

# HATCH CENTER

POLICY REVIEW

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## A FAMILY-CENTERED APPROACH TO CRIMINAL JUSTICE REFORM

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FOUNDATION

# Preface

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Few subjects are as timely or as important to our country right now as criminal justice reform. As I write this, there are more than 2 million people held in jails and prisons across the United States. Millions more are on probation or parole. Tens of millions have completed their sentences, but face the challenge of finding jobs, housing, and other life necessities with the stigma of a criminal conviction on their record.

I know firsthand what it's like to be charged, convicted, and sent to prison. In 1996 I began a life sentence for my role in a nonviolent drug offense. After serving nearly 22 years, my sentence was commuted and I was ultimately pardoned by President Donald Trump. Since being released, I have devoted my life to raising awareness of the challenges associated with incarceration—both for individuals in prison and their families—and to improving our criminal justice system.

It goes without saying that being convicted and sent to prison is a devastating experience. Your whole life is turned upside-down. You're separated from your friends and family. You're sent hundreds or thousands of miles away from home to live in close quarters with strangers. You have little or no freedom and little or no control over your schedule. Everything you do is tightly monitored. You long for the day when you might be able to see the outside world again.

It should also go without saying that it's entirely appropriate for individuals who break the law to face punishment. Laws exist for a reason. Order and community well-being are important. But that doesn't mean we should be unnecessarily punitive or unfair, or close our eyes to the devastating effects conviction and incarceration have on individuals in the system, their families, and their communities.

During my time in prison, I did my best to be productive and to give back to my community of fellow inmates however I could. I became a playwright, an ordained minister, a hospice volunteer, and a mentor for thousands of women. I knew that I had done wrong by breaking the law, but I was determined to turn my life around and to do everything I could to help others do the same.

For me, by far the biggest challenge of being in prison was being separated from my family. The loss of freedom and the tightly controlled schedules were challenges. But it was absolutely heartbreaking to be so far away from my parents, children, and grandchildren, to know I was missing out on important life events and day-to-day joys. It was equally devastating to my family.

After I was convicted, I was sent to a prison 1,500 miles away from my children. I never saw them because they couldn't afford to make the long journey to come visit me. Eventually, I was transferred to a facility closer to home and was finally able to see them. Although it was still heartbreaking to say goodbye at the end of the visits, I at least felt like I was a part of their life again.

In this regard, I was more fortunate than many of my fellow inmates. Many of them never heard from or saw their family because their family couldn't afford to come see them or couldn't afford the cost of prison phone calls, which are extremely expensive. Thankfully, when I came home to my family after I was released, I wasn't a stranger. Many others aren't so lucky. They've spent so long behind bars completely disconnected from their loved ones that their children don't even know them.

Families are a tremendous source of strength for individuals in prison. More than anything else, what kept me going all those years was seeing and talking to my children and grandchildren and knowing that I had a responsibility to try to set a good example for them, even from behind bars. When I got out, my family was equally important to helping me reintegrate into society and readjust to life on the outside. The world had changed during my time in prison, and I needed my family to help me navigate this brave new place.

The importance of family for individuals in the criminal justice system cannot be overstated. Family keeps you going. They motivate you to do better. They give you an *incentive* to do better. They remind you that you're not alone.

But too often, public officials overlook the essential role family members play in the criminal justice system. They focus on convicted individuals, or on victims—essential populations, to be sure—without considering broader family impacts or how family members can help support and rehabilitate individuals in the system.

That's why the bipartisan work the Hatch Center is doing is so important. The 2021 *Hatch Center Policy Review* highlights in a new and significant way how family impacts can—and should—inform a broad range of criminal justice policy decisions, from sentencing practices to prison policy to reentry. To provide just a few examples, it explains how housing inmates closer to home can help ease reentry, how clean slate legislation and occupational licensing reform can help children and family members of formerly incarcerated individuals, and why seeking to impose the minimum amount of punishment necessary to achieve legitimate public safety aims is consistent with a focus on families and children. It also offers valuable insights on police reform.

Equally important, this year's *Policy Review* lays out the decades of research on how incarceration impacts families and children and how strong family relationships can help improve reentry outcomes and reduce recidivism. Although the results of this research may be, on one level, somewhat intuitive—of course incarceration results in loss of family income and greater levels of emotional stress for family members—seeing the research presented in a comprehensive way really drives home how far the impacts of incarceration extend and how essential family members are to successful reentry.

I'm delighted the Hatch Center has chosen to bring attention to this crucially important aspect of criminal justice reform and honored to offer some brief words to lead off the 2021 *Policy Review*. I hope that readers will consider carefully the lessons contained in these pages and that policymakers will use those lessons to inform policy discussions that are taking place at all levels of government. As I said on a webinar earlier this year hosted by the Hatch Center, when one person goes to prison, their entire family goes with them. Let's remember that message, and use it to design a fairer and more effective criminal justice system.

—ALICE MARIE JOHNSON

# Introduction

Conversations about criminal justice typically center around two groups of individuals: individuals who are convicted of crimes, and individuals who are victims of crime. The former receive perhaps the lion's share of attention, as policymakers and commentators debate what consequences they should face, how such consequences should be meted out, what procedural protections should apply, and what can be done to reduce the likelihood that an individual will offend or reoffend. As to victims of crime, discussions may focus on the individual level—how to ensure justice is done in particular cases—or on a broader level—what can be done to reduce crime and improve public safety.

There is another group, however, that can and must be part of the conversation—the family members of convicted individuals.<sup>1</sup> These include spouses and intimate partners, parents and siblings, and, perhaps most importantly, children.<sup>2</sup>

Consider the example of Peyton, a young woman from Oregon. Peyton's father was sent to prison when she was in first grade. According to Peyton, her father's incarceration "all but severed" their relationship. They had occasional visits, but sometimes when Peyton saw him, they just sat in silence. "Some days it hurt too much," Peyton says, "and I just couldn't do it." Nor did Peyton have anyone she felt like she could confide in about her feelings. "I never really talked about my home life," she explains. "I would *never* talk about my dad."<sup>3</sup>

Peyton's story is far from unique among children who have experienced the incarceration of a parent. Peggy, a caregiver to two teenage girls with an incarcerated father, explains that the girls sometimes say things like, "I don't have my dad anymore. There's nobody who belongs to me, so therefore, I don't belong to anybody." For the girls, "[i]t's like being a displaced person, disconnected from anything that looks like the norm."<sup>4</sup>

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1 See Brian Elderbroom et al., FWD.us, *Every Second: The Impact of the Incarceration Crisis on America's Families* 44 (2018), available at <https://everysecond.fwd.us/downloads/EverySecond.fwd.us.pdf> ("Incarceration does not just impact the person who is sent to jail or prison, it reverberates into the lives of their loved ones with severe consequences for their financial security, health, and emotional well-being.").

2 See Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NIJ J. 1, 1 (2017) [hereinafter Nat'l Inst. of Justice, *Hidden Consequences*] (noting that "[c]hildren whose parents are involved in the criminal justice system, in particular, face a host of challenges and difficulties").

3 Emily Andrews, Prison Fellowship, *A Touchy Subject: Growing Up with an Incarcerated Father*, <https://www.prisonfellowship.org/story/growing-up-with-an-incarcerated-father> (last visited Dec. 4, 2021).

4 Patricia Allard & Judith Greene, Justice Strategies, *Children on the Outside: Voicing the Pain and Human Costs of Parental Incarceration* 5 (2011), available at <https://www.justicestrategies.org/sites/default/files/publications/JS-COIP-1-13-11.pdf>.

Feelings of loss and abandonment are not the only difficulties children and family members of incarcerated parents face. Carl, an incarcerated father, describes how before he was sent to prison, his daughter had been headed to college. But “because I was the primary source of financial support,” Carl says, “[n]ow, she’s working instead.” Carl continues: “My kids have always been middle class. Now for the first time in their lives they’re living in poverty. They understand what a single parent life is like for them.”<sup>5</sup>

Prison placement decisions and financial or other constraints can also combine to make visiting a parent or family member in prison virtually impossible. Charlee Ladd was a mere toddler when her father was sentenced to prison for 17 years for drug possession. Charlee’s father was initially sent to a prison only an hour from where she lived, and she was able to visit him at least once a month with her grandparents. But when authorities later transferred her father to a different facility more than three hours away, the visits stopped because health limitations prevented Charlee’s grandparents from making such a long journey.<sup>6</sup>

For decades, researchers have documented the deleterious effects that incarceration and criminal involvement have on the families of individuals who engage in criminal activity.<sup>7</sup> They have also recorded the ways in which strong family ties benefit communities and reduce recidivism.<sup>8</sup> Taking into account both sides of this equation—the impacts on, and the impacts of, family members—is essential to designing effective criminal justice policy.<sup>9</sup>

This paper seeks to do just that—to suggest an approach to criminal justice policy that builds on the decades of research regarding the interrelationship between family ties, incarceration, and criminal behavior. It does not reach every issue related to criminal justice reform. Criminal justice policy is a far-ranging subject that touches everything from policing to trial practice to sentencing to incarceration to reentry. Certain topics within its broader scope lend more naturally to a family-centered approach, and those topics will be the focus of this paper. The hope is that by focusing attention on a category of persons—family members of convicted individuals—that often receive only

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5 *Id.* at 13.

6 *Prison Visits Crucial, but Miles and Money Separate Families*, New Orleans Times-Picayune (Jan. 10, 2017), [https://www.nola.com/news/crime\\_police/article\\_25d54766-782e-5f6a-8a0c-23eb288c0cc9.html](https://www.nola.com/news/crime_police/article_25d54766-782e-5f6a-8a0c-23eb288c0cc9.html).

7 See sources cited *infra* notes 14-42 and accompanying text.

8 See sources cited *infra* notes 43-73 and accompanying text.

9 See Elderbroom et al., *supra* note 1, at 21 (noting that “the extent to which incarceration affects the well-being of families is rarely discussed in criminal justice debates and poorly understood by those who have not been directly impacted”).

secondary consideration in criminal justice policy discussions, this paper can add important insights and spark new ideas for policymakers, thought leaders, and the interested public.

This paper proceeds in five parts. Part I surveys the research on family relationships, incarceration, and recidivism, with a focus on how incarceration impacts family members and children and how family relationships affect recidivism. It also discusses the research on prison visitation and recidivism and how maintaining stronger family ties during incarceration can lead to better reentry outcomes. Part II turns to the topic of prison policy and how this research can inform decisions about inmate placement, visitation, and contact with family members. Part III considers the issue of reentry and how policymakers can design laws and programs that aid, rather than impede, the ability of formerly incarcerated individuals to find employment, housing, and other necessities so they can provide for their families and avoid cycles of recidivism and reincarceration. Part IV turns to punishment and asks what insights a family-centered approach to criminal justice reform can offer regarding sentencing practices and determining what conduct should be subject to criminal penalties in the first place. It suggests that a principle called parsimony—which says policymakers should seek the least amount of criminal punishment *necessary* to accomplish a law’s legitimate ends—can fit well with a family-centered approach because it seeks to avoid inflicting more harm than is necessary on convicted individuals and their families. Part V discusses police reform and offers suggestions for how the principles that can be drawn from the research described in this paper can inform discussions about improving police transparency, accountability, and officer-resident interactions. A brief conclusion follows.

Part I  
Families,  
Incarceration,  
and Recidivism:  
The Research



### *Incarceration's Impact on Family Members*

A family-centered approach to criminal justice policy must begin with an understanding of the impacts of incarceration on family members, and particularly on children—the most vulnerable population affected by the incarceration of a family member. According to the most recent data available from the U.S. Department of Justice, nearly half of state prison inmates (47 percent) and more than half of federal inmates (57 percent) have one or more minor children.<sup>10</sup> This translates to nearly 700,000 inmates with a minor child and 1.5 million minor children in the United States with a parent in prison.<sup>11</sup> The average age of a child with a parent in prison is between 9 and 10 years old.<sup>12</sup> Roughly 1 in 5 children with a parent in state prison and 1 in 8 children with a parent in federal prison are younger than 4 years old.<sup>13</sup>

For decades, researchers have examined the relationship between having a parent in prison and a range of metrics, including financial stability, mental and physical health, homelessness, educational attainment, and the likelihood that a child will engage in future criminal activity him or herself. The results of this research show that parental incarceration is strongly correlated with a variety of negative outcomes. According to a 2017 report published by the National Institute of Justice, an office within the U.S. Department of Justice, “[c]hildren whose parents are involved in the criminal justice system, in particular, face a host of challenges and difficulties: psychological strain, antisocial behavior, suspension or expulsion from school, economic hardship, and criminal activity.”<sup>14</sup> A deeper dive into the findings on each of these points shows just how far the impacts of parental incarceration extend.

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10 Laura M. Maruschak et al., U.S. Dep’t of Justice, Bureau of Justice Statistics, *Parents in Prison and Their Minor Children 1* (2021) [hereinafter Bureau of Justice Statistics 2021], available at <https://bjs.ojp.gov/content/pub/pdf/pptmcspi16st.pdf>. These percentages have declined slightly over the last two decades. In 2000, the U.S. Department of Justice reported that 55 percent of state inmates and 63 of federal inmates had minor children. Christopher J. Mumola, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Incarcerated Parents and Their Children 1* (2000) [hereinafter Bureau of Justice Statistics 2000], available at <https://bjs.ojp.gov/content/pub/pdf/iptc.pdf>. In a 2008 report, the comparable figures were 52 percent and 63 percent, respectively. Lauren E. Glaze & Laura M. Maruschak, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Parents in Prison and Their Minor Children 1* (2008) [hereinafter Bureau of Justice Statistics 2008], available at <https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf>. Throughout this paper, percentages have been rounded to the nearest whole percentile.

11 Bureau of Justice Statistics 2021, *supra* note 10, at 1.

12 *See id.* at 2.

13 *See id.*

14 Nat’l Inst. of Justice, *Hidden Consequences*, *supra* note 2, at 1.

First is the mental and emotional toll that children of incarcerated parents experience. Studies show that children with parents in prison are at increased risk for both “internalizing” challenges such as depression, anxiety, and withdrawal, as well as “externalizing” problems such as anger, aggression, and hostility toward caregivers.<sup>15</sup> One 2013 study analyzed survey data across 14 years and found “[p]ositive, significant associations” between parental incarceration and depression, posttraumatic stress disorder, and anxiety.<sup>16</sup> According to one estimate, 70 percent of young children with mothers in prison experience emotional or psychological problems.<sup>17</sup> Another study found that parental incarceration is associated with a broad range of negative outcomes, including “anger, acting out, withdrawal, lack of trust, feelings of isolation, difficulty coping with the reason for the parent’s absence, trouble in school and with the law, and lack of respect for authority.”<sup>18</sup> Researchers have also found that children with incarcerated parents are at increased risk for “insecure attachment,” meaning that their caregiver relationships are more likely to be “inconsistent, insensitive, or unresponsive to children’s social and emotional needs.”<sup>19</sup> As one study put it, “the disruption associated with parental incarceration will likely adversely affect the quality of the child’s attachment to their parent,” and “[i]nsecure attachments . . . have been linked to a variety of child outcomes, including poorer peer relationships and diminished cognitive abilities.”<sup>20</sup>

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- 15 Rebecca J. Shlafer et al., *Children with Incarcerated Parents—Considering Children’s Outcomes in the Context of Family Experiences*, Child. Mental Health eRev., June 2013, at 4 (citing *Children of Incarcerated Parents: A Handbook for Researchers and Practitioners* (J. Mark Eddy & Julie Poehlmann eds., 2010) [hereinafter *Children of Incarcerated Parents*]); see also Ross Parke & K. Alison Clarke-Stewart, *Urban Inst., Effects of Parental Incarceration on Young Children 5* (2002), available at <https://www.urban.org/sites/default/files/publication/60691/410627-Effects-of-Parental-Incarceration-on-Young-Children.PDF> (report prepared for conference sponsored by the U.S. Department of Health and Human Services).
- 16 Rosalyn D. Lee et al., *The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults*, 131 *Pediatrics* e1188, e1188 (2013).
- 17 Parke & Clarke-Stewart, *supra* note 15, at 5 (citing Phyllis Jo Baunach, *Mothers in Prison* (1985)).
- 18 Elizabeth Davies et al., *Urban Inst., Understanding the Experiences and Needs of Children of Incarcerated Parents: Views from Mentors 5* (2008), available at <https://www.urban.org/sites/default/files/publication/31481/411615-Understanding-the-Needs-and-Experiences-of-Children-of-Incarcerated-Parents.PDF>.
- 19 Shlafer et al., *supra* note 15, at 4 (citing *Children of Incarcerated Parents*, *supra* note 15).
- 20 Parke & Clarke-Stewart, *supra* note 15, at 4 (citing Ross A. Thompson, *Early Socioper-sonality Development*, in *Handbook of Child Psychology: Social, Emotional, and Personality Development* 25 (William Damon & Nancy Eisenberg eds., 1998); L. Alan Sroufe, *The Role of Infant-Caregiver Attachment in Development*, in *Clinical Implications of Attachment* 18 (Jay Belsky & Teresa M. Nezworski eds., 1988)).

Having a parent in prison is also associated with poorer physical health. The 2013 study referenced above found a statistically significant correlation between parental incarceration and various physical ailments, including high cholesterol, asthma, migraine headaches, HIV/AIDS, and overall poor health.<sup>21</sup> Other research has found that having a family member in prison increases the risk of hypertension, obesity, and diabetes.<sup>22</sup>

The loss of financial support when a parent is sent to prison can also be devastating. According to data from the U.S. Department of Justice, more than half of incarcerated parents provided primary financial support for their children prior to incarceration.<sup>23</sup> When a father is incarcerated, family income drops by an average of 22 percent, and remains on average 15 percent lower even after release.<sup>24</sup> Even fathers who did not live with their children prior to prison on average provided financial support to their children two-thirds of the time.<sup>25</sup> It is thus unsurprising that children with incarcerated parents are 80 percent more likely to live in households that have experienced financial strain.<sup>26</sup> According to one survey, 65 percent of households with an incarcerated family member struggled to meet basic needs.<sup>27</sup>

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21 Lee et al., *supra* note 16, at e1188.

22 Elderbroom et al., *supra* note 1, at 37 (citing Kerry M. Green et al., *Impact of Adult Sons' Incarceration on African American Mothers' Psychological Distress*, 68 J. Marriage & Fam. 430 (2006); Kristin Turney et al., *Those They Leave Behind: Paternal Incarceration and Maternal Instrumental Support*, 74 J. Marriage & Fam. 1149 (2012); Hedwig Lee & Christopher Wildeman, *Things Fall Apart: Health Consequences of Mass Imprisonment for African American Women*, 40 Rev. Black Pol. Econ. 39 (2013); Hedwig Lee et al., *A Heavy Burden: The Cardiovascular Health Consequences of Having a Family Member Incarcerated*, 104 Am. J. Pub. Health 421 (2014)).

23 Bureau of Justice Statistics 2008, *supra* note 10, at 5, 17.

24 Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* 21 (2010), available at [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes\\_assets/2010/collateralcosts1pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf) (citing Rucker C. Johnson, *Ever-Increasing Levels of Parental Incarceration and the Consequences for Children*, in *Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom* 177 (Stephen Raphael & Michael A. Stoll eds., 2009)).

25 Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 Fam. L.Q. 191, 192 (2006) (citing Creasia Finney Hairston, *Fathers in Prison: Responsible Fatherhood and Responsible Public Policies*, 32 Marriage & Fam. Rev. 111 (2001); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 Crime & Just. 121 (1999)).

26 Susan D. Phillips et al., *Disentangling the Risks: Parent Criminal Justice Involvement and Children's Exposure to Family Risks*, 5 Criminology & Pub. Pol'y 677, 688 (2006).

27 Saneta deVuono-Powell et al., Ella Baker Ctr. for Human Rights, *Who Pays? The True Cost of Incarceration on Families* 18 (2015), available at <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

One particularly problematic consequence from the loss of financial support may be housing instability. In one nationwide survey of family members of formerly incarcerated individuals, one in five respondents reported difficulty affording housing because of lost income from their family member's incarceration.<sup>28</sup> Children frequently move when a parent is incarcerated, and may face additional moves when the parent is released.<sup>29</sup> In another study, one participant described the experience of a child who had moved seven times within a seven-month period, while another participant described a child who lived in a two-bedroom house with 16 other people.<sup>30</sup> Such unstable housing situations only add to the challenges children of incarcerated parents already face, as the "constantly changing landscape of places and people may weaken otherwise supportive social ties."<sup>31</sup>

Children with incarcerated parents are also far more likely to use drugs, and significantly more likely to experience problems in school, than their peers. According to one study, children whose fathers served time in prison were nearly four times as likely to use illegal drugs as adults.<sup>32</sup> Children with a parent in prison are also three times more likely to engage in "anti-social or delinquent behavior," including violence.<sup>33</sup> Children with incarcerated parents, in turn, are more likely to drop out of school or have poor academic performance.<sup>34</sup> In one study, 70 percent of young children with a mother in prison performed poorly in school.<sup>35</sup> In another study, 50 percent of children with an incarcerated parent experienced problems in school, such as poor grades or instances of aggression.<sup>36</sup> A third study found that children with an

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28 *Id.* at 13.

29 Davies et al., *supra* note 18, at 4.

30 *Id.*

31 *Id.*

32 Allard & Greene, *supra* note 4, at 16 (citing Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 *Crime & Just.* 133 (2008)).

33 *Id.* at 6 (citing Murray & Farrington, *supra* note 32).

34 Bryce Peterson et al., *Urban Inst., Children of Incarcerated Parents Framework Document: Promising Practices, Challenges, and Recommendations from the Field 2* (2015), *available at* <https://www.urban.org/sites/default/files/publication/53721/2000256-Children-of-Incarcerated-Parents-Framework-Document.pdf> (citing Ashton D. Trice & JoAnne Brewster, *The Effects of Maternal Incarceration on Adolescent Children*, 19 *J. Police & Crim. Psychol.* 27 (2004); Lois Wright & Cynthia B. Seymour, *Working with Children and Families Separated by Incarceration: A Handbook for Child Welfare Agencies* (2000)).

35 Parke & Clarke-Stewart, *supra* note 15, at 5 (describing Ann M. Stanton, *When Mothers Go to Jail* (1980)).

36 *Id.* at 5 (describing William H. Sack et al., *The Children of Imprisoned Parents: A Psycho-social Exploration*, 46 *Am. J. Orthopsychiatry* 618 (1976)).

incarcerated parent were 25 percent more likely to have problems in school than other children.<sup>37</sup> Research has also found a link between paternal incarceration and poor school performance.<sup>38</sup>

One final impact of parental incarceration is perhaps the most troubling of all. According to a report published by the National Institute of Justice, children with an incarcerated parent are “on average, six times more likely to become incarcerated themselves.”<sup>39</sup> Although the causes of criminal behavior are multifaceted and individual risk factors are difficult to separate out,<sup>40</sup> the fact that having a parent in prison is correlated with such an increased likelihood of future criminal activity is surely relevant to criminal justice policy discussions. Having a parent “who is constantly cycling in and out of prison” can lead to “inconsistency and repeated traumatization” that leads to life-long, negative consequences for the child.<sup>41</sup>

In sum, parental incarceration is associated with a wide range of adverse impacts for children and other family members left behind. Poorer health, poorer educational outcomes, reduced financial stability, and an increased likelihood of illegal drug use and other high-risk behavior are all correlated with having a parent in prison. Even if in most cases the incarceration of a parent “does not signal the onset of family and child development needs,” but instead “points to a family already struggling with a variety of conditions and experiences that produce risk,” parental incarceration “may then exacerbate these conditions of ongoing family poverty, stress and trauma.”<sup>42</sup> Accordingly, the

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37 See David Murphey & P. Mae Cooper, *Child Trends, Parents Behind Bars: What Happens to Their Children?* 7 (2015), available at <https://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf> (finding that children aged 6 to 11 with a parent in prison had a 44 percent likelihood of experience problems in school, compared to 35 percent of children who did not have a parent in prison); see also *id.* (finding that the comparable figures for children aged 12 to 17 were 43 percent and 35 percent, respectively).

38 See Kristin Turney & Anna R. Haskins, *Falling Behind? Children’s Early Grade Retention After Paternal Incarceration*, 87 Soc. Educ. 241, 248 (2014) (finding that children of incarcerated fathers are more likely to repeat grades in school).

39 Nat’l Inst. of Justice, *Hidden Consequences*, *supra* note 2, at 2 (citing Megan Cox, *The Relationships Between Episodes of Parental Incarceration and Students’ Psycho-Social and Educational Outcomes: An Analysis of Risk Factors* (May 2009) (Ph.D. dissertation, Temple University)).

40 See *id.* at 2.

41 Davies et al., *supra* note 18, at 10.

42 Michelle Waul et al., *Urban Inst., Background Paper: The Effect of Incarceration and Reentry on Children, Family, and Communities*, at i (2002), available at <https://www.urban.org/sites/default/files/publication/60716/410632-Background-Paper-The-Effect-of-Incarceration-and-Reentry-on-Children-Families-and-Communities.PDF> (report prepared for conference sponsored by the U.S. Department of Health and Human Services).

impacts of incarceration on children and other family members must be taken into account when devising and evaluating criminal justice policies. Focusing only on the individuals who commit offenses, or on the victims of such offenses, misses an essential impacted population.

### *Family Members' Impact on Incarcerated Individuals*

Taking into account the impact of incarceration on children and families, however, is just one side of the equation. Equally important is the impact of family relationships on incarcerated individuals and on their ability to successfully reenter society following release.

Research has consistently found that one of the most important determinants of successful reentry is the strength of a formerly incarcerated individual's family ties.<sup>43</sup> As one researcher has explained, "social connectedness is the root

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43 See, e.g., Nat'l Inst. of Justice, *Hidden Consequences*, *supra* note 2, at 4 ("Research shows that . . . strong family support is one of the biggest factors in a successful re-entry experience." (citing Christy A. Visher & Shannon M.E. Courtney, *Urban Inst., One Year Out: Experiences of Prisoners Returning to Cleveland* (2007) [hereinafter Visher & Courtney, *One Year Out*], available at <https://www.urban.org/sites/default/files/publication/43021/311445-One-Year-Out-Experiences-of-Prisoners-Returning-to-Cleveland.PDF>)); Thomas J. Mowen et al., *Family Matters: Moving Beyond "If" Family Support Matters to "Why" Family Support Matters During Reentry from Prison*, 56 J. Res. Crime & Delinq. 483, 484 (2019) ("Although research has highlighted a number of dimensions as important for successful reintegration . . . perhaps more so than any other factor, family support has been highlighted as an extraordinarily vital component for reentry success." (citing Joyce A. Arditti & April L. Few, *Mothers' Reentry into Family Life Following Incarceration*, 17 Crim. Just. Pol'y Rev. 103 (2006); Donald Braman, *Doing Time on the Outside: Incarceration and Family Life in Urban America* (2004); Jeffrey R. Breese et al., *No Place Like Home: A Qualitative Investigation of Social Support and Its Effects on Recidivism*, 2 Soc. Prac.: J. Clinical & Applied Res. 1 (2000); Rebecca L. Naser & Nancy G. La Vigne, *Family Support in the Prisoner Reentry Process: Expectations and Realities*, 43 J. Offender Rehabilitation 93 (2006); Rebecca L. Naser & Christy A. Visher, *Family Members' Experiences with Incarceration and Reentry*, 7 W. Criminology Rev. 20 (2006); Marta Nelson et al., *Vera Inst. of Justice, The First Month Out: Post-Incarceration Experiences in New York City* (1999), available at [https://www.vera.org/downloads/Publications/the-first-month-out-post-incarceration-experiences-in-new-york-city/legacy\\_downloads/first\\_month\\_out.pdf](https://www.vera.org/downloads/Publications/the-first-month-out-post-incarceration-experiences-in-new-york-city/legacy_downloads/first_month_out.pdf); Carol Shapiro & Meryl Schwartz, *Coming Home: Building on Family Connections*, 5 Corrections Mgmt. Q. 52 (2001); Visher & Courtney, *One Year Out*, *supra*; Bruce Western et al., *Stress and Hardship After Prison*, 120 Am. J. Soc. 1512 (2015)); Robert J. Sampson & John H. Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609, 624 (1990) (study of 500 men in Boston who had been committed to correctional schools as minors that found the "largest effect on overall adult criminal and deviant behavior" was the closeness of a participant's ties to his spouse).

source of reintegration into society, and “social connectedness stems from the relationships an incarcerated individual is able to maintain during and after their sentence.”<sup>44</sup> Formerly incarcerated individuals with strong family ties report higher optimism, greater confidence in the future, and stronger opposition to committing future crimes.<sup>45</sup> Studies also show that family connections provide emotional resources to help cope with the stresses of reentry and are an important way that formerly incarcerated individuals can overcome the stigma of a criminal conviction.<sup>46</sup> In one Ohio study of

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44 Timothy Daly, *Family Relationships and the Incarcerated Individual*, EBP Society (Oct. 12, 2016), <https://www.ebpsociety.org/blog/education/221-family-relationships-incarcerated-individual> (citing Sara Wakefield, *Changing the Ties that Bind*, 15 *Criminology & Pub. Pol’y* 543 (2016)).

