[40] Because of the assumption that the crime problem *just was* the problem of young

36. Kennedy started positive social intervention projects that brought residents, police officers, and drug gang members together to improve neighborhood safety. His model of interventionist but community-supported policing and community mobilization is credited with achieving very high reductions in the locality's homicide rate as well as safer living environments for residents. For these collaborations to be possible, trust building between law enforcement and communities of color was a necessary first phase. For methods used and lessons learned, see ANTHONY A. BRAGA & DAVID M. KENNEDY, A FRAMEWORK FOR ADDRESSING VIOLENCE AND SERIOUS CRIME: FOCUSED DETERRENCE, LEGITIMACY, AND PREVENTION (2021).

37. As Anderson observes in his opening chapter to AGAINST THE WALL: POOR, YOUNG, BLACK, AND MALE 19 (Elijah Anderson ed., 2008), "Every black male is approached as though he has a deficit: he has a hole to climb out of before he can be trusted as an ordinary law-abiding person."

38. The policing style was also distinctive: aggressive, militarized, and proactive. *See* Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 274–78 (2021).

39. *See esp.* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

40. For discussion, see Hinton & Cook, *supra* note 38, at 271–74 (viewing oppressive law enforcement practices in poor black inner-city areas as a backlash against urban unrest linked to civil rights and antiwar protests). Wacquant, *supra* note 9, at 98, was persuaded by the data to place prisons since the massive rise of incarceration "in the full lineage of institutions [slavery, Jim Crow, the urban ghetto] . . . enforcing the peculiar 'color line' that cleaves American society asunder." Beckett & Francis, *supra* note 30, at 446, likewise conclude that mass incarceration, which they stress is "unique to the contemporary United States," ". . . cannot be explained without reference to the unique role of race in American politics."

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black men without legitimate earning options going down the path of criminality, the two were bound to amount to the same thing in very many people's minds.[41]

Compared to data for the general prison population, black prisoners constitute an even larger share among those prisoners in the system who serve extremely long sentences. The Urban Institute summarizes the available data as showing that:

> In 35 of the 44 states with complete data, racial disparities among people serving the longest 10 percent of prison terms are larger than disparities in the overall prison population. In Pennsylvania, for example, black people make up 49 percent of the state prison population but 60 percent of those serving the longest prison terms.[42]

A shocking proportion—one in five—of black prisoners who remain in the system after various other schemes designed to reduce incarceration levels have taken effect, is serving what the Sentencing Project classifies as a life sentence (which includes life without parole, life with the possibility of parole, and "virtual" or de facto life sentences of 50 years or more).[43] And the numbers of prisoners serving some form of life sentence are only set to grow. As the Sentencing Project highlights, "29 states had more people serving life in 2020 than just four years earlier." while "[t]he number of people serving life without parole—the most extreme type of life sentence—[shows] a 66% increase since . . . 2003."[44] In California and in Utah prisoners serving de jure or de facto life sentences already make up a third of the prisoner population;[45] other states are set to follow suit as they

41. This is captured well by Michael Tonry, *Crime and Human Rights: How Political Paranoia, Protestant Fundamentalism, and Constitutional Obsolescence Combined to Devastate Black America*, 46 Criminology 1 (2008).

42. Leigh Courtney et al., Urban Inst., A Matter of Time: the Causes and Consequences of Rising Time Served in America's Prisons (2017). The figures for those serving life sentences are even more extreme: Ashley Nellis, No End in Sight: America's Enduring Reliance on Life Imprisonment 19 (2021). In nine states, black prisoners constitute more than 60 percent of the "lifer" population, in four of these over 70 percent.

43. Nellis, *id.* at 4.

44. *Id.*

45. *Id.* at 10 (Table 1) (giving figures for prisoners serving life with parole, life without parole, and virtual life sentences—totalling 203,865 prisoners across all states and the Federal system).

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increase their use of this type of sanction under new policies[46] while concurrently reducing fresh intake for less serious crimes and releasing other prisoners earlier.

Many of the long sentences served by black prisoners must be considered excessive on any reasonable penal-theoretical approach to sentencing. There is no doubt that black suspects and prisoners have borne the brunt of inflated sentences owing to mandatory minimums, prior-record enhancements, and the like.[47] Even short of "three strikes" legislation these policies have resulted in extremely long sentences, some of which are being served for nonviolent crimes or for crimes that, while classed as "violent" (e.g., robbery), relate to incidents where no one was seriously injured or hurt.[48] Pointing to the impossibility of making sense of such sentencing schemes in "traditional criminal justice policy terms," given that they "infringe on even rudimentary notions of proportionality" and "often have little plausibility as crime prevention measures," von Hirsch has described them as policies born of "appeals to resentment [that] reflect an ideology of purging 'undesirables' from the body politic."[49] If this diagnosis is correct, the very imposition of this type of sentence on anyone constitutes a violation of the supposed "undesirable's" entitlement to equal citizenship (since purging the body politic of undesirables is not a legitimate function of criminal justice, nor the function it serves in respect of offenders not selected to be purged). The racialized pattern of the imposition of these types of

46. These policies are analyzed by Christopher Seeds, *Bifurcation nation: American penal policy in late mass incarceration*, 19 PUNISHMENT & SOC'Y 590 (2017).

47. NATIONAL RESEARCH COUNCIL, *supra* note 20, at 92 (Table 3-2). In California, "policy reforms that scale back the severity of punishment for criminal history and active criminal justice status for less serious felony offences" have reduced racial disparity, indicating that these policies disproportionately affected black defendants; John MacDonald & Steven Raphael, *Effect of scaling back punishment on racial and ethnic disparities in criminal case outcomes*, 19 CRIMINOLOGY & PUB. POL'Y 1139 (2020).

48. Recall the sentence of 132 years (a de facto life sentence) served by Messiah Johnson—the robbery he was later found to be innocent of, had involved a threat of violence, but no actual use of it; see notes 1 and 2 above. As highlighted by a recent Sentencing Project study, those sentenced to life as habitual offenders in states where such sentences are possible are typically black, and frequently their cases did not involve homicides (NELLIS, *supra* note 42, at 28–29).

49. Andrew von Hirsch, *Penal Theories*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 659, 676–77 (M. Tonry ed., 1998).

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sentences, then, in itself constitutes further evidence of racial discrimination through the criminal justice system.

