

THE
SQUARE ONE
PROJECT

REIMAGINE JUSTICE

**EXECUTIVE SESSION
ON THE FUTURE OF
JUSTICE POLICY**

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RECONSIDERING THE “VIOLENT OFFENDER”

The Square One Project aims to incubate new thinking on our response to crime, promote more effective strategies, and contribute to a new narrative of justice in America.

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06

**THE VIOLENT OFFENDER
LABEL UNDERMINES
PARSIMONY**

15

**THE VIOLENT OFFENDER
LABEL DISTORTS
PROPORTIONALITY**

22

**THE VIOLENT OFFENDER
LABEL FAILS TO PREDICT
FUTURE VIOLENT CRIMES**

29

RECOMMENDATIONS

34

ENDNOTES

35

REFERENCES

40

ACKNOWLEDGEMENTS

41

**MEMBERS OF THE
EXECUTIVE SESSION
ON THE FUTURE OF
JUSTICE POLICY**

Despite a wave of criminal justice reform around the country over the last decade, the U.S. incarceration rate remains the highest in the world (Travis, Western, and Redburn 2014; Kaeble and Cowhig 2018). People considered "low-level" and "nonviolent" have been the primary focus of reform efforts, but to significantly reduce incarceration, policymakers must fundamentally reconsider the "violent offender."¹ In 2016, of the almost 7 million people incarcerated daily or on community supervision, people labeled violent offenders accounted for the majority of the state prison population (55 percent), and large shares of jail, probation, and parole populations (Table 1).²

TABLE 1U.S. correctional population statistics and shares of those charged with violence, 2016.³

Population	Total Admissions	Daily Population (violent and nonviolent)	Daily Violent Offense Population	Daily Violent Offense Population (%)
Jails	10,629,800	731,300	255,955	35
Probation	2,012,200	3,673,100	734,620	20
<i>Prisons</i>				
State	626,024	1,317,565	724,661	55
Federal	52,035	189,192	15,135	8
Parole	457,100	874,800	262,440	30
Totals	13,777,159	6,785,957	1,992,811	29

Source: Carson and Kaebler (2019).

People convicted of violent crimes have always been treated harshly by the criminal justice system, but in the four decades of rising incarceration rates from the early 1970s, punishment of the violent offender intensified disproportionately. Under President Bill Clinton, bipartisan consensus cemented the 1994 federal crime bill, enacting stricter sentencing laws for violent offenses at the federal level and incentivizing the same in the states.

Two decades later, even as President Barack Obama called for a reexamination of U.S. sentencing laws in 2015, he noted, “there are people who need to be in prison, and I don’t have tolerance for violent criminals” (C-SPAN 2015). That same year, a *Washington Times* opinion piece by Newt Gingrich described criminal justice reform as a “rare area of bipartisan agreement in an otherwise sharply divided Congress,” but added, “we all agree that violent, dangerous criminals should be

in prison, and the cost of incarcerating them is money well spent” (Gingrich and Nolan 2015). Following suit, in 2017, Senator Kamala Harris, a self-identified “progressive” prosecutor stated that “we must maintain a relentless focus on reducing violence and aggressively prosecuting violent criminals” (Marcetic 2017).

Demonizing people as violent has perpetuated policies rooted in fear rather than fact. In this paper, we break from the tradition of punitiveness toward people convicted of violent offenses and argue that the violent offender label breaches the principle of parsimony, distorts proportionality, and fails as a predictive tool for future violent behavior. The label disproportionately affects people of color—black and Hispanic people comprise larger shares of people incarcerated for violent offenses in state prisons than white people (Bronson and Carson 2019). In short, the violent offender label offers little to criminal justice policy. Instead, justice policy should focus on those who actually commit violence, mitigate responses based on the experience of violent victimization, and discount the violent offender label as predictive of future violence.

Convincing policymakers and the public to change the approach to people charged with or convicted of violent offenses will require active education around the truths of violent offending alongside a significant cultural change. Affirming well-established criminal justice principles of parsimony and proportionality should take priority over a politics of fear.

We begin by detailing the social context and life histories that surround violent offending, and argue the case for parsimonious use of punishment. While more serious and violent offenses may merit a proportionally greater response, the principle of parsimony reminds us that the punishment for violent offending should be the least coercive response necessary to achieve justice (Travis, Western, and Redburn 2014). When we account for the life histories of victimization among incarcerated people, and the situational character of the violence in their lives, the principle of parsimony must admit mercy and forbearance.

Second, we will describe how the violent offender label distorts notions of proportionality—or calibrating punishments to the severity of the crime—in part because the definition of violent crimes is overreaching, encompassing nonviolent acts, and also because sentences and conditions of incarceration for people convicted of violent crimes exceed historical and international norms of punitive treatment.

Third, we present evidence that the violent offender label fails to predict future violent behavior. People deemed violent offenders have lower recidivism rates, “mature out” of violent offending, and do not specialize in violence. “Violent” rarely describes a type of person. Thus, empirical research on violent offending tends to repudiate risk-based justifications for very long sentences, extensive pretrial detention, austere confinement conditions, and delayed parole release.

A meaningful decrease in the United States’ historically high rates of incarceration will require that reforms extend to people imprisoned for offenses considered violent. From the standpoint of policymaking, our analysis eschews the simplistic violent-nonviolent distinction as one largely unsupported by research. We conclude this paper with recommendations for a research-informed approach that fashions individual dispositions and public policy upon consideration of an involved party’s own trauma and environmental context.

We make the following three recommendations to policymakers: 1) curtail the use of violent offenses as a predictive tool for correctional decision-making, 2) reduce sentence lengths and time served for people with violent offenses, and 3) invest in families and communities where violent crimes are far too common. Public policy can advance safety not through the punishment of mythical violent offenders, but rather by focusing on healing neighborhoods and traumatized survivors of crime and violence.⁴ □

THE VIOLENT OFFENDER LABEL UNDERMINES PARSIMONY

We cannot rightly describe those convicted of violence exclusively as belonging to a category of guilty people who harm the innocent—often those with violent convictions also have suffered serious victimization themselves.

