

## ASPIRING TO THE IMPRACTICABLE: ALTERNATIVES TO INCARCERATION IN THE ERA OF MASS INCARCERATION

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In 1976, a remarkable handbook for reducing the reliance on incarceration was produced by a group of ordinary citizens known as the Prison Research Education Action Project (PREAP). *Instead of Prisons*<sup>1</sup> was written to call attention to the overuse of incarceration at a time when the United States prison population was about 250,000.<sup>2</sup> The handbook recommended the development and use of alternatives-to-incarceration (ATI) programs as a means to “excarcerate,” defined by the authors as “[p]rograms or procedures that move away from the notion of imprisonment as a response to lawbreaking.”<sup>3</sup> ATI programs were viewed as embedded within communities and as options that offered prospects for reconciliation and community empowerment, in addition to alternative ways to achieve accountability. PREAP’s analysis of crime and punishment, including both ATI and decarceration strategies, was set within the larger contexts of poverty, inequality, and racism.

More than thirty years later, most jurisdictions around the country now offer ATI programs. Yet many present day ATI programs have been divorced from considerations of the socio-political and economic context of crime and punishment and stripped of the holistic framework explained in 1976. ATI programs have instead become part of a technocratic criminal justice system, characterized by punishment, increasing control over social

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1. FAY HONEY KNOPP, BARBARA BOWARD, MARY JO BRACH, SCOTT CHRISTIANSON, MARY ANN LARGEN, JULIE LEWIN, JANET LUGO, MARK MORRIS & WENDY NEWTON, PRISON RESEARCH ACTION PROJECT, *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* (1976).

2. See U.S. DEP’T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* tbl.6.21 (Kathleen Maguire & Ann L. Pastore eds.) (1996).

3. *Id.* at 10.

institutions, and a dominant focus on fiscal calculations—what David Garland terms “the culture of control.”<sup>4</sup> The field of criminology is dominated by professional researchers and practitioners whose focus is the testing and implementation of what has come to be known as “best practices”—the tools, techniques, and methods that address so-called criminogenic behaviors and clinical needs of people in the criminal justice system. However, the paradigm of mass incarceration, which has led to the creation of the largest prison population in the world,<sup>5</sup> goes largely unchallenged.<sup>6</sup>

Within a paradigm that criminalizes a plethora of family, physical health, and mental health problems, the search for technocratic solutions can often seem sensible. The number of people caught in the criminal justice system that have health and mental health problems, learning disabilities, and the like has been widely reported and discussed.<sup>7</sup> ATI programs, such as those offered by the Center for Community Alternatives in New York, have come into existence to provide a range of advocacy, treatment, and support services to help people avoid incarceration, or if imprisoned, to help them make a successful return to their families and communities.

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4. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 175–91 (2001). Garland describes the new culture of crime control emerging in Britain and America as a shift in the “cultural coordinates of crime control . . . altering the way that penal agents think and act, giving new meaning to what they say and do.” *Id.* at 175. The three elements that form this new culture of control are (1) a recoded penal-welfarism, meaning a shift from welfare and rehabilitation to punishment and retribution, *id.*; (2) a new criminology of control, marked by a focus on changing social systems such as transport systems, schools, housing, and leisure areas to create fewer criminological hot spots, *id.* at 182–83; and (3) an economic style of decision-making, referring to new policies and priority settings by criminal justice agencies focused on economic calculations of crime control and prevention. *Id.* at 189.

5. See Adam Liptak, *American Exception: Inmate Count in U.S. Dwarfs Other Nations*, N. Y. TIMES, Apr. 23, 2008, at A1.

6. The scholarship on the phenomenon of mass incarceration is relatively recent, fairly sparse, and exemplified by BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); Loïc Wacquant, *Deadly Symbiosis: When Prison and Ghetto Meet and Mesh*, 3 *PUNISHMENT & SOC'Y* 95 (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); and GARLAND, *supra* note 4.

7. See, e.g., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., OFFICE OF APPLIED STUD., *RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS* 27 (2008) (reporting that of the estimated 1.6 million adults on parole or other supervised release from prison during the past year, 24.1% were current illicit drug users, considerably higher than the 7.7% among the adults not on parole or on supervised release). See also NAT'L COMM'N ON CORR. HEALTH, *THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES* (2002) and Nicholas Freudenberg, *Jails, Prisons and the Health of Urban Populations: A Review of the Impact of the Correctional System on Community Health*, 78 *J. URB. HEALTH: BULL. ACAD. MED.* 214, 217–22 (2001), for overviews of the health problems of people in the criminal justice system. See also PAULA M. DITTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *NCJ 174463, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS* (1999) (discussing the prevalence of mental health problems).

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While it is important to apply expertise to help clients and explain and translate behaviors to judges and prosecutors, the technocratic fix will not undo the United States' over-reliance on incarceration. Mass incarceration is a symptom of grave structural problems in the United States. ATI programming is not a prescription to treat this symptom or its underlying causes. The reliance on incarceration for social control is not due to a lack of effective ATI programs, but rather larger socio-economic issues and structural racism that have marginalized a large percentage of the U.S. population.

In this article, I argue that while ATI programming holds promise as part of a criminal justice reform strategy, the full realization of this promise is thwarted by the structure and rules of the criminal justice system itself. More importantly, the legacy of racism in the U.S. and the economic restructuring and abandonment of inner cities, accompanied by an ensuing crisis in employment, fuels the push for mass incarceration as the primary response to crime. In Section I, I look at the development and efficacy of ATI programs. In Section II, I summarize the systemic forces that have combined to create a carceral state that renders alternatives to incarceration peripheral to its operation. In Section III, I offer some reflections about the role of community and grassroots organizing in making ATI approaches more central to crime prevention and control. ATI programs can become more central to efforts to dismantle mass incarceration by (1) reaching people who would otherwise be incarcerated through better gate keeping and advocacy, (2) demonstrating an affirmative commitment to tackle racial disparities in the criminal justice system, and (3) building stronger ties and connections to the communities most affected by mass incarceration.

## I.

## ALTERNATIVES-TO-INCARCERATION PROGRAMS

*A. The Development of ATI Programming*

The current manifestation of ATI programming began in the 1980s in response to the emerging recognition that prison populations were growing out of control and in response to a reconsideration of the efficacy of rehabilitation.<sup>8</sup> ATI programs, variously called "intermediate sanctions" or "community corrections," came to include rehabilitation-oriented

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8. See JOAN PETERSILIA, ARTHUR J. LURIGIO & JAMES M. BYRNE, SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS, at ix-xv (James M. Byrne, Arthur J. Lurigio & Joan Petersilia eds., 1992); Michael Tonry & Mary Lynch, *Intermediate Sanctions*, 20 CRIME & JUST. 99, 99-100 (1996) (describing these as "intermediate sanctions that fall between prison and probation in their severity and intrusiveness").

programming, notably drug treatment, new methods of accountability including restorative justice approaches and community service, and new methods of supervision such as home confinement and electronic monitoring. While there is no one definition, Zehr's widely accepted framework of restorative justice defines crime as a violation against human relationships and justice as a process to heal and make amends.<sup>9</sup>

The reemergence of support for community-based, non-custodial sentences was strengthened by a growing body of research and information documenting the effectiveness of evidence-based interventions (EBIs).<sup>10</sup> EBIs refer to empirically verified behavioral interventions that improve an individual's functioning in areas of health, mental health, education, employment, and other related areas.<sup>11</sup> There are now initiatives to disseminate information about EBIs to practitioners and policymakers and to train practitioners in these scientifically-supported interventions.<sup>12</sup>

Examples of EBIs include the use of risk and needs assessment to construct a supervision and treatment plan,<sup>13</sup> motivational interviewing to

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9. See HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* 181, 186–91 (1990).

10. See, e.g., ROGER K. WARREN, *CRIME & JUSTICE INST., NAT'L INST. OF CORR. & NAT'L CTR. FOR STATE COURTS., EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES* (2006), available at <http://www.wicourts.gov/about/organization/programs/docs/cjjudicialpaperfinal.pdf> (discussing the implications of principles of evidence-based practice to reduce recidivism for state judiciaries).

11. *Id.* at 18–19 (“The concept of ‘evidence-based practice’ refers to professional practices that are supported by the ‘best research evidence,’ consisting of ‘scientific results related to intervention strategies . . . derived from clinically relevant research . . . based on systematic reviews, reasonable effect sizes, statistical and clinical significance, and a body of supporting evidence.’”).

12. Listings and catalogues of best practices can be found, for example, in the Substance Abuse and Mental Health Servs. Admin., National Registry of Evidence-based Programs and Practices, Oct. 3, 2008, <http://nrepp.samhsa.gov> (containing a searchable database of evidence based programs and interventions for the prevention and treatment of mental and substance use disorders); Ctr. for Mental Health Servs.’ Nat’l GAINS Ctr., What Are EBPs?, <http://gainscenter.samhsa.gov/html/ebp/information/what.asp> (last visited Apr. 19, 2009) (identifying evidence-based practices in Assertive Community Treatment (ACT), supported employment, illness self-management and recovery, integrated treatment for co-occurring mental health and substance use disorders, housing, and trauma); Office of Juvenile Justice and Delinquency Prevention, OJJDP Model Programs Guide, [http://www.dsgonline.com/mpg2.5/mpg\\_index.htm](http://www.dsgonline.com/mpg2.5/mpg_index.htm) (last visited Apr. 19, 2009) (offering a Preventions Model Programs Guide composed of a database full of scientifically proven programs that address a range of issues, including substance abuse, mental health, and education programs); Ctr. for the Study and Prevention of Violence (CSPV), Blueprints for Violence Prevention Model Programs, <http://www.colorado.edu/cspv/blueprints/modelprograms.html> (last visited Apr. 19, 2009) (describing their work to implement research-based violence and drug programs that will help bridge the gap between research and practice).

13. See FAYE TAXMAN, ERIC SHEPARDSON & JAMES BYRNE, U.S. DEP’T OF JUSTICE & MED. DEP’T OF PUB. SAFETY AND CORR. SERVS., *TOOLS OF THE TRADE: A GUIDE FOR INCORPORATING SCIENCE INTO PRACTICE* 28 (2004), available at <http://www.nicic.org/pubs/2004/020095.pdf>.

elicit self-motivational statements and behavioral change,<sup>14</sup> and cognitive behavioral programs to target attitudes, values, beliefs, peers, substance abuse, and anger.<sup>15</sup> These approaches stand in contrast to punitive, prison-oriented responses that center on the degradation and dehumanization of offenders<sup>16</sup> and psychodynamic therapies that have been found unhelpful to the majority of offenders.<sup>17</sup>

ATIs are not without some drawbacks however, particularly relating to concerns about net widening. Net widening refers to the use of alternative-to-incarceration programs to extend social control mechanisms to individuals who would not otherwise have been subject to criminal justice system sanctions. The result, according to Blomberg, is to increase the overall number of people subject to some form of criminal justice system control.<sup>18</sup> Additionally, some research shows that engaging low-risk offenders in more rigorous and intensive correctional treatment and intervention programs can actually increase recidivism by disrupting productive activities such as employment and school.<sup>19</sup>

While there are multiple metrics of effectiveness for ATI programming, policy makers are most often concerned with measures of recidivism.<sup>20</sup> For those concerned with the ability of ATI programming to reduce the use of prison, key outcome measures must also include the extent to which the

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14. See WILLIAM R. MILLER, U.S. DEP'T. OF HEALTH & HUMAN SERVS., TREATMENT IMPROVEMENT PROTOCOL SERIES 35, ENHANCING MOTIVATION FOR CHANGE IN SUBSTANCE ABUSE TREATMENT 39 (1999).

15. See Edward J. Latessa & Christopher Lowenkamp, *What Works in Reducing Recidivism*, 3 U. ST. THOMAS L.J. 521, 524 (2006) (discussing the use of cognitive behavioral programs and their relation to reductions in recidivism).

16. See PAUL GENDREAU, CLAIRE GOGGIN & FRANCIS T. CULLEN, THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM 5 (1999), available at [http://ww2.ps-sp.gc.ca/publications/corrections/199912\\_e.pdf](http://ww2.ps-sp.gc.ca/publications/corrections/199912_e.pdf) (describing prison as a “degrading, dehumanizing experience” that deters the rational individual from engaging in further criminal activities).