All in all, race-based disadvantage and discrimination are important explanatory factors for the patterns and levels of imprisonment of black men. Even when outright prejudice was not at work (and one really must not forget how often it has been[50]), the best available empirical evidence indicates that systemic settings predisposed black suspects and defendants to worse outcomes than were faced by white suspects and defendants accused of similar crimes.[51] It is also important to note how difficult it is to expose racially discriminatory mechanisms and effects through quantitative methods. This is so for two reasons. First, many indicators that predispose suspects to more severe outcomes in their individual cases (the denial of bail, a more serious charge, the application of a recidivist premium, etc.) are on their face racially neutral, and decisions regarding black suspects based on such indicators will often be in line with how white "suspects without a permanent address," "defendants with a juvenile conviction for Y," "defendants charged with Z," and whatever else is "measurable" about their case, are treated. But the very presence of such indicators may reflect past processes tainted by discrimination.[52] To the extent that they do so, studies that measure and compare outcomes for defendants for which these indicators obtain may obscure rather than reveal discriminatory disadvantage. Second, some dynamics that make it more

50. For analysis, see esp. Beck & Blumstein, *supra* note 28. Some of that prejudice may be unconscious. Various studies suggest that Afrocentric facial features may have a prejudicial effect. *See, e.g.*, Ryan D. King & Brian D. Johnson, *A Punishing Look: Skin Tone and Afrocentric Features in the Halls of Justice*, 122 AM. J. SOC. 90 (2016); William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327 (2005).

51. *See esp.* Besiki L. Kutateladze et al., *Cumulative disadvantage: Examining racial and ethnic disparity in prosecution and sentencing*, 52 CRIMINOLOGY 514 (2014), and Megan C. Kurlychek & Brian D. Johnson, *Cumulative Disadvantage in the American Criminal Justice System*, 2 ANN. REV. CRIMINOLOGY 291 (2021). Ulmer considers the most plausible explanation for the observed discrepancies a cumulative effect of bifurcation decisions at different points during investigation and trial; Jeffrey Ulmer, *Race, Ethnicity, and Sentencing*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Feb. 26, 2018), doi.org/10.1093/acrefore/9780190264079.013.262). *See also* NATIONAL RESEARCH COUNCIL, *supra* note 20, at 97–98.

52. Inequality in the application of juvenile justice comes to mind, as does the militarized and aggressive policing style adopted in the ghettos. On both, see Hinton & Cook, *supra* note 38, at 272–73, 275–77.

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likely that a black suspect's case arrives at the worst possible outcome for the suspect can only be rendered visible through ethnographic methods exploring individual case trajectories—and even this kind of research will only identify missed opportunities for better outcomes if the ethnographer is sufficiently knowledgeable about the workings of the criminal justice system to spot these. Someone familiar with the way criminal justice actors think will, for instance, be sensitive to the potential negative impact of a poor black suspect's likely demeanor during the investigation and in the courtroom.[53] A self-presentation shaped by the street culture dominating public interactions in black urban neighborhoods[54] involves projecting attitudes of toughness and opposition to authority that will do a suspect no favors. And the very fact that black suspects are unlikely to trust the criminal justice system to treat them fairly[55] will tend to generate a non-cooperative stance that is likely to be met with hard-line responses.

An additional factor that should not remain unmentioned, even though it will only account for a small fraction of cases among the serving prisoner population, is the heightened risk of wrongful conviction, especially for serious crimes, to which black suspects are exposed.[56] Based on an analysis of all the exonerations listed in the National Registry of Exonerations as of October 2016, African-Americans are 50 percent more likely to have been falsely convicted of murder than white murder convicts, and 3.5 times more likely to have been falsely convicted of sexual assault.[57] One possible reason is that

53. For an ethnographic study that explores young British minority group suspects' response strategies and how perception of them by police and other criminal justice agents worsens individual case outcomes, see Susie Hulley & Tara Young, *Silence, Joint Enterprise and the Legal Trap*, CRIMINOLOGY & CRIMINAL JUSTICE (Feb. 8, 2021), https://doi.org/10.1177/17488958211991622.

54. For a description of the comportment that black street culture mandates for reasons of self-protection even from those who do not subscribe to its values, see Elijah Anderson, *Going straight: The story of a young inner-city ex-convict*, 3 PUNISHMENT & SOC'Y 135, 136-37 (2001).

55. Hulley & Young, *supra* note 53. *See also* Christopher Muller & David Schrage, *Mass Imprisonment and Trust in the Law*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 139, 150 (2014) (finding particularly high rates of distrust in the criminal justice system among African-American respondents with direct or friend/family experiences of incarceration).

56. Arthur L. Rizer, *The Race Effect on Wrongful Convictions*, 29 WM. MITCHELL L. REV. 845 (2003). *See also* SAMUEL R. GROSS, MAURICE POSSLEY, & KLARA STEPHENS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES (2017).

57. GROSS ET AL., *id.* at ii–iii. What this means in actual numbers can be illustrated on the assumption that one has 1,000 convicted individuals of each race for a certain crime, and

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"many of the most common procedural errors that [have been identified by scholars] as significant causes of wrongful conviction are also shaped by race."[58] Another reason is official misconduct.[59] Police misconduct in murder exoneration cases was 22 percent more likely where the exoneree was black.[60] The great majority of the more than 1,800 defendants cleared in "group exonerations" for drug convictions that followed the discovery that police departments had systematically framed innocent defendants were African-American.[61] While the across-the-board wrongful conviction rate is notoriously difficult to estimate[62] and ultimately speculative, the data that points to a marked racial differential in the risk of wrongful conviction is robust.[63] Moreover, it is quite possible that there are outlier districts with noticeably higher proportions of framed and wrongfully convicted individuals based on race—because two or three prejudiced individuals placed at different points in the local system could have made a lot of difference to the end result.[64] That still does not mean that most black prisoners convicted of

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a 2 percent wrongful conviction rate. The 2,000 convicted persons would then include 40 wrongfully convicted individuals. Where the crime is murder, of those 40 individuals, approximately 16 would be white and 24 would be black. Where the crime is sexual assault, approximately 9 would be white and 31 would be black.

58. Earl Smith & Angela J. Hattery, *Race, Wrongful Conviction & Exoneration*, 15 J. Afr. Am. Stud. 74, 93 (2011).

59. *See* Samuel R. Gross, Maurice J. Possley, Kaitlin Jackson Roll, & Klara Huber Stephens, Government Misconduct and Convicting the Innocent: the Role of Prosecutors, Police, and Other Law Enforcement (2020).

