

Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations¹

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Beginning in the 1970s, the United States embarked on a three-decade-long shift in its penal policies. In these years, state and federal governments tripled the percentage of convicted felons sentenced to confinement and doubled the length of their sentences. As a consequence of these changes, punishment in the United States has become an outlier, not only among prevailing practices in the Western world, but also in comparison to the United States' own long-standing practices.² United States imprisonment rates are now almost five times higher than the historical norm prevailing throughout most of the twentieth century, and they are three to five times higher than in other Western democracies.³

The amount of writing by scholars and analysts during this thirty-year period regarding the exceptional nature of U.S. penal policy could fill a library. Early on, many writers suspected that the U.S. prison population was too small and needed to grow.⁴ But in recent years, as the growth of the prison population reached levels that were well beyond those anyone had anticipated and that few believed were needed, the literature about the U.S. prison system has shifted to emphasize deep concerns about the wisdom of our burgeoning prison population. Today, a broad consensus has emerged

¹ This paper draws upon three recent volumes in which the authors were principal writers: TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED PLACES WORSE* (2007); JAMES AUSTIN ET AL., *UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION* (2008), available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf>; and James Austin, *Reducing America's Correctional Populations* (2009) (unpublished working paper for the National Institute of Corrections, on file with author).

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² For the data in support of this conclusion, see MARIE GOTTSCHALK, *THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 1–6 (2006); *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 279–92 (Marc Mauer & Meda Chesney-Lind eds., 2002); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 12–15 (2006); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3–17 (2003).

³ See AUSTIN ET AL., *supra* note 1, at 3–4; MARC MAUER, *SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION*, 1–2 (2003), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_comparative_intl.pdf.

⁴ See, e.g., EDWIN ZEDLEWSKI, *U.S. DEPT OF JUSTICE, MAKING CONFINEMENT DECISIONS* (1987).

that the prison population is too large.⁵ At the same time, pressing fiscal demands at the state and federal levels have convinced many policymakers that the current system is no longer affordable.⁶

The scholarly debate about the prison population today considers three main topics. First, there is contention about the degree to which the current drop in crime is a consequence of the larger number of prisoners—a question we consider briefly in the next section of this Essay. Work addressing this concern tends to show that incarceration rates are not as strongly connected to public safety as one would ordinarily think. Second, there is a growing literature on the unintended consequences of imprisonment; in particular, new studies show that high rates of incarceration have come at an indefensible cost in terms of racial and social inequality and have damaged children, families, and communities.⁷ Works within this literature tend to argue for the need to reduce prison populations as a simple matter of social justice. Third, there is a literature that proposes strategies for reducing incarceration.⁸

This Essay contributes to the last topic—what to do about mass incarceration. It is not an argument that “something needs to be done.” We believe that point has been made eloquently and convincingly by a solid body of work, some of which includes our own previous writing.⁹ Instead, our purpose in this Essay is to chart a broad strategic course for anyone seeking to reduce imprisonment.

This Article is needed because policymakers’ work on incarceration is hampered today by two important misunderstandings. To begin with, too many policymakers assume that the connection between incarceration rates and crime rates is greater than it actually is, and so they are much more cautious about reducing incarceration rates than they need be. They also fail to take account of what we refer to as “the iron law of prison populations”—that the total number of prisoners behind bars is purely and simply a result of two factors: *the number of people put there* and *how long they stay*. As a result, policymakers spend too much time considering policy proposals that will have little effect on incarceration rates.

In this Essay, we make three points. First, we show why the link between incarceration rates and crime rates is not as great as many policymakers presume. We do so in order to make the case that an aggressive program

⁵ Compare conservative writers, such as John DiIulio, *Two Million Prisoners are Enough*, WALL ST. J., Mar. 12, 1999 at A14, and BERT USEEM & ANNE MORRISON PIEHL, PRISON STATE: THE CHALLENGE OF MASS INCARCERATION 169–79 (2008), with their more liberal counterparts, like STEVEN RAPHAEL & MICHAEL A. STOLL, DO PRISONS MAKE US SAFER? 20–22 (2009).

⁶ RYAN S. KING, SENTENCING PROJECT, THE STATE OF SENTENCING 2008: DEVELOPMENTS IN POLICY AND PRACTICE 1 (2009), available at http://www.sentencingproject.org/Admin/Documents/publications/sl_statesentencingreport2008.pdf.

⁷ See CLEAR, *supra* note 1; WESTERN, *supra* note 2, at 85–105, 131–162.

⁸ A recent review of some of these strategies is provided in MICHAEL JACOBSON, DOWN-SIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION 173–214 (2005).

⁹ See generally CLEAR, *supra* note 1; AUSTIN ET AL., *supra* note 1; Austin, *supra* note 1.

to reduce prison populations can proceed without a substantial negative impact on public safety. We then describe the iron law of prison populations. Finally, taking advantage of this *iron* law, we propose a set of penal changes that, if implemented, would cut the correctional population roughly in half and return the prison system to an incarceration rate similar to that of almost thirty years ago—before the trend toward mass incarceration picked up steam. These changes would reverse the trend with limited impact on public safety. We begin the Essay by explaining why.

