THE HAMILTON PROJECT

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Putting Time Limits on the Punitiveness of the Criminal Justice System

Anne Morrison Piehl

MISSION STATEMENT

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We believe that today's increasingly competitive global economy demands public policy ideas commensurate with the challenges of the 21st Century. The Project's economic strategy reflects a judgment that long-term prosperity is best achieved by fostering economic growth and broad participation in that growth, by enhancing individual economic security, and by embracing a role for effective government in making needed public investments.

Our strategy calls for combining public investment, a secure social safety net, and fiscal discipline. In that framework, the Project puts forward innovative proposals from leading economic thinkers — based on credible evidence and experience, not ideology or doctrine — to introduce new and effective policy options into the national debate.

The Project is named after Alexander Hamilton, the nation's first Treasury Secretary, who laid the foundation for the modern American economy. Hamilton stood for sound fiscal policy, believed that broad-based opportunity for advancement would drive American economic growth, and recognized that "prudent aids and encouragements on the part of government" are necessary to enhance and guide market forces. The guiding principles of the Project remain consistent with these views.

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Anne Morrison Piehl
Rutgers University and National Bureau of Economic Research

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NOTE: This policy memo is a proposal from the author. As emphasized in The Hamilton Project's original strategy paper, the Project was designed in part to provide a forum for leading thinkers across the nation to put forward innovative and potentially important economic policy ideas that share the Project's broad goals of promoting economic growth, broad-based participation in growth, and economic security. The author(s) are invited to express their own ideas in policy proposal, whether or not the Project's staff or advisory council agrees with the specific proposals. This policy memo is offered in that spirit.

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Abstract

Over the past 30 years, both the incarcerated population and the limitations placed on those with criminal records have dramatically expanded. The consequences of a criminal conviction can last long beyond any imposed sentence, but current efforts to reduce the punitiveness of the criminal justice system tend to focus on sentencing reform rather than consequences for those who have already served prison terms.

I offer three principles for reform efforts aimed at reducing criminal justice punitiveness. First, negative consequences of prior criminal convictions should be targeted to enhance public safety. Second, processes for time-limiting information about convictions should be implemented. Finally, decreases in the severity of criminal punishment should generally be automatically and retroactively applied. Reform efforts that follow these principles can better target society's resources toward people with the highest risk of offending.

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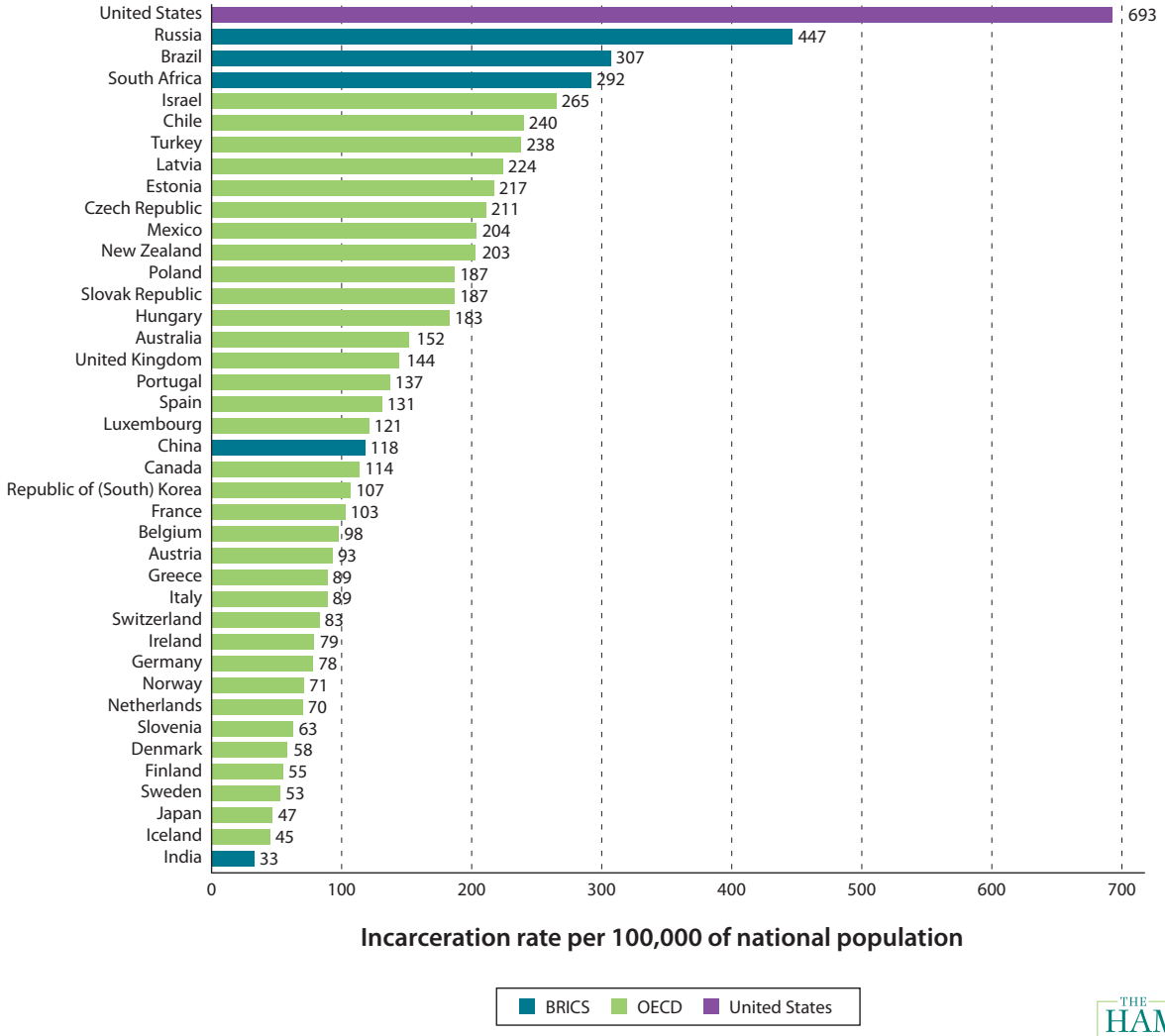
CHAPTER 1. Introduction: Punitiveness in American Criminal Justice

The fact that the United States holds one-fourth of the world's inmates, with an incarceration rate that is unprecedented in other countries or in U.S. history, has lately received long-overdue attention from mainstream policy makers in both parties and at both state and federal levels. The violent crime rate in the country is currently at the level prevailing in the 1950s; safety differs across cities, however, and several locations continue to struggle with homicide rates well above the national average. Property crimes are also at all-time lows since consistent data have been collected, and down over 50 percent since 1993. Many people face extensive consequences of a criminal conviction long after they pose any substantial risk to public safety; this policy memo documents that problem. Many states are beginning to address this challenge, both in the interest of justice and to reduce public expenditure. This memo draws lessons from existing efforts to put time limits on the effects of criminal history in ways that are targeted to maintain public safety.

