

## THE MYTH OF MASS INCARCERATION REMAINS STRONG—DESPITE ALL EVIDENCE TO THE CONTRARY\*

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A review of JEFFREY BELLIN, *MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER* (Cambridge University Press 2022)

Jeffrey Bellin's new book is based on a myth. He believes—wrongly—that the United States is addicted to putting people in prison who don't need to be there—hence the title of his book, *Mass Incarceration Nation*. Despite his best efforts to portray his book as a nuanced account of the current state of the U.S. criminal justice system and its supposed ills, it's actually an ideologically driven tome with a pre-determined conclusion: the states and the federal government lock up too many people. In reaching this pre-determined outcome, Bellin leaves out key context, cites inappropriate or misleading data, and contradicts himself. Especially notable are his neglect of the interests of victims and the failure of his attempt to distinguish between the criminal justice system and what he pejoratively calls the criminal legal system. Far from needing to release huge numbers of incarcerated criminals, as Bellin claims, we should instead focus on solving, prosecuting, and punishing crime to protect our communities and to obtain justice for victims. While some of the following criticisms might seem harsh, it is important to forthrightly examine Bellin's ideas, discuss their shortcomings, and understand that even if implemented, they would likely not achieve the goals Bellin seeks.

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\* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at [info@fedsoc.org](mailto:info@fedsoc.org).

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## I. UNDERINCARCERATION NATION

To see the shortcomings of Bellin’s ideas, a reader needs to look no further than the first sentence of Bellin’s introduction. There, he makes a bold statement that, “[i]n 2019, the United States locked up almost 2 million people.”<sup>1</sup> He then catalogues the number of people in prison for a variety of offenses. This statistic closely echoes what others have claimed. For instance, in a 2016 documentary, Bryan Stevenson, founder of the Equal Justice Initiative and author of *Just Mercy*, claimed that the United States had a prison population of 2.3 million. But it’s not true.<sup>2</sup> The Bureau of Justice Statistics shows that in 2019 there were 1,430,800 state and federal prisoners in the United States and 878,900 parolees.<sup>3</sup> And there are millions of people out on probation who would otherwise be serving time in jail or prison, but who shouldn’t be counted as “locked up.” As criminology professor Barry Latzer points out, “only one-third of criminal defendants in the United States are incarcerated in prison or jail; two-thirds are free on probation and parole.”<sup>4</sup>

A little less than halfway through the book, Bellin makes an accurate admission that undercuts his central thesis. He acknowledges that “[m]ost crimes are not reported, most reported crimes aren’t solved, and most solved

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<sup>1</sup> JEFFREY BELLIN, *MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER* 1 (2023).

<sup>2</sup> ZACK SMITH & CHARLES D. STIMSON, *ROGUE PROSECUTORS: HOW RADICAL SOROS LAWYERS ARE DESTROYING AMERICA’S COMMUNITIES* 257 (2023).

<sup>3</sup> See E. Ann Carson, Bureau Just. Stats., U.S. Dep’t of Just., *Prisoners in 2019*, NCJ 255115 (Oct. 2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>; Barbara Oudekerk & Danielle Kaeble, Bureau Just. Stats., U.S. Dep’t of Just., *Probation and Parole in the United States, 2019*, NCJ 256092 (Jul. 2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus19.pdf>. Bellin clarifies that his 2 million number includes people behind bars in both prisons and jails. BELLIN, *supra* note 1, at 1. But it is not clear from the context how many people are in prison versus how many are in jail. And to his credit, Bellin does reject the broader definition of incarceration used by decarceration advocates such as Michelle Alexander. *Id.* at 15 (stating that “[w]hen this book discusses incarceration, it is referring to locking people up in prisons and jails”). Still, it is important to disaggregate the *prison* population—those convicted of crimes—from the *jail* population—a mixture of those awaiting trial and those serving very short sentences. Much of Bellin’s book focuses on reducing the *prison* population, though this is not often clear throughout the book.

