

# Lock ‘Em Up and Set Them Free?: How to Reconcile Tough-on-Crime Sentencing Policies with Justice Reinvestment in Maryland

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## INTRODUCTION

The United States of America is the world leader in prison population,<sup>1</sup> an unsettling title that results in part from the tough-on-crime sentencing policies of the late 20<sup>th</sup> century.<sup>2</sup> However, the modern approach to criminal justice views mass incarceration itself as a social crisis which may no longer best serve the needs of society.<sup>3</sup> This outlook has America retreating from the criticized tough-on-crime policies.<sup>4</sup>

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1. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLICY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> (The U.S. incarcerates 698 people for every 100,000 residents.). “Today, the incarcerated population is 4.5 times larger than in 1980, with approximately 2.2 million people in the United States behind bars, including individuals in Federal and State prisons as well as local jails.” THE WHITE HOUSE, *ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 3* (2016), available at <https://obamawhitehouse.archives.gov/the-press-office/2016/04/23/cea-report-economic-perspectives-incarceration-and-criminal-justice>.

2. See Mark Osler & J. Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. FOR SOC. JUST. 117, 124 (2014) (“The War on Drugs became its own prison-generating machine, producing incarceration rates that ‘defy gravity and continue to grow even as crime rates are dropping.’”) (quoting Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Institutes*, 56 STAN. L. REV. 1271, 1275 (2004)); Steven Nauman, *Brown v. Plata: Renewing the Call to End Mandatory Minimum Sentencing*, 65 FLA. L. REV. 855, 882 (2013) (“[T]he United States suffers from a prison-overcrowding crisis of unprecedented proportions, primarily resulting from a spike in mandatory minimum sentencing that began in the mid-1980s.”); THE WHITE HOUSE, *supra* note 1, at 3 (“Changes in the severity of sentencing . . . which have led to longer sentences . . . have been the primary drivers of the incarceration boom.”).

3. Jonathan Simon, *Ending Mass Incarceration is a Moral Imperative*, 26 FED. SENT’G R. 271, 271 (2014) (“[P]rison is now seen for the first time in decades as itself a social problem, at least as serious as crime.”); see also James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 995 (2010) (arguing that mass incarceration disproportionately affects America’s most disadvantaged groups).

4. OFFICE OF THE ATT’Y GEN., MEMORANDUM TO THE UNITED STATES ATTORNEYS AND ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION, DEPARTMENT POLICY ON CHARGING MANDATORY MINIMUM SENTENCES AND RECIDIVIST ENHANCEMENTS IN CERTAIN DRUG CASES (2013), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain->

Coinciding with the precipitous increase in the prison population,<sup>5</sup> America has become a dramatically safer place to live.<sup>6</sup> Despite this overall downward trend in nationwide crime, in Baltimore, Maryland, 2017's "most dangerous city" in America,<sup>7</sup> historic violence has the city reeling.<sup>8</sup> State and City officials are at a loss on how to solve the crisis.<sup>9</sup>

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drugcases.pdf (explaining that the Department of Justice will no longer seek available mandatory minimum sentences); *see also* *Congress Shows Bipartisan Support Of Changing Mandatory Sentencing Law*, FOX NEWS (Jan. 5, 2014), <http://www.foxnews.com/politics/2014/01/05/congress-shows-bipartisa>

n-support-changing-mandatory-sentencing-laws.html ("An unusual alliance of Tea Party enthusiasts and liberal leaders in Congress is pursuing major changes in the country's mandatory sentencing laws.").

5. THE WHITE HOUSE, *supra* note 1, at 3 ("Adjusting for population, the incarceration rate grew by more than 220 percent between 1980 and 2014.").

6. *Id.* ("[C]rime rates have fallen sharply; between 1980 and 2014 violent crime rates fell by 39 percent and property crime rates fell by 52 percent."). For a discussion of what caused the crime decline, *see* OLIVER ROEDER, LAUREN-BROOKE EISEN, & JULIA BOWLING, BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? (2015), [https://www.brennancenter.org/sites/default/files/publications/What\\_Caused\\_The\\_Crime\\_Decline.pdf](https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf).

7. Aamer Madhani, *Baltimore is the Nation's Most Dangerous City*, USA TODAY (Feb. 19, 2018), <https://www.usatoday.com/story/news/2018/02/19/homicides-toll-big-u-s-cities-2017/302763002/>.

8. *See* Kevin Rector & Jessica Anderson, *After Violent Summer In Baltimore, Schools Prepare for Empty Seats and Mourning Kids*, BALT. SUN (Sept. 3, 2017), <http://www.baltimoresun.com/news/Maryl>

and/crime/bs-md-ci-youth-violence-20170901-story.html ("After another summer of historic gun violence in the city, school officials are preparing for an emotional return on Tuesday, when empty seats will underscore a grim reality: Some students are now dead, some are recovering from gunshot wounds, and some are sitting in jail, accused of taking part in the mayhem."); Pat Warren, *Baltimore's Rising Violence Getting Rising State Attention*, CBS BALT. (Sept. 12, 2017), <http://baltimore.cbslocal.com/2017/09/12/baltimores-rising-violence-rising-state-attention-maryland-senate-panel-crime-murder-homicide/>

("State Sen. Nathaniel McFadden told lawmakers Tuesday that when 'all hell breaks loose' as it has [in Baltimore], 'the whole state has a problem.'"); Josh Hicks, *Hogan Promises 'Truth in Sentencing' Measure for Repeat Violent Offenders*, WASH. POST (August 29, 2017), [https://www.washingtonpost.com/local/md-politics/hogan-promises-truth-in-sentencing-measure-for-repeat-violent-offenders/2017/08/29/3b2060b2-8cdf-11e7-91d5-ab4e4bb76a3a\\_story.html?utm\\_term=.3e68a766f1d1](https://www.washingtonpost.com/local/md-politics/hogan-promises-truth-in-sentencing-measure-for-repeat-violent-offenders/2017/08/29/3b2060b2-8cdf-11e7-91d5-ab4e4bb76a3a_story.html?utm_term=.3e68a766f1d1)

("Epidemic levels" of violence); Noah Weiland, *At Rallies, Students With a Different View of Gun Violence: As Urban Reality*, N.Y. TIMES (Mar. 24, 2018), <https://www.nytimes.com/2018/03/24/us/gun-rally-urban.html> ("In cities such as Baltimore, the anguish of shootings feels different—the bloodshed comes not in isolated bursts of mass slaughter, but instead in a ceaseless rhythm, something that happens to friends and family, classmates and neighbors, in front yards and on playgrounds.").

