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Undoing the Damage of the War on Drugs: A Renewed Call for Sentencing Reform
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Chairwoman Jackson Lee, Chairman Nadler, Ranking Member Jordan, Ranking Member Biggs, and Distinguished Members of the Subcommittee: Thank you for inviting me to testify on the topic of sentencing reform.

The United States leads the world in incarceration, and its harsh sentencing policies have separated families, destroyed communities, and produced gross racial disparities. The biggest tragedy of all is that these policies have not made us any safer. Just the opposite, too many severe sentences and punitive practices make crime more likely, not less.

In my remarks today, I would like to start by explaining what the evidence tells us about harsh punishments and crime. The conventional wisdom for decades has been that the more severe the punishment, the greater the crime fighting benefits. While that view might be common, it is mistaken. In fact, we have countless examples of excessively punitive practices that have been shown to cause more crimes than they prevent. This is true of excessively long sentences, of pretrial detention, and of collateral consequences attached to convictions. Yet that flawed premise – that we need to be as harsh as possible in response to criminal activity – underlies so many of our laws and practices, and it accounts for the rise of mass incarceration in the United States. We are spending a fortune on punitive practices that do not work to make us safer and, in fact, tend to make things worse.

Whether your concern is fiscal conservatism, racial justice, public safety, or fundamental respect for human dignity, all roads point to the same solutions. We need to roll back the harsh policies of the past four decades, make retroactive relief available for those punished under those laws, and adopt policies that we know work to reduce crime.

I will conclude by highlighting several specific policies that need reform. It is not an exhaustive list, but it will point out some of the major areas where we can promote public safety, save money, reduce racial disparities, and stop destroying families and communities. There are not many areas left in public life that offer this kind of win-win, but criminal law is one of them. That is why this has been the rare space of bipartisanship even in the polarizing times we live in, and it is my hope it will continue to be a place where we can come together to make us all better off.

I. The Costs of Excessive Punishment

For decades, Members of Congress and politicians around the country have hewed to the view that longer sentences promote public safety. They seem to believe that is true either because these harsh sentences and collateral consequences will deter the behavior from occurring in the first place, or because a long sentence incapacitates someone and therefore prevents that person from committing crimes while they are locked up. Both premises are flawed.

Let's start with the assumption that long sentences deter crime. It is one of the more settled aspects of criminology that the best way to deter crime is by increasing the odds of detection, not by changing the length of the sentence.[1] So if you have limited resources, you are better off spending them on mechanisms that improve detection and not increasing sanctions. Far too often, however, policymakers, including Congress, have ignored this evidence. For decades, the dominant approach in Congress and in the states has been to ratchet up punishments while clearance rates for violent crimes are abysmally low. Nationwide, the police solve less than half of all crimes involving physical violence, and in some communities the numbers are even lower. The clearance rate for homicides is less than 30% in some communities, and rates are lowest when the victim of the crime is Black.[2] If people think they have a 70% chance of committing a crime without getting caught, sentence length will do little to deter.

The problem with long sentences is not just that resources spent on sentencing could be better spent on detecting crime. Long sentences themselves can be harmful to public safety because they undermine public confidence in criminal laws. People see disproportionate sentences and lose faith that government is operating fairly and equitably. That, in turn, leads to reduced compliance with the laws themselves.[3] People stop reporting crimes and cooperating with law enforcement, which makes it harder to detect and solve crimes.[4] "If the legal system imposes more, or less, punishment on some crimes than citizens believe is deserved, the system seems unfair; it loses its credibility and, eventually, its effectiveness."[5]

Long sentences also undermine public safety because they make it that much harder for people to adjust when they are released from prison. Ninety-five percent of the people who are incarcerated return to free society.[6] We should want their reentry to be

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[1] COUNCIL OF ECONOMIC ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE JUSTICE SYSTEM 37-38 (2016); Steven Durlauf & Daniel Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13 (2011); Paul J. Larkin, Jr. *Swift, Certain, and Fair Punishment—24/7 Sobriety and HOPE: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders*, 105 J. CRIM. L. & CRIMINOLOGY 39 (2016).

[2] RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 161 (2019).

[3] Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 321 (2003).

[4] Tom R. Tyler, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCHOL. PUB. POL'Y & L. 78 (2014).

[5] STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE 53 (2012).