I. THE CONNECTION BETWEEN CRIME RATES AND INCARCERATION RATES

As David Garland once noted, it would be silly to argue that there is no connection between incarceration rates and crime.¹⁰ After all, it takes a crime to put someone behind bars, and surely imprisonment has some suppression effect on crime. Thus, as crime rates rise, imprisonment rates might also be expected to rise. When this occurs, crime rates might be expected to fall as a result. Empirical studies confirm this pattern, but the size of the impact in both directions is surprisingly small. In fact, in terms of the big picture, today's crime rate is roughly what it was in the early 1970s, but the incarceration rate then was one-sixth what it is today. Moreover, state incarceration rates and state crime rates have a mildly positive correlation, although not a strong one.¹¹

Several recent studies have attempted to calculate the relationship between the size of the prison population and crime. Their findings depend upon the time period they study and whether they analyze national patterns or provide state-specific estimates. Studies investigating national-level patterns from the mid-1980s to the early 1990s estimate that prison population sizes have a large effect on crime.¹² Later studies, especially those that investigate the impact of incarceration growth patterns at state and local levels,¹³ find much smaller effects, even approaching zero. A consensus has emerged among criminologists that the impact of imprisonment on crime is modest compared to other factors.¹⁴

¹⁰ DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 18–19 (1993).

¹¹ RYAN S. KING ET AL., SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP (2005), available at http://www.sentencingproject.org/Admin/Documents/publications/inc_iandc_complex.pdf.

¹² See, e.g., Stephen D. Levitt, *The Effect of Prison Population on Crime Rates: Evidence From Prison Crowding Legislation*, 111 Q. J. ECON. 319 (1996); Thomas B. Marvell & Carlisle E. Moody, *The Impact of Prison Growth on Homicide*, 1 HOMICIDE STUD. 205–233 (1997).

¹³ See, e.g., Tomislav Kovandsic & Lynne M. Vieraitis, *The Effect of County-Level Prison Populations on Growth in Crime Rates*, 5 CRIMINOLOGY & PUB. POL. 213, 215 (2006). See also WESTERN, *supra* note 2, at 182; Peter Reuter & Shawn Bushway, *Revisiting Incapacitation: Can We Generate New Estimates?*, 23 J. QUANTITATIVE CRIMINOLOGY 259 (2007).

¹⁴ See, e.g., DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME (2007), available at http://www.vera.org/publication_pdf/

There are several reasons why the size of the prison population has so little to do with crime, including one crucial limit on the penal system's ability to affect crime. That is, when one person is locked up, another person frequently comes along to replace him, thereby maintaining the rate of crime. This is particularly true for drug-related crime.¹⁵ But it is also true for much of the crime committed by young men in groups, because loosely formed and intermittently criminally active groups quickly find new members when old ones go to prison.¹⁶ Thus, the generally increased likelihood that a felony conviction will lead to imprisonment has resulted in an increased number of people going to prison, but it has not produced a decrease in the criminal activity of those who remain behind.

What would happen if we increased the prison-release rate?¹⁷ First, the size of the prison population would drop. But what would happen to crime rates? Increasing the rate of release would increase the number of people reentering society from prison, certainly a risk factor for crime rates. Yet recent studies show that the length of stay in prison is not associated with a change in the risk of recidivism.¹⁸ So sending people to prison for shorter periods would not make them more likely to commit crimes upon release.

Undeniably, a larger release cohort will have some effect on crime rates. But there are good reasons to think that the overall risk would be small.¹⁹ One study of the nation's 1994 prison release cohort found that it accounted for only five percent of all arrests for felonies in the three-year time period that followed its release, and it produced only one percent of arrests for violent crimes.²⁰ Even though people released from prison are themselves at a high risk of committing new crimes, they commit only a small fraction of all crimes in any given year. Given that prisoners do not become less likely to commit crimes upon release as they spend more years in prison, and given that the contribution of former inmates to the overall

379_727.pdf; PEW CTR. ON THE STATES, *THE IMPACT OF INCARCERATION ON CRIME: TWO NATIONAL EXPERTS WEIGH IN* (2008), available at <http://www.pewcenteronthestates.org/uploadedFiles/Crime%20Incarceration%20QA.pdf>.

¹⁵ See KING ET AL., *supra* note 11, at 6. For a journalistic account of this phenomenon, see DAVID SIMON & EDWARD BURNS, *THE CORNER: A YEAR IN THE LIFE OF AN INNER-CITY NEIGHBORHOOD* (1997).

¹⁶ Marcus Felson, *The Process of Co-offending*, in *THEORY FOR PRACTICE IN SITUATIONAL CRIME PREVENTION* 149 (Martha J. Smith & Derek B. Cornish eds., 2003).

¹⁷ We return to this question later in the paper. See *infra* Part V.B.2.

¹⁸ Daniel S. Nagin et al., *Imprisonment and Reoffending*, in 38 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* (forthcoming 2009).

¹⁹ Of course, no matter how small the risk, the fact that more than 700,000 prisoners are released each year already has the capacity to alarm people, so we can imagine how policy-makers would feel about an increase in that number. See HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, *PRISONERS IN 2007*, at 3 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>.

