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## SYMPOSIUM INTRODUCTION

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### THE VOLUME PROBLEM

There is no shortage of academic critiques of America's system of criminal law enforcement. The bulk of the criticism targets the system's overly punitive nature—that it reaches too many people, treating most of them too severely, with disproportionate impacts by race and class. These critiques are supported by history. The past decades of unprecedented carceral severity have generated the uniquely American phenomenon of “mass incarceration.”

There is no precise definition of mass incarceration. As I explain in the book this symposium is framed around, *Mass Incarceration Nation: How the United States Became Addicted to Prisons and Jails and How it Can Recover*, “Mass Incarceration isn't a number; it is

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a matter of degree.”<sup>1</sup> This phenomenon is reflected in the United States’ sharp deviation from historical and international norms, and the shocking number of people this nation locks up—as of 2021, there were 1.2 million in prison and 636,300 in jail.<sup>2</sup> Wherever the precise delineation, the United States is clearly on the “mass” side of the line.<sup>3</sup>

*Mass Incarceration Nation* demonstrates that there is also no single cause of American mass incarceration. Instead, “lots of different government officials were doing lots of different things over long periods of time. Most of these actions either increased the number of folks sent to prison, lengthened prison stays, or both.”<sup>4</sup> The details are important. But underlying everything is a simple concept: this country has a “volume problem.” Steadily over the past decades, policymakers overextended the criminal law, using it to address problems well beyond its core mission of achieving justice for individuals who suffer grievous harm.<sup>5</sup>

The multitude of contributors to mass incarceration means that there are many levers that policymakers can use to reverse the phenomenon. Reform proposals—in this symposium and throughout the academic literature—reflect this broad variety, spanning the spectrum from changes to discretionary policies, shrinking substantive criminal law, adjusting evidence rules, and enhancing constitutional and statutory protections.<sup>6</sup> Bolder commentary proposes giving up on police, prosecutors, and prisons altogether.<sup>7</sup>

Disagreement about precisely where to focus reform efforts and how broadly to frame them reflects an important difficulty facing those who take on the status quo: the wide variety and decentralization of law enforcement in the United States. The contributions to

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1. JEFFREY BELLIN, *MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER* 11-12 (2023).

2. *U.S. Jail Population Increased While Prison Population Decreased in 2021*, OFF. JUST. PROGRAMS (Dec. 20, 2022), <https://www.ojp.gov/files/archives/pressreleases/2022/us-jail-population-increased-while-prison-population-decreased-2021> [<https://perma.cc/68BN-9Q7E>].

3. BELLIN, *supra* note 1, at 12-14.

4. *Id.* at 23.

5. *See id.* at 24-25 (distinguishing between core “justice” crimes and criminal law’s application to achieve instrumental goals).

6. *See id.* at 165.

7. *See id.* (“Broadly speaking, abolitionists want to get rid of prisons, defund the police, and adopt noncoercive strategies to deal with crime.”).

the punitive dynamics made by police are different from those of prosecutors, judges, parole officers, or legislators.<sup>8</sup> The dynamics also vary across jurisdictions. The critiques of federal white-collar prosecutions, for example, differ from those of prosecutions of retail theft in Louisiana, or sexual assault in California, or opioid abuse in Iowa.<sup>9</sup> And then there are the recent prosecutions of the former president and the current president's son, which soak up public interest in criminal law topics, diverting attention from more typical cases and further crowding the reform conversation.<sup>10</sup> Since most commentators continue to see a legitimate role for at least some law enforcement efforts, advocates and scholars further diverge, with some commentators focusing not on reducing severity generally but shifting severity from one group of targets to another.<sup>11</sup>

The lack of a unified approach leads to fractured conversations, especially outside academic spaces. Public debates about criminal law are often anecdote driven.<sup>12</sup> Reporters, politicians, and advocates seize upon ripped-from-social-media examples that support favored policy positions, while discounting examples that do not.<sup>13</sup> And there are so many examples. America is plagued by so much crime and so much punishment that one can illustrate every type of

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8. See *id.* at 93.