[6] TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE UNITED STATES, http://www.bjs.gov/content/reentry/reentry.cfm.

successful. But the longer they stay in prison, the harder that is.[7] "People who have served long periods of time in prison have a difficult time adjusting to an environment that is not highly controlled because their social skills and ability to make independent decisions atrophy when they are incarcerated."[8] And the greater number of people we incarcerate, which is a product of longer sentences, the more stretched prison resources become to provide rehabilitative programming and help to those who need it. For instance, a recent study of federal prisons found that the demand exceeded the capacity for many programs found to lower recidivism and assist with reentry.[9]

It is no wonder, then, that researchers find evidence that longer sentences can increase the risk of crime when people get out, even controlling for their underlying crime. For example, a study from Texas found that, after a certain point, each additional year of incarceration caused an *increase* in the risk of recidivism from 4-7%.[10]

Some might say that, even if these long sentences do not deter, at least they are incapacitating people from committing crimes outside the prison walls. But here, too, reality is much more complicated than this gut instinct. For starters, most people age of most criminal behaviors even without any government intervention.[11] In addition to aging out of crime, people stop committing crimes for other reasons, like addressing an underlying substance abuse problem or getting mental health treatment.[12] Keeping people behind bars for decades is thus not bringing any incapacitation benefit after a certain point because there is no criminal risk to incapacitate.

In addition, because most people eventually rejoin society, we need to weigh whatever incapacitation benefit we get against the increased risk of recidivism from longer terms of incarceration. And all too often, the risk outweighs the benefits precisely because the person would have stopped committing crimes but incarceration itself and time away from society has made it much harder for them to pursue a law-abiding path. A comprehensive analysis of this issue has concluded that, while "incarceration certainly reduces crime outside prison as long as it lasts, [it] appears to cause more crime later."[13]

The analysis thus far has considered the tradeoffs only from the perspective of the person serving the sentence. But long sentences have downsides that go beyond their effects on the offender. Long sentences cause enormous hardships to families, from the physical separation of parents and children, to lost wages that are often the difference between subsistence and ruin. It thus should come as no surprise that the children of incarcerated parents have an increased risk of a host of behavioral problems that, in turn, increase the risk that the children themselves will end up committing crimes.[14]

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[7] CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, TRANSFORMING PRISONS, RESTORING LIVES ix, 15 (2016).
[8] BARKOW, *supra* note 2, at 44.
[9] COLSON TASK FORCE, *supra* note 7, at 17.
[10] BARKOW, *supra* note 2, at 44.
[11] *Id.* at 44-45.
[12] *Id.* at 80-81.
[13] DAVID ROODMAN, THE IMPACTS OF INCARCERATION ON CRIME 98 (2017), http://files.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf.
[14] BARKOW, *supra* note 2, at 47-48.

When researchers have studied all these costs and benefits of long sentences, they have concluded the costs are too great to justify this approach.[15] Moreover, this analysis underestimates the costs of long sentences because it does not quantify the many things communities and families lose when people are incarcerated for excessive amounts of time.

The stories of people who are granted relief and released early provide a glimpse of the lost talent and productivity we are keeping behind bars. Gerald Tarboro received a 15-year sentence for drug charges. Thanks to the First Step Act, he was released four years earlier. Since his release in March 2019, he has been working as a welder, pursuing a graduate degree in Public Policy, and advocating for the rights of other people still incarcerated.

Or consider Rudy Martinez. He was given a life sentence as a first-time, non-violent drug offender. He was released after serving more than two-and-a-half decades in prison thanks to a commutation from President Obama. Since his release, he has been employed as a truck driver, attending community college to obtain an associate's degree in social work, and advocating for others.[16] He is a positive presence in the life of his children and his granddaughter.

There are countless stories just like Mr. Tarboro's and Mr. Martinez's.[17] People released through commutations, compassionate release, or retroactive sentencing adjustments are thriving despite the long odds against them, and all their contributions would have been lost had they been forced to serve the entirety of their original sentences. They are living proof of the costs of excessively long sentences.

But the costs of long sentences are all too often completely ignored. You can scour the Congressional Record from the 1980s and 1990s and not find any discussion of the downsides to long sentences. Instead, the assumption is the longer, the better. But in so many cases, these long sentences are leading to more crimes than they are preventing.