17. See D.A. Andrews, Ivan Zinger, Robert D. Hoge, James Bonta, Paul Gendreau & Francis T. Cullen, *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 376 (1990) (stating that “psychodynamic and nondirective client-centered therapies are to be avoided within general samples of offenders” because these therapies are designed to “free people from the personally inhibiting controls of ‘superego’ and ‘society,’” but the majority of offenders don’t suffer from neurotic misery and over-control).

18. Thomas G. Blomberg, *Widening the Net: An Anomaly in the Evaluation of Diversion Programs*, in HANDBOOK OF CRIMINAL JUSTICE EVALUATION 575 (Malcolm W. Klein & Katherine S. Teilmann eds., 1980).

19. See Latessa & Lowenkamp, *supra* note 15, at 522–23.

20. See Joan Petersilia, *Measuring the Performance of Community Corrections*, in BUREAU OF JUSTICE STATISTICS—PRINCETON PROJECT, PERFORMANCE MEASURES FOR THE CRIMINAL JUSTICE SYSTEM 61, 64 (1993) (“[H]istorically, recidivism rates . . . have been the gauge by which community corrections has been evaluated.”); Harry N. Boone, Jr. & Betsy A. Fulton, U.S. Dep’t of Justice, *Implementing Performance-Based Measures in Community Corrections*, NAT’L INST. OF JUST. RES. IN BRIEF, June 1996, at 1 (“Traditionally, low recidivism rates have been used as the primary—and often sole—measure of success for community corrections programs.”).

programs actually target people who would otherwise be incarcerated, and the amount of prison and jail displacement that occurs as a result. New York City's ATI programs offer interesting examples of the promise of ATI programming to jail and prison displacement and reductions in recidivism.

*B. The Center for Community Alternatives and  
New York City's ATI Programs*

The Center for Community Alternatives (CCA) is one of several organizations in New York City that provides ATI programming. New York City is unique among jurisdictions in its investment in ATI programs, now amounting to more than twelve million dollars,<sup>21</sup> and the relatively robust network of organizations that provide such services. New York City is home to some of the oldest criminal justice reform organizations. The highly regarded Vera Institute of Justice, for example, has played a critical role in designing and evaluating demonstration ATI programs, many of which have been institutionalized through the work of not-for-profit organizations.<sup>22</sup>

CCA explicitly defines its mission as "promot[ing] reintegrative justice and a reduced reliance on incarceration through advocacy, services and public policy development in pursuit of civil and human rights."<sup>23</sup> CCA's ATI programs are grounded in sentencing advocacy that takes place in parole release and parole revocation hearings. Advocacy on behalf of individual defendants or prisoners is intended to help secure a non-custodial sentence, a shorter prison sentence, or release from prison.

CCA uses an empirical approach to define its target populations, referencing data that identifies factors correlated with the likelihood of

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21. RACHEL PORTER, SOPHIA LEE & MARY LUTZ, VERA INST. OF JUSTICE, *BALANCING PUNISHMENT AND TREATMENT: ALTERNATIVES TO INCARCERATION IN NEW YORK CITY 3* (2002), available at [http://www.vera.org/publication\\_pdf/164\\_251.pdf](http://www.vera.org/publication_pdf/164_251.pdf). ATI funding is small in comparison to spending on corrections. The FY 2008 budget for the New York City Department of Corrections exceeds \$930 million. See WILLIAM C. THOMPSON, JR., N. Y. CITY OFFICE OF THE COMPTROLLER, *COMPTROLLER'S COMMENTS ON THE FISCAL YEAR 2008 EXECUTIVE BUDGET 45* (2007), available at <http://www.comptroller.nyc.gov/bureaus/bud/07reports/may07-Commenst-onFY2008ExecutiveBudget.pdf>.

22. Vera Inst. of Justice, *Sentencing and Corrections/Overview*, <http://www.vera.org/csc/csc.html> (last visited Apr. 19, 2009).

23. See Ctr. for Cmty. Alternatives, *Mission & Purpose*, [http://www.communityalternatives.org/about\\_cca/mission.html](http://www.communityalternatives.org/about_cca/mission.html) (last visited Apr. 19, 2009). CCA's ATI programs include Client Specific Planning (CSP), a sentencing advocacy service that develops community-based sentencing options, reentry/parole release planning and preparation, and reports used to mitigate the length of incarceration. See Ctr. for Cmty. Alternatives, *Sentencing Mitigation*, <http://www.communityalternatives.org/mitigation/mitigation.html> (last visited Apr. 19, 2009). Through its Crossroads programs, CCA offers specialized ATI services for women with drug problems. See Ctr. for Cmty. Alternatives, *Crossroads*, <http://www.communityalternatives.org/programs/drug/crossroads.html> (last visited Apr. 19, 2009). CCA also offers a similar program for youth. See Ctr. for Cmty. Alternatives, *Youth*, <http://www.communityalternatives.org/programs/youth/youth.html> (last visited Apr. 19, 2009).

incarceration such as charge at arrest, prior criminal history, and length of stay in detention. Careful targeting combined with advocacy in court, usually conducted in concert with defense counsel, helps to ensure that CCA programs reach defendants who are facing jail or prison sentences.

Client-centered advocacy requires that CCA staff, known as sentencing advocates, come to know the realities of their clients' lives—their strengths and weaknesses, traumas and setbacks, as well as their achievements and potentials. The work of sentencing advocates occurs in America's hidden places, its ghettos and its dungeons. Sentencing advocates carry the responsibility of telling the stories of clients' lives to judges, prosecutors, and parole board members in an effort to deconstruct the circumstances surrounding criminal actions, in the hope of achieving more humane and less vengeful sentences.

As a provider of ATI services, CCA also delivers services that help clients move to healthier, safer, and more productive lives. CCA is accountable to the courts for client engagement and adherence to court orders. Judges rarely hear the good news about people they sentence. Rather, they typically see a defendant back in court only when he or she is arrested for a new crime or has violated conditions of release. In order to combat this one-dimensional picture, CCA works with defense attorneys to provide judges with regular updates about each client's progress at every scheduled court appearance and at the time of sentencing. These reports are provided in written form to the judge, defense attorney, and prosecutor in advance of the court hearing. CCA staff members are present at the hearing to respond to questions. By contextualizing information about a client's efforts, successes and setbacks, judges come to understand that change takes place over time and in stages.

CCA's participation in the court process is based on the principle that we, as staff, share responsibility with our clients regarding their success, or lack thereof, in our ATI programs. We recognize that individual achievement may be as much about our service delivery and methods as it is about client responsibility. To this end, CCA program representatives are prepared to arrange for other community-based options that may be a better fit for clients who are not succeeding in a CCA program. We view this approach as part of our obligation to provide the court with timely and accurate information.

CCA's approach to working with clients is interdisciplinary, holistic, and grounded in a behavioral change framework.<sup>24</sup> CCA's staff includes social

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24. A behavioral change framework presupposes that change takes place in stages and over time. Cf. James O. Prochaska, Carlo C. DiClemente & John C. Norcross, *In Search of How People Change: Applications to Addictive Behaviors*, 47 AM. PSYCHOL. 1102, 1102 (1992) (examining how people can self-initiate or seek professional assistance to help change their addictive behaviors over time and through stages).

workers, lawyers, family therapists, medical professionals, acupuncturists, educators, youth workers, job developers, employment counselors, and even community organizers. Services include peer leadership; the decision to include them was based on research that shows that peers play a key role in engaging clients in programs, and that peer leadership opportunities help clients transition from programs to community independence.<sup>25</sup>

Understanding that there is a social context to individual behavior, CCA develops relationships with clients' families and support systems, including community organizations and institutions. Community organizations often provide alternative sanctioning options in the form of community service placements. Examples of community service placements include working in hospices for people with AIDS, working in homeless shelters and soup kitchens, painting not-for-profit youth centers, and assisting with community gardens.

Attention to victim concerns, such as restitution and just and effective sentencing, are also part of CCA's ATI work. Whenever appropriate, staff members reach out to victims to gain their perspectives about the sentencing option that we are proposing. Contrary to the media and political characterization of victims as vengeful and punitive, they are often receptive to a restorative justice approach to sentencing and offender accountability. This has been our experience not only in property-related crimes but also in crimes involving victim injury and even death.

### *C. Documentation of ATI Program Effectiveness*

ATI programs in New York City have been the subject of research and evaluation, documenting the process of implementation<sup>26</sup> and

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25. See, e.g., Kathryn A. Sowards, Kathleen O'Boyle & Marsha Weissman, *Inspiring Hope, Envisioning Alternatives: The Importance of Peer Role Models in a Mandated Treatment Program for Women*, 6 J. SOC. WORK PRAC. ADDICTIONS 55, 66-67 (2006) (concluding that "[w]omen's ability to recognize the possibility of change in their lifestyles by witnessing positive change among members of their own social group . . . was a powerful source of hope and motivation for all women interviewed in this study"). See also COMM. ON CMTY. SUPERVISION & DESISTANCE FROM CRIME, NAT'L ACADEMIES, COMM. ON LAW & JUSTICE, PAROLE, DESISTANCE FROM CRIME, & COMMUNITY INTEGRATION 55 (2007) (citing research that shows peer support from formerly incarcerated people is associated with lower recidivism); Kirk M. Broome, Kevin Knight, Matthew L. Hiller & D. Dwayne Simpson, *Drug Treatment Process Indicators for Probationers and Prediction of Recidivism*, 13 J. SUBSTANCE ABUSE TREATMENT 487, 489-90 (1996) (showing that peer support contributed to reduced recidivism); GEORGE DE LEON, *THE THERAPEUTIC COMMUNITY: THEORY, MODEL AND METHOD* 167-72 (2000) (discussing the various roles of positive peer role models in treatment).

26. See, e.g., PETER FINN, U.S. DEP'T OF JUSTICE, *SUCCESSFUL JOB PLACEMENT FOR EX-OFFENDERS* 2-3 (1998), available at <http://www.ncjrs.gov/pdffiles/168102.pdf> (documenting the implementation of the Center for Employment Opportunities program for offenders just released from prison).



effectiveness in reducing recidivism and achieving prison displacement.<sup>27</sup> These studies consistently find (1) New York's ATI programs, including those operated by CCA, target defendants who would otherwise face imprisonment, and (2) recidivism rates for ATI participants are comparable or better than similarly situated incarcerated people.<sup>28</sup>

A 2008 study of New York City ATI programs showed that courts in New York City mandate people facing serious felony charges to community-based drug treatment, employment, community supervision, and support programs.<sup>29</sup> The study also showed that ATI participants were rearrested and convicted at the same rate as a matched comparison group of people who had served longer sentences in jail or prison.<sup>30</sup> Research conducted by the New York City Criminal Justice Agency showed similar findings—rearrest rates were similar for ATI, probation, and prison releasees, with ATI participants having lower rearrest rates than the comparison group of people released from jail.<sup>31</sup> In fact, ATI participants and probationers were significantly less likely to be rearrested than people who received jail sentences—forty-one percent of ATI participants and forty-two percent of probationers were rearrested, compared to fifty-three percent of people released from jail.<sup>32</sup>

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27. See, e.g., MARY T. PHILIPS, N.Y. CITY CRIMINAL JUSTICE AGENCY, ESTIMATING JAIL DISPLACEMENT FOR ALTERNATIVES-TO-INCARCERATION PROGRAMS IN NEW YORK CITY 2-3 (2002), available at <http://www.cjareports.org/reports/ati.pdf> [hereinafter PHILIPS, ESTIMATING JAIL DISPLACEMENT] (assessing the displacement effects of New York ATIs including the Youth Advocacy Project of the CCA); RACHEL PORTER, SOPHIA LEE & MARY LUTZ, VERA INST. OF JUSTICE, BALANCING PUNISHMENT AND TREATMENT: ALTERNATIVES TO INCARCERATION IN NEW YORK CITY, at iii (2002), available at [http://www.vera.org/publication\\_pdf/164\\_251.pdf](http://www.vera.org/publication_pdf/164_251.pdf) (evaluating the CCA Crossroads substance abuse day treatment program for women felony offenders along with other New York City ATI programs to determine the content of alternative sentencing programs and their long-term recidivism rates); JUKKA SAVOLAINEN, N.Y. CITY CRIMINAL JUSTICE AGENCY, THE IMPACT OF FELONY ATI PROGRAMS ON RECIDIVISM 1-2 (2003), available at <http://www.cjareports.org/reports/brief2.pdf> (evaluating the Court Employment Project of CCA along with five other ATI programs in New York for their effectiveness at reducing recidivism).