45 Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 *Just. Q.* 382, 385 (2011) (citing Ros Burnett, *To Re-offend or Not to Re-offend? The Ambivalence of Convicted Property Offenders*, in *After Crime and Punishment: Pathways to Offender Reintegration* 153 (Shadd Maruna & Russ Immarigeon eds., 2004) [hereinafter *After Crime and Punishment*]; Shadd Maruna, *Making Good: How Ex-Convicts Reform and Rebuild Their Lives* (2001); Nelson et al., *supra* note 43).

46 *See id.* at 385 (citing Robert Agnew, *Why Do Criminals Offend: A General Theory of Crime and Delinquency* (2005); Daniel Glaser, *The Effectiveness of a Probation and Parole System* (1964); Maruna, *supra* note 45; John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003); John Braithwaite, *Crime, Shame and Reintegration* (1989); Naser & Visser, *supra* note 43; Eileen Sullivan et al., *Vera Inst. of Justice, Families as a Resource in Recovery from Drug Abuse: An Evaluation of La Bodega de la Familia* (2002), *available at* [https://www.vera.org/downloads/Publications/families-as-a-resource-in-recovery-from-drug-abuse-an-evaluation-of-la-bodega-de-la-familia/legacy\\_downloads/Families\\_as\\_a\\_resource.pdf](https://www.vera.org/downloads/Publications/families-as-a-resource-in-recovery-from-drug-abuse-an-evaluation-of-la-bodega-de-la-familia/legacy_downloads/Families_as_a_resource.pdf); Christy A. Visser & Shannon M.E. Courtney, *Urban Inst., Cleveland Prisoners’ Experiences Returning Home* (2006) [hereinafter *Visser & Courtney, Cleveland Prisoners’ Experiences*], *available at* <https://www.urban.org/sites/default/files/publication/42966/311359-Cleveland-Prisoners-Experiences-Returning-Home.PDF>); *id.* at 388 (citing Glaser, *supra*; Christy Visser et al., *Urban Inst., Employment After Prison: A Longitudinal Study of Releases in Three States* (2008) [hereinafter *Visser et al., Employment After Prison*], *available at* <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releasers-in-Three-States.PDF>; Christy Visser et al., *Urban Inst. Baltimore Prisoners’ Experiences Returning Home* (2004) [hereinafter *Visser et al., Baltimore Prisoners’ Experiences*], *available at* <https://www.urban.org/sites/default/files/publication/42806/310946-Baltimore-Prisoners-Experiences-Returning-Home.PDF>; Stephen Farrall, *Social Capital and Offender Reintegration: Making Probation Desistance Focused*, in *After Crime and Punishment*, *supra* note 45, at 57); *see also* Mowen et al., *supra* note 43, at 486 (describing 2016 study of approximately 1,700 formerly incarcerated individuals that found that “individuals with higher emotional support” from family members “reported lower offending than those with lower emotional support”).

former inmates, respondents pointed to their family members as the most important factor helping them to avoid returning to prison.<sup>47</sup> In another study of former Illinois inmates, 71 percent of respondents identified family support as the most important influence helping them stay out of prison.<sup>48</sup> Research shows that formerly incarcerated individuals with strong family ties are less likely to recidivate.<sup>49</sup> By contrast, individuals with weak family support and social ties are more likely to violate the terms of probation or parole.<sup>50</sup>

The relationship between family ties and successful reentry is rooted in more than the added emotional support and positive reinforcement that individuals with strong family connections receive. Family ties also play a crucial role in helping individuals reentering society obtain employment and stable housing—two of the most important other determinants of successful reentry.

With regard to employment, “a steady job gives offenders a sense of identity and meaning to their life, while it also places restrictions on their routines, thereby reducing their exposure to situations conducive to criminal behavior.”<sup>51</sup> Employment “also enables individuals to pay their bills, secure housing, and develop a wider network of ties to conventional society,” in addition to “reduc[ing] the economic incentive to engage in

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47 Visher & Courtney, Cleveland Prisoners’ Experience, *supra* note 46, at 2.

48 Nancy G. La Vigne et al., Urban Inst., Chicago Prisoners’ Experiences Returning Home 8 (2004) [hereinafter La Vigne et al., Chicago Prisoners’ Experiences], *available at* <https://www.urban.org/sites/default/files/publication/42831/311115-Chicago-Prisoners-Experiences-Returning-Home.PDF>.

49 *See, e.g.*, Ryan Shanahan & Sandra Villalobos Agudelo, Vera Inst. of Justice, Close to Home: Building on Family Support for People Leaving Jail 4 (2011), *available at* [https://www.vera.org/downloads/Publications/close-to-home-building-on-family-support-for-people-leaving-jail/legacy\\_downloads/Close\\_to\\_home\\_report.pdf](https://www.vera.org/downloads/Publications/close-to-home-building-on-family-support-for-people-leaving-jail/legacy_downloads/Close_to_home_report.pdf) (“[A]dults who had more contact with their families while in prison and report positive relationships overall are less likely to be arrested again or re-incarcerated.” (citing Damian J. Martinez & Johnna Christian, *The Familial Relationships of Former Prisoners: Examining the Link Between Residence and Informal Support Mechanisms*, 38 J. Contemp. Ethnography 201 (2009))); Kelle Barrick et al., *Reentering Women: The Impact of Social Ties on Long-Term Recidivism*, 94 Prison J. 279, 290 (2014) (finding that formerly incarcerated women with “higher family emotional and instrumental support” are less likely to be reincarcerated within five years of release).

50 Arthur Rizer & Brett Tolman, *Seeking Success: Reforming America’s Community Supervision System*, 21 Federalist Soc’y Rev. 142, 144 (2020).

51 Berg & Huebner, *supra* note 45, at 387 (citing Glaser, *supra* note 46; Laub & Sampson, *supra* note 46; Mercer L. Sullivan, *Getting Paid: Youth Crime and Work in the Inner City* (1989)).



income-generating crimes.”<sup>52</sup> The recidivism rate for formerly incarcerated individuals who are unemployed is nearly twice as high as for those with jobs.<sup>53</sup>

Research suggests that family ties help individuals reentering society obtain employment in several different ways. First, family members can be an important source of information about job openings.<sup>54</sup> Family members may know of companies that are hiring, know of openings within their own company, or even be employers themselves. They may also have friends or other associates they can ask about potential openings. Second, family members can vouch for a formerly incarcerated individual’s character or work ethic, thus helping the individual to overcome the stigma that may accompany his or her criminal conviction.<sup>55</sup> Third, family members with standing in the community can help lend credibility or a measure of social standing to an individual as he or she searches for a job.<sup>56</sup> Studies show that social ties are particularly important for

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52 *Id.* (citing Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (2003) [hereinafter Petersilia, *When Prisoners Come Home*]; Visher & Courtney, *Cleveland Prisoners’ Experiences*, *supra* note 46; Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 *Ann. Rev. Soc. Sci.* 89 (2003); Joan Petersilia et al., *Nat’l Research Council, Parole, Desistance from Crime, and Community Integration* (2008), *available at* <https://cdpsdocs.state.co.us/ccjj/Resources/Ref/NCR2007.pdf>; Neal Shover, *Great Pretenders: Pursuits and Careers of Persistent Thieves* (1996)).

53 U.S. Comm’n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities 51-52* (2019) [hereinafter U.S. Comm’n on Civil Rights, *Collateral Consequences*], *available at* <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> (citing Stephen Slivinski, *Ctr. for the Study of Econ. Liberty, Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform* (2016), *available at* <https://csel.asu.edu/sites/default/files/2019-09/csel-policy-report-2016-01-turning-shackles-into-bootstraps.pdf>); *see also* Visher & Courtney, *One Year Out*, *supra* note 43, at 10 (finding that “having a job six months after release” is one of the “strongest inhibitors of reincarceration”); Visher et al., *Employment After Prison*, *supra* note 46, at 8 (finding that “[p]redicted probabilities of reincarceration” one year after release were significantly lower for individuals who were employed as compared to individuals who were unemployed).

54 Berg & Huebner, *supra* note 45, at 386 (citing Nan Lin, *Social Capital: A Theory of Social Structure and Action* (2001); Mark Granovetter, *Getting a Job: A Study of Contacts and Careers* (1974) [hereinafter Granovetter, *Getting a Job*]); *see also id.* at 388 (citing Glaser, *supra* note 46; Visher et al., *Employment After Prison*, *supra* note 46; Visher et al., *Baltimore Prisoners’ Experiences*, *supra* note 46; Farrall, *supra* note 46).

55 *Id.* at 386-87 (citing Braman, *supra* note 43; Petersilia, *When Prisoners Come Home*, *supra* note 52; Christopher Uggen et al., *Work and Family Perspectives on Reentry, in Prisoner Reentry and Crime in America* 209 (Jeremy Travis & Christy Visher eds., 2005)).

56 *Id.* (citing Lin, *supra* note 54; Sullivan, *supra* note 51).

job-seekers who are at a relative disadvantage to others in terms of qualifications or reputation,<sup>57</sup> and formerly incarcerated individuals—by virtue of their criminal convictions and time off the job market—are likely to be disadvantaged on both metrics.

Thus, strong family ties can help individuals reentering society overcome both the reputational harm of their criminal conviction and their history of unemployment.<sup>58</sup> In one 2016 study, for example, researchers found that inmates who received more visits from—and had stronger bonds with—family members were more likely to report having employment opportunities following release.<sup>59</sup> A study of formerly incarcerated individuals in Baltimore similarly found that individuals with “closer family relationships” and “stronger family support” were “more likely to have worked” in the months following release.<sup>60</sup> Yet another study found that formerly incarcerated individuals with “quality ties to family had a higher predicted probability of being employed” following release “irrespective of pre-prison employment history.”<sup>61</sup>

Research also shows that formerly incarcerated individuals find jobs through family members more frequently than through other sources. In one study, nearly twice as many formerly incarcerated individuals (36 percent) reported that family networks were their primary source for finding a job following release as reported reentry programs—the next-most-commonly reported primary source for finding a job (at 19 percent).<sup>62</sup>

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57 *Id.* at 383 (citing Granovetter, Getting a Job, *supra* note 54; Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 *Am. J. Soc.* 481 (1985); Lin, *supra* note 54).

58 *Id.* at 402; *see also id.* at 388.

59 *See* Johanna B. Folk et al., *Behind Bars but Connected to Family: Evidence for the Benefits of Family Contact During Incarceration*, 33 *J. Fam. Psychol.* 453, 454 (2019) (describing Siyu Liu et al., *Inside the Black Box: Prison Visitation, the Costs of Offending, and Inmate Social Capital*, 27 *Crim. Just. Pol’y Rev.* 766 (2016)).

60 Visher et al., *Baltimore Prisoners’ Experiences*, *supra* note 46, at 6; *see also* Visher & Courtney, *One Year Out*, *supra* note 43, at 9 (survey of formerly incarcerated individuals in Cleveland one year after release that found that survey participants “who had close relationships with a spouse or intimate partner” were “more likely to be employed”).

61 Berg & Huebner, *supra* note 45, at 404 (emphasis added).

62 deVunono-Powell et al., *supra* note 27, at 22; *see also* La Vigne et al., *Chicago Prisoners’ Experiences*, *supra* note 48, at 8 (survey of formerly incarcerated individuals in Chicago in which 33 percent of respondents reported that they had found jobs through family members).

With regard to housing, many experts agree that “securing housing upon reentry is the most ‘pressing and immediate short-term need’ for formerly incarcerated individuals.”<sup>63</sup> Indeed, “[o]ne of the first tasks a returning prisoner must take on following release from prison is to find a place to stay.”<sup>64</sup> Finding stable housing is also not just a short-term necessity. Obtaining (and retaining) a steady job, establishing community ties, and avoiding situations that may lead to criminal behavior are all made much more difficult if a person does not have a steady place to live. Accordingly, individuals reentering society who are unable to find secure housing are twice as likely to recidivate.<sup>65</sup>

The relationship between family ties and stable housing is straightforward. In one nationwide survey of formerly incarcerated individuals, two-thirds reported turning to family members for help finding housing after release.<sup>66</sup> In another study of formerly incarcerated individuals in Chicago, 62 percent reported sleeping at a relative’s home their first night out of prison, and an even higher percentage—88 percent—were living with family members four to eight months after release.<sup>67</sup> Yet another study of former inmates in the Cleveland area found that 80 percent lived with their family following release.<sup>68</sup> The above-referenced Baltimore study likewise found that 80 percent of formerly incarcerated individuals in the study were living with family members one to three months after release.<sup>69</sup> Family members are by far the most common source of housing for individuals reentering society.

For individuals who do not have family members they can live with, the situation can be dire. According to one report, “[m]ost individuals leave prison without enough money for a security deposit on an apartment.”<sup>70</sup> Many municipalities require a criminal background check for public housing appli-

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63 U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 62 (quoting Claire W. Herbert et al., *Homelessness and Housing Insecurity Among Former Prisoners*, 1 RSF: Russell Sage Found. J. Soc. Sci. 44, 45 (2015)).

64 Waul et al., *supra* note 42, at xxiii.

65 U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 64 (citing Marie Claire Tran-Leung, Sargent Shriver Nat’l Ctr. on Poverty Law, *When Discretion Meets Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing* (2015), *available at* <https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf>); *see also* Visher & Courtney, *One Year Out*, *supra* note 43, at 10 (finding that “[t]he ability to find stable housing in the first month following release” is a “strong[] inhibitor[] of reincarceration”).

66 deVuono-Powell et al., *supra* note 27, at 27.

67 La Vigne et al., *Chicago Prisoners’ Experiences*, *supra* note 48, at 7-8.

68 Visher & Courtney, *Cleveland Prisoners’ Experiences*, *supra* note 46, at 2.

69 Visher et al., *Baltimore Prisoners’ Experiences*, *supra* note 46, at 6.

70 Waul et al., *supra* note 42, at xxiii.

cants, and “may deny housing applications on the basis of conviction history.”<sup>71</sup> Private landlords, as well, may deny housing based on a criminal background. Indeed, in one nationwide study, nearly 8 in 10 formerly incarcerated individuals reported being denied or rendered ineligible for housing because of their conviction history.<sup>72</sup>

What the research shows, then, is that three of the core determinants of successful reentry—family ties, employment, and secure housing—are all interrelated. Family ties provide emotional support and stability, while also serving as a source for job leads and as potential reference points for employers who may be unsure about hiring someone with a criminal background. Family members are also a crucial source of housing, both in the days immediately following release and over the ensuing months. According to a 2020 report by the President’s Commission on Law Enforcement and the Administration of Justice, “[s]table employment and housing are fundamental to successful reentry.”<sup>73</sup> Fundamental to both of those factors, in turn, are returning individuals’ relationships with family members. So the third and final topic to consider before turning to policy prescriptions is what the research shows about how inmates and family members maintain ties during incarceration and how contact with family members affects recidivism and other outcomes.

### *Maintaining Family Ties During Incarceration*

In a nationwide survey of state and federal inmates conducted by the U.S. Department of Justice, 62 percent of parents in state prison and 82 percent of parents in federal prison reported at least monthly contact with their minor children.<sup>74</sup> Mail was the most frequent form of contact, with 52 percent of parents in state prison and 64 percent of parents in federal prison reporting at least monthly mail contact, followed by phone calls, with 38 percent of parents in state prison and 75 percent of parents in federal prison reporting at least monthly phone calls.<sup>75</sup> Personal visits were far less common. Only 19 percent of parents in state prison and 19 percent of parents in federal prison reported receiving visits from their children at least once a month.<sup>76</sup> Fifty-nine percent of parents in state prison and 45 percent of parents in federal prison had *never* received a personal visit from their children.<sup>77</sup>

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71 deVuono-Powell et al., *supra* note 27, at 26.

72 *Id.* at 27.

73 U.S. Dep’t of Justice, President’s Comm’n on Law Enforcement & the Admin. of Justice, Final Report 70 (2020) [hereinafter President’s Comm’n on Law Enforcement], *available at* <https://www.justice.gov/file/1347866/download>.

74 Bureau of Justice Statistics 2008, *supra* note 10, at 18.

75 *Id.*

76 *Id.*

77 *Id.*

The survey data also showed that a significant number of parents in state prison—more than 1 in 5—had no contact at all with their minor children.<sup>78</sup> In addition, nearly 47 percent of parents in state prison had never received a phone call from their children, and 30 percent had never received a letter.<sup>79</sup> The comparable figures for federal inmates were lower—15 and 16 percent, respectively.<sup>80</sup> Nine percent of parents in federal prison reported no contact with their children.<sup>81</sup>

Other studies have found similar figures for family visitation. In a study of former Florida state inmates, for example, researchers found that 58 percent had not received any visitors in the year prior to release.<sup>82</sup> A nationwide survey of immediate family members of formerly incarcerated individuals, in turn, found that fewer than half who had a family member who was incarcerated more than twelve months had visited that family member in prison.<sup>83</sup> A similar survey of family members of former Chicago inmates found that fewer than a *third* had visited their family member in prison, although approximately half of spouses or significant others had done so.<sup>84</sup> A study of over 16,000 Minnesota state inmates reported slightly higher visitation rates, but still found that nearly 4 in 10 inmates did not receive any visitors during their entire period of incarceration.<sup>85</sup>

One key determinant of visitation is the distance an inmate is housed from his or her home community. One study found that nearly half of state inmates housed within 50 miles of home had received a visit in the month prior to being surveyed.<sup>86</sup> Visitation rates steadily decreased as the distance from home increased: from 40 percent in the month prior to survey for inmates housed 50 to 100 miles from home, to 26 percent for inmates housed between 100 and 500 miles from home, to only 15 percent for inmates housed more than

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78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 *J. Res. Crime & Delinq.* 287, 304 (2008).

83 Elderbroom et al., *supra* note 1, at 38.

84 Naser & Visher, *supra* note 43, at 25.

85 Grant Duwe & Valerie A. Clark, *Blessed Be the Social Tie that Binds: The Effects of Prison Visitation on Offender Recidivism*, 24 *Crim. Just. Pol'y Rev.* 271, 282 (2013).

86 Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, Prison Policy Initiative (Oct. 20, 2015), <https://www.prisonpolicy.org/reports/prisonvisits.html>.

500 miles from home.<sup>87</sup> Research has also found that individuals housed in local jails receive more visits than inmates in prisons, which tend to be located farther from family and friends than local jails.<sup>88</sup>

Multiple studies have found that distance is a top barrier to in-person contact by family members.<sup>89</sup> In the above-mentioned study of family members of former Chicago inmates, for example, for 75 percent of respondents, “[t]he number one challenge to staying in touch with an imprisoned family member was that the prison was located too far away.”<sup>90</sup> For those respondents who visited their family member at least once during their term of incarceration, the median travel time to the prison was three hours. For those who did not, the median travel time “increased to four hours, a possible indicator of why they did not visit their incarcerated family member.”<sup>91</sup>

The experience of Alice Marie Johnson, who served over 20 years in federal prison for a drug offense before her sentence was commuted and she was ultimately pardoned, illustrates how distance can impact visitation rates and contact with family members. According to Johnson, after she was sentenced, she was sent to a prison 1,500 miles away from her children.<sup>92</sup> Because of the vast distance and expense associated with traveling that many miles, Johnson never once received a visit from her children. As Johnson tells it, they simply “didn’t have the means” to journey so far to see her.<sup>93</sup> Only after she was transferred closer to home were her children able to come visit.<sup>94</sup>

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87 *Id.*

88 Ryan Shanahan & Sandra Villalobos Agudelo, *The Family and Recidivism*, Am. Jails, Sept.-Oct. 2012, at 17, 21 [hereinafter Shanahan & Agudelo, *The Family and Recidivism*].

89 *See, e.g.*, U.S. Dep’t of Health & Human Servs., Office of the Assistant Sec’y for Planning & Evaluation, Parenting from Prison: Innovative Programs to Support Incarcerated and Reentering Fathers 8 (2010) [hereinafter HHS ASPE, Parenting from Prison], available at [https://aspe.hhs.gov/sites/default/files/migrated\\_legacy\\_files/57811/rb.pdf](https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/57811/rb.pdf); N.Y. State Div. of Criminal Justice Servs., Children of Incarcerated Parents in New York State: A Data Analysis 7 (2013), available at <https://www.criminaljustice.ny.gov/pio/2013-children-with-inarcerated-parents-report.pdf>; Shanahan & Agudelo, *The Family and Recidivism*, *supra* note 88, at 25; Naser and Visher, *supra* note 43, at 25.

90 Naser & Visher, *supra* note 43, at 25.

91 *Id.*

92 Orrin G. Hatch Foundation, Webinar, Justice and Mercy: Bringing Greater Balance to America’s Legal System (May 20, 2021) (remarks of Alice Marie Johnson).

93 *Id.*

94 *Id.*

Johnson's experience being housed hundreds of miles from home is not unique. According to information from the Sentencing Project (based on data compiled by the U.S. Department of Justice), 62 percent of state inmates and 84 percent of federal inmates are housed more than 100 miles from their place of residence at the time of arrest, with 42 percent of federal inmates housed more than 500 miles from home.<sup>95</sup> (The comparable 500-miles-or-more figure for state inmates is 10 percent.) Less than 16 percent of state inmates—and less than 5 percent of federal inmates—are within 50 miles of home.<sup>96</sup> Incarcerated mothers tend to be placed, on average, 160 miles farther from home than incarcerated fathers, owing to the smaller number of correctional facilities for women.<sup>97</sup>

Research has consistently shown a positive relationship between prison visitation and successful reentry outcomes. In the above-referenced Florida study, for example, researchers found that the likelihood that an inmate would commit a new offense and be reincarcerated within two years of release was 31 percent lower for inmates who had received at least one visit in the year leading up to release.<sup>98</sup> For each additional visit an inmate received, the likelihood of recidivism declined by 3.8 percent, and visits closer in time to release had a stronger impact on recidivism reduction.<sup>99</sup> According to the authors, “[e]ven if any observed visitation effect reflects strong preexisting ties to family, friends, and community, the findings support the ideas that continuing the maintenance of these ties is important for reducing recidivism, and developing such ties where they are not already present may also be important, perhaps even more so, for reducing recidivism.”<sup>100</sup>

Another study found that inmates who received visitors at least once during their period of confinement were 13 percent less likely to be convicted of another felony following release, and 25 percent less likely to have parole revoked for a technical violation (such as breaking a curfew restriction), than inmates who did not receive any visitors.<sup>101</sup> Receiving monthly visits reduced

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95 Sarah Schirmer et al., *The Sentencing Project, Incarcerated Parents and Their Children: Trends 1991-2007*, at 8 (2009), available at <https://www.sentencingproject.org/wp-content/uploads/2016/01/Incarcerated-Parents-and-Their-Children-Trends-1991-2007.pdf>. The U.S. Department of Justice reports similar statistics. See Bureau of Justice Statistics 2000, *supra* note 10, at 5.

96 Schirmer et al., *supra* note 95, at 8.

97 Waul et al., *supra* note 42, at xxi (citing John Hagan & Juleigh Petty Coleman, *Returning Captives of the American War on Drugs: Issues of Community and Family Reentry*, 47 *Crime & Delinq.* 352 (2001)).

98 Bales & Mears, *supra* note 82, at 304.

99 *Id.* at 305, 310.

100 *Id.* at 314 (numbering omitted).

101 Duwe & Clark, *supra* note 85, at 282.

the likelihood of reconviction by 0.9 percent per visit and the likelihood of parole revocation by 3.3 percent per visit.<sup>102</sup> Each additional visitor also reduced the likelihood of reconviction by 3.0 percent and the likelihood of parole revocation by 4.8 percent.<sup>103</sup> Although the impact of visitation in the study was somewhat more modest than in the Florida study, it still shows a significant relationship between visitation and reduced recidivism.

Other studies have found similar links between visitation and reduced recidivism. A 2014 study of women inmates across six states, for example, found that study participants “who reported receiving a family visit” while in prison were less likely to be reincarcerated within five years of release than those who did not receive a visit.<sup>104</sup> A 2013 study of incarcerated fathers in three states found that participants who received mail or visits from their children “tend[ed] to work more hours after release” and were “less likely to report criminal activity or substance use.”<sup>105</sup> And another study of Florida inmates from 2012 found that “receiving any visitation” reduced the likelihood of reconviction within three years of release by 10 percent, with visits from a spouse or significant other having the greatest effect.<sup>106</sup> Each additional visit resulted in an additional reduction in the likelihood of reconviction, although the marginal effect declined with each additional visit.<sup>107</sup> Another, more dated study compared post-release arrest rates of individuals who had three or more visitors during their period of incarceration with those who had no contact. Fifty percent of inmates in the no-contact group were rearrested within one year of release; the comparable figure for inmates who had received three or more visitors was 30 percent.<sup>108</sup>

The benefits of family visitation also extend beyond recidivism reduction. Among other things, increased contact with children during incarceration is associated with increased parental involvement following release and a reduced

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102 *Id.*

103 *Id.*

104 Barrick et al., *supra* note 49, at 293.

105 Christy A. Visher et al., *Fatherhood, Community Reintegration, and Successful Outcomes*, 52 *J. Offender Rehabilitation*, 451, 459 (2013) [hereinafter Visher et al., *Fatherhood*].

106 Daniel Mears et al., *Prison Visitation and Recidivism*, 29 *Just. Q.* 888, 904-05 (2012).

107 *Id.* at 907-08.

108 Norman Holt & Donald Miller, Cal. Dep’t of Corr., Research Div., *Explorations in Inmate-Family Relationships 2* (1972), available at [https://www.prisonlegalnews.org/media/publications/holt\\_miller\\_prisoner\\_and\\_family\\_relationship\\_recidivism\\_study\\_1972.pdf](https://www.prisonlegalnews.org/media/publications/holt_miller_prisoner_and_family_relationship_recidivism_study_1972.pdf); see also Visher & Travis, *supra* note 52, at 100 (identifying over a dozen studies from the 1970s, 80s, and 90s finding that “inmates’ family relationships and ties to those family members during prison improve postrelease outcomes”).



risk of poor mental health outcomes for children.<sup>109</sup> Visitation can calm a child's fears about an incarcerated parent's welfare, as well as reinforce the parent's love for them.<sup>110</sup> Studies have found that lack of contact leads children of incarcerated parents to feel alienated from their parent.<sup>111</sup> Contact with family members during incarceration is also associated with a reduced risk of divorce and reduced likelihood that family members will experience poor physical health during the period of incarceration.<sup>112</sup> One study found that increased contact between children and incarcerated mothers is associated with fewer school suspensions and a reduced likelihood of school dropout.<sup>113</sup>

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109 See, e.g., Nancy G. La Vigne et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. Contemp. Crim. Just. 314, 328 (2005) [hereinafter La Vigne et al., *Examining the Effect*]; U.S. Dep't of Health & Human Servs., Office of the Assistant Sec'y for Planning & Evaluation, Change in Father-Child Relationships Before, During, and After Incarceration 11-12 (2016) [hereinafter HHS ASPE, Change in Father-Child Relationships], available at [https://aspe.hhs.gov/sites/default/files/migrated\\_legacy\\_files//145346/Father-Child%20Brief\\_March%2028%202016REV.PDF](https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//145346/Father-Child%20Brief_March%2028%202016REV.PDF); Lindsey Cramer et al., Urban Inst., Parent-Child Visiting Practices in Prisons and Jails: A Synthesis of Research and Practice 3 (2017), available at [https://www.urban.org/sites/default/files/publication/89601/parent-child\\_visiting\\_practices\\_in\\_prisons\\_and\\_jails.pdf](https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails.pdf) (citing Creasie Finney Hairston, Annie E. Casey Found., Focus on Children with Incarcerated Parents: An Overview of the Research Literature (2007), available at [https://assets.aecf.org/m/resourcedoc/aecf-FocusonChildrenwith\\_ncarceratedParentsOverviewofLiterature-2007.pdf](https://assets.aecf.org/m/resourcedoc/aecf-FocusonChildrenwith_ncarceratedParentsOverviewofLiterature-2007.pdf)); see also Laurel Davis & Rebecca J. Shlafer, *Mental Health of Adolescents with Currently and Formerly Incarcerated Parents*, 54 J. Adolescence 120, 127 (2017) (finding that "parental closeness" can help to "buffer[] children from poor mental health outcomes associated with parental incarceration").

110 Parke & Clarke-Stewart, *supra* note 15, at 7 (citing William H. Sack, *Children of Imprisoned Fathers*, 40 Psychiatry 163 (1977)).

111 See, e.g., Rebecca J. Shlafer & Julie Poehlmann, *Attachment and Caregiving Relationships in Families Affected by Parental Incarceration*, 12 Attachment & Hum. Dev. 395, 395 (2010).

112 deVuono-Powell et al., *supra* note 27, at 32, 37.

113 Julie Poehlmann et al., *Children's Contact with Their Incarcerated Parents: Research Findings and Recommendations*, 65 Am. Psychologist 575, 581 (2010) (describing Trice & Brewster, *supra* note 34).

In sum, visitation—as well as phone and mail contact<sup>114</sup>—plays an important role in helping to maintain family relationships during incarceration, which in turn helps reduce recidivism and leads to better outcomes for children and other family members. Facilitating visitation and other forms of contact accordingly should be a priority for policymakers.

### *Guiding Principles*

The above discussion yields a number of insights that can and should guide criminal justice reform discussions. First, incarceration does not occur in a vacuum. The effects of incarceration, while felt most directly (and acutely) by the person confined behind the four walls of a prison or jail, extend far beyond that one individual. Children, in particular, may experience significant, long-term consequences from the imprisonment of a parent. To be sure, incarceration can serve a variety of legitimate purposes, including retribution, rehabilitation, incapacitation, and deterrence. Prison has long been an essential component of the criminal justice system and is an appropriate punishment for certain dangerous, harmful, or antisocial behavior that society has determined warrants a period of criminal confinement. But that does not mean that society, or policymakers, should disregard the harmful effects that incarceration has on individuals in addition to the person convicted of the crime. The goals, and potential benefits, of incarceration must be balanced alongside the harms it can cause. Ensuring the punishment “fits” the crime must take into account the impacts of the punishment on third parties.