9. Compare Isham M. Reavis, *Prestige & Punishment: The Fuzzy World of White-Collar Crime and Where it's Headed*, WASH. STATE BAR ASS'N LAWYER, May 2019, at 38, 38-40, with Nicole Lewis, *What the Panic Over Shoplifting Reveals About American Crime Policy*, THE MARSHALL PROJECT (Feb. 27, 2023), <https://www.themarshallproject.org/2023/02/27/shoplifting-retail-theft-law-makers-response> [https://perma.cc/D4XF-SDXR], James Queally, *Sexual Assault of 10-Year-Old Sparks Latest Criticism of L.A. District Attorney's Policies*, L.A. TIMES (Jan. 15, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-01-15/sexual-assault-of-10-year-old-sparks-latest-criticism-of-l-a-district-attorneys-policies> [https://perma.cc/SQG6-9N8X], and *More Imprisonment Does Not Reduce State Drug Problems*, PEW CHARITABLE TRUSTS (Mar. 8, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems> [https://perma.cc/G5XC-NTVY].

10. See generally Politico Staff, *Tracking the Trump Criminal Cases*, POLITICO (Aug. 16, 2023, 12:59 PM), <https://www.politico.com/interactives/2023/trump-criminal-investigations-cases-tracker-list/> [https://perma.cc/ZLM8-59CQ]; Betsy Woodruff Swan, *Prosecutors Plan to Seek Indictment of Hunter Biden on Gun Charges This Month*, POLITICO (Sept. 6, 2023, 6:33 PM), <https://www.politico.com/news/2023/09/06/prosecutors-plan-to-seek-indictment-of-hunter-biden-on-gun-charges-this-month-00114335> [https://perma.cc/RG7J-NF7Y].

11. See BELLIN, *supra* note 1, at 169.

12. See *id.* at 40-41 (detailing historical examples of politicians and print media utilizing similar practices).

13. See *id.* at 37-38.

injustice, from wild lenience to shocking severity.<sup>14</sup> There are, of course, examples of horrific crimes. On the flip side, anecdotes are available to fill out our preconceived images of law enforcement actors as corrupt, incompetent, professional, or heroic.<sup>15</sup> It is typically unclear where the policy response that applies to any of these anecdotes fits into the broader picture, and the solution to one type of injustice may well aggravate others.

A way forward is to focus on broad strokes. Despite all the variation, the volume problem offers a single theme to tie together America's difficulties with criminal law and most critiques. There is broad consensus that there are, as a general matter, too many arrests, too many prosecutions, too many convictions, too many people on parole and probation, and—the theme of this symposium—too much incarceration.<sup>16</sup> Putting aside the legitimacy of any piece of this vast fabric—and the pieces' relative importance—volume itself is the problem that overshadows all others.

Enormous volume has transformed the system into a kind of loosely controlled bureaucratic chaos, an assembly line approach to enforcing criminal law. In addition to the impact on those directly “targeted” by the chaos, excess case volume overwhelms individual police, prosecutors, defense attorneys, judges, and other officials—even those with the wisdom to recognize the right action and desire to carry it out.<sup>17</sup> The volume problem crowds out thought and introspection.<sup>18</sup> As each station on the assembly line of American law enforcement becomes overwhelmed, the system's precise mechanisms fade into insignificance.<sup>19</sup>

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14. See, e.g., *id.* at 74-75 (describing the prolonged prosecution of Joseph Tigano, III, in which seven years passed before Tigano received a trial).

15. See e.g., *Police Shootings Database 2015-2023*, WASH. POST (Nov. 2, 2023), <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/> [https://perma.cc/UW6X-CVWS]; Ray Sanchez, *Meet Officers Going Beyond the Call of Duty*, CNN (Jan. 29, 2016, 6:29 AM), <https://www.cnn.com/2016/01/29/us/beyond-the-call-of-duty-policing-in-america/index.html> [https://perma.cc/KA8X-ZWHS].

16. See BELLIN, *supra* note 1, at 165.

17. Jeffrey Bellin, *The Changing Role of the American Prosecutor*, 18 OHIO ST. J. CRIM. L. 329, 342 (2020) (“If you want to have a just system, whatever your theory, then high case volume is your number one problem.”).

18. See *id.* at 344.

19. See *id.*

Scholars can, perhaps, de-emphasize disagreement about precise prescriptions by adopting a unifying focus on volume. After all, crafting the perfect legal or policy response to a particular problem becomes pointless when those tasked with implementing that response are too overwhelmed by their caseloads to notice or care.<sup>20</sup>

I discuss one aspect of this “volume problem” in an early chapter in *Mass Incarceration Nation*. That chapter emphasizes the harms inflicted on people in prison not necessarily by evil actors, but instead through the inevitability of neglect and oversight in overcrowded facilities:

It is no small thing to lock up a human being. When the government imprisons over 2 million people, harms like those described above are inevitable. Improving prison conditions is one solution. But unless we decrease the scale of incarceration, there will always be stories like these, and countless other instances of human misery that never find their way into the pages of books.<sup>21</sup>

What is true for incarceration is true every step of the way, from emergency response to arrests to prosecutions to court proceedings to parole and probation supervision.

