

Reassessing, Rethinking, Revising: The Essential Work of Sentencing Commissions*



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It is truly an honor to receive this recognition. Especially here in Portland where eleven years ago I attended my very first NASC meeting. I cannot begin to express how important it has been to me to be involved with NASC. In 2011, as a brand-new executive director for the Minnesota Sentencing Guidelines Commission, NASC helped me see beyond my own state to understand the variety of approaches in sentencing and corrections policy. Today, as a researcher with the Robina Institute of Criminal Law and Criminal Justice, I have a ready-made network of people I can reach out to regularly to better understand sentencing and correctional policies across the country. And on a personal note, I could not have asked for a better set of colleagues.

Today, if you will indulge me, I want to talk about the obligations of sentencing commissions to constantly reassess their policies. But first, let me start by telling a story.

Earlier in my career when I was serving as a staff attorney for the Minnesota Judicial Branch, the Finance Director, focusing on the number of misdemeanor cases with outstanding fines and fees, asked me if I could draft legislation that would result in an automatic entry of conviction if a person failed to appear in court. We had a similar procedure for petty misdemeanors, after all,¹ so why not expand it to misdemeanors? He wanted the court to be able to enter the conviction so the case could be closed, and the court could then send the debt to collections. I had to gently remind him about due process and that a person has the right to be present in any criminal proceeding.²

Back then, the issue was seen through the lens of efficiency. We were facing a budget crisis in the state. We had a lot of outstanding cases, and our leadership was looking for ways to increase the efficiency of the courts. Entering the conviction just seemed to be expedient. It would save time by cutting out the need to try to reschedule the case, hold another hearing, or issue a bench warrant for the individual, and avoiding those warrants would also save time for law enforcement, so we could benefit our partners in the process. But no real thought was given to the impact such a procedure would have on people's lives.

I'm not telling this story to throw my home state under the bus. I am telling it to illustrate how much the world has changed since then, and how our perspectives have changed with it. I do not think I would be asked to write the same legislation today because today there is greater

recognition that some of the policies and practices in the criminal justice system are predatory. They may have been put in place with the greatest of intentions—with a focus on achieving accountability or efficiency—but many also have deep and long-lasting negative impacts on our communities, and particularly on our communities of color.

To put a pin in it, and somewhat salvage the reputation of the Minnesota Judicial Branch, I will let you know that the Branch took a different approach that year. The State Court Administrator, Sue Dosal, doubled down on her insistence that the legislature fully fund the judiciary. And one piece of legislation that *did* pass was a piece that I wrote to uncouple fines and fees from probation so that payment of fines and fees could not be ordered as a probation condition and a person therefore could not be revoked or have their probation extended for nonpayment.³ This solution took less staff and judge time than holding a probation violation hearing for unpaid fines and fees, so it fit the efficiency criteria the Finance Director had originally been looking for.

Getting back to my point, the initial ask that was made of me—to draft legislation to allow for the automatic entry of a misdemeanor conviction—was just one example of how our policies have the potential to do harm to communities that outstrips the accountability we are seeking to achieve. And the question I have is, how many other examples are there? How many examples exist in our own guidelines that are having disparate impacts on people today? How much of a role does our *policy* as opposed to other factors outside of our control play in creating or exacerbating disparities? Those are the questions I ask myself every day.

I look at the situation in my state, and I see racial disparity. After the death of George Floyd, I began doing research much further upstream than where I usually focus—sentencing, probation, and parole—and for the first time, I analyzed data for arrests. In fact, until then, I had never actually taken the time to look at the statistics on arrests in Minnesota. But I was asked to join a project called Truth and Action, where we are combing data with people's lived experience to get a better understanding of how the criminal justice system impacts people's lives,⁴ and in that capacity, we at the Robina Institute were asked to analyze racial disparities at multiple decision points in the life of a criminal case, including arrest.

