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Beyond Budget-Cut Criminal Justice: The Future of Penal Law

Mary D. Fan

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BEYOND BUDGET-CUT CRIMINAL JUSTICE: THE FUTURE OF PENAL LAW*

MARY D. FAN**

American criminal justice is experiencing a perfect storm of budget-cut criminal justice reform and the awakening of courts to the role of checking penal severity. A wave of reforms is sweeping the states as budgetary shortfalls are leading to measures once virtually impossible or very difficult to enact such as expanded early release, conversion of felonies to misdemeanors, and scaling down sentences. On the judicial front, the Supreme Court has resuscitated Eighth Amendment proportionality review and reinvigorated judicial intervention in penal management. This Article explores how these shifts in the social meaning of criminal justice reform from being soft on crime to being fiscally responsible provide both political cover for reform and the potential for garnering bipartisan support. At this important historical juncture, the Article examines how to transition from emergency response to sustainable penal law and policy reform.

Recent cases such as Brown v. Pena and Graham v. Florida demonstrate the utility and wisdom of judicial nudges when penal politics are mired in incapacitation stagnation. Ultimately, however, guides and constraints governing the political branches are needed for sustainable change. The Article analyzes the potential of what it terms “rehabilitation pragmatism” to anchor reforms. Rehabilitation pragmatism is cautious and selective in

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choosing beneficiaries and attentive to the need for evidence of efficacy, cost effectiveness and success. The Article argues that as we turn to such data-driven approaches in decision making, the distribution of benefits and burdens across historically disadvantaged groups should be an important component of efficacy assessments. Performance measures should take into account human and community as well as fiscal costs. The Article also advocates penal impact analysis to curb the tendency to enact a thicket of criminal laws without consideration of systemic costs. Penal impact analysis provides for front-end examination of the fiscal consequences of criminal legislation, curbing the pathological politics of crime.

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INTRODUCTION

A wave of penal law and policy reforms is sweeping the states as severe budget shortfalls are leading to measures once very tough, and arguably virtually impossible, to enact because of the political risk of looking soft on crime. States are implementing reforms such as earlier release of prisoners, conversion of felonies to misdemeanors, and redefining and scaling down the sentences for nonviolent crimes.¹ Exploring alternatives to prison and early release has potential bipartisan support, redefined as a way to curb wasteful and destructive spending rather than being soft on criminals.² The potential of the social meaning shift is demonstrated by recent calls to action by Newt Gingrich and Pat Nolan, and bipartisan measures sponsored in customarily conservative tough-on-crime states such as Texas.³ On the judicial front, the Supreme Court has resuscitated Eighth Amendment proportionality review in the noncapital context

1. See, e.g., Monica Davey, *Safety Is Issue As Budget Cuts Free Prisoners*, N.Y. TIMES, Mar. 4, 2010, at A1 (describing a wave of state reforms relieving budgetary pressures by expanding early release programs and offering sentence reductions); Jessica Fender, *Governor Ritter Signs Bundle of Bills To Promote Rehabilitation of Criminals*, DENV. POST, May 25, 2010, at 1A, available at http://www.denverpost.com/ci_15154787 (reporting on passage of bipartisan measures to relieve the budgetary pressures of incarceration such as scaling down sentences for drug crimes, widening eligibility for parole, and lessening penalties for technical parole violations); Ray Long, Monique Garcia & David Heinzmann, *Truth-Squading the Governor Race*, CHI. TRIB., Oct. 29, 2010, at 6 (noting political fallout from controversial early release reform to reduce budgetary pressure); Marty Roney, *36 States Offer Release to Ill or Dying Inmates*, USA TODAY, Jan. 31, 2011, at 4A (reporting on wave of states enacting early release for ill or dying to cut costs); Cheryl Cadue, *Budget Cuts Challenge Progress Made by States and Elicit Even Smarter Reforms*, ALLBUSINESS (Feb. 1, 2010), <http://www.allbusiness.com/crime-law-enforcement-corrections/corrections-parole/14359499-1.html> (detailing the reinstatement of early release programs to stem budget woes in several states); see also, e.g., Editorial, *Inmates Who Should Walk*, WASH. POST, Feb. 10, 2009, at A16 (detailing a bipartisan plan by Virginia legislators to save taxpayers millions by giving prison officials discretion to release nonviolent offenders up to ninety days earlier).

2. See *infra* Part III.A.

3. The calls to action by Newt Gingrich and Pat Nolan hit newspapers across the nation in January 2011. See, e.g., Newt Gingrich & Pat Nolan, *Right Looking To Lead Fight for Prison Reform*, FORT WAYNE J. GAZETTE, Jan. 12, 2011, at 7A, available at 2011 WLNR 700878; Newt Gingrich & Pat Nolan, *"Right on Crime": Time for Courage on Prison Reforms*, ST. PAUL PIONEER PRESS, Jan. 9, 2011, at B9, available at 2011 WLNR 578735; Newt Gingrich & Pat Nolan, *Save Money, Save Lives*, PITTSBURGH POST-GAZETTE, Jan. 28, 2011, at B7, available at 2011 WLNR 1759279; Newt Gingrich & Pat Nolan, *Saving Money, Saving Lives*, VA. PILOT & LEDGER-STAR, Jan. 19, 2011, at 7, available at 2011 WLNR 1141910; Newt Gingrich & Pat Nolan, *Saving Money, Saving Lives*, WASH. POST, Jan. 7, 2011, at A17, available at 2011 WLNR 1530349; Newt Gingrich & Pat Nolan, *Time To Rethink Rehabilitation*, N.Y. POST, Jan. 8, 2011, at 17, available at 2011 WLNR 551374. For discussion of the bipartisan Colorado and Texas measures, see *infra* Part IV.A.

to constrain penal harshness.⁴ The Court has also affirmed a prisoner release order “of unprecedented sweep and extent” requiring California to reduce its prison population to 137.5% of design capacity within two years.⁵ The order necessitates the release of as many as 46,000 prisoners to ameliorate Eighth Amendment violations in the provision of health and mental care to prisoners.⁶

Is a revolution in penal law and policy in the making? A rich and abundant body of literature has decried the ever-intensifying harshness of American criminal justice mired in “the pathological politics of criminal law.”⁷ This Article explores the future of penal law and policy after the turn to budget-cut criminal justice reform and the recent awakening of courts to address the crippling human and fiscal costs of our incarceration nation. From three institutional dimensions, the Article explores the role of courts, legislators, and criminal justice experts in transitioning from emergency response to sustainable penal law and policy reform.

4. *Graham v. Florida*, 130 S. Ct. 2011, 2028–33 (2010) (categorically invalidating a sentence of life imprisonment without parole for “juvenile nonhomicide offenders” because the sentence foreswore “altogether the rehabilitative ideal,” offering “no chance for reconciliation with society, no hope” of demonstrating reform and rehabilitation after a crime committed while “a child in the eyes of the law”).

