

LIBERAL BUT NOT STUPID: MEETING THE PROMISE OF DOWNSIZING PRISONS

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A confluence of factors—a perfect storm—interfered with the intractable rise of imprisonment and contributed to the emergence of a new sensibility defining continued mass imprisonment as non-sustainable. In this context, reducing America’s prisons has materialized as a viable possibility. For progressives who have long called for restraint in the use of incarceration, the challenge is whether the promise of downsizing can be met. The failure of past reforms aimed at decarceration stands as a sobering reminder that good intentions do not easily translate into good results. Further, a number of other reasons exist for why meaningful downsizing might well fail (e.g., the enormous scale of imprisonment that must be confronted, limited mechanisms available to release inmates, lack of quality alternative programs). Still, reasons also exist for optimism, the most important of which is the waning legitimacy of the paradigm of mass incarceration, which has produced efforts to lower inmate populations and close institutions in various states. The issue of downsizing will also remain at the forefront of correctional discourse because of the court-ordered reduction in imprisonment in California. This experiment is ongoing, but is revealing the difficulty of downsizing; the initiative appears to be producing mixed results (e.g., reductions in the state’s prison population but increases in local jail populations). In the end, successful downsizing must be “liberal but not stupid.” Thus, reform efforts must be guided not only by progressive values but also by a clear reliance on scientific knowledge about corrections and on a willingness to address the pragmatic issues that can thwart good intentions. Ultimately, a “criminology of downsizing” must be developed to foster effective policy interventions.

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INTRODUCTION

For virtually our entire adult lives, we witnessed the steady and seemingly intractable rise of America’s inmate population. When we first entered the field, state and federal prison populations numbered about 200,000, a figure that would climb to more than 1.6 million.¹ By 2007, the daily count of offenders under some form of incarceration (e.g., including jails) reached an all-time high, surpassing 2.4 million.² On any given day in the United States, about 1 in every 100 adults was behind bars—a figure that in 1970 stood at only 1 in every 400 Americans.³ To use John DiIulio’s phrase, there appeared to be “no escape” from this future of mass incarceration.⁴ We seemed, in fact, to be “addicted to incarceration.”⁵

We forgot, however, that futures are not fully foreordained. To be sure, they are bounded by stubborn realities, such as the flow of offenders into prison systems. But futures also can be reshaped when socially constructed realities are punctured and pressure emerges to shift public policies in new directions. In 2008, such a momentous turning point suddenly emerged: a deep financial recession that strained state treasuries and made the continued gluttony of mass

1. FRANCIS T. CULLEN & CHERYL LERO JONSON, *CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES* 1 (2012).
 2. WILLIAM J. SABOL, HEATHER C. WEST, & MATTHEW COOPER, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 228417, *PRISONERS IN 2008* 8 (2009).
 3. JENIFER WARREN, PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA* 5 (2008), available at <http://www.pewtrusts.org/en/research-and-analysis/reports/2008/02/28/one-in-100-behind-bars-in-america-2008>, archived at <http://perma.cc/NEA5-QHAE>; RIGHT ON CRIME, *THE CONSERVATIVE CASE FOR REFORM: FIGHTING CRIME, PRIORITIZING VICTIMS, AND PROTECTING TAX PAYERS—PRIORITY ISSUES: PRISONS*, <http://www.rightoncrime.com/priority-issues/prisons/> (last visited Jan. 8, 2015), archived at <http://perma.cc/H4Y9-2PDX>.
 4. JOHN J. DI IULIO, JR., *NO ESCAPE: THE FUTURE OF AMERICAN CORRECTIONS* 3-5 (1991).
 5. TRAVIS PRATT, *ADDICTED TO INCARCERATION: CORRECTIONS POLICY AND THE POLITICS OF MISINFORMATION IN THE UNITED STATES* 6 (2009).

incarceration seem an excess that was, as it was often termed, “unsustainable.”⁶ Balancing budgets thus required many governors and elected officials to explore fresh ways to decrease the daily prison count. In 2009, for the first time in thirty-eight years, state prison populations in the United States declined, a trend that has since continued.⁷

A significant policy opportunity thus stands before us: the possibility of downsizing the nation’s prisons. This development will be welcomed by those holding liberal views on corrections, which includes most criminologists. Liberals have long argued that the use of prison is racially disparate, ineffective in reducing crime, and excessive in its scope.⁸ Although the political right would not embrace this view completely, they are part of a growing consensus that it is time to scale back the inmate population.

The key point of this Article is that despite these important developments, any sort of liberal hubris—“we were right after all”—should be steadfastly avoided. In corrections, those on the left have been wise in showing what does not work but not very good in showing what does work; that is, we have been better at knowledge destruction than knowledge construction.⁹ Thus, a policy opportunity is not the same as a policy success; an opportunity for reform can be flubbed. The challenge of downsizing prison populations is precisely that it might be undertaken in a “stupid” way that ensures failure or, in the least, no more than a persistence of the status quo. In the end, we must create a new “criminology of downsizing” that can contribute to the policy conversation on how best to reduce the size of the inmate population.¹⁰ We must strive to be “liberal but not stupid.”¹¹

6. See, e.g., Editorial, *Prison Reform: Seize the Moment*, CHRISTIAN SCIENCE MONITOR (August 12, 2013), <http://www.csmonitor.com/Commentary/the-monitors-view/2013/0812/Prison-reform-Seize-the-moment>, archived at <http://perma.cc/2V3K-LRDA> (“Both parties realize that the exploding prison population is unsustainable . . . Sentencing reform is one step in the right direction.”).

7. PEW CHARITABLE TRUSTS, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1 (2010), available at <http://www.pewtrusts.org/en/research-and-analysis/reports/2010/03/16/prison-count-2010-state-population-declines-for-the-first-time-in-38-years>, archived at <http://perma.cc/8BWQ-RS3D>; LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 at 3 (2013).

8. See, e.g., TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA 137-57 (2014); ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 12-36, 37-79 (1998).

9. D. A. ANDREWS & JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT 349-52 (5th ed. 2010); Francis T. Cullen & Paul Gendreau, *From Nothing Works to What Works: Changing Professional Ideology in the 21st Century*, 81 PRISON J. 313, 314, 325-26 (2001).

10. DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); see also FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 91-119 (2nd ed. 2012). See generally SAM D. SIEBER, FATAL REMEDIES: THE IRONY OF SOCIAL INTERVENTIONS (1981).

11. Francis T. Cullen, *It’s a Wonderful Life: Reflections on a Career in Progress*, in LESSONS OF CRIMINOLOGY 1, 3 (Gilbert Geis & Mary Dodge, eds., 2002).

Our goal is thus to initiate this analysis of how the promise of downsizing prisons in America might be achieved. This commentary proceeds in the following stages. First, we propose that, at least in a limited way and for the moment, the era of mass imprisonment in the United States likely has ended. Still, if downsizing is done poorly, calls for another war on crime could occur. A look to the past presents a sobering reminder that, in the words of Rothman, conscience can be corrupted by convenience—that good intentions are not enough.¹² Reforms aimed at decarceration do not always realize anticipated results. Second, following this insight, we detail five reasons why the downsizing reform might fail. Third, we do not believe that failure is inevitable. Accordingly, we specify five reasons why the downsizing reform might succeed. Fourth, we consider the major downsizing experiment now ongoing in California and convey the lessons, positive and negative, that might be learned from this ongoing effort. And fifth, we close with five principles to follow in any effort to downsize prisons. The goal is to articulate an approach that combines progressive sensibilities (“liberal”) with a firm appreciation for the value of science and being pragmatic (“not stupid”) in addressing the daunting challenge of downsizing the nation’s prisons.

I. THE END OF MASS IMPRISONMENT

To say that mass imprisonment has “ended” is not to suggest that, across the nation, prison gates are being flung open and inmates are flooding into society. Still, after nearly four decades of ineluctable rises in prison populations, it is to say that something momentous has occurred: *prison growth has largely stopped*. This reversal of fortunes has been limited but unmistakable. Thus, every year since 2009, the combined state and federal prison population has declined.¹³ As shown in Figure 1, by the end of 2012, the U.S. prison population stood at 1.57 million people, constituting a 1.7% reduction from the previous year.¹⁴

The admission of offenders to America’s prisons diminished for the sixth straight year. For the year starting at the end of 2011, admissions fell 9.2% by a count of 61,800.¹⁵ Between 2009 and 2011, more than half the states chose to lower their imprisonment rates.¹⁶

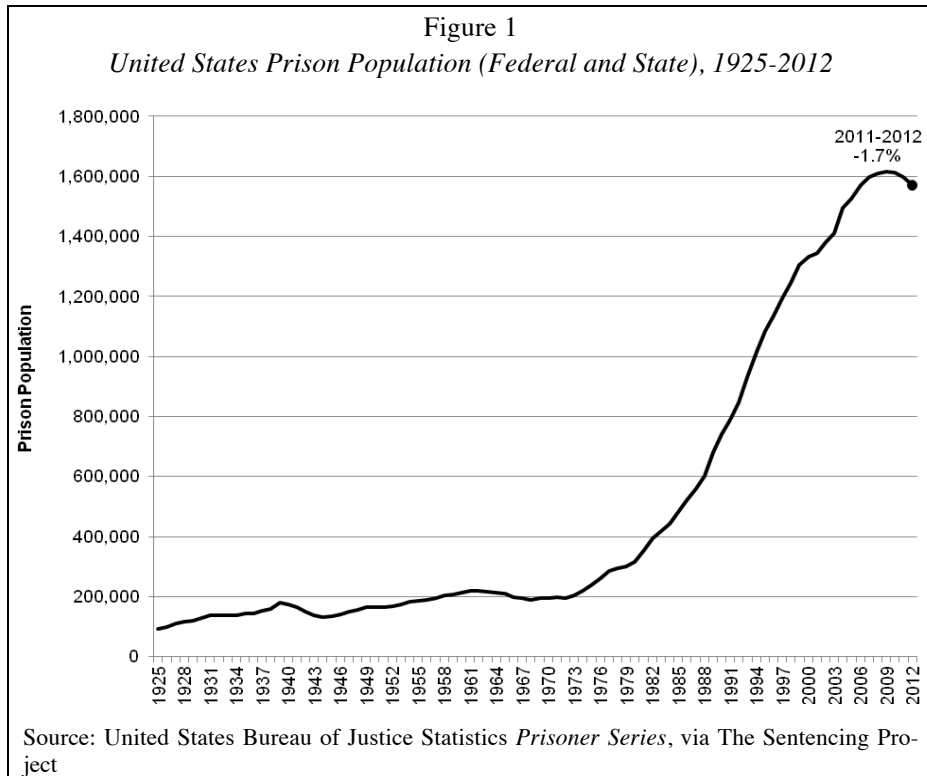
12. ROTHMAN, *supra* note 10, at 3-13.

13. GLAZE & HERBERMAN, *supra* note 7.

14. It is important to note, however, that the federal prison population increased by 0.7% in 2012, while the state prison population declined by 2.1%. E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES 1 (2013), *available at* <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4842>, *archived at* <http://perma.cc/9HWN-37U6>.

15. *Id.*

16. PEW CHARITABLE TRUSTS, U.S. PRISON COUNT CONTINUES TO DROP (Mar. 8, 2013), *available at* <http://www.pewtrusts.org/en/about/news-room/press->



These trends were reflected in prison policy. The Sentencing Project reports that since 2011, seventeen states reduced their overall prison capacity by around 37,000 individuals, and in 2013, six states closed nineteen correctional facilities.¹⁷ State expenditures on corrections also diminished. From 2009 to 2010, such funding dipped 5.6%, from \$51.4 billion to \$48.5 billion.¹⁸ In state after state, policymakers opened discussions on how best to reduce inmate populations. Notably, conservative discourse on mass imprisonment shifted markedly. Prisons were no longer depicted as an essential weapon in the war on crime but as a “blunt instrument” that, when used injudiciously, wasted valua-

releases/2013/03/08/us-prison-count-continues-to-drop, archived at <http://perma.cc/C6PW-AVJU>.

17. NICOLE D. PORTER, THE SENTENCING PROJECT, ON THE CHOPPING BLOCK 2013: STATE PRISON CLOSURES (2013), available at http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%2013.pdf, archived at <http://perma.cc/F68D-6BK7>.

18. TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE CORRECTIONS EXPENDITURES, FY 1982-2010 at 1, 11 (2012), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4556>, archived at <http://perma.cc/CT68-SV68>.

ble taxpayer monies.¹⁹ Conservative think tanks, such as “Right on Crime,” advocated for less use of incarceration, and conservative columnists, such as Rich Lowry of the *National Review*, called for the reform of “the prison-industrial complex.”²⁰ In 2012, the Platform for the Republican Party for the first time explicitly embraced prisoner rehabilitation, reentry programs, and restorative justice; it also rejected the federal government’s overcriminalization of many acts.²¹

Importantly, the U.S. Senate Judiciary Committee recently took an historic step in January 2014 when it passed SB 1410, The Smarter Sentencing Act, a bipartisan bill that is designed to reduce federal prison populations and decrease racial disparities. SB 1410 would revise federal mandatory minimum sentences for nonviolent drug offenses.²² It also makes retroactive the crack cocaine sentencing reforms passed in 2010, and gives judges greater discretion to sentence below mandatory minimums when the facts of the case warrant it. The retroactivity portion of SB 1410 would allow nearly 9,000 inmates currently in prison for crack cocaine charges to get a “resentencing hearing” and the opportunity to have their sentences reduced.²³ If passed by Congress, SB 1410 would constitute the first major overhaul of federal drug sentencing laws since the early 1970s. As Bill Piper, director of national affairs at the Drug Policy Alliance observed, “The tide has turned against punitive drug policies that destroy lives and tear families apart. From liberal stalwarts to Tea Party favorites, there is now consensus that our country incarcerates too many people, for too much time, at too much expense to taxpayers.”²⁴

What had changed, then, is not simply the number of offenders being incarcerated—however important this is—but also a *way of thinking* about incarceration. For so long, mass imprisonment had been the governing policy of corrections—as book after book detailed.²⁵ But seemingly overnight, its hegemony

19. Rich Lowry, *Reforming the Prison-Industrial Complex*, NATIONAL REVIEW ONLINE (Aug. 6, 2013), <http://www.nationalreview.com/article/355170/reforming-prison-industrial-complex-rich-lowry>, archived at <http://perma.cc/QPH9-ML69>.