In this section we describe how violence is contextual—emerging in families, neighborhoods, and institutions in which informal bonds of guardianship are weak. People who have perpetrated violence have often been immersed in violent contexts and thus have been exposed to violence as victims and witnesses. The social contexts from which violence emerges,

along with the life histories of violence and victimization, should temper our assessments of culpability and elevate our sentiments of mercy. Parsimony, which calls on us to avoid gratuitous harm, should guide individualized assessments of a person’s circumstances and culpability, and decisions around sentences and confinement (Tonry 2017).

VIOLENCE IS CONTEXTUAL

Violent acts are often explained solely in terms of the behavioral propensities of the perpetrators. Violence, however, is situational. Environments depleted of informal social bonds—like some poor neighborhoods or prisons—make violence more likely.

Research has focused on families and neighborhoods as settings that can be violent, not because of the dispositions of the individuals that comprise them, but because of how such settings shape social life.⁵ Research on neighborhood wellbeing finds that daily life can be less predictable



IN DISADVANTAGED FAMILIES, EVERYDAY LIFE CAN BE MORE UNSTRUCTURED AND CHAOTIC

in communities that are poor and contend with high rates of unemployment, single-parenthood, and low high school graduation rates. Neighbors may be less able to monitor street life. The daily routines of young men are less structured by work and school, and they have little access to the economic opportunities that help manage the path from adolescence to adulthood (Sampson and Wilson 1995; Sampson 2012). Often, poor communities have fewer social services even though the organizational life of communities is important for violence reduction (Sharkey 2018). Sharkey and his colleagues found that in a typical city with 100,000 people, each additional nonprofit organization focused on violence reduction led to a one percent reduction in that city’s murder rate (Sharkey, Torrats-Espinosa, and Takyar 2017). New York City, for instance, added 25 nonprofits per 100,000 residents between 1990 and 2013, and during the same time period experienced a large decline in homicides. In 2013 there were 1,910 fewer murders in New York City than in 1990 (Sharkey, Torrats-Espinosa, and Takyar 2017; Sharkey, Laetsch, and Daniels 2018).

Psychologists have emphasized the contextual influence of family life on violence. In disadvantaged families, everyday life can be more unstructured and chaotic (Evans 2004; Evans et al. 2010). Adult guardians struggle with economic insecurity, and may experience untreated

mental illness and addiction. The structure of households is often complex, with unrelated adults often residing in the home, a product of communities struggling with housing instability. Instability and chaos are associated with increased violence.

Orderly neighborhoods and families are rich in the informal social connections that help regulate behavior and keep people safe. Prisons, on the other hand, lack these informal social connections almost entirely, instead, trying to coerce order with the threat of sanctions. They lack the sense of collective efficacy that would allow strangers to intervene in the event of trouble. The hierarchical relations of the prison also open the door to arbitrary treatment and the abuse of power. Thus, studies of prison safety regularly find higher rates of violence and victimization in incarceration than in free society (Bottoms 1999). In short, penal institutions—like many disorderly neighborhoods and families—are social contexts ripe with the possibility of violence. Violence, when it emerges from such social contexts, calls for parsimonious and proportionate responses informed by our sense of mercy and rehabilitation.

PEOPLE WHO HARM OTHERS HAVE BEEN VICTIMIZED THEMSELVES

An implication of the situational nature of violence is that those who have committed violence are likely to have also been victims of violence. Growing up in chaotic families and poor neighborhoods elevates the risks of victimization. People who have been incarcerated are particularly likely to have been exposed to violence and trauma (Wolff, Shi, and Siegel 2009 2009; Sered 2019). Before levying the strictest punishment for a crime, the justice system

response should first seek to understand an individual’s life history of violence and trauma, and with that understanding, it should make decisions around sentences and confinement, guided by the principles of parsimony and proportionality. Below, we provide empirical evidence on high rates of victimization among incarcerated youth, adults in Arkansas state prison, and a cohort of adults leaving Massachusetts’ state prisons.

INCARCERATED YOUTH

Empirical evidence from youth detention facilities and state prisons reveal serious victimization in the life histories of youth. In 2010, the Office of Juvenile Justice and Delinquency Prevention released the Survey of Youth in Residential Placement, which showed high rates of exposure to violence among youth in custody (Sedlack and McPherson 2010). Thirty percent had attempted suicide, 67 percent said that they had personally “seen someone severely injured or killed,” and 70 percent said that they had “had something very bad or terrible happen” to them. More than 60 percent of youth surveyed suffered with anger

management issues. Half of incarcerated youth exhibited elevated symptoms for anxiety, and half for depression as well.

High rates of exposure to violence are also apparent in research on local detention facilities. Ninety percent of youth in the Cook County, Illinois juvenile detention center reported past exposure to traumatic violence, which included being threatened with weapons (58 percent) and being physically assaulted (35 percent) (Abram et al. 2004; Ford et al. 2012). In Connecticut, 48 percent of youth in juvenile detention reported having experienced a traumatic



OVERALL, YOUTH IN DETENTION WERE THREE TIMES MORE LIKELY THAN THOSE IN THE NATIONAL SAMPLE TO HAVE BEEN EXPOSED TO MULTIPLE TYPES OF VIOLENCE AND TRAUMATIC EVENTS

loss (Pope, Lyna, and Thomas 2012). Overall, youth in detention were three times more likely than those in the national sample to have been exposed to multiple types of violence and traumatic events (Ford et al. 2012).