28. See, e.g., PORTER, LEE & LUTZ, *supra* note 27, at 18-49 (showing that rearrest rates for ATI participants and a comparison sample of previously incarcerated individuals were statistically the same). See also PHILIPS, ESTIMATING JAIL DISPLACEMENT, *supra* note 27 (assessing the displacement); SAVOLAINEN, *supra* note 27, at 7 (concluding that there were no differences in recidivism among ATI participants, felony-convicted persons on probation, and felony-convicted persons released from state prison, and that ATI participants had lower recidivism rates compared to persons released from city jail).

29. See PORTER, LEE & LUTZ, *supra* note 27, at *Executive Summary* (noting that ATI programs receive regular referrals from courts).

30. *Id.* at 46 (noting that offenders sent to ATIs showed the same reconviction rate as those in a matched comparison group, despite spending much less time incarcerated during the study period).

31. SAVOLAINEN, *supra* note 27, at 4.

32. *Id.*

Even where recidivism rates are comparable, ATI sentences avoid the financial costs of incarceration, the disruption of employment, and the human costs of frayed family relations and depleted communities. According to studies of the New York City Department of Correction, the average annual cost per jail inmate is \$62,595.<sup>33</sup> By contrast, data compiled by organizations that provide ATI services report per person costs ranging from \$1400 to \$13,000.<sup>34</sup> Fred V. Cartensen estimated that expansion of ATI programs in Connecticut would produce additional state and local tax revenue as program participants and graduates secured employment and reduced drug use, also helping to reduce health care costs.<sup>35</sup> There is a growing body of evidence suggesting mass incarceration undermines the fabric of communities, depleting families and neighborhoods of people who are parents, wage earners, and members of faith communities and other social networks.<sup>36</sup>

ATI programs in New York City demonstrate the promise of community-based sentencing options in their ability to target defendants who would otherwise be incarcerated, in their accountability to the courts, and in their achieving outcomes that are comparable or better than jail or prison. Despite these promising outcomes, ATI programs remain relatively peripheral to New York's criminal justice system—a system that saw its prison population of drug offenders more than triple in twenty years, growing from just under 22,000 prisoners in 1980 to just over 70,000 in 2000.<sup>37</sup>

*D. Limits to the Impact of ATI Programs: The Legacy of Net Widening*

Despite the successes of New York City ATI programs, research also showed that New York City ATI participants who did not successfully

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33. N.Y. City Alternatives to Incarceration Coal., *Alternatives to Incarceration Programs: Cut Crime, Cut Costs and Help People and Communities*, <http://www.cases.org/Papers/ATIs.htm> (last visited Apr. 19, 2009).

34. *Id.*

35. See FRED V. CARSTENSEN, STAN McMILLEN, NANDIKA WEERASINGHE, ANASUA BHATTACHARYA, FABIO MALDONADO, MADHURI SARIPALLE & SADIK YILDIRIM, *A DYNAMIC IMPACT ANALYSIS OF ALTERNATIVES TO INCARCERATION IN CONNECTICUT 1–3* (2001), available at <http://ccea.uconn.edu/studies/Incarceration%20Analysis.pdf> (estimating that expansion of ATI programs would provide \$5000 in reduced crime savings per nonviolent offender, \$7300 in reduced arrest and prosecution costs per nonviolent offender, \$4800 in health care and substance abuse treatment cost savings per nonviolent offender, the creation of 989 to 3958 new jobs, and provide a net increase in state tax revenues of \$11,190,000 to \$47,710,000).

36. See Dina Rose & Todd Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 *CRIMINOLOGY* 441, 441–42 (1998) (describing the decreased ability of communities to self-regulate crime where large numbers of people are removed from the neighborhood in crime control efforts).

37. See CORR. ASS'N OF N.Y., *DRUG OFFENDERS UNDER CUSTODY IN NYS PRISONS CALENDAR YEARS 1970–2005* (2006), available at <http://www.correctionalassociation.org/publications/factsheets.htm> (follow the link for “Inmates Under Custody 1970–2005”).

complete their ATI program were sentenced to a longer period of incarceration than they would have received as a result of the initial plea bargain.<sup>38</sup> Many ATI programs in jurisdictions across the country enroll people who would have not otherwise been incarcerated, reflecting Tonry and Morris's assessment of alternative sentences as sanctions that widen the net of social control: "when an intermediate choice is offered, it will tend to be filled more by those previously treated more leniently than by those previously treated more severely."<sup>39</sup> Thus, even well-designed, well-implemented ATI programs can contribute to the net widening that has been the bane of most community corrections efforts.<sup>40</sup>

Drug courts provide one example of net widening.<sup>41</sup> While some drug courts, such as the Brooklyn Treatment Court, carefully targeted felony-charged defendants facing mandatory incarceration, other research suggests that as drug courts expanded nationwide, eligibility was restricted to defendants without prior criminal histories and/or defendants charged with misdemeanors or low level felonies, who would not have been sentenced to jail or prison.<sup>42</sup> These are the defendants least likely to be sentenced to jail time.

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38. See Mary T. Philips, N.Y. City Criminal Justice Agency, *Jail Displacement for ATI Programs*, CJA RES. BRIEF, Dec. 2002, 76-78, available at <http://www.cjareports.org/reports/brief1.pdf> (noting that program failure is more of a problem for felony program participants than for misdemeanor participants, with seventy-two percent of misdemeanor participants and only fifty-four percent of felony participants successfully completing their programs. The negative displacement effect for unsuccessful felony participants resulting from long sentences meted out as punishment for failure reduced overall ATI displacement considerably.).

39. MICHAEL TONRY & NORVAL MORRIS, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 224 (1990).

40. See *id.* at 225. See also DALE PARENT, TERENCE DUNWORTH, DOUGLAS McDONALD & WILLIAM RHODES, U.S. DEP'T OF JUSTICE, *KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: INTERMEDIATE SANCTIONS 2* (1997), available at <http://www.ncjrs.gov/pdffiles/161838.pdf> ("Boot camps, particularly those in local jails, frequently target offenders who otherwise would serve short periods of confinement. Hence, those who complete boot camps may serve longer total confinement terms than inmates who do not participate in them.").

41. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1552 (2004) (explaining that under the therapeutic system of drug court diversion, "there is an increase in the total number of deviants getting into the system in the first place and many of these are new deviants who would not have been processed previously (wider nets)").

42. See REGINALD FLUELLEN & JENNIFER TRONE, VERA INST. OF JUSTICE, *DO DRUG COURTS SAVE JAIL AND PRISON BEDS?* 4-5 (2000), available at [http://www.vera.org/publication\\_pdf/drugcourts.pdf](http://www.vera.org/publication_pdf/drugcourts.pdf) (noting that whether drug courts actually divert offenders from incarceration "has been overlooked by nearly every drug court evaluation to date" and further commenting that expanding eligibility to offenders with more serious charges would produce more potential for diversion). See also AVINASH SINGH BHATI, JOHN K. ROMAN & AARON CHALFIN, URBAN INST., *TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO DRUG-INVOLVED OFFENDERS 7* (2008), available at [http://www.urban.org/UploadedPDF/411645\\_treatment\\_offenders.pdf](http://www.urban.org/UploadedPDF/411645_treatment_offenders.pdf) (noting that "drug courts routinely exclude most of the eligible population"); GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, *ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM*

ATI programs that emphasize supervision and surveillance have been found to net widen as well. Evaluations of electronic monitoring programs attribute net widening effects to program eligibility criteria that screen out the very defendants who would most likely be incarcerated.<sup>43</sup> Programs limit participation to people with minor prior records, defendants who are employed, and people who show evidence of strong family support—characteristics not associated with a prison-bound population.<sup>44</sup> Programs in turn exclude people with felony convictions, people charged with crimes involving violence, people charged with drug selling (as opposed to simple possession), and people with more extensive criminal histories.<sup>45</sup>

Net widening also occurs when methods of surveillance and supervision, such as those employed in Intensive Supervision Programs (ISPs), increase the number of technical violations.<sup>46</sup> Joan Petersilia and Susan Turner's study of fourteen ISPs found that they nearly doubled the number of technical violations compared to routine supervision, despite having recidivism rates for new crimes that were comparable to regular probationers.<sup>47</sup> The implementation of ISPs thus increased the number of people incarcerated.<sup>48</sup>

Even New York City ATI programs contribute to net widening because of the ways judges sanction participants who do not complete the ATI program. Philips found that people who were not successful in their ATI program spent an average of 139 more days in jail or prison than they

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REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 37, 41 (2005) [hereinafter GAO-05-219] (describing the various exclusionary criteria that may bar defendants from drug courts including prior violent history, prior treatment history, people currently on probation or parole and defendants with other open cases and mentioning a misdemeanor-only drug court program in New Castle County, Delaware).

43. See James Bonta, Suzanne Wallace-Capretta & Jennifer Rooney, *Can Electronic Monitoring Make a Difference? An Evaluation of Three Canadian Programs*, 46 *CRIME & DELINQ.* 61, 62–63 (2000) (explaining that “[m]any programs screen out offenders with records of violence, accept only those that are clearly low risk, or they target ‘driving while impaired’ offenders”).

44. *Id.* at 63.

45. *Id.*

46. A technical violation of parole or probation reflects an alleged failure to abide by conditions of release for reasons other than a new crime. Examples of technical violations include drug use, association with other people on parole, changing residence without parole or probation officer approval, failure to maintain employments and failure to report.

47. See Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 *CRIME & JUST.: REV. RESEARCH* 281, 311 (1993) (“At the end of the one-year follow-up, about 37 percent of ISP and 33 percent of control offenders had been officially arrested . . . [A]n average of 65 percent of the ISP clients experience a technical violation compared with 38 percent of the controls.”).

48. See *id.* at 306 (“Evidence from the RAND evaluation suggests that enhancement-type ISP might increase commitments to prison and jail, an effect that is directly contrary to proponents’ hope to reduce prison populations. In general, ISP supervision was associated with more technical violations and more commitments to prison and jail.”).

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would have, had they not entered into the ATI program in the first place.<sup>49</sup> Thus, the price of “failure” in an ATI program is a harsher jail or prison sentence.

While ATI effectiveness is hampered by practical program implementation barriers, such as the cost to train staff in evidence-based practices, workforce development issues, and net widening, the inability of ATI programs to achieve system-level impacts on prevalence and incidence of incarceration lie far beyond the quality of program implementation. Rather, the barriers to effective use of ATIs are a reflection of intractable criminal justice policies that cling to prison as the sentence of choice and the larger social and political agendas that have yielded the highest incarceration rates in the world.

## II.

### ALTERNATIVES-TO-INCARCERATION IN THE CARCERAL STATE

ATI programs are limited by criminal laws and regulations, by institutional and structural racism, and by powerful economic agendas. Factors external to matters of crime prevention and public safety, such as the use of crime issues for political purposes and as a code word for race (known as the “Willie Horton” syndrome), as well as structural changes in American economic and social institutions, have made it difficult to reduce reliance on incarceration through ATI programs. Legal barriers, such as mandatory sentencing laws, are more obviously connected to the constraints placed on ATIs than social structure barriers. Simply put, ATI programs are barred from enrolling prison-bound people because the laws forbid it. The socio-structural barriers are more complicated and seem beyond the purview of ATI practitioners. However, absent an understanding of these barriers, we cannot move forward to develop strategies that make ATI programs more effective at reducing the use of prisons. This section deals with each of these barriers in turn.

#### *A. Drug Laws and Mandatory Sentencing: Placing People Out of ATIs’ Reach*

As described, ATI programming gained currency in the late 1970s beginning with community service sentencing and subsequently encompassing enhanced methods of control and rehabilitation, notably drug treatment.<sup>50</sup> Over these thirty years, ATI programs have moved from the fringes of the criminal justice system to the mainstream, gaining at least a semblance of support from judges and prosecutors, as evidenced by their

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49. See PHILIPS, ESTIMATING JAIL DISPLACEMENT, *supra* note 27, at 57.