In 2019, the Minneapolis Police Department made 8,550 adult arrests, while the Saint Paul Police Department

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made 6,466 arrests. Figure 1 shows the racial breakdown of these arrests. As a basis for a rough comparison, the second bar in each set shows the breakdown of the total population in each city by race according to 2020 census data.⁵ Although people who are white constitute the majority of the population in both cities—60 percent in Minneapolis; 51 percent in Saint Paul—only about a quarter of those arrested in Minneapolis were white, and just a third of those arrested in Saint Paul were white. In contrast, people who are Black represent less than one-fifth of the population in both cities yet represent a majority of those arrested—60 percent in Minneapolis, and 45 percent in Saint Paul. In Minneapolis, people identified as Native American represent just 1 percent of the population but 9 percent of the arrests. Thus, arrest is a significant contributor to racial disparities in the criminal justice system in the Minneapolis-Saint Paul Metro Area.

This disparity in arrests results in disparity throughout the system. Figure 2 shows what the disparity looks like at the point of sentencing by comparing the breakdown of the state population by race to the breakdown of people convicted of felony offenses by race. As with arrests, people who are white are underrepresented in the felony population compared to their representation in the state population, while people who are Black or Native American are overrepresented in the felony population. But honestly, the disparity at arrest is so overwhelming it almost does not matter what happens next. The disparity is so extreme at arrest that it almost cannot be made worse. Yet these arrests are what lays the groundwork for the criminal history score we have in our guidelines.

Eight years ago, when I started working at the Robina Institute, Professor Richard Frase⁶ was closing in on

retirement. And after studying sentencing guidelines throughout the course of his career, he had concluded that the problem with guidelines was their reliance on criminal history.⁷ I worked with him on a project—the Criminal History Enhancements Sourcebook—in which we catalogued and then compared all the ways that guidelines systems constructed their criminal history scores and identified all the policy issues that exist within those different formulations.⁸ We talked to you [commissions] about those policy issues and pushed you to consider ways to address them. It was amazing how much variation we found, how many different approaches, and as my colleague Julian Roberts,⁹ who worked with us on that project, remarked: “They can’t all be right.” So, there is reason to rethink the way we do things.

I dove into the project, and I have had the honor over the years to work with many of the various commissions represented in this room as they reviewed our work and sought to apply our findings to their own policies. Some looked at enacting a decay factor for the first time; some tweaked how their juvenile points were counted; and some, like Pennsylvania, went all in and embarked on a more comprehensive review. But I’ll be honest. Until I was appointed to the Minnesota Sentencing Guidelines Commission as a member responsible for the policy that the Commission produces, I didn’t get it. I really didn’t.

Professor Frase was not challenging us to think about *how* we should construct the criminal history score; he was challenging us to think about whether we should use criminal history at all. Every guidelines system places an outsized reliance on criminal history. But criminal history is a factor that is in and of itself a product of structural racism. We have to acknowledge that. And we have to think

Figure 1.
Arrests Made by Minneapolis Police Department and Saint Paul Police Department by Race
(Adult Arrests Only)¹⁷