²⁰ PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1994*, at 5 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>. Higher estimates have been made by Richard Rosenfeld, et al., *The Contribution of Ex-Prisoners to Crime Rates*, in *PRISONER REENTRY AND CRIME IN AMERICA* 80 (Jeremy Travis & Christy Visher eds, 2005).

crime rate is relatively small, increasing the prison release rate would seem to have little disadvantage. Certainly, some prisoners will commit crimes upon release. However, we can assume these individuals would commit these crimes upon their release at a later date anyway, and it is wildly impractical (and entirely inconsistent with current practice) to propose keeping all potential recidivists incarcerated permanently.

There is further good news: as the prison population drops, the number of people available to be released from prison would also drop. So in the later years of a plan to accelerate prison releases, the size of the reentry cohort—the one we are most worried about for new crimes—would *also drop*. In other words, an accelerated release program moves the risk of new offenses to an earlier period of time, purely as a consequence of an increase in the cohort size. But it does so in a trade for an equivalent *reduction* in the risk of new offenses at the later time, as the release cohort gets smaller. There is even better news for those reformers who would reduce the cohort who enter prison in the first place. The same studies that now show length of stay to have no relationship to rate of recidivism also show that *going to prison in the first place* does not reduce the likelihood that a criminal offender will be a repeat offender and may make it marginally higher.²¹

The conclusion we can draw from this analysis is that the size of the prison population and the amount of crime are related, but not strongly. In particular, the speed at which people are released from prison is not related to their likelihood of staying crime-free. This suggests that prisoners can serve shorter sentences without triggering an increase in the crime rate. Furthermore, maintaining a large prison population does not necessarily significantly decrease the number of crimes committed. So a fairly substantial amount of leeway exists to change the rate at which people are released from prison without much long-term net impact on public safety.

In other words, this is an area where policymakers can innovate without imperiling the public, certainly in the long term. The remainder of this Article addresses the question: What kind of innovations ought they consider?

II. THE IRON LAW OF PRISON POPULATIONS

In addition to assuming too great a relationship between high imprisonment rates and low crime rates, policymakers too often ignore the way prison populations grow. They commonly engage in debates over “rehabilitation versus punishment,” and they are deeply invested in advocacy for drug treatment programs and reentry planning. The amount of attention absorbed by the Second Chance Act of 2007 is a great example.²² This legisla-

²¹ See, e.g., Paul Nieuwbeerta, et al., *The Relationship Between First Imprisonment and Criminal Career Development: A Matched Samples Comparison*, J. QUANTITATIVE CRIMINOLOGY (forthcoming).

²² Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified as amended in scattered sections of 42 U.S.C.).

tion provides extensive federal monetary support for states' efforts to improve services and supervision for people who are released from prison. One might argue that this Act is a good thing, but it will clearly not do much about prison populations. Why? Because all of its effects are side-issues that ignore the way prison populations are created.

The *Iron Law of Prison Populations* states that the size of a prison population is completely determined by two factors: *how many people go to prison* and *how long they stay*. If either of these factors changes, the size of the prison population will also change. The corollary to this iron law is equally important: There is no way to change the prison population without changing either the number of people who go to prison or how long they stay there.

Viewed in light of the iron law, the growth of the prison population in the United States can be divided into three rough periods. In the 1970s, the prison population grew because the crime rate grew, resulting in greater numbers of people going to prison. In the 1980s, and stretching into the early 1990s, a host of sentencing policies restricted the use of probation as a sentence for felons, causing a substantial increase in the number of people entering prison during a period when crime rates were semi-stable.²³ After that, legislation that enhanced penalties for felonies greatly increased the average length of prison terms, which led to growing prison populations even as crime rates dropped and the number of people entering prison began to stabilize. The result was a growing backlog of people serving long sentences, who made up a permanent population base upon which the flow into and out of prison was grafted.

There is substantial debate about whether these changes in penal policy were wise. But there can be no doubt that the recent growth in prison populations in the United States can be viewed almost entirely as a matter of changes in penal policy taking place since 1980. This history supports our argument that America will have whatever prison population its penal policies create. It is even conceivable that, with a new set of policies, the prison population could be cut in half—and this could be done without greatly affecting crime rates in the long run.²⁴ But the other extreme is also true. With over five million people under correctional control who are *not* behind bars, the prison population could, through legal and administrative policy, be *doubled*, again without much impact on crime. The point is that the size of the prison population is a matter of penal policy, and over the last thirty-six years, the United States has built a policy designed to grow prisons.

²³ Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State Between Liberty and Recombination*, in *PRISONER REENTRY AND CRIME IN AMERICA* 50–51 (Jeremy Travis & Christy Visher eds., 2005).

²⁴ A short-run effect might occur because a cut in the prison population would result in a larger release cohort. But the impact of releases on crime would soon approach zero, as the prison population reached a new homeostasis.