50. See PETERSILIA, LURIGIO & BYRNE, *supra* note 8, and accompanying text.

participation in drug courts or in prosecutor-initiated programs such as “Drug Treatment Alternatives to Prison” (DTAP).<sup>51</sup> Yet at the same time, mass incarceration has come to characterize the United States, so the impact of ATI programs is at best marginal. Clearly individual case outcomes are affected, but ATIs have had no effect on the systemic and structural underpinnings of the U.S. criminal justice system. The numbers of people incarcerated in the United States grew from just over a half million people in 1980 to more than two million people by 2006.<sup>52</sup>

The “War on Drugs” is often pointed to as the single most important criminal justice policy that propelled the astonishing growth in the U.S. prison population.<sup>53</sup> Harsh drug laws were first introduced in 1973 in New York State. Under what became known as the Rockefeller Drug Laws,<sup>54</sup> New York’s prison population grew from 12,500 in 1973 to a peak of 71,500 in 1999.<sup>55</sup> In 1980, people convicted of drug offenses were 11% of

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51. See, e.g., AUBRY FOX & ROBERT V. WOLF, CTR. FOR COURT INNOVATION, *THE FUTURE OF DRUG COURTS: HOW STATES ARE MAINSTREAMING THE DRUG COURT MODEL 1* (2004), available at [http://www.courtinnovation.org/\\_uploads/documents/futureofdrugcourts.pdf](http://www.courtinnovation.org/_uploads/documents/futureofdrugcourts.pdf) (“Drug courts, which offered state courts a new way to handle drug addicted defendants, proliferated rapidly after the first court opened in Miami: from one court in 1989, to 300 courts in 1997, to 1,042 drug courts (and 429 more in the planning stages) by 2003.”); NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., *CROSSING THE BRIDGE: AN EVALUATION OF THE DRUG TREATMENT ALTERNATIVE-TO-PRISON (DTAP) PROGRAM*, at i (2003) (noting that the DTAP program in Brooklyn, New York was developed by a Brooklyn district attorney); JENNIFER TRONE & DOUGLAS YOUNG, *BRIDGING DRUG TREATMENT AND CRIMINAL JUSTICE 5* (1996), available at [http://www.vera.org/publication\\_pdf/dtap.pdf](http://www.vera.org/publication_pdf/dtap.pdf) (“Over time, DTAP has become popular with the courts, prosecution and defense offices, and the local treatment network.”); Douglas Young & Steve Belenko, *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment*, 32 J. DRUG ISS. 297, 297 (2002) (discussing three different models of legally mandated treatment in New York City).

52. See William J. Sabol, Todd D. Minton & Paige M. Harrison, U.S. Dep’t of Justice, *Prison and Jail Inmates at Midyear 2006*, BUREAU OF JUST. STAT. BULL., June 2007, at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>.

53. See MARC MAUER & RYAN S. KING, *THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY* (2007), available at [http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp\\_25yearquagmire.pdf](http://www.sentencingproject.org/Admin%5CDocuments%5Cpublications%5Cdp_25yearquagmire.pdf) (describing the increase in the number of persons convicted of drug offenses in state and federal prison between 1980 and 2003).

54. See SHELDON SILVER, *BREAKING NEW YORK’S ADDICTION TO PRISON: REFORMING NEW YORK’S ROCKEFELLER DRUG LAWS* (2009), available at <http://assembly.state.ny.us/ssspolicy/Rockefeller.pdf>; HUMAN RIGHTS WATCH, *CRUEL AND USUAL: DISPROPORTIONATE SENTENCES FOR NEW YORK DRUG OFFENDERS* (1997), available at <http://hrw.org/reports/1997/usny/>; CORR. ASS’N OF N.Y., *SAY NO TO 35 YEARS OF INJUSTICE: POLICY PAPER URGING NEW YORK STATE LEADERS TO REPEAL THE ROCKEFELLER DRUG LAWS* (2008), available at [http://www.correctionalassociation.org/publications/download/ppp/Say\\_No\\_to\\_35\\_Years\\_of\\_Injustice.pdf](http://www.correctionalassociation.org/publications/download/ppp/Say_No_to_35_Years_of_Injustice.pdf).

55. Corr. Ass’n of N.Y., *Basic Prison and Jail Fact Sheet 1* (2006), [http://www.correctionalassociation.org/publications/download/pvp/factsheets/basic\\_prison\\_fact\\_2006.pdf](http://www.correctionalassociation.org/publications/download/pvp/factsheets/basic_prison_fact_2006.pdf). The New York state prison population has since declined, numbering 63,500 in 2007. George B. Alexander, N.Y.S. Division of Parole, *Message from the Chairman*, PAROLE REP., Fall 2007, at 1, available at [http://parole.state.ny.us/pdf/newsletter\\_percent2010-07.pdf](http://parole.state.ny.us/pdf/newsletter_percent2010-07.pdf).

the new commitments to prison, but by 2005 drug offenders represented 35.7% of New York's prison population.<sup>56</sup>

New York's use of strict drug laws has been replicated both by other states and by the federal government.<sup>57</sup> From roughly 1980 to 2000, the number of annual drug arrests in the U.S. tripled, reaching 1,579,566 by 2000.<sup>58</sup> Between 1980 and 1990, the rate of imprisonment for drug arrests increased fivefold, from 19 prison commitments per 1000 drug arrests to 103 per 1000.<sup>59</sup>

However, drug laws are not the only laws that have caused increased rates of incarceration. Mandatory sentencing laws requiring incarceration for violent crimes and for people with prior criminal convictions have led to the incarceration of people who might have otherwise received non-custodial sentences, such as probation.<sup>60</sup> By 1994, all states had implemented some form of mandatory sentencing.<sup>61</sup>

Mandatory sentencing laws have proven difficult to reverse, even in the face of research and data that challenge their efficacy and fairness and a shifting landscape of public opinion that now supports their elimination or abatement.<sup>62</sup> New York State is still living with the legacy of the Rockefeller

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56. Corr. Ass'n of N.Y., *supra* note 55, at 1.

57. *See* DRUG STRATEGIES, CRITICAL CHOICES: MAKING DRUG POLICY AT THE STATE LEVEL 16 (2001) (on file with author) ("New York and Michigan led the way in the 1970s with harsh new mandatory sentencing legislation. New York's 'Rockefeller Drug Laws' require a minimum prison sentence of 15 years to life for selling two ounces or for possessing four ounces of heroin or cocaine—the same punishment faced by a person convicted of murder in New York. In Michigan, a first-time offender possessing 50 grams (1.75 ounces) of cocaine or heroin faces a minimum prison sentence of 10 to 20 years. According to the most recent comprehensive survey, 36 states had enacted some form of mandatory minimum sentencing for drug offenses by 1996."); *The Worst Drug Laws*, NATION, Apr. 9, 2001 ("That was when Governor Nelson Rockefeller set the tone for a national wave of prison-packing schemes with the drug laws that bear his name.").

58. RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISON 1 (2002), *available at* [http://www.sentencingproject.org/Admin%t5CDocuments%5Cpublications%5Cdp\\_distortedpriorities.pdf](http://www.sentencingproject.org/Admin%t5CDocuments%5Cpublications%5Cdp_distortedpriorities.pdf).

59. HUMAN RIGHTS WATCH, PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS (2000), *available at* <http://www.hrw.org/reports/2000/usa> (follow the "V. Impact of the War on Drugs on U.S. Incarceration" hyperlink).

60. *See* Elaine Wolf & Marsha Weissman, *Revising Federal Sentencing Policy: Some Consequences of Expanding Eligibility for Alternative Sanctions*, 42 CRIME & DELINQ. 192, 194 (1996) ("Several comparisons of the use of probation both pre-guidelines and post-guidelines have shown an increase in incarcerative sentences following the guidelines").

61. *See* DALE PARENT, TERENCE DUNWORTH, DOUGLAS McDONALD & WILLIAM RHODES, NAT'L INST. OF JUSTICE, KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: MANDATORY SENTENCING (1997); BUREAU OF JUSTICE ASSIST., 1996 NATIONAL SURVEY OF STATE SENTENCING 4-5 (1996), *available at* <http://www.ncjrs.gov/pdffiles/169270.pdf>.

62. *See* PETER D. HART, OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARDS THE CRIMINAL JUSTICE SYSTEM 12 (2002), *available at* [http://www.soros.org/initiatives/usprograms/focus/justice/articles\\_publications/publications/hartpoll\\_20020201/Hart-Poll.pdf](http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf) ("Fifty-six percent of adults now favor the elimination of three strikes policies and other

drug laws despite widespread opposition.<sup>63</sup> Drug law reforms that have been enacted since 2005 have merely tinkered at the margins.<sup>64</sup> While reforms have eliminated life sentences for people convicted of the top drug felonies (A-I and A-II felonies), judges have not been given discretion to sentence people to probation, treatment or other ATI programs unless they were first time offenders convicted of C, D, or E felonies.<sup>65</sup>

Some progress has been made in reforming federal mandatory drug sentencing laws. In the federal system, Congress initially refused to eliminate the one hundred to one disparity in crack versus cocaine sentencing, despite calls from the the United States Sentencing Commission (“Commission”) itself to abandon this standard. Finally, effective November 1, 2007, the Commission amended the Guidelines with respect to crack cocaine offenses by lowering the crack versus powder cocaine disparity from one hundred to one to twenty to one.<sup>66</sup> The Commission, however, did not change the five-year mandatory minimum for possession of five or more grams of crack or the ten-year mandatory minimum for fifty or more grams of crack cocaine, as such changes require an act of Congress.<sup>67</sup> Shortly after the Commission enacted these changes, the Supreme Court in *Kimbrough v. United States* concluded that the Sentencing Guidelines and the crack/cocaine ratio are only advisory and that judges have discretion in sentencing.<sup>68</sup>

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mandatory sentencing laws, and instead letting judges choose the appropriate sentence, while just 38 percent are opposed.”).

63. See Richard Pérez-Peña & Marjorie Connelly, *Pataki Viewed Favorably in Poll, Despite Qualms About Economy*, N.Y. TIMES, Oct. 18, 2002, at A1 (“Voters overwhelmingly favor changing the state’s Rockefeller-era drug laws, to end long mandatory prison sentences for low-level offenses, give judges more discretion in sentencing, and use treatment as an alternative to prison in some cases.”).

64. See Leslie Eaton & Al Baker, *Changes Made to Drug Laws Don’t Satisfy Advocates*, N.Y. TIMES, Dec. 9, 2004, at B1 (stating that “[t]he important message to get out is that the laws are virtually as harsh as ever,” said Robert Gangi, executive director of the Correctional Association of New York, a prison watchdog group. For example, he noted, judges must still sentence drug offenders to prison, rather than to alternatives like drug treatment.”). Editor’s Note: As this journal went to publication, the New York State Legislature passed significant reform to the Rockefeller drug laws as part of the 2009–10 budget. These changes restore discretion to judges and remove mandatory sentencing requirements in many categories of offenses where discretion had previously been precluded. 2009 N.Y. Laws 56. For discussion of the law, see, e.g., Jeremy W. Peters, *Albany Reaches Deal to Repeal ‘70s Drug Laws*, N.Y. TIMES, Mar. 25, 2009, at A1.

65. See ALAN ROSENTHAL, CTR. FOR CMT’Y ALTERNATIVES, A GUIDE TO ROCKEFELLER DRUG REFORM: UNDERSTANDING THE NEW LEGISLATION 1–2 (2004), available at [http://www.communityalternatives.org/pdfs/sentencing\\_guide.pdf](http://www.communityalternatives.org/pdfs/sentencing_guide.pdf) (discussing elimination of life sentences for A-I and A-II drug felonies while only authorizing judges to change indeterminate sentences to determinate sentences. For first time offenders with C, D, and E felonies, judges were given discretion to sentence offenders to one year in jail or less.). See Editor’s Note, *supra* note 64.

66. See U.S. SENTENCING COMM’N, AMENDMENTS TO THE SENTENCING GUIDELINES 42–47 (2007), available at <http://www.ussc.gov/2007guid/finalamend07.pdf>.