20. *Id.*

21. Vikrant P. Reddy, *How the 2012 GOP Platform Tackles Criminal Justice*, RIGHT ON CRIME (Aug. 31, 2012), <http://www.rightoncrime.com/2012/08/how-the-2012-gop-platform-tackles-criminal-justice/>, archived at <http://perma.cc/RPC2-BUKP>.

22. Smarter Sentencing Act, S. 1410, 113th Cong. §§ 3-4 (2014) (as referred to the S. Comm. on the Judiciary, Mar. 11, 2014).

23. *Reevaluating the Effectiveness of Mandatory Minimum Sentences: Hearing Before the Senate Judiciary Committee*, 113th Cong. 92 (2013) (statement of Judge Patti Saris, Chair, U.S. Sentencing Comm’n).

24. Press Release, Drug Policy Alliance, Groundbreaking Bipartisan Legislation Reforming Federal Drug Sentences Passed by U.S. Senate Judiciary Committee (Jan. 30, 2014), available at <http://www.drugpolicy.org/news/2014/01/groundbreaking-bipartisan-legislation-reforming-federal-drug-sentences-passed-us-senate>, archived at <http://perma.cc/HM75-X2JA>.

25. See, e.g., SASHA ABRAMSKY, AMERICAN FURIES: CRIME, PUNISHMENT, AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT (2007); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS

was shattered, and *downsizing* quickly emerged as its replacement. To use Malcolm Gladwell's term, a "tipping point" was reached,²⁶ in which an idea emerged—mass imprisonment is unsustainable and prisons must be downsized—and, similar to a contagious disease, spread rapidly. When this occurs, Gladwell notes, changes happen "in a hurry."²⁷

II. A PERFECT STORM

In short, when we say that mass imprisonment has ended, we are proposing that a fundamental paradigm shift has occurred within corrections. One day, mass imprisonment appeared an impenetrable ideology; the next day, it was seen as bankrupt, both financially and intellectually. Virtually everyone, it seemed, was trumpeting the need for downsizing, as though they had not previously fully embraced prison expansion. This reversal was not inevitable. It took a perfect storm—an intersection of at least five factors—to make it possible.

First, as noted, the precipitating factor in this paradigm shift was the deep financial crisis that started in 2008 and whose effects linger to this day. As Spelman has shown, one reason why mass incarceration has persisted is because states had the revenue to pay for it.²⁸ This allocation of resources was not idiosyncratic but approximated investment in other priorities. Between 1977 and 2005, observes Spelman, "prison populations grew at roughly the same rate and during the same periods as spending on education, welfare, health and hospitals, highways, parks, and natural resources."²⁹ In and of themselves, economic woes do not require downsizing; they can be weathered. As Gottschalk points out, three major economic downturns since the 1980s "made no dent whatsoever in the nation's incarceration rate."³⁰ Still, the motivation to push through hard times, rather than to turn in a different direction, must be present. Given the severity of the recent recession, the reasonableness of cutting costs was manifest. The need to endure and spend more and more on mass imprisonment was not.

This observation leads to the second factor: crime rates, especially for violent crime, have declined and stabilized at lower levels. The connection be-

WORSE 15-48 (2007); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); MICHAEL JACOBSON, *DOWNIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* (2005); *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* (Bruce Western, Mary Pattillo & David Weiman eds., 2004); BERT USEEM & ANNE MORRISON PIEHL, *PRISON STATE: THE CHALLENGE OF MASS INCARCERATION* 40, 41 (2008).

26. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 8 (2002).

27. *Id.*

28. William Spelman, *Crime, Cash, and Limited Options: Explaining the Prison Boom*, 8 *CRIMINOLOGY & PUB. POL'Y* 29 (2009).

29. *Id.*

30. Marie Gottschalk, *Money and Mass Incarceration: The Bad, the Mad, and Penal Reform*, 8 *CRIMINOLOGY & PUB. POL'Y* 97 (2009).

tween crime and punitiveness is complicated and, at best, they are loosely coupled.³¹ Still, spikes in crime provide shrewd politicians with the intermittent opportunity to claim that victims are being ignored, that sentences are too lenient, and that a tough war on crime is needed. Take, for example, the inordinate rise in juvenile violence, especially homicide, that occurred in the late 1980s and spilled into the 1990s.³² Commentators, such as DiIulio, depicted these youths as remorseless “super-predators”³³ and argued that “moral poverty” that left the American family in “disrepair” meant that we are now “asking prisons to do for young boys what fathers used to do.”³⁴ Predictions of a continuing juvenile homicide epidemic proved to be a “catastrophic error,” as youth violence soon experienced a steep decline.³⁵ Nonetheless, as Feld notes, this context fostered a range of policies aimed at getting tough on juveniles (e.g. stringent waiver policies, incarceration) and “provided . . . [the] impetus to crack down on all young offenders in general and violent minority offenders in particular.”³⁶ More broadly, Garland argues that starting in the 1960s, high crime rates became a “normal social fact” that undermined a social welfare approach to crime control and created incentives for the state to act out by imposing control “by punitive means.”³⁷

In the 1990s, however, the United States experienced what Zimring called the “great American crime decline.”³⁸ Crime rates dropped precipitously, and homicide rates, which once had more than doubled, fell close to where they were in the early 1960s.³⁹ Since that time, crime rates have largely stabilized. In the ten largest cities after New York, homicide rates fell between 2000 and 2009 in every one—a finding that held for most other FBI Index Crimes.⁴⁰ For New York City, the long-term decline was unfathomable. The city’s homicide

31. MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE (2004) [hereinafter Tonry, *Thinking About Crime*]; Michael Tonry, *Determinants of Penal Policies*, in CRIME, PUNISHMENT, AND POLITICS IN COMPARATIVE PERSPECTIVE—CRIME AND JUSTICE: A REVIEW OF RESEARCH (Michael Tonry ed., 2007).

32. Franklin E. Zimring, *American Youth Violence: A Cautionary Tale*, 42 CRIME AND JUST. 265, 266 (2013).

33. John J. DiIulio, Jr., *The Coming of the Super-Predators*, THE WEEKLY STANDARD, Nov. 27, 1995, at 23, available at <http://www.weeklystandard.com/Content/Protected/Articles/000/000/007/011vsbrv.asp>, archived at <http://perma.cc/M7G8-EHPD>.

34. WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS 196 (1996).

35. Zimring, *supra* note 32, at 278.

36. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 208 (1999).

37. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 106-07, 131-32 (2001).

38. FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE, at v (2007).

39. Richard Rosenfeld, *Homicide and Serious Assaults*, in THE OXFORD HANDBOOK OF CRIME AND PUBLIC POLICY 25, 30 (Michael Tonry ed., 2009).

40. FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK’S LESSONS FOR URBAN CRIME AND ITS CONTROL 16 (2012).

rate was “only 18% of its 1990 total in 2009.”⁴¹ In this context—a context in which low crime was increasingly the “normal social fact”—allocating scarce state revenues to further imprisonment was no longer convincing.

Third, although strong partisanship existed over a range of other social policies (e.g., abortion and contraception, immigration, access to health care), crime seemed to vanish as an electoral issue. Compared to previous campaigns, candidates in the past two presidential races barely mentioned, or were asked about, crime policy.⁴² Most remarkably, the Republican Party seemingly has discarded “law and order” and inner-city crime—past conduits for appealing to southern white voters—as core components of their policy agenda.⁴³ It may simply be that this decision reflects a belief that more political capital is to be achieved by focusing on high deficits and taxes than on low crime. Regardless, we seem to have entered a period in crime policy marked by, to use Bell’s term, “the end of ideology.”⁴⁴ When the fiscal crisis hit, nobody seemed to have a stake in advocating for mass imprisonment. North Carolina, for example, saw the largest number of prison closures in 2013, shuttering six juvenile and adult facilities, and “the only public or political opposition to the prison closures has come from some people losing their jobs or being reassigned.”⁴⁵ As Keith Acree of the North Carolina Department of Public Safety observed, “There’s been no pushback at all.”⁴⁶

The history of conservatives’ abandonment of mass imprisonment remains to be written. Still, it seems likely that at least three ideas have played a role: libertarian dislike of laws that infringe on freedoms, including those at the heart of the war on drugs; faith-based compassionate conservatism, sponsored by Prison Fellowship, that prefers to save rather than to demonize offenders; and anti-tax advocacy that sees all government expenditures, including the use of imprisonment, as potentially wasteful and as open to constraint. These ideas have coalesced in Texas, where Republican officials under Governor Rick Perry have implemented policies to lower prison populations, including closing three institutions, and to reform juvenile justice so as to limit confinement.⁴⁷

41. *Id.* at 4.

42. *See generally* KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997); JOHN HAGAN, *WHO ARE THE CRIMINALS? THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN* (2010).

43. *See supra* notes 19–21 and accompanying text; Emma Roller, *How Republicans Stopped Being “Tough on Crime,”* NAT’L J. DAILY (Oct. 2, 2014), <http://www.nationaljournal.com/congress/how-republicans-stopped-being-tough-on-crime-20141001>, archived at <http://perma.cc/Q464-UK9T>.

44. *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* 369–70, 373–75 (Daniel Bell ed., 1st ed. 1960).

45. Carey I. Biron, *U.S. States Leading Fight Against Over-Incarceration*, MINTPRESS NEWS (Feb. 3, 2014), <http://www.mintpressnews.com/us-states-leading-fight-incarceration/178672/>, archived at <http://perma.cc/WWD5-KYYE>.

46. *Id.*

47. *See, e.g.,* Vikrant P. Reddy, *Effective Justice: Tough-on-Crime Texans Support Prison Reforms*, TEX. PUB. POLICY FOUND. (Dec. 11, 2013),

As a prominent “red state,” the importance of these Texas reforms should not be underestimated, especially in their role of providing an alternative correctional “narrative.” As Simon notes, “one of the primary tasks of an institution that exercises the power to punish is to provide a plausible account of what it does, and how it does what it does.”⁴⁸ Narratives serve this purpose. In the 1970s and 1980s, the breakdown of the social welfare-rehabilitation account—that treatment is a humane, scientific means of improving offenders and of protecting public safety—created space for a law-and-order account justifying a punitive state that valued justice for victims, harsh mandatory sentences to deter, and risk management through expanding custodial control.⁴⁹ In Texas and beyond, conservatives are fashioning an alternative narrative in which incarceration no longer is the linchpin and in which mass imprisonment is no longer viewed, much as it had been along with military defense spending, as sacrosanct.

Rather, in this new narrative, a central principle is that “government services be evaluated on whether they produce the best possible results at the lowest possible cost.”⁵⁰ The focus thus should be on “accountability” and “performance measures” that focus on “public safety, victim restitution and satisfaction, and cost effectiveness.”⁵¹ These goals are best achieved not through mindless incarceration, but through a multi-faceted approach that includes treatment services, restorative justice, and reentry programs. Supported by prominent conservatives, from Jeb Bush to Newt Gingrich and Grover Norquist, these ideas are influencing policy choices. In fact, it was this bipartisan “left-right” congressional coalition that initiated efforts to repeal the federal mandatory sentencing drug laws, ultimately culminating in the Smarter Sentencing Act. This coalition highlighted “the high costs of the policies” that led the U.S. Department of Justice to spend \$6.4 billion on prisons annually.⁵² This consensus on crime policy seems even more surprising given the current level of dysfunction and paralysis that characterize Congress today.

Fourth, politicians also have made a clear retreat from the embrace of populism in forming prison policy. As Simon observes, crime policy had been, in effect, turned over to “ordinary” citizens whose anger about crime was incited and who were encouraged to employ ballot initiatives (e.g., three-strikes laws)

<http://www.texaspolicy.com/center/effective-justice/opinions/tough-crime-texans-support-prison-reforms>, archived at <http://perma.cc/7LBQ-QZG3>.

48. JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890-1990 at 9 (1993).

49. GARLAND, *supra* note 37.

50. *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/> (last visited Jan. 11, 2015), archived at <http://perma.cc/8GRN-LQPY>.

51. *Id.* at 2.

52. Henry C. Jackson, *Push for sentencing changes underway in Congress*, ASSOCIATED PRESS (Jan. 4, 2014), available at <http://bigstory.ap.org/article/push-sentencing-reform-underway-congress>, archived at <http://perma.cc/5Q36-WW3T>.

to lock up more offenders for more time.⁵³ Part of this “new populism” was “a penal politics that denigrate[d] expert and professional elites” and gave priority to “public opinion over the views of experts and the evidence of research.”⁵⁴ By contrast, elected officials have shown a willingness to turn to academics for advice on how best to curb mass imprisonment. According to Gelb, “[w]e’re starting to see a triumph of sound science over sound bites State leaders from both parties are adopting research-based strategies that are more effective and less expensive than putting more low-risk offenders into \$30,000-a-year taxpayer-funded prison cells.”⁵⁵ Importantly, academics were positioned to provide such guidance due to their recent embrace of evidence-based corrections and knowledge about treatment effectiveness, their growing interest in reentry programs, their research on racial disparity in drug sentences, and their possession of tools, such as risk-assessment instruments, that could identify low-risk offenders not in need of incarceration.⁵⁶

Fifth, the reality of downsizing was cemented by the U.S. Supreme Court decision of *Brown v. Plata* in May 2011, in which the State of California was mandated to reduce its prison population by more than 30,000 inmates.⁵⁷ We will return to this issue in Part VI. But the point is that the court decision ensured that there would be a “natural” experiment in which substantial downsizing would occur and be evaluated. This reality meant that downsizing would not vanish soon from discussions about the end of mass imprisonment.

III. GOOD INTENTIONS ARE NOT ENOUGH

The opportunity to initiate a vital downsizing movement exists and steps in this direction already are being taken. But a worrisome question remains: Do reformers, including liberals, have the ability to bring about meaningful reductions in prison populations? The history of corrections shows that good intentions do not lead ineluctably to good policies.⁵⁸ In particular, a look to past efforts to decarcerate through community corrections is not encouraging.

In 1982, Austin and Krisberg were asked by the National Academy of Sciences to systematically review all prior efforts to use alternatives to incarceration to reduce levels of imprisonment. They considered such options as com-

53. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

54. See also GARLAND, *supra* note 37, at 13.

55. Sean J. Miller, *U.S. Prison Inmates Returning to Society: How Will They Be Received?*, CHRISTIAN SCIENCE MONITOR (May 20, 2012), <http://www.csmonitor.com/USA/Justice/2012/0520/US-prison-inmates-returning-to-society-How-will-they-be-received>, archived at <http://perma.cc/B4YM-C5QJ>.