Disproportionately, youth sentenced to life without the possibility of parole

are victims of or witnesses to violence. Nearly 80 percent have witnessed violence in their own homes and more than half have been witnesses to violence in their neighborhoods (Nellis 2012). Eight out of 10 female juvenile “lifers” and almost half of all juvenile lifers were themselves victims of violence (Nellis 2012).

ADULTS IN ARKANSAS STATE PRISON

Similar patterns of victimization are found among men and women incarcerated in state prison. In Arkansas, all people sentenced to prison undergo an assessment that asks information about prior exposure to violence—the Social History Inventory (Inventory)—at the Department of Corrections (DOC) reception center. Data from the Inventory are used by the DOC to develop a case plan and make referrals to programs and services that are deemed to be of greatest need by the incarcerated person.

In 2018, an effort was undertaken by the Arkansas DOC to refine and enhance the Inventory. In the area of mental health, questions were added to assess histories of exposure to violent behavior, either as a perpetrator or a victim. Topics included involvement in fist fights and stabbings, witnessing murders, and carrying or using a weapon.

These questions and other changes to the Inventory were pilot tested on all people admitted to the DOC between June and July 2018. During this period, 790 people were admitted to prison and completed the revised assessment. The sample was mostly male (87 percent), white (62 percent), with an average age of 35 years. A majority of interview respondents had been committed to prison for “nonviolent” offenses such as drug use or sales (31 percent), burglary (13 percent), or theft (12 percent). Only a minority had been convicted of violent offenses, such as robbery (9 percent) or assault (6 percent).

Table 2 shows responses to the five questions about prior exposure to violence. Most respondents (85 percent) had been involved in multiple assaults either as the aggressor or victim. Additionally striking, about a third had witnessed a person

murdered. For those exposed to a murder, about 40 percent witnessed it while they were under the age of 18 and about two-thirds when they were 24 years or younger. Another 36 percent said they had been stabbed or seriously beaten. And about a quarter reported carrying a weapon or using a weapon to commit a crime. Selecting just those who had witnessed a murder or been stabbed or shot, half had carried or used a weapon.

Exposure to violence, either as victim or perpetrator, was common in this group. Those exposed to violence were more likely to be black (42 percent) and male (90 percent) compared to the total prison admissions population in Arkansas prisons, but there were no statistically significant differences by age and primary offense.

TABLE 2

Percentage of Arkansas state prison sample reporting prior exposure to violence, sample admitted to Arkansas state prison, 2018 (N=790).

Survey Question	Percent
Been in Fist Fights?	85
Been Stabbed/Shot /Seen Someone Killed?	49
Been Shot/Stabbed?	36
Seen Someone Killed?	30
Under age 25	19
Under age 18	13
Carried A Weapon or Used to Commit A Crime?	26

Source: JFA Institute and Arkansas Department of Corrections 2018.

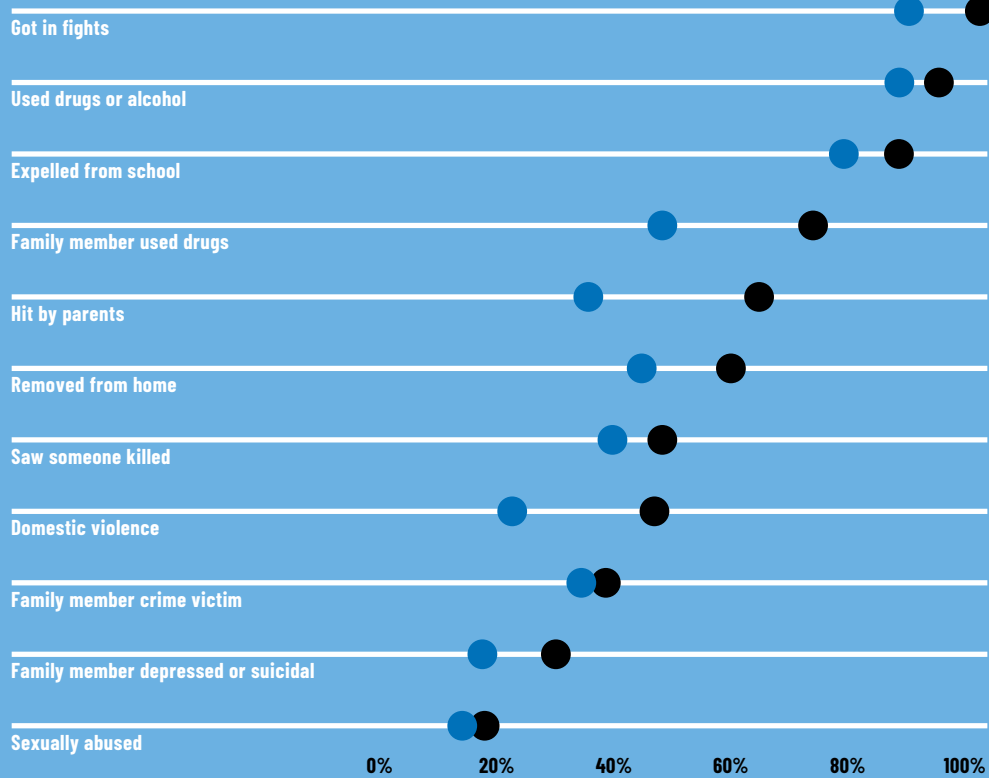


FIGURE 1

Percentage of Boston Reentry Study respondents who report exposure to violence and other trauma in childhood by violent or nonviolent conviction (N=122).

Source: Western 2018.

● Nonviolent conviction
● Violent conviction

ADULTS RELEASED FROM MASSACHUSETTS STATE PRISON

In the Boston Reentry Study (BRS), researchers collected similar data on prior exposure to violence. The BRS followed a sample of men and women from state prison in Massachusetts (N=122) over the year after prison release. In the final interview, respondents were asked detailed questions about their exposure to violence and other trauma while they were growing up: (1) a member of the childhood home was addicted to drugs or alcohol, (2) a family member was depressed or suicidal, (3) there was domestic violence in the childhood home, (4) the respondent was beaten by his or her parents, (5) the respondent was sexually abused as a child, (6) the respondent had been removed from the family home, (7) the respondent had seen someone killed, (8) the respondent had been expelled from school, (9) the respondent got in fights as a child, (10) the respondent drank alcohol or used drugs as a child, and (11) whether a family member had been a crime victim.