Figure 1 shows incarceration rates from 2014 to 2016 for a sampling of Organisation for Economic Co-operation and Development (OECD) countries and five countries with emerging economies

FIGURE 1.

Incarceration Rates in OECD and BRICS Countries



Source: International Centre for Prison Studies 2016.

Note: The ICPR shows the most updated data for its World Prison Population List, which ranges from 2013 to 2016.

(Brazil, Russia, India, China, and South Africa, or BRICS), contrasted to the United States. Two features of this figure are striking: first, the great variation across countries in how extensively they utilize incarceration; and second, how unusual the United States is with regard to incarceration rates. At nearly 700 people per 100,000 Americans, the incarcerated population represents approximately 1 percent of the adult population.

Figure 2 shows that the number of inmates in the United States grew extremely rapidly during the 1980s and 1990s, extending the reach of incarceration beyond what was historically typical. Concerns about the budgetary and human costs of this large deviation from past experience have motivated the reconsideration of criminal justice policy at the national and state levels, leading to a rare bipartisan agreement that the current scope and punitiveness of the criminal justice system are excessive. Before turning to a discussion of policy ideas in this arena, it is useful to have a context broader than simply incarceration.

Several recent reports have investigated the relationship between punitiveness in the criminal justice system and crime rates as important parts of their analyses of incarceration's impact on the economy (Council of Economic Advisors [CEA] 2016) and on society more broadly (Travis, Western, and Redburn 2014). It can be difficult to separate the effect of changing state policies from the contribution of changing crime rates to the number and duration of incarceration spells.

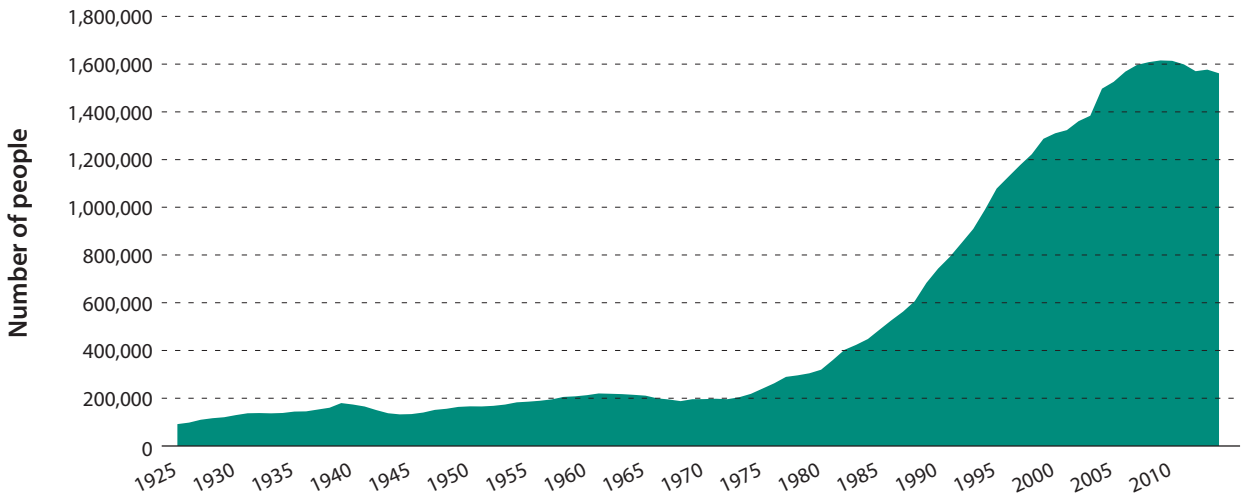
Much of the policy reform that led to the prison buildup took place over the 1980s and 1990s. During these two decades, crime rates were increasing sharply, and neither scholars nor the general public understood the causes or best remedies for those increases. Nonetheless, major changes to sentencing law were implemented, most notably the incentives in the Violent Crime Control and Law Enforcement Act of 1994 for states to increase the time served of certain classes of offenders, particularly offenders convicted of violent crimes. The current consensus is that changes in policy and practice are much more responsible for high rates of incarceration than are changes in criminality, particularly over the past 25 years (Neal and Rick 2016; Raphael and Stoll 2013; Tonry 2016).

One way to demonstrate this finding is to look at how punishment of different types of crimes has evolved. Figures 3a and 3b graph two measures of punitiveness by crime type over the 30 years from 1980 to 2010. Figure 3a shows the number of new admissions to state prison per 100 adult arrests for that same type of crime. For example, only about 40 out of 100 arrests for murder became prison sentences in 1980. The remaining 60 arrests might have had insufficient evidence to secure a conviction or might have resulted in a sentence that did not involve incarceration. By 2010 the proportion of arrests for murder ending in a prison term had more than doubled.

The striking feature of Figure 3a is that all crime types show similarly large increases in the rate of incarceration per arrest—some more than doubling and some less than doubling, but all substantially higher at the end of the period than at the beginning. Figure 3b shows a similar trend for the estimated

FIGURE 2.

U.S. State and Federal Prison Population, 1925–2014



Source: Bureau of Justice Statistics (BJS) 1982; 2000; 2003; 2005; 2015.

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time served of those admitted to prison. Together, figures 3a and 3b indicate a tremendous increase in punishment meted out for a given infraction. The consequences of longer prison sentences can be seen in the aging of the prison population (figure 4). This aging, in turn, has stressed the capacities of states to provide health care to the incarcerated population.

The numbers cited so far actually understate the extent to which the criminal justice system regulates people's daily activities. The number of people supervised by probation and parole agencies outnumbers the number incarcerated by about six times.[1] All told, about 7 million people, or nearly 3 percent of the U.S. adult population, have their daily activities monitored by local, state, or federal criminal justice authorities (BJS 2014).

FIGURE 3A.