<sup>4</sup> BARRY LATZER, *THE MYTH OF OVERPUNISHMENT, A DEFENSE OF THE AMERICAN JUSTICE SYSTEM AND A PROPOSAL TO REDUCE INCARCERATION WHILE PROTECTING THE PUBLIC* 88 (2022).

crimes don't result in incarceration."<sup>5</sup> Based on this information, a more accurate title for his book would be *Underincarceration Nation*.

But Bellin doesn't draw this inference. Instead, Bellin clings to his wrong-headed belief that too many people are locked up in the United States. And to him, success in pushing back against this supposed problem means "a return to the incarceration levels that preceded Mass Incarceration"—that is, a return to the incarceration levels of the 1970s. He exclaims that such a move would be "transformative" because it "would mean going from 2 million to 300,000 people locked up," an "85 percent drop."<sup>6</sup> That's astounding!

Bellin's goal of returning to 1970s levels of incarceration has a pollyannaish quality to it. Crime rates today are much, much higher than they were in the 1960s and 1970s. In fact, crime rates began rising drastically in the late 1960s. Increased imprisonment rates lagged slightly so that "from the mid-1970s to the mid-1990s, both crime and incarceration rates escalated in tandem, only diverging distinctly at the start of the twenty-first century."<sup>7</sup> Even Bellin admits that "a connection between rising crime and rising incarceration seems undeniable."<sup>8</sup> When more people commit crimes, more people are (or should be) locked up. But he fails to note that as "the crime rate came down, the imprisonment rate followed. In fact, the 2019 rate [was] the lowest in twenty-four years, dating back to 1995."<sup>9</sup> In 2020, though, "the United States saw more than 21,000 murders, . . . a 30 percent increase over 2019, which is the biggest year-over-year increase on record."<sup>10</sup> Given that the majority (56%) of individuals serving time in state prisons are serving time for committing violent crimes, Bellin's proposal that we reduce incarceration by 85% means not incarcerating some individuals who commit violent crimes and releasing others from prison early.<sup>11</sup> This goal helps no one besides the criminals—and it arguably doesn't even help them—but it does align with

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<sup>5</sup> BELLIN, *supra* note 1, at 74.

<sup>6</sup> *Id.* at 166.

<sup>7</sup> LATZER, *supra* note 4, at 87.

<sup>8</sup> BELLIN, *supra* note 1, at 35.

<sup>9</sup> SMITH & STIMSON, *supra* note 2, at 261.

<sup>10</sup> RAFAEL A. MANGUAL, CRIMINAL [IN]JUSTICE: WHAT THE PUSH FOR DECARCERATION AND DEPOLICING GETS WRONG AND WHO IT HURTS MOST 21 (2022).

<sup>11</sup> SMITH & STIMSON, *supra* note 2, at 265. As Barry Latzer notes, since "federal inmates are only 11 percent of all prisoners," even if you released all federal prisoners, it would not "significantly affect the total U.S. prison population." LATZER, *supra* note 4, at 91.

the goals of Angela Davis and others who have argued that prisons are obsolete and that essentially no one should be incarcerated.<sup>12</sup>

## II. WHAT ABOUT CRIME VICTIMS?

One group of individuals that receives scant attention from Bellin in his book is crime victims. In fact, he argues for some policies that would affirmatively harm victims of crime (aside from failing to deter and punish crime by not prosecuting and incarcerating the perpetrators of crime). He says that each incarcerated individual “has an important story to tell” and that “what is of primary importance to researchers, government officials, citizens, and presidents is the large number of these stories.”<sup>13</sup> But what about victims? Don’t their stories matter too? Apparently not, because Bellin *blames* the focus on victims and their rights as one cause of mass incarceration. He advocates for policies that would make it difficult for victims to navigate the criminal justice system or that would outright deceive them as they attempt to do so. For example, he notes that “the bulk” of a 1982 report from President Reagan’s Task Force on Victims of Crime “consists of heartbreaking stories of crime, placing the reader in the victim’s shoes and highlighting the speedy return of offenders to the street.”<sup>14</sup> He goes on to note that the “Report offers a list of recommendations, including many that would be adopted across the country, such as (1) restricting pretrial release, (2) longer sentences, and (3) the abolition of parole.”<sup>15</sup> Bellin, of course, disagrees with these commonsense recommendations.