Figure 1 reports the percentage of respondents exposed to different kinds of trauma. The sample is divided into two categories: respondents who were incarcerated for a violent offense and those incarcerated for nonviolent offenses. A violent conviction only marginally (not consistently significantly) discriminated between those exposed to any type of trauma in childhood.

Nearly all respondents reported getting in fights in childhood and using drugs or alcohol. About half said they were hit by their parents and 40 percent reported other family violence in the childhood home. Similar to the results in the Arkansas sample, another 40 percent of the sample had seen someone killed in childhood. In some cases, respondents reported they had witnessed murders, as well as suicides and fatal car accidents.

The data from incarcerated youth and adult state prisoners in Arkansas and Massachusetts indicate life histories of victimization and witnessing violence among justice-involved people. The data suggest the contextual rather than the dispositional character of violence. Rather than violence being a behavioral tendency



IN SOME CASES, RESPONDENTS REPORTED THEY HAD WITNESSED MURDERS, AS WELL AS SUICIDES AND FATAL CAR ACCIDENTS

among a guilty few who harm the innocent, people convicted of violent crimes have lived in social contexts in which violence is likely. Often growing up in poor communities in which rates of street crime are high, and in chaotic homes which can be risky settings for children, justice-involved people can be swept into violence as victims and witnesses. From this perspective, the violent offender may have caused serious harm, but is likely to have suffered serious harm as well.

Life history and situational violence not only activate our sentiments of mercy and forbearance, they also temper our evaluation of culpability. The penal principle of parsimony is paramount in this context. Justice practitioners should weigh individualized assessments of life history and restrict punishment to the least severe kind necessary to achieve the goals of sentencing.



LIFE HISTORY AND SITUATIONAL VIOLENCE NOT ONLY ACTIVATE OUR SENTIMENTS OF MERCY AND FORBEARANCE, THEY ALSO TEMPER OUR EVALUATION OF CULPABILITY

THE VIOLENT OFFENDER LABEL DISTORTS PROPORTIONALITY

People charged or convicted of a violent crime are treated more harshly by the criminal justice system. At each step within the jail, probation, prison, and parole processes, the violent offender label imposes a higher likelihood of pretrial and post-conviction incarceration, and more severe and lengthier periods of punishment.

Harsher punishment is not related to an individual's higher risk to the public, but rather the violent offender label takes on a significance of its own, resulting in increasingly punitive responses.

This section describes how the violent offender label can often cover nonviolent criminal conduct and illustrates how the label's punitive impact distorts our notions of proportionality.

THE BROAD DEFINITION OF VIOLENT CRIMES

The violent offender label is used throughout the legal system if the associated crime is defined as violent. Yet, many people convicted of violent crimes did not commit any actual violence. State and federal law around violent crimes vary and are often

broad, encompassing acts that are commonly understood as nonviolent. This inappropriate categorization in turn imposes deprivations of liberty, sentence enhancements, and collateral penalties that are disproportionate to the actual, or even intended, harm.

On the federal level, the constitutionally-upheld portion of 18 U.S.C. § 16 defines “crime of violence” as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” commonly referred to as the “force clause.”⁶ The force clause can encompass a wide variety of acts ranging from murder to breaking into a car. For example, Texas’ “burglary of a vehicle” law was found to constitute a “crime of violence” under 18 U.S.C. § 16, though the statute merely defines it as “if, without the effective consent of the owner, [a person] breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft” (*United States v. Delgado-Enriquez*, 188 F.3d 592, 595 (5th Cir.1999); Tex. Penal Code § 30.04(a)). Of note, the commission of a “crime of violence” makes a person removable under the Immigration and Nationality Act, suggesting that the over breadth of this definition heightens consequences, even beyond the traditional justice system context (8 U.S.C. §§ 1101(a)(4)(F), 1227(a)(2)(A)(iii)).⁷

States’ sanctioning of nonviolent behaviors as if they were acts of violence also occurs under the “felony murder” rule which allows a person to be convicted of murder if they are found to have been an accomplice to a felony that results in death, even if the person neither committed nor intended the killing (see e.g., N.M. Stat., § 30-2-1(1978)). Felony murder creates the perverse possibility of

life sentences for people who have not acted violently, and had no intention to do so.

For example, the felony murder rule can apply if a person unlawfully assists someone else in the illegal possession and consumption of drugs and death results. In *Hickman v. Commonwealth*, the Court of Appeals of Virginia upheld the second-degree felony murder conviction of a man who ingested a large amount of cocaine with his cousin, and his cousin later died (11 Va. App. 369 (1990); Elizabeth O’Connor Tomlinson, *Litigation of Crim. Liability for Death Resulting from Unlawfully Furnishing Intoxicating Liquor or Drugs to Another*, 158 Am. Jur. Trials 503 (2019)).

Use of the felony murder rule is not as rare as would be expected, and the impact of its use is far-reaching. While statistics of the number of people incarcerated for felony murders are inconsistently recorded and reported, a 2016 survey conducted by a coalition of California justice reform groups found that of the women serving life sentences for murder in California, 72 percent did not commit the actual murder (Smith 2018). According to the Juvenile Law Center, 511 individuals comprise the juvenile lifer population in Pennsylvania. Of the 511 individuals, approximately 36 percent of them have convictions for second-degree murder, which encompass felony murders.⁸



THERE ARE ADMINISTRATIVE RULES AND LAWS THAT DENY ACCESS TO PROGRAMMING FOR THOSE LABELED VIOLENT AND THAT FURTHER LENGTHEN THEIR INCARCERATION

IMPACT ON PRISON CONDITIONS

Within the prison system, the violent offender label has negative consequences for both prison classification and the length of incarceration. Being labeled violent can also deny people access to programs purporting to aid in their rehabilitation.