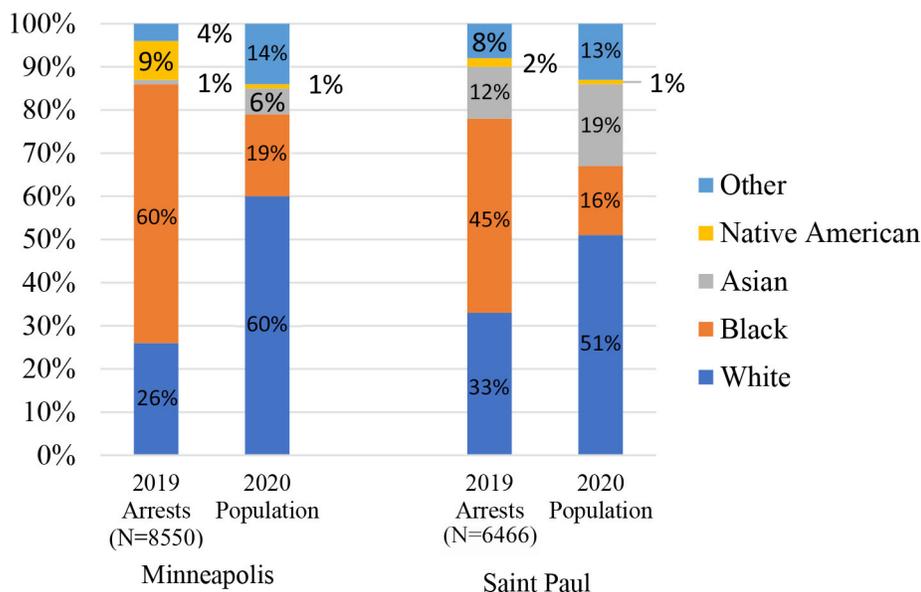
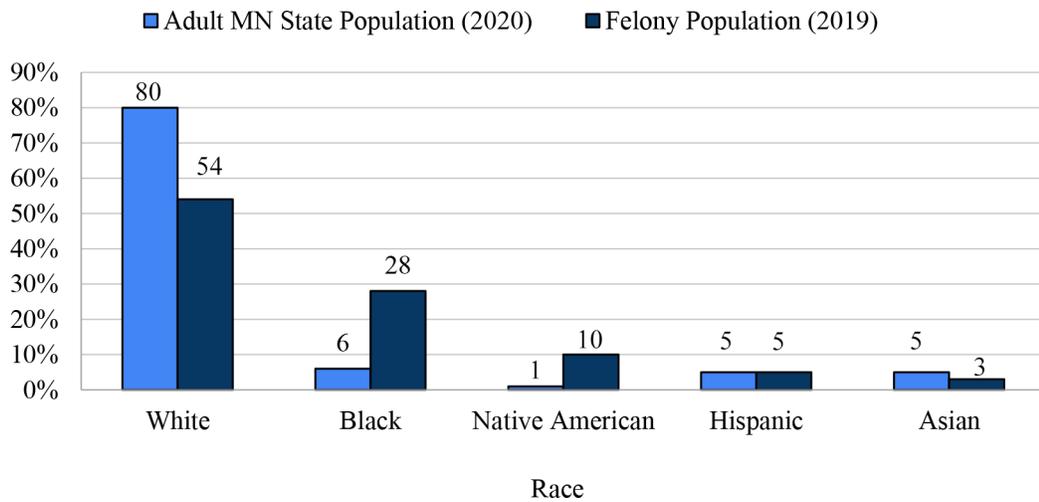


Figure 2.

Statewide Population Compared to Population of People Convicted of Felonies in Minnesota by Race (2019)¹⁸



about what that means for the way that we develop our policies.

A few of my fellow Commission members are here today, and they are probably listening to this and thinking, “Oh my gosh, when we go back, she’s going to say let’s eliminate criminal history.” I’m not going to do that. I’m not suggesting that we get rid of criminal history. It is definitely a relevant consideration at the time of sentencing. But the question I want everyone to be asking is how much should we rely on criminal history? How much emphasis does it need to have in our guidelines, and how much weight do we need to give it? As a sentencing commission member, I have to recognize the significant racial disparity in place before we ever get to sentencing and the application of our guidelines. But I also have to ask myself, “Are we making it worse?” Because we do have some control over that equation. If the answer is yes—if our policies are the source of further disparity—then I think we have a duty to rethink them.