9. Mike Helligren, *Baltimore Seeking Solutions Amid Record High Murder Rate*, CBS BALT. (July 7, 2017), <http://baltimore.cbslocal.com/2017/07/07/baltimore-record-high-murder-rate/> ("The mayor wants tougher gun laws. The governor blames judges and prosecutors for lenient punishments, while

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In an attempt to combat the violence, in 2018, the Maryland General Assembly (“MGA”) invoked relics of the tough-on-crime sentencing era and passed S.B. 101,<sup>10</sup> legislation that requires a 10-year mandatory minimum sentence for a second violent offense to be served in full, without the possibility of parole or having the sentence suspended.<sup>11</sup>

S.B. 101 shortly follows the MGA’s enactment of the Justice Reinvestment Act (“JRA”) in 2016.<sup>12</sup> The JRA solidified Maryland’s commitment to justice reinvestment, a forward-thinking approach in criminal justice reform which is premised on the idea that “accurate information on risk can inform decisions to reserve prison resources for high-risk offenders, while reducing recidivism of low-risk offenders by diverting them to less costly, community-based solutions.”<sup>13</sup> Through strategies like reducing prison sentences, reclassifying offense types, expanding prison alternatives for lower-level offenders, revising mandatory minimum laws, and expanding earned time opportunities for inmates,<sup>14</sup> justice reinvestment is capable of reducing prison enrollment

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the state’s attorney accuses him of finger pointing.”); Ovetta Wiggins, *Md. Lawmakers Struggle for Ways to Address Crime in One of the Nation’s Most Violent Cities*, WASH. POST (Mar. 24, 2018), [https://www.washingtonpost.com/local/md-politics/md-lawmakers-struggle-for-ways-to-address-crime-in-one-of-the-nations-most-violent-cities/2018/03/24/6ca5e59e-289d-11e8-874b-d517e912f125\\_story.html?utm\\_term=.4354a917cc7f](https://www.washingtonpost.com/local/md-politics/md-lawmakers-struggle-for-ways-to-address-crime-in-one-of-the-nations-most-violent-cities/2018/03/24/6ca5e59e-289d-11e8-874b-d517e912f125_story.html?utm_term=.4354a917cc7f) (“Maryland lawmakers arrived in Annapolis this year [2018] determined to pass a bill that would reduce the soaring rate of crime and violence in Baltimore. But deciding the best way to do that has proved painful and divisive, as lawmakers from across the political spectrum debate how best to try to save lives while weighing the potential harm of harsher criminal penalties.”).

10. 2018 Md. Laws 804.

11. Rachel Chason, *Maryland Lawmakers Reject Wide-Ranging Crime Bill, Pass More Modest Measures*, WASH. POST (April 7, 2018), [https://www.washingtonpost.com/local/md-politics/maryland-lawmakers-reject-wide-ranging-crime-bill-pass-more-modest-measures/2018/04/07/db35bd2e-39ee-11e8-9c0a-85d477d9a226\\_story.html?utm\\_term=.897b0347f122](https://www.washingtonpost.com/local/md-politics/maryland-lawmakers-reject-wide-ranging-crime-bill-pass-more-modest-measures/2018/04/07/db35bd2e-39ee-11e8-9c0a-85d477d9a226_story.html?utm_term=.897b0347f122); see 2018 Md. Laws 804, 807. The statute lists twenty-five crimes that are defined as a crime of violence. *Id.* at 805-06.

12. 2016 Md. Laws 6239; see Michael Dresser, *Hogan Signs Bill to Overhaul Maryland Criminal Justice System*, BALT. SUN (May 19, 2016), <http://www.baltimoresun.com/news/maryland/politics/bs-md-justice-reinvestment-20160518-story.html>.

13. Bridget Lowrie, *Stop Asking Which Came First, the Jail or the Criminal - Start Reinvesting in Justice in Maryland*, 47 U. BALT. L.F. 99, 109 (2017).

14. MD. JUSTICE REINV. COORDINATING COUNCIL, GOVERNOR’S OFFICE OF CRIME CONTROL & PREVENTION, FINAL REPORT 5 (2015), available at <http://goccp.maryland.gov/jrcc/documents/jrcc-final-report.pdf>.

and the costs of maintaining correctional facilities.<sup>15</sup>

First, this Note chronicles Baltimore, Maryland's recent surge in violence and introduces Maryland's salve for the problem—a tough-on-crime sentencing law that targets repeat violent offenders. The History section then discusses policy arguments for and against tough-on-crime sentencing policies. Next, the History section explores justice reinvestment and explains Maryland's Justice Reinvestment Act. The Note concludes with an analysis supporting Maryland's decision to enact S.B. 101 and introduces a proposal for the implementation of additional justice reinvestment reform measures to offset the potential increase in prison enrollment from the new legislation.

## I. HISTORY

### *A. Violence in Baltimore, Maryland*

Although the national crime rate is near the historic low,<sup>16</sup> the murder rate in Baltimore, Maryland is at an all-time high.<sup>17</sup> Baltimore's surge in homicides can be traced contemporaneously to the riots of 2015.<sup>18</sup> On

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15. *See id.* at 4. For example,

[i]n 2011, policymakers in Georgia faced a projected eight-percent increase in the prison population over the next five years at a cost of \$264 million. Rather than spend more taxpayer dollars on prisons, Georgia leaders looked for more cost-effective solutions. The state legislature unanimously passed a set of reforms that controlled prison growth through changes to drug and property offense statutes, and improved public safety by investing in local community supervision, sanctions, and services. Between 2012 and 2014 . . . the state crime rate has fallen three percent and the sentenced prison population has declined three percent, giving taxpayers better public safety at a lower cost.