III. THE FAILURE OF THE CONTEMPORARY DEBATE ON MASS INCARCERATION

Despite this history, policymakers focused on reducing mass incarceration have failed to heed the iron law's two conditions. Following three decades of policies that increased the prison population through changes in sentencing and (to a lesser extent) post-release supervision, policymakers continue to act as though they think they can reduce the size of the prison population without directly taking on the rate and length of sentences. Table 1 lists recent sentencing reforms passed by seventeen states that were designed to reduce incarceration and were widely publicized in a report by *The Sentencing Project* this year.²⁵ What can be seen from this list is how little these reforms have to do with either the number of people being sentenced to prison or their lengths of stay there. Some alter the nature of community supervision, and so arguably address the rate at which felons are recycled into prison by being revoked from community supervision. And some aim to make non-incarceration alternatives more attractive by setting up new or more incentivized systems of community supervision. Some set up advisory commissions to provide strategies for reducing prison costs. But there is not a single new law or initiative designed to change the length of sentences or to reduce restrictions on the use of probation as a sentence.

Sentencing reforms can succeed in reducing mass incarceration only if these elements are at their core. It has already been remarked that the agenda of sentencing reform is easily side-tracked. In a recent article in this Journal's online edition, Douglas A. Berman argued that a focus on innocence and debates about the death penalty have made it harder to have a serious, engaging discussion about mass incarceration.²⁶ But these are not the most significant distractions from our necessary national debate about mass incarceration. Far more important are the emphases on reentry, alternatives to incarceration programs, and the philosophy of rehabilitation, which often serve as crucial distractions from the agenda of mass incarceration, a problem that can be addressed only with a focus on the iron law's two elements.

IV. REHABILITATION PROGRAMS

When people hear complaints about mass imprisonment they often automatically assume that opposition to big prisons means favoring rehabilitation. But the debate between punishment and treatment is unwarranted, as they are not opposed. They are merely different coercive penal strategies.

²⁵ See KING, *supra* note 6, at 2.

²⁶ Douglas A. Berman, *Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities*, HARV. L. & POL'Y REV. ONLINE 1, 8 (2008), <http://hlpronline.com> (follow "Reorienting Progressive Perspectives for Twenty-First Century Punishment Realities" hyperlink).

Indeed, some judges will say that they send people to prison for rehabilitation purposes.

TABLE 1. SEVENTEEN STATE REFORMS TO REDUCE INCARCERATION

Arizona	Established probation revocation and crime reduction performance incentive system
Arkansas	Declared marijuana enforcement lowest law enforcement priority (Fayetteville)
Colorado	Amended criminal code to permit certain juveniles charged with murder to have their cases adjudicated in the Youthful Offender System
Connecticut	Authorized racial and ethnic impact statement to be prepared in conjunction with certain criminal justice legislation
Hawaii	Declared marijuana enforcement lowest law enforcement priority (Hawaii County)
Illinois	Created Commission to Study Disproportionate Justice Impact
Iowa	Authorized racial and ethnic impact statement to be prepared in conjunction with certain criminal justice legislation
Kentucky	Amended parole release policies and expanded home incarceration for persons convicted of certain offenses; created committee to study Kentucky Penal Code and make recommendations for reform; rescinded certain requirements for persons seeking to have voting rights restored after the completion of sentence
Louisiana	Expanded dismissal of prosecution to persons who have completed a drug court diversion program
Massachusetts	Declared marijuana enforcement lowest law enforcement priority
Mississippi	Amended parole release policies; expanded eligibility for compassionate release
New Jersey	Expanded drug court eligibility and permitted early termination of probation supervision for persons making exemplary progress
Pennsylvania	Created Recidivism Risk Reduction Incentive sentence to provide for accelerated release for eligible individuals upon completion of certain programs
South Carolina	Established the South Carolina Sentencing Reform Commission
Utah	Appropriated state funds for the provision of postsecondary education for persons in prison
Vermont	Expanded substance abuse programming for persons in prison and under community supervision and permitted courts to reduce probation sentence for persons making progress under supervision
Wisconsin	Established a coordinated strategy for the collection and analysis of criminal justice data for the purposes of identifying unwarranted racial disparities and created a Racial Disparities Oversight Commission

The more important point is that rehabilitation programs, no matter how good, cannot by themselves truly substantially reduce incarceration rates by reducing recidivism. It is true that a growing body of work shows, quite persuasively, that certain kinds of programs reduce recidivism rates more than trivially.²⁷ Especially if our aim is to help those who have broken the law become restored to their communities as pro-social citizens, we would be unwise to ignore this work. But even in a best-case scenario—meaning that rehabilitation programs now offered to a fraction of the population would be brought to scale, so that every person behind bars would be exposed to an effective program—rehabilitation programs would have relatively modest effects. Recidivism rates might fall from forty percent to thirty-two percent. By extension, instead of 300,000 parole violators a year, there would be 240,000. All other things remaining equal, instead of 700,000 prison admissions a year, there would be 640,000.²⁸ This is a non-negligible improvement but hardly a program that would bring mass incarceration down to a new homeostasis. To achieve even these reductions would require bringing rehabilitation programs to scale for everyone at an unrealistic rate, given current knowledge and capacity. In other words, rehabilitation may be the right thing to do but not because it overcomes mass incarceration.