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

6. *Id.*; see also *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000, at *3–5 (E.D. Cal. & N.D. Cal. Jan. 12, 2010) (ordering a reduction in prison population), *appeal granted sub nom.*, *Schwarzenegger v. Plata*, 130 S. Ct. 3413, 3413 (2010) (deferring jurisdictional issues to hearing on merits); *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820, at *84, *106, *116 (E.D. Cal. & N.D. Cal. Aug. 4, 2009) (ordering California to design a plan to reduce its prison population to 137.5% of design capacity within two years, necessitating release of between 38,000 and 46,000 prisoners to ameliorate pathological consequences of overcrowding).

7. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–12, 529–39 (2001) [hereinafter Stuntz, *Pathological Politics*]; see also, e.g., DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* 3, 29–35 (2006); MARC MAUER, *RACE TO INCARCERATE* 195–207 (2d ed. 2006); Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1149, 1193–96, 1205 (2009); Sara Sun Beale, *What’s Law Got To Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 25–32 (1997); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 785–86 (2006) [hereinafter Stuntz, *Political Constitution*]. See generally Robert Batey, *The Costs of Judicial Restraint: Forgone Opportunities To Limit America’s Imprisonment Binge*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 29 (2007) (arguing for increased efforts by the courts to decrease incarceration and noting judicial activism may reduce rates of incarceration).

This Article contends that the future of penal law will be oriented by what it terms “rehabilitation pragmatism,” which is a cautious turn away from incapacitation—warehousing people away—as the primary consideration in penal policy.⁸ Rehabilitation pragmatism is a return of hope for reclamation—but not the idealistic hope of general reclamation of offenders under the rehabilitative ideal that held sway from the 1890s to 1960s.⁹ The new approach is cautious and selective in the choice of beneficiaries, attentive to the need for evidence of efficacy, cost effectiveness, and success.¹⁰ Rehabilitation pragmatism subjects cloistered experts to a demand for evidence that ameliorates the opacity and seemingly unfettered discretion critiqued during the heyday of the rehabilitative ideal.¹¹

In tandem with the move toward data-driven rehabilitation pragmatism, this Article advocates penal impact analysis in criminal legislation and politics. Penal impact analysis renders legislators accountable for the fiscal consequences of the politics of crime. Penal impact analysis redresses part of what makes the politics of crime pathological—the tendency to ratchet up penal severity without allocating sufficient resources to enforce the laws or examining cumulative system impact.

Rehabilitation pragmatism and penal impact analysis are concepts suffused with multiple meanings with appeal across a broad political spectrum, including cost reduction and cost effectiveness.¹² These orienting frameworks can help bridge the usually fiercely partisan worldviews on crime and punishment and clear the threshold hurdle in criminal justice reform of political inertia and deadlock.¹³ Indeed, public opinion pollsters have found that public taste for intermediate sanctions increases when respondents are given information about the costs of prisons.¹⁴ In places where politics remain mired in incapacitation stagnation with destructive human

8. See *infra* Part IV.A.

9. See *infra* Part IV.A.

10. *Infra* Part IV.A.

11. See *infra* Part I.A.

12. See *infra* Part IV.

13. See Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 145–48 (2007) (arguing that law and policy should be infused with a surfeit of meanings—an approach he calls “expressive overdetermination”—so that divergent worldviews can be simultaneously affirmed and people in a pluralistic society can deliberate and work with—rather than work past and at odds with—each other in controversial contexts).

14. Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 41 (2000).

consequences, recent Eighth Amendment doctrinal shifts give courts room to nudge penal law and politics along.¹⁵

This Article also sounds a caution, however. We must take care that this new selective and cautious approach does not aggravate another persistent criminal justice problem: inequities in who bears the burdens of penal severity and who are the beneficiaries of measures of mercy. This Article argues that as we demand more evidence of rehabilitative program efficacy, performance measures should also be sensitive to whether there are disparate distributions of benefits and burdens. To ameliorate disparities, the Article advocates approaches to rehabilitative programming that take cultural and racial context into account. The goal is a richer, farther-reaching understanding of success.

The Article unfolds as follows. Part I explores how we have reached a potential tipping point in unsustainable incapacitation domination. Part II examines the judicial awakening in 2010 to nudging—and in the case of *Plata v. Brown*,¹⁶ downright pushing—state politics out of incapacitation stagnation. Part III explores how state budgetary emergencies have prompted what politics as usual had long prevented—a wave of penal law and policy reforms, the most prevalent of which are shallow, broad-based back-end sentence reductions and early release, accompanied by cuts to programs for rehabilitation and community reintegration. This Part argues that the release-valve practice of reform, in the absence of orienting approaches for managing long-term consequences, can be dangerous and lead to backlash and sharp reversion. Not all is bleak, however. Budget-cut reforms can pose great promise for reorientation in addition to the pitfalls.

Drawing on exemplars, Part IV offers orienting frameworks for reform beyond emergency response and explores how rehabilitative pragmatism and penal impact analysis can support a sustainable transformation of penal law and policy. This Part also cautions for care during this shift toward rehabilitation pragmatism so as not to aggravate the persistent problem of inequities in who bears the burdens of penal harshness and who benefits from the system's mercy and redemptive impulses. The Part concludes by examining the judicial role during the penal law and policy fomentation and the utility and wisdom of judicial nudges when penal law and politics are mired in incapacitation stagnation.

15. See *infra* Part I.B.

16. 131 S. Ct. 1910 (2011).

I. INCAPACITATION STAGNATION AT THE TIPPING POINT

To understand the import of the present opportunity for reorientation, a brief history of our recent past and journey to our present mire as an incarceration nation offers perspective. At stake is whether we extricate ourselves from incapacitation stagnation. This Part explores our journey to this tipping point, the human and fiscal counts that have mounted along the way, and the need for a jolt out of incapacitation stagnation that criminal law and politics as usual cannot supply.

A. *Hope, Dimmed but Not Dead*

For much of the twentieth century, the prevailing orientation of American criminal justice was rehabilitation and hope for redemption, centered on the belief that the system and its sentences should reform the offender.¹⁷ Dubbed the rehabilitative ideal, the prevalent penal approach reflected faith in modern therapeutic intervention as well as older Western beliefs in punishment as loving chastisement meant to correct and improve the offender.¹⁸ Oriented by this penal philosophy, the American incarceration rate of around 100 per 100,000 people in the population was in line with much of the democratic West until approximately 1975.¹⁹ Despair over surging

17. For influential discussions of this history, see, e.g., FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 18–19 (1981); DAVID GARLAND, *THE CULTURE OF CONTROL* 8–20, 28–73, 90–102, 105–37 (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 149–51 (2007). For writings capturing the hope of the prevailing rationale of times past, see, e.g., Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 20–21 (1899) (envisioning “the conversion of the prison into an institution combining the means and aims of hospital, school and church, for the healing . . . of body, mind and will”); Alexander Winter, *The Modern Spirit in Penology*, 8 POL. SCI. Q. 445, 445, 453–54 (1893) (“But to be just, conscientious and humane, demands first of all that the spirit of revenge be abandoned To secure full recognition for the importance, the value and the sacredness of the individual, is the simple and only problem of modern sociology as well as of penology; and the widely prevalent notion that the crime should be punished, not the criminal, requires to be reformed, to be humanized and civilized. Just as we study the causes and consequences of a disease in a man in order to cure and remove it, so we must study the causes and consequences of criminality in the individual if we want to heal and remove it. . . . [T]he criminal, for his own interests as well as the interests of society, is prevented from moving freely about until he is cured from his criminal proclivity . . .”).