*Id.*

16. MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, CRIME TRENDS 1990-2016 3 (Apr. 18, 2017), <https://www.brennancenter.org/sites/default/files/publications/Crime%20Trends%201990-2016.pdf> (“[C]rime has largely fallen steadily, and now is about half what it once was . . .”).

17. Madhani, *supra* note 7.

18. Jess Bidgood, *The Numbers Behind Baltimore's Record Year in Homicides*, N.Y. TIMES (Jan. 15, 2016), <https://www.nytimes.com/interactive/2016/01/14/us/Baltimore-homicides-record.html?mcubz=>

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April 19, 2015, Freddie Gray, a twenty-five year old African-American male, died from a severe spinal injury sustained while riding in the back of a police van without a seatbelt.<sup>19</sup> After Gray’s funeral on April 27, 2015, Baltimore exploded into riots and civil unrest,<sup>20</sup> marking the beginning of unprecedented violence.<sup>21</sup> By the end of 2015, Baltimore had 344 homicides, a staggering 62.9% increase over 2014’s per capita rate.<sup>22</sup> In 2016, Baltimore had 318 homicides, resulting in the second-deadliest per capita rate in the city’s history, second only to 2015.<sup>23</sup> Not to be outdone, in 2017, Baltimore had 342 homicides, again besting its own per capita record.<sup>24</sup> All told, from 2015 to 2017, Baltimore had the highest per capita

3 (“From January through mid-April, the city’s monthly homicide totals were near the same pace of recent years...May...was among its deadliest months in decades. For the rest of the year, Baltimore averaged 31 homicides a month.”).

19. Peter Hermann & John Woodrow Cox, *A Freddie Gray Primer: Who Was He, How Did He Die, Why is There So Much Anger?*, WASH. POST (April 28, 2015), [https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/?utm\\_term=.5d28734d5cf8](https://www.washingtonpost.com/news/local/wp/2015/04/28/a-freddie-gray-primer-who-was-he-how-did-he-why-is-there-so-much-anger/?utm_term=.5d28734d5cf8).

20. Erik Ortiz, *Freddie Gray: From Baltimore Arrests to Protests, a Timeline of the Case*, NBC NEWS (May 1, 2015), <https://www.nbcnews.com/storyline/baltimore-unrest/timeline-freddie-gray-case-arrest-protests-n351156>; see also William J. Gorta, *Baltimore Burns: Freddie Gray Protests Turn Violent, Prompting State of Emergency*, NBC NEWS (Apr. 28, 2015), <https://www.nbcnews.com/storyline/Baltimore-unrest/stones-hurled-cops-after-gray-funeral-gangs-unite-target-cops-n349186> (detailing Maryland’s declaration of a state of emergency as protestors threw cinder-blocks at police, looted businesses, and set vehicles on fire).

21. See Bidgood, *supra* note 18.

22. AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, CRIME IN 2015: A FINAL ANALYSIS 3 (APR. 20, 2016), available at [https://www.brennancenter.org/sites/default/files/analysis/Crime\\_in\\_2015\\_A\\_Final\\_Analysis.pdf](https://www.brennancenter.org/sites/default/files/analysis/Crime_in_2015_A_Final_Analysis.pdf) (The per capita rate in 2015 was 55.2 murders per 100,000 residents.). “In 2014, Baltimore had 211 homicides, which according to the Baltimore Police Department was the city’s second-lowest total since 1972.” Bidgood, *supra* note 18.

23. AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, CRIME IN 2016: FINAL YEAR END DATA 3 (JUNE 6, 2017), available at [https://www.scribd.com/document/350458878/Crime-in-2016-Final-Year-End-Data#from\\_embed](https://www.scribd.com/document/350458878/Crime-in-2016-Final-Year-End-Data#from_embed) (The per capita rate in 2016 was 51.3 murders per 100,000 residents.).

24. AMES C. GRAWERT, JAMES CULLEN & VIENNA THOMPSON, BRENNAN CTR. FOR JUSTICE, CRIME IN 2017: FINAL ANALYSIS 3 (JUNE 12, 2018), available at [https://www.brennancenter.org/sites/default/files/analysis/Crime\\_in\\_2017\\_A\\_Final\\_Analysis.pdf](https://www.brennancenter.org/sites/default/files/analysis/Crime_in_2017_A_Final_Analysis.pdf) (The per capita rate in 2017 was 55.4 murders per 100,000 residents.); *Baltimore Homicide Rate is on a Record High, Deadlier Than Detroit and Chicago*, USA TODAY (Sept. 25, 2018), <https://www.usatoday.com/story/news/2018/02/19/homicides-toll-big-u-s-cities-2017/302763002/>.

murder out of the thirty largest cities in America.<sup>25</sup> The violent crime rate in Baltimore also increased dramatically by 19.2% in 2015,<sup>26</sup> 18.6% in 2016,<sup>27</sup> and 14.8% in 2017.<sup>28</sup> In order to combat the overwhelming violence, in 2018, the MGA passed S.B. 101 which requires that a 10-year mandatory minimum sentence for a second violent offense be served in full, without the possibility of parole or having the sentence suspended.<sup>29</sup> Unsurprisingly, S.B. 101 has provoked passionate emotion from opponents and supporters alike.<sup>30</sup>

### *B. Tough-on-Crime Sentencing Policy*

From 1984 to 1996, American criminal sentencing policy went through a period characterized as “tough-on-crime.”<sup>31</sup> “Most policy initiatives during the tough on crime period sought to make sentences harsher and more certain.”<sup>32</sup> Since their inception, tough-on-crime policies have provoked fervor on both sides of the aisle.

Advocates hail the policies as a solution,<sup>33</sup> while critics maintain that

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25. See *supra* notes 21-23.