That incarceration does not occur in a vacuum highlights in particular the importance of helping individuals successfully reenter society—and avoid reoffending—once the term of imprisonment has ended. As disruptive and harmful to family members and children as one stretch in prison may be, even more harmful is a second or third stretch, or worse yet, a continuing cycle of release and reincarceration. Research shows that nearly 70 percent of released prisoners will be rearrested within three years and that over 80 percent will be rearrested within nine years.<sup>115</sup> Although not all rearrests are for new offenses (some are for technical probation or parole violations, and some may be the

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114 See, e.g. Barrick et al., *supra* note 49, at 293 (finding that women inmates who reported having phone contact with a family member “were significantly less likely to be reincarcerated within 5 years post release than women who did not report family phone contact”); Folk et al., *supra* note 59, at 456 (finding, in study of individuals held on felony charges in a suburban county jail, that family contact, including phone calls and letters, “predicted fewer self-reported offenses and officials records of arrest” following release, as well as “more hours employed”).

115 Mariel Alper & Joshua Markman, U.S. Dep’t of Justice, Bureau of Justice Statistics, 2018 Update on Prisoner Recidivism: A 9-Year Follow-Up Period (2005-2014), at 1 (2018), available at <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

result of mistake or be based on other unjustified grounds), and not all rearrests lead to an additional term of incarceration (charges may be dropped or dismissed, or a lesser or suspended sentence may be imposed), many released individuals do not successfully make the transition back into society and end up returning to prison. This perpetuates the negative impacts of incarceration on their children and other family members. Reducing barriers to reentry, and taking steps to ensure a successful transition, must be a priority.

Second, reentry also does not occur in a vacuum. Just like it's an error to treat an incarcerated individual as a solitary being whose confinement impacts only himself, it's wrong to treat a formerly incarcerated individual seeking to reenter society as a solitary actor whose success or failure depends solely on the strength of her individual will and determination. Family matters. Housing and employment matter, and often are inseparably linked to family. All the grit and determination in the world will not lead to a job absent the requisite skills and references—and knowledge that the job exists in the first place. Enabling prisoners to maintain family relationships during their period of confinement, and reducing unnecessary obstacles that inhibit such relationships, must be a focus.

Third, relationships matter. This is perhaps the most broad-ranging insight to be drawn from the research outlined above. Relationships impact recidivism. Relationships impact a variety of physical and mental health outcomes. Supportive relationships lead to success. Negative or nonexistent relationships lead to failure. Although the research described above deals primarily with the connection between family relationships and various carceral outcomes, it offers lessons about the importance of person-to-person relationships more generally, including relationships between police officers and the communities they serve. It also reinforces the wrongheadedness of treating individuals in the criminal justice system as atomized actors. Other people, especially family members, impact them, and they in turn impact other people.

Fourth, simple steps can make a difference. Something as simple as housing an incarcerated individual closer to home can lead family members to visit the individual more often, which in turn can lead to a reduced risk of recidivism. (And in turn avoid, or help reduce, the negative consequences associated with having a parent or family member in prison.) Improving criminal justice doesn't necessarily require a rewrite of the entire system. Simple steps to ease reentry, or ensure that sentences appropriately reflect the convicted conduct, can make a tremendous difference for individuals in the system and—just as importantly—their families.

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With these principles in mind, this paper now turns to policy prescriptions. As noted at the outset, this paper does not reach every issue related to criminal justice reform, and gives more extensive treatment to aspects of criminal justice policy that have particular applicability to family impacts. It focuses especially on prison policy and reentry. But it also touches on sentencing, policing, and a handful of other topics to which the above insights have relevance. As will be seen, the lessons that can be drawn by identifying the impacts *of*, and the impacts *on*, family members of individuals in the criminal justice system can, and should, inform numerous policy decisions.

## Part II

# Prison Policy: Placement, Visitation, and Family Ties

The policy prescriptions that flow from the research on family ties and incarceration are straightforward. Visitation is associated with reduced recidivism.<sup>116</sup> Visitation is also associated with increased parental involvement following release and a reduced risk of poor mental health outcomes for children.<sup>117</sup> Distance from home decreases visitation.<sup>118</sup> Indeed, distance is frequently reported as a top barrier to in-person contact by family members.<sup>119</sup> For families and children who are unable to make in-person visits, phone calls, email, and letters provide alternative ways to maintain contact during incarceration. The strength of an individual's ties with family members is one of the most important determinants of successful reentry.<sup>120</sup> These findings all support the view that facilitating contact between incarcerated individuals and family members is an important objective whose benefits extend well beyond the period of incarceration. There are a number of steps policymakers can take to facilitate such contact.

### *Visitation*

First is housing incarcerated individuals closer to home. Unsurprisingly, visitation rates drop dramatically as the distance an individual is incarcerated from home increases. In one study, the percentage of inmates who had received a visit in the month prior to being surveyed dropped from nearly 50 percent for individuals housed within 50 miles of home to only 15 percent for individuals housed more than 500 miles from home.<sup>121</sup> Many families cannot afford the time and expense associated with a long-distance journey to visit a family member in prison, which may require time off work or school and even an overnight stay in a hotel.<sup>122</sup> One survey of family members of incarcerated individuals found that over a third of respondents went into debt to pay for

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116 Bales & Mears, *supra* note 82, at 304; Duwe & Clark, *supra* note 85, at 282; Barrick et al., *supra* note 49, at 293; Visher et al., *Fatherhood*, *supra* note 105, at 459; Mears, *supra* note 106, at 904-05.

117 La Vigne et al., *Examining the Effect*, *supra* note 109, at 328; HHS ASPE, *Change in Father-Child Relationships*, *supra* note 109, at 11-12; Cramer et al., *supra* note 109, at 3; Davis & Shlafer, *supra* note 109, at 127.

118 Rabuy & Kopf, *supra* note 86.

119 HHS ASPE, *Parenting from Prison*, *supra* note 89, at 8; N.Y. State Div. of Criminal Justice Servs., *supra* note 89, at 7; Shanahan & Agudelo, *The Family and Recidivism*, *supra* note 88, at 21; Naser and Visher, *supra* note 43, at 25.

120 Nat'l Inst. of Justice, *Hidden Consequences*, *supra* note 2, at 4; Mowen et al., *supra* note 43, at 484.

121 Rabuy & Kopf, *supra* note 86.

122 Elderbroom et al., *supra* note 1, at 38.

the costs of visits and phone calls.<sup>123</sup> Limited visiting hours can create further constraints, particularly when visiting hours are confined to the workday or do not include weekends.<sup>124</sup>

Accordingly, housing inmates within a reasonable distance from home, where possible, should be a goal. Resource constraints, security requirements, and bed availability will necessarily make this more or less difficult in individual circumstances, but the relationship between visitation, recidivism, and improved family outcomes indicates that making the effort to house inmates near family is a worthwhile endeavor.

In 2018, Congress made important strides in this direction by including a provision in the First Step Act<sup>125</sup>—the most recent major federal criminal justice reform—that directs the Bureau of Prisons to “place [a] prisoner in a facility as close as practicable to the prisoner’s primary residence” and “to the extent practicable, in a facility within 500 driving miles of that residence.”<sup>126</sup> Five hundred miles is still a considerable distance from home, and visitation rates at that distance are low,<sup>127</sup> but creating such a requirement was a step in the right direction. (Federal inmate placement decisions are also constrained by the fact that there are far fewer federal correctional facilities than state facilities and that many states do not have a federal correctional facility within their borders. However, federal law permits the Bureau of Prisons to place individuals in non-federal facilities that meet “minimum standards of health and habitability” and that the Bureau determines are “appropriate and suitable” based on the circumstances.<sup>128</sup>)

Some states also have laws that require officials to consider proximity to home or family when making placement decisions, although frequently these laws do not have any sort of mile requirement or goal.<sup>129</sup> These states should strengthen such laws to include a mile benchmark and to require, not just that officials “consider” proximity to family in making placement decisions, but that they actually “place” individuals as close as practicable to family (subject to resource constraints, security needs, etc.). And states without such laws should enact them. One group has proposed model state legisla-

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123 deVuono-Powell, *supra* note 27, at 30.

124 Parke & Clarke-Stewart, *supra* note 15, at 7.

125 Pub. L. No. 115-391 (2018).

126 *Id.* § 601 (amending 18 U.S.C. § 3621(b)).

127 *See* Rabuy & Kopf, *supra* note 86.

128 18 U.S.C. § 3621(b).

129 *See, e.g.*, N.J. Stat. § 30:4-8.6; Fla. Stat. § 944.171(4).

tion that would set a mile benchmark of 250 miles.<sup>130</sup> Lower benchmarks may be appropriate where geography and population density permit. Federal policymakers should also consider the feasibility of lowering the 500-mile benchmark in the First Step Act.

There are additional steps that policymakers can—and should—take to facilitate increased visitation. One is increasing visiting hours, particularly during evenings and on weekends, when children and caretakers are less likely to have school or work conflicts. Virtual visits through Zoom or other online platforms is another option, particularly where resource constraints make extending in-person visiting hours a challenge.<sup>131</sup> Virtual visits should not serve as a replacement for in-person visits (except where health conditions require, such as during the COVID-19 pandemic), but can act as a supplement to in-person visiting hours or an option for family members who are too far away to make a traditional in-person visit.<sup>132</sup> Creating a special child-friendly visitation area in the facility with child-sized furniture, toys, and inviting décor can also improve the quality of visits and lead to “less strained interactions between incarcerated parents and their children.”<sup>133</sup> Permitting overnight visits from family members in certain circumstances is a further possible option. One bill introduced last Congress would direct the Bureau of Prisons to establish a pilot program to allow incarcerated parents serving time for a nonviolent offense who have “displayed good behavior” to receive overnight visits from family members.<sup>134</sup>

### *Phone, Mail, and Email*

Facilitating phone, mail, and email contact with family members is also important—particularly where the incarcerated individual cannot be housed close to family.<sup>135</sup> This means avoiding unduly high phone charges for calls

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130 Am. Legislative Exch. Council, Dignity for Incarcerated Women Act § 5(a) (2018), available at <https://www.alec.org/model-policy/dignity-for-incarcerated-women>.

131 See U.S. Dep’t of Justice, Nat’l Inst. of Corr., Video Visiting in Corrections: Benefits, Limitations, and Implementation Considerations 10 (2014), available at <https://s3.amazonaws.com/static.nicic.gov/Library/029609.pdf> (noting that “[i]n many cases, video visiting is less labor intensive than traditional visiting, allowing for correctional staff to be reassigned to other duties”).

132 See *id.* at 12.

133 HHS ASPE, Parenting from Prison, *supra* note 89, at 8.

134 Next Step Act, S. 697, 116th Cong. § 603 (2019). A House version of the bill was also introduced. See H.R. 1893, 116th Cong. (2019).

135 See Barrick et al., *supra* note 49, at 298-99 (noting benefits of phone contact, particularly “in light of numerous obstacles to in-prison visitation”); Poehlmann et al., *supra* note 113, at 585 (“Mail correspondence offers flexibility, is inexpensive, and involves an element of control, reflection, and planning that can potentially benefit incarcerated parents, children, and caregivers.”).



to family members. Many prisons and jails allow only collect calls to family members.<sup>136</sup> According to one 2018 report, such calls can cost family members more than \$1.20 per minute, six times the cost of a standard collect call.<sup>137</sup> The high costs are driven by the small number of companies who operate in the prison and jail phone market and by the substantial fees such companies pay prison systems for exclusive contracts.<sup>138</sup> Another, older study found that collect calls from prison can cost *two hundred* times as much as the standard rate for calls made outside prison.<sup>139</sup> “It is not unusual for a prisoner’s family to have monthly long distance bills as high as \$250.”<sup>140</sup> In one study of family members of former inmates, over half of respondents reported that the cost of phone calls “was an impediment to staying in touch.”<sup>141</sup> In 2013, the Federal Communications Commission lowered the cap on interstate phone calls from prison from \$17 to \$3.75 for a 15-minute call. But this cap does not apply to calls made to family members *within* the same state (i.e., intrastate calls), which are the vast majority of calls made to family members from detention facilities.<sup>142</sup> States should consider adopting similar rules capping phone call fees from detention facilities at a reasonable level.

Policymakers likewise should identify ways to reduce obstacles to mail and email communication. According to a report from the R Street Institute, some facilities limit incoming prisoner mail only to postcards, meaning that children and family members cannot send colored drawings, greetings cards, or photos printed on photo paper.<sup>143</sup> Other facilities place strict length limits on inmate

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136 Poellmann et al., *supra* note 113, at 581.

137 Elderbroom et al., *supra* note 1, at 41 (citing Timothy Williams, *The High Cost of Calling the Imprisoned*, N.Y. Times (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/us/steep-costs-of-inmate-phone-calls-are-under-scrutiny.html>).

138 See Williams, *supra* note 137.

139 Creasie Finney Hairston et al., Jane Addams Ctr. for Soc. Policy & Research, *Family Connections During Imprisonment and Prisoners’ Community Reentry 3* (2004), *available at* [file:///Users/christopherbates/Downloads/moam.info\\_family-connections-during-imprisonment-and-prison\\_59a5d1571723dd08400c4189.pdf](file:///Users/christopherbates/Downloads/moam.info_family-connections-during-imprisonment-and-prison_59a5d1571723dd08400c4189.pdf).

140 Jim Mustin & Ann Adalist-Estrin, Nat’l Res. Ctr. on Children & Families of the Incarcerated, *Children of Incarcerated Parents Library, Jail and Prison Procedures: Information for Families 2* (2014), *available at* <https://nrccfi.camden.rutgers.edu/files/cipl106-jailandprisonprocedures.pdf>.

141 Naser & Visher, *supra* note 43, at 25.

142 deVuono-Powell, *supra* note 27, at 29.

143 Emily Mooney & Nila Bala, R Street Inst., *The Importance of Supporting Family Connections to Ensure Successful Reentry 2* (2018), *available at* <https://www.rstreet.org/wp-content/uploads/2018/10/Final-Short-No.-63-1.pdf> (citing Leah Sakala, *Postcard-Only Mail Policies in Jail*, Prison Policy Initiative (Feb. 7, 2013), <https://www.prisonpolicy>).

email—in some cases as low as 1,500 characters (roughly the length of one double-spaced page of text in Microsoft Word).<sup>144</sup> It goes without saying that regulating inmate mail and email is essential to safety and orderly prison operations. Draconian measures such as those described above, however, run the risk of doing more harm than good. The association between family ties, recidivism, and family outcomes means that the goal should be to *facilitate* family contact, not restrict or limit it to save costs or for the convenience of officials.

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Central to all of these ideas is the notion that family contact—whether via in-person visitation, video visitation, phone calls, email, or regular mail—should be an affirmative goal. There may be a tendency sometimes to think of visitation, or other forms of contact, as a “privilege” or “reward” for inmates who exhibit good behavior or who are making progress toward certain goals. And indeed, it may well be that certain preconditions should apply to certain kinds of contact (such as overnight visits) or that instances may arise where contact can be used to incentivize good behavior. But contact with family members should not, at the end of the day, be viewed as a privilege or a reward. Rather, it should be a *goal*. Visitation is positively associated with reduced recidivism. Strong family ties are also positively associated with reduced recidivism, and contact during incarceration helps to maintain those ties. “[S]ocial connectedness is the root source of reintegration into society,” and “social connectedness stems from the relationships an incarcerated individual is able to maintain during and after their sentence.”<sup>145</sup> Family contact during incarceration thus is far more than just a perk for inmates. It is a benefit to their families and to society as well, and an integral part of the reentry process.

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org/postcards/report.html; *Inmate Contact— Sending Mail*, Spartanburg Cnty. Sheriff’s Office, Spartanburg, S.C. (May 1, 2015), <http://www.spartanburg-sheriff.org/inmate-contact-sending-mail.php>; Jerry Iannelli, *Florida Federal Prison Bans Families from Mailing Books, Greeting Cards*, Miami New Times (Apr. 5, 2018), <https://www.miami-newtimes.com/news/florida-federal-prison-bans-books-and-greeting-cards-10235132>).

144 Stephen Rahe, Prison Policy Initiative, *You’ve Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation 2-3* (2016), available at <https://www.prisonlegalnews.org/media/publications/You’ve%20Got%20Mail%20-%20Promise%20of%20Cyber%20Communication%20in%20Prisons%2C%20PPI%2C%202016.pdf>.

145 Daly, *supra* note 44.

Part III  
Reentry

Helping incarcerated individuals successfully reenter society must be a priority. As described above, incarceration leads to a range of negative outcomes for children and family members. One of the very worst things that can happen—from the perspective of a family-centered approach to criminal justice reform—is for a released individual to reoffend and return to prison, thereby replicating or exacerbating the harmful impacts that the person’s prior term of incarceration has already caused for family members. Doing everything possible to help ensure successful reentry is thus vitally important not only for the person leaving prison, but for the person’s family as well, and particularly his or her children.

Regrettably, however, barriers abound for formerly incarcerated individuals seeking to reenter society. Many are imposed by law and serve no evident function other than to make it harder for released individuals to obtain employment and stable housing, two of the most important determinants of successful reentry. Other barriers may result from life circumstances or from the simple fact that an individual has been disconnected from the outside world for a period of time. Reducing barriers imposed by law, and helping returning individuals overcome barriers imposed by life circumstances, are both important.

### *Collateral Consequences*

Barriers imposed by law are often referred to as “collateral consequences.” These are “sanctions, restrictions, or disqualifications that stem from a person’s criminal history” and operate separate from, or in addition to, the person’s criminal sentence.<sup>146</sup> “[U]nlike the direct sentence imposed by the court,” which may include imprisonment, probation, or payment of a fine, “a collateral consequence is imposed by federal, state, or local laws and policies.”<sup>147</sup> Some collateral consequences are discretionary, but many are automatic upon conviction. “Collateral consequences can attach to felony and misdemeanor convictions, and can last a lifetime or a finite period.”<sup>148</sup> Examples may include disqualification from certain jobs, ineligibility for certain types of housing or public benefits, or suspension of a driver’s license. As one reform advocate described it, dealing with collateral consequences can be like having an “invisible prison around [you]” that cuts off access to routine opportunities available to everyone else, even after the court-ordered term of imprisonment has ended.<sup>149</sup>

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146 U.S. Comm’n on Civil Rights, *Collateral Consequences* *supra* note 53, at 9.

147 *Id.* at 10.

148 *Id.*

149 *Id.* at 52 (quoting Stef W. Kight, *How Inmates Who Fight Fires Are Later Denied Firefighting Jobs*, *Axios* (Aug. 9, 2018), <https://www.axios.com/how-inmates-who-fight-wildfires-are-later-denied-firefighting-jobs-1513306736-c63805dd-c2fb-4c04-a81e-1f9a7058ef34.html>) (internal quotation mark omitted).

Of particular relevance to this paper, collateral consequences “affect the well-being of not only convicted individuals but also their families and communities.”<sup>150</sup> When a formerly incarcerated individual cannot obtain a steady job, or stable housing, that person’s family suffers as well. In the worst-case scenario, the inability to obtain employment or housing may contribute to a situation where the individual reoffends and returns to prison, an outcome that does no one any good, particularly the individual’s children. As the authors of a report published by the Heritage Foundation put it, “[w]hile these restrictions may make sense for some ex-offenders”—such as where a restriction directly relates to the conduct underlying the person’s conviction—“depriving broad swathes of ex-offenders of the ability to get assistance for themselves and their families, to live in affordable housing in a stable environment, or to obtain educational assistance to enhance their skills is hardly conducive to helping them become productive citizens.”<sup>151</sup> Scrutinizing collateral consequences, and identifying candidates for revision or repeal, is a key component of a family-centered approach to criminal justice reform.

### *Employment Barriers*

Researchers estimate that more than 44,000 collateral consequences exist nationwide as a result of various state and federal laws.<sup>152</sup> Approximately 70 percent deal with employment—that is, they limit job opportunities for individuals with criminal convictions.<sup>153</sup> At the federal level, these restrictions can prevent service in the armed forces, employment with federally insured banks, certain types of jobs with labor organizations, work on a federal contract, and eligibility for various types of federally required occupational licenses, including licenses to work as a flight instructor, train engineer, or grain inspector.<sup>154</sup>

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150 *Id.* at 35.

151 John G. Malcolm & John-Michael Seibler, Heritage Found., *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?* 4 (2017), available at <https://www.heritage.org/sites/default/files/2017-03/LM-200.pdf>.

152 See Nat’l Inventory of Collateral Consequences of Conviction, *Collateral Consequences Inventory*, Nat’l Reentry Res. Ctr., <https://niccc.nationalreentryresourcecenter.org/consequences> (last visited Dec. 4, 2021). This figure does not include collateral consequences imposed by local or municipal laws, of which there are thousands more. See U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 35.

153 U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 35.

154 10 U.S.C. § 504(a) (service in armed forces); 12 U.S.C. § 1829(a) (federally insured banks); 29 U.S.C. § 504(a) (labor organizations); 10 U.S.C. § 2408(a) (federal defense contracts); 14 C.F.R. § 61.15 (flight instructor); 49 C.F.R. §§ 240.111, 240.115 (train engineer); 7 U.S.C. § 85 (grain inspector).

State and local-level restrictions are even more varied and can prevent employment in a breathtakingly broad range of fields, from truck driving to construction to door-to-door sales to serving as a notary public.<sup>155</sup>

The intersection of collateral consequences with occupational licensing requirements can cause particular challenges for formerly incarcerated individuals seeking employment. According to estimates, approximately 30 percent of U.S. workers require a license for their job.<sup>156</sup> More than 1,100 different occupations are licensed in at least one state.<sup>157</sup> Examples of jobs that may require a license include operating a dance hall, bowling alley, or movie theater; serving as an interior designer; working as a barber or cosmetologist; or fighting fires.<sup>158</sup> Some occupational licensing laws automatically exclude applicants with certain convictions; others require proof of “good moral character,” a standard that a criminal conviction may make impossible to satisfy.<sup>159</sup> According to a 2019 report by the U.S. Commission on Civil Rights, there are more than 13,000 state licensing restrictions for individuals with a criminal conviction.<sup>160</sup> Roughly 8,000 apply to anyone convicted of *any* felony. Another 4,000 apply to anyone convicted of any *misdemeanor*.<sup>161</sup>

It goes without saying that some types of conviction-based employment disqualifications may make sense. For example, prohibiting a person convicted of defrauding a federal program from working as a contractor in that field for a period of time, or prohibiting a convicted child sex offender from running a

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155 Ohio Rev. Code § 4506.16 (truck driver); N.Y.C. Admin. Code § 28-401.6 (construction); Frostproof, Fla., Code § 14-22 (door-to-door sales); Va. Code § 47.1-4 (notary public).

156 Brad Hershbein et al., *Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices*, Brookings Inst. (Jan. 27, 2015), <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices>.

157 The White House, *Occupational Licensing: A Framework for Policymakers* 4 (2015), available at [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

158 Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 Ohio St. L.J. 1, 15 (2014) (dance hall, movie theater, bowling alley); Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol’y 209, 217 (2015) (interior designer, barber, cosmetologist); U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 52 (fire-fighter); see also Eugene McQuillin, *The Law of Municipal Corporations* §§ 26:154.46-.59 (3d ed. 2012); Dick M. Carpenter II et al., Inst. for Justice, *License to Work: A National Study of Burdens from Occupational Licensing* (2d ed. 2017), available at [https://ij.org/wp-content/themes/ijorg/images/ltw2/License\\_to\\_Work\\_2nd\\_Edition.pdf](https://ij.org/wp-content/themes/ijorg/images/ltw2/License_to_Work_2nd_Edition.pdf).

159 U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 51.

160 *Id.* at 50.

161 *Id.* at 50-51.

daycare center.<sup>162</sup> But broad-based ineligibility that does not relate to the actual nature of the conviction or that lacks any sort of nexus between the convicted conduct and the nature of the job is much harder to justify. This becomes all the more true in light of the relationship between employment and recidivism. As noted earlier, the recidivism rate for formerly incarcerated individuals who are unemployed is nearly twice as high as for those with jobs.<sup>163</sup> Employment in many respects “serves as a ‘linchpin to the successful rehabilitation of ex-offenders and their full and productive participation in society.’”<sup>164</sup> Job restrictions that lack a cognizable relation to an individual’s criminal conviction, or the conduct underlying the conviction, stand a significant risk of doing more harm than good.

Moreover, formerly incarcerated individuals are *already* at a significant disadvantage when it comes to finding employment vis-à-vis other job seekers. Research shows that a job applicant with a criminal record is 50 percent less likely to receive a callback than an applicant without a record.<sup>165</sup> In a nationwide survey of formerly incarcerated individuals, more than 3 in 4 rated their experience trying to find work following release as “very difficult or nearly impossible.”<sup>166</sup> One study found that nearly 60 percent of formerly incarcerated individuals were unemployed one year after release.<sup>167</sup> Another found that by the fifth year following release, only 40 percent were working full time.<sup>168</sup>

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162 Malcolm & Seibler, *supra* note 151, at 2.

163 U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 51-52.

164 *Id.* at 39 (quoting Amy E. Hirsch et al., Ctr. for Law & Soc. Policy, *Every Door Closed: Barriers Facing Parents with Criminal Records* 14 (2002), *available at* [https://www.clasp.org/sites/default/files/publications/2018/01/every\\_door\\_closed.pdf](https://www.clasp.org/sites/default/files/publications/2018/01/every_door_closed.pdf)).

165 Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *Annals Am. Acad. Pol. & Soc. Sci.* 195, 199 (2009); *see also* Amanda Agan & Sonja B. Starr, *The Effect of Criminal Records on Access to Employment*, 107 *Am. Econ. Rev.: Papers & Proc.* 560, 560 (2017) (finding that employers were 60 percent more likely to call back a job applicant without a criminal record); Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 *Yale L. & Pol’y Rev. Inter Alia* 11, 19 (2016) (finding that “the proportion of applicants with criminal records who received interview invitations or job offers was more than sixty-six percent lower than the proportion of their equally qualified counterparts with clean records”).

166 deVuono-Powell et al., *supra* note 27, at 20.

167 *See id.* (citing *Rethinking Corrections: Rehabilitation, Reentry, and Reintegration* 332 (Lior Gideon & Hung-En Sung eds., 2010)).

168 *Id.*

Other studies have reported similar findings.<sup>169</sup> And even for individuals who do find work, compensation frequently is meager. One 2018 study found that the median earnings for formerly incarcerated individuals with jobs in the first year after release were only \$10,000, and that only 20 percent of former inmates earned more than \$15,000 their first year out of prison.<sup>170</sup> Another study of formerly incarcerated individuals in Illinois, Ohio, and Texas found that eight months after release, the median monthly income of participants was only \$700.<sup>171</sup> Given the already challenging odds individuals reentering society face in finding employment at a decent wage, further narrowing their job opportunities through licensing disqualifications or other restrictions that have no real relation to their crime of conviction or underlying criminal conduct is unjustified.

The sheer number of employment-related collateral consequences spread across state, federal, and local codes makes a one-size-fits-all solution to the problem infeasible. Still, there are specific steps jurisdictions can take to reduce the number of barriers. First, jurisdictions should review the collateral consequences their laws currently impose and eliminate those that do not serve public safety or have a rational relationship to the crime of conviction. Texas, for example, recently eliminated a state policy that automatically disqualified individuals with a drug conviction from becoming a licensed well driller or water-well pump installer.<sup>172</sup> One approach, proposed by the American Bar Association, could be to say that a collateral consequence should apply only where “engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been

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169 See, e.g., Adam Looney & Nicholas Turner, Brookings Inst., *Work and Opportunity Before and After Incarceration 1* (2018), available at [https://www.brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf) (analyzing data on formerly incarcerated individuals from the Internal Revenue Service and finding that only 55 percent reported earnings their first full year after release); La Vigne et al., *Chicago Prisoners’ Experiences*, *supra* note 48, at 11 (survey of formerly incarcerated Chicago inmates four to eight months after release in which only 44 percent reported working for at least one week since release and only 30 percent reported being employed at the time of interview); Visher et al., *Employment After Prison*, *supra* note 46, at 4, 6 (study of formerly incarcerated individuals in Illinois, Ohio, and Texas that found that eight months after release, only 45 percent were employed, although 65 percent had been employed “at some point since release.”); Visher & Courtney, *One Year Out*, *supra* note 43, at 4 (survey of formerly incarcerated individuals in Cleveland in which only 37 percent reported being employed full-time one year after release).

170 Looney & Turner, *supra* note 169, at 1.

171 Visher et al., *Employment After Prison*, *supra* note 46, at 8.

172 See U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 155 & n.19 (joint statement of Heriot & Kirsanow, Comm’rs).



convicted.”<sup>173</sup> This would link the collateral consequence to the person’s actual conduct rather than to the mere fact of the conviction and would help reduce disqualifications that serve no real purpose (other than to make it harder for the person to find employment).