Instead, he takes issue with the number of people on probation or parole who have their release revoked and are sent to prison. For revocation to happen, an individual would have had to violate a condition of his or her release. Bellin admits that “[o]ne of the most common ways that people violate the terms of probation is to commit a new offense,”<sup>16</sup> that is, the individual committed a new crime while already under supervision in his or her community, likely creating new victims along the way. Unlike Bellin, Latzer notes that incarcerating an offender who breaks the law after having received an opportunity to remain free in the community serves several valid goals such as

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<sup>12</sup> See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

<sup>13</sup> BELLIN, *supra* note 1, at 14.

<sup>14</sup> *Id.* at 43.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 147.

“incapacitat[ing] dangerous repeaters, deter[ring] them and others from committing crimes, and increas[ing] the punishment for incorrigibles.”<sup>17</sup>

Bellin also oddly takes issue with Truth in Sentencing laws. These laws came about because victims, their families, and others involved in the criminal justice system often became frustrated when a judge handed down a lengthy sentence only to have the convicted criminal serve a much shorter period of incarceration. The goal of these laws, as the name reflects, is to ensure that the amount of time served by a convicted criminal more closely mirrors the sentence imposed by the judge. Along with this change, many states began requiring judges to impose determinate sentences rather than broad, indeterminate ones. Bellin explains:

This increased the transparency of criminal sentences. Under an indeterminate system, judges could appear tough by imposing a sentence with a high sticker price. A judge could even omit the low part of the range, sentencing the defendant to “twenty years” or “life” in prison, knowing that the real sentence would ultimately be determined by a parole board and would, in all likelihood be much lower, perhaps a third or less. The shift to determinate sentencing eliminated this sleight of hand.<sup>18</sup>

Is this a bad thing? To Bellin, it is. In the penultimate pages of his book, he extols the “subtle genius of indeterminate sentencing” for essentially hiding the ball from the victims and the public who are (Bellin seems to believe) unable to understand what’s going on. He describes this non-transparent sentencing as “an antidote to an apparent hallmark of American society: populist penal severity.”<sup>19</sup> In his mind, the “genius” of indeterminate sentencing is that “[i]t places the real sentence-length decision in the hands of nonelected actors and allows them to make those decisions well after the offense.”<sup>20</sup> He continues that it “allows elected prosecutors and judges to vent community outrage by sending serious offenders ‘to the penitentiary.’ But it then offers a kind of safety valve that can be used, if needed, to reduce incarceration at a later date.”<sup>21</sup> He says that “this delay allows the initial wave of punitive populism to subside, and permits later adjustments toward lenience.”<sup>22</sup> He claims that “the past decades have shown why looking tough is preferable to being

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<sup>17</sup> LATZER, *supra* note 4, at 115.

<sup>18</sup> BELLIN, *supra* note 1, at 54.

<sup>19</sup> *Id.* at 191.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

tough.”<sup>23</sup> How so? Crime rates began coming down after many of the reforms Bellin derides were implemented.<sup>24</sup> And do we really want victims to think they have received some measure of justice, only to have it later yanked away by unaccountable officials? Bellin thinks this is good.

He says that indeterminate sentencing supports the deterrence goals of punishment because “there is little evidence that severe punishments are effective. . . . In the moment when they break a law, people often aren’t thinking rationally. . . . Thus, an indeterminate prison sentence, or a one-year sentence can be just as effective a deterrent as a five-, ten- or twenty-year sentence.”<sup>25</sup> This is hard to square with Bellin’s earlier statement that “the people who regularly commit crimes are as well informed about the low likelihood of arrest and punishment as anyone,” which suggests they are in some sense rational.<sup>26</sup> His point, though, is that the likelihood of arrest and conviction is more important than the length of sentence in deterring criminal conduct. But one recent study showed that, at least at the federal level, longer sentences do result in lower recidivism.<sup>27</sup> So at least in some circumstances, sentence length matters in addition to the likelihood of conviction.