18. See, e.g., ALLEN, *supra* note 17, at 4–5 (offering intellectual history).

19. See, e.g., Bruce Western & Christopher Wildeman, *Punishment, Inequality and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 858–59 fig.2 (2009) (displaying trends in data); David Cole, *Can Our Shameful Prisons Be Reformed?*, N.Y. REV. BOOKS, Nov. 19, 2009, at 41, available at <http://www.nybooks.com/articles/archives/2009/nov/19>

crime rates, collapse of faith in government institutions to successfully rehabilitate, and a governance structure highly responsive to flare-ups of passion and Manichean crusading led to the decline of the rehabilitative ideal beginning in the 1970s.²⁰ Fueled by anger and hopelessness, incapacitation, and vengeful impulses sometimes confused for retributivism grew unabashedly ascendant.²¹

Broadly speaking, there are two main categories of rationales for punishment.²² The first worldview is deontological, also termed retributivist, and associated with thinkers such as Immanuel Kant. This perspective justifies punishment based on the moral culpability of the offender because of the criminal act.²³ While retributivists proffer various sophisticated accounts of why punishment is a moral imperative, the worldview is oft caricaturized as a thirst for vengeance, to the chagrin of retributivists.²⁴ The second perspective is

/can-our-shameful-prisons-be-reformed/ (offering a history of the growth of incarceration since 1975).

20. GARLAND, *supra* note 17, at 9, 69–70, 130–34; FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 3–10 (1995); *see also, e.g.*, DOUGLAS LIPTON, ROBERT MARTINSON & JUDITH WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES 175 n.* (1975) (observing that “[g]iven the large investment most correctional systems have made in counseling and casework, it is surprising that few experimental studies of the efficacy of such treatment, independent of other treatments, have been conducted” and concluding, based on analysis of 231 studies of rehabilitative programs, that evidence of efficacy was lacking); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 17–18 (1976) (noting “few programs seem to succeed; and it is still uncertain to what extent the claimed successes would survive replication”); JAMES Q. WILSON, THINKING ABOUT CRIME 45–52 (1975) (noting that evidence of program efficacy is lacking and arguing for a shift from criminologists’ preoccupation with the root social causes of crime to evaluating policy efficacy); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 23–25 (1974) (reviewing the literature concluding that rehabilitative efforts in general, with few exceptions, had no appreciable impact on reducing recidivism). For an illuminating rebuttal of customary accounts of why American penal severity has outstripped all other cultures and analysis of the influence of a paranoid strain in politics, Manichean worldviews, a governance structure that enables law to swing with the passions, and the tortured history of American race relations, see Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11 PUNISHMENT & SOC’Y 377, 378–79, 382–90 (2009).

21. GARLAND, *supra* note 17, at 8–9, 69–70.

22. *See, e.g.*, Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1240 (2005) (explaining deontological and consequentialist theories of punishment).

23. *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 416–17 (2000) (explaining retributivism); Tonry, *supra* note 22, at 1240 (explaining the deontological worldview).

24. *See, e.g.*, David Gray, *Punishment As Suffering*, 63 VAND. L. REV. 1619, 1657 (2010) (discussing this confusion).

consequentialist, also termed the instrumentalist or utilitarian worldview, which justifies punishment based on the social benefits—such as deterrence, rehabilitation, or incapacitation of offenders—that it produces.²⁵

Penal politics do not follow the elegant intricacies of the philosopher's categories.²⁶ Broadly, however, the prevalent approaches were oft couched in terms of incapacitation and aggressive visions of just deserts.²⁷ States turned to enacting mandatory minimums, which lengthened sentences for offenses and eliminated or strongly curtailed the discretion to release prisoners early.²⁸ Under the aegis of "truth-in-sentencing" reforms aimed at ensuring that prisoners serve the sentence pronounced in court, numerous jurisdictions limited or even eliminated longstanding sentence-mitigating measures and incentives to rehabilitate, such as early release, good time credits, and parole.²⁹ Losing faith in the ability of the state to rehabilitate or even deter criminals decied as recidivating at alarming rates, the nation increasingly focused on

25. See, e.g., Carissa Byrne Hessick & F. Andy Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 88 (2011) (explaining the utilitarian perspective).

26. Nor apparently, do the punitive intuitions of everyday people strictly distinguish between moral desert and instrumental factors such as treatability and prevention. See, e.g., Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in its Place* 17–18 (Vanderbilt Law Sch., Working Paper No. 3, 2011) (draft on file with the North Carolina Law Review) (presenting experimental findings that people's views about punishment are influenced by more than moral intuitions about desert, including utilitarian considerations such as treatability and relative risk).

27. See, e.g., Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 368 (2010) (summarizing the history).

28. For an exploration of the harshening trend, see, e.g., MAUER, *supra* note 7, at 40–91.

29. PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS 2–3 tbl.1 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tssp.pdf> (surveying the reforms across the states; see, e.g., Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 214–215, 224, 226, 235–236, 98 Stat. 1837, 1937–2040 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C. (2006)) (eliminating parole eligibility for all federal offenders committing crimes on or after November 1, 1987); Parole Commission Phaseout Act of 1996, Pub. L. No. 104-232, 110 Stat. 3055 (codified at 18 U.S.C. §§ 3551 note, 4201 note (2006)) (phasing out parole commission in light of Sentencing Reform Act elimination of parole eligibility, though extending term for prisoners sentenced under prior law); Act of Jan. 15, 1984, ch. 459, § 5, 1983 Me. Laws 1278, 1293 (effectively repealing parole); TIMOTHY HUGHES ET AL., BUREAU OF JUSTICE STATISTICS, TRENDS IN STATE PAROLE, 1990–2000, at 1–2 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/tsp00.pdf> (noting that sixteen states had eliminated discretionary release by 2000).

incapacitating them in prisons away from society to contain the risk of harm they posed.