In cases where the convicted conduct and the nature of the job do have a nexus, it may also be appropriate to consider lifting the disqualification after a period of time if the person has had no further convictions. Former Senator Doug Jones (D-Ala.), for example, introduced bipartisan legislation last Congress to lift the prohibition on employment at a federally insured bank for individuals convicted of an “offense involving dishonesty or a breach of trust or money laundering”—which prevents employment even as an entry-level teller—once seven years have passed since completion of the individual’s sentence.<sup>174</sup> The National Reentry Resource Center maintains an online database of state and federal collateral consequences that could provide a good place for policymakers to begin their review.<sup>175</sup>

Occupational licensing requirements should be a particular focus. Many reentry experts have long looked unfavorably on licensing requirements that automatically exclude individuals with criminal convictions, believing such requirements to be both “anti-competitive” and “an overreaction to the fear that someone may reoffend.”<sup>176</sup> In the words of one commentator, “[i]n reality, [such individuals] are far more likely to reoffend if they are shut out of employment in a field they are otherwise qualified for.”<sup>177</sup> Requirements that license applicants prove “good moral character” are also problematic. Such vague standards place considerable discretion in the hands of licensing officials—who may have an economic incentive to keep the size of the profession small—and have an unclear policy justification. Certainly we want workers to be scrupulous and upright. But why it should be necessary for a person wishing to run

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173 Am. Bar Ass’n, ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons 41 (3d ed. 2004), *available at* [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/collateral-sanctions.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/collateral-sanctions.pdf).

174 Fair Hiring in Banking Act, S. 3441, 116th Cong. § 2 (2020) (amending 12 U.S.C. § 1829(a)). The bill had four bipartisan co-sponsors, two Republicans and two Democrats. Representative Joyce Beatty (D-Ohio) recently introduced a House version of the bill, H.R. 5911, 117th Cong. (2021). The House bill was reported out of the House Financial Services Committee in November 2021 by voice vote. *See* Press Release, H. Comm. on Fin. Servs., Committee Passes Legislation to Protect Retail Investors from Predatory Practices and Promote Fair Hiring Opportunities (Nov. 16, 2021), *available at* <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=408688>.

175 *See* Nat’l Inventory of Collateral Consequences of Conviction, *supra* note 152.

176 U.S. Comm’n on Civil Rights, Collateral Consequences, *supra* note 53, at 142-43 (statement of Kladney, Comm’r).

177 *Id.* at 143.

a movie theater or cut hair for a living to demonstrate to the state that they're a good person is unclear. Far better, again, to tie disqualification to the actual underlying conduct than to overbroad, ill-defined standards.

Kansas made important strides in this direction with a 2018 law that prohibits state licensing boards from disqualifying applicants based on “non-specific terms, such as moral turpitude or good character.”<sup>178</sup> The Kansas law further provides that licensing boards may only disqualify applicants for criminal offenses that are “directly related to protecting the general welfare and the duties and responsibilities for such entities.”<sup>179</sup> Indiana similarly prohibits licensing boards from using “moral turpitude” or lack of “good character” as grounds for disqualification and requires that any disqualifying offenses be “specifically and directly related to the duties and responsibilities of the occupation or profession for which the individual is applying.”<sup>180</sup> Kansas and Indiana also both prohibit licensing boards from considering an otherwise disqualifying offense if more than five years have passed since the date of conviction and the individual has not been convicted of another crime.<sup>181</sup> Kentucky and the District of Columbia are among other jurisdictions that have recently enacted similar laws.<sup>182</sup>

An alternative option could be to allow individuals with criminal convictions to obtain a provisional or probationary occupational license. If, after a period of time—say, six months or a year—the individual has complied with all requirements of the profession and has not committed a new criminal offense, the license would become permanent.<sup>183</sup>

It is not enough, however, simply to eliminate unnecessary or unjustified employment barriers. Affirmative steps to make it easier for individuals leaving prison to find jobs are also vital. One simple step that is already being implemented at the federal level and in many states is ensuring that incarcerated individuals nearing release have photo identification (such as a valid driver's license) and proof of employment eligibility (such as a birth certificate or other proof of citizenship). Helping individuals obtain such documents *before* release enables them to get a quicker start on their job search and prevents them from missing out on potential

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178 Kan. Stat. § 74-120(b)(1).

179 *Id.*

180 Ind. Code § 25-1-1.1-6(d)-(e).

181 Kan. Stat. § 74-120(b)(2); Ind. Code § 25-1-1.1-6(f).

182 See D.C. Act 23-561 (D.C.) (published Apr. 2, 2021); S.B. 120 (Ky. 2021) (signed into law Apr. 10, 2017).

183 See U.S. Comm'n on Civil Rights, Collateral Consequences, *supra* note 53, at 54.

employment opportunities for lack of necessary identification.<sup>184</sup> In the First Step Act, Congress made it the responsibility of the Bureau of Prisons to “assist” inmates to obtain such documents prior to release.<sup>185</sup> Legislation introduced by Senator Cory Booker (D-N.J.) would strengthen this to a requirement that the Bureau actually “obtain” such documents for the individual, provided the individual cooperates by providing the authorization to obtain the documents.<sup>186</sup> States from Kentucky to Michigan to West Virginia are leading similar initiatives to ensure that individuals leave prison with valid state-issued photo identification.<sup>187</sup>

Another affirmative step that can be taken to make it easier for individuals with a criminal conviction to find jobs is so-called “clean slate” legislation, which enables such individuals to remove the stigma of a criminal conviction from their public record, or alternatively provides an avenue to seek to reduce the stigma associated with their conviction. Creating a “clean slate” can take a variety of forms, from expungement to record sealing to certificates of rehabilitation. Expungement eliminates the individual’s record of conviction altogether, while record sealing limits who can access or learn of the conviction to certain government officials such as prosecutors, law enforcement officials, and judges.<sup>188</sup> Some states provide for automatic expungement or record sealing once a sentence is completed; others require the convicted individual to file a petition.<sup>189</sup> Certificates of rehabilitation, in turn, do not eliminate or shield from public inquiry a record of conviction, but provide an endorsement from

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184 See President’s Comm’n on Law Enforcement, *supra* note 73, at 77 (recommending that “[j]ails and prisons . . . ensure people have primary identification documents and eligible benefits at least 60 days prior to release”).

185 Pub. L. No. 115-391, § 604 (2018) (amending 18 U.S.C. § 4042(a), 34 U.S.C. § 60541(b)).

186 Next Step Act, S. 697, 116th Cong. § 1102 (2019). Representative Bonnie Watson Coleman (D-N.J.) introduced a House version of the bill. See H.R. 1893, 116th Cong. (2019).

187 See Press Release, Commonwealth of Ky., Justice & Pub. Safety Cabinet, State Agencies Team-Up to Provide Identification Cards for State Inmates (Feb. 5, 2021), *available at* <https://transportation.ky.gov/NewsRoom/State%20Agencies%20Team-up%20to%20Provide%20Identification%20Cards%20for%20State%20Inmates.pdf>; Angie Jackson, *New Michigan Program Will Help People on Parole Get IDs upon Release from Prison*, Detroit Free Press (June 24, 2020), <https://www.freep.com/story/news/local/michigan/2020/06/24/michigan-prison-release-id-program/3250108001>; W. Va. Code § 17B-2-1c; *see also* H.B. 1679 (Okla. 2021) (signed into law Apr. 20, 2021) (directing Oklahoma Department of Corrections to assist inmates in obtaining state-issued identification cards).

188 See U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 58-59.

189 See, e.g., Pa. Cons. Stat. § 9122.2 (automatic); Tex. Gov’t Code § 411.081(d-1) (petition required); Ark. Code § 16-90-904 (petition required); *see also* Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 Harv. L. & Pol’y Rev. 361, 367-73 (2016).

a neutral third-party (such as a court) that a formerly incarcerated individual has demonstrated a commitment to living a law-abiding life and does not pose a safety risk.<sup>190</sup>

Many advocates support automatic expungement or record sealing for certain crimes on the ground that it saves the time and court costs associated with petitioning and is fairer for individuals who are not “savvy and wealthy enough to navigate the legal process.”<sup>191</sup> One example of a bill that would provide for automatic record sealing at the federal level is the Clean Slate Act,<sup>192</sup> which has been introduced in both the House and Senate with bipartisan support. The bill would provide for automatic sealing of nonviolent offenses involving marijuana or simple possession of a controlled substance one year after the person completes his or her sentence, as well as a process for individuals convicted of other nonviolent offenses to petition for sealing one year after completing their sentences.<sup>193</sup> Another bipartisan bill that has been introduced in both Houses of Congress, the Kenneth P. Thompson Begin Again Act,<sup>194</sup> would enable a person convicted of a first-time simple possession offense at any age to petition for expungement. (Current law permits expungement only if the conviction occurred before the person turned 21.<sup>195</sup>) A number of states have adopted laws permitting expungement in certain circumstances. Hawaii, for example, allows individuals convicted of first-time drug offenses who have completed

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190 See, e.g., Recognizing Education, Employment, New skills, and Treatment to Enable Reintegration (RE-ENTER) Act, S. 2931, 116th Cong. § 2(a) (2019); Ohio Rev. Code § 2953.25(C)(3).

191 U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 59 (quoting written hearing statement by Marc Levin, Policy Dir., Right on Crime) (internal quotation marks omitted).

192 H.R. 2864, 117th Cong. (2021); S. 1380, 117th Cong. (2021). The House bill is sponsored by Representative Lisa Blunt Rochester (D-Del.) and has eight bipartisan co-sponsors (four Republicans and four Democrats). The Senate bill is sponsored by Senator Bob Casey (D-Pa.) and co-sponsored by Senator Joni Ernst (R-Iowa).

193 H.R. 2864, § 2(a); S. 1380, § 2(a).

194 H.R. 1924, 117th Cong. (2021); S. 2502, 117th Cong. (2021). The House bill is sponsored by Representative Hakeem Jeffries (D-N.Y.) and has eleven bipartisan co-sponsors (six Republicans and five Democrats). The Senate bill is sponsored by Senator Chris Coons (D-Del.) and has four bipartisan co-sponsors (two Republicans and two Democrats). The Senate bill was reported out of the Senate Judiciary Committee in September 2021 by voice vote. See S. Comm. on the Judiciary, *Results of Executive Business Meeting* (Sept. 23, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%20September%202023%202021.pdf>.

195 18 U.S.C. § 3607(c).

treatment and other court-ordered conditions to apply for expungement.<sup>196</sup> Mississippi similarly allows individuals convicted of certain low-level felonies such as possession of a controlled substance to apply for expungement.<sup>197</sup> Utah recently passed a law that provides for automatic expungement of most misdemeanors punishable by up to six months in prison after a certain number of years have passed.<sup>198</sup> If an individual has more than a specified number of other criminal offenses on his or her record, or if the office that prosecuted the individual certifies there is reason to believe the individual is still engaging in criminal activity, automatic expungement is unavailable.<sup>199</sup>

An example of certificate-of-rehabilitation legislation is Senator John Cornyn's (R-Tex.) Recognizing Education, Employment, New skills, and Treatment to Enable Reintegration (RE-ENTER) Act,<sup>200</sup> which had 15 bipartisan co-sponsors last Congress. This bill would allow any individual convicted of a federal offense to petition the trial court for a certificate that the individual has demonstrated he or she "is committed to a law-abiding future" and "has successfully reintegrated into society."<sup>201</sup> The bill directs the court to consider a variety of factors in determining whether to issue the certificate, including the crime of conviction; any job training, education programs, or substance abuse treatment programs the individual has participated in; the individual's conduct since the time of conviction; the individual's attempts to secure employment following completion of his or her sentence; and the amount of time that has passed since the conviction.<sup>202</sup> Notably, the bill also includes a "sense of Congress" that a federally issued certificate of rehabilitation "shall act as an expungement of any prior conviction of an eligible offender for the purposes of any employment, licensing, education, housing, or other determination."<sup>203</sup>

A study on the impact of a similar Ohio law enacted in 2012 found that court-issued certificates of rehabilitation (called "certificates of qualification for employment" under the Ohio law<sup>204</sup>) helped to nearly eliminate the disparity in callback rates and job offers for individuals with criminal records as compared to individu-

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196 Erin Kincaid & Alison Lawrence, Nat'l Conference of State Legislatures, Ex-Offender Employment Opportunities 3 (2011), *available at* <https://www.ncsl.org/documents/cj/pew/ex-offenderreport.pdf>.

197 *Id.*; see also Murray, *supra* note 189, at 369-73 (describing laws in Maryland, Louisiana, Indiana, and Minnesota).

198 H.B. 431, §§ 1, 5, 12 (Utah 2019) (signed into law Mar. 28, 2019) (amending Utah Code §§ 77-40-102, 77-40-105, 77-40-114).

199 *Id.*

200 S. 2931, 116th Cong. (2019).

201 *Id.* § 2(a). The bill has not been reintroduced in the current Congress.

202 *Id.*

203 *Id.*

204 See Ohio Rev. Code § 2953.25.

als without records.<sup>205</sup> The Ohio statute additionally provides (with exceptions) that such certificates lift any “automatic bar[s]” on employment or occupational licensing under Ohio law that might otherwise apply and constitute a “rebuttable presumption” that the person’s conviction is “insufficient evidence” that the person is unfit for the job or license.<sup>206</sup> The Ohio statute thus provides a judicial bypass for state laws or licensing requirements that disqualify individuals with criminal convictions from certain jobs or occupational licenses.

Combining the different aspects of these bills could suggest one potential approach to clean slate legislation: Automatic record sealing for first-time, low-level, nonviolent offenses; a process to petition for sealing other nonviolent offenses (with exceptions for individuals who have previously been convicted of certain crimes or a certain number of crimes); and a process to petition for a certificate of rehabilitation for individuals who do not qualify for record sealing. Expungement could also potentially be available for certain first-time, minor offenses. Determining which offenses should qualify for which forms of relief warrants further thought, but a graduated scheme of the sort described could have merit.

Providing employers incentives to hire recently released individuals is also important. As noted above, job applicants with a criminal record are 50 percent less likely to receive a callback than applicants without a record.<sup>207</sup> Given the association between unemployment and recidivism (and the negative impacts of (re) incarceration on families and children), helping formerly incarcerated individuals improve these odds should be a priority. One way to do so is through certificates of rehabilitation that individuals can present to potential employers. As discussed above, this option has shown significant success at the state level. Another approach is to provide employers financial incentives to hire individuals with criminal records. Some states, for example, provide tax credits to employers who hire individuals with records.<sup>208</sup> In California, the tax credit can be as much as 50 percent of the employee’s qualified wages (capped at 150 percent of the state minimum wage) during the first year of employment, diminishing gradually each subsequent year.<sup>209</sup> Some states limit eligibility for tax credits to hires within a certain number of years of release; others limit eligibility for tax credits to certain types of offenses.<sup>210</sup> A combination of these criteria could make sense.

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205 Leasure & Andersen, *supra* note 165, at 20.

206 Ohio Rev. Code § 2953.25(D)(1)-(2).

207 Pager et al., *supra* note 165, at 199.

208 See Shristi Devu, *Trapped in the Shackles of America’s Criminal Justice System*, 20 *Scholar* 217, 253-54 (2018) (describing programs in Texas and California).

209 Cal. Rev. & Tax Code § 17053.34.

210 See, e.g., 35 Ill. Comp. Stat. 5/216 (providing tax credits for hiring employees who have been released from an Illinois correctional facility within the last three years); La. Rev. Stat. § 47:287.752 (providing tax credits for hiring employees convicted of a “first-time nonviolent offense”).

Federal law, for its part, currently provides a tax credit of up to \$2,400 to an employer who hires an individual with a felony conviction within one year of release.<sup>211</sup> This credit, which is currently slated to expire at the end of 2025,<sup>212</sup> could be made permanent, and perhaps increased to match the larger credits available to employers who hire certain qualified veterans.<sup>213</sup> Although some might balk at the notion of reducing taxes for employers who hire individuals with criminal records, it must be remembered that the recidivism rate for formerly incarcerated individuals who are unemployed is nearly *twice* as high as for those with jobs,<sup>214</sup> and that incarceration is also extremely expensive, costing over \$33,000 on average per inmate each year.<sup>215</sup> So such credits may well pay for themselves.

### *Housing Barriers*

Housing is another area where collateral consequences can erect significant hurdles. Because many recently released individuals lack savings or steady income, public or subsidized housing may be their best (or only) option. Federal law, however, provides that housing authorities may deny admission to applicants who have “engaged in any drug-related or violent criminal activity or other criminal activity” that the authority determines would “adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents,” if a “reasonable time” (as determined by the housing authority) has not passed since the time of the offense.<sup>216</sup> Denial is automatic if the person was previously evicted from federally assisted housing for “drug-related criminal activity” within the past three years.<sup>217</sup> Significantly, these restrictions extend to any tenant or member of the household, meaning that individuals in subsidized housing who take in a recently released family member may jeopardize their own continued eligibility for such housing. Given that a high percentage of formerly incarcerated individuals live with family members following release, such restrictions can make finding—and keeping—housing a significant challenge. State and local housing authorities may also have their own additional restrictions on renting to individuals with criminal convictions.<sup>218</sup>

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211 See 26 U.S.C. § 51.

212 *Id.* § 51(c)(4).

213 *Id.* § 51(b)(3).

214 U.S. Comm’n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 51-52.

215 Chris Mai & Ram Subramanian, Vera Inst. of Justice, *The Price of Prisons: Examining State Spending Trends, 2010-2015*, at 7 (2017), *available at* <https://www.vera.org/downloads/publications/the-price-of-prisons-2015-state-spending-trends.pdf>.

216 42 U.S.C. § 13661(c).

217 *Id.* § 13661(a). If the individual “successfully completes a rehabilitation program approved by the public housing agency,” the automatic denial may be lifted. *Id.*

218 deVuono-Powell et al., *supra* note 27, at 26-27.

Many private landlords likewise will refuse to rent to individuals with a criminal record. According to one source, an estimated 80 percent of private landlords use background checks to screen out applicants with criminal records.<sup>219</sup> Studies in a number of cities have found relatively few landlords willing to rent to individuals with a felony conviction, and many housing providers have blanket policies against renting to anyone with a criminal record.<sup>220</sup>

It is therefore little surprise that individuals leaving prison frequently experience difficulty finding secure housing. In one study of formerly incarcerated individuals and their family members, nearly 80 percent of the formerly incarcerated individuals surveyed reported that they had been denied or rendered ineligible for housing because of their criminal background.<sup>221</sup> A significant percentage of family members who housed a returning individual following release—nearly one in five—reported being evicted or denied housing because they took in their returning family member.<sup>222</sup> Sixteen percent of formerly incarcerated individuals reported that they were unable to live with their family members following releasing because of their criminal background.<sup>223</sup>

Given the importance of obtaining stable housing to successful reentry, reducing these barriers should be a goal of policymakers. As noted previously, individuals reentering society who are unable to find secure housing are twice as likely to recidivate.<sup>224</sup> Formerly incarcerated individuals are particularly likely to experience homelessness in the first 30 days following release.<sup>225</sup> One obvious place to start, as with employment, is narrowing laws that impose housing-related collateral consequences. Rather than leaving it up to housing authorities to determine whether an individual's offense would have "adversely

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219 Rebecca Vallas & Sharon Dietrich, Ctr. for Am. Progress, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records* 19 (2014), available at <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> (citing David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 *Law & Soc. Inquiry* 5 (2008)).

220 See, e.g., Austin/Travis County Reentry Roundtable, *Locked Out: Criminal History Barriers to Affordable Rental Housing in Austin & Travis, County Texas* 4 (2016), available at [https://www.reentryroundtable.org/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final\\_.pdf](https://www.reentryroundtable.org/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf) (Austin); Philip M.E. Garboden & Eva Rosen, *When Landlords Discriminate*, *TalkPoverty* (May 17, 2016), <https://talkpoverty.org/2016/05/17/when-landlords-discriminate> (Baltimore, Cleveland, and Dallas).

221 deVuono-Powell et al., *supra* note 27, at 27.

222 *Id.*

223 *Id.*

224 U.S. Comm'n on Civil Rights, *Collateral Consequences*, *supra* note 53, at 64.

225 Stephen Metraux & Dennis P. Culhane, *Recent Incarceration History Among a Sheltered Homeless Population*, 52 *Crime & Delinq.* 504, 510 (2006).



affected” the health, safety, or peaceful enjoyment of other residents and whether a “reasonable time” has passed since the offense, lawmakers should identify which set of offenses may properly serve as grounds for disqualification and specify a time period during which such disqualification may apply. State or local laws that treat a criminal record as an automatic disqualifier for public housing should be repealed. And restrictions that extend to household members should be carefully evaluated to ensure they do not unduly hinder the ability of tenants to give recently released family members a place to stay while they get back on their feet.

Policymakers should also explore ways to give landlords incentives to rent to formerly incarcerated individuals. One possibility, similar to the above proposal for employers, could be to provide tax breaks on rental income from tenants who are within a certain number of years of release. Housing vouchers for recently released individuals are another option.<sup>226</sup> These would provide landlords a guaranteed amount of rent during the voucher period and thus make voucher holders more attractive tenants.

### *Barriers to Financial Assistance*

A third type of collateral consequence that warrants review under a family-centered approach to criminal justice reform is laws that deny food stamps and other government financial assistance to individuals convicted of certain crimes. Under 21 U.S.C. § 862a, individuals convicted of a felony involving the “possession, use, or distribution of a controlled substance” are ineligible for benefits under the Temporary Assistance for Needy Families (TANF) program or Supplemental Nutritional Assistance Program (SNAP).<sup>227</sup> TANF provides grants to states to provide financial assistance to low-income families.<sup>228</sup> SNAP, in turn, provides funding to states for low-income households to purchase food.<sup>229</sup> States can choose to lift the prohibitions on eligibility for individuals with felony drug convictions, or limit the amount of time the prohibitions apply, through opt-out legislation.<sup>230</sup>

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226 See Justice Roundtable, Transformative Justice: Recommendations for the New Administration and the 117th Congress 61 (2020), available at <https://justiceroundtable.org/wp-content/uploads/2020/11/Transformative-Justice.pdf> (recommending that lawmakers “[a]uthorize and fund a Reentry Housing Voucher program to provide housing vouchers to individuals being released from local, state, or federal criminal-legal facilities to ensure that people exit incarceration into safe, stable, accessible, and affordable housing”).

227 21 U.S.C. § 862a(a).

228 See 42 U.S.C. §§ 603, 604.

229 See 7 U.S.C. §§ 2012, 2013.

230 21 U.S.C. § 862a(d).

As of 2016, 13 states and the District of Columbia had opted out of the restrictions on TANF eligibility for felony drug convictions entirely, and another 27 states enforced modified restrictions (e.g., by limiting the amount of time the restrictions applied or adopting other conditions, such as requiring individuals with felony drug convictions to undergo periodic drug testing).<sup>231</sup> Ten states maintained a lifetime ban.<sup>232</sup> With regard to SNAP, as of 2017, 23 states and the District of Columbia had opted out of the eligibility restrictions in full, another 23 states enforced modified restrictions, and 4 states maintained a lifetime ban.<sup>233</sup>

Given the challenges formerly incarcerated individuals already face in finding employment and stable housing, restricting their ability to obtain food stamps and other financial assistance can serve to make the reentry process that much more difficult. The justification for denying eligibility based solely on the fact of a drug conviction is also unclear. Perhaps if the individual used public assistance to purchase the drugs, or accepted food stamps or other public assistance as payment for the drugs, there could be a basis. But a blanket prohibition for all felony drug convictions appears insufficiently grounded in a readily available justification, especially given that it impacts a population—formerly incarcerated individuals—for whom finding steady employment is particularly difficult. There is also research that suggests denying SNAP benefits can increase recidivism and that “the increase in recidivism is driven by crimes that have a monetary motive.”<sup>234</sup> And of course, denying TANF and SNAP benefits can negatively impact children in particular, as these programs are targeted to families and households that need assistance providing for food, clothing, and other basic necessities.

That is not to say that all restrictions on TANF and SNAP eligibility for formerly incarcerated individuals are unjustified. For example, if the individual used or relied upon public benefits in the commission of a crime, or if there is reason

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231 Maggie McCarty et al., Cong. Research Serv., R42394, Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance 8-9 (2016), *available at* <https://fas.org/sgp/crs/misc/R42394.pdf>.

232 *Id.* at 9.

233 U.S. Dep’t of Agric., Supplemental Nutrition Assistance Program, State Options Report 21 (2018), *available at* <https://fns-prod.azureedge.net/sites/default/files/snap/14-State-Options.pdf>.

234 Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, 11 Am Econ. J.: Econ. Pol’y 301, 324 (2019).

to think the person's criminal conduct suggests a likelihood of misusing public assistance in the future, limitations may be appropriate. It may also be appropriate to restrict eligibility for a certain period of time following release for the person to demonstrate a commitment to living a law-abiding life. Across-the-board, lifelong denial, however, seems unwarranted in all but the most extreme circumstances, and likely to do more harm than good—particularly where the formerly incarcerated individual is trying to support a family and children. Narrowing bans on TANF and SNAP eligibility for individuals with criminal convictions fits sensibly within a family-centered approach to criminal justice reform.

### *Other Recommendations*

The reentry discussion thus far has focused primarily on employment and housing because those are two of the most important determinants of successful reentry and because, as discussed above, success in finding employment and stable housing following release is frequently linked to the strength of a returning individual's ties with family members. There are, of course, a multitude of other factors that impact reentry and a virtually unlimited number of steps that could be taken to improve an individual's likelihood of successfully reintegrating into society. Space does not permit an exhaustive review of these other possibilities, but in line with the principle that simple steps can make a difference, four warrant brief mention.

First, states should end the practice of suspending driver's licenses for unpaid fines and fees. Driving is an essential aspect of daily life for most people, and in areas without good public transportation, it is necessary to get to and from work, medical appointments, and church and other community activities. Lacking a driver's license thus can be a significant hindrance to finding a job, obtaining health care (which often requires valid photo identification), and reintegrating into society. For this reason, as discussed above, federal and state policymakers alike have begun initiating programs to help incarcerated individuals approaching their release date obtain a valid driver's license.

Yet many states have laws that provide for automatic driver's license suspension for conduct that is entirely unrelated to driving, such as unpaid fines and fees.<sup>235</sup> According to one source, *40 percent* of driver's license suspensions in the United States occur for conduct unrelated to driving.<sup>236</sup> In Florida alone, over one million residents received a suspension notice for unpaid fines and fees in 2017.<sup>237</sup> Without question, driver's license suspension is warranted in

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235 See *Free to Drive: National Campaign to End Debt-Based License Restrictions, Fines & Fees* Justice Ctr., <https://finesandfeesjusticecenter.org/campaigns/national-drivers-license-suspension-campaign-free-to-drive> (last visited Dec. 4, 2021) [hereinafter *Free to Drive*].

236 Driving for Opportunity Act, S. 998, 117th Cong. § 2(13) (2021).

237 *Id.* § 2(11).

some circumstances, such as where a person has been convicted of driving while intoxicated or another serious traffic offense. But suspending licenses for reasons unrelated to driving—and particularly for unpaid fines and fees—only makes it harder for individuals who may already be struggling to make ends meet (hence the unpaid fines and fees), without improving traffic safety. For individuals attempting to reenter society, a suspended license can become yet one more impediment on the long list of obstacles to employment, housing, and successful reintegration.

For this reason, a number of states have recently begun reconsidering laws that provide for driver's license suspension in the event of unpaid fines or fees.<sup>238</sup> Last year, for example, Virginia repealed its law requiring suspension if a person fails to pay all fines and costs associated with a state law violation within a certain number of days.<sup>239</sup> Orange County, Florida, in turn, has set up a program under which individuals with unpaid fines can perform community service in lieu of payment and retain their driver's license while they perform the service.<sup>240</sup> At the federal level, bipartisan legislation called the Driving for Opportunity Act<sup>241</sup> has been introduced in both houses of Congress to provide grants to states that repeal laws providing for suspension for unpaid fines and fees to help such states cover the costs of reinstating previously suspended licenses.<sup>242</sup> Such initiatives deserve serious consideration and are an example of simple steps that can make a significant difference for individuals seeking to reenter society— particularly those with outstanding fees and court costs.

Second, and relatedly, jurisdictions should put in place programs to identify any outstanding arrest warrants or unpaid fines for incarcerated individuals nearing release and help such individuals come up with a plan of action to address them. The plan of action should include resolving any outstanding warrants so that the individual is not simply released only to be picked up again and so that any criminal background checks potential employers run do not hit on outstanding warrants. It should also include a plan to pay off any outstand-

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238 *Free to Drive*, *supra* note 235.

239 Dave Ress, *Virginians Will No Longer Have Their Driver's Licenses Suspended for Unpaid Court Fines*, *Virginian-Pilot* (Feb. 27, 2020), <https://www.pilotonline.com/government/virginia/dp-nw-drivers-license-suspension-repeal-20200227-xxcggzib5zhdnrupa54o-tyja24-story.html>.

240 See President's Comm'n on Law Enforcement, *supra* note 73, at 75-76.

241 H.R. 2453, 117th Cong. (2021); S. 998.

242 See H.R. 2453, § 3; S. 998, § 3. The House bill is sponsored by Representative Mary Gay Scanlon (D-Pa.) and has seven bipartisan co-sponsors (two Republicans and five Democrats). The Senate bill is sponsored by Senator Chris Coons (D-Del.) and has 13 bipartisan co-sponsors (six Republicans and seven Democrats). Both bills have been reported out of committee and are awaiting floor action.

ing fines, which could include receiving a deferment or suspension of such fines for a period of time while the individual seeks employment or, as in the aforementioned example of Orange County, Florida, allowing the individual to perform community service in lieu of payment.