26. GRAWERT & CULLEN, *supra* note 22, at 2.

27. GRAWERT & CULLEN, *supra* note 23, at 2.

28. GRAWERT CULLEN & THOMPSON, *supra* note 24, at 2.

29. See Chason, *supra* note 11.

30. *Id.* A policy director for the American Civil Liberties Union of Maryland said that “[e]xpanded sentences — whether mandatory minimums or enhanced maximums — have never made us safer . . . They are regressive provisions that will not improve the lives of Marylanders.” *Id.* The Governor’s office countered that “Maryland must take action to target the repeat violent offenders who are terrorizing our communities.” *Id.*

31. Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME & JUST. 141, 150 (2013) (“[M]ost jurisdictions enacted some or all of mandatory minimum sentence, truth-in-sentencing, ‘sexual predator,’ ‘career criminal,’ three-strikes, and [life without parole] laws.”); see also Susan Turner, Peter W. Greenwood, Terry Fain & James R. Chiesa, *An Evaluation of the Federal Government’s Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants*, 86 PRISON J. 364, 367 (2006) (explaining that the wave of tough-on-crime policy enactment was in response to a 40% increase in violent crime from 1984 to 1992).

32. See Tonry, *supra* note 31, at 160.

33. See James Wootton, *Truth in Sentencing-Why States Should Make Violent Criminals Do Their Time*, 20 U. DAYTON L. REV. 779, 780 (1995) (“Keeping violent criminals incarcerated for at least eighty-five percent of their sentences would be the quickest, surest route to safer streets, schools, and homes.”).

they are too severe and ineffective.<sup>34</sup> Research shows that imposition of longer sentences can serve as a deterrent to criminals.<sup>35</sup> Opponents counter that the theory of deterrence is outdated and is not supported by tangible evidence.<sup>36</sup> Supporters of tough-on-crime policies also point to successful incapacitation of offenders as an achievement of longer sentences, because increasing the incarceration rate has been shown to reduce crime rates.<sup>37</sup> In response, critics argue that longer sentences have little incapacitation effect because prisoners remain in jail at ages when they would have stopped offending.<sup>38</sup> Academics also argue that incapacitation fails because it turns people into career criminals.<sup>39</sup>

Critics of tough-on-crime policies point to swelling prison populations and the corollary increase in correctional costs as a problem exacerbated by such laws.<sup>40</sup> Opponents further contend that when judges’ sentencing

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34. See Mark Mauer, *Why Are Tough on Crime Policies So Popular*, 11 STAN. L. & POL’Y REV. 9, 11 (1999) (“[M]andatory penalty laws . . . too often result in imposition of penalties that everyone involved believes to be unduly harsh.”); see also Susan Turner, Peter W. Greenwood, Elsa Chen & Terry Fain, *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL’Y REV. 75, 79 (1999) (finding that in the early years of its implementation, ‘get tough’ legislation did not appear to cause a reduction in levels of reported violent crimes).

35. Giovanni Mastrobuoni & David Rivers, *Criminal Discount Factors and Deterrence* (IZA Discussion Paper No. 9769), available at <https://ssrn.com/abstract=2730969> (finding that harsher sentences work as a deterrent, but only up to the first few years in prison).

36. Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 302 (2007) (concluding that the “theory of specific deterrence inherent in the politically popular and intuitively appealing view that harsher treatment of offenders dissuades them from further criminal behavior is thus not consistent with the preponderance of available evidence.”); see also Stephanos Bibas, *The Truth about Mass Incarceration*, NATIONAL REVIEW (Sept. 16, 2015), <http://www.nationalreview.com/article/424059/mass-incarceration-prison-reform> (arguing that deterrence fails because “we overestimate prospective criminals’ foresight and self-discipline.”).

37. Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319, 348 (1996).

38. Carl P. Schmettmann, Adansi Amankwaa, & Robert D. Long, *Three Strikes and You’re Out: Demographic Analysis of Mandatory Prison Sentencing*, 35 DEMOGRAPHY 445, 458-59 (1998).

39. Bibas, *supra* note 36.

40. See Joanna M. Shepherd, *Police, Proposals, and Determinate Sentencing: The Truth About Truth-in-Sentencing Laws*, 45 J.L. & ECON. 509, 510 (2002) (explaining that determinate sentencing policies cause longer prison sentences and prison stays which in turn increase the cost of maintaining correctional facilities); Tonry, *supra* note 31, at 147 (“Mandatory minimum, three-strikes, and truth-in-sentencing laws have greatly increased the lengths of prison terms and for that reason are a major cause of the fivefold increase in America’s imprisonment rate between 1972 and 2007.”); see also

discretion is eliminated, it prevents sentencing adjustment that assures proportionality between the crime and punishment.<sup>41</sup> This results in unduly harsh sentences for some undeserving offenders.

### *C. Justice Reinvestment*

Although the crime rate has remained near the historic low,<sup>42</sup> prison populations<sup>43</sup> and correctional costs continue to swell.<sup>44</sup> Even with America's continued exponential prison growth after the crime rate peaked in the early 1990's, the strongest research shows that only one-quarter to one-third of the drop in crime can be attributed to this growth.<sup>45</sup> Instead, research finds that the decrease in crime may be attributable to several other factors, including better policing, changing demographics, increased private security, and improved theft prevention technologies.<sup>46</sup> Relying on new empirical data, states are embracing the notion that they can reduce the crime rate without increasing the prison population, thereby cutting tremendous costs from the state budget.<sup>47</sup>

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Ashley Gilpin, Note, *The Impact of Mandatory Minimum and Truth-in-Sentencing Laws and Their Relation to English Sentencing Policies*, 29 ARIZ. J. INT'L & COMP. L. 91, 100-01 (2012) (citing longer prison terms as a direct cause for the increase in state budget spending on prison costs throughout the thirty years of sentencing reform from 1970 through 2001).