So, it is time that we turn the lens on ourselves and review our own policies. Shortly after the death of George Floyd, I asked the Minnesota Sentencing Guidelines Commission to do just that. We had a meeting scheduled on the same day as Mr. Floyd’s funeral, so we rescheduled for the following week out of respect for the events going on around us. When we came back, I opened up the meeting, and I said, “I think we need to review our guidelines. I think we need to look at the racial impact of our policies. Will you join me? Will you support me in that?” And the Commission said, “Yeah, we’ll support you in that.” But they took it a step further. Our guidelines have a provision that says, “Sentencing should be neutral with respect to the race, gender, social, or economic status of convicted felons.”¹⁰ And based on that, the Commission said, “We want to do it all. We want to see what we can learn about all of those aspects of potential disparity.” Thus, we embarked on

a neutrality review. Originally our own staff was going to lead this effort, but after they became hampered by staff turnover and a statewide hiring freeze during the pandemic, we sought outside help. Chris Uggen, a sociologist and criminologist at the University of Minnesota agreed to take on the work. He brought on one of his PhD-level graduate students, Hannah Schwendamen, for assistance, and some of the early findings particularly struck me.

First, criminal history scores are going up (figure 3). From 2001 to 2005, the average criminal history score was 1.6—from 2015 to 2019, the average was 2.2.

Figure 4 shows the stark upward trend for average criminal history scores from 2001 to 2019. It also shows that criminal history scores vary by race. They have been highest for people who are Black, next highest for people who are Native American, and next highest for people who are white.

Particularly sharp increases started in about 2008, and then again around 2016. What could be causing this? Well, one possibility is that in 2006 the legislature created a new structure for several offenses that made them enhanceable. For crimes such as driving while intoxicated, assault, or domestic assault, Minnesota now has a structure where the first offense is a misdemeanor, the second ratchets up to a gross misdemeanor, and the third or fourth ratchets up to a felony.¹¹ In other words, Minnesota has more felonies on the books today than before 2006, so some proportion of the increase in the average criminal history score is likely because felonies carry more weight in Minnesota’s criminal history score than misdemeanors or gross misdemeanors.¹² But we really have no idea what caused the second sharp increase more recently. It bothers me to no end that I cannot pinpoint a policy change to that particular time frame. Nate Reitz, the executive director for the Minnesota Sentencing Guidelines Commission, commented to me recently that this period coincides with the launch of the