67. See *id.* at 45.

68. See *Kimrough v. United States*, 128 S. Ct. 558, 568–69 (2007).



The growing number of people in prison is also associated with changes in probation and parole supervision. Many states eliminated parole and enacted legislation that increased the length of sentences.<sup>69</sup> Probation and parole supervision approaches moved away from a rehabilitative focus and became increasingly law enforcement-oriented, using enhanced technology such as electronic monitoring to increase surveillance.<sup>70</sup> The change in the organizational mission of probation,<sup>71</sup> combined with increasingly sophisticated surveillance and supervision technologies, such as electronic monitoring and urinalysis, resulted in greater numbers of violations for “technical” conditions, rather than new criminality.<sup>72</sup> The Urban Institute reports that the number of parole violators returned to prison increased sevenfold between 1980 and 2000.<sup>73</sup> They further note that the number of parole violators who were incarcerated in 2000 (203,000) approximates the total number of people imprisoned in state prisons in the U.S. in 1980.<sup>74</sup>

Drug and mandatory sentencing laws are clear examples of barriers that prevent ATI programs from impacting incarceration rates. These laws undermine the ability of ATI programs to properly target defendants who would otherwise be incarcerated and apply evidence-based practices for those “high risk offenders” who would most benefit from such interventions. Administrative rules and regulations like those that bar federally-funded drug courts from accepting people with current or prior violent convictions exclude

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69. See Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 480, 496 (1999) (listing some of the states that have fully or partially eliminated parole: Arizona, California, Delaware, Illinois, Indiana, Kansas, Maine, Minnesota, Mississippi, Ohio, Oregon, New Mexico, New York, North Carolina, Virginia, and Washington).

70. See Marc Renzema, *Home Confinement Programs: Development, Implementation, and Impact*, in SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS 43 (James M. Byrne, Arthur J. Lurigio & Joan Petersilia eds., 1992) (noting that explosive growth in the use of home confinement programs and electronic monitoring began in the 1980s, and by 1990, all states, Puerto Rico, and the District of Columbia had home confinement and electronic monitoring programs).

71. See James M. Byrne, *Reintegrating the Concept of Community into Community-Based Corrections*, 35 CRIME & DELINQ. 471, 471–99 (1989) (discussing the transformation of probation to a more surveillance- and punishment-oriented system in response to public attitudes and technological changes and noting that “[i]ronically, it appears that as police administrators move to embrace a *problem-oriented* style of interaction with offenders and communities, *community corrections* administrators are introducing traditional (offender-based) policing concepts—utilizing surveillance, control, and incident-based apprehension strategies—which deemphasize the need to examine (and change) the underlying community context of offender behavior.”). *Id.* at 473.

72. See Petersilia & Turner, *supra* note 47, at 281, 306.

73. JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST., BEYOND THE PRISON GATES: THE STATE OF PRISON IN AMERICA 21 (2002), available at [http://www.urban.org/UploadedPDF/310583\\_Beyond\\_prison\\_gates.pdf](http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf).

74. *Id.*

many defendants from being considered for programming.<sup>75</sup> Finally, the indigent defense system, which is responsible for advocating for ATI sentences, is in shambles, with few resources for defenders to do their jobs properly.<sup>76</sup> These laws, rules, and processing variables remove defendants who are truly vulnerable to incarceration from even being considered for ATI programs. In this way, ATIs become yet another cog in the wheel of mass incarceration.

### *B. Racialized Justice and Limitations on Alternatives*

Racial discrimination in the criminal justice system is historical and current, deliberate and inadvertent, and occurs at every stage of the criminal justice system, from arrest to sentencing. It spans the range of crimes, from low-level misdemeanors to the imposition of the death penalty.<sup>77</sup> Black males between the ages of twenty and thirty have significantly higher rates of incarceration than other racial groups. An estimated one in three adult black men has a felony conviction,<sup>78</sup> twelve

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75. See Provisions Implementing the Violent Crime Control and Law Enforcement Act of 1994, 28 C.F.R. § 93.5(a)–(b) (2007).

76. See Faye Taxman, James M. Byrne & April Pattavina, *Racial Disparity and the Legitimacy of the Criminal Justice System: Exploring Consequences for Deterrence*, 16 J. HEALTH CARE POOR & UNDERSERVED 57, 70 (2005) (discussing indigent defense systems operating outside of national standards); NAT'L LEGAL AID & DEFENDER ASS'N, BLUE RIBBON COMM'N ON INDIGENT DEF. SERVS. (1997), available at [http://www.nlada.org/Defender/Defender\\_Standards/Blue\\_Ribbon](http://www.nlada.org/Defender/Defender_Standards/Blue_Ribbon) (describing the crisis in indigent defense services); COMM'N ON THE FUTURE OF INDIGENT DEF., INTERIM REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 16 (2005), available at <http://www.courts.state.ny.us/reports/futureofindigentdefense.pdf> (“[T]he indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York.”).

77. For a sense of the research on racial disparities throughout the criminal justice system, see generally STEVEN KALEGEROS, THE SENTENCING PROJECT, ANNOTATED BIBLIOGRAPHY: RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM (2003), available at [http://www.sentencingproject.org/Admin/Documents/publications/rd\\_annot\\_bibl.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_annot_bibl.pdf). For additional examples of disparities in misdemeanor arrests, see generally Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131 (2007); Ed A. Mufioz, David A. Lopez & Eric Stewart, *Misdemeanor Sentencing Decisions: The Cumulative Disadvantage Effect of “Gringo Justice,”* 20 HISP. J. BEHAV. SCI. 298 (1998); Ed Mun & Barbara J. McMorris, *Misdemeanor Sentencing Decisions: The Cost of Being Native American*, 15 CRIM. JUST. STUD. 239 (2002). For specific research on disparities in the application of the death penalty, see generally RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN BLACK & WHITE: WHO LIVES, WHO DIES, WHO DECIDES (1998); David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); David Cole, *Race, Life and Death*, WASH. POST, Jan. 11, 2007, at A17.

78. See Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy*

percent of black men between sixteen and thirty-four years old are incarcerated;<sup>79</sup> more than twice that number are on probation or parole.<sup>80</sup> Blacks are imprisoned at a rate of 3218 per 100,000, Latinos at 1220 per 100,000, and whites at 463 per 100,000.<sup>81</sup> So pervasive is the criminal justice system in the lives of black men that more black men have done prison time than have earned college degrees.<sup>82</sup>

The racial disparities in the U.S. criminal justice system play a major role in undermining public confidence in the system. Levels of trust in the criminal justice system vary considerably among different segments of the population and questions about the fairness of the justice system have certainly divided Americans along racial grounds.<sup>83</sup> Blacks are almost twice as likely as whites to believe that courts treat criminals too harshly.<sup>84</sup> Sixty percent of whites compared to twenty-two percent of blacks report a high level of confidence in the police,<sup>85</sup> and forty-four percent of blacks compared to thirty percent of whites say they have very little confidence in the criminal justice system.<sup>86</sup> The extent of these disparities has come to the attention of the international community as evidenced by comments made in the Concluding Observations of the United Nations Committee on the Elimination of Racial Discrimination:

The Committee notes with concern that the majority of federal, state and local prison and jail inmates in the State party are members of ethnic or national minorities, and that the

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*and the Civic Restoration of Criminal Offenders*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2006, at 281, 288.

79. See Paige M. Harrison & Alan Beck, U.S. Dep't of Justice, *Prisoners in 2004*, BUREAU JUST. STAT. BULL., Oct. 2005, at 1.

80. See LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2007 STATISTICAL TABLES 6 (2008) (showing that in 2007, twenty-nine percent of the total 14.2 million people on probation in the U.S. were black).

81. *Id.* at 8.

82. See BRUCE WESTERN, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., EDUCATION AND INCARCERATION 8 (2003), available at [http://www.justicepolicy.org/images/upload/03-08\\_REP\\_EducationIncarceration\\_AC-BB.pdf](http://www.justicepolicy.org/images/upload/03-08_REP_EducationIncarceration_AC-BB.pdf) ("In 2002, the Justice Policy Institute analyzed data from the US Justice Department and the National Center for Education Statistics and found that there were more Black men of any age incarcerated (791,000) than were enrolled in higher education (603,000) in 2000.").

83. See DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 22-23 (1999); Delores D. Jones-Brown, *Debunking the Myth of Officer Friendly: How Black Males Experience Community Policing*, 16 J. CONTEMP. CRIM. JUST. 209, 212 (2000); James R. Lasley, *The Impact of the Rodney King Incident on Citizen Attitudes Toward the Police*, 3 POLICING & SOC'Y 245, 249-51 (1994).

84. See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2003, 140 tbl.2.47 (2003), available at <http://www.albany.edu/sourcebook/pdf/t247.pdf>.

85. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online, 1 tbl.2.12.2007 (2007), <http://www.albany.edu/sourcebook/pdf/t2122007.pdf>.

86. *Id.* at tbl.2.11.2007, <http://www.albany.edu/sourcebook/pdf/t2112007.pdf>.

incarceration rate is particularly high with regard to African-Americans and Latinos. The Committee recommends the State party to take firm action to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equal treatment before the tribunals and all other organs administering justice. Noting the socio-economic marginalization of an important part of the African-American, Latino and Arab population, the State party is further recommended to ensure that the high incarceration rate is not a result of the economically, socially and educationally disadvantaged position of these groups.<sup>87</sup>

The stages that begin at arrest and conclude with pre-trial release and sentencing of discrimination have a cumulative effect that lend themselves to the adage “the whole is greater than the sum of its parts.” The American Bar Association’s Kennedy Commission concluded, “The cumulative effect of discretionary decisions at each step of the process ultimately contributes to the racial disparity in our prisons and jails.”<sup>88</sup> To reduce reliance on incarceration, ATI programs must become conscious about disparities and develop explicit strategies to tackle those disparities that are present at every stage of the criminal justice and juvenile justice system.

The cumulative nature of disparity can obscure the systemic racial bias. While some of the literature on racial discrimination in sentencing attributes disparate sentencing outcomes to legally relevant factors such as longer criminal histories,<sup>89</sup> these longer histories are themselves due in part to harsher treatment of juveniles who are minorities,<sup>90</sup> as well as the

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87. Comm. on the Elimination of Racial Discrimination [CERD], *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, ¶ 395, U.N. Doc. A/56/18 (Aug. 13, 2001).

88. JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES 9 (2004), available at <http://www.abanet.org/media/kencomm/rep121b.pdf>.

89. See Alfred Blumstein, *On the Racial Disproportionality of United States’ Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1268 (1982); John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 L. & SOC’Y 357, 368 (1974).

90. See Carl Pope & William Feyerhem, *Minority Status and Juvenile Justice Processing: An Assessment of the Research Literature (Part I)*, 22 CRIM. JUST. ABSTRACTS 327, 330–31 (1990) (reviewing studies showing race influenced decisions in initial detention and case dispositions, with black youth more likely to have negative outcomes than white youth); Robert Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 311, 342–43 (Michael Tonry ed., 1997) (finding two-thirds of studies reviewed showed evidence of either direct or indirect discrimination against minorities in juvenile justice processing); EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT’L COUNCIL ON CRIME & DELINQUENCY, AND JUSTICE FOR SOME 1, 4–5 (2000) (suggesting processing decisions in many states and local juvenile justice systems are not racially neutral with minority youth more likely to be involved in the system than

harsher treatment of minorities during each stage of the adult criminal justice system.<sup>91</sup> Thus, legally relevant factors at sentencing cannot be separated from racialized criminal justice practices within the criminal justice system.

### 1. *The Starting Point: Racial Disparities in the Juvenile Justice System*

The juvenile justice system is the starting point for what becomes an accumulation of disparities. Racial disparities in the juvenile justice system are so pervasive that in 1992, Congress made the reduction of disproportionate minority confinement a core requirement of the Juvenile Justice and Delinquency Prevention Act.<sup>92</sup> Despite the U.S. Department of Justice Disproportionate Minority Contact (DMC) initiative, a 1999 report by the U.S. Department of Justice conceded that there is “substantial evidence of widespread disparity in juvenile case processing.”<sup>93</sup>

Foreshadowing trends in the criminal justice system, minority youth are more likely to be detained at arrest, adjudicated, and sentenced to a custodial placement than white youth.<sup>94</sup> Youth of color experience longer periods of confinement in juvenile facilities than white youth<sup>95</sup> and are more likely to be prosecuted in the adult court system.<sup>96</sup> The disparities were most pronounced in dispositions for drug offenses, where the average

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white youth), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/16/4a/0d.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/16/4a/0d.pdf).

91. See JAMES F. NELSON, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., *DISPARITIES IN PROCESSING FELONY ARRESTS IN NEW YORK STATE*, at i–xii (1995). Nelson’s research controlled for key factors such as prior criminal history, seriousness of the charge, and county of prosecution, and nonetheless found racial disparity at every level of case processing decisions following arrest but preceding incarceration. The most pervasive examples of such disparity were at sentencing. Looking at cases where defendants were eligible for probation, i.e., the non-custodial sentence, the Division of Criminal Justice Services (DCJS) study found that one-third of minority offenders who were eligible for probation (4000 out of 12,000 studied) would not have been sentenced to a term of incarceration had they been white. Disparities were present in both non-violent crimes and crimes classified as “violent felony offenses” (VFO).