41. See Shepherd, *supra* note 40, at 510. Proponents defend tough-on-crime policies by arguing that research demonstrates determinate sentencing policies reduce sentencing disparity amongst judges. James M. Anderson, Jeffrey R. Kling, & Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and after the Federal Sentencing Guidelines*, 42 J. L. & ECON. 271, 298-99 (1999).

42. FRIEDMAN, GRAWERT & CULLEN, *supra* note 16, at 3.

43. See Wagner, *supra* note 1.

44. See THE WHITE HOUSE, *supra* note 1 ("Real expenditures on the criminal justice system as a whole total over \$270 billion, or \$870 per capita and have grown by over 70 percent in the last two decades.").

45. See MD. JUSTICE REINV. COORDINATING COUNCIL, *supra* note 14, at 3.

46. *Id.*; see also *Factors Contributing to the Crime Decline*, PEW CHARITABLE TRUSTS (Sept. 11, 2014), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2014/09/11/factors-contributing-to-the-crime-decline> (suggesting that waning crack cocaine demand, the improved economy, and less lead exposure are additional contributing factors to the nation's crime decline).

47. See MD. JUSTICE REINV. COORDINATING COUNCIL, *supra* note 14, at 3-4.

Consider Florida and New York: over the past 20 years, both states experienced massive and identical crime rate reductions of 54 percent. New York achieved that reduction while reducing its imprisonment rate by 24 percent, while Florida expanded its use of prison by 31 percent—costing taxpayers hundreds of millions of dollars a year. . . . In the last five years, 32 states . . . reduced both their imprisonment and crime rates.



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In 2006, the Pew Charitable Trust and the Bureau of Justice Assistance launched the Justice Reinvestment Initiative to help states reduce their swelling prison populations.<sup>48</sup> Justice reinvestment is premised on the idea that “accurate information on risk can inform decisions to reserve prison resources for high-risk offenders, while reducing recidivism of low-risk offenders by diverting them to less costly, community-based solutions.”<sup>49</sup> Numerous states have already implemented justice reinvestment strategies,<sup>50</sup> and, in 2015, Maryland followed suit by establishing the Justice Reinvestment Coordinating Council (“Council”).<sup>51</sup> Maryland tasked the Council with “develop[ing] a statewide framework of sentencing and corrections policies to further reduce the state’s incarcerated population, reduce spending on corrections, and reinvest in strategies to increase public safety and reduce recidivism . . .”<sup>52</sup> The

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*Id.*

48. Nicole Lewis, *Maryland Leads as Prison Populations Continue to Decline*, THE MARSHALL PROJECT (May 18, 2018), <https://www.themarshallproject.org/2018/05/18/maryland-leads-as-prison-populations-continue-to-decline>; see also SENTENCING PROJECT, ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 2, available at <http://sentencingproject.org/wp-content/uploads/2015/12/Ending-Mass-Incarceration-Charting-a-New-Justice-Reinvestment.pdf> (“[A] revived, reoriented Justice Reinvestment effort could significantly reduce U.S. corrections populations and costs. . . .”). But see Michael Tonry, *Making Peace, Not a Desert: Penal Reform Should Be About Values Not Justice Reinvestment*, 10 CRIMINOLOGY & PUB. POL’Y 637, 637 (2011) (criticizing Justice Reinvestment as an “oblique[], . . . complicated proposal[] aiming simultaneously—and magically[] to save money, reduce offending, and reduce the numbers of people in confinement.”).

49. See Lowrie, *supra* note 13, at 109. The key question at the heart of justice reinvestment is “[h]ow do we get taxpayers a better public safety return on their correctional dollars.” JUSTICE REINVESTMENT COORDINATING COUNCIL, *supra* note 14, at 4. Justice reinvestment strategies include reducing sentence lengths, reclassifying offense types, expanding prison alternatives for lower-level offenders, revising mandatory minimum laws, expanding earned time opportunities for inmates, and altering parole policy and practice to create more certainty and to reduce the length of stay. *Id.* at 5.

50. The report states:

Georgia, Kentucky, Mississippi, North Carolina, Oregon, Pennsylvania, Texas, Utah . . . have implemented reforms to protect public safety and control corrections costs . . . by revis[ing] their sentencing and corrections policies to focus state prison beds on violent and career offenders and then reinvest[ing] a portion of the savings from averted prison growth into more cost-effective strategies to reduce recidivism.

*Id.* at 4.

51. Lowrie, *supra* note 13, at 111-12.

52. MD. JUSTICE REINV. COORDINATING COUNCIL, *supra* note 14, at Executive Summary.

Council proposed recommendations<sup>53</sup> which, if implemented, projected to reduce Maryland's prison population by 3,930 inmates over the next 10 years. This 14% reduction could avert \$247 million in corrections spending.<sup>54</sup>

In May 2016, Governor Hogan signed the groundbreaking Justice Reinvestment Act,<sup>55</sup> adopting many of the Council's recommendations.<sup>56</sup> Relying on justice reinvestment principles, the JRA aimed to reduce Maryland's prison population,<sup>57</sup> and use the savings to provide for more effective treatment to offenders, before, during, and after incarceration.<sup>58</sup> Highlights of the JRA include decreasing the maximum penalties for convictions on drug possession and distribution charges,<sup>59</sup> repealing mandatory minimum sentences for nonviolent drug offenses,<sup>60</sup> eliminating delays in administrative parole for some nonviolent offenders,<sup>61</sup> and establishing graduated sanctions short of re-imprisonment for technical violators of supervised release.<sup>62</sup> In an effort to target the most disruptive

53. *Id.* at 13. The Council's recommendations aimed to focus prison beds on serious violent offenders, strengthen probation and parole supervision, improve and enhance release and reentry practices, support local correctional institutions, and ensure oversight and accountability. *Id.*

54. *Id.* at 24.