The best evidence demonstrating this point is looking to see what happens in places that have started to take a different course. We have seen jurisdiction after jurisdiction reduce sentences and reduce crime.[18] "[S]tates that lowered their incarceration rates have seen a greater drop in their crime rates than states where imprisonment rates have increased."[19]

This is not just a state phenomenon. We see the same positive results when federal sentences have been reduced. The United States Sentencing Commission has studied the effect of retroactive sentencing reductions on recidivism and found that shortening sentences does not increase recidivism. On multiple occasions, the

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[15] *Id.* at 49.
[16] Rudy Martinez, *Who Is My Brother's Keeper?*, 16 U. ST. THOMAS L.J. 353, 357 (2020).
[17] FAMM has an excellent collection of such stories, available at https://famm.org/stories/.
[18] PEW CHARITABLE TRUSTS, MOST STATES CUT IMPRISONMENT AND CRIME, http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/imprisonment-and-crime; BARKOW, *supra* note 2, at 43
[19] BARKOW, *supra* note 2, at 43.

Commission has compared the recidivism rates of those who receive sentencing reductions with similarly situated people who do not get the reductions solely because they served their full sentences before the changes were made. These are ideal comparison groups because the only difference between them is the sentence length. And the Commission has found, time and time again, that lowering sentences does not increase recidivism.[20]

Unfortunately, reductions at the federal level have been relatively rare, and retroactive adjustments in statutes have been even rarer. Instead, most often Congress has increased sentences on the assumption doing so is the right course for public safety. Its failure to consider the tradeoffs of an excessively punitive approach and the resulting damage it does to public safety is not limited to long sentences. We see the same counterproductive hit to public safety when we overuse pretrial detention,[21] fail to grant compassionate release or take other actions to correct excessive sentences[22] and impose harsh collateral consequences when someone is convicted.[23] In all these areas, we see that a "tough" approach actually backfires and makes crime more likely.

Congress may not have understood these tradeoffs at the peak of the drug war and tough-on-crime politics in the 1980s and 1990s, but we know better now. It is long past time to change the laws to take advantage of what we know about public safety.

It is particularly urgent given that these same policies not only fail to make us safer, but have so many other troubling outcomes. We incarcerate more people per capita than any other country on earth, and the negative consequences do not fall evenly on everyone in society. They disproportionately affect poor people and people of color.[24]

And we are not just punishing an individual with these sentences and draconian policies. We are punishing their innocent loved ones as well. Ironically, the law recognizes that third party effects have to be central to a punishment decision when the

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[20] U.S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 3 (2014) (2007 Amendment Report), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf; U.S. SENTENCING COMM'N, RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 1 (2018) (FSA Amendment Report), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf; U.S. SENTENCING COMM'N, RETROACTIVITY & RECIDIVISM: THE DRUGS MINUS TWO AMENDMENT 6 (2020) (Drugs Minus Two Report), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200708_Recidivism-Drugs-Minus-Two.pdf.

[21] CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, THE HIDDEN COSTS OF PRETRIAL DETENTION, LAURA AND JOHN ARNOLD FOUNDATION (Nov. 2013), https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf; Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

[22] BARKOW, *supra* note 2, 84-86

[23] *Id.* at 88-97.

[24] LEAH SAKALA, BREAKING DOWN MASS INCARCERATION IN THE 2010 CENSUS: STATE-BY-STATE INCARCERATION RATES BY RACE/ETHNICITY (May 28, 2014), https://www.prisonpolicy.org/reports/rates.html.

target is a corporation.[25] Yet when it comes to individuals, all too often the collateral damage to others is completely ignored.

II. Examples of Federal Laws and Policies that Undermine Public Safety

There are numerous examples of federal laws that stem from the flawed premise that they needed to be as harsh as possible, and these laws have turned out to be counterproductive to safety and fundamentally flawed in practice.