Third, jurisdictions should expand the use of remote check-ins with probation and parole officers to make it less burdensome for individuals on supervised release to attend check-in meetings. Such meetings—which, depending on the individual’s supervision plan, may occur as frequently as once or twice a week—can interfere with work schedules or family obligations, and missing a meeting can mean revocation of release and reincarceration. Nearly half of all prison admissions in the United States are for probation or parole violations, and the majority of those in turn are for “technical” violations, which can include missing appointments with supervision officers.<sup>243</sup> Expanding the use of remote check-ins, as many states have done during the COVID-19 pandemic,<sup>244</sup> can enable individuals on supervised release to better navigate between work obligations and supervision requirements and help reduce the incidence of technical violations. Mississippi provides an example of a forward-looking approach to this issue. Even before COVID-19, the state allowed probation and parole officers to conduct check-in meetings through Skype, FaceTime, Google video chat, and other portals that allow “simultaneous[] . . . real time” voice and video communication.<sup>245</sup> Continuing to use these and similar technologies—and even expanding their use—as the COVID-19 pandemic wanes could prove highly beneficial.

Fourth, jurisdictions should support initiatives to develop and implement individualized reentry plans for individuals held in the jurisdiction’s custody. Ideally, development of such a plan should begin early during the individual’s term of incarceration, and the plan should be updated periodically as the inmate’s situation and needs change. Plan components should include, among other things, identifying the individual’s medical, educational, vocational, and substance abuse needs and working with the individual to address those needs; finding ways to maintain (and where possible strengthen) the individual’s relationships with family and other community members; and connecting the individual with available community resources as the individual nears release. The plan should also include assisting the individual in setting up job training appointments, medical appointments, health benefits, and housing beyond a

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243 Council of State Gov’ts Justice Ctr., *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets 1* (2019), available at <https://csgjusticecenter.org/wp-content/uploads/2020/01/confined-and-costly.pdf>.

244 See *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, Prison Policy Initiative (May 18, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html#paroleprobation>.

245 Miss. Code § 47-7-36.

halfway house—before the individual is released. New Jersey recently passed pilot legislation directing the state Department of Corrections and Parole Board to work with appropriate staff to create “individualized, comprehensive reentry plan[s]” for inmates that include many of these elements.<sup>246</sup> Other states have similar programs.<sup>247</sup>

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What all these ideas share in common is the goal of reducing barriers to reentry for individuals who have completed their sentences and are ready to rejoin society. Successful reentry is important not just for the individual leaving prison, but for his or her family members as well. Finding stable employment means the individual can contribute to rent and other household financial needs. The individual can also help with childcare and provide emotional support to children and other family members. Unsuccessful reentry, by contrast, presents perhaps the worst of possible outcomes. Not only do family members endure another round of separation, emotional stress, and lost income, but all of the time and effort that went into preparing the individual for reentry is wiped away, and the individual may suffer the psychological toll of feeling like a repeat failure. Worse yet, if reincarceration occurs as the result of a new offense, the individual becomes a repeat offender, which yields additional consequences. A family-centered approach to criminal justice reform is one that makes every effort possible to ensure that an individual’s *first* time in prison is that individual’s *only* time in prison, and that the individual leaves prison ready—and able—to rejoin his or her family and lead a productive, law-abiding life.

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246 N.J. Stat. § 30:1B-6.10; *see also* Colleen O’Dea, *New Law Aims for Dramatic Shift in How NJ Inmates Will Get Ready for Life Outside Prison*, NJ Spotlight News (Feb. 1, 2021), *available at* <https://www.njspotlight.com/2021/02/new-law-aims-for-dramatic-shift-in-how-nj-inmates-will-be-helped-to-prepare-for-life-outside-prison>.

247 *See, e.g.*, Wash. Rev. Code § 72.09.270.

Part IV

When and  
How to Punish:  
Sentencing and  
Overcriminalization

*Theories of Punishment and Family Impacts—The Case for Parsimony*

A family-centered approach to criminal justice reform can also inform discussions about how much punishment individuals who break the law should receive, how that punishment should be meted out, and what sorts of conduct should be subject to criminal penalties in the first place. Broadly speaking, scholars and policymakers have recognized four key objectives of criminal punishment: rehabilitation, retribution, deterrence, and incapacitation.<sup>248</sup> Rehabilitation focuses on changing and improving behavior, retribution aims to ensure lawbreakers suffer proportionate consequences, deterrence seeks to make criminal behavior less appealing, and incapacitation seeks to remove individuals' ability to commit additional crimes.<sup>249</sup> A fifth goal, which has received increasing attention in recent decades, is restoration.<sup>250</sup> This goal focuses on making the victim whole, as well as healing relationships between victims, convicted individuals, and the broader community.<sup>251</sup>

Each of these goals may point in favor of differing levels or types of punishment, depending on the nature of the offense. Rehabilitation, for example, asks what type of sentence will best help the individual correct his or her behavior. The answer could be a relatively short sentence in a lower-security detention facility, followed by a period of intensive supervised release. Retribution, by contrast, looks to the seriousness of the offense and attempts to calibrate the length of the sentence to the amount of harm caused (or threatened). The result may be a longer, or shorter, sentence depending on who was injured and how significant the injuries (or threatened injuries) were. Deterrence and incapacitation, in turn, may favor longer or shorter sentences depending on judgments regarding why individuals commit certain crimes and what a given crime tells us about the person who commits it. Finally, restoration, like retribution, looks to the harm caused by the offense, but rather than weighing how serious or culpable the criminal conduct was, asks what is necessary to make the victim whole. The answer to that question will determine the severity of punishment.

Each of these goals, in turn, has at least some relevance to a family-centered approach to criminal justice reform. Perhaps most obviously, rehabilitation seeks to reorient the individual's behavior so that they can avoid future

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248 See Arthur Rizer, The Square One Project, A Call for New Criminal Justice Values 8-11 (2019), available at [https://squareonejustice.org/wp-content/uploads/2019/09/executive-session-pdf-ACallforNewCriminalJusticeValues\\_ArthurRizer\\_Final.pdf](https://squareonejustice.org/wp-content/uploads/2019/09/executive-session-pdf-ACallforNewCriminalJusticeValues_ArthurRizer_Final.pdf).

249 See *id.*

250 See, e.g., Susan Sarnoff, *Restoring Justice to the Community: A Realistic Goal?*, 65 Fed. Probation 33, 33 (2001).

251 *Id.* at 33-34.



criminality and instead contribute positively to their family and community.<sup>252</sup> Retribution, while focused less on the individual and more on the individual's acts, takes as a "key component" ensuring that the sentence is "proportional" to the culpable conduct.<sup>253</sup> This means avoiding unduly long or harsh punishments that inflict greater harm on the convicted individual and his or her family than the gravity of the offense calls for. The link between the three remaining goals—deterrence, incapacitation, and restoration—and a family-centered approach to criminal justice policy appears somewhat more attenuated, given that deterrence and incapacitation focus on the motives and tendencies of the individual who commits the offense,<sup>254</sup> while restoration focuses primarily on victims and their needs.<sup>255</sup> Of course, crime negatively impacts families and communities wherever it happens, so in that sense deterrence, incapacitation, and restoration all seek to serve the needs of families by aiming to reduce crime and recompense victims and their families. But that sort of expansive framing leads into arguments about reducing crime generally, whereas the goal of this paper is to identify how a family-centered approach can bring new insights to bear on particular subjects.

To recap briefly, research shows that incarceration is associated with a number of unwelcome consequences for family members and children. These include poorer physical and mental health,<sup>256</sup> increased risk of drug use and other antisocial behavior,<sup>257</sup> heightened housing and financial instability,<sup>258</sup> and poorer performance in school.<sup>259</sup> Incarceration is also associated with increased unemployment and reduced earning potential following release,<sup>260</sup> meaning that even after incarceration ends, a formerly incarcerated individual is likely to have less income to contribute to housing and family needs.

A family-centered approach to criminal justice reform takes into account these negative consequences when determining appropriate punishments, as well as when determining what conduct should be subject to criminal penalties in the first place. Of the five models described above, retribution perhaps best fits this bill. (Rehabilitation is also relevant, but deals more with the

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252 See Rizer, *supra* note 248, at 8.

253 *Id.* at 9.

254 See *id.* at 9-10.

255 See Sarnoff, *supra* note 250, at 33-34.

256 See sources cited *supra* notes 15-22 and accompanying text.

257 See sources cited *supra* notes 32-33 and accompanying text.

258 See sources cited *supra* notes 23-31 and accompanying text.

259 See sources cited *supra* notes 34-38 and accompanying text.

260 See sources cited *supra* notes 24, 167-71, and accompanying text.

prison experience, the services provided to the incarcerated individual, and the landscape the individual faces following release. Those issues are addressed in prior sections of this paper.) A retributive model, as noted, seeks to avoid penalties that inflict greater punishment on individuals—and by extension, their families—than the crime of conviction calls for. Punishment should be proportional to the offense; it should be no harsher, and no more lenient, than the individual deserves.

But there is a modification to the retributive model that the research on families and incarceration suggests may be appropriate—a modification that takes inspiration from a paper by Arthur Rizer of the Lincoln Network. Rizer’s paper, “A Call for New Criminal Justice Values,”<sup>261</sup> suggests that a principle called “parsimony” can serve as a “unifying value for our criminal justice system” by helping to delineate the instances where criminal punishment is appropriate and how severe such punishment should be.<sup>262</sup> Building on the work of other scholars, Rizer defines parsimony as “the belief that [a]ny punishment that is more severe than is required to achieve valid and applicable purposes is to that extent morally unjustifiable.”<sup>263</sup> Put differently, parsimony seeks the “minimum necessary intervention” into an individual’s liberty “to achieve public safety and wellness.”<sup>264</sup> Unlike “proportionality,” the goal is not (necessarily) “equally applied punishment,” but rather “the best, least-severe method of accountability.”<sup>265</sup>

Under a family-centered approach to criminal justice reform, parsimony can, and should, play a significant role. Because incarceration is associated with a range of negative outcomes, not just for the incarcerated individual, but for his or her family and children as well, policymakers must be thoughtful in how they select punishments and set sentencing ranges. A sentence that is longer than necessary separates a parent from his or her children longer than is necessary, takes an individual out of the workforce longer than is necessary, and reduces a person’s lifetime earning potential more than is necessary. Every one of these outcomes is a net negative for society, as well as for the person and his or her family. That does not necessarily mean that parsimony should be pursued at all costs.

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261 Rizer, *supra* note 248.

262 *Id.* at 16.

263 *Id.* (quoting Jeremy Travis et al., *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 326 (2014)).

264 *Id.* (quoting Daryl V. Atkinson, *A Revolution of Values in the U.S. Criminal Justice System*, Ctr. for Am. Progress (Feb. 27, 2018), <https://www.americanprogress.org/issues/criminal-justice/news/2018/02/27/447225/revolution-values-u-s-criminal-justice-system>) (internal quotation mark omitted).

265 *Id.*

Proportionality, for example, is also an important goal. Among other things, proportionality seeks to ensure that like crimes are treated alike and that sentences do not vary based on improper characteristics such as race, sex, or socioeconomic status. But parsimony should be a core part of the effort.

### *Sentencing Practices*

Evaluated through the lens of parsimony, there are a variety of reforms to sentencing practices that could be appropriate. One candidate is mandatory minimums, which prescribe a minimum term of imprisonment for certain crimes or when certain predicates are met, such as a prior conviction or use of a weapon during commission of a crime.<sup>266</sup> Mandatory minimums came into widespread use during the 1970s and 1980s, as policymakers began to favor more “determinate” sentencing practices that “constrained the discretion of judges, ensured that sentences were pegged to crime seriousness and to the criminal history of those found guilty, and, in many jurisdictions, eliminated discretionary release on parole.”<sup>267</sup>

In the years since, supporters and opponents of mandatory minimums have raised a variety of arguments for and against their use. Supporters argue that mandatory minimums promote consistent sentencing practices, help ensure that convicted individuals receive adequate punishment, and encourage individuals to cooperate with law enforcement so that they can plead to a reduced offense or receive a sentence below the statutory minimum for providing “substantial assistance.”<sup>268</sup> Opponents argue that they improperly constrain judges’

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266 *E.g.*, 18 U.S.C. § 924(c)(1)(A) (providing for a minimum sentence of at least 5 years imprisonment for the use, carriage, or possession a firearm “during and in relation to any crime of violence or drug trafficking crime,” rising to a 7-year minimum sentence if the firearm is “brandished” and a 10-year minimum sentence if the firearm is “discharged”); 21 U.S.C. § 841(b)(1)(A) (providing for a minimum sentence of at least 10 years imprisonment for the manufacture, distribution, or possession with intent to manufacture or distribute certain types and quantities of controlled substances, rising to a 15-year minimum sentence if the person has a prior conviction for a “serious drug felony” or “serious violent felony” and a 25-year minimum sentence if the person has two or more such prior convictions).

267 Pamela K. Lattimore et al., *Reimagining Pretrial and Sentencing*, in *A Better Path Forward for Criminal Justice: A Report by the Brookings-AEI Working Group on Criminal Justice Reform* 16, 18 (Rashawn Ray & Brent Orrell eds., 2021), available at [https://www.brookings.edu/wp-content/uploads/2021/04/Better-Path-Forward\\_Brookings-AEI-report.pdf](https://www.brookings.edu/wp-content/uploads/2021/04/Better-Path-Forward_Brookings-AEI-report.pdf).

268 See Evan Bernick & Paul J. Larkin, Jr., Heritage Found., *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms* 4-5 (2014), available at [http://thf\\_media.s3.amazonaws.com/2014/pdf/LM114.pdf](http://thf_media.s3.amazonaws.com/2014/pdf/LM114.pdf) (summarizing arguments in favor of mandatory minimums); see also 18 U.S.C. § 3553(e) (providing that upon

ability to take individualized factors into account when imposing sentences, transfer too much power to prosecutors who control charging decisions, and lead to unnecessarily harsh and punitive sentences.<sup>269</sup>

According to the U.S. Sentencing Commission, in the federal system, individuals convicted of an offense with a mandatory minimum receive a sentence that is on average four times longer than individuals convicted of an offense without a mandatory minimum.<sup>270</sup> Mandatory minimums are particularly common in drug cases. In 2018, 67 percent of individuals convicted of a drug trafficking offense in the federal system were convicted of an offense carrying a mandatory minimum.<sup>271</sup> Similarly, in 2016, the primary offense of conviction for 67 percent of individuals in the federal system convicted of an offense carrying a mandatory minimum was a drug offense.<sup>272</sup> Roughly 22 percent of federal convictions overall in 2016 were for an offense carrying a mandatory minimum.<sup>273</sup>

Federal law provides two primary pathways to obtain relief from a mandatory minimum—that is, to receive a sentence below the statutory minimum. First, as noted above, an individual can obtain a sentence below the statutory minimum by providing “substantial assistance” to the government “in the investigation or prosecution of another person who has committed an

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motion by the government, a sentencing court may impose a sentence below the statutory minimum if the defendant has provided “substantial assistance in the investigation or prosecution of another person who has committed an offense”); U.S. Sentencing Comm’n, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* 43 (2017) [hereinafter U.S. Sentencing Comm’n, *Overview of Mandatory Minimum Penalties*], available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711\\_Mand-Min.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf) (finding that “offenders convicted of an offense carrying a mandatory minimum penalty were over three times more likely to have provided substantial assistance to the government”).

269 See Bernick & Larkin, *supra* note 268, at 3-4 (summarizing arguments against mandatory minimums); see also Justice Roundtable, *supra* note 226, at 44 (arguing that prosecutors “routinely use the threat of [lengthy mandatory minimums] to incentivize plea bargains and frustrate the accused’s assertion of the constitutional right to trial”).

270 U.S. Sentencing Comm’n, *Overview of Mandatory Minimum Penalties*, *supra* note 268, at 43.

271 U.S. Sentencing Comm’n, *The First Step Act of 2018: One Year of Implementation* 19 (2020) [hereinafter U.S. Sentencing Comm’n, *First Step Act*], available at [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831\\_First-Step-Report.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf).

272 U.S. Sentencing Comm’n, *Overview of Mandatory Minimum Penalties*, *supra* note 268, at 34.

273 *Id.* at 29.

offense.”<sup>274</sup> The government must agree to the reduction by making a motion to the court, and the court retains the authority to reject the reduction—that is, to impose a sentence at or above the statutory minimum—if it so chooses.<sup>275</sup> Second, in certain drug trafficking cases, federal law creates a “safety valve” that authorizes a sentencing court to impose a sentence below the statutory minimum if the defendant lacks a history of serious crime, did not use violence or the threat of violence in the commission of the offense, played only a minor role in the drug operation, and “truthfully provide[s]” the government “all information and evidence the defendant has” regarding the offense and any other offenses that were part of the same scheme or plan.<sup>276</sup> (A third pathway to a reduced sentence is for the individual to plead to a reduced offense that does not carry a mandatory minimum.) In 2019, approximately 42 percent of individuals convicted of a federal drug trafficking offense carrying a mandatory minimum received relief under the safety valve.<sup>277</sup>

Reforms to mandatory minimums could follow one (or a combination) of three approaches. First, lawmakers could narrow the range of offenses to which mandatory minimums apply. As indicated, in 2016, the primary offense of conviction for roughly two-thirds of individuals in the federal system convicted of an offense carrying a mandatory minimum was a drug offense.<sup>278</sup> The next-most-common primary offenses were pornography (7 percent of individuals convicted of an offense carrying a mandatory minimum), firearms (6 percent), and sexual abuse (5 percent).<sup>279</sup> Fifteen percent fell into the “other” category.<sup>280</sup>

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274 18 U.S.C. § 3553(e).

275 *Id.*

276 *Id.* § 3553(f).

277 U.S. Sentencing Comm’n, First Step Act, *supra* note 271, at 19.

278 U.S. Sentencing Comm’n, Overview of Mandatory Minimum Penalties, *supra* note 268, at 34.

279 *Id.*

280 *Id.*

Some reform advocates have proposed eliminating mandatory minimums for certain—or even all—“nonviolent” crimes,<sup>281</sup> although what constitutes a nonviolent crime is a topic of considerable debate.<sup>282</sup> Following recommendations by a state sentencing commission appointed by the governor and other state leaders,<sup>283</sup> for example, New Jersey’s legislature has passed a bill to eliminate mandatory minimums for certain “non-violent” drug and property crimes identified by the commission, including manufacturing, distributing, or dispensing a controlled substance without authorization; operating a controlled substance production facility; first-degree computer hacking; and repeat shoplifting.<sup>284</sup> Other states have enacted similar laws eliminating mandatory minimums for various types of offenses.<sup>285</sup>

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281 See, e.g., Elizabeth Weill-Greenberg, *‘It Tears Families Apart’: Lawmakers Nationwide Are Moving to End Mandatory Sentencing*, The Appeal (Apr. 15, 2021), <https://theappeal.org/it-tears-families-apart-lawmakers-nationwide-are-moving-to-end-mandatory-sentencing> (describing efforts in various states to eliminate mandatory minimums for “certain non-violent” crimes).

282 Compare, e.g., *Are All Drug Offenders Really Violent?: A Snapshot of Federal Drug Offenders & Their Sentences*, Families Against Mandatory Minimums, <https://famm.org/wp-content/uploads/Factsheet-Are-All-Drug-Offenders-Violent.pdf> (last visited Dec. 4, 2021) (stating that “most federal drug traffickers are not violent”), with Rafael A. Mangual, *Everything You Don’t Know About Mass Incarceration*, City J., Summer 2019, <https://www.city-journal.org/mass-incarceration> (arguing that characterizing individuals convicted of drug offenses as “nonviolent” can be misleading because “charges often get downgraded or dropped as part of plea negotiations” and “more than three-quarters of released drug offenders are rearrested for a nondrug crime”).

283 See N.J. Criminal Sentencing & Disposition Comm’n, Annual Report 21-23 (2019), available at [https://www.njleg.state.nj.us/OPI/Reports\\_to\\_the\\_Legislature/criminal\\_sentencing\\_disposition\\_ar2019.pdf](https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf).

284 A. 4369 (N.J. 2021) (amending, inter alia, N.J. Stat. § 2C:35-4 (maintaining or operating a controlled substance production facility); *id.* § 2C:35-5 (manufacturing, distributing, or dispensing a controlled substance without authorization); *id.* § 2C:20-25 (computer hacking); *id.* § 2C:20-11 (shoplifting)). The bill has been caught up in a back-and-forth with New Jersey Governor Phil Murphy (D-N.J.), who has previously vetoed the bill and signaled his intent to veto it again because it also eliminates mandatory minimums for certain public corruption offenses. See Ted Sherman & Amanda Hoover, *Murphy Intends to Again Veto Mandatory Minimums Bill over Weaker Penalties for Public Corruption, Officials Say*, NJ.com (June 24, 2021), <https://www.nj.com/politics/2021/06/murphy-intends-to-again-veto-mandatory-minimums-bill-over-weaker-penalties-for-public-corruption-officials-say.html>.

285 See, e.g., Ram Subramanian & Rebecka Moreno, Vera Inst. of Justice, *Drug War Détente? A Review of State-Level Drug Law Reform, 2009-2013*, at 6-8 (2014), available at [https://www.vera.org/downloads/Publications/drug-war-d%C3%A9tente-a-review-of-state-level-drug-law-reform-2009-2013/legacy\\_downloads/state-drug-law-reform-review-2009-2013-v5.pdf](https://www.vera.org/downloads/Publications/drug-war-d%C3%A9tente-a-review-of-state-level-drug-law-reform-2009-2013/legacy_downloads/state-drug-law-reform-review-2009-2013-v5.pdf) (describing laws in New York, Rhode Island, South Carolina, and Delaware).

A second approach to reforming mandatory minimums could be to reduce the statutory minimum for certain offenses or certain sentence enhancements. Congress followed this approach in 2018's First Step Act, reducing the statutory minimum for certain drug trafficking offenses involving large drug quantities where the defendant has a prior drug felony conviction from 20 years to 15 years, and reducing the statutory minimum where the defendant has two or more prior convictions from life without parole to 25 years.<sup>286</sup> A bipartisan group of Senators led by Dick Durbin (D-Ill.) and Mike Lee (R-Utah) has introduced legislation to further reduce the mandatory minimums applicable to these and other drug trafficking offenses.<sup>287</sup>

A third approach could be to expand the drug "safety valve" so that more defendants qualify for relief. Congress again did this in the First Step Act, loosening the criminal history requirement so that a defendant can have up to two prior non-violent convictions that resulted in a sentence of up to 13 months, as well as an unlimited number of prior minor convictions that resulted in a sentence of less than 60 days, and still qualify for relief.<sup>288</sup> Prior to the First Step Act, any one prior conviction with a sentence of 60 days or more, and any two convictions with a sentence of any length, rendered an individual ineligible for the safety valve.<sup>289</sup> Last Congress, bipartisan legislation was introduced in both the House and Senate to expand the safety valve to permit courts to sentence below a statutory minimum whenever "the court finds that it is necessary to do so" in light of various considerations set forth in 18 U.S.C. § 3553(a), including the seriousness of the offense, the need to deter future crime, and the need to provide the defendant "effective" correctional treatment.<sup>290</sup> Notably, unlike the current safety valve, the expanded safety valve would not be limited to drug offenses, but would apply to any offense with a mandatory minimum.

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286 See Pub. L. No. 115-391, § 401 (2018) (amending 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)).

287 See Smarter Sentencing Act, S. 1013, 117th Cong. § 2 (2021) (amending 21 U.S.C. §§ 841(b)(1), 960(b)). References to this and to other bills in this paper are intended merely to provide examples of possible reforms; they should not be taken as an endorsement of the bills or the provisions contained therein.

288 See Pub. L. No. 115-391, § 402 (amending 18 U.S.C. § 3553(f)).

289 See U.S. Sentencing Comm'n, First Step Act, *supra* note 271, at 17; U.S. Sentencing Guidelines Manual § 4A1.1 (2018).

290 Justice Safety Valve Act, H.R. 1097, 116th Cong. § 2 (2019); S. 399, 116th Cong. § 2 (2019); see also 18 U.S.C. § 3553(a). The bill has been reintroduced in the Senate in the current Congress as S. 2695, 117th Cong. (2021). As of the time of writing, the bill had not been reintroduced in the House.

Determining the appropriate punishment for the host of crimes that carry mandatory minimums is a complicated endeavor that lies beyond the scope of this paper. For present purposes, the key point to be drawn from the research on families and incarceration is that policymakers must be very careful when setting sentence lengths, because incarceration has consequences that extend far beyond the individual being sent to prison. Under a parsimonious approach to sentencing, policymakers should seek sentences that are no longer than necessary to accomplish the goals of safety, rehabilitation, and other legitimate policy objectives.<sup>291</sup> To the extent mandatory minimums produce sentences that exceed what is needed to achieve these aims, they should be reevaluated and, where appropriate, reduced. That sentences for offenses carrying mandatory minimums tend to be, on average, four times longer than sentences for offenses without mandatory minimums may suggest there is a disconnect between aims and means for at least some offenses with mandatory minimums.

One approach that could have merit, similar to what New Jersey did, might be appointing a bipartisan commission to review federal mandatory minimums to identify which offenses warrant a statutorily mandated minimum sentence and which offenses might properly be left more fully to the discretion of sentencing judges. The commission could also identify minimums that are unnecessarily harsh or that appear to be disconnected from the gravity of the offense.<sup>292</sup> A thoughtful, scientific approach to the subject that considers matters on an offense-by-offense basis could avoid the sort of ad hoc, headline-driven decision-making that sometimes affects the legislative process. Of particular value might be comparing the recidivism rates and conduct of individuals who receive reduced sentences under the First Step Act with those who would already have qualified for sentence reductions under prior law to see what effect, if any, the abrogated mandatory minimums may have had in helping to protect the public and prevent (or deter) crime. Similar state-level commissions could also prove valuable.

Another topic that warrants further review under a parsimonious approach to sentencing is the disparity in punishment for drug trafficking offenses involving similar quantities of crack and powder cocaine. Prior to 2010, fed-

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291 See Rizer, *supra* note 248, at 16.

292 Such an approach would dovetail nicely with the U.S. Sentencing Commission's recommendations in a 2011 report that mandatory minimums should "not be excessively severe" and should be "narrowly tailored to apply only to those offenders who warrant such punishment." U.S. Sentencing Comm'n, 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System 345 (2011), *available at* <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.



eral law imposed the same penalty for a drug trafficking offense involving 5 or more grams of crack cocaine (also referred to as “cocaine base”) as for an offense involving 500 or more grams of powder cocaine—a 5-year mandatory minimum with a 40-year statutory maximum.<sup>293</sup> The same 100:1 disparity applied to offenses involving larger drug quantities as well. A trafficking offense involving 50 or more grams of crack cocaine had the same statutory penalties as an offense involving 5,000 or more grams (i.e., 5 kilograms) of powder cocaine—a 10-year mandatory minimum with a maximum life sentence.<sup>294</sup> In the 2010 Fair Sentencing Act,<sup>295</sup> Congress reduced the disparity from 100:1 to approximately 18:1 by increasing the amount of crack cocaine required to trigger the statutory penalties from 5 grams to 28 grams and from 50 grams to 280 grams, respectively.<sup>296</sup> Eight years later, in the First Step Act, Congress created a procedure for individuals sentenced for a crack cocaine offense under the penalty structure in effect prior to the Fair Sentencing Act to seek a reduced sentence under the modified penalty structure set forth in the Fair Sentencing Act.<sup>297</sup> According to data from the U.S. Sentencing Commission, in the first year after enactment of the First Step Act, courts granted 2,387 retroactive sentence reductions under this new procedure.<sup>298</sup>

Congress originally created the 100:1 crack-powder disparity in the 1980s at a time when there was concern that crack cocaine was fueling an increase in violence and gang activity in cities and towns throughout the country.<sup>299</sup> Over time, lawmakers on all sides came to agree that the penalties for crack cocaine were too harsh and that the 100:1 crack-powder disparity led to unjustified

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293 See U.S. Sentencing Comm’n, First Step Act, *supra* note 271, at 41; see also 21 U.S.C. §§ 841(b)(1)(B), 960(b)(2)).

294 See U.S. Sentencing Comm’n, First Step Act, *supra* note 271, at 41; see also 21 U.S.C. §§ 841(b)(1)(A), 960(b)(1)).

295 Pub. L. No. 111-220 (2010).

296 *Id.* § 2 (amending 21 U.S.C. §§ 841(b)(1), 960(b)).

297 Pub. L. No. 115-391, § 404 (2018).

298 U.S. Sentencing Comm’n, First Step Act, *supra* note 271, at 43.

299 See, e.g., U.S. Sentencing Comm’n, Report to the Congress: Cocaine and Federal Sentencing Policy 7-10 (2002), available at [https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205\\_Cocaine\\_and\\_Federal\\_Sentencing\\_Policy.pdf](https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf) (reviewing the legislative history behind the creation of the 100:1 crack-powder disparity); James C. Howell & Scott H. Decker, *The Youth Gangs, Drugs, and Violence Connection*, *Juv. Just. Bull.*, Jan. 1999, at 1, 1-4, available at <https://www.ojp.gov/pdffiles1/93920.pdf> (describing popular understandings of the link between crack cocaine and gang violence in the 1980s).

racial disparities in sentences for cocaine offenses.<sup>300</sup> The Fair Sentencing Act helped to reduce the disparity, but it remains the case today that it takes *18 times* as much powder cocaine as crack cocaine to trigger the same federal penalties. Further reform on this front seems warranted.