56. See, e.g., Edward J. Latessa et al., *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 FED. PROBATION 16 (2010).

57. *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011).

58. ROTHMAN, *supra* note 10, at 10.

munity-based sentencing options (e.g., community service, restitution), post-incarceration release programs (e.g., work release, work furloughs), and legislation to limit state prison populations (e.g., probation subsidy programs).⁵⁹ The results were dismal. “A careful review of the research literature on alternatives to incarceration,” Austin and Krisberg concluded, “suggests that their promise of reducing the prison population has remained largely unmet.”⁶⁰ In each case, goal displacement occurred, as alternative options were transformed to serve “criminal justice system values and goals other than reducing imprisonment” (e.g., net-widening to increase control, probation subsidies becoming a form of revenue sharing).⁶¹

Another cautionary example is the much-noted analogy to the mental hospital deinstitutionalization movement in the 1950s to 1960s. The closing of psychiatric hospitals—custodial institutions that often did more to warehouse than assist the mentally ill—was a triumph of good science and smart politics. The hope was that the reform would move toward community care, where psychiatric patients would be assisted with antipsychotic drugs and have a higher quality of life if treated in their communities rather than in “large, undifferentiated, and isolated mental hospitals.”⁶² It was also supposed to be less expensive. The closure of psychiatric hospitals in the United States was codified by the Community Mental Health Centers Act of 1963, and strict standards were passed so that only individuals “who posed an imminent danger to themselves or someone else” could be committed to state psychiatric hospitals.⁶³ In 1955, there were 340 public psychiatric beds per 100,000 U.S. population. In 2010 there were 14 beds per 100,000 population—a 95 percent decline—and states continue to reduce psychiatric beds.⁶⁴

The goal of deinstitutionalization was a broadly humane measure, but the consequences in many places were disquieting in large part because the irresistible mantra of treating the mentally ill in “the community” ignored the absence of quality programs. In many cases, deinstitutionalization shifted the burden of care to families, although they often lacked the financial resources and expertise to provide proper care. And for many of those deinstitutionalized, the only community available to them was group housing located in inner-city slums that soon turned into psychiatric ghettos. Studies found that many living in the

59. James Austin & Barry Krisberg, *The Unmet Promise of Alternatives to Incarceration*, 28 CRIME & DELINQ. 374, 374 (1982).

60. *Id.*

61. *Id.*

62. Enric J. Novella, *Mental Health Care and the Politics of Inclusion: A Social Systems Account of Psychiatric Deinstitutionalization*, 31 THEORETICAL MED. & BIOETHICS 411, 412 (2010).

63. Jeneen Interlandi, *When My Crazy Father Actually Lost His Mind*, N.Y. TIMES, June 24, 2012, at MM24, available at http://www.nytimes.com/2012/06/24/magazine/when-my-crazy-father-actually-lost-his-mind.html?pagewanted=all&_r=1&, archived at <http://perma.cc/N7KG-VAFQ>.

64. E. FULLER TORREY, AMERICAN PSYCHOSIS: HOW THE FEDERAL GOVERNMENT DESTROYED THE MENTAL ILLNESS TREATMENT SYSTEM 117 (2014).

community had significant deficits in important aspects of routine health care.⁶⁵ Others documented social isolation, depression, victimization, homelessness, substance abuse, and arrest. Tragically, as psychiatrist Torrey concludes, closing institutions did not produce better care as intended, but ultimately resulted in underfunded programs, higher rates of community violence, and neglect.⁶⁶ Today, “at least one-third of homeless individuals are seriously mentally ill,”⁶⁷ as are approximately 20 percent of those incarcerated,⁶⁸ and public facilities are overrun by untreated individuals.⁶⁹ Some argue that deinstitutionalization has simply become “transinstitutionalization,” a phenomenon in which state psychiatric hospitals and criminal justice systems are “functionally interdependent.”⁷⁰ According to this theory, deinstitutionalization, combined with inadequate and under-funded community mental health programs, has forced the criminal justice system to provide the highly structured and supervised environment required by some persons with mental illness.⁷¹

What went wrong? Deinstitutionalization itself was not the problem. The architects of the movement truly believed that closing state mental hospitals and moving patients into the community would improve everyone’s lives. The egregious error was the failure to provide treatment to patients after they left the hospital. According to psychiatrist Richard Lamb, the problem was compounded by the fact that:

[T]he community mental health and civil rights movement made where to treat an ideological issue Unfortunately, deinstitutionalization efforts have, in practice, too often confused *locus* of care and *quality* of care. Where persons with mental illness are treated has been seen as more important than how or how well they are treated. Care in the community has often been assumed almost by definition to be better than hospital care. In actuality, poor care can be found in both hospital and community settings.⁷²

Lamb and Bachrach concluded: “Among the lessons learned . . . are that successful deinstitutionalization involves more than simply changing the locus of care.”⁷³ Deinstitutionalization was also supposed to save money, but “if all the hidden costs associated with responsible programming are considered, it is

65. Martinez-Leal et al., *The Impact of Living Arrangements and Deinstitutionalization in the Health Status of Persons with Intellectual Disability in Europe*, 55 J. INTELL. DISABILITY RES. 858, 868 (2011).

66. TORREY, *supra* note 64, at 144.

67. *Id.* at 124.

68. *Id.* at 117.

69. *Id.* at 124.

70. Seth J. Prins, *Does Transinstitutionalization Explain the Overrepresentation of People with Serious Mental Illnesses in the Criminal Justice System?*, 47 COMMUNITY MENTAL HEALTH J. 716, 717 (2011).

71. *Id.* at 716.

72. H. Richard Lamb, *Deinstitutionalization at the Beginning of the New Millennium*, 6 HARV. REV. PSYCHIATRY 1, 7 (1998) (emphasis added).

73. H. Richard Lamb & Leona L. Bachrach, *Some Perspectives on Deinstitutionalization*, 52 PSYCHIATRIC SERVICES 1039, 1039 (2001).

generally not accurate to conclude that community services will result in substantial savings over hospital care.”⁷⁴

Interviews with Bertram Brown, one of the National Institute of Mental Health (NIMH) architects of the deinstitutionalization plan, later decried “the ‘dumping’ of mental hospital patients in inadequate community settings.”⁷⁵ Looking back on it all, Brown observed that he and his colleagues “were carrying out a public mandate to abolish the abominable conditions of insane asylums,” but in doing so “the doctors were overpromising for the politicians . . . [W]e did allow ourselves to be somewhat misrepresented.”⁷⁶ Brown characterized the deinstitutionalization of the mentally ill as “a grand experiment” but added: “I just feel saddened by it.”⁷⁷ Daniel Moynihan convened hearings in 1994 to review the history and in his opening statement, he criticized the failure to follow up patients after discharge from the state hospitals: “It was soon clear enough that in order for this [deinstitutionalization] to work you could not just discharge persons, they had to be looked after.”⁷⁸

Good intentions were clearly present. As Robert Atwell, one of the architects of the deinstitutionalization of the mentally ill, later observed, “I really wanted this thing to work . . . I was a believer.”⁷⁹ But the failure to provide programs to care for patients was palpable. According to sociologist Andrew Scull, “the new programs remained castles in the air, figments of their planners’ imaginations The term ‘community care’ . . . merely an inflated catch phrase which concealed morbidity in the patients and distress in the relatives.”⁸⁰ Similarly, Rashi Fein, a member of the original Task Force on Mental Health notes, “we should have more carefully examined and discussed what it would take in dollars and commitment at the local and state levels to make it work.”⁸¹ As Robert Weisberg concludes, “It is now an axiom that deinstitutionalization caused the contemporary epidemic of homelessness for the mentally ill.”⁸² He writes, “Ultimately, the dumped patients wandered around, lost in their new community.”⁸³ As one former patient poignantly observed, “They moved all the buildings.”⁸⁴ These lessons are highly admonitory.

Perhaps most directly applicable to the current prison downsizing experiment is the 1980s movement to use intermediate sanctions, especially intensive probation and parole supervision (ISP), to reduce imprisonment. At least in

74. *Id.* at 1040.

75. TORREY, *supra* note 64, at 140.

76. *Id.*

77. *Id.*

78. *Id.* at 139.

79. *Id.*

80. *Id.* at 140.

81. *Id.* at 139.

82. Robert Weisberg, *Restorative Justice and the Danger of “Community,”* 2003 UTAH L. REV. 343, 364 (2003).

83. *Id.* at 368.

84. *Id.*

some ways, the correctional context at this time approximated that of today. Then, as now, the wave of intermediate sentencing reform came in response to prison overcrowding, ineffective probation programs, judicial intervention, and the exorbitant cost of incarceration. Petersilia described the rise of intermediate sanctions in the following way:

[P]rison crowding in the southern United States, coupled with a poor regional economy, created early pressures for tough community-based [sentencing] options. Federal courts found several overcrowded prisons in the South to be in violation of the Eighth Amendment prohibition against cruel and unusual punishment and mandated that these states either build new facilities or find some other way to punish offenders. Because these states did not have the funds to build new prisons . . . judicial pressure created an incentive for them to develop tough but inexpensive sentences, specifically those that did not require a prison cell . . .⁸⁵

Georgia developed the first well-publicized intensive supervision probation program and their self-evaluation showed that ISP participants had extremely low recidivism rates.⁸⁶ In 1985, Georgia claimed that its ISP program had saved the state the cost of building two new prisons.⁸⁷ As the economic downturn of the late 1980s and early 1990s spread across the country, other states moved quickly to implement these prison diversion programs, and the intermediate sanctions movement was born.⁸⁸

By the mid-1990s, virtually every state had passed legislation funding intermediate sanction programs as a prison-diversion tactic. Probation and parole departments across the country implemented intensive supervision, house arrest, electronic monitoring, and other community-based sanctions. The hope was that prison-bound offenders would be “diverted” from expensive prison cells to more intensive community programs. In seven to ten years, however, most of the programs developed under the umbrella of this reform were discredited and dismantled.

The evaluations of intermediate sanction programs are now well known; in general, their impact on recidivism was disappointingly limited.⁸⁹ More than this, little evidence exists that the programs achieved reductions in prison populations or achieved cost savings.⁹⁰ This failure can be seen in Petersilia and

85. Joan Petersilia, *A Decade of Experimenting with Intermediate Sanctions: What Have We Learned?*, 3 CORRECTIONS MGMT. Q. 19, 19-20 (1999).

86. *Id.*

87. *Id.*

88. *Id.*

89. See, e.g., DORIS LAYTON MACKENZIE, *WHAT WORKS IN CORRECTIONS: REDUCING THE CRIMINAL ACTIVITIES OF OFFENDERS AND DELINQUENTS* (2006); Francis T. Cullen et al., *Control in the Community: The Limits of Reform?* in CHOOSING CORRECTIONAL OPTIONS THAT WORK: DEFINING THE DEMAND AND EVALUATING THE SUPPLY 69, 87-114 (Alan Harland ed., 1996); Joan Petersilia & Susan Turner, *Intensive Probation and Parole*, 17 CRIME & JUST. 281 (1993).

90. Michael Tonry, *Stated and Latent Functions of ISP*, 36 CRIME & DELINQUENCY 174 (1990).

Turner's experimental study of ISP's across fourteen sites. Compared to offenders receiving regular community supervision, those in the control-oriented ISP programs did not achieve lower rates of reoffending; in fact, if anything, their recidivism (37 percent to 33 percent) was higher.⁹¹ The impact of the ISP's on prison crowding is equally instructive. Petersilia and Turner's study yielded three conclusions:

- First, the results showed that ISPs were seldom used for prison diversion; more often they were used to increase the supervision of those already in the community on probation (in other words, the net-widened).⁹²
- Second, the casework portion of the ISP program was never implemented (due to a shortage of funds and lack of political will), but the surveillance portion of the program was implemented (e.g., drug testing, electronic monitoring). This resulted in the increased discovery of technical violations and ultimately increased incarceration rates.⁹³
- Third, increased incarceration rates meant higher correctional costs. Since most of the ISPs were funded to reduce prison costs, they were deemed a failure and most were dismantled and defunded between 1995 and 2000.⁹⁴

Retrospective analysis of the national experiment showed that ISPs seldom followed a theoretical model supporting rehabilitation, and even when they did, they were insufficiently funded to deliver adequate programs. One result of the 1990s' intermediate sanctions movement was a backlash in support of rehabilitation programs and alternative community sanctions. Instead of demonstrating that nonprison sanctions could decrease commitments to prison, some of the ISPs showed just the opposite: implementing intensive probation and parole supervision resulted in increased prison commitments. Some supporters of prison buildup used this evidence to argue that alternatives have been tried and they did not work. It was recycling of the 1960s' nothing-works argument, but this time buttressed with more rigorous experimental evaluation data. Within a short decade, ISPs went from being the "future of American corrections" to a failed social experiment.⁹⁵

These past failures do not determine the future, but they do warn that meaningful downsizing will not be accomplished easily. In this context, it is wise to consider what factors might cause the promise of the current reform effort to remain unmet.

91. Petersilia & Turner, *supra* note 89, at 311.

92. *Id.* at 320.

93. *Id.* at 308.

94. *Id.* at 309.

95. *Id.* at 283.

IV. FIVE REASONS WHY DOWNSIZING REFORM MIGHT FAIL

There are at least two ways in which the current reform movement might fail. First, prison populations might not decline; downsizing might not occur. Second, the alternatives to incarceration to be used for offenders might turn out to be ineffective. As with ISPs, the possibility exists that both might occur. We share five reasons to be concerned.