The biggest shift in federal punishment policy took place in the 1980s when Congress passed Comprehensive Crime Control Act of 1984 (CCCA).[26] Members of Congress on both sides of the aisle were dissatisfied with the federal approach to punishment that existed up to that point.[27] Under the pre-CCCA model, judges had wide discretion to set sentences, and the ultimate release date for a given person was determined by parole officials. Legislators lost faith in this model mainly because it rested on the idea of rehabilitation, with the parole board deciding when someone had rehabilitated and could therefore be released. A Senate report summed up the prevailing view of the time that "almost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated."[28] Many legislators (particularly those on the left) also wanted to address what they saw as unwarranted disparities associated with the wide discretion the indeterminate model gave judges and parole officials.[29] And still other legislators (particularly those on the right) thought the prior regime was flawed because the sentences were too lenient and not doing enough to prevent crime.[30]

The CCCA aimed to address these concerns and ushered in "the most significant series of changes in the federal criminal justice system ever enacted at one time."[31] A centerpiece of the CCCA was creating harsher punishments for federal offenses, including creating mandatory minimum sentences, increasing maximum sentences, raising fines, and expanding asset forfeiture.[32]

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[25] Rachel E. Barkow, *Using the Corporate Prosecution and Sentencing Model for Individuals: The Case for a Unified Federal Approach*, 83 LAW & CONTEMP. PROBS. 159, 175 (2020).

[26] Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

[27] Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 209-210 (2019).

[28] S. REP. NO. 98-225, at 38 (1983).

[29] *See* Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1079 (1992); Edward M. Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 356–57 (1979).

[30] *See* Barrett, *supra* note 27, at 1079; Donald W. Dowd, *What Frankel Hath Wrought*, 40 VILL. L. REV. 301, 303–04 (1995).

[31] Joseph E. diGenova & Constance L. Belfiore, *An Overview of the Comprehensive Crime Control Act of 1984 — The Prosecutor's Perspective*, 22 AM. CRIM. L. REV. 707, 707 (1985).

[32] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, tit. II, §§ 211–216, 98 Stat. 1976, 1987–2017 (1984) (codified as amended in scattered sections of 18 U.S.C.); S. REP. NO. 98-225, at 3, 66, 105; Barkow, supra note 25, at 210.

Another part of the CCCA fundamentally changed federal pretrial practice. The Bail Reform Act of 1984[33] dramatically expanded the availability of pretrial detention.[34] Congress allowed courts to consider a defendant's risk of danger to the community, but "danger" was not limited to a concern with violence. This was the peak of the war on drugs, so Congress created a rebuttable presumption that a defendant is dangerous (and therefore should be detained) if he is charged with a drug violation that carries a maximum penalty of at least ten years.[35] Congress aimed to "increase dramatically the number of people detained pretrial."[36]

The Sentencing Reform Act[37] was another key component of the CCCA, and it created the United States Sentencing Commission and instructed that body to promulgate mandatory sentencing guidelines to limit the discretion of judges.[38] But instead of letting that expert body study sentencing and research to create the guidelines, Congress acted on its own before the Commission even had a chance to pass a single guideline. Congress passed harsh mandatory minimums for individuals with certain prior felony convictions who were charged federally with possessing a firearm pursuant to the Armed Career Criminal Act (ACCA),[39] which was also part of the CCAA. It instituted even more sweeping mandatory minimum sentences in the Anti-Drug Abuse Act of 1986,[40] which was also the law that created what came to be known as the 100-to-1 ratio between powder and crack cocaine, requiring 100 times the quantity of powder cocaine than crack cocaine to trigger the same mandatory minimum penalties.[41] And Congress continued to pass its own sentencing laws and sweeping collateral consequences for those convicted of federal crimes without consulting the Commission even after the Guidelines were promulgated.[42] Congress even ordered the Commission to take specific actions to increase sentences no matter what the Commission's own research might have said.[43]

It was bad enough that Congress failed to consult the expert agency it created to address sentencing. But Congress did no independent research, either. For decades, it has passed ever harsher laws with no evidence that they would further public safety or that they would make the most of limited resources.

Congress's approach to crack cocaine is emblematic of the process it followed across the board. When it set the penalties for crack, it responded to sensational media

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[33] Pub. L. No. 98-473, tit. II, ch. I, §§ 202–209, 98 Stat. 1976, 1976–87 (1984) (codified as amended in scattered sections of 18 U.S.C.).

[34] 18 U.S.C. § 3142 (2012); diGenova & Belfiore, *supra* note 29, at 708–12.

[35] *See* 18 U.S.C. § 3142(e).

[36] Barkow, *supra* note 25, at 211.

[37] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.).

[38] 28 U.S.C. §§ 991–998 (2012).