60. Gross Et Al., *supra* note 56, at ii.

61. *Id.* at iv.

62. Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 Crim. L. Bull. 221 (2012), offers a highly conservative estimate of a minimum of 0.5–1 percent of false convictions for all felony convictions generally in the U.S. Exonerations achieved in capital cases point to a substantially higher (!) rate for these cases; D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761, 786–88 (2007). There also appears to have been a much higher wrongful conviction rate in sexual assault cases, especially in the pre-DNA era. Roman et al. were able to exclude the convicted defendant as a source of the crime-scene DNA in 7.8 percent of sexual assault convictions in a sample of 634 Virginia sexual assault cases sentenced between 1973 and 1987; J. Roman, K. Walsh, P. Lachman, & J. Yahner, Post-Conviction Dna Testing and Wrongful Convictions (2012).

63. Gross Et Al., *supra* note 56.

64. For patterns of abuse by influential individuals, see Gross Et Al., *supra* note 59, at 21, 50, 115, 133–41. Prosecutor-led case review units also appear to follow up rogue decision-makers; *id.* at 168.

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serious crimes are likely to be innocent. What it does mean, however, is that actual innocence is an ever-present real possibility that should not be dismissed out of hand in those cases where these prisoners do claim to be innocent.

It is important to set the scene in this way because even in an atmosphere where there is widespread community and cross-party support for a very significant reduction of overall levels of imprisonment,[65] including through some mechanisms of early release, prisoners serving very long sentences for serious offenses are largely being left out of these schemes, which tend to focus on low-level offenders whose crimes are classed as nonviolent.[66] The absence of release schemes focused on prisoners serving often very long sentences for violent offenses has already cemented and, in fact, increased racial imbalances in parts of the prison system. As researchers at the Urban Institute noted:

> Though most states have seen a decline in racial disparities among people serving shorter prison terms, the story is less consistent among those in prison the longest. In recent years, racial disparities have decreased in at least 42 states for people serving less than 10 years. But in at least 18 states, disparities actually grew among people serving 10 or more years. Current reforms fail to address these glaring disparities because they largely leave out those serving the longest terms.[67]

Considering that many of these prisoners are serving sentences imposed pursuant to now-defunct or moribund sentencing policies that on any defensible view of the purposes of punishment constitute overpunishment for what they have done, this group is likely to contain those who, as individuals, are suffering the gravest injustices in consequence of the policies that led to their incarceration.

It would, of course, not be impossible for some of these prisoners to benefit from reforms formulated in racially "neutral" terms.[68] But it is not

65. For analysis, see Michelle S. Phelps, *Possibilities and Contestation on Twenty-First Century U.S. Criminal Justice Downsizing*, 12 ANN. REV. L. & SOC. SCI. 153 (2016). For influential policy interventions, see, e.g., James Austin, *Reducing America's correctional populations: A strategic plan*, 12 JUST. RES. & POL'Y 9 (2010), and JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? (2016).

66. For discussion and analysis, see Seeds, *supra* note 46, and Clear, *supra* note 5.

67. COURTNEY ET AL., *supra* note 42.

68. For one comprehensive set of suggestions, see Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL'Y 503 (2014).

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simply a style preference whether programs that reach prisoners serving very long sentences are designed using racially insensitive or racially sensitive categories. Insensitivity to race can easily become little more than a smokescreen of false neutrality behind which past systemic disadvantage and discrimination can continue to take effect.[69] If the problem is indeed identified correctly as a criminal justice system that generated damagingly high and racially oppressive levels of black imprisonment, and if there is moreover at least some reason to believe that these effects are part of "the system working as it should" in the eyes of those who operate(d) it,[70] then promising ways of fixing these injustices will require setting race-based priorities and targets especially with regard to the existing prisoner population. There would be, on this premise, not only unnecessary complication but also renewed unfairness in insisting on racially insensitive routes that cannot—in the way that a racially sensitive mechanism could—be designed to guarantee to reduce racially based injustice and disparity.

II. TAKING THE COLLECTIVE WRONG OF OVERPUNISHED COMMUNITIES TO THE INDIVIDUAL LEVEL

Given the data just presented it is easy to see why the wrong of mass incarceration is often conceived of as a collective wrong. For some, this collective wrong consists in the sheer quantity of people in prison, including as a matter of fact (but not conceptually) the composition of the prisoner population in terms of race.[71] Those imprisoned, considered in the aggregate, amount to too many people in prison; that number and

69. Given that many black prisoners were given very long sentences while still very young, it is quite possible that release systems focused on the age of the prisoner might, again, increase rather than decrease racialized patterns of imprisonment. Time already served can be an important consideration in the context of an individualized program but is problematic as a single measure, or as a measure used in combination with a headline offense, since there are indications that black suspects were also more frequently charged with more serious available offenses than comparable white suspects.

70. As is suggested by Butler, *supra* note 8, and implicit in the analysis of others, such as Wacquant, *supra* note 9.

71. Levin, who distinguishes between authors using a "mass (imprisonment) frame" and an "over (-punishment) frame" for reducing prison use, would refer to such authors as employing the latter framing of the issues; *see* Benjamin Levin, *The Consensus Myth in*

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proportion of the populace in prison is what should be addressed through suitable incarceration-reducing policies.[72] This perspective is often connected to a critique of criminal justice policies that foreground prison sentences as the default mode of criminal punishment, use rigid and mechanistic sentencing schemes, and fail to make use of diversionary options and alternative modes of sanction.[73] Other authors place greater stress on the effects on communities of the overuse of imprisonment as a means of social, and crime, control. These authors emphasize the socio-economic and racial geography of imprisonment: the fact that in many communities with predominantly poor black and other minority residents, it is a normal fact of life that a large proportion of its male inhabitants will spend many of their prime adult years in prison, disrupting family life, increasing impoverishment, and undermining the very fabric of communal life.[74]

In both framings, a critique of the use of imprisonment as a criminal sanction for certain types of offending behaviors, and of the duration of sentences handed out under post-1970s sentencing policies, is implicit (and often explicit). But the critique remains at the structural level. The individuals who are imprisoned in consequence of such policies may be pitied as casualties of politics, and their imprisonment be viewed as unnecessary from a public safety perspective,[75] but (at least when they are serving sentences imposed for serious crimes still on the statute book) they are generally not, as individuals, perceived to be imprisoned unjustly.[76] The

Criminal Justice Reform, 117 MICH. L. REV. 259, 269–74 (2018), for a comparison of these frames.