55. Ovetta Wiggins, *How Maryland Came to Repeal Mandatory Minimums for Drug Offenders*, WASH. POST (June 1, 2016), [https://www.washingtonpost.com/local/md-politics/how-maryland-came-to-repeal-mandatory-minimums-for-drug-offenders/2016/06/01/4961c7c4-2124-11e6-8690-f14ca9de2972\\_story.html](https://www.washingtonpost.com/local/md-politics/how-maryland-came-to-repeal-mandatory-minimums-for-drug-offenders/2016/06/01/4961c7c4-2124-11e6-8690-f14ca9de2972_story.html) ("No state has gone as far as Maryland in recent memory . . .").

56. *Governor Larry Hogan Signs 144 Bills into Law*, MARYLAND.GOV: OFFICE OF GOVERNOR LARRY HOGAN (May 19, 2016), <http://governor.maryland.gov/2016/05/19/governor-larry-hogan-signs-144-bills-into-law/>; See Dresser, *Hogan supra* note 12.

57. Maryland is already reaping the benefit of the Justice Reinvestment Act—the Vera Institute of Justice announced that Maryland led the nation with a 9.6% drop in prison inmates in 2017. Michael Dresser, *Maryland Tops States in Decline of Prison Population, Report Shows*, BALT. SUN (May 18, 2018), <http://www.baltimoresun.com/news/maryland/politics/bs-md-prison-population-20180518-story.html#>.

58. See Dresser, *supra* note 12.

59. Justice Reinvestment Act, 2016 Md. Laws 6239, 6373-74 (codified at MD. CODE ANN., CRIM. LAW § 5-601 (West 2017)) (changing the law to imprisonment up to twelve months for a first conviction, imprisonment up to eighteen months for a second or third conviction, and imprisonment up to twenty-four months for a fourth or subsequent conviction).

60. *Id.* at 6377-83 (codified at MD. CODE ANN., CRIM. LAW §§ 5-607, 5-608, 5-609, 5-609.1 (West 2017)).

61. *Id.* at 6355-60 (codified at MD. CODE ANN., CORR. SERVS. §§ 7-205, 7-301.1 (West 2017)).

62. *Id.* at 6352 (codified at MD. CODE ANN., CORR. SERVS. § 6-121 (West 2017)). See also *id.* at 6365 (codified at MD. CODE ANN., CORR. SERVS. § 7-401(d) (West 2017)); *id.* at 6409-10 (codified at

offenders, the JRA also increased the maximum penalty for second-degree murder<sup>63</sup> and child abuse resulting in death.<sup>64</sup> Researchers projected that implementation of the JRA in Maryland would save at least \$80.5 million in correctional spending and reduce the prison population by nearly 1,200 beds over the next ten years.<sup>65</sup>

## II. ANALYSIS/PROPOSAL

Since 2015, Baltimore, Maryland has experienced untenable levels of violence on neighborhood streets.<sup>66</sup> Everyone agrees that the violence must end but exactly what brings down the crime rate is an oft-debated and divisive topic.<sup>67</sup> Various explanations have been offered: some experts cite active measures like smarter policing and expanding the police force while others cite natural changes in societal demographics like aging population and lower unemployment rates which work independently to reduce crime.<sup>68</sup> In truth, any theory or study is met with a confluence of extraneous factors that prevent an accurate determination or conclusion as to which variable, or variables, bring down the crime rate. For example, studies have reached contradictory conclusions on how much, if at all, incarceration reduces crime.<sup>69</sup> The bottom line is, it is way more

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MD. CODE ANN., CRIM. PROC. § 6-224(d) (West 2017)) (establishing that for a technical violation of parole or probation an individual may serve no more than fifteen days for a first violation, thirty days for a second violation and forty-five days for a third violation). Additional highlights include eliminating jail time for driving on a suspended license, allowing geriatric parole at an earlier age, and raising the value of stolen items that makes theft a felony while also decreasing the length of imprisonment for theft. *Id.* at 6387, 6407, 6436-37.

63. *Id.* at 6372 (codified at MD. CODE ANN., CRIM. LAW § 2-204(b)) (increasing the penalty from thirty to forty years).

64. *Id.* at 6373 (codified at MD. CODE ANN., CRIM. LAW § 3-601(b)(2)) (imposing imprisonment not exceeding life if the abuse results in the death of a child under the age of thirteen years).

65. Wiggins, *supra* note 55.

66. *See supra* notes 22-24.

67. *See* ROEDER, EISEN, & BOWLING, *supra* note 6, at 3 (“Why has crime fallen? . . . Social scientists and policy experts have searched for answers. . . . Most likely, there is no one cause for such widespread, dramatic change. Many factors are responsible.”).

68. *Id.*

69. *Compare* Levitt, *supra* note 37, at 348 (finding that “increased prison populations appear to substantially reduce crime”), *with* ROEDER, EISEN, & BOWLING, *supra* note 6, at 4 (“Increased incarceration has had little effect on the drop in violent crime in the past 24 years.”).

complicated than the talking points.<sup>70</sup>

Looking beyond the numbers, incapacitation of repeat violent offenders by removing them from society and limiting their ability to commit crimes, is an intuitively sensible measure.<sup>71</sup> When an individual makes the repeated choice to violate the fragile constructs of society, disrupting civilized life with cruel acts that ruin the lives of others, the neighborhood is safer with that individual behind bars. Therefore, Maryland made the right, nonetheless difficult, decision to enact S.B. 101.

However, the effectiveness of longer, harsher sentences do have their limits. Research shows that the incapacitation effect of longer sentences wears off over time because prisoners remain in jail at ages when they would have stopped offending.<sup>72</sup> And while longer sentences do have some deterrent effect, they are concentrated in the first few years.<sup>73</sup> In light of these considerations, the limits placed on S.B. 101, setting the mandatory minimum sentence for repeat violent offenders at 10-years, is a sensible compromise between achieving Maryland's goals with narrowly tailored means.

No doubt this measure alone will not curb violent crime in Baltimore. It will take the establishment of programs that work to improve economic opportunities in low-income neighborhoods, a modernization of effective

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70. See Inimai M. Chettiar, *The Many Causes of America's Decline in Crime*, THE ATLANTIC (Feb. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/> (arguing that “the enormous growth in imprisonment only had a limited impact [on the drop in the crime rate]” while also conceding that “[w]e do not know with precision what caused the crime decline.”).