[39] Pub. L. No. 98-473, tit. II, ch. XVIII, 98 Stat. 2185 (1984) (codified as amended at 18 U.S.C. § 924(e) (2012)).

[40] Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended primarily in scattered sections of 18 and 21 U.S.C.); *see id.* §§ 1401–1402, 100 Stat. at 3207-30 to -40.

[41] Pub. L. No. 99-570, § 1002, 100 Stat. 3207, 3207-2 to -4 (1986) (codified as amended at 21 U.S.C. § 841 (2012)).

[42] Barkow, *supra* note 25, at 213-214.

[43] *Id.* at 214.

accounts and hysterical anecdotes characterizing crack as a uniquely addictive drug that prompted violent behavior.[44] One member of Congress candidly admitted that they set crack penalties without "really hav[ing] an evidentiary basis."[45] If Members of Congress had taken the time to consult the Sentencing Commission or study the issue on its own, it would have discovered that crack and powder are pharmacologically indistinguishable and that crack is no more addictive. They would have also learned that individuals on crack are no more prone to violence than individuals on powder cocaine.[46] They would have further learned that treating crack and powder so dramatically differently would create enormous racial disparities in sentencing, punishing Black people far more harshly than White people because of different arrest rates for the two forms of the drug based on race.[47]

We see the same basic pattern – a failure to consider evidence, a lack of consultation with subject matter experts, no evaluation of what would be best to promote public safety – in Congress's passage of the ACCA. The legislative history indicates that Congress wanted to target the relatively small number of people who commit a disproportionate share of the most violent crimes. The actual legislation it enacted, however, fails to achieve that objective. Prior drug felonies trigger the harsh mandatory minimum even if they involved no violence at all. Almost 99% of drug offenses involve no physical injury to anyone. And people with drug-only convictions pose little risk of future violence – with only 1.6% of them being rearrested for a violent felony.[48] That is why the Sentencing Commission has concluded that "drug trafficking only offenders generally do not warrant similar (or at times greater) penalties than those career offenders who have committed a violent offense" and has urged Congress to amend the law "to more effectively differentiate between career offenders with different types of criminal records."[49] Prior burglary offenses also trigger ACCA, and they, too, lack an association with violence. Congress included this offense because prosecutors requested it and claimed, without evidence, that burglary is a dangerous offense linked to violence.[50] The data show otherwise. More than 97% of burglaries involve no physical injury.[51] Congress just never looked at any data.

The entire framework of mandatory minimum sentences suffers from the same shortcomings. When Congress set the mandatory minimums for drug sentences in the Anti-Drug Abuse Act of 1986, it made assumptions that those minimums would reach high-level dealers and leaders of drug-trafficking operations.[52] Congress did not take the time to learn how conspiracy law works, so it did not understand that low-level

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[44] *Id.* at 215.
[45] NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 125 (2014) (quoting 156 CONG. REC. H6202 (daily ed. July 28, 2010) (statement of Rep. Daniel E. Lungren)).
[46] Barkow, *supra* note 25, at 215-216.
[47] *Id.* at 216.
[48] *Id.* at 230.
[49] U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 8, 27 (2016).
[50] Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 99th Cong. 26 (1986) (testimony of James Knapp, Deputy Assistant Att'y Gen., Criminal Division, U.S. Department of Justice).
[51] Barkow, *supra* note 25, at 231-232.
[52] Id. at 216-217.

participants in trafficking operations would also get hit would those mandatory minimum penalties. The result was sadly predictable. A bipartisan task force evaluating criminal law concluded that "that the mandatory minimum framework . . . is fundamentally broken" because "judges find their hands tied by an extraordinarily punitive one-size-fits-all structure."[53] And that size is set for the most culpable leaders of trafficking operations, even though the punishments are overwhelmingly applied to low-level participants, many of whom sell to support a drug habit. The Sentencing Commission has issued multiple reports laying out the problems with mandatory minimum sentences, but Congress has continued to ignore its expert advice. It is hardly surprising that numerous commutations granted by recent presidents have come in cases involving mandatory minimum sentences.[54]

It is no wonder that mandatory minimum sentences have failed to achieve their policy objectives. They have not reduced crime, they have increased rather than reduced racial disparities, and they have "lumped together people of vastly different levels of culpability, thus resulting in excessive and disproporionate sentences for tens of thousands."[55]

The federal legal landscape is overrun with laws like these. They set severe mandatory minimums, direct the Commission to establish harsh guidelines, and they give prosecutors leverage to impose huge penalties on anyone who wants to exercise their right to a jury trial. They play a huge role in filling federal prisons and contributing to mass incarceration. They lead to gross racial disparities.[56] They cost a fortune. What they do not do is make us any safer.