In a short span of history, the United States became the number one incarceration nation in the world by per capita incarceration rate, with one out of every thirty-seven adults either incarcerated or having spent time in jail by 2003.³⁰ Today, one-quarter of all incarcerated people in the world are imprisoned in the United States, though the United States has only five percent of the world population.³¹ The United States has a per capita rate of incarceration that is more than seven times that of Western European democracies with a similar intellectual heritage.³² The next closest countries in line for the dubious distinction of having the world's highest incarceration rate are Russia and Rwanda, which run a distant second and third, respectively.³³ The United States incarcerates 753 people per 100,000 of the population—a nearly 20% greater rate than second-place Russia, which incarcerates 629 per 100,000, and more than 25% greater rate than Rwanda, which incarcerates 593 per 100,000.³⁴

Times and crime rates have dramatically changed since despair over surging crime rates fueled the ascendancy of incapacitation by incarceration as the prevalent penal approach of our times. Crime rates have been falling substantially for more than a decade, beginning in the mid-1990s.³⁵ Violent crime rates have remained low and declined through the recession, bucking ominous predictions that the recession would push up crime rates.³⁶ Oft-proffered reasons for the great crime decline include such overarching demographic

30. Gail Russell Chaddock, *US Notches World's Highest Incarceration Rate*, CHRISTIAN SCI. MONITOR, Aug. 18, 2003, at 2, available at <http://www.csmonitor.com/2003/0818/p02s01-usju.html> (reporting figure from 2003, when the government began releasing data on the extent of imprisonment).

31. Silja J.A. Talvi, *Incarceration Nation*, THE NATION (Jan. 22, 2007), <http://www.thenation.com/article/incarceration-nation>.

32. Western & Wildeman, *supra* note 19, at 857–59 fig.1 (displaying incarceration data).

33. JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 2, 4–5 fig.2 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

34. *Id.*

35. MICHAEL R. RAND, BUREAU OF JUSTICE STATISTICS BULLETIN, NAT'L CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2008, at 1–3 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cv08.pdf>; Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489, 490 (2010); Allison Klein, *Major Cities' Plummeting Crime Rates Mystifying*, WASH. POST, July 20, 2009, at A1.

36. Evan Perez, *Violent Crime Falls Sharply*, WALL ST. J. (May 25, 2010), <http://online.wsj.com/article/SB10001424052748704113504575264432463469618.html>.

changes as the large baby boomer population aging out of prime crime-committing years and a reduction in the most crime-prone demographic—young juvenile males born to impoverished families unable to care for them—as well as strategy shifts in policing and incarceration.³⁷ Regardless of the precise mix of reasons, the point is that the needs of our time have shifted.

Just as the law of criminal procedure responds to shifts in the nature and extent of crime concerns, with the 1960s shift in criminal procedure protections made possible by the low-crime 1950s,³⁸ so too should the prevalent penal approaches be responsive to shifts in the nature and extent of crime concerns. Penal law and policy should shift from the panic mode of the past, at least for ordinary crimes and criminals, particularly as we reach the point of diminishing or even perversely inverse returns for investment in incarceration. Scholars and practitioners in the field have been sounding the alarm for a long time about how high rates of incarceration erode community constraints to crime, exposing greater proportions of the population to the criminogenic conditions of prison and posing crippling financial as well human, social, and community costs.³⁹

Public opinion has shifted toward support for rehabilitative and preventative measures as crime rates go down and the costs of maintaining an incarceration society keep going up.⁴⁰ For example, a

37. *E.g.*, FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 57–103 (2007) (analyzing prevalent explanations and debunking overly optimistic tendency to credit policy changes for crime rate shift); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP., Winter 2004, at 163, 170–83 (attributing the crime decline to the legalization of abortion, more police, increased incarceration, and the waning of the crack epidemic); William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 97, 123–24 (Alfred Blumstein & Joel Wallman eds., 2006) (analyzing data and concluding violent crime rate would have dropped substantially anyhow without the incarceration ramp up but the incarceration ramp up increased the extent of drop by a quarter).

38. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2138, 2150–52 (2002).

39. *See, e.g.*, PAUL BUTLER, *LET'S GET FREE* 23–40 (2009) (explaining why more imprisonment can make us less safe because of desensitization and disruption of communities); Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281–96 (2004) (analyzing the burdens of high incarceration on communities of color). *See generally* Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441, 442–78 (1998) (explaining mechanisms and costs of social disorganization).

40. *See, e.g.*, PETER D. HART RESEARCH ASSOCS., INC., *OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM* 2–3 (2002) [hereinafter *OPEN SOC'Y INST.*]; SIMON, *supra* note 17, at 11 (noting the mounting

2002 Open Society Institute-commissioned poll of a demographically representative sample of adults found that 66% of respondents believed “the best way to reduce crime is to rehabilitate prisoners by requiring education and job training so they have the tools to turn away from a life of crime.”⁴¹ In contrast, only 28% of the 1,056 respondents believed “keeping criminals off the streets through long prison sentences would be . . . more effective.”⁴² Indeed, public support for the goal of rehabilitation never died, even though it waned during the time of punitive anger over the seemingly unstoppable crime surge in the late 1960s through 1980s.⁴³ A 1968 Harris poll indicated that about 73% of respondents believed rehabilitation should be the main goal of punishment.⁴⁴ By 1982, the support for rehabilitation had dropped to 44%.⁴⁵ Support increased again by 2001, with more than 55% of respondents in a nationwide poll indicating that rehabilitation should be the main goal of prisons.⁴⁶

The difficulty is that for more than a decade, we have been caught in a one-way ratchet and a rut. Once the national mood turns grim, it is much easier to accelerate penal severity and much harder to shift course, even if the lessons of experience counsel for change. Politicians cannot afford to look soft on crime and have much to gain by taking tough symbolic stands, even when they think the resulting punishment would be too harsh in most cases.⁴⁷ The interests of politicians intersect with that of prosecutors, whose power and discretion expand with an ever-broadening and -deepening arsenal of

skepticism of Americans toward harsh prison sentences and preference for a return to a greater emphasis on rehabilitation); Shelley Johnson Listwan et al., *Cracks in the Penal Harm Movement: Evidence from the Field*, 7 CRIMINOLOGY & PUB. POL’Y 423, 427 (2008) (collecting studies to show evidence of support for moving away from harsh penological responses to crime); Daniel S. Nagin et al., *Public Preferences for Rehabilitation Versus Incarceration of Juvenile Offenders: Evidence from a Contingent Valuation Survey*, 5 CRIMINOLOGY & PUB. POL’Y 627, 629–30 (2006).

41. OPEN SOC’Y INST., *supra* note 40, at 4.

42. *Id.* at 4, 19.

43. Francis T. Cullen et al., *Public Support for Correctional Rehabilitation in America: Change or Consistency?*, in CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME AND JUSTICE 128, 143–44 (Julian V. Roberts & Mike Hough eds., 2002).

44. Cullen et al., *supra* note 14, at 49 tbl.1.

45. *Id.*

46. Cullen et al., *supra* note 43, at 135.

47. For influential accounts of the politics of crime, see, e.g., Erwin Chemerinsky, *The Essential but Inherently Limited Role of the Courts in Prison Reform*, 13 BERKELEY J. CRIM. L. 307, 310 (2008); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 100–02 (2009).

crimes and harsh penalties that can be leveraged as incentive to secure guilty pleas.⁴⁸ There is a weak constituency against tough legislation because those whose interests are impacted most—criminals and judges who have their discretion constrained by get-tough techniques like mandatory minimums—are hardly in the position to lobby.⁴⁹ The result is incapacitation stagnation—the entrenchment of harsh incarceration policies despite shifts in popular needs and a coming-to-consciousness regarding the steep toll such policies exact.