72. Some of these authors may well share a belief that the extreme racial disparity in imprisonment patterns reflects racial prejudice, but may also believe that race-neutral remedies are more effective at fixing the problem.

73. *See, e.g.*, Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423 (2013); and Perry L. Moriearty, *Implementing Proportionality*, 50 U.C. DAVIES L. REV. 961 (2017).

74. From a sociological perspective, this is argued mainly on account of the destructive effects of the incarceration of a large proportion of male inhabitants on the social and economic vitality of the community. The poverty-increasing effects of mass incarceration have been studied by Bruce Western & Christopher Muller, *Mass Incarceration, Macrosociology, and the Poor*, 647 ANN. AM. ACAD. POL. & SOC. SCI. 166 (2013). *See also* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); *and* ALEXANDER, *supra* note 39.

75. As in the studies by Austin and AUSTIN ET AL., *supra* note 65.

76. For an important argument that long-term incarceration denies an offender's status as a human being because it denies the presence or worth of his life-building capacity, and

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victims of the collective wrong of mass incarceration are the communities themselves. Prisoners hailing from those communities are affected by, and in that sense share in victimization by, that collective wrong, but that is not usually taken to mean that, considered as individuals serving sentences of imprisonment, their imprisonment is wrong as such.

Indeed, theorists who lay the main blame for the policies that generated mass incarceration at the door of retributivist justifications of punishment will sometimes concede that, wrongful convictions aside, the sentences served by individual prisoners are (as measured against the prevailing justification of punishment) just.[77] But even where such a concession is not presented as a substantive one, but merely as a hypothetical one made to declutter the argument the author wants to develop (it will apply even if all these sentences are indeed fully justified by the lights of whatever penal-theoretical justification is taken to underpin them[78]), it is a highly problematic assumption to make in the context of addressing the real-world phenomenon described in Part I of this article. This is so because this assumption—if only *qua* hypothetical—necessarily makes the first of Butler's four explanatory articulations for levels of imprisonment of black men[79] paramount: black criminality. Put differently: for such an assumption to make any sense even as a hypothetical, one would have to concede the logical possibility that the prevailing pattern of imprisonment could have arisen entirely due to levels of black criminality being addressed through non-racialized, non-prejudiced, and in all respects fully above-board operations of the penal system. And that just isn't an assumption that (even as a decluttering move) is a helpful assumption to make in this discussion.

that it therefore violates the moral prohibition on degrading punishment, see Jacob Bronsther, *Long-Term Incarceration and the Moral Limits of Punishment*, 41 CARDOZO L. REV. 2369 (2021).

77. Vincent Chiao, for instance, assumes (in the context of presenting an argument against what he calls "strictly deontological theories of punishment," which determine whether punishment is just "in terms of justice in individual transactions") that "[t]he current . . . incarceration rate is not the result of systematic violation of deontological constraints" (Chiao, *supra* note 11, at 436, 437)—in other words, that one cannot say, with respect to any individual penal transaction, that someone is overpunished as an individual.

78. This is how I read Chiao's and Stewart's contributions to the debate that I discuss in the text.

79. Butler, *supra* note 8 and associated text.

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This misgiving having been highlighted, there is value in reflecting how these authors conceive of the theoretical challenge they are facing. For Vincent Chiao, the task consists in "limit[ing]" (at the theoretical level) "the degree to which a society may permissibly punish the guilty,"[80] and for him, this requires relinquishing what he calls "a 'private right conception' of the criminal law," which views "criminal justice institutions [as] importantly distinct from the institutions and policies that regulate public health, education, income, the environment and so on" in favor of a conception of criminal justice as a "public good" about which questions of fair or unfair distribution at the collective level may coherently be posed.[81] This, for Chiao, makes the justification of state punishment sensitive "to the social costs of punishment" and thereby "provides a means for the theory of punishment to distinguish between the first and the *n*th wrongdoer, and hence to decide how committed to punishing the guilty a society should be."[82] But even though this initially appears to have as an upshot that the *n*th wrongdoer would be able to argue that his punishment is unjust, it does not seem to be the case that Chiao would support any such conclusion. Instead, his argument is directed at introducing another layer of justification at the systemic level, in that criminal justice institutions should be evaluated in terms of their "impact . . . on the fair distribution of effective access to basic capabilities," where "[a] capability is basic if it is required in that society to live as an equal."[83] This can expose policies that "quintuple[] the size of the custodial population" as unjust because they "fail to maximize the likelihood that everyone—including those held in custody—has effective access to basic capability when compared to other reasonably feasible institutional arrangements."[84]

What remains unclear is how that finding connects back to the justification of any particular—even the *n*th—individual's punishment. Such a connection is easier to make for authors who explicitly conceive of mass incarceration as a racialized phenomenon connected to the overuse of punishment in (and against) spatially and economically delineated population groups—populations that then develop certain pathological features

80. Chiao, *supra* note 11, at 447.

81. *Id.* at 448.

82. *Id.* at 449.

83. *Id.* at 450.

84. *Id.*

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distinctive of overpunished communities. Ekow Yankah offers an argument of this kind.[85] Yankah insists that "the 'mass' part of mass incarceration . . . imposes unique harms on discrete communities" in that "[c]oncentrating prison sentences on the poor and communities of color unravels the social and economic bonds that make civic life possible [and] paints racial minorities as a criminal class."[86] Because "the incarceration of large numbers from particular communities undermines the fabric that sustains essential community functions,"[87] Yankah sees "civic equality" directly challenged by the "pronounced racial effects" of mass incarceration.[88] He proposes to acknowledge "the role punishment plays in preserving and re-stitching civic equality"[89] by reorienting penal practices toward less severe and differently structured punishments that "value the way the offender is intertwined within a community and how punishing him threatens to unravel those bonds."[90] What requires attention in the context of the present discussion is that Yankah takes the community-level injustice that he has identified to have direct repercussions on the justification of the punishment of individuals resident in overpunished communities. Concretely, the objective of preventing (further) harm to the community calls for punishing members of these communities less frequently and less severely, as the system's way of taking notice of "how the punishment of each individual defendant piles up, unravelling communities one absent person at a time."[91] The de-individualized basis for the proposed sentence reduction as a way of taking notice of such effects appears, however, potentially vulnerable to individualized arguments regarding the undesirability or indifference from a community perspective of the presence of a particular individual. What is needed to make the punishment of individuals from overpunished communities register as an

85. Yankah, *supra* note 12.

86. *Id.* at 187.