State Prison Admissions per 100 Adult Arrests, 1980–2010

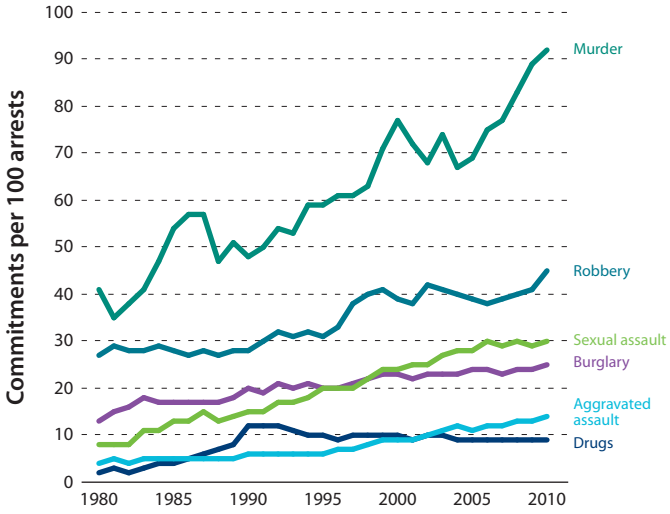
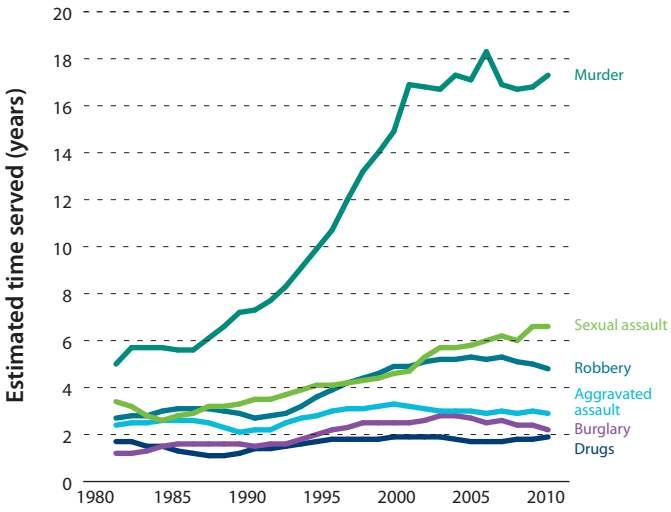


FIGURE 3B.

Estimated Time Served in State Prison, 1980–2010



Source: Beck and Blumstein 2012.

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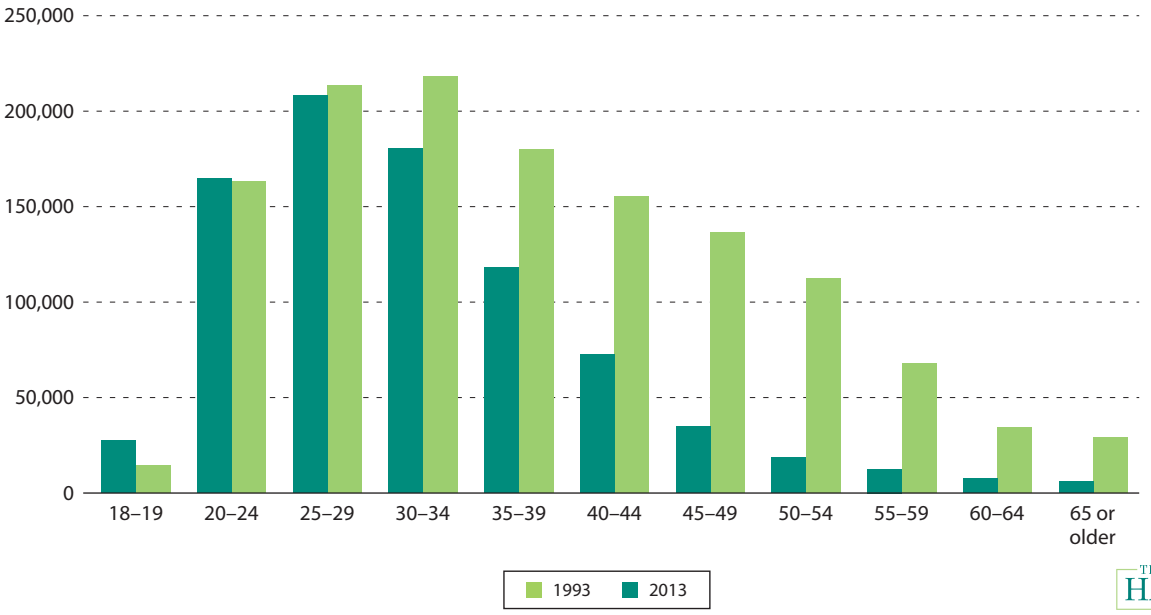
FIGURE 4.

State Prisoner Populations by Age, 1993 and 2013



Source: Bureau of Justice Statistics 2016.

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Given these developments, the National Academy of Sciences assembled a panel of 20 experts in a variety of fields to review the evidence, academic and otherwise, on what caused the current high rate of incarceration in the United States. They spent several years reviewing the evidence and issued a consensus report in 2014. With the benefit of hindsight, the National Academy's panel concluded that there was not strong evidence for the major increases in the probability of incarceration and length of prison term that occurred over the past few decades (Travis, Western, and Redburn 2014). Nor do we know that alternative approaches would not have been as effective at crime control (Aos, Miller, and Drake 2006).[2] The panel concluded that some sentencing practices "impose large social, financial, and human costs" and "yield uncertain benefits" (Travis, Western, and Redburn 2014, 10). Furthermore, the panel called out two sorts of policies as particularly inefficient: those that do not target particularly dangerous or high-rate offenders, and those that impose long sentences (Travis, Western, and Redburn 2014).

This policy memo takes that charge to reconsider broad (untargeted) long-term punishments—and takes it beyond the context of sentencing. As will be discussed, the past 30 years have also seen the dramatic expansion of limitations placed on those with criminal records. Some of these limitations have stemmed from legislative exclusions from participation in particular social programs or access to a wide range of employment. Other limitations have been facilitated by the information technology revolution, such as the ease of conducting criminal background checks by potential employers, landlords, and other entities. Whereas increased attention is being paid to reversing the trends of rising incarceration described in figures 3a and 3b, this memo draws attention to policy considerations for those who have already served prison terms, in some cases long ago.

A note of caution: It is not possible to provide a simple and fully accurate characterization of the criminal justice policy environment because the key policy-making units are states and localities. Moreover, states vary in their approaches to criminal justice—not only in enforcement intensity, but also in how authority is distributed across agencies. So the discussion in this memo is sometimes general and usually relies on national numbers that necessarily gloss over distinctions across states. Nonetheless, the three principles in chapter 5 of this memo are designed to apply to all jurisdictions. Examples from several states are provided to illustrate how the principles could be—and are—implemented in practice.

BOX 1-1.