B. The Building Pressure of Human and Fiscal Costs

For more than a decade the United States has been mired in incapacitation stagnation as the fiscal and human costs have mounted. Today one in thirty-one adults is under some form of correctional control, either in jail or prison or on probation or parole.⁵⁰ Because of the disproportionate incarceration of men and African Americans, the numbers are even more striking when further broken down—one in eighteen men and one in eleven African Americans are under correctional control.⁵¹ The “odds of an African American man going to prison today are higher than the odds he will go to college [or] get married”⁵² and incarceration is now “a pervasive event in the lives of poor and minority men”⁵³—stark portraits of the structure of life opportunities. As incarceration becomes a commonplace phenomenon in disadvantaged communities, the prospect of prison loses the deterrent force of stigma.⁵⁴ Moreover, high rates of

48. Stuntz, *supra* note 47, at 2558. For further background, see, e.g., Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL’Y REV. 1, 43 (2007) (discussing incentives to leverage charging power); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 623–24 (2005) (exploring prosecutors’ interests in having a plethora of charging options).

49. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 725–26 (2005); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1029–30 (2006).

50. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009), available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf.

51. *Id.*

52. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 141 (2007).

53. IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 3 (Mary Pattillo, David Weiman & Bruce Western eds., 2004).

54. See BUTLER, *supra* note 39, at 33, 133 (noting perverse consequences of the destigmatization of prison in communities with high incarceration rates).

incarceration may aggravate disparities in political power because of the concentration of felon disenfranchisement in communities already underrepresented at the ballot box.⁵⁵

The mounting costs and incarceration ramp ups produce diminishing gains and may even have reached the tipping point where more incarceration becomes criminogenic both within packed prison walls and outside in communities living in the shadow of high rates of incarceration. There is widespread agreement among scholars that the United States is likely to experience diminishing marginal returns as we continue to increase incarceration.⁵⁶ There is also evidence indicating that states with high incarceration rates have reached an inflection point where increasing incarceration is actually associated with a lack of effectiveness on crime rates.⁵⁷ This should not be surprising. As we lock more and more people up, we begin to incarcerate not just the most dangerous but also the less dangerous, for whom incapacitation does not buy society as much safety, and who may be doing more good as fathers, brothers, and sons in communities—often communities of color—disrupted by high rates of incarceration of the men.⁵⁸

55. See, e.g., Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 560, 598–99 (2003) (collecting literature on the dilution of political power among communities of color by felon disenfranchisement laws and tracing history); Pamela S. Karlan, *Conviction and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1161–62, 1162 n.76 (2004) (noting the dynamics of underrepresentation, race, and political protections).

56. ZIMRING, *supra* note 37, at 51–52 (noting that “[e]very serious commentator on incapacitation has pointed out this likelihood” of diminishing returns, and citing examples). See generally JAMES AUSTIN & TONY FABELLO, JFA INST., *THE DIMINISHING RETURNS OF INCREASED INCARCERATION: A BLUEPRINT TO IMPROVE PUBLIC SAFETY AND REDUCE COSTS* (2004), available at <http://www.jfa-associates.com/BlueprintFinal.pdf> (discussing diminishing returns); RYAN S. KING, MARC MAUER & MALCOLM C. YOUNG, *THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP* (2005), available at http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf (same).

57. Raymond V. Liedka, Anne Morrison Piehl & Bert Useem, *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY & PUB. POL’Y 245, 270, 272 (2006).

58. See BUTLER, *supra* note 39, at 23–40 (arguing that more imprisonment can make us less safe because of desensitization and disruption of communities); ZIMRING, *supra* note 37, at 52 (noting that to increase incarceration “the system must have been dipping much deeper into the dangerousness barrel, if not scraping its bottom”); Roberts, *supra* note 39, at 1281–96 (analyzing the burdens of high incarceration on communities of color); Rose & Clear, *supra* note 39, at 442–78 (explaining mechanisms and costs of social disorganization).

Moreover, prisons may exert a criminogenic effect, brutalizing the inmate further, facilitating the creation of a criminal network, providing an education in criminality, and consolidating a criminal identity.⁵⁹ There is evidence that imprisonment has a particularly pronounced criminogenic effect on drug offenders who recidivate more quickly and at higher rates following incarceration than those similarly situated put on probation.⁶⁰ This should be particularly troubling because drug offenders have been described as “the single most important cause of the trebling of the prison population in the United States since 1980.”⁶¹

For these diminishing and potentially perverse returns, budget-strapped states and the nation are paying crippling financial costs. The fiscal burden has dramatically increased as incarceration has surged 240% between 1980 and 2008.⁶² In 2008, the \$68 billion total spent on prisons was a 336% increase from the fiscal burden two and a half decades ago.⁶³ The heavy costs of prisons—the second-fastest increasing general fund expenditure after Medicare—deprives budget-strapped states of money for essential services such as education, which is suffering severe cuts.⁶⁴ In 2008, the nation spent \$75 billion on corrections—the majority of the cost on incarceration.⁶⁵

59. See, e.g., Lynne M. Vieraitis, Tomislav V. Kovandzic & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data: 1974–2002*, 6 CRIMINOLOGY & PUB. POL’Y 589, 591–93 (2007).

60. Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 330, 345 (2002).

61. MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* 81 (1995).

62. See SCHMITT ET AL., *supra* note 33, at 2, 5–6.

63. PEW CTR. ON THE STATES, *supra* note 50, at 11.

64. See, e.g., NAACP, *MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE* 12–15 (2011), available at http://naacp.3cdn.net/01d6f368edbe135234_bq0m68x5h.pdf (discussing how prison spending restricts funds available for education); CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, *THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES* 3 (2009), available at http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf (“Second only to Medicaid, corrections has become the fastest growing general fund expenditure in the United States.”); Vernon Clark, *NAACP Blasts U.S. Trend for Spending More on Incarceration than Education*, PHILA. INQUIRER (Apr. 14, 2011), http://articles.philly.com/2011-04-14/news/29417821_1_prison-populations-incarceration-prison-growth (reporting on findings from six cities, including Philadelphia); Elizabeth Prann, *States Spend Almost Four Times More Per Capita on Incarcerating Prisoners Than Educating Students, Studies Say*, FOXNEWS.COM (Mar. 14, 2011), <http://www.foxnews.com/politics/2011/03/14/states-spend-times-incarcerating-educating-studies-say-464156987/> (summarizing research findings showing most states spend “three to four times more per capita” on incarceration than education).