For a brief period, volume eased due to a decrease in law enforcement during the COVID-19 pandemic.<sup>22</sup> And that decrease coincided with shrinking jail and prison populations.<sup>23</sup> In fact, the United States is no longer the world’s leader in incarceration rate. As of 2020, we have been passed by El Salvador, Cuba, Rwanda, and Turkmenistan.<sup>24</sup> For a time, these signs of progress supported optimism for the potential end of mass incarceration. But the specter of rising crime, an ongoing scourge of drugs, and the uniquely American phenomenon of gun violence feed political (and popular)

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20. *See id.*

21. BELLIN, *supra* note 1, at 19.

22. *Id.* at 1.

23. E. Ann Carson, *Prisoners in 2020—Statistical Tables*, BUREAU OF JUST. STATS. (Dec. 2021), <https://bjs.ojp.gov/library/publications/prisoners-2020-statistical-tables> [<https://perma.cc/J3HG-WKKU>].

24. *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) [<https://perma.cc/34FQ-UKRN>].

resistance to reform and the return to the attitudes and policies that generated mass incarceration.<sup>25</sup> And on top of all this is increased political and ideological polarization that further distorts the already delicately balanced scales of justice.<sup>26</sup> While Americans across the political spectrum seek to reduce law enforcement excesses, the new consensus seems to be that lots of people need to be locked up, with disagreement largely concerning which ones.<sup>27</sup>

This is the crossroads at which the nation stands, and it is why I wrote *Mass Incarceration Nation*. The first thing to recognize about the mechanisms of American law enforcement is that they are overwhelmed.<sup>28</sup> And since there continues to be a great deal of crime, policymakers need to embrace a kind of triage, reducing the overall footprint of American law enforcement to better focus on the problems that matter most.<sup>29</sup> Reducing the volume cuts across actors: legislators, judges, prosecutors, and police.<sup>30</sup> Governors, presidents, parole officers, and probation supervisors can reduce the volume too.<sup>31</sup> Even regular people can contribute by thinking twice about invoking formal mechanisms of the criminal justice system in disputes that they could handle more flexibly themselves.

For the scholarly community, the way to find (and project) consensus is to maintain a sharp focus on the volume problem. Whatever policy prescription one elects to emphasize, it is important to ensure that the prescription will lead, directly or indirectly, to a decrease in the volume of police-public interactions and incarceration. The overarching question facing scholars is, can this country find ways to decrease the volume? The written contributions to this symposium all take on this question in distinct ways. Andrew W. Grindrod offers a sweeping proposal for bottom-up sentencing

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25. See BELLIN, *supra* note 1, at 1.

26. Frank Newport & Andrew Dugan, *Partisan Differences Growing on a Number of Issues*, GALLUP (Aug. 3, 2017), <https://news.gallup.com/opinion/polling-matters/215210/partisan-differences-growing-number-issues.aspx> [<https://perma.cc/T7Z7-BYR2>].

27. See BELLIN, *supra* note 1, at 194 (“‘Lock them up’ is not just an applause line at political campaign rallies. It has become our country’s unofficial motto.”); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 264 (2018).

28. See Bellin, *supra* note 17, at 344.

29. See *id.*

30. See *id.*

31. See *id.*

reform in the federal system.<sup>32</sup> Corinna Barrett Lain raises the critical importance of addressing mental health outside the criminal law.<sup>33</sup> And Margaret Hu shines new light on the role of technology in mass incarceration.<sup>34</sup>

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32. Andrew W. Grindrod, *Bottom-Up Federal Sentencing Reform*, 65 WM. & MARY LAW REV. 785, 787 (2024).

33. Corinna Barrett Lain, *The Road to Hell is Paved with Good Intentions: Deinstitutionalization and Our Mass Incarceration Nation*, 65 WM. & MARY LAW REV. 893, 898-99 (2024).

34. Margaret Hu, *Critical Data Theory*, 65 WM. & MARY LAW REV. 839, 843 (2024).