Figure 3.
Average Criminal History Scores Over Time¹⁹

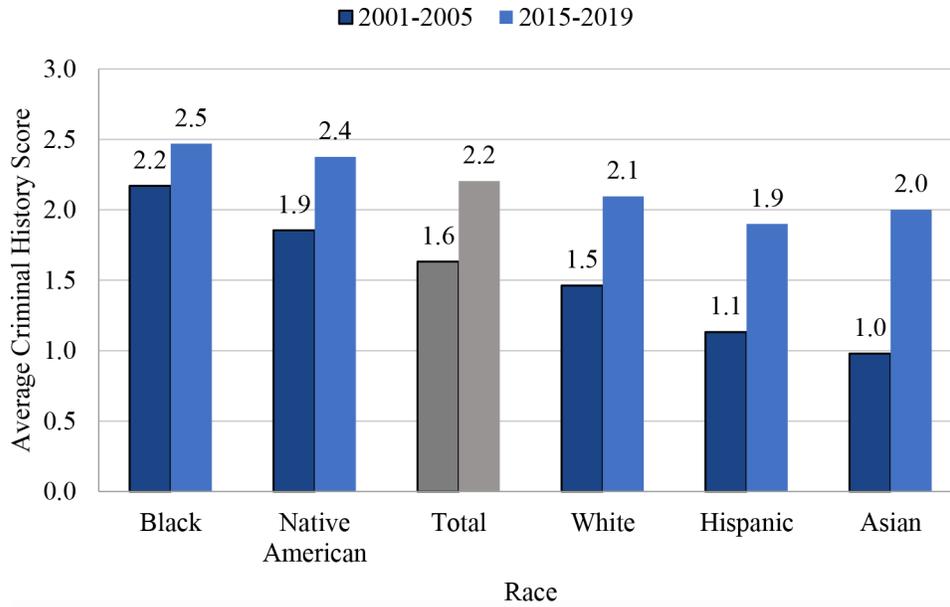
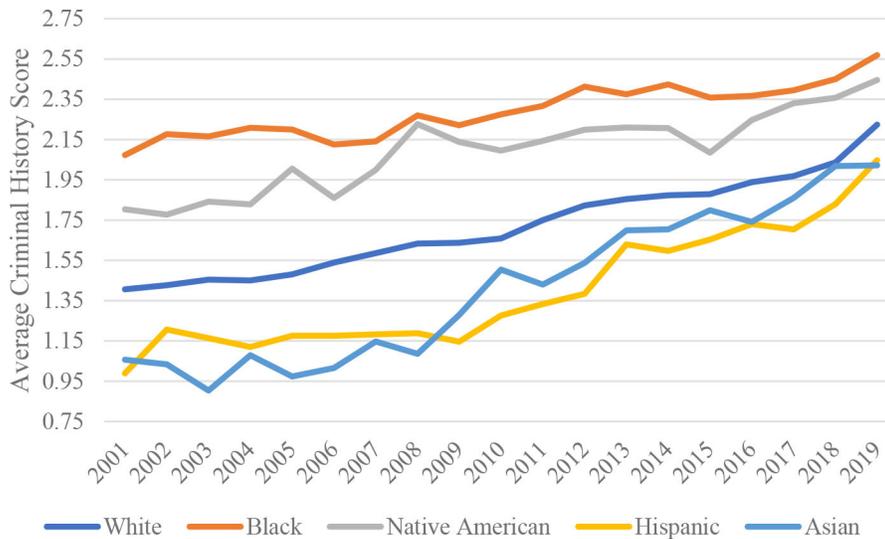


Figure 4.
Average Criminal History Scores by Race (2001-19)²⁰



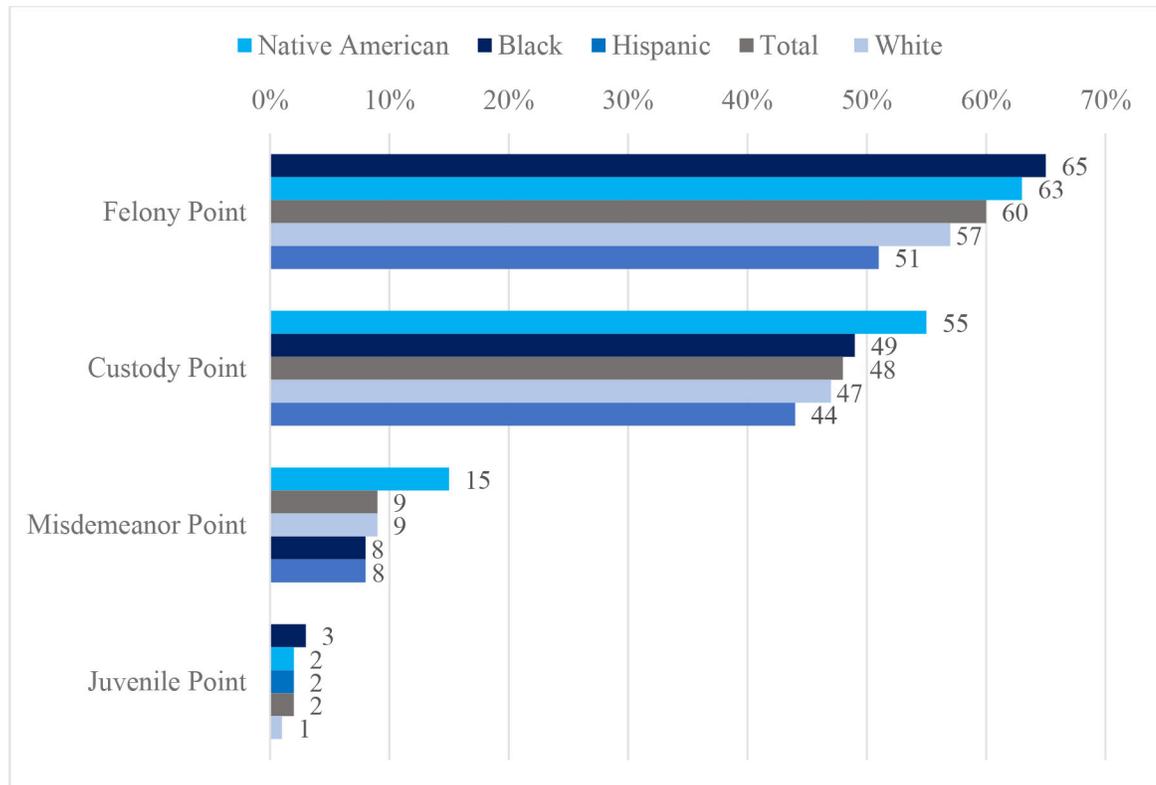
Commission’s new electronic sentencing worksheet, and if so, it is terrifying to me that the cause could simply be better administrative record keeping. So, I want to determine the cause because I want to know if it is something we can change or affect with our policy or if it something else.