65. SCHMITT ET AL., *supra* note 33, at 2, 10.

To put the costs in closer perspective, to house just one prisoner in 2005, taxpayers spent an average of \$23,876 a year.⁶⁶ Moreover, longer sentences mean more aging prisoners to pay for, further straining resources because the elderly, defined as those age fifty-five or older by the National Commission on Correctional Health Care, cost “two to three times more” to house because of health needs.⁶⁷ In a time when at least forty-two states and the District of Columbia are struggling with cutbacks to deal with more than \$103 billion in budget shortfalls, the crippling costs have become unsustainable.⁶⁸

The fiscal and human consequences are becoming so impossible to ignore that even traditionally fiercely tough-on-crime conservative leaders are calling for a reorientation of the conservative stance. The potential of bipartisan penal policy reform was recently demonstrated by a call to action by conservatives Newt Gingrich and Pat Nolan that hit newspapers across the nation in January 2011.⁶⁹ Gingrich and Nolan described the rise of a conservative “Right on Crime” campaign to help states realize the need for reform:

There is an urgent need to address the astronomical growth in the prison population, with its huge costs in dollars and lost human potential. . . . If our prison policies are failing half of the time, and we know that there are more humane, effective

66. Adam Liptak, *More Than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14.

67. TINA CHIU, VERA INST. OF JUSTICE, IT'S ABOUT TIME: AGING PRISONERS, INCREASING COSTS, AND GERIATRIC RELEASE 3-5 (2010), available at <http://www.vera.org/download?file=2973/Its-about-time-aging-prisoners-increasing-costs-and-geriatric-release.pdf>; see also, e.g., *California's Aging Prisoner: Demographics, Costs, and Recommendations: Hearing Before the Cal. S. Subcomm. on Aging & Long Term Care, the Cal. S. Comm. on the Cal. Corr. Sys., and the Cal. S. Pub. Safety Comm.*, 2003-2004 Leg., Reg. Sess. 26-27 (Cal. 2003) (statement of Professor Jonathan Turley), available at http://www.prisonterminal.com/documents/AGING_PRISONERS_TRANSCRIPT.pdf (noting that elderly prisoners cost more than three times more than younger prisoners); Mike Mitka, *Aging Prisoners Stressing Health Care System*, 292 JAMA 423, 423 (2004) (noting three-strikes laws, mandatory minimums, and other indicia of penal severity mean more elderly prisoners in jail, and that elderly prisoners cost three times more for healthcare); Tia Gubler & Joan Petersilia, *Elderly Prisoners Are Literally Dying for Reform* 5-6 (Jan. 23, 2006) (unpublished working paper), available at http://www.law.stanford.edu/program/centers/scjc/workingpapers/TGubler_06.pdf (analyzing costs and reasons for upsurge in elderly inmates).

68. ELIZABETH MCNICHOL, PHIL OLIFF & NICHOLAS JOHNSON, CTR. ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 1 (2011), <http://www.cbpp.org/files/9-8-08sfp.pdf> (noting \$103 billion in budget gaps across forty-two states and D.C.). The data is offered as of fiscal year 2012, current through June 2011. *Id.*

69. For a sampling, see *supra* note 3.

alternatives, it is time to fundamentally rethink how we treat and rehabilitate our prisoners.⁷⁰

Despite crippling costs and perverse consequences, however, an emphasis on incapacitation domination, once entrenched in law, does not recede easily. The “pathological politics of criminal law”⁷¹ is not just scholarly postulating. It is an empirical fact demonstrated by state experience. For example, a recent independent state investigatory agency found that California, which has prisons straining at nearly double intended capacity in a state of fiscal and humanitarian crisis, is suffering a “state of emergency” because “[f]or decades, governors and lawmakers fearful of appearing soft on crime have failed to muster the political will to address the looming crisis.”⁷² Any attempt to explore alternatives to incarceration and early release is fraught with political risk because the salience of crime multiplies the perception of public risk. If even one released offender “goes berserk” and commits a horrific crime, political careers will end and policy will swing sharply back, perhaps to an even more severe state.⁷³

The result is incapacitation stagnation, whereby the nation continues on the costly course of punitive harshness and high incarceration rates despite changes in public attitudes, crime context, and mounting evidence regarding the high costs and potentially perverse consequences.⁷⁴ Penal harshness also has a drag and drift effect in the sense that one get-tough gesture, such as sending more juveniles to adult courts, has a host of potential ripple consequences that may not have been deliberated over and intended, such as

70. Gingrich & Nolan, *Saving Money, Saving Lives*, WASH. POST, *supra* note 3.

71. The term was coined by Bill Stuntz. Stuntz, *Pathological Politics*, *supra* note 7, at 505.

72. LITTLE HOOVER COMM’N, SOLVING CALIFORNIA’S CORRECTIONS CRISIS: TIME IS RUNNING OUT, at i (2007), available at <http://www.lhc.ca.gov/studies/185/Report185.pdf>.

73. See, e.g., Vincent Carroll, *Realities of Early Release*, DENV. POST, Dec. 6, 2009, at 3D, available at http://www.denverpost.com/commented/ci_13921492?source=commented- (detailing the political dangers if a prisoner is released early because of budget-prompted reforms and “goes berserk” as did a prisoner released early by former Arkansas Governor Mike Huckabee); Manny Fernandez & Alison Leigh Cowan, *When Horror Came to a Connecticut Family*, N.Y. TIMES, Aug. 7, 2007, at A1 (detailing tragedy that ensued when two ‘career criminals’ released early raped, robbed, and then murdered a family).

74. See *supra* notes 39–49 and accompanying text; see also, e.g., Erwin Chemerinsky, 3 *Strikes: Cruel, Unusual and Unfair*, L.A. TIMES, Mar. 10, 2003, at A13 (commenting on how the amendment to California’s three-strikes law to curtail it to serious or violent offenders, though supported by a majority of Californians, did not pass because “elected officials don’t want to appear soft on crime, even when the crime is shoplifting. No politician wants to be vulnerable to a story of a shoplifter who was released and then committed a much worse crime”).

subjecting juveniles to the possibility of life in prison without parole.⁷⁵ Enacting one measure opens the door to a whole host of harshening consequences, leading to a severity drift effect.

II. THE JUDICIAL AWAKENING

Courts occupy an awkward position when the polity is caught in the pathological politics of crime. Judicial artillery is clumsy and heavy, and the judiciary is ill suited to steer the penal law and policy choices of the political branches of the states. For two decades, the judicial branch was hesitant to intervene, taking a hands-off, wait-and-see approach that makes the recent awakening of judicial review and intervention in penal choices all the more remarkable.