III. Suggested Reforms

There is a better path forward, one that Congress itself recognized at one point. When it sought to reform federal sentencing in the mid-1980s, it conceded that "[s]entences that are disproportionate to the seriousness of the offense create a disrespect for the law."[57] It also approvingly cited the Minnesota approach to sentencing guidelines as the one it wanted to follow.[58] Tragically, somewhere along the way, Congress veered off this course and took a punitive path that ignored expert advice and data. But it is not too late to fix the federal framework.

Eliminate Mandatory Minimums. The first key step is to make policy grounded in evidence and data instead of flawed intuitions like the harsher, the better. That means

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[53] COLSON TASK FORCE, *supra* note 7, at 21.
[54] Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 837 n.208 (2015).
[55] Rachel E. Barkow, *The Evolving Role of the United States Sentencing Commission*, 33 FED. SENT. REP. 3, 5 (2020).
[56] The Sentencing Commission has concluded that mandatory minimums and mandatory sentencing guidelines had a greater adverse impact on Black people who commit offenses than did the sentencing regime that existed before the 1984 legislation. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 135 (2004).
[57] S. REP. NO. 98-225, at 46 (1983).
[58] *Id.* at 46.

Congress needs to repeal mandatory minimums or effectively do the same thing by creating a safety valve that is available to anyone and allows judges not to impose the mandatory minimum if the punishment would be disproportionate to the facts of the case. Mandatory minimums have been a complete policy failure, and they should not be part of any functioning sentencing scheme. The Commission has amply documented these problems, and it is long past time for Congress to take note of the evidence and repeal them.

Congress has already begun to recognize the need for this change. The First Step Act reduced many drug mandatory minimums.[59] But that was, as the law's title indicates, but a first step, and it is time for Congress to finish what it started by repealing all mandatory minimums. They rest on the flawed premise that they work to reduce crime and disparities when in fact they do not achieve any of their objectives.

Fix the Sentencing Commission Framework. The next critical step is to fix flaws with the Sentencing Commission and Guidelines. Congress should start by passing a new directive to the Sentencing Commission to reconsider all of its prior Guideline sentences without being bound by any previous congressional directives. Those prior directives were not grounded in evidence or analysis, but instead were based on political impulses to call for increases based on the fatally flawed assumption that increasing sentence length was good for public safety.[60] I have explained the flaw with that assumption, and it is important to allow the Commission to balance all relevant interests in setting guidelines without a thumb on the scale in favor of an increase when it might not be warranted. A new directive relieving the Commission from any prior directives will allow it to fix guidelines that are problematic, which are most easily identified by the fact that large numbers of judges are not complying with them. That is a key sign that the guideline is not proportional in most cases and needs to be right-sized.

Congress should reform other aspects of the Commission's operation. While successful state commissions like Minnesota must make sure its punishments fit within existing prison capacity – a restraint that helps make state sentencing more rational and prioritizes limited resources so they are used most effectively and to avoid overcrowding and overspending – the federal commission does not currently have such a constraint.[61] But it should. It should also have to engage in a cost-benefit analysis before passing a new guidelines, something that is standard for other administrative agencies and an approach that helps keep important tradeoffs in view and makes it more likely that the government is operating efficiently.

Congress should also balance the composition of the Commission. Since its inception, it is an agency that has been dominated by former prosecutors, a byproduct of the fact that the only specified requirement for commissioners is to have a certain number of judges, who themselves largely come from the ranks of former prosecutors. Unfortunately, that means a majority of the Commission at any one time has tended to have a view that longer sentences are better for public safety. A more balanced Commission would include commissioners who are criminologists, defense lawyers, and formerly incarcerated people – perspectives sorely lacking on the Commission now. The

[59] Barkow, *supra* note 53, at 8 (describing the reductions).
[60] Barkow, *supra* note 53, at 5
[61] Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 760 (2005).

original idea for a sentencing commission came from Judge Marvin Frankel, but Congress ignored Frankel's suggestion that the body should be made up of "criminologists, sociologists, and former or present prisoners."[62] Requiring the president to nominate individuals with those backgrounds will help improve the Commission's decisions and bring relevant expertise on what works to reduce crime and what life inside prisons is like – perspectives that will help the Commission set sentence lengths with a full range of information.