Professor Uggen and Ms. Schwendeman were also able to show that the different components of the criminal history score fall more heavily on some groups than others. As shown in figure 5, greater proportions of people who are Black and Native American have prior felonies in their criminal history. And greater proportions of both groups have custody status points in their criminal history. These factors result in higher criminal history scores and

therefore more severe sentences under the Minnesota Sentencing Guidelines for people who are Black and Native American. But these facts give me pause when I relate them back to the findings I showed you earlier regarding the disparity in arrests. Does the construction of our criminal history score add to or simply hold constant the disparities at arrest?

Each of the components that we include in our criminal history score is a policy choice. It is also a policy choice to determine how much weight to give to each component. And these decisions in turn can have varying impacts on people as the guidelines are applied to their cases. As an illustration, I will briefly talk about the discussion our

Figure 5.
Proportion Accruing Criminal History Scoring Components by Race (2015-19)²¹



commission has been having about the custody status point. Under the Minnesota Sentencing Guidelines, a person can accrue an additional one-half to two points if they were under some sort of custody status when they committed the current offense.¹³ Custody status is defined to include things like being on probation or supervised release (Minnesota’s version of parole), in jail or prison, or on escape status.¹⁴ I will not go into detail about the issue, but I will use this topic as an illustration of the impact our policies can have on communities and how changes in policies can drive racial disparities.

As the guidelines are currently functioning, wide racial disparity prevails in imprisonment rates (table 1). Within Minnesota, 115 of 100,000 people who are white will be imprisoned. For people who are Black, the rates are astronomically higher at 1,202 people per 100,000. For those who are Native American, 1,176 of 100,000 people will be imprisoned. But those imprisonment rates can be changed with different variations in the custody status policy. If we were to limit the application of custody status to people with high criminal history scores, the rates would drop to 114 for people who are white, 1,189 for people who are Black, and 1,164 for people who are Native American. If we repealed the custody status component altogether, the rates would drop even lower, to 109 for people who are white, 1,167 for people who are Black, and 1,098 for people who are Native American. It may not sound like much of an improvement, but when we remember that the rates represent people in

Table 1. Changes in Imprisonment Rates Based on Potential Changes in the Criminal History Policy²²

Policy Options	Imprisonment Rates by Race (per 100,000 adults)		
	White	Black	Native American
Imprisonment rates by race under then current guidelines policies	115	1,202	1,176
... if custody status was applied only to high criminal history scores (3 or more)	114	1,189	1,164
... if custody status was removed	109	1,167	1,098

our community, it is a huge impact. Yes, racial disparity is already present at the time of sentencing. But the policy choices in our guidelines directly impact those rates and therefore the people in our communities. In this case, the custody status policy results in imprisonment for six more people who are white, thirty-five more people who are Black, and seventy-eight more people who are Native American per 100,000 adults. All told, the impact is just over one hundred people per 100,000 in the community. It is not a big difference, but do you see that our policy is what changes the imprisonment rate? Imagine those one hundred people live in your neighborhood. How many families would be affected? And *how* would they be affected?