People convicted of current or prior violent crimes are less likely to be classified to minimum custody regardless of their conduct in prison (for example see the Texas Department of Justice 2004, South Carolina Department of Corrections 2017, and Florida Department of State 2014 inmate classification policies). As a result, they are unable to experience a less degrading and more heavily programmed prison environment. Also, important privileges like extended visitation hours, canteen purchases, recreation, and access to work details outside of prison are not available for a good portion of a person's stay in prison if they carry the violent offender label. If we believe that the punishment of a prison sentence resides in the deprivation of liberty, not the severity of prison conditions, assigning those convicted of violence to harsh incarceration not only violates the principle of proportionality; it is also gratuitous and thus violates the parsimony principle.

Classified at higher levels of security, people convicted of violent offenses have less access to "work" or "program" credits that can reduce their sentences and aid in their rehabilitation (e.g. see California Department of Corrections and Rehabilitation 2018). For example, the U.S. Bureau of Prisons will not allow people convicted of a violent crime, people with prior convictions for a violent crime, or people convicted of a drug crime where a weapon was involved (whether it was used or not) to receive up to a 12-month reduction in their prison term for completing a drug treatment program (Families Against Mandatory Minimums 2012). Similarly, South Carolina does not allow people convicted of violent crimes to earn special work and education credits (South Carolina Department of Corrections 2019).

Sentence reductions for program participation are designed to incentivize participation in rehabilitative programs. However, there are administrative rules and laws that deny access to programming for those labeled violent and that further lengthen their incarceration. These policies require them to serve a greater percentage of already longer sentences even though they pose the same or less risk as so-called nonviolent offenders.

IMPACT ON SENTENCE LENGTH AND LENGTH OF STAY

A major reason for the longer length of stay for people with violent offenses is the longer sentence lengths. A suite of sentencing policies—including mandatory minimum sentences, three-strikes laws, truth-in-sentencing provisions, and life without possibility of parole terms—enacted from the mid-1980s through the 1990s—had the effect of not only ensuring incarceration for a wide range of offenses, but also lengthening incarceration for those offenses (Travis, Western, and Redburn 2014). Of these policies, truth-in-sentencing laws have played a significant role in lengthening incarceration for people convicted of violent offenses. Prominently, the 1994 federal Violent Crime Control and Law Enforcement Act (Crime Act) required states to incarcerate people convicted of violent crimes for at least 85 percent of their sentence as a condition of receiving matching federal prison construction funds (34 U.S.C. § 12104). In addition to receiving a significantly longer sentence due to the nature of the crime, the Crime Act made it so persons convicted of a violent crime must serve a much higher percentage of their longer sentence.

A study examining 1985 to 2005 time-served data from the National Corrections Reporting Program (NCRP) and arrest data from FBI Uniform Crime reports illustrates these policies’ harsh effects on people arrested for violent crimes (Neal and Rick 2014). The study finds that people arrested for violent crime in the 2000s were at a greater risk of entering prison and serving a longer prison sentence than comparable alleged offenders who were arrested in 1985. More recent research conducted by the Urban Institute using NCRP data support these earlier findings on the potency of the Crime Act. Since 2000, across 44 jurisdictions, the average time served in state prison has increased. Notably, researchers found that the trend was almost entirely due to an increase in time served by violent offenders (Courtney et al. 2017).

State prison population data from the Federal Bureau of Justice Statistics (BJS) in Table 3 offer more detailed information on the number of people admitted to prison for a violent crime, their length of stay, and the percent of sentence served. Persons convicted of violent offenses represent 29 percent of all releases in 2016 but comprise 55 percent of the current or daily state prison population.

TABLE 3

U.S. prison population, releases, and length of stay for state prisoners by offense, 2016.

	Current Prison Population (%)	Prison Releases (%)	Sentence Length (Months)	Length of Stay (Months)	Proportion of Sentence Served (%)
Violent	55	29	81	56	69
Murder	14	2	232	180	78
Negligent homicide manslaughter	1	1	151	62	41
Rape/sexual assault	13	5	132	74	56
Robbery	13	7	91	56	62
Assault	11	11	56	30	54
Other violent	3	3	50	37	74
Property	18	27	51	21	41
Drug	15	24	58	22	38
Public Order	12	19	45	20	44
Other	1	1	79	27	34

Source: Bonczar et al. 2011.

The single reason for their higher percentage of the daily prison population is that they have a length of stay of 56 months, which is more than twice that of persons incarcerated for nonviolent crimes. Persons convicted of violent offenses also serve an average of 69 percent of their sentences compared to 38 percent and 41 percent for persons convicted of drug or property offenses, respectively. Importantly, these length-of-stay statistics do not include the amount of pretrial jail incarceration, which generally ranges from three to nine months for people sentenced to prison (Bonczar et al. 2011).

Laws and policies like mandatory minimum sentences, three-strikes, truth-in-sentencing, and life without possibility of parole collectively function to make incarceration more likely, extend the length of imprisonment, and adversely affect the conditions of confinement for people convicted of violent offenses. Reforms offered by state and federal advocacy groups often focus on persons convicted of nonviolent crimes (Hoskins 2018). However, data analyses suggest that truly reducing America’s historically unique rates of incarceration will require that reforms extend to people imprisoned for violent offenses (Austin et al. 2008).