In particular, policymakers should ask whether imposing such disparate sentences for similar amounts of crack and powder cocaine is *necessary* to accomplish the aims of public safety, crime prevention, and other objectives of drug criminalization. It could be that there are persuasive reasons for some level of differential treatment. Perhaps crack is more addictive, is easier to transport or sell in small quantities, or is more closely associated with violent crime than powder cocaine. When it comes to other drugs, the amount of the drug required to trigger a given statutory penalty can vary substantially. Ten grams of LSD, for example, triggers the same penalties as 100 grams of PCP, 1 kilogram of heroin, or 5 kilograms of powder cocaine.<sup>301</sup> So it may not be the case that the quantity thresholds for crack and powder cocaine must be exactly identical. But there should be good reason for disparate treatment, and any disparity should be *necessary* to promote legitimate public aims. An 18:1 disparity seems hard to justify under this standard.

Bipartisan legislation called the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act<sup>302</sup> has been introduced in both the House and Senate to eliminate the crack-powder sentencing disparity altogether by raising the amount of crack cocaine required to trigger the statutory penalties to match the amount of powder cocaine required.<sup>303</sup> As of the date of writing, the House bill has 26 Republican and 30 Democratic co-sponsors, and the Senate bill has five Republican and four Democratic co-sponsors. The House bill passed the House of Representatives on September 28, 2021 by a vote of 361-66.<sup>304</sup> This proposal merits serious consideration. Even if eliminating the crack-powder disparity altogether is not the right step at this time, further reductions in the disparity—and further review of the reasons justifying any disparity—surely warrant attention.

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300 See, e.g., Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing*, U.S. News & World Rep. (Aug. 3, 2010), <https://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing> (describing passage of the Fair Sentencing Act and data showing racial disparities in cocaine sentences).

301 See 21 U.S.C. § 841(b)(1)(A).

302 H.R. 1693, 117th Cong. (2021); S. 79, 117th Cong. (2021).

303 See H.R. 1693, § 2; S. 79, § 2.

304 U.S. House of Representatives, Roll Call 297, 117th Cong., 1st Sess. (Sept. 28, 2021), <https://clerk.house.gov/Votes/2021297>.

A third area of sentencing policy that deserves review is the consideration of acquitted conduct during sentencing. As every reader surely knows, to secure a conviction, the prosecution must prove “beyond a reasonable doubt” every fact “necessary to constitute the crime with which [the defendant] is charged.”<sup>305</sup> But when it comes time for sentencing, a lower standard applies to the facts a judge may consider in determining the appropriate sentence. The Supreme Court has said that, as a general matter, a sentencing judge may use the “preponderance of the evidence” standard to resolve factual disputes at sentencing.<sup>306</sup> This means a judge may choose to increase a sentence based on facts that the judge determines are supported by a preponderance of the evidence (i.e., that the judge determines are more likely than not to be true), even if those facts were not proved by the prosecution beyond a reasonable doubt, provided the sentence does not exceed the statutory maximum authorized by the jury’s verdict.<sup>307</sup>

Among the facts the judge may consider in determining an appropriate sentence is conduct for which the defendant was acquitted *in the very same case*.<sup>308</sup> This means that where a defendant is charged with multiple offenses and wins acquittal on some but not all of the offenses, the judge can determine at sentencing that the defendant *did* in fact commit the acquitted offenses (or more precisely, engaged in the conduct underlying the acquitted offenses) and increase the defendant’s sentence based on that finding.

Suppose, for example, a defendant is charged with drug distribution and conspiracy. At trial the defendant is acquitted of conspiracy but convicted of distribution. At sentencing, the judge determines by a preponderance of the evidence that the defendant did in fact engage in the charged conspiracy. The judge can then rely on that finding to impose a longer sentence *for the distribution charge* than the judge otherwise would have imposed.<sup>309</sup>

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305 *In re Winship*, 397 U.S. 358, 364 (1970).

306 *United States v. Watts*, 519 U.S. 148, 157 (1997). The Court has suggested in dicta that a higher “clear and convincing evidence” standard could apply “in extreme cases” where a particular fact “would dramatically increase the sentence,” but not has addressed whether and when such an exception might apply. *Id.* at 156-57.

307 *See id.* at 156-57; *see also Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”).

308 *Watts*, 519 U.S. at 157.

309 *See United States v. Bell*, 808 F.3d 926, 927 (D.C. Cir. 2015) (Kavanaugh, J., concurring in the denial of rehearing en banc); *id.* at 929 (Millett, J., concurring in the denial of rehearing en banc).

Setting aside constitutional concerns with this practice,<sup>310</sup> under a parsimonious approach to sentencing that seeks not to inflict punishments that are longer than necessary, in part to avoid added harm to children and families, it is highly questionable what legitimate purpose the practice serves. Even if the judge's determination is correct and the defendant did in fact engage in the acquitted conduct, the defendant is not being punished for the acquitted conduct, but rather for the *convicted* conduct. Why it is necessary (or even beneficial) for a judge to consider conduct for which the prosecution could not sustain its burden of proof in setting punishment for an entirely separate offense is unclear. Perhaps one could argue that the acquitted conduct provides insight into the defendant's dangerousness or culpability. But even then, it is still unclear why it is *necessary* to impose a higher sentence than would otherwise apply based on an examination of the facts and circumstances underlying the actual conviction. To repeat, parsimony seeks the "best, least severe method" of punishment "to achieve valid and applicable purposes."<sup>311</sup> Those purposes are set by the statute criminalizing the offense of conviction. Going beyond that statute to consider conduct *not* encompassed within its prohibition and for which the defendant was actually acquitted delinks the punishment handed down from the statute and the statute's legitimate purposes. This is inconsistent with the principle of parsimony.

Prior to his retirement, Senator Orrin Hatch (R-Utah) introduced legislation in 2018 to end the practice of permitting judges to consider acquitted conduct in sentencing.<sup>312</sup> Earlier this year, a bipartisan group of lawmakers introduced an updated version of the bill in both the House and Senate. The bill, titled the Prohibiting Punishment of Acquitted Conduct Act,<sup>313</sup> provides that a sentencing court "shall not consider, except for purposes of mitigating a sentence, acquitted conduct."<sup>314</sup> The Senate bill was reported out of the Senate Judiciary Committee in June 2021 by a bipartisan vote of 16-6, with

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310 Several Justices, including Justice Scalia (joined by Justices Thomas and Ginsburg), *see Jones v. United States*, 574 U.S. 948, 948-50 (2014) (Scalia, J., dissenting from the denial of certiorari), and then-Judge Kavanaugh, *see Bell*, 808 F.3d at 927, have expressed concerns with allowing judges to increase sentences based on acquitted conduct. Former Senator Orrin Hatch (R-Utah) likewise has expressed the view that the practice is "constitutionally suspect." Sen. Orrin Hatch, *Judge Kavanaugh's Fight for Stronger Jury Rights*, SCOTUSblog (Aug. 31, 2018), <https://www.scotusblog.com/2018/08/judge-kavanaughs-fight-for-stronger-jury-rights>.

311 Rizer, *supra* note 248, at 16 (quoting Travis et al., *supra* note 263, at 326).

312 Acquitted Conduct Reform Act, S.4, 115th Cong. (2018).

313 H.R. 1621, 117th Cong. (2021); S. 601, 117th Cong. (2021).

314 H.R. 1621, § 2; S. 601, § 2.

11 Democrats and 5 Republicans voting aye.<sup>315</sup> The House bill, in turn, was reported out of the House Judiciary Committee in November 2021 by voice vote. This is a proposal that hopefully will continue to move forward.

One final type of sentencing reform that may be worth consideration is so-called “second look” sentencing. Under this idea, an inmate would have the ability, after a certain number of years have passed, to seek a sentence reduction if the inmate can establish that he or she is not a danger to society, has demonstrated good behavior throughout the entire term of imprisonment, and has been rehabilitated, and that the interests of justice warrant a sentence reduction.<sup>316</sup> Under current law, sentence reductions once a sentence has been imposed are available only in very limited circumstances, such as where an inmate can demonstrate “extraordinary and compelling reasons” for the reduction, where an inmate is at least 70 years old and has served at least 30 years of a life sentence for certain crimes, or where an individual has provided “substantial assistance in investigating or prosecuting another person” after sentencing.<sup>317</sup> Second-look sentencing would increase the set of circumstances in which an inmate could seek a sentence reduction, focusing in particular on whether the inmate has been rehabilitated, has demonstrated good behavior, and is not a danger to society. Of particular relevance to a family-centered approach to criminal justice policy, determining whether the “interests of justice” warrant a reduction could take into account the needs and interests of the person’s children and family and the support the person would be able to provide to them following release.

Any reductions under second-look sentencing should be available only after a person has served a significant portion of their sentence. It may also be appropriate to set age and sentence length requirements and to exclude certain types of crimes. Because of the various challenges associated with early release, any second-look reforms should be enacted only after careful consideration and consultation with law enforcement agencies and sentencing experts.

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315 See S. Comm. on the Judiciary, *Results of Executive Business Meeting* (June 10, 2021), <https://www.judiciary.senate.gov/imo/media/doc/Results%20of%20Executive%20Business%20Meeting%20June%2010,%202021.pdf>.

316 *E.g.*, Second Look Act, H.R. 3795, 116th Cong. § 2 (2019); S. 2146, 116th Cong. § 3 (2019). As noted previously, *see supra* note 287, references to this and to other bills are intended merely to provide examples of possible reforms; they should not be taken as an endorsement of the bills or the provisions contained therein.

317 18 U.S.C. § 3582(c); Fed. R. Crim. P. 35(b).

### *Considering Alternatives to Incarceration in Appropriate Circumstances*

An additional category of sentencing-related reforms that deserves consideration under a family-centered approach to criminal justice policy is so-called “alternatives to incarceration.” These are programs that permit individuals convicted of crimes, in certain circumstances, to serve their sentences at home or in a residential facility under close supervision. The most well-known alternatives-to-incarceration programs are drug courts, specialized court dockets that offer individuals with substance abuse disorders who commit crimes related to their disorder (typically drug crimes) the ability to enter long-term treatment with intensive court supervision rather than receive a prison sentence.<sup>318</sup> Nationwide, there are more than 3,000 drug courts operating in all 50 states.<sup>319</sup> Other types of “problem-solving courts” that offer treatment and intensive supervision as an alternative to incarceration include mental health courts, which are designed for individuals with a mental health disorder that led to the commission of a crime, and operating while intoxicated (OWI) courts, which offer an alternative for individuals convicted of driving under the influence.<sup>320</sup> Typical eligibility requirements include that the offense charged must be nonviolent, the person must not have a prior violent felony conviction, the person must have a diagnosed substance abuse or mental health disorder, the offense charged must be related to the disorder, and the person must be willing to submit to treatment.<sup>321</sup>

An individual who selects a problem-solving court is placed under the court’s supervision and must follow a court-ordered program of treatment, drug and alcohol testing, and frequent court appearances.<sup>322</sup> At the beginning of the program, therapy sessions, drug tests, and court appearances may be weekly or even daily, but become gradually less frequent as the person moves through the program. Programs also typically involve mandatory self-help

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318 See *What Are Drug Courts?*, Nat’l Drug Court Res. Ctr., <https://ndcrc.org/what-are-drug-courts> (last visited Dec. 4, 2021).

319 See *National Resources*, Mich. Ass’n of Treatment Court Prof’ls, <https://www.matcp.org/national-resources.html> (last visited Dec. 4, 2021).

320 See Kim Gilhuly et al., Human Impact Partners, Healthier Lives, Stronger Families, Safer Communities: How Increasing Funding for Alternatives to Prison Will Save Lives and Money in Wisconsin 4 (2012), available at [https://humanimpact.org/wp-content/uploads/2017/09/wi\\_tip\\_hia\\_full\\_11\\_2012.pdf](https://humanimpact.org/wp-content/uploads/2017/09/wi_tip_hia_full_11_2012.pdf).

321 See *id.* at 8; see also Shelli B. Rossman et al., Urban Inst., The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience 10-13 (2011) [hereinafter Rossman et al., Drug Court Experience], available at <https://www.ojp.gov/pdffiles1/nij/grants/237111.pdf>.

322 Gilhuly et al., *supra* note 320, at 8; see also Rossman et al., Drug Court Experience, *supra* note 321, at 14-16.

meetings, educational sessions, and job training.<sup>323</sup> Depending on the jurisdiction, participants may receive a deferred or suspended sentence while in the program, or prosecution may be deferred altogether.<sup>324</sup> Participants who successfully complete their treatment program and other court-ordered conditions can have their underlying charges dismissed or expunged. Individuals who fail to complete the program—which may occur if the person fails to attend meetings or court appearances, fails to remain sober, or commits another crime while in the program—return to the traditional court docket, and their cases are processed as they otherwise would have been.<sup>325</sup>

Studies have found that problem-solving courts can do a better job of helping individuals reduce substance abuse and avoid mental health relapses than other programs such as traditional probation or court-mandated treatment in prison. One study of drug courts in eight states, for example, found that participants were roughly 25 percent less likely to report using drugs or alcohol in the 6-to-18 month period after beginning the program than individuals in a control group.<sup>326</sup> Participants were also 37 percent less likely to test positive for illegal drugs at an 18-month interview.<sup>327</sup> Evaluations of mental health courts, in turn, have found dramatic reductions in the percentage of participants hospitalized for psychiatric reasons in the year following completion of the program compared to the year prior to entering the program, as well as a significant reduction in the number of inpatient treatment days.<sup>328</sup>

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323 Gilhuly et al., *supra* note 320, at 8.

324 *What Are Drug Courts?*, *supra* note 318; see also Shelli B. Rossman et al., Urban Inst., The Multi-Site Adult Drug Court Evaluation: Study Overview and Design 7 (2011), available at <https://www.ojp.gov/pdffiles1/nij/grants/237109.pdf>.

325 *What Are Drug Courts?*, *supra* note 318.

326 Shelli B. Rossman et al., Urban Inst., The Multi-Site Adult Drug Court Evaluation: Executive Summary 5 (2011) [hereinafter Rossman et al., Executive Summary], available at <https://www.ojp.gov/pdffiles1/nij/grants/237108.pdf>. The reported rates of use in the 6-to-18-month period after beginning the program were 56 percent for drug court participants, compared to 76 percent for the control group. *Id.*

327 *Id.* The positive test rate for drug court participants was 29 percent, compared to 46 percent for the control group. *Id.*

328 See Kelly O’Keefe, Ctr. for Court Innovation, The Brooklyn Mental Health Court Evaluation: Planning, Implementation, Courtroom Dynamics, and Participant Outcomes 52 (2006), available at <https://www.courtinnovation.org/sites/default/files/BMHCEvaluation.pdf> (finding that the percentage of participants in Brooklyn, New York mental health court hospitalized for psychiatric reasons declined from 50 percent in the year prior to entering the program to 19 percent in the year after entering the program); Heidi A. Herinckx et al., *Rearrest and Linkage to Mental Health Services Among Clients of the Clark County Mental Health Court Program*, 56 *Psychiatric Servs.* 853, 856 (2005) (finding that the number of inpatient psychiatric treatment days for participants in Clark County, Washington mental health court program declined from an average of 145 days in the year prior to enrollment to 37 days in the year following enrollment).

Problem-solving courts have also shown promise in reducing recidivism. A study by the Government Accountability Office of 32 drug courts found that the rearrest rates for individuals who had completed the programs ranged from 12 to 58 percentage points lower than for individuals in a control group.<sup>329</sup> In a similar vein, the eight-state study described above found that the percentage of drug court participants who reported committing a crime in the previous 12 months was approximately 25 percent lower than individuals in a control group.<sup>330</sup> A third study that aggregated results from over 150 independent drug court evaluations likewise found that recidivism rates for drug court participants were approximately 25 percent lower than rates for corresponding non-participants.<sup>331</sup> Research on the recidivism effects of mental health courts is more limited, although one study of mental health courts in Clark County, Washington (home of Vancouver, Washington) found that the percentage of program participants who qualified as “frequent offenders”—defined as individuals with three or more arrests in a 12-month period—declined from 26 percent in the year prior to enrollment to less than 3 percent in the year after enrollment.<sup>332</sup> Fifty-four percent of program participants had no arrests in the year following enrollment.<sup>333</sup>

These sorts of positive outcomes support the view that policymakers should consider ways to improve and expand the use of problem-solving courts as alternatives to incarceration in appropriate circumstances, particularly for first-time, nonviolent offenses. Consideration of family impacts adds further weight to this view. Participants typically complete treatment in their communities, either at home or in a residential treatment facility, depending on the nature of their disorder and the court conditions imposed.<sup>334</sup> This reduces disruption to family relationships and also enables participants to retain employment. According to one survey of programs in Wisconsin, “[t]hose who participate

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329 U.S. Gov’t Accountability Office, GAO-12-53, *Adult Drug Courts: Studies Show Courts Reduce Recidivism, but DOJ Could Enhance Future Performance Measure Revision Efforts 19-20* (2011), available at <https://www.gao.gov/assets/gao-12-53.pdf>.

330 Rossman et al., Executive Summary, *supra* note 326, at 5. The percentage of drug court participants who reported committing a crime in the past 12 months was 40 percent, compared to 53 percent in the control group. *Id.*

331 Ojmarh Mitchell et al., *The Campbell Collaboration, Drug Courts’ Effects on Criminal Offending for Juveniles and Adults 7* (2011), available at <https://onlinelibrary.wiley.com/doi/epdf/10.4073/csr.2012.4>. The average recidivism rate for drug court participants across the aggregated evaluations was 38 percent, compared to 50 percent for non-participants. *Id.*

332 Herinckx et al., *supra* note 328, at 855.

333 *Id.*

334 See Gillhuly et al., *supra* note 320, at 5 (noting that problem-solving courts “allow low-risk, non-violent offenders to remain in the community while complying with mandated treatment”).



in a problem solving court are more likely to be employed and make more money than those who are incarcerated.<sup>335</sup> Indeed, many programs require participants to seek employment or job training and offer incentives for participants who enter an educational or vocational training program, complete such a program, or obtain employment.<sup>336</sup> The result is that family members may be less likely to suffer financial hardship when a person begins a treatment program through a problem-solving court than when a person is sent to prison, particularly when the person is a primary financial provider for the family.<sup>337</sup>

Problem-solving courts and other alternatives to incarceration that allow individuals to remain in their communities and continue providing financial support to their families thus align well with a family-centered approach to criminal justice reform. It should be emphasized that such alternatives should be used only in appropriate circumstances. In particular, they should not become a get-out-of-jail-free card for serial offenders or individuals who have caused substantial harm to others or to their communities. But for individuals with a limited criminal history facing charges for a nonviolent offense, they may be an appropriate way to limit the negative consequences that incarceration has on families and children, as well as the barriers a prison sentence can create for future employment and housing opportunities.

Several states have experimented with alternatives-to-incarceration programs that are designed specifically for parents of minor children. In 2010, the State of Washington created the Parenting Sentencing Alternative, which authorizes judges to sentence parents of minor children convicted of a nonviolent offense carrying a sentence of more than one year to “community custody” (which may include home confinement or other geographic restrictions) rather than prison under certain circumstances.<sup>338</sup> To qualify, an individual must have custody of his or her children at the time of the offense, must not have any prior convictions for a violent or sex felony, and must be facing a presumptive prison sentence.<sup>339</sup> The court may impose various treatment and other rehabilitation-related conditions as part of the sentence and may also request a risk assess-

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335 *Id.* at 29.

336 Rossman et al., Drug Court Experience, *supra* note 321, at 18.

337 See Gilhuly et al., *supra* note 320, at 29.

338 See S.B. 6639 (Wash. 2010) (signed into law Mar. 26, 2010). Principal portions of the law are codified at Wash. Rev. Code §§ 9.94A.655 and 9.94A.6551.

339 Wash. Rev. Code § 9.94A.655(1); see also *Parenting Sentencing Alternative (PSA)*, Wash. State Dep’t of Corr., <https://www.doc.wa.gov/corrections/justice/sentencing/parenting-alternative.htm> (last visited Dec. 4, 2021).

ment from the state Department of Corrections prior to sentencing.<sup>340</sup> Under the Community Parenting Alternative, parents of minor children serving a prison sentence for a nonviolent offense (or who have not been determined to have a high risk of reoffending) may be eligible to serve the last 12 months of their sentence under home confinement.<sup>341</sup> To qualify, an individual must either have custody of his or her children or must have a “proven, established, ongoing, and substantial relationship” with his or her children “that existed at the time of the offense.”<sup>342</sup> Individuals who fail to comply with the conditions for home confinement or any other program conditions may be returned to prison.<sup>343</sup> According to the Washington State Department of Corrections, approximately 80 percent of individuals placed in these programs successfully complete them.<sup>344</sup> Less than 10 percent of individuals who complete the programs return to prison on a new felony conviction.<sup>345</sup>

Oregon has found similar success with a program called the Family Sentencing Alternative Pilot Program (FSAPP), which began operation in 2016.<sup>346</sup> Under this program, parents of minor children convicted of a nonviolent offense carrying a sentence of more than one year may qualify to serve an alternative sentence of probation under strict court supervision.<sup>347</sup> To be eligible, the individual must have custody of his or her children at the time of the offense, must not have any prior convictions for a violent or sex felony, and must comply with all court-mandated conditions regarding geographic restrictions (such as home confinement and electronic monitoring), drug or alcohol treatment, and vocational training.<sup>348</sup> Failure to comply with these conditions may result in revocation of program participation and incarceration.<sup>349</sup> An evaluation of the program in 2021—five years after it was first instituted—

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340 Wash. Rev. Code § 9.94A.655(3), (6).

341 *Id.* § 9.94A.6551(1); see also *Community Parenting Alternative (CPA)*, Wash. State Dep’t of Corr., <https://www.doc.wa.gov/corrections/justice/sentencing/community-parenting.htm> (last visited Dec. 4, 2021).

342 Wash. Rev. Code § 9.94A.6551(1).

343 *Id.* § 9.94A.6551(6)-(7).

344 Wash. State Dep’t of Corr., Parenting Sentencing Alternative Fact Sheet 1 (2017), available at [https://justicestrategies.org/sites/default/files/FOSA\\_CPA\\_FACT\\_SHEET\\_3.pdf](https://justicestrategies.org/sites/default/files/FOSA_CPA_FACT_SHEET_3.pdf).

345 *Id.*

346 See H.B. 3503 (Or. 2015) (signed into law Aug. 12, 2015).

347 *Id.* § 1. The statute uses the term “person felony” to denote the sorts of crimes typically referred to as violent offenses. Compare *id.* § 1(2)(b)(A) (disqualifying individuals who have been convicted of a “person felony”), with Or. Crim. Justice Comm’n R. 213-003-0001(14) (defining “person felonies”).

348 H.B. 3503, § 1(2), (4).

349 See *id.* § 1(4).

found that recidivism rates for individuals in the program were between 12 and 17 percentage points lower three years after conviction than for individuals in a comparison group who did not participate in the program.<sup>350</sup>

In 2019, Tennessee enacted a law that directs judges to consider “community-based alternatives to confinement” when sentencing an individual who is the “primary caregiver of a dependent child” for a nonviolent offense.<sup>351</sup> The law additionally directs judges to consider “the benefits that imposing such alternatives may provide to the community.”<sup>352</sup> Although less detailed than the Washington and Oregon schemes, the Tennessee law reflects a similar legislative judgment that alternatives to incarceration may be particularly appropriate where an offense is nonviolent and the individual is responsible for one or more minor children.

Other jurisdictions would do well to study the impacts of these laws and other ways in which alternatives-to-incarceration programs could be tailored to the needs of families and children. As before, such programs should not be used as get-out-of-jail-free cards for serial offenders or individuals who have caused significant harm. But it certainly makes sense to consider family impacts when determining whether alternatives to incarceration may be appropriate. The harm that incarceration causes to children and other family members, as well as its negative long-term impacts on family income and employment opportunities, weigh in favor of exploring alternative ways to adequately punish and rehabilitate offenders—provided those alternatives meet the needs of public safety and provide sufficient incentives to avoid reoffending (or offending in the first place).

### *Overcriminalization*

The punishment discussion thus far has focused on sentencing and how a family-centered approach to criminal justice reform can inform how sentences should be determined and handed down. But there is another, equally important aspect of the punishment conversation to which principles of parsimony and family impacts also apply, and that is what sorts of conduct should be subject to criminal penalties in the first place.

Over the past decade, there has been increasing recognition in a number of quarters that there are too many criminal laws on the books that reach too much conduct that could better be addressed through civil penalties or other

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350 Or. Dep’t of Human Servs., Family Sentencing Alternative Pilot Program: Report to the Senate and House Committees on Judiciary 6 (2021), *available at* [https://www.oregonlegislature.gov/citizen\\_engagement/Reports/Joint%20Family%20Sentencing%20Alternative%20Pilot%20Project%20Report%201\\_1\\_2021.pdf](https://www.oregonlegislature.gov/citizen_engagement/Reports/Joint%20Family%20Sentencing%20Alternative%20Pilot%20Project%20Report%201_1_2021.pdf).

351 S.B. 985, § 1 (Tenn. 2019) (codified at Tenn. Code § 40-35-103(7)).

352 *Id.*

means.<sup>353</sup> This phenomenon is often referred to as “overcriminalization.”<sup>354</sup> As explained by James R. Copland and Rafael Mangual of the Manhattan Institute, overcriminalization has two core components. First is the “rapid growth in the number of criminally enforceable rules and regulations—particularly those regarding conduct that is not intuitively thought of as criminal.”<sup>355</sup> Second is “the erosion of traditional intent requirements and other due-process protections in criminal cases.”<sup>356</sup> The result is increasingly expensive “transaction costs” for individuals seeking to comply with seemingly unending legal requirements, coupled with a heightened “risk of becoming entangled in the ever-growing web of [federal and] state criminal law.”<sup>357</sup>

The statistics on overcriminalization speak for themselves. In 1877, there were 200 crimes in the U.S. Code.<sup>358</sup> By the early 1980s, that number had swelled to 3,000.<sup>359</sup> Fast forward to 2008—the date of the most recent effort to create a comprehensive count—and the total was nearly 4,500.<sup>360</sup> According to one report, “Congress has created an average of 56 new crimes every year since 2000.”<sup>361</sup> And these figures include only statutory crimes, that is, crimes found in federal statutes. If regulatory crimes—regulations that are enforceable by criminal penalties—are included in the count, the number

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353 See, e.g., James R. Copland & Rafael A. Mangual, Manhattan Inst., *Overcriminalizing America: An Overview and Model Legislation for the States* 5-9 (2018), available at <https://media4.manhattan-institute.org/sites/default/files/R-JC-0818.pdf>; John-Michael Seibler & Jonathan M. Zalewski, Heritage Found., *Overcriminalization in the 115th Congress* 1-2 (2019), available at <https://www.heritage.org/sites/default/files/2019-03/LM-242.pdf>; Press Release, ACLU, *Bipartisan Task Force on Over-Criminalization a Step in Right Direction, Says ACLU* (May 7, 2013), available at <https://www.aclu.org/press-releases/bipartisan-task-force-over-criminalization-step-right-direction-says-aclu>; *Task Force on Overcriminalization*, Am. Bar Ass’n, <https://www.americanbar.org/groups/litigation/initiatives/overcriminalization> (last visited Dec. 4, 2021).

354 See Copland & Mangual, *supra* note 353, at 4.

355 *Id.*

356 *Id.*

357 *Id.* at 8.

358 Seibler & Zalewski, *supra* note 353, at 3.

359 John Baker, Heritage Found., *Revisiting the Explosive Growth of Federal Crimes* (June, 16, 2008), <https://www.heritage.org/report/revisiting-the-explosive-growth-federal-crimes> (describing count conducted by the U.S. Department of Justice).

360 *Id.*

361 Stephen F. Smith, Heritage Found., *A Judicial Cure for the Disease of Overcriminalization* 2 (2014), available at <https://www.heritage.org/courts/report/judicial-cure-the-disease-overcriminalization>.

explodes to an estimated 300,000 federal crimes,<sup>362</sup> although no one knows the exact number, because no one has ever been able to tally them all up.<sup>363</sup>

Overcriminalization has been a growing problem at the state level as well. One study of five states (Michigan, Minnesota, North Carolina, Oklahoma, and South Carolina) found that over the course of six years, the states created an average of 42 new crimes each year.<sup>364</sup> An examination of the *length* of the five states' criminal codes was equally revealing. The codes ranged from 129,000 words on the low end to 293,000 words on the high end—well over “500 pages of 10-point, double-spaced Times New Roman text.”<sup>365</sup>

Equally important as the explosion in the *number* of crimes has been the fact that many of these crimes prohibit conduct that an average person would have no reason to think was unlawful. Stories abound of individuals being arrested, charged, and even convicted for seemingly innocent behavior. In 2016, an Oklahoma bartender was prosecuted for serving vodka infused with flavors like pickles and bacon.<sup>366</sup> In 2012 a Minnesota man was jailed for failing to complete the siding on his house.<sup>367</sup> In 2014, a Florida pastor was threatened with 60 days in jail and a \$500 fine for feeding the homeless in a local park.<sup>368</sup> In the early 2000s, a Florida fisherman was sentenced to over eight years in prison for importing lobsters in plastic packaging rather than cardboard.<sup>369</sup> (Even more remarkably, no U.S. law prohibited the use of plastic packaging. Instead, the man was convicted based on the court's conclusion that the importation violated a *Honduran* regulation that the Honduran

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362 See Paul J. Larkin, Jr. *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. & Pub. Pol'y 715, 729 (2013).