V. ALTERNATIVES TO INCARCERATION

A panoply of strategies, generally thought of as “alternatives to incarceration,” have been offered to entice judges to place offenders into community programs rather than incarceration, including, for example, intensive probation programs and drug treatment diversion programs. However, these programs rarely substantially replace incarceration and drive down incarceration rates. There are two reasons. First, to be politically feasible, most “alternatives” have to promise to be tough and uncompromising. As a result, they end up having high rates of “technical” failures, which occur when program participants are unable to live under the programs’ strict rules.²⁹ Second, these strategies typically promise not to put the public at risk, so they forego dealing with serious law violators and instead deal with law-breakers who would not be sent to prison anyway. In the first case, these tougher “alternatives” increase incarceration by sending people back to

²⁷ LAWRENCE SHERMAN ET AL., U.S. DEP'T OF JUSTICE, NAT'L INST. JUSTICE, PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING 6–12 (1998), available at <http://www.ncjrs.gov/pdffiles/171676.pdf>.

²⁸ For estimates of the size of the rehabilitation effect, see Don A. Andrews & Craig Dowden, *Managing Correctional Treatment for Reduced Recidivism: A Meta-analytic Review of Programme Integrity*, 10 LEGAL & CRIMINOLOGICAL PSYCHOL. 173 (2005) and Mark Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297 (2007).

²⁹ Susan Turner et al., *Evaluating Intensive Supervision Probation/Parole (ISP) for Drug Offenders*, in 38 CRIME & DELINQUENCY 539, 553–554 (1992).

prison at higher rates; in the second, they are irrelevant to incarceration rates.

A. *Reentry Programs*

Interest in reentry programs has been intense ever since the National Institute of Justice announced about a decade ago that nearly 700,000 people reenter communities from prison each year.³⁰ It was as though nobody had realized before how many people were returning to communities from prison. Researchers and policymakers have become focused on this issue. The potential for improving the prospects of those reentering society from prison is significant now that the problem has surfaced and received so much public attention, but there is at least an equal chance that this new attention will backfire by promoting the usual kinds of changes: closer surveillance, more restrictions, and greater emphasis on being “tough.”

But the central problem is even more basic. Even if reentry programs are wildly successful—and there is no reason to think they will be, given current studies—they cannot solve the problem of mass incarceration.³¹ The inescapable fact is that reentry comes after the person has already gone to prison. We have 700,000 people in reentry each year because we have removed each of them in prior years. Our concern with reentry cannot solve the problem of mass imprisonment because it is, itself, a consequence of mass imprisonment.

B. *The Obvious Need: Sentencing Reform*

Any solution to the problem of mass incarceration must begin with two points. First, programmatic tinkering has not reduced the prison population to date, and it will never have much effect, even under the most optimistic assumptions. Second, to overcome mass incarceration requires that we incarcerate fewer people. There is no getting around it. If the problem is mass imprisonment, then the solution is to change the laws that send people to prison and sometimes keep them there for lengthy terms. *That means reducing the number going in, their length of stay, or both.*

1. *The Number Going In*

There are two main ways to reduce the number of people entering prison. They are, first, to eliminate mandatory sentencing and, second, to eliminate technical revocations of probation and parole.

³⁰ JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 35 (2005). The number of people released from prison has been growing and now exceeds 720,000.

³¹ James A. Wilson & Robert C. Davis, *Good Intentions Meet Hard Realities: An Evaluation of the Project Greenlight Reentry Program*, 5 *CRIMINOLOGY & PUB. POL'Y* 303–38 (2006).

a. *Mandatory Sentencing*

The main reason for prison growth in the United States in the 1980s was a reduction in the use of probation as a sentence for people convicted of felonies, especially drug crimes. Before laws mandating prison sentences in place of probation came into effect, drug offenders were a small fraction of the U.S. prison population, about six percent; they are now about twenty percent.³²

Eliminating mandatory prison terms across the board would have a substantial impact on the size of the prison population. Much of this impact would come from having fewer people serve time for drug-related crimes. Enabling judges to choose non-prison penalties for other kinds of felonies would also have an effect on the size of the prison population, but because many of these felonies are serious enough to warrant some loss of freedom—and often prison sentences result from defendants' prior felony records—the overall impact of eliminated non-drug mandatory penalties would likely be small.

b. *Technical Revocation of Probation and Parole*

When a person who is under community supervision fails to comply with the requirements set by probation or parole, such as “reporting as directed,” the privilege of community supervision can be revoked, and the person can be sent back to prison or jail, even if no new crime is alleged. This is referred to as a “technical revocation” of probation or parole, and at least one-third of prison admissions come by this route.³³ It is notable that these prisoners are people who have not been convicted of new crimes but are returned to prison as a consequence of rules violations. Prohibiting reincarceration for technical violations of probation or parole could cut the number of prisoners substantially.

Undoubtedly, in some of these cases, the probation or parole violation involves the commission of a new crime; in such cases, violators will likely end up in prison if the option of technical revocation is eliminated. In California, for example, it has been estimated that as many as eighty percent of “technical” violations involve allegations of criminal misconduct.³⁴ Yet one study of parole revocations in that state found that only sixteen percent of those criminal allegations involved serious and/or violent felonies. The other alleged crimes are less serious; they are the kinds of crime that quite often result in sentences of probation when fully prosecuted.³⁵ And California, by all accounts, presents the most extreme version of this overuse of technical

³² See CLEAR, *supra* note 1, at 54–56.