87. *Id.* at 190.

88. *Id.* at 188.

89. *Id.* at 197.

90. *Id.* at 205–06.

91. *Id.* at 206. His specific proposal for offenders from overpunished communities is to reduce sentence length by a third. The suggestion to reduce the use of imprisonment sits in the broader context of what Yankah calls a "civic-republican" or an Aristotelian reorientation of criminal justice toward reintegrative policies capable of restoring civic equality, which is developed more fully in Ekow N. Yankah, *The Right to Reintegration*, 23 New Crim. L. Rev. 74 (2020).

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injustice *done to these individuals*, is an argument that shows why even the less valued and less obviously worthy members of the community are entitled to be treated less harshly by the penal system.

Help comes from unlikely theoretical quarters: in this case, from an author who conceives of mass incarceration as a wrong purely located at the collective level. In an article entitled "The Wrong of Mass Punishment,", Hamish Stewart tries to explain the wrong of mass punishment by focusing on "the task of the legal order [] to constitute a rightful condition for free and purposive [human beings]."[92] Criminal justice has a role to play in securing these conditions, in that "[t]he legal order must punish criminals because its failure to do so allows the criminal to effectively assert the superiority of his or her private ends over the public task of creating and maintaining a rightful condition."[93] Stewart's main point is that "mass punishment is wrong because it is inconsistent with the idea of the rightful condition."[94] Why is that so? Interestingly, his argument is not that in a basically just society, people cannot possibly be engaged in committing that many crimes deserving of punishment. Rather, his argument is that even if people do that, "a policy of unremittingly prosecuting and punishing all wrongs is inconsistent with the idea of a rightful condition" because it "puts the state in the position of using punitive force so regularly against its citizens—routinely depriving them of liberty and property—that it can only appear to those citizens as their enemy rather than as the agent who acts on behalf of all of them to define and preserve their freedom."[95]

Taken at face value, this is a strange argument. It could be read, unsympathetically, as suggesting that the state must reign in criminal law enforcement because, if the crime rate is very high and very many people would get punished, punishing so many people is just "not a good look." The point Stewart is after becomes clearer when one considers his suggestion that punishment that is appropriate when the individual case is viewed in isolation, can be excessive in the aggregate. The thought appears to be that a state that expends so much of its energy and attention on punishing citizens it has identified as criminals interacts with its population mainly in the mode of punisher, when that mode is—

92. Stewart, *supra* note 13, at 49.

93. *Id.* at 50.

94. *Id.* at 53.

95. *Id.* at 56.

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particularly when it becomes so prevalent as to affect a large proportion of the population—one of the least promising of many possible ways in which the state could build and maintain "a rightful condition." This is so because for Stewart, living in a rightful condition means also leaving without having to fear the state—and a state over-committed to penal control of its citizenry would create a situation where "no-one could pursue his or her own purposes without the constant fear of being coercively interrupted by prosecution."[96]

If one unpacks this further, two aspects of living in a rightful condition emerge. The first aspect relates to the general orientation or attitude with which the state meets the citizen: not from the vantage point of enforcer or controller, but from that of a supporter or protector. The second aspect relates to the state's role in securing to its citizens conditions in which they are able to pursue legitimate life projects. That point puts a question mark behind the thought that the *only* way in which an excessively punitive state is failing its citizens is by putting too many of them in fear of criminal-law enforcement. Rather, a state that finds itself constantly in the role of punisher may have something else wrong with it: its political order may be failing dismally at securing decent life chances—and in this sense, equal freedom—to all its citizens; it could be a pathological society whose political order is delegitimated by the level of compulsion and exclusion it needs to exercise over its populace.

If one bears in mind that even white U.S. citizens are imprisoned in a proportion that is much increased when compared to pre-1970 figures and far in excess of the levels of imprisonment in other developed democracies,[97] one might be tempted to ask whether the above description fits U.S. society generally. This is not the question pursued here. The discussion that follows focuses on the situation of black men from disadvantaged neighborhoods. From that discussion, it will become clear what aspects of their situation are without parallel in the wider society. It could still be asked, of course, whether the rightful condition obtains in respect of other groups in society. The following analysis's heavy reliance on factors that are unique to the circumstances of black men—often in contrast to how

96. *Id.* at 57.
97. For relevant data, see NATIONAL RESEARCH COUNCIL, *supra* note 20, at 35–37.

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members of other population groups are treated—suggests, however, that such an argument would be difficult to sustain.[98]

The extent of penal control exercised specifically over black men becomes visible when one considers imprisonment rates by age group at two successive moments in time: 2003 and 2010.

In 2003 (before imprisonment peaked in 2007[99]), the male imprisonment rate for the U.S.—calculated from numbers for sentenced prisoners under state or federal jurisdiction—stood at 915 male prisoners per 100,000 male residents.[100] Looking only at white male prisoners, that rate fell to 425. For black male prisoners, by contrast, it shot up to 3,405. Truly mindboggling figures emerge when this data is further broken down by age cohort. Per 100,000 residents aged 18–19, 2,068 black men were in prison—compared to 266 white men and 692 Hispanic men. In the age cohort 20–24, for black men, this figure shot up to 7,017, peaking at 9,262 for ages 25–29 and coming down only very slowly thereafter: 7,847 for ages 30–34, 6,952 for ages 35–39, 5,854 for ages 40–44, and 3,500 for ages 45–54. By contrast, the "peak figure" by age for white male prisoners (also at 25–29 years) stood at 1,090, and for Hispanics at 2,267. Even their "peak values" were much lower than the rate of imprisonment of still-imprisoned older black men.

In 2010 (three years after nationwide imprisonment levels had reached their peak), the pattern was even more shocking. Looking at inmates held in custody in state or federal prisons or in local jails per 100,000 U.S. residents, the male incarceration rate for the United States stood at 1,362 male inmates.[101] White men were incarcerated at a rate of 678 per 100,000. The comparable figure for black men was 4,347. In the 18–19 age cohort,

98. That is not to say that a powerful critique of the prevailing level of imprisonment that includes these groups cannot be mounted—it can, of course (and scholars who write in the "overpunishment" tradition have done so), but it has to rest on other grounds.

99. National Research Council, *supra* note 20, at 34. *See also* Carson, *supra* note 18, at 35 (Appendix Table 1) for U.S. imprisonment rates from 1978 to 2019.