So again, I provided this example to demonstrate the impact of our policy choices on communities. As sentencing commissions, we cannot change the extreme disparities that come into our system at the point of arrest, but we can ask ourselves, “Are we making it worse?” And, “What’s the right policy to protect public safety and impose accountability for these offenses while also accounting for the impact on community?”

A few years after the Minnesota Sentencing Guidelines Commission was created, the legislature updated our enabling legislation to require that public safety be our primary consideration as we do our work.¹⁵ But I think too often public safety is equated with incarceration. I think we know now that isn’t the case. Some people *do* need to be locked up. But that’s not the way to achieve public safety in every case. Drug courts are an example of how providing wrap-around services and support to someone who is ready to address their addiction is more effective at protecting public safety than incarceration. And as more research is being done in community supervision—probation and parole—we are learning that it is not the length of supervision that matters, but rather, the quality. And that providing incentives to change behavior are more effective than sanctioning someone for failing to follow supervision conditions.¹⁶

I have been a manager in some capacity in almost every place I have worked, and the one answer I have never tolerated is “because that’s the way we’ve always done it.” If you look under the hood sometimes you will find that policies and practices were put in place for really stupid reasons; someone just liked it that way or it was more convenient, or—more to the point about what commissions can do—we just lacked the information we needed to make a better decision at the time.

It is not acceptable to keep doing things a certain way just because we have always done it that way. And we shouldn’t accept that from our policy, either. Instead, we should constantly reassess why policies are in place, what their impacts are, and whether there are different approaches that should be considered. And as commissions, we should be using data to guide these considerations. That, after all, is one of the major purposes of having sentencing commissions: to collect and analyze sentencing data so we can truly figure out what works.

I am excited to hear the upcoming presentations about the work being done in Pennsylvania and Washington to comprehensively review their sentencing guidelines. I know projects are also underway in Washington, DC, and New Mexico to go even bigger and look at revising the criminal code. I hope this work will inspire all of us to go back to our home states, remember that this is what we were created for, roll up our sleeves, and get to work.

Notes

* Adapted from the speech given by Mitchell upon receiving the Richard P. Kern Memorial Award from the National Association of Sentencing Commissions (NASC) on August 9, 2022.

¹ Minn. Stat. § 609.491, subd. 1 (2022) (“If a person fails to appear in court on a charge that is a petty misdemeanor, the failure to appear is considered a plea of guilty and waiver of the right to trial, unless the person appears in court within ten days and shows that the person’s failure to appear was due to circumstances beyond the person’s control”).

² In contrast, Minnesota law deems petty misdemeanors not to be criminal convictions, so the same due process concerns are not implicated for failure to appear. Minn. R. Crim. P. 23.06.

³ 2009 Minn. Laws ch. 83, art. 2 §§ 28, 39–46, available at www.revisor.mn.gov/laws/2009/0/83 (removing probation revocation and incarceration as an option when the defendant fails to pay fines and fees and establishing authority for the court to send unpaid fines and fees to collections). The law did not, however, change the procedure for nonpayment of restitution, for which a person can still be subject to a probation violation and revocation. Minn. Stat. § 609.135, subd. 1a (2022).

⁴ The project, *Truth and Action: Addressing Systemic Racism in the Criminal Justice System in Minnesota*, is an initiative of the Dispute Resolution Institute at Mitchell Hamline School of Law in Minnesota. <https://mitchellhamline.edu/truth-and-action>.