Recent Federal and State Efforts on Criminal Justice Reform

There have been many recent calls for criminal sentencing reform to correct what is often seen as an excessive policy response during the latter decades of the twentieth century. Proposals and legislation come from policy makers and advocates across the political spectrum. For example, the Department of Justice began a Justice Reinvestment Initiative (JRI) in 2010 with 17 states to pursue cost-effective and evidence-based strategies to enhance public safety and reduce corrections and supervision populations (La Vigne et al. 2014). Maryland passed a JRI law focused on removing mandatory minimum sentencing for nonviolent drug offenses, providing administrative release to shorten sentences, and shortening incarceration time for those who have their parole or probation revoked (Associated Press 2016). North Carolina's JRI law restructured probation supervision to reduce recidivism, created a new sentencing option for judges to encourage prison-based cognitive behavioral programs, and shifted prison inmates toward local jails (North Carolina Justice Center 2014).

States outside the original JRI have also taken notice. In response to severe prison overcrowding in that state (195 percent of design capacity), Alabama created a Prison Reform Task Force in 2014 that identified a lack of supervision for those on community release with a high risk of reoffending. It also showed that a large share of new admissions are people convicted of lower-level property and drug offenses who are now staying in prison for longer periods (North Carolina Justice Center 2015a). In response, Alabama created a Justice Reinvestment policy framework that was passed and signed into law in 2015 as Senate Bill 67. This framework includes policies to strengthen community-based supervision and prioritize the imprisonment of violent and dangerous offenders (North Carolina Justice Center 2015b). In particular, Senate Bill 67 established intermediate sanctions for technical violations of probation and parole terms, allowed for short jail stays prior to full revocation of probation or parole, and allowed people on supervision who have lost their driver's licenses due to their convictions to apply for a new license with limited driving privileges. The new law also created a Class D felony category for the property and drug offenses that are the lowest-level felonies; for such offenders, sentences are for community corrections programs rather than for time in prison. Although such measures will not fully solve Alabama's overcrowding problem, the new legislation is expected to reduce the prison population by 16 percent by fiscal year 2021. The state of Alabama is partnering with the U.S. Department of Justice to analyze the results of the legislation (North Carolina Justice Center 2015b).

CHAPTER 2. The Challenge: Criminal Justice History Can Have Permanent Effects

The consequences of a criminal conviction—or even an arrest that does not lead to conviction—often last long beyond any imposed sentence or supervision. Depending on the state and the nature of the criminal record, these consequences can include bans from public housing and income support programs such as Temporary Assistance for Needy Families (TANF) and Supplemental Nutrition Assistance (SNAP), as well as loss of access to educational assistance (Subramanian, Moreno, and Gebreselassie 2014). A criminal record often also creates high hurdles for job seekers. Many employment barriers for people with records are matters of state policy rather than marketplace decisions: most importantly, occupational licenses are often denied or revoked due to criminal records. For example, any criminal conviction can bar an individual from obtaining a license to work as a licensed practical nurse in Tennessee (Tennessee Board of Nursing 2011, 1000-02-.13). With about one-fourth of employed workers now holding licenses (Bureau of Labor Statistics 2016), and such restrictions common across many states, this situation is a serious impediment to labor market reentry for many individuals.

The impact of collateral consequences has grown as legislators have added restrictions and new technology has made it easier for the public to access criminal records (Jacobs and Crepet 2008). In 2006 the FBI expanded the scope of national criminal record access to include nonserious crimes such as curfew violations and loitering (Jacobs and Crepet 2008). In addition to employers, landlords sometimes use any type of criminal record to deny applications, which means that those with minor infractions can have difficulty finding a place to live (Domonoske 2016).

Broadly speaking, there are two primary rationales for the imposition of collateral consequences. First, collateral consequences can be experienced by individuals as foreseeable negative consequences of criminal behavior, thereby acting to deter criminal conduct (just as a prison term is expected to deter crime). However, many of these collateral consequences are in fact difficult for individuals to foresee, particularly given that the criminal justice system—including judges and defense attorneys—is under no obligation to inform defendants of their existence (Subramanian, Moreno, and Gebreselassie 2014). Moreover, collateral consequences can accrue long after the commission of a crime and after any sentence is completed, meaning that only far-sighted individuals would take them into account when they contemplate criminal conduct. As such, collateral consequences of criminal records appear unlikely to have a significant deterrent effect. Furthermore, these collateral consequences are often applied retroactively as well as prospectively, reducing further the possibility of a deterrent effect.

Second, collateral consequences can be a by-product of efforts to protect public safety. For example, in Florida, among other states, a DUI conviction can prevent an individual from holding a commercial driver's license (Florida Legislature 2016, 322.61). In this case, the state acts under the assumption that a particular individual poses an unacceptable risk to the public while employed as a commercial driver. This type of restriction is reasonable because it is tightly focused on a legitimate public safety concern.

However, this rationale is compelling only in a limited set of cases. Often, collateral consequences go beyond what is necessary to protect the public. For example, when any felony conviction—regardless of type and recency—is cause for denial of an occupational license, the effects are likely out of proportion to legitimate safety concerns. This broad application of collateral consequences violates the recommendation of the National Academy's panel to target punishment. It hardly seems reasonable that subsequent consequences following from a criminal conviction should be applied more broadly than the direct punishment itself.

The imposition of collateral consequences often generates substantial costs. First and foremost, to the extent these limitations impair the process of reintegration into society, they perversely endanger public safety while harming the individuals with records as well as their families and communities. Without access to housing, employment, and public assistance, individuals with records face an uphill battle in their efforts to establish a successful life; these members of society are least adept at managing such challenges. At the same time, there are also broader spillovers beyond the individual with a criminal record: the economy is weakened when workers are unnecessarily barred from productive employment, and the circumstances of their children's upbringing are worsened.

The collateral consequences discussed so far are products of policy decisions. It is important to note, though, that private actors throughout society and the labor market can and do

generate collateral consequences through their response to learning about criminal records. When some employers are reluctant to hire individuals with criminal records, it can be difficult for applicants to demonstrate their work-readiness and overcome any stigma associated with their criminal records. However, the recent move on the part of many firms to voluntarily "ban the box" is promising, and indicates an increasing willingness of private employers to hire workers with criminal records (White House 2015).

Whether through public or private action, the effects of a past criminal conviction can permeate one's life in ways that go beyond access to services and employment. Social exclusion can result from the loss of full legal status (Waters and Kasinitz 2015). Furthermore, past criminal history is likely to adversely affect future interactions with law enforcement, and not just through sentencing enhancements for subsequent infractions. LoBuglio and Piehl (2015) highlight that when law enforcement officers encounter a suspect with a past criminal history, they are unlikely to use their discretion in a way that minimizes official involvement of the criminal justice system. That is, someone with a criminal history is less likely to receive a warning or other diversionary outcome, and more likely to experience official punishment. This mechanism of a less-forgiving law enforcement response compounds earlier punishment, and is an underappreciated collateral consequence of punishment for past conduct.