Retroactivity. Whenever Congress modifies a law so that sentences are lower, that change must be retroactively available to all individuals currently serving sentences under the old regime. Congress recognized the importance of retroactivity when it gave the Sentencing Commission the authority to determine when its changes to the Sentencing Guidelines should be retroactive. The Commission's use of this authority shows how effective it has been. When it reduced crack sentences in 2007, it made those reductions retroactively available and then studied what happened to those who served their full sentences and those who received the retroactive reductions (which averaged 26 months).[63] Those who received reductions in 2007 had, five years later, recidivated at a rate of 43.6% compared to 47.8% for those who served their full sentence.[64] (With recidivism measuring arrest rates.) When it conducted a study of the 2011 reductions, it also found no stastitically significant difference in the two groups three years later.[65]

The Commission lowered sentences for all drug offenses, not just crack cocaine, in 2013, and made those changes retroactive. More than 30,000 people received an average reduction of 37 months.[66] When those receiving a reduction were compared three years later with a similarly situated group who had served their full sentences before retroactivity took effect, the Commission found the group that received a reduced sentence recidivated at a rate of 27.9% compared to 30.5% for the group that served their full sentence.[67] This data shows that retroactive adjustments do not compromise public safety.

Congress itself recognized the need for retroactive sentencing adjustments in the First Step Act when it allowed individuals sentenced before the Fair Sentencing Act to seek adjustments based on the FSA's changes to crack sentences.[68] Almost 2400 people have received a sentencing reduction thanks to the First Step Act's retroactivity provision, and roughly 91% of them are Black.[69]

Congress should similarly provide for retroactive eligibility whenever it makes statutory changes that result in lower sentences. No one should serve a sentence today that has been recognized as harsher than it needs to be. No society can justify keeping people locked up under laws they now recognize were flawed and too harsh.

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[62] MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 120 (1973).
[63] 2007 Amendment Report, note 19, at tbl. 8.
[64] 2007 Amendment Report, *supra* note 19, at 3.
[65] FSA Amendment Report, *supra* note 19, at 1.
[66] Drugs Minus Two Report, *supra* note 19, at 1.
[67] Drugs Minus Two Report, *supra* note 19, at 6.
[68] Pub. L. No. 115-391 § 404, 132 Sta. 5194 (2018).
[69] U.S. SENTENCING COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REPORT tbl.4 (2020).

Second Look Mechanisms. Even if the laws themselves do not change, people and circumstances do. Consequently, there need to be second-look mechanisms in place in addition to retroactive legislative adjustments to account for changes in individual circumstances over time. The federal sentencing regime is notable among all jurisdictions in the United States for its lack of viable second look mechanisms. No one sentenced after November 1, 1987, is eligible for parole in the federal system. Individuals must either turn to clemency or compassionate release, neither of which has been up to the task of dealing with all the meritorious cases. Clemency is fundamentally flawed because the Department of Justice is in charge of screening petitions. Given that DOJ brought the cases in the first place, it is hardly surprising that they do not look favorably on requests to overturn its decisions.[70] Compassionate release has failed to pick up the slack. Until the First Step Act passed, the Bureau of Prisons had to file a petition with a court for anyone to be considered for compassionate release, and the BOP's failure to do so was subject to two critical inspector general reports.[71] That awful track record led Congress in the First Step Act to allow people to file directly with courts for compassionate release. That has been a welcome reform. But even with that change, some courts have been generous with their grants, while others have been less so.[72] Part of the variation is due to the fact that there is uncertainty about the grounds on which a sentence can be reconsidered as a matter of compassionate release.[73]

Congress must expand the available second look options. Specifically, it should make clear that any sentence can be reconsidered after a certain period of time, either by reestablishing parole or making clear that the compassionate release second look under the First Step Act is not limited to situations of ill health or extraordinary family circumstances but includes taking a second look for any compelling reason, which can include the fact the sentence is excessive. People and circumstances change over time – particularly over the long periods of incarceration that are so often handed down in the federal system. Having a second look allows a decision maker to account for the ways in which people change, particularly as they age out of criminal behaviors. It also provides a mechanism for reflecting changes in attitudes to particular kinds of crime. For example, marijuana is now legal in many states and federal prosecutors have been largely let those state schemes stand without federal interference. Yet individuals continue to serve decades in federal prison for selling marijuana. Parole eligibility or the opportunity to appear before a judge for resentencing after a certain length of time can help account for inevitable changes in circumstances.