First, the very scale and changing nature of imprisonment creates barriers to its downsizing. The United States still has 1.6 million inmates in state and federal prisons. Although the 2011-2012 decline of 1.7% is significant, Mauer and Ghandnoosh alert us to the true challenge at hand should the annual drop stay at this level.⁹⁶ They point out that, “Still, at this rate, it will take until 2101—88 years—for the prison population to return to its 1980 level.”⁹⁷ Further, despite the left-right coalition supporting downsizing, organized groups have a clear stake in mass imprisonment. In particular, attempts to close institutions will be increasingly fought by unions and by communities that will lose a major employer and source of revenue. And while some state-run prisons may be closing, private prisons are experiencing growth. Between 2011-2012, inmates in federal facilities increased 0.2%, but those in private federal facilities increased 5.7%. Similarly, inmates in state prisons declined by 2.3%, but those in private facilities increased 4.8%.⁹⁸ *Forbes* magazine recently singled out Corrections Corporation of America (CCA), one of the nation’s largest provider of corrections services to government agencies,⁹⁹ for its growth potential and named it as a “top dividend stock” with insider buys and noting its “favorable long-term multi-year growth rates.”¹⁰⁰ As private prisons get a stronger foothold in corrections, they become an even stronger political force—similar to the correctional guard unions—and can use their significant resources for lobbying and political campaigns. A Huffington Post analysis shows that CCA did just that—spending nearly \$300,000 on California campaigns during the 2011-2012 election cycle, up more than eightfold from the 2005-2006 cycle.¹⁰¹

96. Marc Mauer & Nazgol Ghandnoosh, *Can We Wait 88 Years to End Mass Incarceration?*, HUFFINGTON POST (Dec. 20, 2013), http://www.huffingtonpost.com/marc-mauer/88-years-mass-incarceration_b_4474132.html, archived at <http://perma.cc/RW3W-Y6RJ>.

97. *Id.*

98. Glaze & Herberman, *supra* note 7, at 10.

99. See Andy Kroll, *This Is How Private Prison Companies Make Millions Even When Crime Rates Fall*, MOTHER JONES (Sept. 19, 2013), <http://www.motherjones.com/mojo/2013/09/private-prisons-occupancy-quota-cca-crime>, archived at <http://perma.cc/468C-ZGXH>.

100. *Corrections Corporation of America Named Top Dividend Stock With Insider Buying and 5.72% Yield (CXW)*, FORBES DIVIDEND CHANNEL (November 26, 2013, 11:02 AM), <http://www.forbes.com/sites/dividendchannel/2013/11/26/corrections-corporation-of-america-named-top-dividend-stock-with-insider-buying-and-5-72-yield-cxw/>, archived at <http://perma.cc/C8B2-8QWC>.

101. Saki Knafo & Chris Kirkham, *For-Profit Prisons Are Big Winners of California’s Overcrowding Crisis*, HUFFINGTON POST (Oct. 25, 2013),

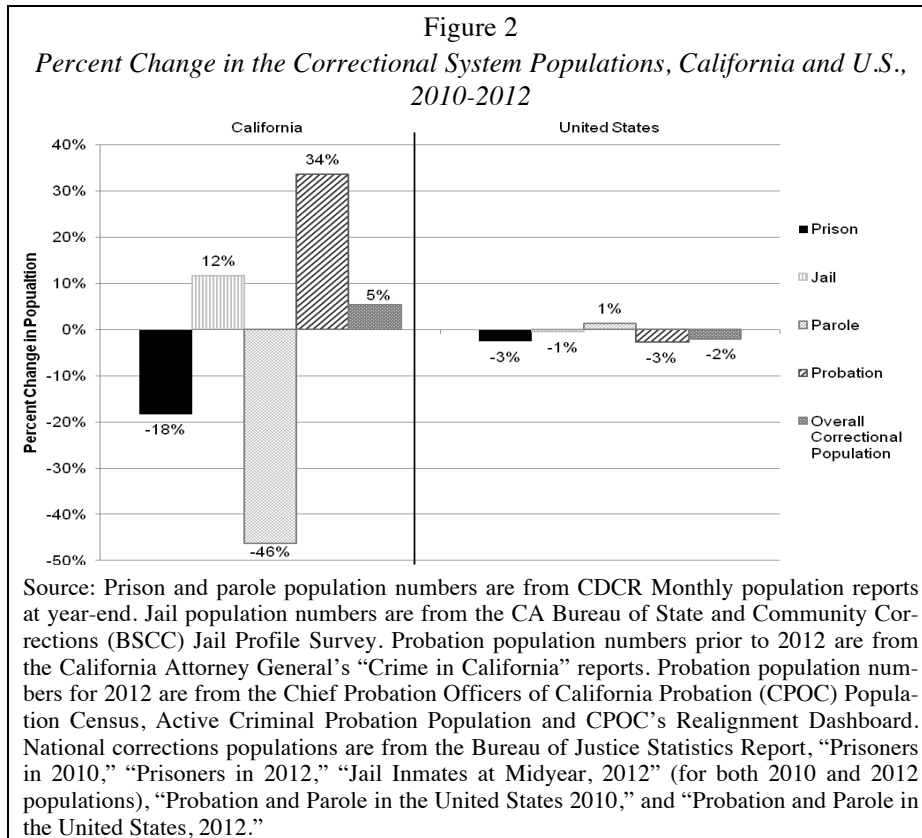
Second, the decline in the nation's prison population is primarily a California story and its downward trend is reversing. Criminologists are heralding the third consecutive annual drop in prison populations as a sign that the nation's experiment with mass incarceration is over. As Clear and Frost write, "there are signs—strong signs—that the experiment is coming to an end."¹⁰² But a closer look at the details of America's prison downsizing would urge more caution and suggest their conclusion is premature.

While it is true that U.S. prison populations declined slightly for the last three years, most of those declines occurred in California due to a Supreme Court ruling *ordering* those prison reductions (discussed more fully below). California's prison population fell by 15,493 individuals from 2010 to 2011. No other state saw its prison population change in either direction by more than 1,500 people over that period, and the federal prison population actually grew from 2010 to 2011 by over 6,000 people. Carson and Golinelli report that while twenty-eight states reduced their prison population in 2012, contributing to a national reduction of 29,000 inmates, 51 percent (or 15,035) of that reduction was due *solely* to California.¹⁰³ Excluding the decline in California's prison population, the nationwide prison population would have remained relatively stable during recent years. As Figure 2 also reveals, offenders being supervised under different types of sanctions (i.e., jail, parole, probation, prison) has changed dramatically in California, but not so much in the overall U.S. correctional population. Importantly, as shown in Figure 2, the overall correctional control rate has actually *increased* by 5 percent in California, while decreasing by 2 percent nationally.

http://www.huffingtonpost.com/2013/10/25/california-private-prison_n_4157641.html, *archived at* <http://perma.cc/2BR3-7EHM>.

102. CLEAR & FROST, *supra* note 8, at 3.

103. CARSON & GOLINELLI, *supra* note 14, at 1-2.



Moreover, the Bureau of Justice Statistics (BJS) tracked prisoner counts only until year-end 2012. California’s prison population stopped declining (from a low of 118,989 six months later in June 2013) and is now increasing; the latest counts show that as of January 31, 2014, the in-state prison population was up to 125,518 (up 1.3% or 1,718 in state, and up 5 percent out-of-state).¹⁰⁴ The total California prison population (both in state and out of state) continues to increase and by March 2014 was 134,913 inmates.¹⁰⁵ And CDCR has announced that it is expanding “design capacity” by constructing a new Health Care facility and expanding cells at two existing prisons.¹⁰⁶ In turn, “The resulting increase in design capacity will raise the Three-Judge Court’s benchmark population cap proportionally.”¹⁰⁷ As the *Los Angeles Times* recently reported: “After declining for six years, California’s prison population is

104. DATA ANALYSIS UNIT, CAL. DEP’T OF CORR. & REHAB., WEEKLY INMATE POPULATION, available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOPIA/TPOPIAd140122.pdf, archived at <http://perma.cc/ZFT2-ZJDY>.

105. *Id.*

106. *Id.*

107. *Id.*

expected to growth by 10,000 inmates in the next five years New state population projections show criminals heading to prison at the same rates expected before Brown began to shrink the prison population”¹⁰⁸

And the nation’s “decarceration story” surely must include what is happening to jail populations. The Bureau of Justice Statistics (BJS) recently reported that after three consecutive years of decline in the jail inmate population, the number of persons confined in jails (744,524) *increased* by 1.2% (or 8,923) between 2011 and 2012.¹⁰⁹ According to the U.S. Bureau of Justice Statistics’ estimates, 85 percent of that increase is attributable to California jails. California’s jail inmate population had fallen to its lowest level in decades (69,404) in June 2011, but then its populations began to increase due to Realignment (discussed below) and by year-end 2012, California jails held 78,878 people (a one year increase of 7.4%).¹¹⁰ Further, California’s jail population continues to increase: as of January 2014, the average daily population equaled 81,914 (a one-year increase of 2.5%).¹¹¹

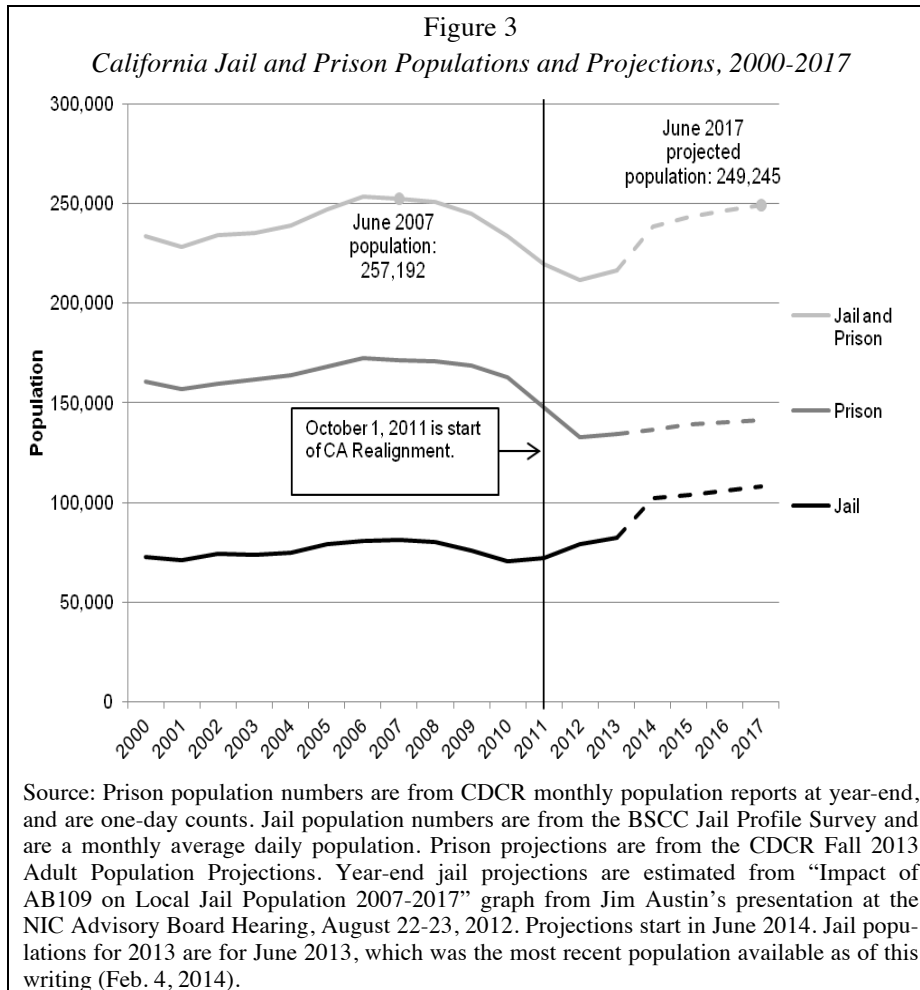
So while California prison populations were decreasing in 2011-2012, its jail populations were increasing over the same time period. As indicated in Figure 3, California state projections show that the decrease in the combined prison and jail incarceration rate between 2010-2017 is expected to be just 1.3%.

108. Paige St. John, *Population of Prisons to Increase; State Expects 10,000 More Inmates Over 5 Years, Complicating Bid to Cut Crowding*, L.A. TIMES, Jan. 10, 2014, at AA1.

109. TODD D. MINTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2012 – STATISTICAL TABLES 1 (2013).

110. LISA T. QUAN, SARA ABARBANEL & DEBBIE MUKAMAL, STANFORD CRIMINAL JUSTICE CTR., REALLOCATION OF RESPONSIBILITY: CHANGES TO THE CORRECTIONAL SYSTEM IN CALIFORNIA POST-REALIGNMENT 10 (2014), *available at* <http://www.law.stanford.edu/sites/default/files/childpage/183091/doc/slspublic/CC%20Bulletin%20Jan%202014.pdf>, *archived at* <http://perma.cc/8Z8F-PZ4E>.

111. *Average Daily Population, Rated Capacity, and Bookings, Jail Population Dashboard*, CAL. BOARD OF STATE & CMTY. CORRECTIONS, <https://public.tableausoftware.com/profile/kstevens#!/vizhome/ACJROctober2013/About> (last visited Jan. 15, 2014).



This projection also ignores the fact that California recently made available \$1.2 billion for county jail construction, which could provide for the construction of up to about 11,000 more jail beds over the next five years.¹¹² In sum, the “evidence behind the headlines” suggests that the nation’s decarceration story is being driven by California’s court-ordered prison reduction, and California is now trending up—and building new capacity at both the state and county levels. Although the failure of state prison populations to grow nationwide is a salient development, scholars need to be honest brokers of the data and not oversell the “end of mass incarceration.” It seems important that we consider the possibility that *trans*-incarceration—the move from one carceral

112. CAL. BOARD OF STATE & CMTY. CORRECTIONS, A.B. 900 JAIL CONSTRUCTION FINANCING PROGRAM, PROJECT STATUS UPDATE – PHASES I AND II 1 (2013).

setting to another—rather that *decarceration* will be what we have achieved when we look back at this moment in history.

Third, many of the mechanisms that might have been used in the past to reduce prison populations—such as parole boards and discretionary release—have been greatly circumscribed. State legislatures have passed a range of statutes that have robbed the system of the flexibility to manage inmate populations (e.g., determinate sentencing, mandatory minimum sentences, truth-in-sentencing laws). Legislators, such as those in Ohio and Georgia, have undertaken statutory reform in efforts to facilitate downsizing.¹¹³ Still, downsizing is unlikely to be successful in the longer run without significant statutory changes to state and federal penal codes and punishment structures.