CHAPTER 3. The Declining Relevance of Criminal History Information with Time

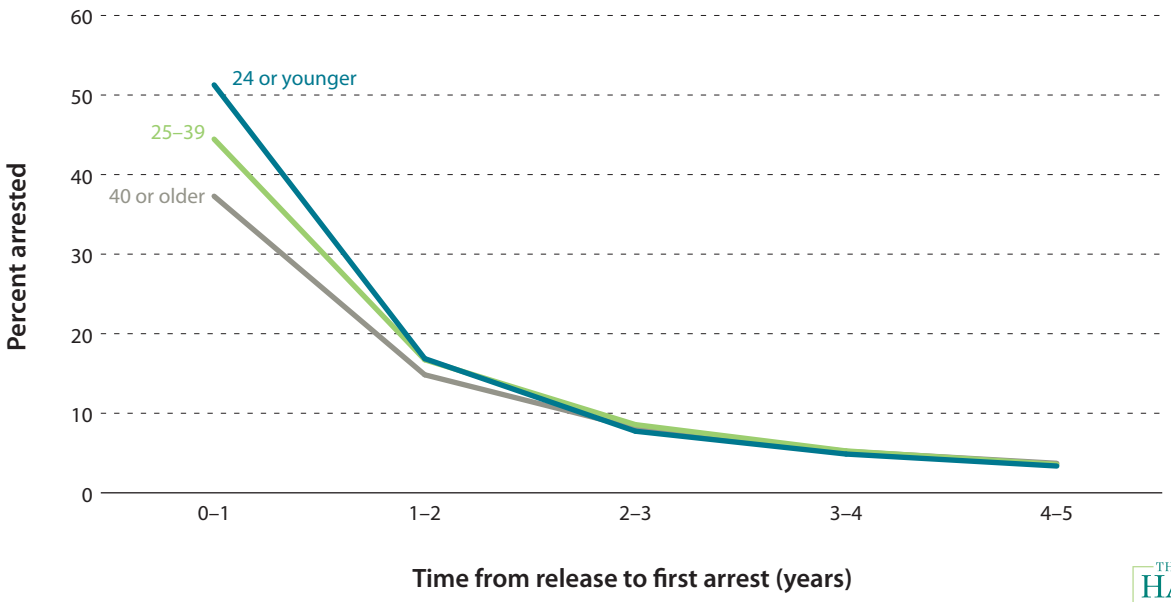
The long-lasting effects of one's criminal history might not be problematic if the status "criminal offender" were a permanent condition and desistance from crime were impossible. However, this is not the case. The most consistent finding in criminology is that crime is committed primarily by the young (at least the most frequently committed crimes under discussion in this report; high-value financial crime is a likely exception). Recidivism rates fall dramatically not only with age, but also with the time elapsed from the most recent conviction. Both of these phenomena are demonstrated in figure 5, which shows how the probability of rearrest evolves following release from state prison. Figure 5 plots the fraction of those released from prison, by age group, who are rearrested in each year following release. The dominant feature of this figure is that arrest rates are high in the first year following release, on the order of 45 percent. But these rates fall off sharply, by more than half in the second year, and by half again the year after that. The figure also demonstrates that older releasees have substantially lower recidivism rates than younger releasees.

After release, some offenders are rearrested quickly. Those who have their first arrest in the second year following release by definition were not arrested earlier, implying that they are a select group with fewer high-risk offenders. Interestingly, most of the difference in recidivism rates across age groups disappears after the first year. Simply put, people who will recidivate eventually, tend to do so fairly quickly. Once an ex-offender—regardless of age—has lived in civil society for several years without recidivating, she is unlikely ever to do so.

Most scholars prefer to measure recidivism by time to first conviction rather than time to first arrest, because conviction demonstrates a higher certainty that the measure reflects criminal conduct rather than enforcement priorities. Because of data limitations, it is not straightforward to produce a national "time to conviction" graph, however. A useful benchmark is provided by comparing overall recidivism rates: by three years after release, overall recidivism is about 20 percentage points lower than the year following release, when measured by conviction rather than arrest.

FIGURE 5.

Share of Releasees Rearrested, by Age and Time Since Release



Source: Bureau of Justice Statistics 2014.

Note: Data are for state prisoners released in 2005.

Blumstein and Nakamura (2009) conducted a close look at recidivism using criminal conviction data from New York state. They found similar patterns to those in figure 5, even when restricting attention to narrow crime types—that is, those who fail tend to fail early. Furthermore, they measured the rate of new conviction for many years following release, as the group of former inmates who have not yet recidivated becomes more and more select. They concluded that after six to eight years, depending on the crime type, rates of new conviction in this select group were indistinguishable from conviction rates in the general population.

Most of those who enter and then exit imprisonment never return, but a substantial minority of those who enter continue to cycle in and out. The criminal justice system takes account of criminal history through sentencing enhancements and higher likelihood of official sanctions for repeat criminal activity, which further magnifies the differences between infrequent and frequent offenders. But for the majority of people who do not offend after the completion of their initial sentence (Blumstein and Nakamura 2009; Rhodes et al. 2014), their "offender" status can permanently and unnecessarily exclude them from full participation in society.

These dynamics combine to create a large social problem when offender status does not end during a person's lifetime. Of course there are plenty of truly dangerous people in and out of prison, and the regular operation of the criminal justice system has a number of tools for identifying, detaining, and punishing them appropriately. Consider for now those who were convicted of a crime 10 or 20 or 30 years ago, but who have not been convicted subsequently. Not only are those individuals older, but also information systems have improved, resources for law enforcement have increased, and the collateral consequences have expanded. As a result, the permanent effects can sometimes be large relative to the initial underlying criminal conduct, and can be large relative to the minimal threat to public safety they now represent. For these people with criminal records, both justice and efficiency in the use of government authority argue the case for achieving some conclusion to the official status of having once been a criminal offender.

CHAPTER 4. Targeting the Effects of Criminal History Status Information by Restricting its Reach

The size of the criminal justice system, together with the dynamic of large inflows into prison with a minority returning to serve additional terms, has resulted in a large segment of the population having served time in prison—an estimated 3 percent of the U.S. adult population. Expanding attention beyond prison to all with convictions for felony offenses yields an estimated 8–9 percent (Shannon et al. 2011).[4] Note that this segment of the population is large, and disproportionately includes men, racial and ethnic minorities, and those at the bottom of the educational and economic ladders—the groups most likely to be convicted and incarcerated.