100. All data in this paragraph is taken from Paige M. Harrison & Allen J. Beck, Prisoners in 2003, Bureau of Justice Statistics Ncj 205335, 9 (Table 12) (2004), https://bjs.ojp.gov/library/publications/prisoners-2003.

101. All data in this paragraph is taken from Lauren E. Glaze, Correctional Populations in the United States, 2010, Bureau of Justice Statistics Ncj 236319, 8 (Appendix Table 3) (2011), https://bjs.ojp.gov/content/pub/pdf/cpus10.pdf. The figures given for 2010 are based on the total incarcerated population, taking a snapshot of those in custody at a given date. This cohort is bigger than the cohort of sentenced prisoners, which

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4,192 of 100,000 black young men just out of adolescence were already held in custody. The next age cohort, 20–24, shows 8,008 black men in custody; for ages 25–29, there are 8,932. This is followed by 9,892 for ages 30–34, 9,100 for ages 35–39, 7,689 for ages 40–44, 6,048 for ages 45–49, and 4,032 for ages 50–54. By contrast, the "peak figures" by age for white men (also at 30–34 years) stood at 1,629, and for Hispanic men, at 3,896. The peak was now reached for an age cohort older than the peak cohort from 2003, most probably reflecting the impact of serving prisoners from earlier cohorts aging into the next age group.[102]

This reflects the reality of state interaction with young black men, mainly from disadvantaged backgrounds, throughout the decades of what is euphemistically referred to as the "prison boom." Behind the data lies an everyday reality of growing up with family members in prison, with the destructive effect this has on relationships between parents and children, between partners, and on other relatives.[103] For these young men, few feasible role models for materially successful law-abiding lives existed.[104] Figures of social authority, like school teachers, were constantly ready to turn on them as future criminals beginning to show their stripes.[105] As Duck writes:

> The individual in such an environment ends up in a situation in which all of his choices, born of neglect and despair, are bad choices regardless of potential personal benefit. . . . The consequences [of the absence of even one functional, supportive institution] are . . . dire for poor black men, who

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is why the figures from 2003 and 2019 (which are based on sentenced prisoners serving sentences of one year or more) and 2010 do not allow for a like-with-like comparison.

102. A glimmer of hope can be found in the 2019 data in the much lower numbers for younger age cohorts. For black sentenced prisoners under state or federal jurisdiction, this number has dropped to 720 at ages 18–19 and to 2,772 at ages 20–24 (which is still multiple times the comparable figures for white males, though). Rates for older prisoners have, however, remained very high for those over 40, and have risen to a multiple of the 2003 figures for those over 55. Imprisonment rates for 55–59-year-olds are now nearly as high as for the 20–24-year-olds. *See* CARSON, *supra* note 18, at 16 (Table 10).

103. *See esp.* TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM (2016), and see generally AGAINST THE WALL, *supra* note 37.

104. WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY (2009); and WAVERLEY DUCK, NO WAY OUT: PRECARIOUS LIVING IN THE SHADOW OF POVERTY AND DRUG DEALING (2015).

105. *See esp.* NANCY A. HEITZEG, THE SCHOOL-TO-PRISON PIPELINE: EDUCATION, DISCIPLINE, AND RACIALIZED DOUBLE STANDARDS (2016).

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aspire to be self-sufficient but no longer have the tools to achieve this goal adequately without proper guidance.[106]

Chances are lost before they have even fully emerged.[107] Any brush with the law can be expected to end badly.[108] Ghetto parents may well exhort their children to avoid drawing the attention of the police to themselves. "I haven't raised you to become prison-fodder" is what one can imagine the mothers of those young black men, statistically overwhelmingly destined for prison, to say. Such appeals to stay law-abiding are, however, often extremely difficult to follow. As ethnographic research into ghetto life and ghetto culture has shown, it is a tricky business to stay safe and uninvolved in crime in the ghetto.[109]

These observations pertain most directly to the second reason why living in an overpunished community affects the justification of punishment vis-à-vis individual young black men: that they had an unequal chance of living a successful law-abiding life. More strongly than even in the case of unfortunate dispositions and personality traits that tend to bring a person in collision with the criminal law, and which Matt Matravers has suggested supply no "desert basis" in distributive justice,[110] what these young men have acted upon are traits and dispositions that proved unfortunate *only* because of the circumstances in which they were placed.[111] But they also speak to the first ground for the absence of a rightful condition. One can easily imagine the mothers of these young men telling a politician, a defender of the war on crime that came to replace more welfare-oriented policies, of "zero-tolerance" educational institutions, of "broken windows" policing priorities, and of the carceral system U.S.-style: "I haven't raised him to become prison fodder." And addressed thusly, it would be an accusation: that you are treating my child as if he were nothing but prison-fodder, and that that is what you have no right to do.

106. Waverley Duck, *Young, Black, and Male: The Life History of an American Drug Dealer Facing Death Row*, *in* AGAINST THE WALL, *supra* note 37, ch. 3, at 51–52.

107. *See* Raymond Gunn, *David's Story: From Promise to Despair*, *in* AGAINST THE WALL, *supra* note 37, ch. 2.

108. *See esp.* Alexander, *supra* note 39.

109. *See esp.* Anderson, *supra* note 54; SHELBY, *supra* note 103; DUCK, *supra* note 104.

110. Matt Matravers, *Mad, Bad, or Faulty? Desert in Distributive and Retributive Justice*, *in* RESPONSIBILITY AND DISTRIBUTIVE JUSTICE 136 (C. Knight & Z. Stemplowska eds., 2011).

111. *See also* MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

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Addressed to the politician, this accusation would not be mistaken. Young black men from disadvantaged neighborhoods were indeed relegated by the state to prison fodder.[112] The educational, welfare-stripping, and crime control policies discussed above show that all the state was prepared to invest in was the coercive control of these young men. It was only their surveillance in their neighborhoods and in the carceral system that the state was ever-ready to provide for. It concerned itself with them only as potential or actual criminals. In short, the quantitative and qualitative data on the situation of black men from socio-economically disadvantaged backgrounds allows for only one conclusion: that since the beginnings of the political shift toward mass incarceration, the state has interacted with this subgroup of citizens only in the modality of a punisher. These black men did not live in a society where, for them, the rightful condition obtained.