71. See Joseph Hartzler, *A Fork in the Road – Build More Prisons or Develop New Strategies to Deal with Offenders – Keynote Address*, 23 S. ILL. U. L.J. 285, 290 (1999) (“[T]here really is not an intelligent alternative to incarcerating violent criminals.”); see also Leon Neyfakh, *OK, So Who Gets to Go Free?*, SLATE (Mar. 4, 2015), [http://www.slate.com/articles/news\\_and\\_politics/crim\\_e/2015/03/prison\\_reform\\_releasing\\_only\\_nonviolent\\_offenders\\_won\\_t\\_get\\_you\\_very\\_far.html](http://www.slate.com/articles/news_and_politics/crim_e/2015/03/prison_reform_releasing_only_nonviolent_offenders_won_t_get_you_very_far.html) (“[P]risons exist for a reason—to remove violent criminals from the streets and to punish them for the violence they’ve committed.”). On the other hand, using incarceration as a punishment for nonviolent, non-serious crimes, imposing imprisonment for violations of technical conditions of supervised release, jailing low-risk defendants who are waiting for their trials to begin, and imposing mandatory minimum sentences for nonviolent crimes are intuitively insensible measures and should be the focus of America’s criminal justice system reform. See Chettiar *supra*, note 70. This note, therefore, only supports harsher penalties for repeat violent offenders.

72. See Schmertmann, *supra* note 38.

73. See S.K., *supra* note 35.

policing practices, and an expansion of treatment and rehabilitation programs that improve the health of communities to reduce people’s inclination towards crime.<sup>74</sup> Nevertheless, tougher sentences are a worthwhile start. Violent crime is committed by a small, disruptive segment of the population,<sup>75</sup> and removing this small portion of the population will make Baltimore a safer place to live.

Imposing longer sentences for repeat violent offenders and eliminating their parole eligibility will likely increase the prison population over time.<sup>76</sup> Thus, on its face, S.B. 101 is seemingly antithetical to Maryland’s recent efforts to *reduce* prison enrollment and correctional costs through justice reinvestment. But, the issue of mass incarceration should not sway the debate over whether to lock up legitimately violent and harmful members of society. Rather, it should propel policy to undo the harshness of penalties for crimes which are no longer viewed as particularly injurious to the public welfare.<sup>77</sup>

Upon closer examination, tougher sentences fit neatly into the purpose of Maryland’s justice reinvestment reform which aims to “reserve prison resources for high-risk offenders, while reducing recidivism of low-risk offenders by diverting them to less costly, community-based solutions.”<sup>78</sup> Justice reinvestment seeks to maximize the allocation of prison resources for violent offenders who deserve to occupy a prison bed more than their

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74. See generally ROEDER *supra*, note 67. In conjunction with tougher sentencing laws, Maryland also passed legislation requiring the Governor to appropriate \$3,600,000 in the annual State budget for Baltimore City to be used provide grants to community-based organizations to implement Safe Streets Initiatives, an anti-violence program, in Baltimore City. 2018 Md. Laws 838.

75. Senator Bobby Zirkin, sponsor of S.B. 101 and chair of the Maryland Senate Judicial Proceedings Committee commented “[t]hat bill (S.B. 101) was for the worst of the worst and it was not a large number of individuals.” See Dresser, *supra* note 57.

76. See *Criminal Justice Facts*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/criminal-justice-facts/> (last visited Oct. 7, 2018)(reporting that half of the 222% growth in the state prison population between 1980 and 2010 was due to an increase of time served in prison for all offenses).

77. See Lauren-Brooke Eisen & Inimai Chettiar, *39% of Prisoners Should Not Be in Prison*, TIME (December 9, 2016), <http://time.com/4596081/incarceration-report/> (finding that “approximately 39% of the nationwide prison population (576,000 people) is behind bars with little public safety rationale” including “25% of prisoners (364,000 people), almost all nonviolent, lower-level offenders, [who] would be better served by alternatives to incarceration such as treatment, community service, or probation.”).

78. See Lowrie, *supra* note 13, at 109.

nonviolent counterpart.<sup>79</sup> As justice reinvestment reduces the number of beds for nonviolent offenders, shifting a portion of those beds to violent offenders is a natural corollary. Violent offenders make up approximately 65% of all inmates in Maryland prisons.<sup>80</sup> While this ratio of violent to nonviolent offenders is a more efficient utilization of prison beds than the national average in state prisons, 54%,<sup>81</sup> Maryland has the potential to use prison resources on violent offenders with greater efficiency.

To offset the potential prison population increase from S.B. 101, Maryland should double down on their commitment to justice reinvestment and adopt additional measures to further reduce prison enrollment and correctional costs. While the JRA took significant steps towards fixing Maryland's penal system, key alterations to the Council's proposed recommendations in the final version of the JRA resulted in a decrease of 2,730 beds and \$167 million from the projections.<sup>82</sup> Where did all the savings go?

As evidenced by the sheer difference in impact projections from the Council's recommendations to the final version of the JRA, much more

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79. See MD. JUSTICE REINV. COORDINATING COUNCIL, *supra* note 14, at 13 (listing "focus prison beds on serious and violent offenders" as one of the five goals of the Council's recommendations for implementing justice reinvestment). V. Glenn Fueston Jr., executive director of the Governor's Office of Crime Control and Prevention remarked:

One of the key goals of [justice reinvestment] is to focus enforcement efforts on individuals committing violent crimes while providing second chances and rehabilitation for nonviolent offenders . . . The legislation passed this session focuses on getting repeat violent offenders off of our streets by ensuring that they serve their full sentences.

*See Dresser, supra* note 57. The MGA also already demonstrated a willingness to come down harsher on the most disruptive criminals by increasing the maximum penalty for second-degree murder and abuse of a child that results in death in the JRA. See 2016 Md. Laws 6239, 6244 (codified at MD. CODE ANN., CRIM. LAW § 2-204 (West 2017)).