Where a consensus exists that criminal justice system punitiveness has gone farther than necessary, what might be done to reduce the negative social impact? There has been a great deal of legislative and administrative action to improve the functioning of the criminal justice system at state and federal levels. Some of these actions operate at the case level, such as President Obama's efforts to expand clemency for federal offenders. Others have been precipitated by Supreme Court decisions limiting the length of sentences for juvenile offenders or reiterating other constitutional protections. Many other efforts have been initiated within prosecutors' offices, or by the defense bar, or by nongovernmental organizations with social justice missions.

Because this policy memo is focused on the potential for broad-based policy actions to substantially alter the adverse impacts of criminal sentencing, this chapter highlights four examples that have been adopted and implemented. These examples illustrate opportunities although, as noted throughout, jurisdictions vary along multiple dimensions, and policy details would have to be tailored to the particular context. As demonstrated by these cases, it is possible to implement reforms that affect criminal sentences that have already been imposed, in addition to those imposed after the reform. Every jurisdiction can learn that it is possible to alter the landscape that has been built by past punitiveness, and can determine which avenues to pursue in accordance with local preferences.

States have begun to reduce the challenges faced by those with criminal records. As documented by the Vera Institute, 41 states and the District of Columbia passed legislation between 2009 and 2014 to mitigate the constraints faced by people with certain criminal convictions (Subramanian, Moreno, and Gebreselassie 2014). For example, in 2010 Mississippi expanded expungement eligibility to certain first-time felony offenders and in 2011 California expanded such eligibility to those convicted and sentenced to incarceration for a misdemeanor (Subramanian, Moreno, and Gebreselassie 2014). Indiana and Colorado, among other states, have enacted policies that reduce waiting periods to seal or expunge a criminal record (see box 4-1) and have introduced offense downgrades that allow some felony records to be reduced to misdemeanors to avoid the collateral consequences associated with felony offenses (Subramanian, Moreno, and Gebreselassie 2014).

BOX 4-1.

Record Sealing vs. Expungement

There are two types of action that a formerly convicted person can take in order to prevent disclosure of her former conviction to those conducting a background check. Sealing a criminal record means that potential employers and others cannot access a record by normal means during a background check, but the record itself still exists and allows restricted access. Expungement, on the other hand, involves removing or destroying the criminal record; after expungement, it is as if the record never existed. States vary greatly in the extent to which (and under what conditions) they allow record sealing and expungement. Once a record has been sealed or expunged, the formerly convicted person is legally allowed to deny the existence of that criminal record on future job applications or in other arenas where such information is requested.

Four examples of reforms are detailed in case studies 1, 2, 3, and 4. These examples come from states and from federal jurisdiction, and address changes in both sentencing statutes and court or executive practice. Each example involves a reduction in the overhang of American punitiveness, so that resources are more effectively targeted to those who have a greater risk of re-offending.

After the United States Sentencing Commission prospectively reduced the gap in sentencing between cocaine in powder and rock forms (see case study 1), it considered retroactive application of the same standards. The Commission decided not to make resentencing automatic, but rather allowed those who were convicted under statutes that now had reduced sanctions to apply for resentencing under the new rules. This retroactive application of prospective reductions in prison sentences occurred on a large scale and provides a model for other jurisdictions that reduce long, mandatory sentences—exactly the region of sentencing law that the National Academy's panel found most promising for reform.

A related example comes from Oregon and regards treatment of marijuana offenses (see case study 2). Unlike other states that have legalized marijuana, when Oregon reduced penalties for most marijuana-related offenses, it included provisions for those with past marijuana-related convictions to have them sealed. But the requirements for an application for record sealing are onerous for those with few resources. When sentencing authorities deem that offenses are sufficiently minor to be treated as legal or downgraded to infractions, it is reasonable to apply these same judgments to those with criminal records for that conduct—without restricting it to people who have the means to jump through additional hoops such as proving no outstanding fines owed to any court or outstanding child support, or requiring an application fee. Imposing those conditions undermines the goals of the reform and generates unfairness in its application.

"… neither administrative burden nor a crime wave resulted from retroactive sentencing reform."

Massachusetts provides a different sort of model (see case study 3). Here, the executive branch has developed a system that provides criminal history information about applicants for employment or other responsibilities that require a background check, such as certain types of volunteering. What is compelling about this system is that the extent of the information released is different depending on the sensitivity of the position. Because the state controls the information flow, it can limit what requestors see by crime type or the recency of the offense—again, depending on relevance of the request.

The protocol developed by Massachusetts to address the sharing of criminal history information accommodates the demand for information by private- and public-sector entities in a way that recognizes the current technology environment. Jurisdictions can develop a reputation for cheap, speedy, accurate information that is relevant to the requester's desire for that information. It is possible that states will need to provide this information for free or almost free in order to ensure high rates of utilization. If not, other repositories without concern for the broad social welfare will respond to the demand for information.

Finally, Missouri provides a useful example of restricted access to criminal records based on changes in expungement policies (see case study 4). First, Missouri decreased the waiting period for expunging records of felonies and misdemeanors to 7 and 3 years, respectively. This is reasonable given the lower risk of recidivism several years after release that is depicted in Figure 5. Missouri also expanded expungement eligibility to many more nonviolent crimes, including most marijuana-related offenses.

CASE STUDY 1. Retroactive Sentencing Changes: Crack Cocaine

The United States Sentencing Commission sets the guidelines for criminal sentencing for violation of federal criminal law. (Most crimes are violations of state laws, and states have a variety of mechanisms for setting and revising their own criminal codes.) Under the United States Code [18 U.S.C. § 3582(c)(2)], the court can modify sentences of defendants who have been sentenced to a term of imprisonment if that sentence was based on a sentencing range subsequently lowered by action of the Commission (Office of General Counsel 2015). Consideration of a modification can be initiated by a motion from the defendant, the director of the Bureau of Prisons, or by the court itself.

The Commission may amend sentencing guidelines to resolve conflicts of interpretation across federal circuits or to implement revised policy judgments. Each amendment carries specifications regarding the eligibility and procedures for sentencing modifications (Office of General Counsel 2015).

Several times in recent years, and occasionally over its history, the United States Sentencing Commission has altered guidelines to reduce sentences for certain offenses committed after some specified date. When those offenses carry long terms, the question of fairness (horizontal equity) arises because inmates in prison are serving longer terms than they would have received if they had committed the same act more recently. If the Commission chooses, it can allow sentencing modifications to address this inequity.