*Fourth, the research is clear that effective community programs must involve a human services component in which offenders receive rehabilitation.*¹¹⁴ If cost savings become the overriding concern, the temptation will exist to use monitoring technology to conduct surveillance on offenders in the community while forgoing more expensive treatment interventions. In particular, electronic monitoring is relatively cheap and provides economies of scale for keeping track of offenders. Such a technological fix is likely to become more attractive as the gadgetry advances and becomes even less expensive. The danger, however, is that technological surveillance removes personal contact with program officers and thus may sacrifice real treatment and supervision. Were this to occur, the result may parallel the 1980s ISP experiment when offenders received few real services or meaningful interactions with probation and parole officers. In the long run, the criminogenic needs of higher risk offenders will be ignored and the risk of recidivism will be heightened.

We also must recognize that the number of proven programs, especially for adult reentry programs, is in short supply. If one searches the U.S. Department of Justice's CrimeSolutions.gov website, a one-stop shop for research on programs that work, just 6 of all the 300 programs reviewed focus on adult reentry programs, and of those six programs, none qualify as "effective." Four of these programs qualify as "promising" (effectiveness across contexts not yet established) and two are rated as "no effects." Notably, a rigorous evaluation of the large, collaborative, federally-funded Serious and Violent Offender Reentry

113. DAVID J. DIROLL, H.B. 86 SUMMARY: 2011 CHANGES TO CRIMINAL AND JUVENILE LAW (2011), available at http://www.opd.ohio.gov/Legislation/Le_OhioCrimSentSummary.pdf, archived at <http://perma.cc/CB3A-YWU8>; PEW CTR. ON THE STATES, GEORGIA PUBLIC SAFETY REFORM 1, 5 (2012), available at <http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/2012-georgia-public-safety-reform>, archived at <http://perma.cc/45EM-E7Y9>.

114. See, e.g., ANDREWS & BONTA, *supra* note 9, at 47; MACKENZIE, *supra* note 89, at 333; Paul Gendreau et al., *Intensive Rehabilitation Supervision: The Next Generation in Community Corrections?*, 58 FEDERAL PROBATION 72, 76 (1994); Petersilia & Turner, *supra* note 89, at 321.

Initiative (SVORI) found no recidivism reduction effects.¹¹⁵ SVORI was designed to improve employment, education, health, and housing outcomes of offenders upon release from incarceration. “No effects” were also found with the Transitional Case Management program, a strengths-based case management intervention that provided expanded case management services during an inmate’s transition from incarceration to the community. The existing evaluation data does not mean that there are not programs that work, only that we have no rigorous evidence whether these programs work or not. We must be careful to not oversell the science of “evidence-based corrections.”

Fifth, the life circumstances for felons are likely to become even more daunting and their access to services outside of the justice system even tighter. Although some reforms regarding collateral consequences have occurred, offenders still face extensive statutory restrictions on employment, housing, and federal support.¹¹⁶ Employers have increasing accessibility to criminal history information through third-party intermediaries that specialize in background checks, and they increasingly rely on such services.¹¹⁷ In a time of persistent financial crisis, it is also difficult to imagine that jurisdictions will allocate funds to support quality offender reentry (e.g., treatment services, jobs, housing) instead of education, health care, and other budget priorities. The challenge will be to see if revenue saved from downsizing is reallocated to community-based programs for offenders reentering or diverted to pay for other pressing social needs.

V. FIVE REASONS WHY DOWNSIZING REFORM COULD SUCCEED

First, and perhaps most important, the paradigm of mass imprisonment is exhausted. As noted, a paradigm shift has occurred that is accompanied by a new narrative about prisons. Although this narrative might vary across political lines, it shares the view that spending more money on prisons is unsustainable. Beyond those with a naked self-interest in more prisons (e.g. correctional officer unions or private prisons), it is not clear who remains to carry the mantle of ramping up prison expansion.

Tonry has used another term, which he calls “sensibility,” to capture how people understand crime and its control.¹¹⁸ He points out that this sensibility or

115. Pamela K. Lattimore & Christy A. Visher, *The Multi-site Evaluation of SVORI: Summary and Synthesis ES-9 (2009)* (unpublished report) (on file with the U.S. Dep’t. of Justice), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/230421.pdf>, archived at <https://perma.cc/78P5-PKUY>.

116. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 144-58 (2010).

117. STEVEN RAPHAEL, *THE NEW SCARLET LETTER? NEGOTIATING THE U.S. LABOR MARKET WITH A CRIMINAL RECORD* 49-50 (2014), available at <http://www.upjohn.org/sites/default/files/WEfocus/The%20New%20Scarlet%20Letter.pdf>, archived at <http://perma.cc/A72V-AMHK>.

118. Tonry, *Thinking About Crime*, *supra* note 31, at 5.

worldview makes some policies about crime seem rational or “thinkable” and others seem “unthinkable.” Torture, for example, is a practice that Americans “just do not do.” For four decades, locking up more and more fellow Americans was eminently thinkable. The prevailing sensibility was described by such concepts as “the punitive imperative,”¹¹⁹ “the culture of control,”¹²⁰ “governing through crime,”¹²¹ and “penal populism.”¹²² We are suggesting, however, that the prevailing sensibility has changed qualitatively so that symbolic, emotive appeals to get tough on crime simply do not have the same appeal. Continuing to cram more and more offenders into crowded prisons into the foreseeable future is becoming unthinkable. Instead, it appears that a new pragmatism has emerged that has largely forfeited strong ideology in favor of using good sense to figure out solutions to the prison problem. Discourse on crime thus is more focused on replacing overly rigid mandatory minimum sentences, using risk assessment to divert lower risk offenders from prison, and seeing prison space as an expensive expenditure that should be allocated with care. A recent public opinion poll confirmed that American voters overwhelmingly support a variety of policy changes that shift non-violent offenders from prison to more effective, less expensive alternatives. Moreover, the support for sentencing and corrections reform is strong across political parties, regions, age, gender, and racial/ethnic groups.¹²³

Second, the science is better, which may allow prison-downsizing initiatives to be undertaken more effectively. Importantly, we have developed better tools to evaluate the risk of recidivism that will allow us to match the offender with the appropriate sanction. We also have better actuarial risk prediction tools that predict recidivism more accurately than the unstructured clinical judgments of the past, allowing officials to more effectively sort who should be placed in which community programs.¹²⁴ We know that some evidence-based treatment programs, tailored to the offender’s risks and needs, successfully reduce recidivism if implemented with fidelity. Particularly for a population like the mentally ill, who are two times more likely to fail community supervision and constitute approximately 15 percent of offenders,¹²⁵ community-based programs

119. CLEAR & FROST, *supra* note 8.

120. GARLAND, *supra* note 37.

121. SIMON, *supra* note 49.

122. PUBLIC OPINION STRATEGIES & THE MELLMAN GRP., PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA (2012), available at http://www.prisonpolicy.org/scans/PEW_NationalSurveyResearchPaper_FINAL.pdf, archived at <http://perma.cc/7WN8-G4BU>.

123. *Id.*

124. See, e.g., D. A. Andrews & Craig Dowden, *Risk Principle of Case Classification in Correctional Treatment: A Meta-Analytic Investigation*, 50 INT’L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 88 (2006).

125. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, ADULTS WITH BEHAVIORAL HEALTH NEEDS UNDER CORRECTIONAL SUPERVISION: A SHARED FRAMEWORK FOR REDUCING RECIDIVISM AND PROMOTING RECOVERY 3-5 (2012), available at https://www.bja.gov/Publications/CSG_Behavioral_Framework.pdf, archived at

must holistically target the offender's criminogenic and psychosocial needs.¹²⁶ We are more focused and knowledgeable about the importance of implementation.

Third, evidence-based corrections has arrived. The ascendancy of this movement is important because, as just noted, it has increased the scientific knowledge that downsizing will require. While the research database is rather scant so far, it is growing and over time will likely identify more programs that are effective. But more than this, the embrace of scientific data and expertise represents a rejection of penal populism and of ill-informed common sense.¹²⁷ Just as "moneyball" has led baseball executives to make decisions based on statistics ("sabermetrics") rather than on "gut level" intuition, so too does evidence now enter the conversations held with correctional policymakers.¹²⁸ This orientation also leads to a focus on performance measures, which is a growing concern for programs receiving federal funding (e.g., by the Office of Management and Budget). None of this is to suggest that politics and populism have been fully vanquished as guides for policy. But it is to propose that once science is embraced as a criterion for decision-making, a retreat from knowing "what the evidence says" is difficult. As such, broad appeals to "lock up more super-predators" will lack legitimacy unless backed up by solid evidence—an obstacle that will be difficult to surmount as the data accumulates.

Fourth, although still not widespread, efforts are being made in some states to close prisons. In the past, prison capacity was rarely reduced. Several states, including North Carolina, Georgia, Kentucky, New York, Pennsylvania and Texas closed correctional facilities or contemplated doing so, potentially reducing prison capacity by about 10,000 beds.¹²⁹ Costs are the main factor, but also important is the realization that overcrowded prisons could invite expensive California-like prison litigation regarding conditions of confinement. Many states are pushing more money to drug rehabilitation and other reentry programs aimed at keeping people out of jail rather than building new prisons. Kentucky, Ohio, Indiana, Missouri, Georgia, and West Virginia, among others, have acted aggressively to reduce their own prison populations through a series of sentencing changes and overhauls of state prison codes.¹³⁰

<https://perma.cc/BS8W-M2JQ>; Jennifer L. Skeem & Jennifer Eno Loudon, *Toward Evidence-Based Practice For Probationers and Parolees Mandated to Mental Health Treatment*, 57 *PSYCHIATRY SERVICES* 333 (2006).

126. *Id.* at 39.

127. See generally Paul Gendreau, Claire Goggin, Francis T. Cullen & Mario Paparozzi, *The Common-Sense Revolution and Correctional Policy*, in *OFFENDER REHABILITATION AND TREATMENT: EFFECTIVE PROGRAMMES AND POLICIES TO REDUCE RE-OFFENDING* 359–86 (James McGuire ed., 2002).

128. Francis T. Cullen, et al., *Eight Lessons from Moneyball: The High Cost of Ignoring Evidence-Based Corrections*, 4 *VICTIMS & OFFENDERS* 197 (2009).

129. PORTER, *supra* note 17, at 2.

130. Rich Ehsen, *In Our View: Prison Mess Tarnishes Brown's 'CA Comeback'*, *CAPITOL J.* (Aug. 15, 2013), available at http://www.statenet.com/capitol_journal/08-05-2013/html, archived at <http://perma.cc/CK3M-B8RZ>.

*Fifth, there is an increasing recognition that the American public supports a pragmatic approach to crime control.*¹³¹ Although not always fully understood, research has shown consistent support for offender rehabilitation and for community alternatives to prison for many years.¹³² Still, a number of polls have been commissioned in recent years that consistently show the public's willingness to reduce the use of imprisonment. For example, a 2010 Oregon study showed that large majorities of citizens supported a range of policies to reduce the use of incarceration (e.g., shorter sentences for certain crimes, early release for good time or successful treatment, discretionary release by the parole board). Fully 96 percent of the respondents favored at least one of these policies.¹³³ Similarly, a 2012 survey by Public Opinion Strategies and The Melmann Group found that "voters overwhelmingly support a variety of policy changes that shift non-violent offenders from prison to more effective, less expensive alternatives."¹³⁴ Further, the respondents were informed that corrections spending had increased over the past twenty years from \$10 billion to \$50 billion. Over three-fourths—including 76 percent of Republicans—agreed that "we are not getting a clear and convincing return on that investment in terms of public safety."¹³⁵ It also appears that political leaders no longer need to sacrifice public support if they support prison downsizing. California Governor Jerry Brown's approval rating hit a record high of 60 percent among likely voters while he continued to advocate for a reduced state prison budget and fewer prisoners.¹³⁶

Perhaps the most publicized survey, however, has been a 2013 poll of Texas residents conducted by the Texas Public Policy Foundation, a conservative think tank. The survey showed that the respondents favored rehabilitation and that "Texans of all political flavors want low-level offenders to pay their debt out of prison."¹³⁷ For example, 84 percent of all likely Texas voters, including 81 percent identified as Republicans and 86 percent identified as independents, supported alternative-to-prison programs for non-violent drug offenders. Notably, the fact that a "red state" electorate would endorse a series of reforms to lower mass imprisonment was seen as consequential; in essence, if Texans support reducing inmate populations, would not citizens in every state?

131. See, e.g., James D. Unnever et al., *The Pragmatic American: Attributions of Crime and the Hydraulic Relation Hypothesis*, 27 JUST. Q. 431 (2010).

132. See, e.g., Francis T. Cullen et al., *Public Opinion about Punishment and Corrections*, in 27 CRIME & JUST. 1, 42 (Michael Tonry, ed., 2000); Michael G. Turner et al., *Public Tolerance for Community-Based Sanctions*, 77 PRISON J. 6 (1997).

133. JODY SUNDT, CRIMINAL POLICY RESEARCH INST., OREGONIANS REPORT BROAD SUPPORT FOR POLICIES THAT COULD REDUCE PRISON POPULATION 2 (2007).

134. PUBLIC OPINION STRATEGIES & THE MELLMAN GRP., *supra* note 122, at 1.

135. *Id.* at 7.

136. PUB. POLICY INST. OF CAL., CALIFORNIANS AND THEIR GOVERNMENT 3 (2014), available at http://www.ppic.org/content/pubs/survey/S_114MBS.pdf, archived at <http://perma.cc/2GBT-46B7>.

137. Mike Ward, *Poll: Texans Support Treatment, Rehab Programs*, AUSTIN AMERICAN-STATESMAN, Dec. 10, 2013, at A1.

Commentators observed that “Texans’ opinions have changed” and that “this should fortify legislators to do the right thing They should know they have public support and it won’t be held against them at the polls.”¹³⁸ In short, the public sensibility has moved from the embrace of mass imprisonment to downsizing and the judicious use of a costly government resource.

VI. LESSONS FROM CALIFORNIA

No discussion of decarceration would be complete unless consideration was given to the unprecedented experiment in downsizing prisons now under way in California. We have already discussed California’s reductions in imprisonment, but whether California’s Realignment experiment serves as a springboard to change the country’s overreliance on prisons will all depend on whether the counties can do a better job than the state at reducing recidivism. Understanding that potential requires an examination of the law, how California counties are implementing its provisions, and the early lessons it can teach the nation.