Bellin even insists that indeterminate sentencing supports the goal of incapacitating those who commit violent crimes. He wants criminals to be incapacitated only as long as necessary and no longer. Fair enough, but then he claims that “an indeterminate parole-based system makes the most sense, not a determinative ‘truth-in-sentencing’ system that incarcerates people long after they are likely to reoffend.”<sup>28</sup> There’s a lot to unpack in that statement, but at least two issues stand out.

First, “[r]epeat offending is a fact of life with criminals. . . .”<sup>29</sup> As Barry Latzer notes, “[a]side from the seriousness of the crime, nothing affects

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<sup>23</sup> *Id.* at 50.

<sup>24</sup> *Oversight Hearing on Police Practices before the H. Comm. on the Judiciary*, 116th Cong. (2019) (written testimony of Heather MacDonald, Fellow, Manhattan Institute), available at <https://docs.house.gov/meetings/JU/JU00/20190919/109952/HHRG-116-JU00-Wstate-MacDonaldH-20190919.pdf> (“Since the 1990s, felony crime in the U.S. has dropped 50%. Tens of thousands of lives, the majority Black and Hispanic, have been saved, closing the life expectancy gap between whites and blacks by 17%.”); see also LATZER, *supra* note 4, at 82 (delving into the arrest and crime statistics).

<sup>25</sup> BELLIN, *supra* note 1, at 191.

<sup>26</sup> *Id.* at 70.

<sup>27</sup> LENGTH OF INCARCERATION, UNITED STATES SENTENCING COMMISSION (June 2022), <https://www.ussc.gov/research/research-reports/length-incarceration-and-recidivism-2022>.

<sup>28</sup> BELLIN, *supra* note 1, at 191-92.

<sup>29</sup> LATZER, *supra* note 4, at 114.

sentencing severity more than the criminal history of the defendant.”<sup>30</sup> This has led some states, such as California, to pass enhanced habitual offender laws. As Latzer explains:

A report on the Three Strikes law concluded that it had “a major effect on the make-up of the prison population” in California. From the law’s enactment in 1994 to the end of 2004, the state courts sent over 80,000 second strikers and 7,500 third strikers to prison. By December 2004, nearly 43,000 inmates were serving time under Three Strikes, approximately 26 percent of the total prison population.<sup>31</sup>

Bellin groans that laws such as this “are particularly impactful in an era of Mass Incarceration.”<sup>32</sup> But guess what? They’re effective. As a co-author and I have previously noted:

Professors Daniel Kessler of Stanford University and Steven Levitt of the University of Chicago tested a research model using California’s Proposition 8, which imposed sentence enhancements for a select group of crimes. They found that in “the year following its passage, crimes covered by [three-strikes] fell by more than 10 percent relative to similar crimes not affected by the law, suggesting a large deterrent effect.” More strikingly, they found that “three years after the law [came] into effect, eligible crimes have fallen roughly 20-40 percent compared to non-eligible crimes.” They concluded that California sentence enhancements had a large deterrent effect and “may be more cost-effective than is generally thought.”<sup>33</sup>

Second, if a parole-based system is best, what is supposed to happen to those who violate their parole? Bellin earlier derides parole and probation

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<sup>30</sup> *Id.* at 115.

<sup>31</sup> *Id.* at 116 (citing Brian Brown & Greg Jolivet, *A Primer: Three Strikes—The Impact After More Than a Decade*, California Legislative Analyst’s Office (Oct. 2005), available at [https://www.lao.ca.gov/2005/3\\_strikes/3\\_strikes\\_102005.htm](https://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm)).

<sup>32</sup> BELLIN, *supra* note 1, at 145.