Arguments against retroactive amendments generally concern administrative burden and adverse crime impacts. To evaluate these concerns, the Commission analyzed the substantial reform to crack cocaine sentencing that took effect in November 2007, with retroactive sentencing available as of March 2008. In the first three years, the court granted modifications to about 16,500 cases (Hunt and Peterson 2014). Some cases were denied under the court's discretion, sometimes due to concerns about public safety. The Commission developed protocols to address the resentencing during the several months between the adoption of the amendment and its effective date. As a result, the cases did not overwhelm courtrooms (Hunt and Peterson 2014).

Researchers also assessed the recidivism of those who received a retroactive adjustment for five years following their release by using a comparison group of defendants released before retroactive sentencing became available (Hunt and Peterson 2014). Recidivism was somewhat lower for the "retroactivity group" than for the "comparison group," but the differences were not statistically significant. Thus, neither administrative burden nor a crime wave resulted from retroactive sentencing reform.

CASE STUDY 2. Reclassifying Marijuana Convictions

When Oregon reduced most marijuana-related penalties, the legislature also made it easier for those with past convictions to seal records for those offenses. The law requires that individuals apply for these records to be sealed, and to pay fees, file paperwork, and submit fingerprints. Applications are routinely approved for those who meet the criteria (regarding, for example, subsequent criminal activity). Yet even with its new law, Oregon is sealing only a small fraction of old marijuana convictions—on the order of hundreds per year out of an estimated nearly 80,000 eligible cases (Crombie 2015). Despite legalizing marijuana before Oregon did, the states of Washington and Colorado have not implemented anything systematic; those with old convictions must apply through the usual expungement process. In those two states, the courts evaluate the applications on a case-by-case basis.

The Vera Institute of Justice documented that many states have recently adopted reforms to reduce the availability and impact of criminal history information (Subramanian, Moreno, and Gebreselassie 2014). Vera finds that most of these efforts are quite narrow in scope. The impact of the legislation adopted in the past five years is likely to be fairly small.

CASE STUDY 3. Time-Limiting Criminal History Information

In 2012 Massachusetts implemented a series of reforms to more-appropriately target the release of criminal history information (Massachusetts Department of Criminal Justice Information Services 2012). In the past, all criminal records were reported regardless of the record's age or disposition status. Beginning in 2012, however, standard access for potential landlords and employers includes only pending criminal matters, felony convictions for the past ten years (dated from disposition or release from incarceration, whichever is later), and misdemeanor convictions for the past five years (with the same timing convention). Certain categories of potential employers receive additional information on older offenses and, in some cases, non-convictions and juvenile offenses. Employers that utilize the Commonwealth's criminal history information follow its procedures to receive some legal protections (e.g., against negligent hiring claims) in return. Data on certain convictions—including murder, manslaughter, and sex offenses—are released to all seekers of information, regardless of how long ago the crime took place.

Another feature of the law change was to shorten the waiting periods for individuals seeking to seal their records (Massachusetts Department of Criminal Justice Information Services 2012). The new law reduced the waiting period from 15 years to 10 years for felonies and from 10 years to 5 years for misdemeanors. Records that would normally be revealed to employers under standard access cannot be sealed. However, there are conditions under which it might be advantageous to seal records for old crimes, non-convictions, and other events because they are then unavailable to some organizations with higher security requirements and because an individual can then legally report having "no record" with regard to those cases.

CASE STUDY 4. Expanding Expungement Eligibility in Missouri

Missouri extended the use of expungement through both a decrease in the waiting period and an expansion of the types of conviction that are eligible for expungement. The revision to Section 610.140.1, which was signed into law in July 2016, decreased the waiting period for expungement from 10 years to 3 years for those with a misdemeanor conviction and from 20 years to 7 years for those with a felony conviction (Missouri Senate 2016). The new law also expands expungement eligibility to hundreds of nonviolent crimes, including most marijuana-related convictions (Gaines 2016). However, the law also modifies the implementation of expungement by specifying that the records be closed rather than removed from state electronic files and destroyed (Missouri Senate 2016).

CHAPTER 5. Principles

The targeting of society's resources toward people with the highest risk of offending against others will be improved by reducing the number of "false positives": those individuals labeled as high risk who actually pose a low risk of offending. The examples of reform cited in this memo are the first, easiest steps toward this goal. The principles for reform in this chapter can apply to any jurisdiction, and are win–win ideas that improve justice, reduce the burden on government, and reduce the burden of government on citizens. Once these have all been implemented—no easy task—efforts to further reduce criminal justice punitiveness might require more-difficult trade-offs.

PRINCIPLE 1. Consequences of prior criminal convictions should be targeted to enhance public safety.

In some instances, employment or other restrictions are closely tied to the circumstances of the criminal conduct. For example, a person with a recent DUI conviction might reasonably be disallowed from work as a licensed commercial driver. However, many collateral consequences are broadly applied. States should begin work to remove specific collateral consequences in contexts where public safety is not threatened and where removal of the collateral consequence would enhance the chances of successful reintegration into society, such as access to TANF and SNAP benefits. In addition, a process for earning certificates of recovery should be made available to individuals categorically excluded from some activities so that they have a way to establish that they have acquired new pro-social habits and skills.

PRINCIPLE 2. All jurisdictions sentencing criminal behavior should establish processes for time-limiting information about the convictions. These time limits should vary depending on criminal conduct and the purpose of the inquiry.

Note that it is insufficient to legislate how information is used, but instead is necessary to establish systematic processes for time-limiting criminal record information. There are several reasons this is the case.

First, new consequences of a past criminal conviction might be enacted years after the conviction. This concern is particularly salient because many consequences are not considered in the process of a plea bargain—through which the vast majority of cases are resolved currently—and certainly future restrictions cannot be anticipated (recall the immigration law reforms of the 1990s).

Second, fully implementing Principle 1 is a large task. The American Bar Association has compiled a comprehensive accounting of the consequences of convictions by jurisdiction. The National Inventory of Collateral Consequences of Conviction (www.abacollateralconsequences.org) is a database that allows defendants (or their attorneys) to search by offense or by consequence to retrieve a set of legal codes that restrict access to government benefits, housing, employment, domestic affairs, etc. Although this database is useful for defense attorneys, the volume and breadth of the restrictions reveals just how difficult it would be to revise each of these statutes or conditions. Thus, a systematic approach to an expiration of one's offender status is more expedient and a better match between the purpose and the practice of the policy.

An argument can be made for federal leadership to facilitate state reforms of sentencing law and practices regarding criminal history information. The Department of Justice has supported the development of local policing and corrections practices for decades through grants, technical assistance, and the dissemination of evidence on best practices. Although a handful of states have already initiated reforms in this direction, Department technical assistance and funding can help those jurisdictions that require additional support.