When punishment is employed in contexts where the rightful condition does not obtain, and against persons who did not enjoy life under such conditions, the only way of justifying that person's punishment is as a contribution to the creation of a rightful condition—including for that person. Read in this way, consideration of the state's role in creating and maintaining a rightful condition gets quite close to Chiao's suggestion that criminal justice institutions should be evaluated in terms of their "impact . . . on the fair distribution of effective access to basic capabilities . . . required in that society to live as an equal,"[113] and whereas Chiao proposes this as a criterion by which to evaluate arrangements at systems level, the connection to Yankah's proposal to create conditions of civic equality by reorienting punishment toward "preparing the punished to be a productive citizen"[114] already shows that conclusions about how

112. The larger socio-economic system treats them as prison fodder when arguments can be made without shame that reform policies shouldn't empty out prisons too quickly because that would threaten jobs in the prison estate. That such arguments would be made was predicted by David F. Greenberg, *Novus Ordo Saeclorum? A Commentary on Downes, and on Beckett and Western*, 3 PUNISHMENT & SOC'Y 81, 85 (2001), and is borne out by subsequent political developments; on which see Christopher Petrella & Alex Friedmann, *Slowly Closing the Gates: A State-by-State Assessment of Recent Prison Closures*, PRISON LEGAL NEWS (June 15, 2013), https://www.prisonlegalnews.org/news/2013/jun/15/slowly-closing-the-gates-a-state-by-state-assessment-of-recent-prison-closures/.

113. Chiao, *supra* note 11, at 450.

114. Yankah, *supra* note 12, at 96.

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individual offenders should be treated by the system, can be drawn. Once we admit that criminal law enforcement raises questions of distributive justice because of the way in which criminal behavior is connected to undeserved disadvantage, we can ask about the proper distributive justice response. The most plausible response is that, in punishing disadvantaged offenders, we have to recognize their interest in partaking in a life in common. Their interest in succeeding in such participation—in leading a coercion-free life in the future—provides the justification for a penal imposition that has reformation as its goal (and realistically possible outcome). The distributive justice dimension of criminal punishment lies in the fact that as we punish, we acknowledge an obligation we have to share the burdens of the offender's misfortunes by investing into his self-reform and offering him reasonable conditions for a life in society.[115]

III. THE CASE FOR A TARGETED CLEMENCY PROGRAM

The moral case for a clemency scheme focused on black prisoners serving very long sentences is based on three elements: (1) the moral significance of the prisoner's racial-social group's overrepresentation in the system (the "overpunished community" point), which is especially strong for those who started serving their sentences before or around 2010; (2) the heightened risks of prejudice/discrimination, miscarriage of justice, and sentence inflation that prisoners in this sub-group have faced and that ground an assumption of overpunishment for these prisoners; and (3) a harm-reduction priority that calls for giving attention to those who, if their punishment is indeed unjust, have already suffered a lot and are at risk of suffering the most if the injustice is allowed to continue.

The actual shape of the program must be sufficiently sensitive to each of the explanatory frameworks highlighted by Butler, including the framework that points to underlying criminality. Any individual's early release would thus need to be based on a finding that it appears more likely than not that the prisoner's continued imprisonment is unjust. A sensible way in which to gauge the strength of an individual prisoner's case for early release

115. For further discussion, see Antje du Bois-Pedain, *Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State*, *in* CRIMINAL LAW AND THE AUTHORITY OF THE STATE 199 (Antje du Bois-Pedain, Magnus Ulväng, & Petter Asp eds., 2017).

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could work with “flags” that indicate the potential presence of injustice (either in the form of overpunishment even if guilty or in the form of unjust punishment of an innocent). Possible flags include the following:

- “presumptively unjust sentence” flag
- “suspected official misconduct” flag
- “possible miscarriage of justice” flag
- “already punished enough” flag
- “already suffered enough” flag.

Each of these flags will now be addressed in turn.

Excessive sentences are properly within the remit of clemency-competent actors to address when the injustice in the individual case is both manifest and extreme. A “presumptively unjust sentence” can be defined as a sentence where the severity of the punishment bears no readily discernible relationship to the seriousness of behavior under sentence. Of course, sentence proportionality is a difficult concept to unpack, and the detailed accounts differ. What should function as an indicator for clemency is based on a very minimal notion of an evident mismatch, in that pointing to the offense the prisoner committed will not even begin to explain why the sentence is this severe. (Imagine a prisoner being asked “Why do you serve a life sentence?,” and the answer being “I tried to steal some garden shears.”[116]) That a sentence is presumptively unjust in these broad terms matters from the perspective of any penal-theoretical justification of punishment.

Evident mismatches of this kind have not only arisen in the application of “three strikes” legislation or habitual offender statutes (legislative schemes that commit to mismatch by, effectively, taking an offender’s right to proportionate punishment away). Two other pathways to penal excess are the so-called “trial penalty” and recidivist premiums. As regards the first, any sentence imposed after trial which is more than three times the length of the best plea offer refused by the prisoner must be suspect. These sentences can be considered presumptively excessive on the following basis. The size of any “trial penalty” should bear a reasonable relationship to

116. This example is taken from a real case involving a life sentence given to a habitual offender in Louisiana whose final offense was to attempt to steal some hedge clippers. Sentenced to life without parole in 1997, he was released in 2020 after changes had been made to Louisiana’s habitual offender law. NELLIS, *supra* note 42, at 25.

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sentence discounts following a "guilty plea" (the flipside of the coin, so to speak). In England and Wales, for instance, a one-third discount for an early guilty plea is taken to be acceptable.[117] An offender would be considered underpunished if he received more than a one-third sentence discount for a guilty plea, but by the same token, if he chooses not to plead guilty, he ought not to receive a sentence that is more than one-third longer than the sentence he would have been given, had he pleaded guilty. In the U.S. context, the prosecution's "best offer" will often include an element of deliberate and clear underpunishment; in other words, it will include a hypothetical deduction greater than one-third. Even if one accepts that the discount may be closer to "half" or two-thirds, however, a sentence generated after trial that is more than three times the best plea offer probably overpunishes the prisoner, and a sentence that exceeds that multiple should be considered presumptively unjust. This is so because it would be very far in excess of what a responsible prosecutor considered still-adequate punishment following a plea.