<sup>33</sup> ZACK SMITH & CHARLES D. STIMSON, THE D.C. CITY COUNCIL FAILED AT CRIMINAL JUSTICE REFORM—CONGRESS MUST FIX IT, HERITAGE FDN. LEG. MEM. NO. 337, at 30 (Jul. 12, 2023), <https://www.heritage.org/sites/default/files/2023-07/LM337.pdf> (citing Daniel Kessler & Steven D. Levitt, *Using Sentence Enhancements to Distinguish Between Deterrence and Incapacitation*, Nat’l Bureau of Econ. Res., Working Paper 6484 (March 1998), <https://www.nber.org/papers/w6484>). See also David S. Abrams, *Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements*, Inst. for L. & Econ., U. Pa. L. Sch., Research Paper No. 11–13 (Jan. 2011) [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1360&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1360&context=faculty_scholarship) (taking a “similar methodological approach to Kessler and Levitt” and finding “evidence for a deterrent effect of sentence enhancement in the form of add-on gun laws”).

violations as a major driver of mass incarceration, but he gives no attention to alternative consequences. Should parole violators simply receive a stern warning followed by supplicating requests to not break the law? Of course not. But Bellin offers no satisfactory alternative to incarceration.

Bellin also takes issue with police and prosecutors taking certain crimes more seriously than they did in the past. He claims that even as crime rates began coming down, “a punitive response lingered in the form of lots more police and tough new laws and attitudes.”<sup>34</sup> Because of this, he claims that police officers focused on arresting for “crimes that were easiest to find and folks that were easiest to punish.”<sup>35</sup> He goes on to explain that the “greatest impacts in terms of incarceration occur when police take more interest in a crime that arises frequently and is regularly detected and solved.”<sup>36</sup> But this complaint contradicts Bellin’s point elsewhere in the book that the certainty of being caught has a larger deterrent effect on criminals than the potential for receiving a lengthy sentence if caught. Does this contradiction reveal that he doesn’t really care much about deterrence?

### III. A NONSENSICAL DISTINCTION BETWEEN THE CRIMINAL JUSTICE SYSTEM AND THE CRIMINAL LEGAL SYSTEM

Bellin tries to draw a distinction between the criminal justice system and what he calls the criminal legal system. He says that “[i]nvoking the rhetoric of justice, we ratcheted up severity and then, with little thought, applied the increased severity to an expanding catalog of crimes that had little to do with justice.”<sup>37</sup> According to him, though the lines between the categories can get blurry, crimes that fall under the criminal *justice* category are ones “that the system has little choice but to forcefully address”<sup>38</sup> and that usually include “grave harm to an identifiable victim.”<sup>39</sup> “Criminal legal system offenses (e.g., drug offenses, weapons possession, theft, illegal immigration),” by contrast, “are prosecuted to discourage behaviors and prevent potential harms, rather than to obtain justice on behalf of an identifiable victim.”<sup>40</sup> He says that the

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<sup>34</sup> BELLIN, *supra* note 1, at 97.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 101.

<sup>37</sup> *Id.* at 7.

<sup>38</sup> *Id.* at 24.

<sup>39</sup> *Id.* at 26.

<sup>40</sup> *Id.* at 27.

expanding scope of criminal law along with the increasing severity of sentences are the major drivers of mass incarceration.

While there is a case to be made that federal law has criminalized too many actions that aren't inherently harmful (think regulatory offenses),<sup>41</sup> those types of offenses inherently differ from the criminal offenses that Bellin argues are part of the criminal *legal* system he decries. Maybe someone doesn't know that they have to obtain a wetlands permit from the EPA to build a house on their own property that contains no water on it—that's a classic regulatory crime.<sup>42</sup> But surely everyone knows that virtually throughout the United States it's illegal for them to possess crack or heroin or fentanyl. And while drug possession doesn't victimize in the same way as murder and other violent crimes, its proliferation has left a trail of bodies and broken lives in its wake. It is not unreasonable or inhumane to weigh these as part of the policy considerations in favor of criminalization. After all, the lives of perpetrators are not the only ones policymakers must consider.