PRINCIPLE 3. Jurisdictions should routinely consider retroactive application of decreases in the severity of criminal punishment. These actions should be automatic where appropriate.

This principle applies when punishments are reduced, due either to legalization or to a downgrading of the degree of an offense (such as from a misdemeanor to an infraction, or from a felony to a misdemeanor). When such a downgrading of an offense applies prospectively, a jurisdiction should as a matter of course deliberate on the appropriate treatment of past offenses of the same type (i.e., violations of the same statute). Depending on the legislative calendar, the retrospective treatment can be part of the initial law, as in the example of Oregon, or taken up immediately following, as in the example of the United States Sentencing Commission and the crack cocaine sentencing amendments. In the latter case, there were substantial implementation concerns to be assessed. In complex circumstances with many potentially eligible parties, it is reasonable to take several months to develop a plan. As much as possible, however, expungement or sealing of records should be automatic rather than at the initiative of the individual. This is not only efficient, but also is essential to ensure that inequities in the implementation of this policy do not exacerbate any other inequities in the criminal justice system.

Author

Anne Morrison Piehl

Rutgers University and National Bureau of Economic Research

Anne Morrison Piehl is Professor of Economics and former director of the Program in Criminal Justice at Rutgers University and a research associate at the National Bureau of Economic Research. She conducts research on the economics of crime and criminal justice. Current work analyzes the causes and consequences of the prison population boom, determinants of criminal sentencing outcomes, and the connections between immigration and crime, both historically and currently. Dr. Piehl recently testified before the United States Sentencing Commission and the U.S. House of Representatives subcommittee on Immigration and served on the New Jersey Commission on Government Efficiency and Reform (GEAR) Corrections/Sentencing Task Force. She received her A.B. from Harvard University and her Ph.D. from Princeton University.

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Endnotes

1. The word *supervision* as used here generally means that the person lives in the community, likely in her own residence, and has a series of conditions she needs to comply with regarding drug testing, employment, and maintaining regular contact with a case worker. Failure to comply with these conditions might result in jail or prison time, or other sanctions.
2. Historians, political scientists, and sociologists contest the deeper sources of the policy environment that led to the prison buildup. Useem and Piehl (2008) showed that people had basis for concern with rising crime rates that led to support for higher punitiveness; using a very different evidence base, political scientists such as Miller (2016) agree that higher crime led to sustained public and political attention to crime. Some experts characterize the buildup as much more politically or racially motivated (Alexander 2012; Gottschalk 2006). Others emphasize that high levels of punitiveness are particularly American (Garland 2002; Spamann 2015; Tonry 2015).
3. Reforms to immigration law in the 1990s substantially expanded the classes of crimes for which a noncitizen was eligible for deportation, applying this change retroactively to all convictions incurred prior to the law's enactment. The Supreme Court ruled that defense counsel must inform defendants of the potential deportation consequences prospectively, but that does not provide any retroactive relief *(Padilla v. Kentucky)*.
4. It is necessary to estimate these values because no nationally representative data series collects this information directly (BJS 2015; CEA 2016; LoBuglio and Piehl 2015).
5. The author's calculations indicate that about 550 cases were denied on this basis.

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Highlights

Anne Piehl of Rutgers University discusses the increase in punitiveness of the criminal justice system over the past several decades and proposes three principles for states aiming to reduce both collateral consequences of criminal convictions and sentence length.

The Principles

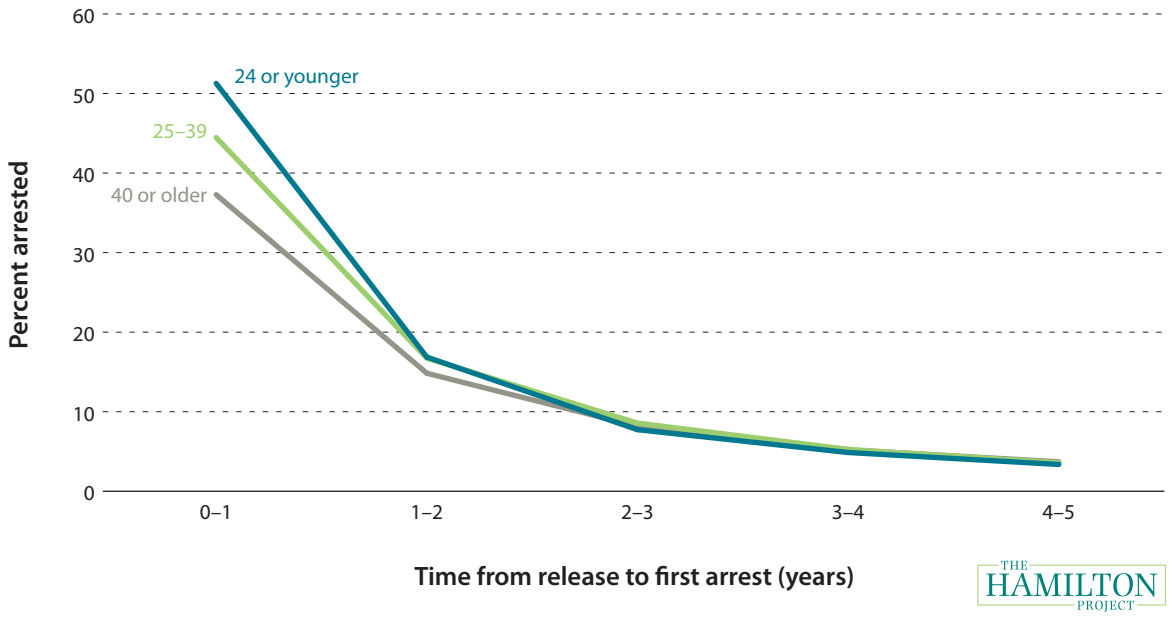
Principle 1: Consequences of prior criminal convictions should be targeted to enhance public safety. Collateral consequences should be tied to specific concerns about public safety.

Principle 2: All jurisdictions sentencing criminal behavior should establish processes for time-limiting information about the convictions. These time limits should vary depending on criminal conduct and the purpose of the inquiry.

Principle 3: Jurisdictions should routinely consider retroactive application of decreases in the severity of criminal punishment. These actions should be automatic where appropriate.

FIGURE 5.

Share of Releasees Rearrested, by Age and Time Since Release



Source: Bureau of Justice Statistics 2014.

Note: Data are for state prisoners released in 2005.

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1775 Massachusetts Ave., NW
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(202) 797-6484

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