A. *Prison Reform and Corrections Realignment*

California has embarked on a prison downsizing experiment of historical significance. Facing a U.S. Supreme Court decision, *Brown v. Plata*, which ordered the state to reduce its prison population by 25 percent within two years,¹³⁹ Governor Jerry Brown signed the Public Safety Realignment Act (A.B. 109).¹⁴⁰ Realignment transferred authority for large numbers of convicted felons from the state prison and parole system to the state’s fifty-eight counties. In February 2014, the courts granted California a two-year extension to reduce its adult prison population to 137.5% of design capacity by February 28, 2016.¹⁴¹

Realignment took effect on October 1, 2011. It substantively altered three major issues within the criminal justice system: where prisoners serve time for different offenses, who is responsible for supervising them after their release, and the time served by offenders who have violated the terms of their supervised release. Felons convicted of certain serious, violent, and aggravated sex offenses continue to serve their time in state prison, but individuals convicted of non-serious, non-violent, non-sexual crimes (“triple nons”) now serve that time in the county jail, regardless of the length of their sentence.¹⁴² Counties

138. *Id.* at A2.

139. *Plata*, 131 S. Ct. at 1945.

140. A.B. 109, 2011-2012 Assemb., Reg. Sess. (Cal. 2011).

141. Dan Brekke, *Federal Judges Give State Two More Years to Cut Prison Population*, KQED NEWS (Feb. 10, 2014), <http://ww2.kqed.org/news/2014/02/10/federal-judges-give-state-two-more-years-to-cut-prison-population>, archived at <http://perma.cc/8NVB-222J>.

142. CAL. PENAL CODE § 1170(h). Whether a felony qualifies as serious or violent is determined by CAL. PENAL CODE §§ 667.5(c), 1192.7(c).

must now handle virtually all drug and property crime sentences, which represented 54 percent of all adults convicted in 2010.¹⁴³

Importantly, if offenders have their probation or parole revoked for a technical violation (i.e., violation of the rules of supervision rather than commission of a new crime), they now serve their revocation sentence in the county jail instead of state prison even for those whose backgrounds include serious crimes. County court-appointed hearing officers (rather than the State's paroling authority) now decide how to respond to technical violations, and they can use their discretion to impose jail time, refer to community programs, or continue on supervision without any sanction—but they cannot impose a prison sentence. And if the hearing officer sends them to jail, each sheriff now has the authority to independently release inmates to accommodate overcrowding within the jail. Ironically, if the state had given the same discretionary release authority and “relief valve” to prison officials to control inmate populations, California might have avoided the *Plata* litigation that ultimately led to A.B. 109. The revised policy regarding technical violations is a major change from the days when the state parole board sent about 35,000 technical violators each year to prison for up to a year.¹⁴⁴

Counties are being given state funding (about \$1 billion a year) to deal with the increased number of offenders, and each county was given nearly unbridled discretion to develop its own custodial and post-custody plan.¹⁴⁵ Counties were initially worried that state funding could be discontinued. But California voters passed Proposition 30 in November 2012, a sales and income tax increase, which guarantees in the State Constitution funding for Realignment going forward.¹⁴⁶ The hope is that Realignment, with its focus on locally designed rehabilitative services, will not only reduce prison overcrowding but also the state's 64 percent return-to-prison recidivism rate—one of the highest in the nation.¹⁴⁷ This infusion of new funding far surpasses any similar allocation for adult offender rehabilitation in California history, and the funding is now guaranteed for the next several years.

143. CAL. ATT'Y GEN., CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 2010 at 53 (2011) (showing that 109,494 of 201,820 adult arrestees convicted in 2010 were convicted of property and drug offenses).

144. Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, in 37 CRIME & JUST.: A REVIEW OF RESEARCH 207, 264-66 (2008); Ryken Grattet, Jeffrey Lin & Joan Petersilia, *Supervision Regimes, Risk, and Official Reactions to Parolee Deviance*, 49 CRIMINOLOGY 371 (2011). The only exception is that individuals released from prison after serving an indeterminate life sentence may still be returned to prison for a technical parole violation.

145. *Funding of Realignment*, CAL. DEP'T OF CORR. & REHAB., <http://www.cdcr.ca.gov/realignment/Funding-Realignment.html> (last visited Jan. 12, 2015), archived at <http://perma.cc/5BWL-YCHG>.

146. *Id.*

147. CAL. DEP'T OF CORR. & REHAB., 2012 OUTCOME EVALUATION REPORT 75 (2012), available at http://www.cdcr.ca.gov/adult_research_branch/Research_Documents/ARB_FY_0708_Recidivism_Report_10.23.12.pdf, archived at <http://perma.cc/WE53-265F>.

The legislature's underlying hope, as written in the general legislative findings to Realignment, declares that instead of solely adding jail capacity, the legislature views A.B. 109 as a "reinvest[ment]" of resources to support "locally run community-based programs" and evidence-based practices "encompassing a range of custodial and noncustodial responses to criminal or noncompliant offender activity."¹⁴⁸ The legislation further defines evidence-based practices as those "supervision policies, procedures, programs, and practices demonstrated by scientific research."¹⁴⁹

At the time of the *Plata* ruling on May 23, 2011, California's in-state prison population was approximately 162,000, down from an all-time high of 173,614 or 200% of design capacity in 2007.¹⁵⁰ By upholding the three-judge panel's population cap of 137.5% of capacity, the Supreme Court was ordering the California Department of Corrections and Rehabilitation (CDCR, the state's prison system) to reduce its prison population to 109,805, a reduction of about 35,000 prisoners or 25 percent of all prisoners housed at the time.¹⁵¹ The task was not only daunting; it also represented the largest court-ordered reduction in prison populations ever in the United States. *The Economist* recently called Realignment, "one of the great experiments in American incarceration policy."¹⁵²

Governor Brown expressed confidence that Realignment would reduce California's prison population, telling the courts that, "Once funded and implemented, AB 109 will dramatically reduce prison crowding by authorizing a realignment that will require tens of thousands of adult felons to serve their sentences under local authority."¹⁵³

Governor Brown's predictions proved correct. During 2012, the first full year of Realignment, total admissions to California prisons declined 65 percent, from 96,700 in 2011 to 34,300 in 2012.¹⁵⁴ Admissions to California prisons on parole violations decreased by 87 percent, from 60,300 in 2011 to 8,000 in 2012.¹⁵⁵ California went from admitting 140,800 offenders to prison in 2008 to

148. CAL. PENAL CODE § 17.5.

149. CAL. PENAL CODE § 17.5(a)(3)-(5).

150. *Plata*, 131 S. Ct at 1924; see CAL. DEP'T CORR. & REHAB., MONTHLY POPULATION REPORT AS OF MIDNIGHT MAY 31, 2011 (2011), available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly_TPOPIA/TPOPIAd1105.pdf, archived at <http://perma.cc/RV74-4AJ6>. The CDCR prison population figures can be found at: CAL. DEP'T CORR. & REHAB., THREE-JUDGE COURT UPDATES (2013), available at http://www.cdcr.ca.gov/News/3_judge_panel_decision.html, archived at <http://perma.cc/XK8V-PGPS>.

151. See CAL. DEP'T CORR. & REHAB., MONTHLY POPULATION REPORT AS OF MIDNIGHT MAY 31, 2011, *supra* note 150.

152. *Prison Overcrowding: The Magic Number*, THE ECONOMIST, May 11, 2013, available at <http://www.economist.com/news/united-states/21577411-california-hasnt-emptied-its-prisons-enough-it-trying-magic-number>, archived at <http://perma.cc/K67C-97R6>.

153. Defendants' Report in Response to January 12, 2010 Order at 2, *Coleman v. Brown*, No. 2:90-cv-00520 LKK JFM P (E.D. Cal. June 7, 2011).

154. CARSON & GOLINELLI, *supra* note 14, at 19.

155. *Id.* at 2.

34,300 in 2012—nearly an 80 percent decrease in prison admissions in just four years.¹⁵⁶ California’s overall prison population has declined by more than 20 percent since 2007, while its adult resident population increased by 7.3%.¹⁵⁷ In fact, the state’s prison population is at its lowest level in seventeen years, and even though California recently saw its prison population start to climb slightly, official projections show that it will have gained just 2,700 inmates by 2018. In fact, Realignment has reduced California’s inmate population so much that Texas now has a larger prison system, despite having about twelve million fewer residents. Violent offenders are also now a growing majority of the prison population: violent criminals (based on current commitment offense) have risen from 59 percent in 2011 to 70 percent in 2013.¹⁵⁸ On June 30, 2011, parolees with a serious or violent current or prior offense made up 46 percent of the state parole population; two years later they constituted 71 percent.¹⁵⁹

But the burden shifted to California’s counties is enormous, and how they carry out their newfound obligations will ultimately determine Realignment’s success. In the State’s successful request for a three-year extension of the deadline to meet the population cap, they wrote:

State prisons are just one part of the larger, interconnected criminal justice system When the State changes its policies to reduce the prison population, the entire criminal justice system must absorb the changes. State and local officials must find ways to protect public safety while helping offenders, who would have otherwise been in prison, successfully reintegrate into our communities. For a prison-crowding solution to last, it must be developed in consultation with the state and local officials who will place a decisive role in its implementation.¹⁶⁰

156. *Id.*

157. DATA ANALYSIS UNIT, CAL. DEP’T CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT DEC. 31, 2013, *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad1312.pdf, *archived at* <http://perma.cc/V62C-Z9CP> and MONTHLY REPORT OF POPULATION AS OF MIDNIGHT DEC. 31, 2007, *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad0712.pdf, *archived at* <http://perma.cc/FU9Z-K9TX>. For prison population numbers, see *Monthly Total Population Report Archive*, CAL. DEP’T CORR. & REHAB., http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Monthly/Monthly_Tpop1a_Archive.html, *archived at* <http://perma.cc/X2T3-M6QM> (each month comes from the respective monthly total population report). The U.S. Census Bureau estimates that California’s adult population increased from 27,169,594 in 2007 to 29,158,337 in 2013 American Community Survey Demographic and Housing Estimates *American Fact Finder*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1_YR_DP05&prodType=table, *archived at* <http://perma.cc/DM55-6EZD>.

158. RYKEN GRATTET & JOSEPH HAYES, CALIFORNIA’S FUTURE: CORRECTIONS (Pub. Policy Inst. of Cal. ed., 2014), *available at* http://www.ppic.org/content/pubs/report/R_215MLR.pdf, *archived at* <http://perma.cc/AQM8-7M54>.

159. *Id.*

160. Defendants’ Status Report and Request for an Extension at 3, *Coleman v. Brown*, No. 2:90-cv-00520 LKK JFM P (E.D. Cal. Sept. 16, 2013).

B. *Counties Tackle Corrections Reform: Findings and Lessons Learned*

Realignment represents a titanic policy shift and tremendous opportunity for reform, but it will only deliver lasting benefits if counties can make it work. The critical unanswered question is, “how is it going for the counties?”

During the second year of Realignment’s implementation, Stanford University researchers conducted 125 interviews in twenty-one counties to produce a snapshot of how California is faring under Realignment so far. We talked with police, sheriffs, judges, prosecutors, defense attorneys, probation and parole agents, victim advocates, and social service representatives. Interviewees were selected to represent diversity in agency and county perspectives.¹⁶¹ Our goal was to determine how Realignment had influenced their agency’s work and what changes they would make to the law. We also spoke with offenders to gauge their pre- and post-Realignment experiences.¹⁶²

Broadly speaking, Realignment gets mixed reviews so far. The interviews revealed a justice system undergoing remarkable changes, arguably unprecedented in depth and scope.¹⁶³ Stakeholders’ opinions varied widely, and their comments reflected their role in the system more than the county they represented. The interviews elicited a portrait of counties struggling, often heroically, to carry out an initiative that was poorly planned and imposed upon them almost overnight, giving them little time to prepare.¹⁶⁴ Kim Raney, then-President of the California Police Chiefs Association, said, “The first year was like drinking from a fire hose,” as counties scrambled to cope with an influx of offenders far larger than expected, and with more serious criminal histories and needs.¹⁶⁵ Shifting these lower-level offenders to local custody strained county health care and social services programs. State budget cuts had already devastated many of the essential programs upon which former prisoners depend, especially for mental health care and alcohol and drug treatment.¹⁶⁶ Everyone agreed that it would have made more sense to test Realignment on a smaller scale before rolling it out statewide, but given the *Plata* mandates, the State had no choice.¹⁶⁷

161. Complete research methods and findings are in JOAN PETERSILIA, VOICES FROM THE FIELD: HOW CALIFORNIA STAKEHOLDERS VIEW PUBLIC SAFETY REALIGNMENT (2014), available at <http://www.law.stanford.edu/sites/default/files/child-page/443444/doc/slspublic/Petersilia%20VOICES%20no%20es%20Final%20022814.pdf>, archived at <http://perma.cc/3KJ9-8DZT>. The National Institute of Justice, Award No. 2012-IJ-CX-0002, U.S. Department of Justice, and the James Irvine Foundation provided funding for the research. Joan Petersilia was the principal investigator of the study.

162. Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL’Y REV. 327, 339 (2014).

163. *Id.* at 356.

164. *Id.* at 339.

165. *Id.*

166. *Id.* at 334.

167. *Id.* at 351.

Overall, probation officials were the most enthusiastic champions of Realignment, welcoming the momentum the legislation provided their rehabilitation focus. They unequivocally felt that Realignment gave them an opportunity to fully test whether well-tailored rehabilitation services can keep lower-level felony offenders from committing new crimes and returning to prison.¹⁶⁸ If Realignment is to amount to more than an experimental, emergency response to a court directive regarding prison overcrowding, it will depend heavily on how well probation agencies deliver effective programs and services. Our interviews showed that across the state, probation agencies have launched pilot projects that, if successful, will significantly strengthen community corrections in California and nationally. One of the most promising options is the Day Reporting Center (DRC), often described as “one-stop” centers where offenders can access educational programs, cognitive behavioral therapy, and employment services, and meet with probation officers.¹⁶⁹ Offenders are assessed for needs and then matched to services that best address those needs. There are now nearly twenty-five DRC’s across California, virtually all of them receiving some A.B. 109 funding.¹⁷⁰ In addition, nearly all probation agencies reported adopting risk/needs classification instruments to measure an offender’s predicted risk of recidivism and to help target treatment to those most likely to benefit. The adoption of such actuarial tools has professionalized probation, and allowed officials to better triage services and the level of monitoring provided by officers.¹⁷¹

While new funding has made new programs possible, our interviews confirmed the hard realities agencies are facing. The seriousness of the realigned population’s criminal backgrounds remains a key challenge across agencies. Under Realignment, only the *current* conviction offense is considered when determining whether inmates leaving prison will be placed on state parole or county probation supervision.¹⁷² As a result, offenders with serious and violent prior convictions—including moderate-risk sex offenders—are reporting to county probation officers.