**MANDATORY MINIMUM SENTENCES,
THREE-STRIKES, TRUTH-
IN-SENTENCING,
AND LIFE WITHOUT POSSIBILITY OF
PAROLE COLLECTIVELY FUNCTION TO
MAKE INCARCERATION MORE LIKELY,
EXTEND THE LENGTH OF IMPRISONMENT,
AND ADVERSELY AFFECT THE CONDITIONS
OF CONFINEMENT FOR PEOPLE CONVICTED
OF VIOLENT OFFENSES**

THE VIOLENT OFFENDER LABEL FAILS TO PREDICT FUTURE VIOLENT CRIMES

The violent offender label is intended to identify a discrete group of people who, it is claimed, have an unusual propensity to commit violence and harm innocent victims.

In reality, there is little evidence that the legal term violent offender identifies someone who exclusively commits violent offenses on a regular, or even occasional, basis. People who have been convicted of violent crimes are also likely to have been involved in nonviolent crime(s). Although such people may be responsible for a large proportion of all crime, both violent and

nonviolent, predictions of highly-criminally involved individuals are imperfect. In this section, we summarize the evidence that people who have perpetrated violence do not specialize in the type of crime they commit and have relatively low rates of recidivism, and argue that the label's significant consequences on pretrial detention, probation, and parole are unwarranted.

LITTLE EVIDENCE OF SPECIALIZATION IN VIOLENCE

The absence of criminal specialization has been found in a wide variety of contexts. Foreshadowing contemporary policy debates about risk assessment, numerous studies of youth in juvenile courts find no patterns of arrests and convictions across offense types, challenging the hypothesis of specialization in violence

(Wolfgang, Figlio, and Sellin 1972; Bursik 1980; Farrington, Snyder, and Finnegan 1988). Gottfredson and Gottfredson (1992), examining specialization from the lens of recidivism rather than arrest and conviction patterns, conducted a long-term follow-up study with a cohort of men incarcerated in California prisons from 1962 to 1963.



THE RECIDIVISM RATES AMONG THOSE INCARCERATED FOR VIOLENT OFFENSES ARE LOWER THAN THOSE INCARCERATED FOR OTHER OFFENSES

Similar to current recidivism statistics, just over half were re-incarcerated within three years. After incarceration, the entire cohort—including those originally convicted of violence—was most commonly re-arrested for public order offenses. Of those re-arrested for violent offenses, about half were previously incarcerated for property crimes.

The national recidivism studies carried out by BJS show the same results. The recidivism rates among those incarcerated for violent offenses are lower than those incarcerated for other offenses (e.g., Alper et al. 2018).

There is evidence that those involved in serious violence tended to be highly criminally-involved over their life courses (Elliott et al. 1986). Longitudinal cohort studies have found that about 5 percent of all people perpetrate about 50 percent

of all crime committed by the cohort. This five percent not only commit more serious crimes, but also, they offend at a higher rate than the rest of the population (Moffitt 1993; Wolfgang et al. 1972). However, efforts to predict those would-be high-rate violent offenders from early in the life course have not been successful (Laub and Sampson 2003; Sampson and Laub 2003). Piquero and his colleagues (2012:177) write in their review of the literature, “attempts to correctly predict the violent recidivist are virtually impossible regardless of the make-up of individual risk and protective factors available to researchers and policymakers.” They elaborate that the incidence of committing a violent crime is “rare” except for that very small group of chronic offenders who are not specializing in any particular crime type. “Chronic offenders” have a higher probability of committing a violent crime simply due to their high rate of offending across crime types.

LOWER RATES OF RECIDIVISM

BJS has issued three national studies of state prison recidivism rates for people released in 1983, 1994, and 2005. All three studies measure three-year re-arrest, reconviction, and return to prison rates. The 2005 study extended the follow-up period to nine years. Although these

statistics are highly aggregated, the results are remarkably consistent over a three-year follow-up period. Specifically, the recidivism rates for people convicted of violent crimes are either the same or lower than the recidivism rates for all state offenders (violent and nonviolent) (Table 4).

TABLE 4

Percentage of state prisoners arrested, convicted, and imprisoned within three years after release, BJS release cohorts, 1983, 1994, and 2005.

Three Year Follow-up	1983	1994	2005
<i>All State Prisoners</i>			
Re-Arrest	63	68	68
Re-Conviction	47	47	45
Re-Imprisonment	41	52	50
<i>Prisoners Convicted of Violent Crimes</i>			
Re-Arrest	60	62	62
Re-Conviction	42	40	37
Re-Imprisonment	37	49	45

Source: Bureau of Justice Statistics 2018, Recidivism of State Prisoners Released in 1983, 1994, and 2005.

In terms of re-arrests for violent crimes, only about 15 percent of all released prisoners were re-arrested for a subsequent violent offense, and virtually all of those re-arrests were for assault or robbery. People convicted of a violent crime have a violent re-arrest rate of about five percent. Only about one percent of people convicted of rape and homicide are re-arrested for violent crimes.

In terms of re-arrests, in contrast to re-convictions, which face a higher standard, 33 percent of people convicted of a violent crime were re-arrested for a new violent crime within five years. This rate is slightly higher than people convicted of property and public order crimes (Table 5) (Durose et al., 2014).

TABLE 5

Percentage of state prisoners who were arrested within five years after release, BJS release cohorts, 1983, 1994, and 2005.

Most Serious Commitment Offense	Percent of Released Prisoners Re-Arrested for:				
	Any Offense	Violent	Property	Drug offense	Public Order
All Released Prisoners	77	29	38	39	58
Violent	71	33	30	28	55
Property	82	29	54	39	62
Drug	77	25	33	51	56
Public Order	74	29	33	30	60

Source: Bureau of Justice Statistics, Recidivism of State Prisoners Released in 2005.

Other studies have found that people convicted of murder and sexual assault or rape have the lowest rates of recidivism. Sex offenders, in particular, have extraordinary restrictions, like residency and reporting requirements, imposed on them that often follow them for the rest of their lives, despite having some of the lowest recidivism rates of any group of persons returning from prison (Gottschalk 2015).