Recidivist sentence enhancements are another notorious source of excessively long sentences. As a baseline for presumptively legitimate recidivist enhancements against which actual sentences could be compared,[118] the flattening curve pattern for recidivist offending that emerged in moderate-sentencing jurisdictions from a case-by-case consideration of recidivist behavior as a possible aggravating factor could be used. The "recidivist sentencing" curve that reflects the sentencing practices in jurisdictions such

117. SENTENCING COUNCIL FOR ENGLAND AND WALES, *Reduction in sentence for a guilty plea: Definitive guideline* (Mar. 7, 2017), https://www.sentencingcouncil.org.uk/publications/item/reduction-in-sentence-for-a-guilty-plea-definitive-guideline-2/.

118. Space constraints prevent a fuller discussion of the best penal-theoretical treatment of recidivist offending. The penal-theoretical approach I defend, which views sentences as setting reasonable terms for offenders to re-enter society (e.g., in Du Bois-Pedain, *supra* note 115), is open to some consideration of recidivist offending as aggravating the sentence, but would also insist that recidivism should never automatically be treated as an aggravating factor but always only after the context of the offending behavior has been fully appreciated. It would also allow for the possibility that, where recidivism is linked to the offender having faced obstacles to law-abiding behavior that he couldn't reasonably be expected to overcome, mitigation of sentence may well be appropriate. (For an argument that mitigation—as I understand it, on these grounds—should be the system's response to recidivism, see Christopher Lewis, *The Paradox of Recidivism*, 70 EMORY L. J. (2021), suggesting that recidivism should lead to a recidivist discount, based on recidivism being a proxy for multiple disadvantage.)

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as Sweden and Germany (similar to the curve that developed for multiple offense sentencing) shows a fairly steep increase in sentence severity for the first few "repeat" occasions but flattens out quickly, with no further increases in sentence severity after the sixth or seventh offense of the same type.[119] This curve is the inverse of the curve that was implemented through sentencing grids in some U.S. jurisdictions, which assumed an ever-increasing recidivist premium.[120] Again, the point for clemency-competent actors would not be whether the sentence "fits" or is close to a moderate curve, but whether it is so far removed from it as to seem utterly detached from the seriousness of the offending behavior.

This is not the place to develop more nuanced indicators for "suspected official misconduct" and for "possible miscarriages of justice." This task is more appropriately left to those who have greater familiarity with the day-to-day operations of the criminal justice system (and they probably also already inform the work done by case review units). It is, however, important to spell out more precisely what the "already punished enough" and the "already suffered enough" flags refer to. Clemency providers will need to be prepared to defend the release of prisoners serving long sentences in large numbers. This is a daunting task—not because the case is difficult to make, but because making it convincingly will have to admit to some uncomfortable truths about the flawed past of criminal justice, and do that without undermining trust in the system in the future. The "already *punished* enough" argument gets most traction when offenders have already served long periods of imprisonment, and their most serious conviction offense is either one that does not indicate violence, or (where the offense designation does indicate violence) the underlying facts do not suggest that any particular victims have suffered serious and lasting injury, or death, as a result of the prisoner's actions. It can and should be combined with a call to allow prisoners a "fresh start." The point is about rebuilding the moral credibility of the punishment system—by punishing more reluctantly, and a lot less. That a prisoner has already *suffered* enough is a different kind of consideration. It is more individual and sensitive to changes that affect the

119. *See* Anthony E. Bottoms, *Exploring an Institutionalist and Post-Desert Theoretical Approach to Multiple-Offense Sentencing*, *in* SENTENCING MULTIPLE CRIMES (Jesper Ryberg, Julian V. Roberts, & Jan W. De Keijser eds., 2018) 31, 37–38.

120. On grid-based sentencing schemes, see Richard S. Frase, *Principles and Procedures for Sentencing of Multiple Current Offenses*, *in* Ryberg et al. eds., *id.* at 189, 207. Three-strikes-laws, of course, increased the premium to infinite heights.

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prisoner as a human being, and therefore closest to existing grounds for pardon-based release.

The bottom line is that clemency-competent actors should be bold: It isn't about an individual prisoner's case raising all these flags, but about the flags helping the clemency-actor to decide if this person is owed a second chance now. Given that black prisoners from disadvantaged communities entered the prison system when they were living in circumstances that placed them outside a rightful condition, they must be considered first for early release, and a target should be set that at least half of those black prisoners who have already served more than 15 years of their sentences should be recommended for early release.

CONCLUSION

With a topic that indirectly puts all the ills of the criminal justice system on the table, it is inevitable that authors will be selective in which ones they focus on. Many academics who have addressed mass incarceration have (for the sake of the argument) assumed that individual prisoners are serving sentences that are "retributively just." This article has rejected this assumption. It has rejected it, first, because it flies in the face of the known facts about the criminal justice practices that have produced the levels and patterns of imprisonment invoked by the term "mass incarceration." It has rejected it, second, because an argument in favor of the early release of prisoners serving very long sentences, mostly for crimes classified as crimes of violence, will not convince many who cling to the illusion that most of those who benefit from such release are, at that point, serving a "retributively just" sentence. In order to spur political actors into acting, it is important to show why (almost) everyone who benefits from an early release program as an individual is, at that point, *not* serving a sentence that a decent citizen would describe as "just." The "flags" that have been suggested in Part III are warning signals for injustice.

Looking at the state of criminal justice in the United States, it stretches credulity beyond the breaking point that such levels and patterns of incarceration could have resulted from the regular operations of a basically decent criminal justice system. This background assumption no doubt provides a level of false comfort even when writing about criminal justice

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in settings that produce more palatable aggregate outcomes, but it must be rejected when writing about the U.S. system.

When feminists coined the slogan "the personal is political" to challenge political-institutional attitudes and social practices that treated injuries done to women by their sexual partners, with whom they were in some kind of enduring relationship, as a private matter, they challenged the assumption that these attitudes and practices were somehow a response to an "external given" for the political system, and stressed the fact that this state of affairs—the systemic lack of attention to male partner violence against women—was a choice made by the political system. In a similar way, the patterns of incarceration and of criminal records in the U.S. provide a powerful reminder that state punishment is political in a certain sense. Against attempts to hive off responsibility for these patterns to those punished by making—and declaring unchallengeable—the assumption that (allegedly rare miscarriages of justice aside) those recorded as criminals and punished under that system are legitimately punished by it, one needs to stress that their punishment also always reflects a political preference.

Once one makes the argument that punishment is political, it is easier to defend that punishment's flipside—clemency—as also properly part of a system of state punishment: an appropriate corrective of it at the systemic level, and one on which U.S. jurisdictions urgently need to draw to a much greater extent than at present to address the enduring injustices of racialized mass incarceration.

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