³³ JACOBSON, *supra* note 8, at 146.

³⁴ See Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST.: REV. RES, 206 (2008)

³⁵ JEREMY TRAVIS, URBAN INST., PAROLE IN CALIFORNIA, 1980–2000: IMPLICATIONS FOR REFORM (2003), available at http://www.urban.org/UploadedPDF/900598_Parole_in_Calif.pdf.

violations for alleged misconduct; in other states the problem is less dramatic, and technical revocations are less likely to reflect uncharged criminal activity.³⁶ As many as one-fourth of technical violations nationwide involve no allegation of new criminal conduct.³⁷

The problem of misconduct on supervision has been the subject of extensive discussion. Most experts recognize that cycling minor violations, even criminal ones, through prison is expensive and counterproductive. They propose developing a range of sanctions that replace return to prison and yet reinforce the importance of complying with supervision requirements and avoiding infractions. Referred to as “graduated problem-solving responses,” these strategies deal with misconduct through a variety of in-community controls in place of return to prison. It has been estimated that most low-level violations, even those that involve minor crimes, can be dealt with through such mechanisms.³⁸

If technical revocations are eliminated and graduated strategies put into place, the rate of parolees returning to prison will be cut substantially, perhaps as much as two-thirds. And because there is no evidence that technical revocations prevent crime, a policy that eliminates them might be pursued with minimal public safety implications.

2. *The Length of Incarceration*

In the last thirty years, the average time served by people going to prison has almost doubled, and the amount of time felons spend under parole supervision has also increased.³⁹ Lengthening prison terms and high rates of technical revocation have resulted in a consistently growing prison population, even in the face of declining crime rates. Considerably rolling back the length of prison terms would leave the United States with a smaller prison population and a punitive policy more in line with those of other Western democracies. Because decreasing a prisoner’s length of stay does not lead to an increased chance of recidivism (if anything, the relationship is in the other direction), and because almost everyone going to prison gets out eventually, we can reduce sentence lengths substantially without affecting crime rates or prison reentry rates.⁴⁰

A crucial policy target is extremely long sentences. They used to be rare in the United States but are becoming more common. Currently, 140,000 prisoners are serving life terms (twenty-eight percent without possibility of parole), and one-fifth of prisoners serve sentences with a minimum term of twenty-five years or longer. People who receive sentences of this magnitude

³⁶ See JACOBSON, *supra* note 8.

³⁷ JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003). See also Petersilia, *supra* note 35.

³⁸ See, e.g., AMY SOLOMON, ET AL., URBAN INST., PUTTING PUBLIC SAFETY FIRST: 13 PAROLE SUPERVISION STRATEGIES TO ENHANCE REENTRY OUTCOMES (2008), available at http://www.urban.org/UploadedPDF/411791_public_safety_first.pdf.

³⁹ See Austin, *supra* note 1, at 12, 20.

⁴⁰ See Nagin et al., *supra* note 18, at 51–56.

nearly always have committed atrocious acts that shock the conscience,⁴¹ and their lengthy sentences often result from decisions imposed at a time of heightened public outrage in the face of the crime. Yet with little exception, the outer years of these terms have no public safety value—most people who serve long sentences and reach their forties or fifties pose little threat to the public.⁴² Placing an upper limit on sentences and making release more readily available to people in their fifties would help reduce incarceration with little effect on public safety.

These are the implications of the iron law. To affect the size of prison populations, we have to change the dynamics that produce prison populations by altering how many people go to prison and how long they stay. This means reform of sentencing and parole practices. We have already recommended placing upper limits on sentences and making release more readily available for older prisoners. What other specific reforms might be implemented?

a. The Big Three: Length of Stay, Mandatory Penalties for Drugs, and Technical Revocation

In a recent report, we showed the likely impact on prison populations of adjusting three major pressure points on the prison population.⁴³ We chose those pressure points because they, more than any others, were the places of change in the 1980s and 1990s that produced the prison population we have today. Here, we summarize these recommendations to illustrate the power of the iron law as an organizing principle for prison reform.

Table 2 shows the cumulative effects on state prison populations of implementing the following reforms over a five- to eight-year period of time:

1. Reduce length of stay (LOS) for sentenced prisoners to 1988 levels;
2. Divert technical parole and parole violators from prison and reduce their LOS;
3. Eliminate mandatory penalties for drug crimes.

These reforms would cut the incarceration rate by about half. They would also reduce the state and federal prison populations by over 400,000 inmates.

⁴¹ The exception is prisoners convicted under extreme versions of three-strikes legislation, such as that of California. Cal. Penal Code §§ 667(e)(2)(A), 1170.12(c)(2)(A)(ii) (1994).

⁴² See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, CRIMINOLOGY (forthcoming Aug. 2009).

⁴³ See AUSTIN ET AL., *supra* note 1.