While these statistics do not take account other risk factors such as age or criminal history, they do suggest that people imprisoned for violence pose no greater risk to public safety after leaving prison than those convicted of nonviolent offenses.



SOME JURISDICTIONS DEEM PERSONS ACCUSED OF VIOLENT FELONIES INELIGIBLE FOR PARTICULAR KINDS OF ALTERNATIVES TO DETENTION LIKE SUPERVISED RELEASE

For pretrial detention, research dating back to 1994 shows that people charged with violent crimes are *less likely* to fail to appear or be re-arrested compared to people charged with property and drug crimes, but are more likely to be detained until they are convicted (Reaves 1994; Tafoya et al. 2017). Further, persons accused of violent offenses are highly unlikely (less than 2 percent) to be arrested for another violent crime while under pretrial supervision (Austin 2018; DeMichele et al. 2018).

The problem of relying exclusively on the violent offender label to assess pretrial risk is exemplified in the case of domestic violence (DV). Even though research shows that DV defendants have the same risk of re-offending as non-DV defendants, persons accused of DV have a much lower rate of release or higher bail amounts (Berk 2011). Further, detaining more, and mostly, males for DV for long periods of time often negatively affects the financial situation of the family and may make DV survivors hesitant to report their victimization.

IMPACT ON PRETRIAL JAIL DETENTION, PROBATION, AND PAROLE

People arrested for violent crimes and detained in local jails face greater difficulties in securing release pending the disposition of their charges. To begin, bail schedules are generally driven by the severity of the offense with violence charges having the highest bail schedules (see, for example, Superior Court of California 2018 Bail Schedule; Administrative Office of the Courts Salt Lake City, Utah Uniform 2018 Fine/Bail Forfeiture Schedule; or Harris County District Courts 2017 Felony Bond Schedule).

In some jurisdictions, there are pretrial service agencies that screen cases for

release without the need to post bail. These agencies often impose restrictions on recommending people for release, especially those charged with a homicide, rape, other sex crimes, or domestic violence. As a condition of pretrial release, many jurisdictions also require a formal hearing by the court for people charged with violent and other serious offenses rather than granting the authority to a pretrial services agency. This restriction delays release, sometimes resulting in incarceration for the entire pretrial period. Some jurisdictions deem persons accused of violent felonies ineligible for particular kinds of alternatives to detention like supervised release, further

jeopardizing their liberty (Redcross et al. 2017). Collectively, these restraints result in people with violent charges spending more time in pretrial detention even though there is no evidence that they pose a greater risk to fail to appear or be arrested for another crime during pretrial release (Karnow 2008).

The biggest impact of the violent offender label for people on either parole or probation supervision is the length of the supervision

period. Similar to prison terms, people on probation or parole who were convicted of violent crimes serve much longer periods of community supervision than those convicted of nonviolent crimes even though they do not pose a greater risk to public safety. This, in turn, exposes them to revocations of community supervision and incarceration for non-criminal technical violations of the terms of their supervision (Columbia University Justice Lab 2018).



PEOPLE WITH VIOLENT CHARGES SPEND MORE TIME IN PRETRIAL DETENTION EVEN THOUGH THERE IS NO EVIDENCE THAT THEY POSE A GREATER RISK TO FAIL TO APPEAR OR BE ARRESTED FOR ANOTHER CRIME DURING PRETRIAL RELEASE

RECOMMENDATIONS

Our society's response to violent crime must affirm the values of parsimony and proportionality and reject punishments that do not serve to reduce violence.

Proportionality is a key principle of sentencing and the violent offender label can have utility in calibrating sentences to harm. But proportionality must be balanced with the principle of parsimony to assure sentences are no lengthier than needed to meet the needs of justice. Parsimony in the interests of justice is especially important given the life-histories of victimization and other trauma that permeate correctional populations.

Upholding the values of parsimony and proportionality requires us to weigh context more heavily, placing limits on individual culpability and mitigating punishments for adverse contexts. While violence is often highly unpredictable and situational, we do not suggest that people who commit such acts should not be held accountable to the community and the people they have harmed. Nor do we reject the notion that society has the right to establish laws and

policies that view violence as more severe than other types of crime. What we object to are the current criminal justice laws and practices that produce excessive and ineffective amounts of punishment to people who are inaccurately labeled as violent offenders. These laws and practices do not address the harm and trauma suffered by the victims of such crimes.

We recommend abandoning the violent offender label when making decisions about pretrial detention, sentencing, prison release, and community supervision. In so doing, lengths of imprisonment and community supervision will be more proportional to the severity of the crime and victim harm. This will serve to significantly and safely lower our correctional populations. Finally, victim services can be enhanced to better address the level of trauma experienced by those afflicted by violent crimes.

1. POLICYMAKERS SHOULD MAKE PRETRIAL, PRISON CLASSIFICATION, AND PAROLE DECISIONS WITHOUT THE VIOLENT OFFENDER LABEL

Research shows that those who have committed violent crimes do not specialize in violent or nonviolent criminality, they age out of such offending and are no more likely to fail to appear or recidivate than those who have committed nonviolent crimes (Piquero et al. 2012). Our primary recommendation is to abandon the violent offender label when making correctional decisions including pretrial detention, conditions of confinement, probation and parole supervision decisions, and to rethink its role in sentencing decisions.⁹

For persons facing pretrial detention, far less significance should be attached to the violent offender label than factors that correlate with pretrial failure and resources that can help assure faithful and incident-free court appearance like reminders, supervision, and supports.

Prison and jail systems need to rely more on the behavior of incarcerated persons in classifying them than the label with which they enter prison. Denying adequate programming, and the accompanying merit time sentence reductions, to persons convicted of violent offenses results in unnecessarily long periods of incarceration and denies programs to an important group of incarcerated persons.