⁵ Census data retrieved from www.census.gov/quickfacts/fact/table/minneapoliscityminnesota,stpaulcityminnesota/POPO10220. The census data reflects the racial breakdown of the total population in each city; it is not limited to the adult population.

⁶ Professor Richard S. Frase is the Benjamin N. Berger Professor of Criminal Law emeritus at the University of Minnesota Law School and serves as a Board Member for the Robina Institute of Criminal Law and Criminal Justice.

⁷ See Richard S. Frase, *Paying for the Past: The Case against Prior Record Sentence Enhancements* (Oxford University Press 2019).

⁸ Richard S. Frase, Julian V. Roberts, Rhys Hester, Kelly Lyn Mitchell, Robina Institute of Criminal Law and Criminal Justice, *Criminal History Enhancements Sourcebook (2015)*. <https://robinainstitute.umn.edu/publications/criminal-history-enhancements-sourcebook>

⁹ Julian Roberts served with Richard Frase as co-director on the Robina Institute’s Criminal History Enhancements Project, which sought to critically examine how criminal history enhancements are defined and used within sentencing guidelines and how their use impacts prison and probation populations within the jurisdiction. See Criminal History Enhancements. <https://robinainstitute.umn.edu/criminal-history-enhancements>.

¹⁰ Minn. Sentencing Guidelines § 1.A.1 (2022).

¹¹ See, e.g., 2006 Minn. Laws ch. 260, art. 1 §§ 6–19 (establishing this structure for domestic violence offenses).

¹² See *Minn. Sentencing Guidelines* § 2.B. (2022) (establishing separate rules for the weight attributed to prior felonies, gross misdemeanors and misdemeanors, juvenile offenses, and offenses committed while under some form of custody status).

¹³ Minn. Sentencing Guidelines § 2.B.2 (2022).

¹⁴ Minn. Sentencing Guidelines § 2.B.2.a(1) (2022).

¹⁵ 1989 Minn. Laws ch. 290, art. 2, § 8.

¹⁶ Robina Institute of Criminal Law and Criminal Justice, *Use of Structured Sanctions and Incentives in Probation and Parole Supervision* (July 2020). https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/sanctions_and_incentives.pdf

¹⁷ The Robina Institute obtained data from the Minneapolis Police Department (MPD) and Saint Paul Police Department (SPPD), which are the largest law enforcement agencies in Hennepin County and Ramsey County, respectively. Both agencies provided adult arrest data covering the period from January 1, 2019, to December 31, 2019. Adult arrests consist

of incidents in which individuals were detained and booked by MPD or SPPD; it does not include instances in which individuals were issued a citation or whether the arrest resulted in a conviction.

¹⁸ Hannah Schwendeman and Christopher Uggen. 2022. "Intersectional Disparities in Minnesota Felony Sentencing: Race, Geography, and Indigeneity." Paper to be presented at the Annual Meetings of the American Society of Criminology, Atlanta.

¹⁹ Schwendeman and Uggen, "Intersectional Disparities in Minnesota Felony Sentencing."

²⁰ Source: Minnesota Sentencing Guidelines monitoring data, 2001–2019.

²¹ Schwendeman and Uggen, Intersectional Disparities in Minnesota Felony Sentencing."

²² Minnesota Sentencing Guidelines Commission, *Estimated Impact of October Custody Statutes Proposals* at 4, 7, 15 (updated 7/18/2022). (Table 1 on p. 4 shows the assumed starting point of imprisonment rates under then existing policies; table 4 on p. 7 shows estimated imprisonment rates if custody status were limited to people with high criminal history scores; table 11 on p. 15 shows imprisonment rates if the custody status policy were to be repealed). https://mn.gov/sentencing-guidelines/assets/4B-CORRECTED-MeetingError-Staff-Identified-Error-Staff-Impact-OctCustodyProposals_tcm30-501755.pdf