County officials in the larger counties are feeling the burdens most intensely. Los Angeles (LA) County, for example, operates the largest probation population in the world—supervising more than 80,000 probationers pre-A.B. 109.¹⁷³ A.B. 109 added about 16,000 former parolees to LA Probation’s case-

168. *Id.* at 340.

169. *Id.*

170. *Id.*

171. *Id.*

172. CAL. PENAL CODE § 3041.

173. Timothy Williams, *Innovative Leader to Leave Probation Dept.*, L.A. TIMES, Dec. 11, 1996, available at http://articles.latimes.com/1996-12-11/local/me-7979_1_probation-department, archived at <http://perma.cc/4QCB-83A3>.

load in the first two years of Realignment.¹⁷⁴ LA Chief Probation Officer Jerry Powers reported that according to their LS/CMI risk assessment, 62 percent of the offenders who have been sent to LA probation by the State for post-prison supervision score high risk, and just 1.4% score low risk.¹⁷⁵ Los Angeles Probation recently reported that its one-year recidivism rate—defined as a return to jail or prison—for these offenders was 60 percent.¹⁷⁶

Los Angeles County was given nearly \$600 million in the first two years to help deal with the situation (an increase in LA probation’s annual budget of about 35 percent), and they are in the process of hiring 470 new officers to bring their caseloads down.¹⁷⁷ Once the hiring is complete, they will have seventy-two offenders for every one probation officer, arguably too high to closely monitor such high-risk offenders. They are also in the process—along with increased funding for drug and mental health treatment—of arming more of their probation officers to handle these more serious offenders. Chief Powers is making the unprecedented move to more than triple the number of his armed probation officers, from 30 to 100.¹⁷⁸ “It is a natural response to an ever increasing number of higher threat individuals and the operations that go along with supervising them,” Powers said in the Stanford interview.¹⁷⁹

A recent analysis by University of California Irvine (UCI) researchers Gerlinger and Turner found that released prisoners diverted to county probation supervision were *higher risk* than those retained on state parole supervision—exactly the opposite of Realignment’s intent.¹⁸⁰ The Gerlinger and Turner re-

174. L.A. CNTY, PUBLIC SAFETY REALIGNMENT: YEAR-TWO REPORT (2013), available at http://ccjcc.lacounty.gov/LinkClick.aspx?fileticket=GZ99E_1joHk%3d&portalid=11, archived at <http://perma.cc/NAQ3-8EVR>.

175. *Id.* at 3 tbl.2.

176. *Id.* at iv.

177. Abby Sewell, *L.A. County Probation Jobs Unfilled Because of Stricter Hiring Rules*, L.A. TIMES, Oct. 15, 2013, available at <http://articles.latimes.com/2013/oct/15/local/la-me-probation-hiring-20131016>, archived at <http://perma.cc/DDL8-6UTC>.

178. Christina Villacorte, *Probation Arms More of its Officers to Cope with Realignment*, L.A. DAILY NEWS, May 2, 2013, available at <http://www.dailynews.com/general-news/20130503/probation-arms-more-of-its-officers-to-cope-with-realignment>, archived at <http://perma.cc/9TLX-TCMK>.

179. Interviews conducted for Stanford research project on California realignment. Results reported in Petersilia, *supra* note 162, at 342.

180. Julie Gerlinger & Susan Turner, *California’s Public Safety Realignment: Correctional Policy Based on Stakes Rather than Risk* 13 (Dec. 2013) (unpublished working paper) (on file with the University of California, Irvine, Center for Evidence-Based Corrections). (finding that proxy-PRCS offenders—those sent to the counties for supervision—had *lengthier* criminal records and a *higher* percentage of prior prison commitments for “serious” and/or “violent” convictions when compared to those retained by the state on traditional parole (i.e., proxy-state parolees). The proxy-PRCS offenders had an average of five prior California prison commitments. And, according to the California Static Risk Assessment (CSRA), 59 percent of the proxy-PRCS were in the “high risk” to recidivate category, and 23 percent of these high risk offenders were considered “high violent” by the California Static Risk Assessment (CSRA).

port concludes, “Counties are receiving some of the most criminally active offenders in the state.”¹⁸¹

Central to the larger issues about Realignment’s impact on probation going forward is how this infusion of more serious offenders will change the character and culture of the quasi-rehabilitative role that probation has historically played—and A.B. 109 funding was supposed to strengthen. Historically, probation is designed to be the supportive stage of the criminal justice process, relative to arrest, trial, and incarceration. How can a probation officer engage in “motivational interviewing” (a technique to create a greater bond between officer and client, and a key component of evidence-based practices) when the probation officer has a weapon strapped to his/her waist? Some of this is reminiscent of the implementation of the ISP experiment in the 1990s, as discussed in Part III.

The problem is that the State had indicated that only *non-violent* offenders would be placed under local supervision, the “triple nons,” yet a large number of A.B. 109 offenders have *prior* convictions for violent crimes. The issue of which inmates are being realigned to counties has generated the most controversy across all agencies. Most officials recommended that complete adult and juvenile criminal histories should be considered when determining if the state or county will supervise an offender leaving prison.¹⁸²

Public defenders are also optimistic about Realignment’s potential but expressed concerns about the longer county jail terms their clients face and the conditions under which they are served. County jails were built to house inmates for a maximum stay of one year, but under Realignment sentences are extending well beyond that. Public defenders also identified a chasm between the ideal of Realignment and its reality in many counties, noting that treatment was either unavailable or not intensive enough for the most serious offenders.¹⁸³ All of those interviewed agreed the most critical needs were services for sex offenders and the mentally ill, as well as housing and crisis beds.¹⁸⁴

Conversely, prosecuting attorneys generally gave Realignment negative reviews, lamenting their loss of discretion under the law and about the deep jail discounts given to arrestees due to crowded jails.¹⁸⁵ Judges expressed mixed opinions, although most were also concerned about a loss of discretion and said A.B. 109 had greatly increased the courts’ workload.¹⁸⁶ Judges were cautiously optimistic that mental health and other collaborative courts could reduce recidivism but worried about the lack of split sentencing.¹⁸⁷ A.B. 109 allows the court the option to split the sentence between time in jail and time under super-

181. *Id.*

182. Petersilia, *supra* note 162, at 354.

183. *Id.* at 344.

184. *Id.*

185. *Id.* at 329.

186. *Id.* at 351.

187. *Id.* at 329.

vised release. Counties administer the programs but the state pays for them. Some counties are taking advantage of split sentencing, but in Los Angeles County, only 5 percent of felons have their sentences split, and the rest walk out of jail without supervision or services of any kind.¹⁸⁸ Judges, prosecutors, and victim service agencies were increasingly concerned about victim protection, and the neglect of victims' constitutional rights under the Victims' Bill of Rights Act of 2008. The California Constitution provides victims with the right to receive notice of and to be heard at any proceeding involving a post-arrest release decision in which the right of the victim is at issue.¹⁸⁹ Realignment has yet to fully integrate these victim rights with new policy and practices.

Law enforcement—both front line police and sheriffs—varied more than any other group in their assessment of Realignment, with their opinions largely influenced by local jail capacity. Sheriffs were challenged by overloaded county jails, which in many counties have been strained by a flood of inmates and a tougher criminal population that has increased the likelihood of jail violence. It is not just the growing number of jail inmates that cause concern, but the long lengths of their sentence. Because jails are typically not well equipped to house people for extended periods, the increase in individuals serving long sentences in jails was a concern of many stakeholders.¹⁹⁰ In particular, some offenders needing mental or medical care have waited weeks before receiving any treatment.¹⁹¹ Indeed, in talking with jail inmates about such conditions, we found a surprising twist: Many offenders, particularly those facing long terms, would prefer to do their time in prison. “I would have preferred to go to prison,” said fifty-year-old James Scott, an addict who was convicted on felony drug charges and sentenced to a seven-year jail term. “Their medical facilities are better, their food is better—everything is better. They have TV, radio, yards.”¹⁹² In jails plagued with overcrowding, sheriffs often feel the only option to assure inmate safety and prevent violence is to keep more inmates in lock down.¹⁹³ In the most crowded jails, they are also converting any available space to house

188. Sarah Lawrence, *Managing Jail Population to Enhance Public Safety: Assessing and Managing Risk in the Post-Realignment Era* 30 (June 10, 2013) (unpublished manuscript) (on file with the Stanford Criminal Justice Center), *available at* <https://www.law.stanford.edu/sites/default/files/child-page/440504/doc/slspublic/Paper%20on%20jail%20mgmt%20July%202013.pdf>, *archived at* <https://perma.cc/V2NF-XJL4>.

189. CAL. CONST. art. I, § 28. Complete information is contained at OFFICE OF THE CAL. ATT'Y GEN., VICTIMS' BILL OF RIGHTS ACT OF 2008: MARSY'S LAW, *available at* <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf>, *archived at* <http://perma.cc/B4S6-F7GC>. See also Jessica Spencer & Joan Petersilia, *California Victims' Rights in a Post-Realignment World*, 25 FED. SENT'G REP. 226 (2013).

190. Petersilia, *supra* note 162, at 348.

191. *Id.*

192. Arvin Temkar, *Jailhouse Blues: Inmates Would Rather Go To Prison Than Stay Stuck in the County Jail*, MONTEREY COUNTY WEEKLY, Mar. 20, 2014, at 18.

193. Petersilia, *supra* note 162, at 348-49.

inmates.¹⁹⁴ As a result of jail crowding, fewer offenders have access to rehabilitation programs, and extreme idleness is a problem.¹⁹⁵ Some of these conditions seem startlingly familiar, closely mirroring the problems that produced the successful claim in *Plata* that state prison conditions violated the Eighth Amendment. Has Realignment simply moved these constitutional violations from the state prisons to the county jails? Could the health care problems that led to *Plata* morph into county-level versions of the state problem? Currently, 37 of California's 58 county jails are operating under either a self-imposed or court-ordered population cap.¹⁹⁶ Given the success of the *Plata* litigation, a surge of county-level Eighth Amendment suits is likely to emerge. The Prison Law Office has already filed class action lawsuits seeking to remedy Eighth Amendment violations in the Fresno County and Riverside County jails.¹⁹⁷

Sheriffs are trying to intervene early and address jail conditions before the courts become involved. Many Sheriffs have become highly creative in managing their release authority under Realignment, using risk assessments, and operating their own work furlough programs, electronic monitoring systems, and day reporting centers.¹⁹⁸ Sheriffs also said they are using good time credits and flash incarceration for probation violators.¹⁹⁹ By necessity, their expanded duties under Realignment have turned these elected law enforcement leaders into treatment providers, probation managers, and reentry coordinators. For Sheriffs in counties rich in resources and with jail beds to spare, Realignment has been an opportunity to expand and create innovative programming, apply evidence-based practices to reduce recidivism, and absorb a population that they firmly believe is best managed at the local level.

While most police applauded the spirit of Realignment, including the expansion of local control and treatment options for offenders, all of those interviewed worried about declining public safety. California's long-term crime decline is reversing, and police said Realignment is to blame.²⁰⁰ A recent study by Lofstrom and Raphael found that crime rates increased significantly during the first year of Realignment (from 2011 to 2012).²⁰¹ Property crime continued to drop nationally, but in California it rose nearly 8 percent, and California's property crime increases were higher than the increases in states whose crime

194. *Id.* at 349.

195. *Id.*

196. *Id.* at 350.

197. See Order Granting Plaintiff's Motion for Class Certification, *Gray v. Cnty of Riverside*, No. 5:13-cv-00444-VAP-OP (C.D. Cal. Sept. 02, 2014); Class Action Complaint For Injunctive And Declaratory Relief, *Hall v. Mims*, No. 1:11-cv-02047-LJO-BAM (E.D. Cal. Dec. 13, 2011).

198. Petersilia, *supra* note 162, at 350.

199. *Id.*

200. *Id.* at 346.

201. MAGNUS LOFSTROM & STEVEN RAPHAEL, PUB. POLICY INST. OF CAL., PUBLIC SAFETY REALIGNMENT AND CRIME RATES IN CALIFORNIA 4 (2013), available at http://www.ppic.org/content/pubs/report/R_1213MLR.pdf, archived at <http://perma.cc/MX5Z-NLB7>.

trends were similar to those of California before Realignment.²⁰² Violent crimes in California also increased by 3.2% in the first year after Realignment, but that increase closely tracks national trends and closely matches the rate of increase experienced by other states that had similar crime rates to California before Realignment. The report finds there is “robust evidence that realignment is related to increased property crime In particular, we see substantial increases in the number of motor vehicle thefts, which went up by 14.8% between 2011 and 2012”.²⁰³ In addition to coping with rising crime, police said they now have fewer options to control offenders’ behavior.²⁰⁴ When an arrest is made in some counties, offenders are quickly released due to jail crowding. Everyone is watching the crime trends closely.

In sum, in just over two years since Realignment began, California’s justice system has changed in ways that are unprecedented in both depth and scope. The reallocation of responsibility across the major components of California corrections system has been nothing short of remarkable, as thousands of individuals have been shifted from the state’s jurisdiction to counties’ jurisdictions. Officials reported collaborating with one another in surprising and unprecedented ways, embarking on jointly funded initiatives, eliminating duplication, and approaching justice from a system-wide perspective, rather than a narrower agency perspective. Realignment also has encouraged counties to take a more holistic view of offender needs, treating them within their family and community contexts.

Only time will tell whether California’s Realignment experiment will fundamentally serve as a springboard to change the nation’s overreliance on prisons. It is a watershed opportunity and an experiment the whole nation is watching. Its early lessons—about higher-risk offenders putting pressure on counties to beef up surveillance rather than service-oriented probation, the expense and difficulty of treating sex offenders and the mentally ill, and the re-creation in some jails of the exact crowding, violence, and idleness that plagued prisons—are admonitory. But they are not destiny. Policymakers are banking on counties to do a better job, and criminologists—with their science of program fidelity and implementation, risk and need assessment tools, and evaluations of evidence-based and reentry programs—have a central role to play in assisting them. We need to assure that the pressure to end mass incarceration outlasts the current fiscal crisis and crime decline and does not revive itself in more prosperous times or when crime trends reverse.