363 Michael B. Mukasey & Paul J. Larkin, Jr., Heritage Found., *The Perils of Overcriminalization* 1 (2015), available at [http://thf\\_media.s3.amazonaws.com/2015/pdf/LM146.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/LM146.pdf).

364 Copland & Mangual, *supra* note 353, at 7.

365 *Id.* at 6.

366 Brian Hardzinski, *Arrest over 'Bacon Vodka' Prompts Questions from Oklahoma's Alcohol Commission*, KGOU (June 23, 2016), <https://www.kgou.org/native-american/2016-06-23/arrest-over-bacon-vodka-prompts-questions-from-oklahomas-alcohol-commission>.

367 Madeleine Morgenstern, *Minnesota Man Thrown in Jail for . . . Failing to Put up Siding on His Home*, Blaze Media (Mar. 21, 2012), <https://www.theblaze.com/news/2012/03/21/minnesota-man-thrown-in-jail-for-failing-to-put-up-siding-on-his-home>.

368 Jordan Richardson, *Pastor Charged with Criminal Penalty for Feeding the Homeless*, Daily Signal (Nov. 6, 2014), <https://www.dailysignal.com/2014/11/06/pastor-charged-criminal-penalty-feeding-homeless>.

369 Brian Walsh, *The Worst Thing that Anybody Can Do to You Is Take Away Your Freedom*, Daily Signal (Aug. 8, 2011), <https://www.dailysignal.com/2011/08/08/the-worst-thing-that-anybody-can-do-to-you-is-take-away-your-freedom>.

Attorney General said did not even apply.<sup>370</sup> These and other countless stories highlight the ways in which overcriminalization can ensnare individuals for mundane or seemingly innocuous behavior, in some cases leading to jail time and even a felony record for conduct that most people would have no reason to think was wrong.

Other laws duplicate existing offenses or appear to any rational observer downright silly. North Carolina, for example, has a law that criminalizes the theft, destruction, or vandalizing of portable toilets.<sup>371</sup> Why it is necessary to have a separate criminal statute just for portable toilets when North Carolina law already outlaws theft (larceny) and injury to property generally is unclear.<sup>372</sup> South Carolina, in turn, makes it a criminal offense to practice fortune telling without a license.<sup>373</sup> One can only imagine the horrors that might befall the Palmetto State if palm readers and psychics were permitted to tell the future without first getting a license from the local county clerk. Federal law similarly abounds with frivolous or seemingly pointless criminal prohibitions.<sup>374</sup>

Many of these crimes also lack adequate criminal intent standards. In order to commit a crime, a person must both engage in an unlawful act and do so with the required level of criminal intent, also called *mens rea* (Latin for “guilty mind”).<sup>375</sup> Only if the prosecution can prove that the defendant committed the prohibited act *and* did so with the necessary criminal intent can the person be found guilty.<sup>376</sup> Criminal intent standards protect the innocent by helping to ensure that criminal penalties attach only to truly culpable conduct and that otherwise law-abiding individuals do not find themselves caught up in the criminal justice system for accidental behavior or honest mistakes.<sup>377</sup>

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370 *Id.*

371 N.C. Gen. Stat. § 14-86.2.

372 *See id.* § 14-72 (larceny); *id.* § 14-160 (injury to personal property).

373 S.C. Code § 40-41-310.

374 *See, e.g.,* Jason Pye, *19 Ridiculous Federal Criminal Laws and Regulations*, FreedomWorks (Jan. 14, 2016), <https://www.freedomworks.org/content/19-ridiculous-federal-criminal-laws-and-regulations>.

375 Paul Rosenzweig, Heritage Found., *Congress Doesn't Know Its Own Mind—And That Makes You a Criminal* 3 (2013), *available at* [http://thf\\_media.s3.amazonaws.com/2013/pdf/lm98.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/lm98.pdf).

376 *See id.*

377 *See, e.g., Mens Rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary*, 113th Cong. 3 (2013) (statement of Rep. Bobby Scott (D-Va.)), *available at*

Criminal law recognizes various levels of intent, from “willfulness” (awareness that the act was unlawful), to “knowledge” (awareness that the act was practically certain to lead to a particular result), to “recklessness” (awareness that there was a substantial risk the act could cause harm), to “negligence” (failure to exercise the level of care a reasonable person would have exercised under the circumstances).<sup>378</sup> Some offenses, called “strict liability” offenses, do not require any criminal intent.<sup>379</sup> For these offenses, all the prosecution has to do is prove that the defendant committed the prohibited act, as well as establish any threshold jurisdictional requirements.

The problem is that many criminal laws do not specify what level of intent applies. For example, a review of Michigan’s state code found that of the over 3,100 crimes in the code, 27 percent of all felonies and nearly 60 percent of all misdemeanors contained no mens rea requirement.<sup>380</sup> This could mean that lawmakers intended the offense to be strict liability, or it could mean that the drafters simply failed to consider the question.<sup>381</sup> Or it could be the result of poor draftsmanship.<sup>382</sup> Whatever the reason, the failure to specify clear mens rea requirements breeds uncertainty and leaves the public at the mercy of aggressive enforcement officials. Coupled with the fact that many modern criminal laws outlaw conduct that the average person would have no reason to think was illegal (or even wrong), this is a significant problem.

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<http://www.gpo.gov/fdsys/pkg/CHRG-113hhr81984/pdf/CHRG-113hhr81984.pdf> (“The mens rea requirement has long served as an important role in protecting those who did not intend to commit a wrongful act from prosecution or conviction. . . . Without these protective elements in our criminal laws, honest citizens are at risk of being victimized and criminalized by poorly crafted legislation and overzealous prosecutors.”); *cf.* *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

378 John G. Malcolm, Heritage Found., *The Pressing Need for Mens Rea Reform* 3 (2015), available at [http://thf\\_media.s3.amazonaws.com/2015/pdf/LM160.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/LM160.pdf).

379 *Id.* at 4.

380 James R. Copland et al., Mackinac Ctr. for Pub. Policy, *Overcriminalizing the Wolverine State: A Primer and Possible Reforms for Michigan* 5 (2014), available at [https://media4.manhattan-institute.org/sites/default/files/ib\\_31.pdf](https://media4.manhattan-institute.org/sites/default/files/ib_31.pdf).

381 See Malcolm, *supra* note 378, at 6 (arguing that where a criminal statute fails to specify a mens rea requirement, it is possible “Congress truly intended to create a strict liability offense,” but “more likely [that] in the rush to pass legislation [Congress] simply neglected to consider the issue”).

382 See Copland & Mangual, *supra* note 353, at 8 (arguing that [s]ilence on intent in most cases . . . is a likely by-product of ad hoc decision making by different statutory drafters”).

A family-centered approach to criminal justice reform can inform conversations about overcriminalization in much the same way it can inform conversations about sentencing. The goal should be to identify the amount of punishment *necessary* to accomplish the varying goals these laws are trying to achieve, because the consequences of criminal punishment extend far beyond the individual being sentenced. They affect the person's children and family members as well. If the punishment includes incarceration, all of the negative impacts described at the outset of this paper come into play. If the punishment includes a fine, the person is left with less financial means to support his or her family. And no matter the punishment, the fact of a criminal conviction can trigger all sorts of collateral consequences that may make future employment, housing, and benefits significantly more challenging to obtain. Thus, when it comes to sentencing policy, the question should be how *much* punishment is necessary to accomplish the goals the statute is seeking to achieve. And when it comes to overcriminalization, the question should be whether it is necessary for the conduct proscribed by the statute to be punished criminally *in the first place*—as opposed to being dealt with through civil penalties or other sanctions. Evaluating the problem of overcriminalization through this lens can suggest a number of solutions.

First, and most obviously, policymakers need to get a handle on the actual number of criminal laws on the books and what those laws say. Remarkably, there is no comprehensive list anywhere of federal criminal offenses, statutory or regulatory. This makes it virtually impossible to ascertain, in any sort of systematic way, which criminal laws are unnecessary, duplicative, never enforced, or cover conduct better addressed through civil penalties or other sanctions. So the first thing to do is to “count the crimes.” Representative Chip Roy (R-Tex.) has introduced legislation to do just that. His bill, the Count the Crimes to Cut Act,<sup>383</sup> would direct the Attorney General to submit a report to Congress that contains a list of all federal criminal statutory offenses, including the elements of each offense, the potential criminal penalties for the offense, the number of prosecutions brought for the offense in the last 15 years, and the mens rea requirement for the offense.<sup>384</sup> The bill additionally directs federal agencies that administer regulations with potential criminal penalties to submit a report to Congress that contains a list of all the criminal regulatory offenses the agency can enforce, together with the potential criminal penalties for each offense, the number of times the agency has referred a violation of the offense to the U.S. Department of Justice for potential criminal prosecution in

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383 H.R. 5597, 117th Cong. (2021). The bill has three bipartisan co-sponsors (one Republican and two Democrats).

384 *Id.* § 2(b).



the last 15 years, and the mens rea requirement for the offense.<sup>385</sup> The Attorney General and covered agencies would also be required to post a publicly accessible index of the offenses online,<sup>386</sup> so that members of the public could more easily determine when particular conduct may be unlawful.

Similar “count the crimes” proposals have appeared in various other bills introduced in recent years, including the aforementioned legislation by Senators Durbin and Lee to reduce mandatory minimums<sup>387</sup> and a bill Senator Hatch introduced in 2018 with then-Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) to strengthen mens rea requirements in federal law (described further below).<sup>388</sup> Congress should get to work on enacting such a proposal so that it can move to the next stage of the process—cleaning up the criminal code. And of course, states should do likewise.

Once an inventory has been created of all the various criminal laws on the books, lawmakers can begin the process of reviewing these laws to identify ones that are duplicative, unnecessary, or never enforced, and thus potential candidates for repeal or consolidation with other laws. Particular attention should be given to the question of whether the conduct proscribed could be better dealt with through civil penalties such as civil fines or debarment (i.e., ineligibility to participate in certain activities for a period of time). Given the number of laws that will need to be reviewed, it may be appropriate to create a commission to undertake a systematic assessment and report back to Congress on its findings, with recommendations for action.<sup>389</sup> In 2014, Minnesota repealed nearly 1,200 “obsolete, unnecessary, and incomprehensible” laws following input from numerous state officials, legislators, and the general public.<sup>390</sup>

Another valuable reform would be to create a default mens rea requirement that applies where a statute or regulation fails to specify the level of criminal intent required for a given offense. This would help provide greater clarity and certainty regarding the prerequisites for criminal liability and avoid situations

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385 *Id.* § 2(c).

386 *Id.* § 2(d).

387 Smarter Sentencing Act, S. 1013, 117th Cong. § 5 (2021).

388 Mens Rea Reform Act, S. 3118, 115th Cong. § 102 (2018).

389 *Cf. id.* tit. II (providing for the establishment of a “National Criminal Justice Commission” to undertake a review of the criminal justice system and report back to Congress with recommendations for reform).

390 Bill Salisbury, *Minnesota ‘Unsession’ Drops 1,175 Obsolete, Silly Laws*, St. Paul Pioneer Press (May 26, 2014), <https://www.twincities.com/2014/05/26/minnesota-unsession-dumps-1175-obsolete-silly-laws>; *see also* Governor Mark Dayton, 2014 State of the State Speech (May 1, 2014), *available at* <https://www.governing.com/archive/gov-minnesota-gov-mark-dayton-2014-state-of-the-state-speech.html>.

where individuals find themselves facing potential criminal prosecution for honest mistakes or accidental behavior under overly aggressive interpretations advanced by enforcement officials. Senator Orrin Hatch introduced legislation in 2015 and 2017 to set a default mens rea requirement of willfulness for any federal offense that fails to specify the level of criminal intent required to commit the offense.<sup>391</sup> Senator Mike Lee has reintroduced the bill in the current Congress.<sup>392</sup> At the state level, at least fifteen states have enacted default mens rea statutes.<sup>393</sup>

To the extent there may be concern that an across-the-board default mens rea standard could hinder enforcement of certain laws or regulations, lawmakers could build into the default statute an effective date that would give enforcement officials time to review any laws or regulations within their jurisdiction that lack a mens rea requirement, identify offenses for which a standard other than the default would be appropriate, and then either amend the applicable regulation or seek to persuade Congress to add a mens rea requirement to the applicable statute. Senator Hatch introduced a revised default mens rea bill in 2018 together with then-Senate Judiciary Committee Chairman Chuck Grassley that would have done just that.<sup>394</sup> Senator Hatch's 2018 bill would also have created a commission to identify offenses that lack a mens rea requirement, identify any such offenses that—based on the severity of the penalties and the nature of the prohibited conduct—the commission believed should be strict liability, and propose language to clarify that the offenses should be treated as strict liability offenses.<sup>395</sup>

A final type of reform that policymakers should consider relates to the power of unelected agency officials to promulgate regulations carrying criminal penalties. As noted above,<sup>396</sup> the vast majority of federal offenses—over 98 percent, in fact—are created, not by statute, but by regulations that carry criminal penalties. This means that the overwhelming majority of criminal laws in our country (at least at the federal level) are written by politically unaccountable agency officials rather than popularly elected legislators and are buried within the 200-volume,

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391 Mens Rea Reform Act, S. 2298, 114th Cong. § 2 (2015); Mens Rea Reform Act, S. 1902, 115th Cong. § 2 (2017).

392 Mens Rea Reform Act, S. 739, 117th Cong. § 2 (2021).

393 See Copland & Mangual, *supra* note 353, at 9 & n. 41 (identifying Alaska, Arkansas, Delaware, Hawaii, Illinois, Kansas, Michigan, Missouri, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, and Utah as states with default mens rea provisions).

394 Mens Rea Reform Act, S. 3118, 115th Cong. § 101(a) (2018).

395 *Id.* § 101(b).

396 See sources cited *supra* notes 362-63 and accompanying text.

175,000-page Code of Federal Regulations (CFR).<sup>397</sup> Frequently what happens is Congress will pass a statute giving rulemaking authority to an agency over a certain subject or field, state that any violation of regulations promulgated under the statute shall be enforceable with criminal penalties, and then leave it to the agency to decide what the regulations should say and what conduct the regulations should prohibit.<sup>398</sup> Laying aside potential constitutional concerns with giving agencies the power to define crimes,<sup>399</sup> this means that the vast majority of federal criminal law is now arguably created without any real political check and that the tough decisions regarding what sorts of conduct are so harmful that criminal penalties should attach are made by agency employees, not elected representatives.

Opponents of this practice have proposed a variety of reforms, from stripping agency officials of the power to issue regulations with criminal penalties, to requiring legislators to ratify any such regulations, to limiting the sorts of penalties that may be imposed for regulatory violations (e.g., by providing that an individual cannot be imprisoned for violating a regulation).<sup>400</sup> Senator Hatch's 2018 default mens rea bill adopted a variant of the third approach, providing that as of an effective date, any regulatory offense without a mens rea requirement may not be enforced through criminal penalties.<sup>401</sup> This would allow agencies to create criminal regulatory offenses with knowledge, willfulness, or other criminal intent requirements, but would prevent them from creating strict liability crimes. Lawmakers would do well to consider additional potential solutions to this problem.

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397 See Gov't Printing Office, *Code of Federal Regulations (CFR) in Print*, <https://bookstore.gpo.gov/catalog/code-federal-regulations-cfrs-print> (last visited Dec. 4, 2021) (stating that “[a] full set of the CFR consists of approximately 200 volumes”); Clyde Wayne Crews, *New Data: Code of Federal Regulations Expanding, Faster Pace Under Obama*, Competitive Enter. Inst. (Mar. 17, 2014), <https://cei.org/blog/new-data-code-of-federal-regulations-expanding-faster-pace-under-obama> (stating that “at year-end 2013,” the CFR was 175,496 pages long).

398 See Michael Van Beek, *Administrative Law Can Make Any American a Criminal*, The Hill (Oct. 5, 2019), <https://thehill.com/opinion/criminal-justice/463911-administrative-law-can-make-any-american-a-criminal> (“Increasingly, when Congress and state legislatures enact laws, they leave many of the details to administrative agencies. A law they enact often will include an enforcement catch-all, which says that anyone violating any rules created to enforce it is guilty of a crime. But because bureaucrats, not lawmakers, actually determine these rules, they are the ones who decide what is criminal conduct and what is not.”).

399 See, e.g., Brenner M. Fissell, *When Agencies Make Criminal Law*, 10 U.C. Irvine L. Rev. 855, 880-906 (2020); cf. also *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorusch, J., dissenting).

400 See, e.g., Timothy Lynch, Cato Inst., *Overcriminalization*, in *Cato Handbook for Policymakers* 193, 197-98 (8th ed. 2017); Copland & Mangual, *supra* note 353, at 15.

401 Mens Rea Reform Act, S. 3118, 115th Cong. § 101(a) (2018).

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Because a criminal conviction and the incarceration that can follow can carry such far-reaching consequences for both the convicted individual and his or her family, policymakers should exercise great care both when setting punishment ranges and when deciding what sorts of conduct merit criminal punishment in the first place. An overly aggressive approach to sentencing or criminalization can result in a range of harms to family members and children that can be avoided, or at the very least reduced, through more carefully calibrated decision-making. Lawmakers should ask themselves how much criminal punishment is *necessary* to accomplish the goals they are seeking to achieve through a particular law or policy and then seek to marry that necessary amount of punishment to an appropriate penalty scheme. In some cases this may mean a long sentence; in others it may not. In some cases it may mean substantial criminal penalties; in other cases—perhaps a broad range of cases—it may mean civil penalties are all that’s needed. The goal should be to impose the amount of punishment that is necessary to meet the needs of safety and public welfare, but to avoid imposing *more* than is necessary, because imposing more than is necessary means unnecessary harm to the convicted individual, his or her family, and—perhaps most importantly—his or her children.

Part V  
Police Reform

A final topic for which a family-centered approach to criminal justice reform can provide potentially useful insights is police reform. Particularly following the death of George Floyd in May 2020, national attention has focused on challenges associated with—and ways to improve—police practices, training, and use-of-force policies.<sup>402</sup> Republican and Democratic members of Congress have introduced competing proposals to bring greater oversight and accountability to state and local law enforcement agencies. The Democratic bill, called the George Floyd Justice in Policing Act,<sup>403</sup> was introduced by Representative Karen Bass (D-Cal.) in the House and Senator Cory Booker in the Senate. The House bill passed the House of Representatives in June 2020 and again in March 2021 on near party-line votes.<sup>404</sup> The Republican proposal, called the Just and Unifying Solutions To Invigorate Communities Everywhere (JUSTICE) Act,<sup>405</sup> was introduced in the Senate in June 2020 by Senator Tim Scott (R-S.C.). The bill was supported by a majority of Senators, but did not receive enough votes to overcome a Democratic filibuster.<sup>406</sup> Throughout the spring and summer of 2021, Representative Bass and Senators Booker and Scott engaged in negotiations to try to reach agreement on a compromise bill that could enjoy bipartisan support.<sup>407</sup> Negotiations ended in September 2021 without success.<sup>408</sup>

### *Police Reform and Building Positive Relationships*

Like all aspects of criminal justice reform, police reform covers numerous subtopics. These range from how to improve officer training and preparedness, to how to define the circumstances in which use of force may be appropriate,

402 See, e.g., Orion Rummler, *The Major Police Reforms Enacted Since George Floyd's Death*, Axios (Oct. 1, 2020), <https://www.axios.com/police-reform-george-floyd-protest-2150b2dd-a6dc-4a0c-a1fb-62c2e999a03a.html>.

403 H.R. 7120, 116th Cong. (2020); S. 3912, 116th Cong. (2020). Representative Bass reintroduced the House bill in the current Congress as H.R. 1280, 117th Cong. (2021).

404 See U.S. House of Representatives, Roll Call 119, 116th Cong., 2d Sess. (June 25, 2020), <https://clerk.house.gov/Votes/2020119>; U.S. House of Representatives, Roll Call 60, 117th Cong., 1st Sess. (Mar. 3, 2021), <https://clerk.house.gov/Votes/202160>.

405 S. 3985, 116th Cong. (2020).

406 See U.S. Senate, Roll Call 126, 116th Cong., 2d Sess. (June 24, 2020), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=116&session=2&vote=00126](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=116&session=2&vote=00126). Representative Pete Stauber (R-Minn.) introduced a House version of the bill, H.R. 7278, 116th Cong. (2020). Representative Stauber reintroduced the bill in the current Congress as H.R. 677, 117th Cong. (2021).

407 Nikole Killion, *Congressional Policing Reform Negotiations Continue Despite Setbacks*, CBS News (July 7, 2021), <https://www.cbsnews.com/news/policing-reform-legislation-negotiations-continue-congress>.

408 Rachel Scott et al., *Bipartisan Police Reform Negotiations Over Without Deal*, ABC News (Sept. 22, 2021), <https://abcnews.go.com/Politics/bipartisan-police-reform-negotiations-deal-sources/story?id=80171751>.

to how to ensure accountability for police officers who violate civil rights or department standards. Although a family-centered approach may not be as directly on point for these sorts of questions as for some of the other subjects discussed previously, the insights that can be gleaned from the research on family impacts and the criminal justice system can suggest certain principles or points of focus to guide discussions.

First, as noted above,<sup>409</sup> relationships matter. This is apparent both in the way that the separation that accompanies incarceration negatively impacts children and family members and in the crucial link between family relationships and recidivism.<sup>410</sup> Strong relationships breed trust and support. They lead to greater collaboration and improve outcomes for all sides. Weak relationships do the opposite. This dynamic plays out similarly with law enforcement officers and the communities they serve. As the U.S. Commission on Civil Rights notes, “[r]esearch consistently shows that positive relationships between community members and law enforcement are essential for safer communities.”<sup>411</sup> When residents hold law enforcement officials in high regard and believe they can trust officials to carry out their duties fairly and without prejudice, residents are “more likely to report crimes, serve as witnesses, and comply with the law.”<sup>412</sup>

Second, communication matters. Take the example of prison visitation and recidivism. On the one hand, the connection between the two is not surprising. Strong family relationships are linked to reduced recidivism, and visitation is reflective of the strength of a relationship. On the other hand, the fact that receiving in-person visits while in prison makes a person less likely to reoffend in the months and years that follow is quite striking. This outcome is due no doubt in part to the fact that visitation helps to preserve family relationships during a period of significant physical and psychological separation, thereby helping to preserve an important building block for successful reentry. Communication and contact are core elements of creating—and maintaining—solid relationships. In order to build such relationships with the commu-

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409 *See supra* at 24.

410 *See* sources cited *supra* notes 14-73 and accompanying text.

411 U.S. Comm’n on Civil Rights, *Police Use of Force: An Examination of Modern Policing Practices 2* (2018) [hereinafter U.S. Comm’n on Civil Rights, *Police Use of Force*], available at <https://www.usccr.gov/pubs/2018/11-15-Police-Force.pdf> (citing Tom R. Tyler, *Why People Obey the Law* (2006); Ben Bradford & Jonathan Jackson, *Cooperating with the Police as an Act of Social Control: Trust and Neighborhood Concerns as Predictors of Public Assistance* (2016), available at <https://ssrn.com/abstract=1640958>).

412 *Id.* at 135-36 (citing Nancy La Vigne et al., *Urban Inst., How Do People in High-Crime, Low-Income Communities View the Police?* (2017), available at [https://www.urban.org/sites/default/files/publication/88476/how\\_do\\_people\\_in\\_high-crime\\_view\\_the\\_police.pdf](https://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf)).

nities they serve, it is important for law enforcement agencies to communicate to residents that they hear and appreciate their concerns and are working to address them.

Third, as also noted above,<sup>413</sup> simple steps can make a difference. Housing inmates closer to home can lead to increased visitation, which in turn can help reduce recidivism.<sup>414</sup> Providing formerly incarcerated individuals certificates of rehabilitation can help increase their odds of obtaining job callbacks and employment.<sup>415</sup> Solving problems doesn't always require a top-to-bottom overhaul. Intuitive, even obvious, changes can make a significant difference.

When it comes to police reform, these principles lead naturally to the following questions: What are some policies that could help to improve relationships between police officers and the communities they serve? Or alternatively, what are policies that have caused breakdowns of trust in the past that could be reformed or improved? And what are some simple steps that could make a difference?

### *Use-of-Force Policies, Chokeholds, and No-Knock Warrants*

One place to start is use-of-force policies. These are standards that delineate for officers—and the public—when force is appropriate, what level of force is appropriate, what steps officers need to take before employing force, and what officers should do following a use of force. According to a 2020 report by the President's Commission on Law Enforcement and the Administration of Justice, “the greatest source of distrust and disrespect for police today results from the unlawful use of force against citizens in the course of enforcing the law.”<sup>416</sup> The report therefore recommends that agencies issue “specific protocols and policies to minimize unjustified uses of force.”<sup>417</sup>

One potential blueprint for use-of-force policies is the “National Consensus Policy on Use of Force” published by the International Association of Chiefs of Police (IACP).<sup>418</sup> The result of a “collaborative effort” among 11 different national law enforcement organizations, the consensus policy states that “[o]fficers shall use force only when no reasonably effective alternative appears to exist and shall use only the level of force which a reasonably prudent officer would use under the same

413 See *supra* at 24.

414 See sources cited *supra* notes 86-108 and accompanying text.

415 See sources cited *supra* notes 200-206 and accompanying text.

416 President's Comm'n on Law Enforcement, *supra* note 73, at 5.

417 *Id.*

418 See Int'l Ass'n of Chiefs of Police, National Consensus Policy and Discussion Paper on Use of Force 2-4 (2020) [hereinafter IACP], available at [https://www.theiacp.org/sites/default/files/2020-07/National\\_Consensus\\_Policy\\_On\\_Use\\_Of\\_Force%2007102020%20v3.pdf](https://www.theiacp.org/sites/default/files/2020-07/National_Consensus_Policy_On_Use_Of_Force%2007102020%20v3.pdf).



or similar circumstances.”<sup>419</sup> The policy further provides that officers “shall use de-escalation techniques and other alternatives to higher levels of force consistent with [their] training whenever possible and appropriate before resorting to force and to reduce the need for force.”<sup>420</sup> Deadly force is authorized in only two situations: (1) “to protect the officer or others from what is reasonably believed to be an immediate threat of death or serious bodily injury”; or (2) “to prevent the escape of a fleeing subject when the officer has probable cause to believe that the person has committed, or intends to commit a felony involving serious bodily injury or death, and the officer reasonably believes that there is an imminent risk of serious bodily injury or death to the officer or another if the subject is not immediately apprehended.”<sup>421</sup>

The consensus policy additionally creates a “duty to intervene to prevent or stop the use of excessive force by another officer when it is safe and reasonable to do so,” and provides that officers shall “provide appropriate medical care consistent with [their] training” to injured individuals “[o]nce the scene is safe.”<sup>422</sup> All uses of force are to be “documented and investigated.”<sup>423</sup> These or similar standards<sup>424</sup> should be adopted and made publicly available by law enforcement agencies so that officers and residents alike know what policies officers are expected to follow and when officers will be held to account. Adopting, publishing, and—perhaps most important—*enforcing* use-of-force policies communicates to the public that agencies take seriously the need to ensure that officers use force only when appropriate and use only the level of force justified by the situation.

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419 *Id.* at 2. The 11 organizations that participated in the creation of the consensus policy were the Association of State Criminal Investigative Agencies, Commission on Accreditation for Law Enforcement Agencies, Fraternal Order of Police, Federal Law Enforcement Officers Association, International Association of Chiefs of Police, Hispanic American Police Command Officers Association, International Association of Directors of Law Enforcement Standards and Training, National Association of Police Organizations, National Association of Women Law Enforcement Executives, National Organization of Black Law Enforcement Executives, and National Tactical Officers Association.

*See id.* at 16.

420 *Id.* at 3.

421 *Id.* at 3-4.

422 *Id.* at 3.

423 *Id.*

424 Various other law enforcement and municipal leadership organizations have issued model use-of-force policies or guidelines for departments to follow. *See, e.g.*, Major Cities Chiefs Ass’n, Final Report of the MCCA Police Reform Working Group 5-7 (2021) [hereinafter MCCA], *available at* <https://majorcitieschiefs.com/wp-content/uploads/2021/03/MCCA-Police-Reform-Working-Group-Report.pdf>; U.S. Conference of Mayors, Report on Police Reform and Racial Justice 17-19 (2020), *available at* [https://www.usmayors.org/wp-content/uploads/2020/08/20.55.USCM\\_Police-Reform-Report.MEC\\_.pdf](https://www.usmayors.org/wp-content/uploads/2020/08/20.55.USCM_Police-Reform-Report.MEC_.pdf).