92. See Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 107–273, 116 Stat. 1869 (2002) (codified at 42 U.S.C. § 5633 (2008)) (requiring states to submit reports detailing how they have designed juvenile delinquency prevention efforts and system improvement efforts to reduce the disproportionate number of juvenile members of minority groups in exchange for federal grants); Office of Juvenile Justice and Delinquency Prevention, U.S. Dep’t of Justice, *Minorities in the Juvenile Justice System*, 1999 NAT’L REP. SERIES: JUV. JUST. BULL., Dec. 1999, at 1, available at <http://www.ncjrs.gov/pdffiles1/ojdp/179007.pdf>.

93. Office of Juvenile Justice and Delinquency Prevention, *supra* note 92, at 3.

94. See POE-YAMAGATA & JONES, *supra* note 90, at 1–3.

95. *Id.* at 3 (“In 1993, African American youth were confined on average for 61 days more than white youth and Latino youth were confined 112 days more.”).

96. *Id.* at 2 (“Minority youth were much more likely to be waived to adult criminal court than white youth. This was true in all offense categories.”).

length of stay in public facilities for Latino youth admitted for drug offenses was double the length of stay of white youth (306 days versus 144 days), and where African American youth were also held longer than white youth (235 days versus 144 days).<sup>97</sup>

New York State exemplifies these disparities: eighty-seven percent of youth admitted to New York State Office of Children and Family Services (OCFS) custody in 2006 were minority children (fifty-five percent black, twenty-six percent Hispanic, and the remainder composed of other ethnic groups).<sup>98</sup> In contrast, New York's adolescent population (youths between the ages of ten and nineteen) is only nineteen percent black and eighteen percent Latino. In New York City, the juvenile detention population is disproportionately composed of minorities: black and Latino youth make up roughly ninety-five percent of youths in detention, yet they comprise less than two-thirds of New York City's youth population.<sup>99</sup>

## 2. *Mass Incarceration and Racial Disparities*

The juvenile justice system is the precursor to the mass incarceration of adults, which has created a prison nation disparately impacting people of color. The extreme difference in rates of incarceration between blacks and whites began in the 1970s.<sup>100</sup> Today, blacks are almost six times more likely to be incarcerated than whites.<sup>101</sup> By 2006, the majority of the 2.2 million people confined in U.S. jails and prisons were people of color.<sup>102</sup> Bruce Dixon, Associate Editor of the *Black Commentator* writes, "the shadow of prison squats at the corners of, and often at the center of nearly every black family's life in this nation"<sup>103</sup>—a statement that is not surprising when one realizes that the incarceration rate of blacks in the U.S. exceeds the rate in South Africa during apartheid.<sup>104</sup>

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97. *Id.* at 21.

98. DIV. OF REHABILITATIVE SERVS., N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., 2006 ANNUAL REPORT 2 (2005).

99. JUVENILE JUSTICE PROJECT, CORR. ASS'N N.Y., JUVENILE DETENTION IN NEW YORK CITY 1 (2007), available at [http://www.correctionalassociation.org/publications/download/jjp/factsheets/detention\\_fact\\_2007.pdf](http://www.correctionalassociation.org/publications/download/jjp/factsheets/detention_fact_2007.pdf).

100. See WESTERN, *supra* note 6, at 2–5.

101. MARC MAUER & RYAN KING, SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 3 (2007), available at [http://sentencingproject.org/Admin/Documents/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://sentencingproject.org/Admin/Documents/publications/rd_stateratesofinbyraceandethnicity.pdf).

102. Sabol, Minton & Harrison, *supra* note 52, at 9.

103. Bruce Dixon, *Mass Incarceration is an Abomination*, BLACK COMMENTATOR, July 21, 2005, at ¶ 2, available at [http://www.blackcommentator.com/147/147\\_cover\\_incarceration.html](http://www.blackcommentator.com/147/147_cover_incarceration.html).

104. MARC MAUER, SENTENCING PROJECT, AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION, 1992–1993, at 1 (1994).

The tremendous growth in the numbers of blacks and Latinos in prison has been the most troubling aspect of mass incarceration, and the numbers are more exaggerated within the population of incarcerated females. The number of women incarcerated increased by 757% between 1977 and 2004, with blacks and Latinos making up more than half of the population of incarcerated women.<sup>105</sup> The incarceration rate for black women, at 358 per 100,000, is nearly four times the incarceration rate for white women, which stood at 94 per 100,000.<sup>106</sup> Latino women, with an incarceration rate of 152 per 100,000 are more than 1.6 times more likely to be incarcerated than white women.<sup>107</sup>

The enforcement of drug laws—arrest, prosecution, and sentencing—has been most pronounced in communities of color.<sup>108</sup> While drug use rates are roughly the same between different races and ethnicities,<sup>109</sup> almost two-thirds of all the people in state prison for drug offenses are black.<sup>110</sup>

Mandatory sentencing laws, particularly for drug offenses, have not only led to higher incarceration rates, they have also exacerbated racial disparities in the criminal justice system. In 2004, the U.S. Sentencing Commission reported that the odds of imprisonment in drug cases were twenty percent higher for blacks and forty percent higher for Latinos.<sup>111</sup> The U.S. Sentencing Commission acknowledged this in 2004 when it commented that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”<sup>112</sup>

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105. See NATASHA A. FROST, JUDY GREENE & KEVIN PRANIS, INST. ON WOMEN & CRIMINAL JUSTICE, *HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN 1977–2004*, at 9, 24 (2006), available at <http://www.wpaonline.org/pdf/HARD%20HIT%20Full%20Report.pdf>.

106. Sabol, Minton & Harrison, *supra* note 52, at 9.

107. *Id.*

108. See MICHAEL H. TONRY, *MALIGN NEGLECT—RACE, CRIME AND PUNISHMENT IN AMERICA* 104–16, (1995) (discussing the war on drugs and its disproportionate focus on people and communities of color); MARC MAUER, SENTENCING PROJECT, *THE RACE TO INCARCERATE 157–76* (1999) (rev. and updated, pbk ed. 2006) (discussing the war on drugs, its impact on the black community, and its exacerbation of racial disparities).

109. See OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (SAMHSA), DEP’T OF HEALTH AND HUMAN SERVS., *RESULTS FROM THE 2007 NATIONAL SURVEY ON DRUG USE AND HEALTH: NATIONAL FINDINGS 25* (2007), available at <http://www.oas.samhsa.gov/nsduh/2k7nsduh/2k7Results.pdf> (stating that the rate of drug use by blacks is 9.5%, 8.2% for whites, and 6.6% for Latinos).

110. See HUMAN RIGHTS WATCH, *supra* note 59 (follow the “I. Summary and Recommendations” hyperlink).

111. PAUL J. HOFER, CHARLES LOEFFLER, KEVIN BLACKWELL & PATRICIA VALENTINO, U.S. SENTENCING COMMISSION, *FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM* 122 (2004), available at [http://www.ussc.gov/15\\_year/15\\_year\\_study\\_full.pdf](http://www.ussc.gov/15_year/15_year_study_full.pdf).

112. *Id.* at 132.

### 3. *Racialized Decision-Making: Disparities Along the Criminal Justice Continuum*

Disparities in the adult criminal justice system are not just due to drug and mandatory sentencing laws. Disparities also arise from police deployment patterns and decisions regarding who to arrest, as well as choices made by prosecutors and judges at various points in the criminal justice system. A 1983 study by Alfred Blumstein showed that eighty percent of the racial disparity in the prison population could be explained by racial differences in arrest for serious crimes like murder and robbery that typically result in imprisonment, leaving twenty percent of the disparity unexplained by crime of arrest.<sup>113</sup> Blumstein updated his study in 1991 and found that racial disproportionality had become slightly worse, with only seventy-six percent of disproportionality attributed to differential arrest rates. Blumstein pointed to the increase in drug arrests as the source of the increased disparities.<sup>114</sup>

Racial profiling in policing is an acknowledged problem in stop and frisk encounters.<sup>115</sup> In 1999, then-Attorney General Eliot Spitzer issued a report that showed that blacks in New York City were twenty-three percent more likely and Latinos thirty-nine percent more likely to be stopped by police than whites, even controlling for differing crime rates among neighborhoods.<sup>116</sup> In February 2007, the New York City Police Department released data showing that people in one of the poorest black neighborhoods in Brooklyn were stopped and frisked by police on average about once every twenty-four minutes.<sup>117</sup> In contrast, in wealthier white neighborhoods the police stopped only one person every sixteen hours.<sup>118</sup>

The racial disparities in the criminal justice system are further manifested in the use of pre-trial detention, plea-bargaining, and sentencing. Data on felony cases processed in large urban counties shows that blacks and Latinos are more likely than whites to be detained from arrest to adjudication.<sup>119</sup> Research also shows that detention is associated

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113. Blumstein, *supra* note 89, at 1267.

114. Blumstein, *Racial Disproportionality of US Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 753 (1993).

115. See OFFICE OF THE ATTORNEY GEN., NEW YORK CITY POLICE DEPARTMENT'S 'STOP & FRISK' PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK, at iv-v (1999), available at [http://www.oag.state.ny.us/media\\_center/1999/dec/stp\\_frsk.pdf](http://www.oag.state.ny.us/media_center/1999/dec/stp_frsk.pdf). On March 18, 1999, the Office of the Attorney General commenced an investigation into the NYPD's use of "stop and frisks" in response to deep public concerns about the impact of the "stop and frisk" tactics upon the minority community.

116. See *id.* at 123.

117. Emily Vasquez, *Numbers Show How Police Work Varies by Precinct*, N.Y. TIMES, Feb. 5, 2007, at B1.

118. *Id.*

119. See Stephen Demuth & Darrell Steffensmeier, *The Impact of Gender and Race-Ethnicity on the Pretrial Release Process*, 51 SOC. PROBS. 161, 234, 237-38 (2004) (finding



with a greater likelihood of conviction.<sup>120</sup> Discretionary charging and plea decisions made by prosecutors also exhibit racial disparities. In the federal system, for example, prosecutors are granted great amounts of discretion in the granting of downward departures for substantial assistance.<sup>121</sup> Research shows that such departures have benefited white defendants more than black or Latino defendants. Albonetti's study of the use of this discretionary mechanism found that white defendants who provided substantial assistance received an average twenty-three percent reduction in the likelihood of incarceration, while similarly situated black defendants received only a thirteen percent reduction.<sup>122</sup>

By the time one arrives at the sentencing outcome, also known as the "in/out" decision, the accumulation of the racially biased actions and decisions in the various stages of the criminal justice system almost ensures that people of color will be sentenced to jail or prison and whites will receive a non-custodial sentences such as probation and ATI programs. While there are no state or national databases on the demographic characteristics of ATI participants, data does show that unlike prisons, the majority of drug court participants and probationers are white. For example, a 2005 study of twenty-seven drug courts around the country showed that of the drug courts which kept data on race reported that the majority of their drug court participants were white.<sup>123</sup> With respect to the probation population, fifty-five percent of the more than three million people on probation in 2005 in the United States were white.<sup>124</sup> In contrast, during the same year, approximately sixty percent

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that black and Hispanic defendants are more likely to be detained pretrial even controlling for legal, extralegal, and contextual factors).

120. See Mary T. Philips, N.Y. City Criminal Justice Agency, *Bail, Detention, & Felony Case Outcomes*, RES. BRIEF, No. 18, Sept. 2008, at 5; Mary T. Philips, N.Y. City Criminal Justice Agency, *Bail, Detention, & Nonfelony Case Outcomes*, RES. BRIEF, No. 14, May 2007, at 5; BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, *FELONY DEFENDANTS IN LARGE URBAN COUNTIES*, 1998, at 24 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc98.pdf> (finding "[s]eventy-eight percent of the defendants who were detained until case disposition were eventually convicted of some offense, compared to 63% of those released pending disposition . . ."). See also Taxman, Byrne & Pattavina, *supra* note 76, at 62, 71.

121. See LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMM'N, *SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 2-3* (1998), available at <http://www.ussc.gov/publicat/5kreport.pdf>. The authors note that the federal Sentencing Guidelines policy statement 5K1.1 – Substantial Assistance to Authorities was designed to provide incentives to encourage defendant cooperation in the prosecution of another person, but there is "scant instruction clarifying the terms and policies contained in this" statement. *Id.*

122. Celesta A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 LAW & SOC'Y REV. 789, 813 (1997).

123. According to a 2005 study of twenty-seven drug courts around the country, about half of the drug courts that kept data on race reported that the majority of their participants were white. GAO-05-219, *supra* note 42, at 41.

124. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, *PROBATION AND PAROLE IN THE UNITED STATES*, 2005, at 6 (2006).

of prisoners were people of color.<sup>125</sup> Finally, rates of incarceration vary dramatically for whites and people of color. In 2005, the rate of incarceration per 100,000 was 3145 for black males, 1244 for Latino males and 471 for white males.<sup>126</sup>

*C. The Real World: Prisons and Agendas of Economics and Social Control*

While concerns for public safety and crime control are often used to explain the use of prisons, there is little data to support the proposition that the level of incarceration in the United States has reduced crime or secured public safety. The Sentencing Project found that rates of incarceration increase whether crime is decreasing or increasing, and that the rate of incarceration outpaces increases in crime rates when they occur.<sup>127</sup> In general, a relatively small proportion of the overall decrease in serious crimes over the last several decades has been attributed to the increase in incarceration with estimates ranging from two to twenty-five percent.<sup>128</sup> Moreover, there is increasing appreciation that incarceration itself is a destabilizing force particularly when meted out in concentrated forms on specific communities.<sup>129</sup>

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125. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2005, at 8 (2006). At year-end 2005, forty percent of state and federal prisoners were black and twenty percent were Latino. *Id.*

126. *Id.*

127. See RYAN S. KING, MARC MAUER & MALCOLM C. YOUNG, SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 3 (2005) (finding that between 1984 and 1991 crime rates increased by seventeen percent, but incarceration rates rose even more, by sixty-five percent. Between 1991 and 1998, crime rates fell by twenty-two percent but incarceration rates continued to rise by forty-seven percent. Thus the incarceration rates seem to increase regardless of whether crime is rising or falling, and conversely crime rates rise or fall independent from incarceration rates.).

128. See JAMES P. LYNCH & WILLIAM J. SABOL, URBAN INST., DID GETTING TOUGH ON CRIME PAY?, CRIME POLICY REPORT NUMBER 1 (1997), available at <http://www.urban.org/url.cfm?ID=307337> (estimating that the increase of violent offenders in prison in the 1980s resulted in an additional nine percent decrease in violent crime); DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 2 (2007), available at [http://www.vera.org/publication\\_pdf/379\\_727.pdf](http://www.vera.org/publication_pdf/379_727.pdf) (estimating that imprisonment was responsible for twenty-five percent of the decrease in crime that the U.S. experienced between 1992 and 1997); BRUCE WESTERN, RUSSELL SAGE FOUND., PUNISHMENT AND INEQUALITY IN AMERICA 186–87 (2006) (estimating that the increase in the prison population in the 1990s reduced the rate of serious crime by two to five percent); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 178–79 (2004), available at <http://www.urban.org/url.cfm?ID=307337> (estimating that increases in incarceration in the 1990s account for a reduction in crime of approximately twelve percent for homicide and other violent crime).

129. See Rose & Clear, *supra* note 36, at 467 (“[A]n overreliance on formal controls may increase disorganization by impeding other forms of control. High incarceration rates may contribute to rates of criminal violence by the way they contribute to such social problems as inequality, family life deterioration, economic and political alienation, and social disorganization. Concentrated within certain communities, high levels of incarceration undermine social, political, and economic systems.”).

What then can explain the orgy of imprisonment in the U.S. in the latter part of the twentieth century? David Garland describes mass incarceration as social control that reflects the social and economic changes of late modernity. On the economic side, Garland speaks of the restructuring of the labor market, including the collapse of the industrial sector and the globalization of capital.<sup>130</sup> Changes in family structure, mass media, culture, and other structural changes made societies in the late twentieth century both more vulnerable to crime and receptive to more punitive criminal justice policies.<sup>131</sup> In a society that “governs through crime,”<sup>132</sup> both poverty and crime are characterized as the individual choices of unworthy individuals that in turn justify social policies that undermine the legitimacy of publicly supported welfare and safety net programs.<sup>133</sup> Expanded and increasingly punitive crime control responses become the public policy of the day.

The expanded investment in prisons has been accompanied by decreased support for social and public goods such as housing, education and healthcare, transforming criminal justice policy in the United States into its de facto social policy. For example, deinstitutionalization combined with inadequate development of community-based health services have led to jails and prisons becoming, in effect, the most important providers of health care in the United States.<sup>134</sup> Substance abuse treatment remains inadequate to the demand, despite concern about the relationship between crime and drug use.<sup>135</sup> Police are now deployed in schools to handle problems and behaviors that were previously addressed by school principals.<sup>136</sup> Homelessness has been

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130. See GARLAND, *supra* note 4, at 81.

131. See *id.* at 85–92.

132. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 4 (2007). Simon highlights three ways in which the “American elite” are “governing through crime.” First, crime has become a significant strategic issue by which institutional actors are seen to be acting legitimately when they act to prevent crime. Second, people use the category of crime to legitimate interventions that have other motivations. Third, technologies, discourses, and metaphors of criminal justice have become more visible in institutions where they gravitate into new opportunities for governance. *Id.*

133. See GARLAND, *supra* note 4, at 196.

134. See SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 16 (2003), available at [http://www.soros.org/initiatives/usprograms/focus/justice/articles\\_publications/publications/ill\\_equipped\\_20031022/ill\\_equipped.pdf](http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/ill_equipped_20031022/ill_equipped.pdf).

135. See Peter D. Friedmann, Stephanie C. Lemon, Michael D. Stein & Thomas A. D’Aunop, *Accessibility of Addiction Treatment: Results from a National Survey of Outpatient Substance Abuse Treatment Organizations*, 38 HEALTH SERVS. RES. 887, 888 (2003) (“[A]ccess to substance abuse treatment remains a major concern in the United States—fewer than half of addicted persons receive needed treatment.”).

136. See ADVANCEMENT PROJECT, *EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO THE JAILHOUSE TRACK 7* (2005), available at <http://www.advancementproject.org/reports/FINALEOLrep.pdf>.

criminalized as well, through laws that prohibit activities such as eating, sitting, and begging in public spaces, and through strict enforcement of loitering and panhandling laws.<sup>137</sup>

In a case study of the prison-industrial complex in California, Ruth Wilson Gilmore traces the expansion of prisons within the context of changing economic structures and political ideology.<sup>138</sup> Gilmore documents how surpluses in capital, land, labor, and state capacity made prisons an increasingly attractive investment.<sup>139</sup> Prisons were built on surplus agricultural land in an effort to shore up rural economies that were decimated by agribusiness and climate-induced production crises.<sup>140</sup> The prisons were financed by public borrowing that was “off-book,”<sup>141</sup> which meant that it was not included in the regular state budget.<sup>142</sup> This method of financing made prison funding immune to the right-wing-organized taxpayer refusal to approve public expenditures. This conservative faction formed after the state passed Proposition 13, which reduced property tax revenue.<sup>143</sup> The dismantling of welfare supports for the poor and near poor was supported by the consolidation of right wing Republican power through the administrations of Ronald Reagan, George Deukmejian and Pete Wilson.<sup>144</sup> This and other economic and political changes created a large urban underclass that became, in essence, a commodity used to stoke the prison-building boom.<sup>145</sup> The politically expedient “get tough on crime” mantra created harsh sentencing laws such as “Three Strikes,” which ensured that a steady stream of prisoners would be channeled into the large number of new prisons being built in rural areas throughout the state.<sup>146</sup>

What Gilmore has termed California’s “Golden Gulag” is perhaps the most dramatic example of the role of prisons in the late twentieth century political and economic landscape, but it is not the only example. New York State was first to pioneer mandatory sentencing laws with its 1973 Rockefeller drug laws.<sup>147</sup> It, too, sidestepped the state’s regular budget

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137. See Nat’l Coal. for the Homeless, Fact Sheet: A Dream Denied: The Criminalization of Homelessness in U.S. Cities (June 2008), available at <http://www.nationalhomeless.org/publications/facts/criminalization.pdf>; Randall Amster, *Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness*, 30 SOC. JUST. 195, 200–01 (2003).

138. See GILMORE, *supra* note 6, at 26.

139. *Id.* at 88.

140. See *id.* at 105–06.

141. See *id.* at 98.

142. See *id.* at 99–101.

143. See *id.* at 97.

144. *Id.* at 48–49, 94.

145. *Id.* at 107–13.

146. See *id.* at 112–13 (discussing the outcome of California’s Three Strikes laws).

147. See Alexandra Marks, *More States Roll Back Mandatory Drug Sentences*, CHRISTIAN SCI. MONITOR, Dec. 10, 2004, available at <http://www.csmonitor.com/2004/1210/p02s02-usju.html>.

process and even its bonding process in its efforts to fund prison construction.<sup>148</sup> In 1981, the voters of New York rejected a \$500 million prison construction bond referendum.<sup>149</sup> The state government then turned to the Urban Development Corporation (UDC) to fund the building of new prisons.<sup>150</sup> In this way, then-Governor Mario Cuomo was able to disregard the outcome of the referendum.<sup>151</sup> It is ironic and repugnant that the UDC, which was originally established to fund low- and moderate-income housing,<sup>152</sup> had its funds redirected to prison building during a period of time when homelessness was on the rise in New York.<sup>153</sup>

In upstate New York, prison employment has become the major form of economic development for poor rural communities where residents have little choice in what jobs to take. Although the economic benefits of prisons have been debunked,<sup>154</sup> employment in correctional facilities still plays a major role in some communities. In a 1992 study, eighty-nine percent of state prison employees were from upstate, rural, and typically Republican-dominated communities, where family farms were no longer economically viable and small factories and businesses had shut down.<sup>155</sup> Residents of these rural communities come to depend on the young men and women from New York City—the home of more than seventy-five percent of state prisoners—to serve as the raw material for their new jobs. There is no secret about the use of prisons to foster economic development

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148. See RYAN S. KING, MARC MAUER & TRACY HULING, SENTENCING PROJECT, BIG PRISONS, SMALL TOWNS: PRISON ECONOMICS IN RURAL AMERICA 4 (2003), available at [http://www.sentencingproject.org/Admin/Documents/publications/inc\\_bigprisons.pdf](http://www.sentencingproject.org/Admin/Documents/publications/inc_bigprisons.pdf) (discussing Governor Cuomo's use of a loophole in the Urban Development Corporation structure that provided funding for rebuilding cities in the wake of riots and economic despair, but did not require public support for the issuance of bonds).

149. *Id.*

150. *Id.*

151. *Id.*

152. See Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 56 (explaining that the UDC was enacted to build housing for the poor and was signed into legislation in 1968 on the day of Martin Luther King's funeral to honor his legacy).

153. See COAL. FOR THE HOMELESS, MODERN MASS HOMELESSNESS IN NEW YORK CITY: A BRIEF HISTORY AND CURRENT THREATS TO THE RIGHT TO SHELTER 6 (2002), available at <http://www.coalitionforthehomeless.org/FileLib/PDFs/righttoshelterhistory.pdf> (charting the increase in people in homeless shelters in New York City from just over 15,000 in 1983 to 28,237 in 1987).

154. See KING, MAUER & HULING, *supra* note 148, at 2 (finding no difference in economic development between rural New York counties that got prisons and rural New York counties that did not); Terry L. Besser & Margaret M. Hanson, *Development of Last Resort: The Impact of New State Prisons on Small Town Economies in the United States*, 35 J. COMTY. DEV. SOC'Y 1, 4-5 (2004) (reviewing a study that found prison towns did not gain significantly in employment when compared to non-prison towns).

155. See Daniel L. Feldman, *20 Years of Prison Expansion: A Failing National Strategy*, 53 PUB. ADMIN. REV. 561, 561-62 (1993).

on the backs of poor young people of color.<sup>156</sup> As the New York State Department of Correctional Services observed, “The Department of Correctional Services in concert with the Department of Economic Development can, in effect, use the prison system and some of its resources to assist the State’s economic development.”<sup>157</sup> The carceral system described by Loïc Wacquant has become the dominant force in poor, urban, black communities revealing not only the profound lack of jobs but also other indices of the abandonment of inner cities.<sup>158</sup>

The use of prisons to house the black urban poor belies the progress made during the economic boom of the 1990s. Becky Pettit and Bruce Western show that the apparent improvement in the economic position of young black men during the 1990 was in part the result of the number of black men in prison.<sup>159</sup> By 1999, the labor inactivity of black men (when accounting for incarcerated people) inflated black relative earnings by between seven and twenty percent among all working-age men, and by as much as fifty-eight percent among young men.<sup>160</sup>

### III.

#### CONCLUSION:

#### ALTERNATIVES TO INCARCERATION AND SOCIAL JUSTICE

Application of best practices and the production and dissemination of research and evaluations demonstrating what works and what does not are important, but they will not lead to more effective use of ATI options. The promises of ATIs will not be met through technocratic solutions. The barriers to decarceration are deeply embedded in America’s social, political, economic, and ideological being. Moving away from the carceral state will require community and grassroots organizing efforts that open the door to community-based solutions to crime, safety, and social justice.