202. *Id.*

203. *Id.* at 2.

204. Petersilia, *supra* note 162, at 347.

VII. LIBERAL BUT NOT STUPID: FIVE PRINCIPLES TO FOLLOW IN
DOWNSIZING PRISONS

A liberal approach to corrections emphasizes that crime is not chosen by autonomous actors of equal social advantage. Rather, such choices are bounded by a host of individual and social deficits—many of which can be traced to losing the birth lottery—that place people at risk of offending. Fairness and empathy lead liberals to take into account these criminogenic realities in forming state policies. This perspective also inclines liberals to embrace science because it is only through careful analysis that the nature of crime-related deficits can be identified and responsive treatments developed. As with all ideologies, however, liberalism can obfuscate more than it illuminates. When excessive, it prompts an over-identification with offenders and the denial of pathology.²⁰⁵ Not being stupid thus involves not assuming that liberal good intentions will be sufficient to overcome stubborn realities. It also means paying attention to science and to the barriers that have to be surmounted to realize preferred liberal goals. In this case, the challenge is to think clearly, even innovatively, about what it will take to facilitate the sustained downsizing of prisons.

To advance the prospects of a liberal-but-not-stupid approach to prison downsizing, we are able to propose five principles to guide this effort. These principles are, in a sense, drawn from what we have learned from past failures, what we have learned from criminological research, and what we have learned from the ongoing experiment in California. They are not meant to be etched in stone but rather to be provisional guidelines that can be elaborated and expanded as knowledge grows.

First, set inmate population caps. Alternatives to incarceration are not like a “field of dreams” baseball field: if you build it, they will come. Rather, as has been shown repeatedly, such optional programs will be treated as resources that can serve many goals, including net-widening and increased control.²⁰⁶ It is possible that providing local jurisdictions with strong financial incentives might have some success in restraining their willingness to use state prisons and making community-based alternatives seem attractive. But in the end, the only real way to downsize prisons is to set a hard limit in capacity.

Thus, although not of their choosing, the court-imposed population cap in California is succeeding in downsizing the state’s inmate population. Another option would be for states to voluntarily restrict the number of prisons they would operate. Jonson, Eck, and Cullen have suggested creating a cap-and-trade system in which each county in a state would be funded for a limited number of bed spaces.²⁰⁷ If they wished to exceed this cap, they would have to

205. ELLIOTT CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* 227, 236 (1985).

206. Austin & Krisberg, *supra* note 59, at 377; *see also* Tonry, *supra* note 90, at 174.

207. John E. Eck et al., *The Small Prison*, in *THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE* 215, 226-28 (Francis T. Cullen et al. eds., 2014).

purchase more bed space from more frugal counties that have not used their allotment. Regardless, it is foolish to expect that creating alternatives to incarceration will siphon off large numbers of offenders from prisons. In the end, downsizing will likely be meaningful only when lowering the size of the inmate population becomes a specific goal that is chosen by policymakers. Thus, the challenge is first to set the limit to the prison population and then to figure out how best to sanction offenders in alternative ways.

Second, take recidivism seriously. Downsizing is likely to fail if releasing inmates from prison creates a crime wave. To avoid this possibility, it will be necessary to use risk-assessment instruments to carefully separate the wheat (low-risk offenders) from the chaff (high-risk offenders). It also will be necessary, however, to develop a system of accountability that has “someone” responsible for keeping recidivism rates in check. Corrections can take a page from policing where innovations such as Comstat in New York City have reduced crime by focusing on clear performance measures and on administrative responsibility to lower crime.²⁰⁸ Part of the wisdom in policing is that crime rates and hot spots should not simply be allowed to exist, if not flourish. They must be identified and then addressed through a proactive problem-oriented intervention. In a similar way, as prisons are downsized, crime by offenders placed in the community cannot be seen, much as the weather, as a natural phenomenon over which nobody had any control. Rather, such recidivism must be monitored carefully. Objective performance measures need to be enacted, and responsibility allocated for developing solutions. These metrics need to be tied to risk and need offender profiles and not just broad categories of conviction crime or offender need.

Third, reaffirm rehabilitation. A fundamental liberal correctional premise, which is substantiated by extensive evidence, is that interventions with offenders will not be effective unless they involve a strong rehabilitative component.²⁰⁹ Rehabilitation programs, however, will not “work” if they are implemented without regard to evidence or if fidelity to treatment integrity is undermined by low funding. If reducing recidivism is a serious goal that we are committed to as a society, community corrections must be viewed as a fully viable option on equal footing with incarceration, not just the cheap alternative that we run to when the state can no longer afford to put people behind bars. Unless policymakers are willing not just to save money on rehabilitation efforts but to actually spend money on what works, this movement away from incarceration will likely be just as ineffective as those in the past.

Advocates should stop selling “alternatives” as less expensive. Good alternatives for higher risk offenders and those with mental health issues will never

208. See Francis T. Cullen et al., *The Accountable Prison*, 28 J. CONTEMP. CRIM. JUST. 77, 81 (2012).

209. ANDREWS & BONTA, *supra* note 9, at 69-74; MACKENZIE, *supra* note 89, at 333; Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. OF L. & SOC. SCI. 297, 314 (2007).

be cheap and we need to acknowledge that. But over the long run, they will be more humane and pay for themselves. Thankfully, criminal justice reform is attracting a promising infusion of funding from the private sector. Social-impact bonds (SIBs) or “pay for success bonds,” are an innovative financing arrangement that aims to increase the pool of money available for social programs. In an SIB, investors provide financing to operate federal, state, or local-run programs that aim to achieve predetermined outcomes. Generally, these outcomes are expected to save government money, for example, by reducing the need for prison beds or homeless shelters. The government entity agrees in advance that, if the program meets its goals, it will use the savings to pay back the original investment, plus a return. What is particularly attractive about this development is that it should not only jump-start the funding for innovative programs but also improve the corresponding program evaluations. Investors will not invest the capital unless the program can document exactly what it does, with what anticipated reduction in recidivism, and at what cost. It also has the added benefit of creating partnerships between nonprofit, government leaders, and the private sector.

In 2012, Goldman Sachs announced that it would invest \$10 million in a new jail program using social impact bonds.²¹⁰ In January 2014, Bank of America Merrill Lynch announced it had raised \$13.5 million from over forty private and institutional clients, financing a reform initiative for previously incarcerated New York state offenders.²¹¹ That same month, the James Irvine Foundation launched the California Pay for Success Initiative.²¹² This \$2.5 million effort will provide flexible funding for nonprofit organizations to secure seed funding for innovative programs.²¹³ And the federal government has allocated even greater funding. The U.S. Department of Labor has granted \$24 million in funding for social-impact bond employment programs,²¹⁴ while the Department of Treasury is soliciting project ideas for the proposed development of a \$300 million Pay For Success Incentive Fund.²¹⁵ For prison downsizing, us-

210. David W. Chen, *Goldman to Invest in City Jail Program, Profiting if Recidivism Falls Sharply*, N.Y. TIMES, Aug. 2, 2012, at A14.

211. *Bank of America Merrill Lynch Introduces Innovative Pay-for-Success Program in Partnership With New York State and Social Finance Inc.*, MARKETWATCH (Dec. 30, 2013), <http://www.marketwatch.com/story/bank-of-america-merrill-lynch-introduces-innovative-pay-for-success-program-in-partnership-with-new-york-state-and-social-finance-inc-2013-12-30>, archived at <http://perma.cc/RA5G-5964>.

212. Press Release, Non-profit Finance Fund, James Irvine Foundation and Nonprofit Finance Fund Launch California Pay For Success Initiative (Jan. 18, 2014), available at <http://nonprofitfinancefund.org/announcements/2014/james-irvine-foundation-and-nff-launch-pay-success-initiative-in-california>, archived at <http://perma.cc/CD8Y-DG5N>.

213. *Id.*

214. Press Release, Dep’t of Labor, U.S. Labor Department Awards Nearly \$24 million in Pay For Success Grants (Sept. 23, 2013), available at <http://www.dol.gov/opa/media/press/eta/ETA20131936.htm>, archived at <http://perma.cc/Y7FD-CJE2>.

215. Press Release, White House Office of Mgm’t & Budget, Pay For Success - An Innovative Approach to Improve Results and Save Money (July 10, 2013), available at

ing social impact bonds should spur innovation, knowledge-building, and program accountability.

Fourth, provide expert technical assistance to states and communities willing to downsize their prisons. As can be seen in California, downsizing is a complex, lengthy process that must take into account diverse interests and the peculiarities within each state (e.g., criminal statutes, sentencing, revocation decisions). For downsizing to have a chance at success, these efforts must be informed either by indigenous staff or by consultants with the time and technical expertise to ensure that the nature of the problem is understood and that appropriate policies are then developed. Doing so, however, will be a daunting challenge. Because downsizing remains a nascent movement, the existence of such expertise is likely in short supply. Figuring out how to build this technical capacity, including the sharing of knowledge from one state to another, is an important task to be addressed.

Fifth, develop a criminology of downsizing. Although scholars have written numerous critiques of mass imprisonment, the literature on how to downsize prisons remains limited.²¹⁶ The challenge for criminologists—especially liberals who have long decried the overuse of incarceration—is now to devote the same level of energy to understanding how best to downsize the nation’s prisons. This might involve, for example, clearly demarcating the risk factors for mass imprisonment, and determining which ones are “static” (cannot be changed) and which ones are “dynamic” (can be changed). We also need to have a better accounting of what “risk” means in the most popular off-the-shelf risk assessment tools. For example, what are the objective criteria that define high risk (e.g., number of priors, age, crime type)? Better transparency would help across-state and county comparisons. Such information could also be used to carefully catalogue all downsizing initiatives and to begin to evaluate their effects. Eventually, it might be possible to develop models for downsizing that are based on evidence-based principles. Regardless of its specific features, a criminology of downsizing would seek to engage in knowledge construction so as to inform policymakers’ decisions that will affect the lives of offenders and the safety of the public.

CONCLUSION

Mass imprisonment has been the central concern of correctional policy for four decades. For a confluence of reasons, cracks in what Clear has called the “penal harm” movement have widened.²¹⁷ The intractable growth of prison populations has largely halted. Equally important, a new sensibility about pris-

<http://www.whitehouse.gov/blog/2013/07/10/paying-success-innovative-approach-improve-results-and-save-money>, archived at <http://perma.cc/5FBK-PY74>.

216. For an exception, see JACOBSON, *supra* note 25.

217. See TODD R. CLEAR, HARM IN AMERICAN PENOLOGY: OFFENDERS, VICTIMS, AND THEIR COMMUNITIES (1994).

ons has emerged, where commentators on the political left and right are calling mass imprisonment unsustainable and open to scrutiny. In and of themselves, these changes reflect an important turning point in the correctional policy and ideological landscape—a pivot, so to speak, in a qualitatively different direction. What is less clear, however, is whether this favorable context will result merely in a leveling off of prison populations or in a sustained campaign to downsize meaningfully the nation’s prison system.

The prospect of downsizing is especially welcomed by many liberals, including most criminologists, who have, over the past decades, devoted inordinate effort to deconstructing punitive rhetoric and to unmasking the disquieting consequences of leading the world’s nations in imprisonment.²¹⁸ However, although criminologists have been skilled in “knowledge destruction” in the realm of corrections—that is, in showing what “does not work”—they have often been silent in showing policymakers and practitioners what “does work.”²¹⁹ Importantly, criminologists have been mute by choice and not by fate.

Indeed, notable exceptions to the preference for critique exist, such as in rehabilitation where specific principles and the technology necessary for effective interventions have been developed.²²⁰ Even if finding cures is more daunting than diagnosing the underlying ailment, criminology has unrealized potential to take a problem-oriented approach to mass imprisonment.²²¹ In fact, Sherman has urged scholars to think of themselves as “inventors” who have the ability to create “new designs” that reduce “crime and injustice.”²²² Our call for a “criminology of downsizing” is thus an admonition to scholars to invent the knowledge and analytical tools needed to guide practical efforts to lower inmate populations.²²³

The creation of this criminology will not be achieved through platitudes, wishful thinking, and scholarship flowing only from armchairs and desktop computers. Easy solutions to downsizing do not exist. This essay thus is intended to be sobering, instructive, and directive. It is sobering because it warns that, as has occurred in the past, a propitious opportunity for reform can be squan-

218. See, e.g., ALEXANDER, *supra* note 116; JOYCE ARDITTI, PARENTAL INCARCERATION AND THE FAMILY: PSYCHOLOGICAL AND SOCIAL EFFECTS OF IMPRISONMENT ON CHILDREN, PARENTS, AND CAREGIVERS (2012); CLEAR, *supra* note 25, at 5-7; CLEAR & FROST, *supra* note 8, at 137-57; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 95-112 (2006); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 5-6 (2006).

219. Cullen & Gendreau, *supra* note 9.

220. ANDREWS & BONTA, *supra* note 9, at 403-22, 451-57; see also MACKENZIE, *supra* note 89.

221. See generally John E. Eck, *Science, Values, and Problem-Oriented Policing: Why Problem-Oriented Policing?*, in POLICE INNOVATION: CONTRASTING PERSPECTIVES 117 (David Weisburd & Anthony A. Braga eds., 2006).

222. Lawrence W. Sherman, *Criminology as Invention*, in WHAT IS CRIMINOLOGY? 423 (Mary Bosworth & Carolyn Hoyle eds., 2011).

223. See JACOBSON, *supra* note 25.

dered if good intentions are not reinforced by sound policy and practice. It is instructive in trying to identify key reasons why downsizing might be thwarted or be possible. And it is directive in attempting to outline principles to be considered in efforts to reduce prison populations.

In short, downsizing prisons represents both a critical opportunity to implement a liberal or progressive vision for corrections and a dangerous opportunity for failure and a reversion to a brand of corrections that is punitive and devoted to the bureaucratic management of the offender flow into, out of, and back into institutions.²²⁴ At this point, it is important that as much scholarly effort be put into understanding how mass imprisonment can be reversed as has been put into understanding why this correctional tsunami swept across the United States and left enormous wreckage in its wake. Our ignorance about how to solve the crisis of mass imprisonment—our “stupidity”—must be recognized and overcome. Doing so studiously and with determination is essential if the promise of downsizing prisons is to be met.

224. See SIMON, *supra* note 48.