Still, Bellin persists in arguing that there “is no single policy change that has as much potential to scale back Mass Incarceration as drug decriminalization.”<sup>43</sup> But even other decarceration advocates, such as Yale Law School's James Forman, Jr., recognize the limits of Bellin's approach. In his book, *Locking up Our Own: Crime and Punishment in Black America*, Forman makes the following observations, which directly undercut Bellin's proclaimed cure. He says:

Basing criminal justice reform on leniency for nonviolent drug offenders reinforces a deeply problematic narrative. First, consider the numbers. America's incarceration rates for nonviolent drug offenders are unprecedented and morally outrageous, but they are not “the real reason our prison population is so high.” Roughly 20 percent of America's prisoners are in prison on drug charges. As a result, even if we decided today to unlock the prison door of every single American behind bars on a drug offense, tomorrow morning we'd wake up to a country that still had the world's largest prison population.

And to be clear, when advocates speak of “nonviolent drug offenders,” they are not talking about all, or even most, of the five hundred thousand

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<sup>41</sup> ZACK SMITH & NATHAN PYSNO, WITHOUT INTENT *REVISITED*: ASSESSING THE INTENT REQUIREMENT IN FEDERAL CRIMINAL LAW 10 YEARS LATER, HERITAGE FDN. REPORT (Dec. 2021), [http://thf\\_media.s3.amazonaws.com/2021/Without\\_Intent\\_Revisited.pdf](http://thf_media.s3.amazonaws.com/2021/Without_Intent_Revisited.pdf).

<sup>42</sup> *Sackett v. EPA*, 598 U.S. 651 (2023).

<sup>43</sup> BELLIN, *supra* note 1, at 176.

incarcerated on drug offenses . . . [T]he drug trade—especially during the crack era—was extraordinarily violent. Some of the people involved had no connection to violence, but it wasn't easy—pacifists didn't survive for long. In arguing for mercy and compassion for nonviolent drug offenders, and only for them, advocates are pursuing an approach that excludes not just the majority of prisoners, but even the majority of incarcerated drug offenders.<sup>44</sup>

Yet Bellin argues that we should decriminalize drugs writ-large. He claims this would “generate indirect effects” such as “reducing ancillary crimes” and “policing excesses” that accompany the drug trade.<sup>45</sup> Lest you worry, he makes clear that the government can still seek to combat the drug trade, but he says it should do so by treating drug offenses in essentially the same way it treats traffic or parking violations.<sup>46</sup> And he says that the “logic of drug decriminalization applies more broadly to a host of criminal legal system offenses that are best understood as efforts to reduce harmful behaviors like gun possession, drunk driving, and parole and probation violations.”<sup>47</sup> He goes further and says that the “logic arguably extends even to unequivocally abhorrent and harmful behavior like domestic violence.”<sup>48</sup>

But he really gives away the ballgame towards the end of his book and undercuts many of his own arguments. He says that the “most effective tactics in the battle against Mass Incarceration include efforts to reduce violent crime, and especially homicide”—presumably meaning that if fewer people commit crimes, fewer people will need to be locked up.<sup>49</sup> He suggests this means more social services, redistributive welfare programs, and other such interventions. But one of the most, if not *the* most, effective ways of combating crime is to arrest those who break the law, prosecute them, and impose an appropriate punishment—including incarceration—where deserved. Bellin argues against these very tactics throughout his book.<sup>50</sup>

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<sup>44</sup> Paul J. Larkin & GianCarlo Canaparo, *The Fallacy of Systemic Racism in the American Criminal Justice System*, 18 LIB. UNIV. L. REV. (forthcoming 2023) (manuscript at 54-55 n.194) (citing JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 220, 228-29 (2017)).

<sup>45</sup> BELLIN, *supra* note 1, at 176.

<sup>46</sup> *Id.* at 176-77.

<sup>47</sup> *Id.* at 177.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 180.

<sup>50</sup> *Id.* at 5 (“The critical flaw of the last fifty years of ‘tough on crime’ policies is that this never works.”).