TABLE 2. PROJECTED EFFECTS OF THREE RECOMMENDED REFORMS

State Prison Admissions	Current Length of Stay and Admissions			All Reforms Plus Diversion of Victimless Crimes		
	Admits	LOS	Prisoners	Admits	LOS	Prisoners
Total	684,656		1,401,605	418,109		731,077
New Court Admissions	351,510		860,321	311,965	21	551,168
Violent	91,393	49	373,186	91,393	34	261,231
Property	101,938	23	195,381	101,938	16	136,767
Drug	112,483	23	215,593	84,362	16	113,186
Public Disorder	45,696	20	76,161	34,272	14	39,984
Technical Probation Violators	143,792		351,931	94,310	21	176,950
Violent	37,386	49	152,659	33,647	34	96,175
Property	41,700	23	79,924	31,275	16	41,960
Drug	46,013	23	88,192	25,883	16	34,726
Public Disorder	18,693	20	31,155	3,505	14	4,089
Technical Parole Violators	189,354	12	189,354	11,835	3	2,959
U.S. Population	303,000,000			303,000,000		
Incarceration Rate per 100,000 citizens	463			241		

b. Companion Efforts: Community Penalties

Two additional reforms might be enacted as complements to the big three strategies described above. They are complementary in the sense that they are not directly related to the iron law; they do not alter the rate of prison commitments or the length of stay in prison. But they do relieve pressure on the non-prison alternatives to incarceration, thus enhancing the capacity of these alternatives to absorb the increased demand they will experience when the “big three” are put into effect. The complementary strategies are:

1. Reduce length of stay for persons placed on probation and parole;
2. Make greater use of fines, restitution, and community service in lieu of probation.

Presently, there are over five million people on probation and parole. This number is about three times higher than it was in the 1970s, when the prison boom began.⁴⁴ Thus, the same kind of expansion that took place with regard to prison populations has also taken place in the use of these non-imprisonment criminal penalties. These penalties are subject to their own version of the “iron law”: the size of probation and parole populations de-

⁴⁴ See CLEAR, *supra* note 1, at 15–48

pend on the number of people placed under community supervision and their length of stay under that sanction. A companion effort to the one designed to reduce prison populations could target reductions in the size of community supervision populations.

Studies show that the effects of parole supervision on recidivism fade after about a year, and longer supervision periods are not associated with higher success rates.⁴⁵ This means that community supervision caseloads can be reduced substantially, merely by reducing length of stay on supervision.⁴⁶ Finally, use of fines, restitution, and community service as the *sole sanctions* would make our penalties look more like those of other Western countries.⁴⁷

The impact of these additional changes on parole and probation populations is shown in Table 3.

TABLE 3. PAROLE AND PROBATION NUMBERS AFTER CHANGES IN ADMISSIONS AND LOS

Population	Current LOS and Admissions			New LOS – Only			Plus Diverted Probationer/ Parolees		
	Admits	LOS	Population	Admits	LOS	Population	Admits	LOS	Population
Probation	2,362,100	21	4,190,896	2,362,100	14	2,755,783	1,771,575	14	2,066,838
Parole	512,800	17	710,065	512,800	10	427,333	384,600	10	320,500
Totals	2,874,900		4,900,961	2,874,900		3,183,117	2,156,175		2,387,338

c. *Projected Impact on Mass Incarceration*

Table 4 shows the grand totals for all correctional populations, including the federal prison system and the jails, that would follow from adoption of our strategies.⁴⁸ We have built in the reductions indicated in the two preceding tables. We have also projected modest reductions in the nation’s jail population based on what appears to be a growing trend of reduced arrest rates, which fuel jail bookings.⁴⁹ If our proposals are implemented, there will also be fewer jail bookings, as fewer probationers and parolees will become violators and be required to remain in jail until they receive their revocation hearings. The federal prison population is also projected to de-

⁴⁵ See, e.g., Avinash Singh Bhati, *Investigating the Dynamics of the Criminal Recidivism Process* (Urban Inst. Working Paper, 2004), cited in Joan Petersilia, *Employ Behavioral Contracting for “Earned Discharge” Parole*, 6 CRIMINOLOGY & PUB. POL’Y. 807, 810 (2007); Patrick C. Jackson, *Some Effects of Parole Supervision on Recidivism*, BRIT. J. CRIMINOLOGY, Jan., 1983, at 17.

⁴⁶ AUSTEN ET AL., *supra* note 1, at 24.

⁴⁷ See Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 50 (1990).

⁴⁸ See Austin, *supra* note 1, at 35.

⁴⁹ See *id.*

crease as Truth in Sentencing laws are relaxed,⁵⁰ and judges make greater use of probation. With these two additions, as shown by the chart, an overall fifty percent reduction in correctional population will be achieved by 2016. Of course, these reductions would occur gradually, and the amount of time they would require would depend on the precise nature of the policy reforms chosen to achieve them. Policy reforms requiring the enactment of new legislation or modification of existing laws would take longer to implement, and their effects would therefore be more delayed.