A. *Eighth Amendment Proportionality Review of Penal Severity*

The first awakening came in the context of the revival of Eighth Amendment proportionality review of noncapital penal severity, after years of deep fractures followed by de facto dormancy. The Eighth Amendment prohibits the infliction of “cruel and unusual punishments.”⁷⁶ The Supreme Court has read the prohibition to not only prohibit “barbaric punishments,” but also to prohibit “sentences that are disproportionate to the crime committed.”⁷⁷ In the noncapital context, the Supreme Court has fractured over application of the proportionality principle in a series of controversial cases.⁷⁸

1. Deference to the Political Branches

The Supreme Court’s proportionality review cases from the 1980s through the turn of the millennium demonstrate the excesses of incapacitation domination. In an early case, *Rummel v. Estelle*,⁷⁹ in

75. See *Graham v. Florida*, 130 S. Ct. 2011, 2025–26 (2010) (explaining that the decision of many states to move away from juvenile court systems and permit more juveniles to be transferred to adult court, making life in prison without parole possible, “does not justify a judgment that many States intended to subject such offenders to life without parole sentences”); see also FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 143–50 (2005) (analyzing the reasons for and effects of transferring more juveniles to adult courts).

76. U.S. CONST. amend. VIII.

77. *Solem v. Helm*, 463 U.S. 277, 284 (1983).

78. E.g., *Ewing v. California*, 538 U.S. 11, 20 (2003) (plurality opinion) (referring to “narrow proportionality principle” in the noncapital context); *Harmelin v. Michigan*, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (referring to narrow proportionality principle in the noncapital context for grossly disproportionate sentences).

79. 445 U.S. 263 (1980).

1980, the Court rejected an Eighth Amendment proportionality challenge to a sentence of life imprisonment for obtaining \$120.75 worth of goods under false pretenses under a Texas “recidivist” statute that levied mandatory life imprisonment on anyone convicted of three felonies.⁸⁰ Writing for the Court, Chief Justice Rehnquist held that in the Eighth Amendment noncapital review context, successful challenges would be “exceedingly rare” because of “reluctance to review legislatively mandated terms of imprisonment.”⁸¹

Over time and under pressure from repeated exposure to similarly draconian Jean Valjean-esque⁸² facts, the Court fractured in proportionality review cases but largely continued the course of nonintervention out of deference.⁸³ In *Ewing v. California*,⁸⁴ the Supreme Court split over an Eighth Amendment challenge to a sentence of twenty-five years to life for shoplifting three golf clubs under California’s three-strike law with the result of affirming the sentence.⁸⁵ In *Lockyer v. Andrade*,⁸⁶ the Court fractured over a sentence of fifty years to life for shoplifting videotapes, affirming that sentence, too.⁸⁷ Writing for a plurality of three, Justice O’Connor underscored the need for deference to the legislature and its choice of penal policies, and stated that outside of the noncapital context, “only extreme sentences that are grossly disproportionate to the crime” would implicate the Eighth Amendment’s exceedingly narrow proportionality principle.⁸⁸

In 2003, the same year the Court decided *Ewing* and *Lockyer*, Justice Kennedy gave a memorable speech to the American Bar

80. *Id.* at 264, 266, 285. Rummel’s prior two predicate convictions were fraudulent use of a credit card to get \$80 worth of goods and passing a forged check for \$28.36. *Id.* at 265–66.

81. *Id.* at 272, 274.

82. See VICTOR HUGO, *LES MISERABLES* 30–32 (Charles Wilbour trans., Halcyon House 1947) (1862) (telling the story of Jean Valjean, imprisoned for nineteen years for stealing bread for his starving sister and her children and for escape attempts that extended his base five-year sentence).

83. See *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 63 (2003); see also *Harmelin v. Michigan*, 501 U.S. 957 (1991) (rejecting an Eighth Amendment claim brought against a sentence of life imprisonment for possessing more than 650 grams of cocaine).

84. 538 U.S. 11 (2003).

85. *Id.* at 18–19, 30 (plurality opinion).

86. 538 U.S. 63 (2003).

87. *Id.* at 66, 67. The sentence was two consecutive terms of twenty-five years to life. *Id.* at 66.

88. *Ewing*, 538 U.S. at 23–25 (plurality opinion) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)) (internal quotation marks omitted).

Association urging that lawyers do something about the ossification of severity in American criminal justice to ease the fiscal and human toll.⁸⁹ In an oft-quoted diagnosis of the system, Justice Kennedy said, "Our resources are misspent, our punishments too severe, our sentences too long."⁹⁰ He cautioned about a misallocation of priorities, noting, "When it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long."⁹¹ In oral remarks that extemporized to a degree, varying somewhat from the prepared remarks, and underscoring the heartfelt concern behind the prepared text, Justice Kennedy said:

The debate on the purposes of prison—should it be deterrence, should it be prevention, should it be rehabilitation—has gone on for a long time. But please don't think it's a tired debate. That debate must be renewed given the number of people we have in our prisons. We have to find some way to bridge the gap between skepticism about rehabilitation and the fact that so many of your fellow citizens and your fellow humans are being maintained in prison. . . . There are reasons for incapacitation. But that simply can't be the sole function of our prisons. . . . It is not acceptable for all of our prisoners and for all of our prisons to borrow a sign from Mr. Dante's *Inferno*: "Leave aside all hope all ye who enter here."⁹²

The speech was striking because the Court had just signaled it was bowing out of noncapital proportionality review because of deference to the political process.⁹³ Justice Kennedy's call to the polity was also brave, within the constraints of the stance of judicial nonintervention, because rather than just avert his gaze, Justice Kennedy called for the political process to do something.

For seven years after Justice Kennedy's call, the Court sat back and waited for the political process to take action. But the political process was stuck. The politics of crime and punishment had created a one-way ratchet because of the skewed incentives to create more

89. Justice Anthony M. Kennedy, U.S. Supreme Court, Keynote Address at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* <http://www.abanow.org/2003/08/speech-by-justice-anthony-kennedy-at-aba-annual-meeting/>.

90. *Id.*

91. *Id.*

92. Justice Anthony M. Kennedy, U.S. Supreme Court, Keynote Address at the American Bar Association Annual Meeting (Aug. 9, 2003), <http://www.c-spanvideo.org/program/KeynoteAddress7> (providing quoted remarks at time stamps 27:41 to 29:15 and 31:02 to 31:15).

93. *Ewing*, 538 U.S. at 23–25 (plurality opinion).

crimes and ramp up penalties to respond to the salient crime story of the day and because of the risk of looking soft on crime.⁹⁴ More than a half decade later, the nation was still mired in penal severity and the pathological politics of crime.

2. Facing the Human Costs

In *Graham v. Florida*,⁹⁵ the Supreme Court finally sat back no longer. Justice Kennedy wrote for a majority of the Court, a rare triumph in a noncapital proportionality review case, which typically produces a jigsaw puzzle of opinions with only the result discernible. In a heartening turn from the frequent five-to-four split down ideological lines in controversial cases, there were six votes for striking down a sentence of life in prison without possibility of parole for armed burglary and attempted armed robberies committed at ages sixteen and seventeen.⁹⁶ Chief Justice Roberts concurred in the judgment striking down Graham's sentence to life in prison without parole.⁹⁷ The Chief Justice has said "5-4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics."⁹⁸ His stand in *Graham* helps counter that impression.