Still, there is one interesting aspect to Bellin’s book. He rightly gives pushback—albeit very gentle pushback—to the ideas and theories advocated by Michelle Alexander, whose influential book, *The New Jim Crow*, largely assigns the problems attributed to mass incarceration and the racial disparities between black and white prisoners to “the legacy of slavery and ongoing racism.”<sup>51</sup> Bellin acknowledges that she “characterizes the criminal justice system as the third incarnation of American efforts to perpetuate a racial caste system, following slavery and Jim Crow.”<sup>52</sup> Nonetheless, he declines to adopt her broad definition of mass incarceration that “refers not only to the criminal justice system but also to the web of laws, rules, policies, and customs that control those labeled criminals both in and outside of prison.”<sup>53</sup> And he says that Alexander’s account “is most convincing as a description of the impact of American law enforcement on certain communities of color, and least convincing as an account of the system’s design.”<sup>54</sup> He says, in looking at the increased numbers of individuals incarcerated from 1971 to 2001:

The stunning disproportionate impact on Black people is the first thing that jumps out . . . But it is also notable that in the same period that Alexander highlights (“the turn of the twenty-first century”), more white people had been sent to prison than any other group. This fact does not disprove Alexander’s claim that Mass Incarceration is designed to appeal to the “racial resentments of poor and working class whites,” but it complicates that thesis.<sup>55</sup>

That’s a nice way of saying that Alexander’s hyperbolic claims attributing increased incarceration numbers to racism don’t hold up—even to those who are sympathetic to her claims.<sup>56</sup>

#### IV. CONCLUSION

Ask anyone on the street the following simple question: Should someone who commits premeditated first-degree murder be sent to prison? Almost to

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<sup>51</sup> *Id.* at 79.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 15 (quoting MICHELLE ALEXANDER, *THE NEW JIM CROW* 15 (2020 ed)).

<sup>54</sup> *Id.* at 79.

<sup>55</sup> *Id.* at 80. See Zack Smith, *Capitalization Wars Come to Our Courts*, THE DAILY SIGNAL (Feb. 3, 2024), <https://www.dailysignal.com/2024/02/03/capitalization-wars-come-to-our-courts/> (explaining why only capitalizing certain races is a pernicious practice that weaponizes language in service of a radical agenda).

<sup>56</sup> See Larkin & Canaparo, *The Fallacy of Systemic Racism*, *supra* note 43.

a man or woman, each person asked will say, “Yes, of course!” You will get the same answer if you ask them what should happen to rapists, robbers, and recidivists. People convicted of these crimes are the individuals who today overwhelmingly fill state and federal prisons in the United States. Yet these are the very individuals Bellin would release from prison to achieve his decarceration goals. Maybe that’s the point. He seems to say that the public shouldn’t have a say in how we punish certain crimes. But that can’t be the way a democratic society operates. It certainly seems obvious that where there is crime, there must also be punishment. If not, more crime and more victims will be the inevitable result.

#### Other Views:

- Christy Visher & John Eason, *A Better Path Forward for Criminal Justice: Changing Prisons to Help People Change*, BROOKINGS INST. (Apr. 2021), <https://www.brookings.edu/articles/a-better-path-forward-for-criminal-justice-changing-prisons-to-help-people-change/>.
- Carrie Pettus, *Smart Decarceration: Guiding Concepts for an Era of Criminal Justice Transformation*, FSU INST. FOR JUSTICE RES. & DEV. (Dec. 23, 2021), [https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication\\_pdfs/SmartDecarceration\\_GuidingConcepts\\_0.pdf](https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/SmartDecarceration_GuidingConcepts_0.pdf).
- Nazgol Ghandnoosh, *Ending 50 Years of Mass Incarceration: Urgent Reform Needed to Protect Future Generations*, THE SENTENCING PROJECT (Feb. 8, 2023), <https://www.sentencingproject.org/policy-brief/ending-50-years-of-mass-incarceration-urgent-reform-needed-to-protect-future-generations/>.