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[70] Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387 (2017).

[71] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 2 (2016), https://perma.cc/9T6H-5GGN; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 1 (2013), https://perma.cc/KQX2-R5GC.

[72] U.S. SENT. COMM'N, COMPASSIONATE RELEASE DATA REPORT, tbl. 1 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/20210609-Compassionate-Release.pdf?utm_medium=email&utm_source=govdelivery.

[73] There is a split between the 11th Circuit, which takes the more limited view, and decisions from the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits that take the broader view.

Relief from Collateral Consequences. Although not officially part of a defendant's sentence, collateral consequences of convictions effectively amount to additional punishment of defendants – and in ways that compromise public safety. Federal law renders individuals convicted of drug offenses ineligible for public housing, welfare assistance, and food stamps, all of which are often critical transitional tools for individuals trying to reenter society after terms of incarceration. Federal law also mandates the reduction of state highway funds if states do not suspend drivers' licenses for people with drug offenses, which ends up hampering people's ability to get to jobs, again in opposition to public safety goals.[74] Congress paid little attention to public safety effects when these laws were passed. For example, it passed the restrictions on welfare and food stamps after two minutes of discussion, and inexplicably carves out drug offenses for ineligibility.[75] These laws have nothing to do with public safety and everything to do with the hysteria that surrounded the start of the drug war. Repealing these collateral consequences would improve public safety by allowing more people to successfully transition to law-abiding lives after serving their sentences.

Pretrial Detention Reform. Detention before trial is not technically part of a defendant's sentence because individuals are presumed innocent before they are convicted. But although it is not considered punishment in a legal sense, pretrial detention affects sentencing and public safety. Individuals detained pretrial are more likely to plead guilty than similarly situated defendants who are not detained. That is, even controlling for offense and criminal record, the detention itself leads to more convictions.[76] Pretrial detention also leads to longer sentences, regardless of a defendant's risk, crime, or criminal history.[77] And just as long sentences can lead to more criminal offending upon release than shorter ones, all else being equal, pretrial detention can have the same consequences. It is so disruptive on individuals' lives – leading to job loss, eviction, loss of custody of children – that it is no wonder that individuals detained pretrial have a greater risk of offending than individuals who were not detained, even when controlling for the offense type and risk level. Pretrial detention itself leads to a 20% increase in misdemeanors and a 30% increase in felonies.[78]

Because of their inextricable connection, sentencing reform must include pretrial detention reform. The federal scheme is fundamentally flawed because it assumes individuals should be detained if they are a risk to engage in drug trafficking, and it creates a presumption that the risk exists if an individual is merely charged with drug trafficking offenses that carry a maximum sentence of at least ten years.[79] That covers most drug defendants in the federal system and leads to far too much pretrial detention. Congress should reform its pretrial detention practices, just as many states are doing, and base its determinations on evidence, not unsubstantiated assumptions based on the hysteria that surrounded the drug war. States like New Jersey that have reformed their pretrial detention practices have seen their jail populations decline substantially without an increase in crime. It is time for the federal government to lead in this effort as well.

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[74] BARKOW, *supra* note 2, at 93.
[75] *Id.*
[76] Heaton et al., *supra* note 19, at 717.
[77] LOWENKAMP ET AL., *supra* note 19, at 4.
[78] Heaton et al., *supra* note 19, at 718.
[79] 18 U.S.C. § 3142(e).

This is not meant to be an exhaustive list. Congress should fix all the areas in which it was guided by the flawed premise that the most punitive approach is the most effective approach. Data, evidence, and experience show that not to be the case, and thousands of lives have been destroyed as a result.

IV. Conclusion

Thank you for allowing me to testify and share my thoughts on sentencing reform. I would be happy to answer any questions that you might have.