TABLE 4. SUMMARY OF THE RECOMMENDATIONS' IMPACT ON CORRECTIONAL POPULATIONS

Correctional Populations	Current	New LOS	New LOS and Diversions	Plus Diverted "Victimless" Crimes	% Change
Grand Totals	7,496,425	5,126,628	4,071,866	3,842,879	-49%
State Prisons	1,398,698	1,037,930	803,948	731,077	-48%
Federal Prison	199,618	125,000	100,000	100,000	-50%
Probation	4,293,163	2,755,783	2,066,838	2,066,838	-52%
Parole	824,365	427,333	320,500	320,500	-61%
Local Jails	780,581	780,581	780,581	624,465	-20%

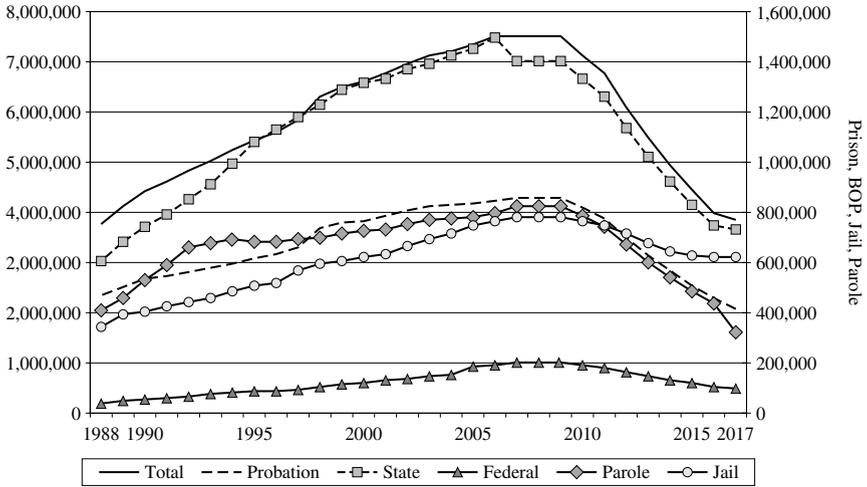
It is worth noting that there is nothing truly revolutionary about these proposals. They are "evidence-based,"⁵¹ having been shown to be effective in reducing correctional populations without adversely impacting on crime or recidivism rates.⁵² The point follows: these proposals are essentially public safety neutral. To the degree that an increase in the release cohort will carry with it a slight increase in felony commissions from that cohort, at least in the short term, there is an effect. But, as discussed in Part I, it is entirely an effect of moving crimes to an earlier point in time, as releases occur earlier. Once the release cohort bubble has worked its way through the system, people in reentry will begin to account for *fewer* crimes, because there will be fewer people in reentry. That is, over a short period of time, any increases in crime due to increases in prison releases will be counteracted by equivalent decreases in crime as the number of releases shrinks to a smaller level than before.

⁵⁰ See JACOBSON, *supra* note 8.

⁵¹ For a review of evidence-based policies in corrections, see Center for Evidence-Based Corrections, <http://ucicorrections.seweb.uci.edu/pubs> (last visited Jul. 10, 2009)

⁵² Indeed, a strong case can be made that public safety could be greatly enhanced using the billions of dollars that would be saved each year by the states. They could invest those funds in preventive programs in the communities that produce the vast majority of admissions to the correctional system.

PAST AND PROJECTED DECLINES IN CORRECTIONAL POPULATIONS
1988-2016



VI. DOING SOMETHING ABOUT MASS INCARCERATION

It is clear that the criminal justice system today feeds upon itself. There are many ways this is true. Increased police presence in a “troubled” neighborhood increases the probability of detecting violations of the law and subjecting people in those places to criminal justice. When concentrations of arrest get to a certain point, crime begins to rise rather than fall, creating more eligibility for detection and arrest. This cycle is fueled as more adults go to prison in places with more police presence and thus more arrests. In turn, the chances of a child becoming involved in delinquency are increased by having a parent go to prison, in part because socialization and adjustment are affected by loss of the parent. Being exposed to neighborhood violence and being victimized as a child increase the chances of adult criminality. Similarly, a child who becomes involved in the formal juvenile justice system as an adolescent is at greater risk of criminal activity in early adulthood. People who are convicted of crimes as juveniles are targeted for prison terms as recidivists; people who go to prison are more likely to recidivate once again. As crime grows, pressure for more aggressive policing concentrated in problem communities increases, and pressure for more stringent penalties does as well. And so the cycle begins again.⁵³

The cycle described above is now widely viewed as a serious problem, and a situation from which we must move away. But how do we do that? The answer is simpler in principle than we might think, but it will be more

⁵³ For research in support of these conclusions, see generally CLEAR, *supra* note 1.

challenging to implement than we might expect. We got to this place as a consequence of a generation of policymaking. It will take a sustained effort of policymaking to get us out.

There is a temptation to look toward the penal system for the policies we need: better rehabilitation programs, high quality reentry practices, and strong and attractive alternatives to incarceration. These are worthy ideas, but they will not cure the ills that undergird mass incarceration. If we are to take meaningful steps toward decreasing the size of the U.S. prison population, we must change the incarceration policies that produce it.

We must reduce the number of people who go to prison and the length of time they stay there.