Parole boards should not refer to the nature of the crime when considering a person for parole. There should be a presumption of parole at the earliest parole eligibility date. People convicted of violent crimes have already received longer sentences and later parole eligibility dates due to their crime. Further incarceration of people convicted of violent crimes is costly and ineffective.



PAROLE BOARDS SHOULD NOT REFER TO THE NATURE OF THE CRIME WHEN CONSIDERING A PERSON FOR PAROLE

2. SHORTEN PRISON SENTENCES AND LENGTHS OF STAY FOR PEOPLE CONVICTED OF VIOLENT OFFENSES

While punishment has been a historically valid purpose of sentencing, prison sentences for violent offenses have grown out of proportion to the dangerousness of such crimes and subvert the ends of justice. Sentences for both incarceration and community supervision should be much shorter. We not only support policies that cap sentences like Marc Mauer and Ashley Nellis' (2018) policy proposal to cap sentences at 20 years, but also propose that state and federal law agencies do away with 85% truth-in-sentencing laws and restrictions on good time awards for people convicted of crimes of violence.

These policies needlessly lengthen time-served and inhibit program participation by denying people incarcerated for violent offenses from earned time credits.

Since those convicted of violent offenses have often led lives enmeshed in violence, their prior victimization should mitigate their sentences. New York recently passed the Domestic Violence Survivors Justice Act (Senate Bill 1077) that mitigates sentences for domestic violence victims. Other jurisdictions should consider applying such a policy for a broad swath of violent victimization.



SINCE THOSE CONVICTED OF VIOLENT OFFENSES HAVE OFTEN LIVED LIVES ENMESHED IN VIOLENCE, THEIR PRIOR VICTIMIZATION SHOULD PROPERLY MITIGATE THE SENTENCES THEY RECEIVE

3. MAKE SIGNIFICANT AND LASTING INVESTMENTS IN SOCIAL POLICY FOR COMMUNITIES CHALLENGED BY VIOLENCE AND PROVIDE TRAUMA-INFORMED CARE AND RESTORATIVE JUSTICE OPTIONS

Contrary to the bright line drawn between innocent victims and remorseless offenders, people in prison have often experienced violence and victimization prior to and during their imprisonment. Data from Arkansas and Massachusetts prisoners and from juvenile detainees reveal high levels of exposure to violence as witnesses or victims. Persons incarcerated for violent offenses have themselves witnessed, heard about, or been the victims of violence and trauma (Sered 2019). They often grew up poor in families and neighborhoods where violence was prevalent. Ignoring such life histories tips retribution into vengefulness, and proportionality is lost.

Because violence is deeply situational, and public safety is a key goal of criminal justice policy, reform should promote healing and support for disadvantaged communities to which many people incarcerated for violence will return. The bloated cost of imprisoning, jailing, and surveilling nearly

two million persons charged for violent crimes could be better spent. Helping neighborhoods heal from violence and improve their capacity to support those returning from prison makes communities safer. Partnerships between government agencies and disadvantaged communities should increase collective efficacy as a way of reducing violence.

Curtailing use of the violent offender label, reducing incarceration for violence, and investing in communities challenged by violence shifts the criminal justice paradigm. Taking the empirical reality of violence seriously leads us to affirm the values of parsimony, proportionality, and mercy. Even more important, shifting the criminal justice paradigm charts a fairer and more effective path to safe and healthy communities.

ENDNOTES

1 We use the terms “violent offender” and “violent offender label” to refer to common usage in policy and politics that is often applied to those charged or convicted of crimes involving violence. As we argue throughout the paper, we view the term as a pejorative label, rather than designating real groups of people in the world. Throughout the paper we have mostly avoided the use of quotations around the phrase “violent offender” because we are intending to describe general usage rather than limited use by a specific source.

2 The daily violent offense population does not include people convicted of a weapons or burglary offenses, crimes that many jurisdictions label as violent (Kopp 2014).

3 By violence, we mean the application, or threat of, of physical force. A violent event instills fear or inflicts bodily injury. Violence, in this definition, need not be intentional or unlawful. A person may be in an accident and get seriously injured. Although accidents are an important category, the violence known to the criminal justice system typically has a social quality, describing interactions that result in physical or mental harm between people.

4 Here, we want to emphasize that violence itself is not mythical. Indeed, U.S. residents suffer high rates of violence, particularly gun violence. But the notion that characterizing individuals as “violent” because they committed, or are accused of, offenses defined as violent (some of which do not involve actual acts of violence) is problematic for the reasons outlined in this paper.

5 A more dispositional perspective on serious offending is taken by researchers studying human development who have found that those who commit the most serious crimes, often begin anti-social behavior at very young ages and sustain it well into adulthood. Even this research points to adverse environments in early childhood as a prominent cause of serious and enduring criminal offending (see Moffitt 1993).

6 See *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) deeming the “residual clause” unconstitutionally vague, which reads, “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”

7 Under § 237(a)(2)(A)(iii) of the Immigration and Nationality Act (8 U.S.C.A. § 1227(a)(2)(A)(iii)), aliens are subject to deportation based on the commission of an “aggravated felony.” An “aggravated felony” under 8 U.S.C.A. § 1101(a)(43)(F) is defined as a crime of violence—as defined in 18 U.S.C.A. § 16.

8 Data received on February 8, 2019 from a communication with Brooke McCarthy, Esq. of the Juvenile Law Center.

9 Recommending against the use of a violent charge as a tool for predicting future offending opens the very large question of how and whether to make such predictions. The strongly situational nature of violence argues against individualized assessments of risk that aim to measure behavioral predispositions to violence. If violent victimization is predictive of violence, intensifying punishment against those who have suffered most, may also seem perverse. These issues are beyond the scope of this paper, but they do underline the need to evaluate not just the predictive power of risk assessment instruments but their implications for the underlying values of penal policy.

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REIMAGINE JUSTICE

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