One particular use-of-force technique that has led to significant breakdowns of trust between officers and the communities they serve is the use of chokeholds to restrain individuals. The IACP consensus policy defines a chokehold as a “physical maneuver that restricts an individual’s ability to breathe for the purpose of incapacitation.”<sup>425</sup> A variation on this technique called a “carotid” chokehold (or “vascular neck restraint”) occurs when an officer “places an arm around the neck and puts pressure on the sides of the neck to slow the blood flowing through two large arteries to render the person unconscious.”<sup>426</sup> The use of chokeholds by police played significant roles in both the death of George Floyd in May 2020 and in the July 2014 death of Eric Garner in New York City.<sup>427</sup>

Given the “inherently dangerous nature” of chokeholds, which “can easily result in serious bodily injury or death,” many states and localities have banned their use by law enforcement.<sup>428</sup> The IACP consensus policy, for its part, prohibits chokeholds “unless deadly force is authorized.”<sup>429</sup> Policy statements by other law enforcement and municipal leadership organizations have adopted similar positions.<sup>430</sup> At the federal level, the Justice in Policing Act and JUSTICE Act would both prohibit the use of chokeholds by federal law enforcement and deny grant funding to states and localities that lack similar prohibitions, with the JUSTICE Act providing an exception for when deadly force is authorized.<sup>431</sup> The U.S. Department of Justice recently implemented a policy prohibiting the use of chokeholds by “Department law enforcement agents and correctional officers” (including FBI agents, DEA agents, U.S. Marshals, and Bureau of Prisons personnel) unless deadly force is authorized.<sup>432</sup>

425 IACP, *supra* note 418, at 3.

426 Lawrence J. Buckfire, *Lawsuits for Police Chokehold Deaths*, Nat’l L. Rev. (Nov. 23, 2020), <https://www.natlawreview.com/article/lawsuits-police-chokehold-deaths>; *see also* IACP, *supra* note 418, at 3.

427 Buckfire, *supra* note 426.

428 IACP, *supra* note 418, at 15; *see* Buckfire, *supra* note 426 (noting bans in California, Phoenix, and Washington, DC).

429 IACP, *supra* note 418, at 4.

430 *See, e.g.*, MCCA, *supra* note 424, at 6 (“[T]he MCCA supports banning all manipulations of the neck, such as chokeholds and carotid holds, as well as arm maneuvers, leg maneuvers, and other movements designed to restrict respiration capacity, unless an officer is in a fight for his or her life.”); U.S. Conference of Mayors, *supra* note 424, at 18 (“Using chokeholds, strangleholds, or any other carotid restraints should be banned, unless deadly force is necessary.”).

431 *See* George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. § 363 (2021); JUSTICE Act, S. 3985, 116th Cong. § 105 (2020).

432 Memorandum from Deputy Att’y Gen. Lisa Monaco to Law Enforcement Component Heads, U.S. Dep’t of Justice 2 (Sept. 13, 2021) [hereinafter Monaco Memorandum], available at <https://www.justice.gov/dag/page/file/1432531/download>.

Prohibiting the use of chokeholds except when deadly force is authorized is a commonsense, long-overdue measure that law enforcement agencies at all levels should adopt.

Another law enforcement tool that has generated significant controversy and led to the innocent loss of life is no-knock warrants. Although a no-knock warrant is not a use of force *per se*, it can create situations that can quickly escalate into violence and even death, as happened with Breonna Taylor in March 2020 in Louisville, Kentucky. A no-knock warrant “allows law enforcement to enter a property without notifying the occupants immediately prior to entering.”<sup>433</sup> They are typically used when law enforcement has reason to believe that announcing their presence prior to entry could create a danger to themselves or others or lead to the destruction of evidence.<sup>434</sup> Because no-knock warrants allow police to enter a person’s home without first announcing themselves, they can create confusion and lead residents to believe their home is being invaded by armed intruders.

In the case of Breonna Taylor, Taylor and her boyfriend, Kenneth Walker, were awakened in the middle of the night by a loud banging at their front door. Fearful that it was Taylor’s ex-boyfriend trying to break in, Walker fired a shot toward the door, which by that point had been broken off its hinges. The banging, however, had not been caused by Taylor’s ex-boyfriend, but by police officers seeking to execute a search warrant for drugs they believed Taylor’s ex-boyfriend might be storing at the apartment. The officers returned fire, striking Taylor five times. The officers later claimed to have identified themselves before entering the apartment, but Walker said that neither he nor Taylor ever heard any announcement. Taylor died at the scene.<sup>435</sup>

Following Taylor’s death, a number of states and localities have moved to ban or severely restrict the use of no-knock warrants. Louisville, for example, banned the use of no-knock warrants entirely, as have Florida, Oregon, and Virginia.<sup>436</sup> Kentucky enacted a partial ban, limiting no-knock warrants to instances where there is “clear and convincing” evidence that the crime being investigated “would

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433 MCCA, *supra* note 424, at 18.

434 See Micah Schwartzbach, *Knock-and-Announce Rule and No-Knock Warrants*, Nolo, <https://www.nolo.com/legal-encyclopedia/warrants-the-knock-notice-rule.html> (last visited Dec. 4, 2021).

435 Richard A. Oppel, Jr. et al., *What to Know About Breonna Taylor’s Death*, N.Y. Times (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html>.

436 *Id.* (Louisville); Piper Hudspeth Blackburn, *Kentucky Limits No-Knock Warrants After Breonna Taylor Death*, ABC News (Apr. 9, 2021), <https://abcnews.go.com/US/wireStory/kentucky-governor-signs-bill-limiting-knock-warrants-76973519> (Florida, Oregon, Virginia).

qualify a person, if convicted, as a violent offender” and that “giving notice prior to entry” would “endanger the life or safety of any person, or result in the loss or destruction of evidence” that would support a charge that “would qualify a person, if convicted, as a violent offender.”<sup>437</sup> The Kentucky law additionally provides that an officer seeking a no-knock warrant must “obtain[] the approval of his or her supervising officer”; that, “except in exigent circumstances,” such a warrant can be executed “only between the hours of 6 a.m. and 10 p.m.”; and that the officers executing the warrant must be equipped with body cameras and must be members of a special team that has been trained in the use of no-knock warrants.<sup>438</sup> A paramedic or emergency medical technician must also be “in proximity and available to provide medical assistance, if needed.”<sup>439</sup>

At the federal level, the Justice in Policing Act and the JUSTICE Act take differing approaches to the issue of no-knock warrants. The Justice in Policing Act would ban their use altogether in federal drug investigations and would deny grant funding to states and localities that lack a similar prohibition.<sup>440</sup> The JUSTICE Act, by contrast, would require states and localities receiving funds under the Byrne JAG grant program—the largest federal grant program for state and local law enforcement<sup>441</sup>—to submit an annual report to the Attorney General that details, for each no-knock warrant carried out by the jurisdiction that year, the reason for the warrant; any use of force, injury, or death that occurred in the course of executing the warrant; and the sex, race, ethnicity, and age of each person found at the location the warrant was executed.<sup>442</sup> The purpose of such reports would be to inform decisions regarding changes to no-knock warrant policies.

Virtually every organization that has examined the issue agrees that the use of no-knock warrants should be narrowly constrained. The Major City Chiefs Association (MCCA), for example, which represents the views of the chiefs of the largest police departments in the country, recommends that no-knock warrants “only be used in situations where an unannounced entry is necessary to ensure the safety of the officers, people inside the building, and the surrounding community.”<sup>443</sup>

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437 S.B. 4, § 1 (Ky. 2021) (codified at Ky. Rev. Stat. §§ 455.180-.200).

438 *Id.* §§ 1, 3.

439 *Id.* § 3.

440 H.R. 1280, 117th Cong. § 362 (2021).

441 See Nathaniel Lee, *Here’s How Two Federal Programs Helped Expand Police Funding by over 200% Since 1980*, CNBC (June 25, 2020), <https://www.cnbc.com/2020/06/25/two-federal-programs-helped-expand-police-funding-by-over-200percent.html>.

442 S. 3985, 116th Cong. § 102 (2020).

443 MCCA, *supra* note 424, at 18.

The MCCA also recommends prohibiting the use of no-knock warrants in drug cases unless there are “exigent circumstances related to life or safety” and states that such warrants should not “be used exclusively for the purpose of securing or preserving evidence.”<sup>444</sup> Like the Kentucky law referenced above, the MCCA recommends that requests for no-knock warrants should have to be approved by a senior agency official, such as the chief of police or the chief’s designee, and should be “served by specialized units” that have received training in executing no-knock warrants.<sup>445</sup> The U.S. Department of Justice recently adopted a policy for Department law enforcement agents that includes many of these characteristics. Among other things, the policy limits use of no-knock warrants to instances where there is reason to believe “knocking and announcing [an] agent’s presence would create an imminent threat of physical violence to the agent and/or another person” and requires agents to obtain approval from a supervising agent and supervising prosecutor before seeking such a warrant from the court.<sup>446</sup> A policy along these lines could make sense across all levels of law enforcement.

### *Training and Accountability*

It is not enough, however, merely for agencies to have clearly articulated use-of-force policies. Police departments and sheriff’s offices must also provide adequate training to officers regarding such policies and hold officers accountable when they contravene them. Accurate, consistent data collection is also essential to ensure that use-of-force policies are properly implemented, identify areas for improvement, and communicate to the public a correct understanding of the frequency of and circumstances surrounding officer uses of force.

With regard to training, agencies should provide use-of-force training at least annually for all officers and should ensure that such training includes both de-escalation and defusing techniques, as well as alternatives to use of force.<sup>447</sup> “Tactical training should include strategies to create time, space, and distance; to reduce the likelihood that force will be necessary; and should occur in realistic conditions appropriate to the department’s location.”<sup>448</sup> Training should focus on citizen interactions and should follow a problem-focused approach that teaches officers how they can work “to slow down actions before they escalate into a situation where an officer may feel that force is necessary.”<sup>449</sup>

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444 *Id.*

445 *Id.* at 18-19.

446 Monaco Memorandum, *supra* note 432, at 3.

447 See IACP, *supra* note 418, at 4; President’s Comm’n on Law Enforcement, *supra* note 73, at 221.

448 U.S. Comm’n on Civil Rights, Police Use of Force, *supra* note 411, at 5 (punctuation altered).

449 *Id.* at 114.

Remarkably, as of 2017, 34 states did not require officers to receive de-escalation training, and even in states that did require such training, the required amount could be as little as one hour per year.<sup>450</sup> A survey of more than 280 police departments conducted by the Police Executive Research Forum found that on average, new officers receive 58 hours of firearms training and 49 hours of defensive tactical training, but only 8 hours of de-escalation training.<sup>451</sup> De-escalation training must be a priority for law enforcement agencies and, like use-of-force policies, can communicate to the public that agencies place a high value on preserving life and avoiding unnecessary harm.

When it comes to ensuring accountability, there are a variety of measures agencies can and should take, including providing for independent or secondary review of misconduct investigations and ensuring that all uses of force are properly documented and investigated.<sup>452</sup> One measure that would both promote accountability and help ensure that officers who violate use-of-force standards or civil rights laws are not simply passed from agency to agency would be the creation of an officer misconduct registry. This would give agencies a streamlined way to check whether potential new hires have had incidents of abuse or other wrongdoing in the past and would also prevent officers from escaping accountability by moving to a new office.<sup>453</sup> Key considerations in creating such a registry include whether its contents should be publicly available, whether it should include all complaints against officers or only those complaints that have been sustained following investigation, and whether there should be a single national registry or whether states and localities should create separate, interoperable registries.

The Justice in Policing Act and JUSTICE Act take differing approaches to these questions. The Justice in Policing Act would create a national registry maintained by the U.S. Department of Justice that contains records of all complaints lodged against all federal and local law enforcement officers, including complaints that were later “determined to be unfounded or not sustained.”<sup>454</sup>

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450 Curtis Gilbert, *Not Trained to Not Kill: Most States Neglect Ordering Police to Learn De-Escalation Tactics to Avoid Shootings*, Am. Pub. Media (May 5, 2017), <https://www.apmreports.org/story/2017/05/05/police-de-escalation-training>.

451 Police Exec. Research Forum, *Re-Engineering Training on Police Use of Force 11* (2015), available at <https://www.policeforum.org/assets/reengineeringtraining1.pdf>.

452 See, e.g., President’s Comm’n on Law Enforcement, *supra* note 73, at 11-14.

453 See, e.g., MCCA, *supra* note 424, at 7 (stating that a misconduct registry would “provide agencies with additional information on potential hires,” “serve as a mechanism to help prevent law enforcement officers with histories of misconduct from moving between departments,” and “assist with navigating the patchwork of state and local sunshine laws that can complicate vetting new recruits”).

454 H.R. 1280, 117th Cong. § 201 (2021).

The Act further provides that the registry should be posted online in a way that allows members of the public to search for records of misconduct “involving a use of force or racial profiling.”<sup>455</sup> The JUSTICE Act, by contrast, would not create a national registry. Instead, it would require states and localities receiving funds under the Byrne JAG grant program to create their own records retention systems for complaints and other allegations of misconduct and would only require the inclusion of complaints that have been “substantiated and . . . adjudicated by a government agency or court” and that resulted in “adverse action by the employing law enforcement agency” or criminal charges.<sup>456</sup> The records systems also would not be publicly available. Rather, the JUSTICE Act would limit access to the employing agency and to other law enforcement agencies conducting checks “for the purpose of making a decision to hire a law enforcement officer.”<sup>457</sup> The MCCA, for its part, supports the creation of a national misconduct registry, but says the registry should include only “sustained” complaints (as opposed to “pending or exonerated complaints”) and should be treated as “law enforcement sensitive” (rather than made publicly accessible) to protect officer safety and privacy.<sup>458</sup> To the extent the primary goal of establishing a misconduct registry is to create a permanent record for misbehaving officers and ensure that officers are not able to escape accountability by changing jobs, the approach taken by the JUSTICE Act could make sense.

Another measure that can help promote accountability is requiring the use of body cameras by officers. Body cameras can provide first-hand, critical information about what transpired during an encounter and help resolve disputes where officers and residents offer competing stories. Studies have also shown that the use of body cameras can help reduce the number of complaints against officers, lead to improved behavior by both officers and residents, and expedite the resolution of complaints and lawsuits.<sup>459</sup> “Although there are limits on the data, researchers have found that both parties tend to behave more calmly when recorded and if the officer continues to remind suspects that they are being recorded.”<sup>460</sup>

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455 *Id.* § 201(e).

456 S. 3985, 116th Cong. § 301(a) (2020).

457 *Id.*

458 MCCA, *supra* note 424, at 7-8; *see also* Press Release, Nat’l Dist. Att’y’s Ass’n, NDAA Policy Recommendations on Improving the Criminal Justice System (June 16, 2020), *available at* [https://ndaa.org/wp-content/uploads/NDAA-Criminal-Justice-Policy-Statement\\_Final.pdf](https://ndaa.org/wp-content/uploads/NDAA-Criminal-Justice-Policy-Statement_Final.pdf) (stating that “the collection of data on officers with prior incidents of misconduct” should be done “in a way that respects privacy and due process”).

459 *See, e.g.*, Michael D. White, U.S. Dep’t of Justice, Office of Community Oriented Policing Servs., *Police Officer Body-Worn Cameras: Assessing the Evidence 19-24* (2014), *available at* [https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/diagnosticcenter\\_policeofficerbody-worncameras.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/diagnosticcenter_policeofficerbody-worncameras.pdf).

460 U.S. Comm’n on Civil Rights, *Police Use of Force*, *supra* note 411, at 65 (citing Lindsay Miller et al., U.S. Dep’t of Justice, Office of Community Oriented Policing Servs., *Implementing a*

Two of the primary challenges associated with body cameras are cost and ensuring they are turned on at the right times. With regard to cost, the most expensive aspect of body camera usage “is typically storing and processing the recorded data.”<sup>461</sup> Grants from the federal government and state agencies can be helpful in enabling law enforcement agencies with fewer resources to afford such costs.<sup>462</sup> With regard to ensuring body cameras are turned on at the right times, it is important for agencies to establish clear guidelines for when cameras are to be turned on, when they may be turned off, and how the data is to be stored.<sup>463</sup> Equally important, for the guidelines to be effective, officers who fail to adhere to them must face repercussions.<sup>464</sup> The Justice in Policing Act and JUSTICE Act both provide grants to states and localities to expand the use of body cameras and require grant recipients to have in place policies to ensure the proper use of cameras and storage of footage.<sup>465</sup>

### *Improved Data Collection*

Accurate data collection on officer uses of force and other incidents can also help strengthen relationships between law enforcement agencies and the communities they serve by identifying trends and potential areas for improvement and providing communities a fuller picture of officers’ activities. As the U.S. Commission on Civil Rights explains, “[w]ithout accurate data on police use of force, allegations by community members and actions by law enforcement” can “sow distrust among communities and the police, making policing more dangerous [and] jeopardiz[ing] public safety.”<sup>466</sup> Despite the importance of data collection, however, “[a]ccurate and comprehensive data regarding police uses of force is generally not available to police departments or the American public.”<sup>467</sup> This is because many local precincts and offices do not consistently

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Body-Worn Camera Program: Recommendations and Lessons Learned (2014), *available at* <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

461 MCCA, *supra* note 424, at 17.

462 *See id.* at 18 (“[T]he MCCA calls on the federal government to provide local law enforcement with additional funding to help obtain body worn cameras and cover other costs.”); *see also* Nat’l Dist. Att’y Ass’n, *supra* note 458 (stating that use of body cameras and “timely, transparent” review of footage “cannot be accomplished without sufficient funding for state and local prosecutors to ensure they have the staff and resources available to review the hours of footage an officer’s camera may collect”).

463 MCCA, *supra* note 424, at 17.

464 *See* U.S. Comm’n on Civil Rights, Police Use of Force, *supra* note 411, at 66-68.

465 George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. § 382 (2021); JUSTICE Act, S. 3985, 116th Cong. §§ 201-202 (2020).

466 U.S. Comm’n on Civil Rights, Police Use of Force, *supra* note 411, at 2.

467 *Id.* at 4.



track and report use-of-force data, particularly for nonfatal incidents or incidents involving nonlethal force.<sup>468</sup> Many agencies also do not track or report demographic information regarding the individuals involved.<sup>469</sup>

A number of states have recently enacted laws to improve the collection and reporting of data on officer uses of force. Arizona, for example, recently passed a law requiring law enforcement agencies within the state to report incidents involving death, serious bodily injury, or the discharge of a firearm to the state criminal justice commission.<sup>470</sup> Missouri passed similar legislation requiring agencies to report data on such incidents to the National Use of Force Data Collection program administrated by the FBI.<sup>471</sup>

At the federal level, the Justice in Policing Act would require states and localities receiving funds under the Byrne JAG grant program to report detailed information to the U.S. Department of Justice regarding use-of-force incidents, as well as information regarding traffic stops, pedestrians stops, and stop-and-frisks, including the race, ethnicity, age, and gender of the officers and members of the public involved.<sup>472</sup> The JUSTICE Act would require Byrne JAG grant recipients to report a more limited set of information, namely, information regarding incidents involving death, serious bodily injury, or discharge of a firearm.<sup>473</sup> The MCCA recommends that use-of-force reporting include *all* uses of force, including deadly force, non-deadly force, and any other physical contact (except contact pursuant to standard arrest procedures such as handcuffing or escorting an individual who has been taken into custody), as well as any instance in which an officer draws a firearm.<sup>474</sup> Where resources permit, collecting data as the MCCA recommends on *all* uses of force may be the most effective course of action, as it would provide the fullest picture of officer

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468 See Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. Pol. Econ. 1210, 1211 (2019) (“Data on lower level uses of force, which happen more frequently than officer-involved shootings, are virtually non-existent. This is due, in part, to the fact that most police precincts don’t explicitly collect data on use of force, and in part, to the fact that even when the data is hidden in plain view within police narrative accounts of interactions with civilians, it is exceedingly difficult to extract.”).

469 See Rob Arthur et al., *Shot by Cops and Forgotten*, Vice News (Dec. 11, 2017), <https://news.vice.com/story/shot-by-cops>.

470 H.B. 2168 (Ariz. 2021) (codified at Ariz. Rev. Stat. § 38-1117).

471 S.B. 26 (Mo. 2021) (codified at Mo. Rev. Stat. § 590.1265); see also S.B. 212 (Nev. 2021) (signed into law June 4, 2021) (requiring state law enforcement agencies to participate in the National Use of Force Data Collection program).

472 H.R. 1280, 117th Cong. §§ 118, 221-227 (2021).

473 S. 3985, 116th Cong. § 101 (2020).

474 MCCA, *supra* note 424, at 6.

behavior and help agencies and the public understand better what happens when deadly force is *not* used. At the very least, data collection on incidents involving death, deadly force, or the discharge of a firearm should be improved, standardized, and better reported.

### *Co-Responder Models, Residency Incentives, and Local Leadership*

Another reform that could help to improve relationships between law enforcement agencies and the communities they serve is to recognize that law enforcement officers may not always be the best responders to a particular situation. In many jurisdictions, law enforcement agencies have experienced a form of “mission creep” that has taken them beyond their core responsibility of protecting public safety and into the realm of acting as first responders for a variety of “complex social problems—such as mental health crises, substance abuse, and homelessness”—for which they lack adequate resources and training.<sup>475</sup> One 2019 study, for example, found that law enforcement officers spend approximately 20 percent of their time on the job responding to and transporting individuals experiencing mental health crises.<sup>476</sup> To address this dynamic, a number of experts have suggested that states and localities develop “integrated co-responder models,” under which officers “respond to certain calls for service jointly with mental or behavioral health specialists or other social service providers.”<sup>477</sup> In Salt Lake City, for example, the police department has a “team of social workers” who serve as co-responders to 911 calls that involve “mental health, suicide, substance use, or homelessness.”<sup>478</sup> Including trained mental health or medical professionals as responders where appropriate can help provide better service to individuals in crisis and also help prevent situations from escalating due to a lack of training or expertise in the particular type of crisis at issue.

Where resource and personnel limits make broader co-response programs infeasible, even simple steps like raising public awareness of alternatives to 911 or training emergency dispatchers to recognize when a non-law-enforcement-official may be a more appropriate responder could prove beneficial. In 2020, the Federal

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475 *Id.* at 12.

476 Treatment Advocacy Ctr., Road Runners: The Role and Impact of Law Enforcement in Transporting Individuals with Severe Mental Illness, a National Survey 9 (2019), *available at* <https://www.treatmentadvocacycenter.org/storage/documents/Road-Runners.pdf>.

477 MCCA, *supra* note 424, at 13; *see also* President’s Comm’n on Law Enforcement, *supra* note 73, at 45 (“Law enforcement agencies should have policies and procedures specifying officer response protocols for calls for service that involve individuals with a mental health disorder or substance use disorder or those who are homeless, including the integration of behavioral health professionals and other community services providers.”).

478 President’s Comm’n on Law Enforcement, *supra* note 73, at 47.

Communications Commission designated 988 as the number for the National Suicide Prevention Hotline.<sup>479</sup> Another three-digit phone number, 211, is “a short-cut for community information and referral services at the local level, providing an alternative to calling 911 for non-emergency, community service assistance.”<sup>480</sup> Among the subjects 211 call takers assist with are “behavioral health services, housing, food, or other local services.”<sup>481</sup> Raising awareness of these and other alternatives to 911 could help reduce calls to 911 service centers and the frequency with which officers are dispatched to situations for which a different type of responder might be more appropriate.

An additional idea that may be worth considering is creating incentives for officers to live in the communities they serve. According to a review of census data by *USA Today*, only about 31 percent of officers live in the city or town where they work.<sup>482</sup> Although researchers have not identified a strong link between officer residency requirements and improved community relations,<sup>483</sup> there have been indications in at least some situations that officers with stronger personal ties to a community, or a history of living in the community, can help reduce tensions or better connect with residents. In 2014, for example, following the shooting death of Michael Brown in Ferguson, Missouri, news reports indicated that the “arrival on the scene” of a Missouri State Highway Patrol captain named Ron Johnson who had grown up in Ferguson and who made an effort to “to walk among the protesters and talk to them one-on-one . . . sparked a dramatic shift in the mood in Ferguson.”<sup>484</sup> Thus, although not a panacea, it may be worth identifying ways to encourage officers to live closer to where they work. The Justice in Policing Act, for instance, would authorize grants for “initiatives to encourage residency in the jurisdiction served by the law enforcement agency” and to recruit and retain officers “who are willing to relocate to” the communities the officers serve.<sup>485</sup>

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479 Press Release, Fed. Commc’ns Comm’n, FCC Designates ‘988’ as 3-Digit Number for National Suicide Prevention Hotline (July 16, 2020), *available at* <https://docs.fcc.gov/public/attachments/DOC-365563A1.pdf>.

480 President’s Comm’n on Law Enforcement, *supra* note 73, at 42.

481 *Id.*

482 Grace Hauck & Mark Nichols, *Should Police Officers Be Required to Live in the Cities They Patrol? There’s No Evidence It Matters*, *USA Today* (June 13, 2020), <https://www.usatoday.com/story/news/nation/2020/06/13/police-residency-data/5327640002>.

483 *See id.*

484 Sarah Goodyear, *Should Cops Have to Live Where They Work?*, *Bloomberg CityLab* (Aug. 20, 2014), <https://www.bloomberg.com/news/articles/2014-08-20/should-cops-have-to-live-where-they-work>.

485 H.R. 1280, 117th Cong. §§ 114, 366 (2021).

As policymakers consider options for police reform, it is important to keep in mind the limitations on what can be achieved through federal law-making. As the above discussion illustrates, many initiatives at the federal level seek to accomplish reforms by placing conditions on the receipt of federal funds by state and local law enforcement agencies. The Justice in Policing Act, for example, seeks to limit the use of no-knock warrants in drug cases by denying funding to states and localities that permit their use in such cases.<sup>486</sup> But according to the National Criminal Justice Association, which represents state and local law enforcement agencies, the two largest federal grant programs for law enforcement uses—the Byrne JAG program and the COPS Hiring program—*combined* contribute less than 0.5 percent of state and local police budgets and reach fewer than 1 in 10 local law enforcement agencies.<sup>487</sup> Even for agencies that do receive funds, the cost of new federal mandates can easily outstrip the amount provided through Byrne JAG and other grant programs, rendering the use of grant conditions an ineffective means for accomplishing change.

Policing by and large is a local activity administered at the local level, and that is where the impetus for true change must come. The federal government can seek to set an example through enacting policies local agencies can follow and through wielding conditions on grants that may be significant for larger agencies, but the bulk of the effort needs to be directed at the state and local level. Which is appropriate, because the leaders and policymakers who are closest to their individual communities are the ones who will have the best read on what their communities need, what law enforcement officers in their community are doing well, and what can be improved.

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Although it may not be as directly on point as for the other subjects discussed above, a family-centered approach to criminal justice reform can still provide valuable insights for police reform discussions. First and foremost, relationships matter. Agencies should seek ways to build trust between officers and the communities they serve and should reevaluate and reform policies that lead to breakdowns of trust. Second, communication matters. Agencies can communicate to residents that they take seriously their concerns and are

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486 *Id.* § 362.

487 Nat'l Criminal Justice Ass'n, *Byrne JAG and COPS as a Percentage of Local and State Criminal Justice Budgets* (2021) (unpublished fact sheet) (on file with author); *see also Can Congress Force State Policing Reforms?*, *Ariz. State Univ. Crime & Just. News* (May 7, 2021), <https://crimeandjusticenews.asu.edu/can-congress-force-state-policing-reforms> (quoting NCJA as stating that “fewer than 1,500 of the nation’s 18,000 local law enforcement agencies receive any Byrne JAG or COPS funds”).

committed to increased transparency and accountability through a variety of means, including by adopting, publishing, and enforcing use-of-force policies; improving data collection and reporting; creating and maintaining misconduct registries; and enforcing body camera requirements. Third, simple steps can make a difference. Limiting the use of chokeholds and no-knock warrants, working to integrate social services providers with first responder teams where appropriate, and raising awareness of alternatives to 911 are all steps that can help reduce unnecessary uses of force and ensure that individuals in crisis get the help they need. Taken together, these measures can help to strengthen relationships, and improve communication, between law enforcement agencies and communities.

# Conclusion

Criminal justice policy is a far-reaching subject that involves a multitude of actors across all levels of federal, state, and local government. It seeks answers to some of society's most pressing questions, such as how we can keep our homes and communities safe, how we should deter and punish crime, and how we can help individuals who get off on the wrong track get themselves back on track. At the same time, criminal justice policy impacts an array of cross-cutting, interconnected populations, from individuals who commit crime, to individuals who are victims of crime, to individuals who live in communities where criminal activity takes place.

There is another, equally essential population that can and must be part of criminal justice reform discussions—the family members of individuals who become involved in the criminal justice system. Family members suffer when a loved one goes to prison, and may endure even greater suffering when the loved one comes home if he or she falls back into old patterns, reoffends, and returns to prison. Children may be the parties most injured by cycles of release and reincarceration, as research documents a wide variety of negative outcomes that children of incarcerated parents experience.

At the same time, family members are an essential part of the reentry process. Research shows that strong family relationships are associated with reduced recidivism, increased work hours, and better overall outcomes both for formerly incarcerated individuals and their families. Research also shows that contact with family members during incarceration can help to sustain those relationships, thereby contributing to an important component of successful reentry.

This paper has drawn on these insights to suggest a variety of steps policymakers can take to improve our criminal justice system and better align criminal justice policy with the needs and impacts of individuals in the criminal justice system and their families. The most straightforward connections relate to issues like inmate placement, contact with family members, and reentry policies. But the above insights can also inform discussions about sentencing practices, overcriminalization, and police reform. At the end of the day, what policymakers need to do is consider how their decisions impact *all* parties whose lives are affected by the criminal justice system. A family-centered approach can be a good place to start.

## ABOUT THE AUTHOR

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