80. CONNIE UTADA & FELICITY ROSE, PEW CHARITABLE TRUSTS, MARYLAND DATA ANALYSIS PART I: PRISON DRIVERS 69 (2015), available at <http://www.goccp.maryland.gov/jrcc/documents/presentation-20150729-prison-drivers.pdf>.

81. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 1 (Caitlin Scoville & Jill Thomas eds., 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

82. MD. JUSTICE REINV. COORDINATING COUNCIL, *supra* note 14, at 2. If adopted, the Council's consensus recommendations were projected to reduce Maryland's prison population by 3,930 inmates over the next 10 years, averting \$247 million in corrections spending. *Id.* In the final version of the JRA, researchers projected that its implementation would save only \$80.5 million in correctional spending and reduce the prison population by 1,200 beds over the next ten years. See Wiggins, *supra* note 55.

can be done. First, although the JRA established graduated, capped sanctions short of reimprisonment for violators of parole and probation,<sup>83</sup> a major step in reducing the prison population,<sup>84</sup> a clause in the JRA may have eliminated any potential gain. The JRA included a safety valve for judges to impose periods of incarceration beyond the legislative caps for parole violations if the inmate posed a risk to public safety.<sup>85</sup> This safety valve gives judges ample room to disregard the revised revocation sanctions for probation and parole and will likely result in judges maintaining their old revocation-sentencing habits, enabling them to send undeserving technical violators back to prison to serve part, or all, of their remaining sentence. Maryland should eliminate this ‘trap door’ and prevent judges from imposing unjust sentences on mere technical violators.

Second, the Council found that although the percentage of offenders released to parole increased in the last ten years, it remains under 40%.<sup>86</sup> When offenders are eligible for parole, they serve an average of nine months past their eligibility date.<sup>87</sup> As a solution, the Council recommended creating an administrative parole process for nonviolent, parole-eligible offenders.<sup>88</sup> The Council intended that this administrative

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83. See 2016 Md. Laws 6239, 6364-71 (codified at MD. CODE ANN., CORR. SERVS. § 7-401 (West 2017)) (“On finding that adhering to the limits would create a risk to public safety, a victim, or a witness . . . the commissioner may: direct imposition of a longer period of imprisonment than provided in paragraph (1) of this subsection.”); MD. CODE ANN., CRIM. PROC. § 6-224 (West 2017).

84. See UTADA, *supra* note 80, at 69. In Maryland, prisoners serving sentences for revocation from probation, parole, and mandatory supervision take up 37% of all prison beds. *Id.* This figure is unsurprising considering the 29% increase in average sentence length for probation revocation over the last decade, *id.* at 29, a trend that has not shown signs of abatement—58% of all prison admissions in 2014 were on supervision before entering prison. *Id.* at 11. Strikingly, for possession with intent to distribute narcotics and distribution of narcotics, the average sentence of offenders sent to prison for a violation of probation was longer than those sentenced directly to prison. See JUSTICE REINVESTMENT COORDINATING COUNCIL, *supra* note 14, at 28.

85. 2016 Md. Laws 6239, 6411-12 (codified at MD. CODE ANN., CRIM. PROC. § 6-223(e)(3) (West 2017)).

86. MD. JUSTICE REINV. COORDINATING COUNCIL, *supra* note 14, at 9.

87. UTADA, *supra* note 80, at 51. This nine-month average delay in release from parole costs the system almost 1,600 beds. *Id.* Moreover, nonviolent parolees are released at around 40% of their aggregate sentence despite reaching eligibility at 25%. *Id.*

88. MD. JUSTICE REINV. COORDINATING COUNCIL, *supra* note 14, at 21. This process is “based on the results of a validated risk and needs assessment administered at the time of commitment to developed individualized case plans that are achievable by the parole eligibility date.” *Id.*

parole process apply to *all* nonviolent offenders in prison.<sup>89</sup> Instead, the JRA limited the administrative parole process to some, but not all, low-risk inmates,<sup>90</sup> further contributing to the reduction of savings in the final projection. Maryland should conform the JRA with the Council's proposed recommendations and apply the administrative parole process to all nonviolent offenders.

### CONCLUSION

To offset the potential increase in prison population from recently enacted S.B. 101, Maryland should double-down on their recent justice reinvestment reform. While the two measures seem at odds with each other, straddling opposite ends of the criminal justice ideological spectrum, upon closer examination, the measures will work in tandem to achieve dual, complimentary aims—ensuring the societal removal of individuals who make the repeated choice to commit violent crimes while simultaneously reducing prison time for nonviolent offenders who may be better dealt with through alternative programs.

Over the last quarter-century, America has become a much safer place to live.<sup>91</sup> Yet, Baltimore, Maryland has not enjoyed the benefits of this crime decline; rather, the homicide rate is at an all-time high.<sup>92</sup> Maryland must do more to address this crisis, and S.B. 101 is a worthwhile start to making the neighborhoods of Baltimore a safer place to live.

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89. *Id.*

90. 2016 Md. Laws 6239, 6356-57 (codified at MD. CODE ANN. CORR. SERV. § 7-301(e) (West 2017)). The JRA excluded inmates serving time for their third possession with intent to distribute, the number one crime at admission from the administrative parole process. *Id.* see also JUSTICE REINVESTMENT COORDINATING COUNCIL, *supra* note 14, at 28. Instead, the JRA required them to serve one-half of their sentence before becoming parole eligible, *id.*, a requirement that equates these inmates with violent offenders. See MD. CODE ANN., CORR. SERVS. § 7-301(c)(1)(i) (West 2017). Maryland should also eliminate this provision and re-equate these offenders to other nonviolent offenders who are eligible for parole after serving 25% of their sentence. MD. CODE ANN., CORR. SERVS. § 7-301(a) (West 2017)

91. See THE WHITE HOUSE, *supra* note 6.

92. Madhani, *supra* note 7.