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156. See TODD R. CLEAR & DAVID R. KARP, *THE COMMUNITY JUSTICE IDEAL: PREVENTING CRIME AND ACHIEVING JUSTICE* 50 (commenting on the transfer of wealth from a neighborhood like Bedford-Stuyvesant in New York City to upstate New York).

157. N.Y. STATE DEP’T OF CORR. SERVS., DIV. OF INDUS., *CORCRAFT PRODUCTS, 1996–97 ANNUAL REPORT* 21 (1997); See also *id.* at 10 (describing the economic impact of correctional industries).

158. See Wacquant, *supra* note 6, at 95 (describing the carceral system as a mesh that entraps a population of younger black men rejected by the deregulated wage-labor market and has reshaped the urban Black Belt of mid-century as to make the ghetto more like a prison).

159. See *id.*; Bruce Western & Becky Pettit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. OF SOC’Y. 553 (2005) (explaining that the improvements in the economic condition of black men is in part an artifact of the shrinking pool of men able to work, combined with the fact that men in prison would have been more likely to hold low wage jobs).

160. *Id.* at 573.

ATI organizations must position themselves within a strategic framework that challenges both criminal justice system practices and policies and larger structural factors that produce mass incarceration. ATIs must disentangle themselves from a specialist view of criminal justice and, given the role of mass incarceration, recognize that our work has moved from the criminal justice arena to the arena of social justice. The impact of the carceral state on the fabric of American society means that punishment is no longer a specialty to be addressed by criminologists using a narrow framework. As the carceral state becomes central to the governance of American community, school, and family life, it becomes imperative that ATI organizations engage with community-based and community-led struggles to counter mass incarceration. As Marie Gottschalk states,

We need to recognize that crime control strategies are profoundly political because they both reflect and direct the distribution of power in society. Experts need to overcome their squeamishness about taking politics seriously. They also need to view engaging the public in discussions about the future of the carceral state as part of their professional responsibility.<sup>161</sup>

For ATIs to be relevant in efforts to dismantle the carceral state, our work must become more than adjustments to the margin of sentencing policy and practice. There are four elements to the ability of ATIs to become more relevant in an era of mass incarceration:

**1. Becoming Better Gatekeepers.** ATIs must get serious about reaching those people who would otherwise be incarcerated. Targeting the appropriate client population is a matter of looking at who is in the detention system, the jails and prisons in a given community, the charges, the criminal history, and the demographic characteristics of people in confinement. ATI programs should avoid program criteria that exclude participants a priori because of their conviction or criminal history. ATIs should use an individualized client-centered approach, be proactive in identifying people who would be incarcerated, and be open to partnering with the defense, often the discredited party in the criminal justice system. It requires working with defense attorneys to understand the expectations and practices of plea bargaining.

**2. Confronting Racial Disparities.** ATI programs must make an explicit commitment to recognize and confront racial discrimination and disparities in the system. While to date there is little information about whether ATI programs are used in ways that counter discrimination in the criminal justice system, the data on who goes to prison versus who receives probation suggest otherwise. There are models and approaches that can

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161. Marie Gottschalk, *Dollars, Sense and Penal Reform: Social Movements and the Future of the Carceral State*, 74 SOC. RES. 669, 686 (2007).

and should be adopted to ensure that ATIs play a role in reducing racial disparities. For example, the Juvenile Detentions Alternative Initiative, launched by the Annie E. Casey Foundation, has developed an assessment tool to reduce racial disparities in the juvenile justice system. It includes creating an organizational mission statement to ensure that reducing racial disparity is a core goal of programming, looking at staffing patterns to ensure cultural competency, developing program criteria, program assessment tools and program methods that reduce overt and covert racial bias, and using data collection to track who is in the program.<sup>162</sup> The Sentencing Project has also developed a manual for criminal justice professionals to reduce racial disparities.<sup>163</sup>

**3. Becoming Stronger Advocates.** ATI programs must incorporate advocacy in court or at parole hearings to make the case for an ATI sentence. Advocacy includes providing written verified information to the judge or parole board about the background of the prospective client and documenting the mitigating factors that contribute to offense behavior. Most importantly, in advocating for ATI sentences, programs must detail information about the ATI option and how it will address the factors underlying the criminal behavior factors, such as addiction, and provide alternative methods of accountability, such as restitution or community service.

Advocacy transforms the capacity of ATI programs to work with people who would otherwise be incarcerated. Advocacy enables ATIs to be assertive in reaching jail and prison-bound defendants, rather than passive recipients of referrals from a criminal justice system that has a long history of using ATIs to widen the net of social control. Advocacy is the means to ensure that the key decision-makers—judges and prosecutors—have options and information to consider.

**4. Forging Critical Alliances.** There is no more critical aspect to making ATIs more effective at reducing mass incarceration than forming alliances with the community. This can take many forms, including hiring staff that come from the same communities as most ATI clients, incorporating models of peer-delivered services, sharing information and technical expertise with community groups, and participating with grassroots organizing efforts and campaigns that challenge egregious criminal and social justice practices.

Examples of community-level struggles date back as early as the 1970s, during the very emergence of the prison-industrial complex. The national

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162. See Juvenile Detentions Alternative Initiative, JDAI Core Strategies Through a Racial Lens Framework, <http://www.jdaihelpdesk.org/reducingracial/Pages/RacialTechnicalAssistanceMaterials.aspx> (follow “JDAI Core Strategies Through a Racial Lens Framework” hyperlink) (last visited Apr. 19, 2009).

163. See DENNIS SCHRANTZ & JERRY MCELROY, SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 1, 35–39, 46–51, 57–63 (2000).



community-organizing effort around the theme “Attica Is All of Us” resulted in the dismissal of all of the indictments against the prisoners charged in the 1971 prison uprising.<sup>164</sup> More current examples of grassroots community efforts in New York State include Prison Families of New York, run by the family members of people incarcerated in New York prisons.<sup>165</sup> Prison Families helped to spearhead the statewide coalition and campaign, New York Campaign for Telephone Justice, which successfully ended exorbitant telephone charges billed to family members with loved ones in prison.<sup>166</sup> The Seven Neighborhood Action Partnership (SNAP) “work[s] with community members in the neighborhoods most impacted by . . . New York State criminal justice policies to advocate for the repeal of the Rockefeller Drug Laws and justice in communities.”<sup>167</sup> In California, organizations such as Mothers Reclaiming Their Children (Mothers ROC)<sup>168</sup> and Families to Amend California’s Three Strikes (FACTS)<sup>169</sup> are tackling the criminal justice system in that state. Nationally, Families Against Mandatory Minimums (FAMM)<sup>170</sup> has been waging a relentless battle to revise federal drug sentencing guidelines. All of Us or None<sup>171</sup> is a national organization led by formerly incarcerated people to challenge the lifetime consequences of a criminal conviction. Critical Resistance, a group dedicated to challenging the normalization of prison as a solution to social, political, or economic problems, has nine

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164. See STEVEN M. CHERMAK & FRANKIE Y. BAILEY, *CRIMES AND TRIALS OF THE CENTURY* 335 (2007) (describing the combination of legal and community organizing efforts in the defense of the Attica defendants).

165. See PrisonNet, About Prisonet, <http://www.prisonet.com/about.asp> (last visited Apr. 19, 2009). Prison Families of New York is located in Albany, New York.

166. See Telephone Justice, About the New York Campaign for Telephone Justice, <http://www.telephonejustice.org/about/> (last visited Apr. 19, 2009). New York Campaign for Telephone Justice is a project of the Center for Constitutional Rights, in partnership with Prison Families Community Forum and Prison Families of New York. The purpose of the Campaign is to achieve lower and fairer rates for telephone calls from people in prison to family members. As a result of the Campaign’s efforts, prison telephone rates in New York State were reduced by more than fifty percent in Apr. 2007. *Id.*

167. See JusticeWorks Cmty., Seven Neighborhood Action Partnership (SNAP), <http://www.justiceworks.org/snap.htm> (last visited Apr. 19, 2009).

168. See GILMORE, *supra* note 6, at 181. Founded in Los Angeles in 1992, ROC brings together mothers in defense of their children who are caught up in the criminal justice system. *Id.*

169. See Families to Amend California’s Three Strikes, Short History of FACTS, <http://facts1.live.radicaldesigns.org/article.php?id=35> (last visited Apr. 19, 2009). Families to Amend California’s Three Strikes has chapters throughout California working to end that state’s notorious mandatory sentencing statutes. More information about the organization is available at Families to Amend California’s Three Strikes, <http://facts1.live.radicaldesigns.org/?sub=Home&view=Default&url=> (last visited Apr. 19, 2009).

170. See Families Against Mandatory Minimums, <http://www.famm.org> (last visited Apr. 19, 2009).

171. See All of Us or None, <http://www.allofusornone.org> (last visited Apr. 19, 2009).

chapters around the country.<sup>172</sup> Prison Moratorium projects in California and New York are working to stop new prison construction in those states.<sup>173</sup> Increasingly, these grassroots and community organizations are reaching out across domains to environmental justice, youth, and immigrant organizations to build cross-issue coalitions that in some places, including California, have managed to stop the building of prisons in some towns.<sup>174</sup>

These are just a few of the organizations that have sprung up to challenge mass incarceration and the attendant prison-industrial complex. The phenomenon of mass incarceration has spurred a countervailing energy of opposition. In every state and in most cities in the United States, there are organizations comprised of family members, formerly incarcerated people, social justice workers, and activists challenging mass incarceration in big and small ways. Coalitions of groups are working together to garner international attention to the racial disparities in the U.S. criminal justice system as part of the United Nations' review of compliance with the Convention to End Racial Discrimination in All Forms (CERD).<sup>175</sup>

These are the kinds of efforts that are needed to move the United States away from the carceral state and to promote a definition of public safety that encompasses basic human rights to employment, health care, education, housing and the like. ATI organizations need to be part of these efforts.

To be sure, there are behaviors that are anti-social and cause real harm to individual victims and to communities. However, ATI programs must have an analytic framework that considers not only individual behaviors but also social policies, like those that push youth of color into the justice system, or structural and institutional practices that bar former prisoners from entering the workforce and participating in the civic life of their communities. In short, both crime production and mass incarceration are as much as, if not more, the result of class and race structures in the

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172. See Critical Resistance, CR Structure and Background, <http://www.criticalresistance.org/article.php?id=95> (last visited Apr. 19, 2009) ("CR has played a leading role in challenging the normalization of prison as a solution to social, political or economic problems.").

173. See Prison Moratorium Project, <http://www.nomoreprisons.org/> (last visited Apr. 19, 2009); California Prison Moratorium Project, About Us, <http://www.calipmp.org/aboutus> (last visited Apr. 19, 2009).

174. See Rose Braz & Craig Gilmore, *Joining Forces: Prisons and Environmental Justice in Recent California Organizing*, 96 *RADICAL HIST. REV.* 92, 108 (2006). In Farmersville, California, a coalition that included not just anti-prison activists, but also environmentalists, family ranchers, and farm worker families were successful in their efforts to stop the building of a prison in that community. The coalition challenged the myth of prisons as a form of economic development in rural areas and exposed negative environmental consequences of a new prison.

175. See generally U.S. Human Rights Network, CERD Shadow Reporting, [http://ushrnetwork.org/cerd\\_shadow\\_reporting](http://ushrnetwork.org/cerd_shadow_reporting) (last visited Apr. 19, 2009).

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United States. They leave communities and the individuals in those communities marginalized.

To those who argue that larger social issues are beyond our control, I would respond that as long as we do nothing, it will be true. But the collective reasoned voices of those who work with organizations committed to real alternatives to incarceration—in concert with the voices of our clients, their families, and their communities—might show us all that we have more control than we think.