Graham involved facts that capture the twin trends of severity drift and giving up on people that mark the prevailing penal approach.⁹⁹ The criminal justice system gave up on the young defendant in the case, Terrance Jamar Graham, after he flunked his first chance.¹⁰⁰ Justice Kennedy's opinion in *Graham* began by introducing Graham not by his crime as typically occurs in criminal opinions,¹⁰¹ but by the circumstances of his birth to crack-addicted

94. See *supra* notes 47–49 and accompanying text.

95. 130 S. Ct. 2011 (2010).

96. *Id.* at 2011, 2018, 2034, 2036.

97. *Id.* at 2036–42 (Roberts, C.J., concurring).

98. Jeffrey Rosen, *Roberts's Rules*, ATLANTA MONTHLY, Jan.–Feb. 2007, at 104, 105.

99. See *infra* notes 106–22.

100. See *infra* note 120 and accompanying text.

101. See, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2645–46 (2008); *Roper v. Simmons*, 543 U.S. 551, 555 (2005). *Roper* opens the facts section with this arresting sentence: "At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder." *Roper*, 543 U.S. at 556. The opinion proceeds to narrate chilling details of Simmons's cold-blooded commission of the crime. *Id.* at 556–58. In *Kennedy*, Justice Kennedy begins the recitation of the facts thus: "Petitioner's crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim or to convey the revulsion society, and the jury that represents it, sought to express by sentencing petitioner to death." *Kennedy*, 128 S. Ct. at 2646.

parents.¹⁰² The opinion's brief but evocative introduction made clear that Graham had the chips stacked against him. He suffered from attention deficit hyperactivity disorder and began using addictive substances early, smoking tobacco at age nine and marijuana at age thirteen.¹⁰³ Studies indicate that prenatal cocaine exposure may render a child vulnerable to "dysfunction in selective attention"¹⁰⁴ and parental substance abuse heightens the risk that the child will become a substance abuser.¹⁰⁵ The opinion thus began by explaining the context for Graham's later conduct, recalling an era of sensitivity to the etiology of crime.

As far as crimes go, Graham's crimes were serious compared to the shoplifting,¹⁰⁶ passing a bad check,¹⁰⁷ or obtaining money under false pretenses¹⁰⁸ at issue in some of the Court's earlier noncapital proportionality cases. At age sixteen, he committed attempted armed robbery and burglary of a restaurant.¹⁰⁹ Armed burglaries and robberies are considered crimes of violence because of the high risk of people getting hurt.¹¹⁰ And people did get hurt during the commission of Graham's crimes, though he was not the one striking the blows.¹¹¹

For most felonies under Florida law, the prosecutor has discretion to decide whether to charge sixteen- and seventeen-year-olds as juveniles or adults.¹¹² The prosecutor opted to charge Graham

102. *Graham*, 130 S. Ct. at 2018.

103. *Id.*

104. See, e.g., Mathew H. Gendle et al., *Enduring Effects of Prenatal Cocaine Exposure on Selective Attention and Reactivity to Errors*, 118 BEHAV. NEUROSCIENCE 290, 296 (2004).

105. See, e.g., Kevin P. Haggerty et al., *Long-Term Effects of the Focus on Families Project on Substance Use Disorders Among Children of Parents in Methadone Treatment*, 103 ADDICTION 2008, 2008–09 (2008); Jeannette L. Johnson & Michelle Leff, *Children of Substance Abusers: Overview of Research Findings*, 103 PEDIATRICS 1085, 1085–86 (1999).

106. *Ewing v. California*, 538 U.S. 11, 11 (2003) (plurality opinion).

107. *Solem v. Helm*, 463 U.S. 277, 281 (1983).

108. *Rummel v. Estelle*, 445 U.S. 263, 266 (1980).

109. *Graham v. Florida*, 130 S. Ct. 2011, 2018–19 (2010).

110. See, e.g., *United States v. Taylor*, 529 F.3d 1232, 1234, 1237–38 (2008) (holding that attempted armed robbery is categorically a crime of violence where it includes as an element the attempted or threatened use of force against another); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2010) (designating burglary a crime of violence because of the serious risk of injury to another involved).

111. *Graham*, 130 S. Ct. at 2018–19. In the restaurant armed robbery, Graham's accomplice twice whacked the restaurant manager with a metal bar in the back of the head. *Id.* at 2018. In the second attempted robbery the same night of the home invasion armed robbery, Graham's accomplice got shot. *Id.* at 2019.

112. FLA. STAT. ANN. § 985.227(1)(b) (West 2003) (subsequently renumbered at § 985.557(1)(b) (2007)).

as an adult, exposing him to a possible life sentence for the charge of armed burglary with assault or battery.¹¹³ Graham ultimately pled guilty in exchange for the prosecutor's recommendation for a sentence of concurrent terms of three years of probation and withheld adjudication on both charges.¹¹⁴

The judge sentenced Graham in accordance with the plea agreement, giving him the bargained-for break of delayed adjudication and three years of probation.¹¹⁵ The first year of probation was to be spent in the county jail, but Graham received credit for time served pending trial and was released.¹¹⁶ Less than six months later, while on parole, Graham joined in an armed home invasion and another attempted robbery all in one night.¹¹⁷ Fleeing by car at high speed, Graham crashed into a telephone pole and then tried to flee on foot.¹¹⁸

Appearing before a different judge, Graham's defense attorney tried to lay the case for a second chance.¹¹⁹ The sentencing judge was unconvinced and told Graham that he was a hopeless case:

[Y]ou had a judge who took the step to try and give you direction through his probation order to give you a chance to get back onto track. . . .

And I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing that I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you. . . . We can't do anything to deter you. . . .

. . . [I]t is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing

113. FLA. STAT. ANN. § 810.02(1)(b), (2)(a) (West 2007); *Graham*, 130 S. Ct. at 2018.

114. See Transcript of Proceedings, *Florida v. Graham*, No. 2003-11912-CFA (4th Jud. Cir. Fla. Dec. 18, 2003), in Joint Appendix, Vol. I, at 31, *Florida v. Graham*, No. 08-7412, (U.S. July 16, 2009).

115. See *id.* at 36.

116. *Graham*, 130 S. Ct. at 2018.

117. *Id.* at 2018–19.

118. *Id.* at 2019.

119. Transcript of Proceedings, *Florida v. Graham*, No. 16 2003 CF 11912 AXXX MA (4th Jud. Cir. Fla. Mar. 7, 2006), in Joint Appendix, Vol. II at 278, *Florida v. Graham*, No. 08-7412 (U.S. July 16, 2009).

I can do now is to try and protect the community from your actions.¹²⁰

The sentencing court's analysis and sentence captures in courtroom vernacular the dominant penal approach and sentiment of our time: incapacitation. Graham had flubbed his first and only chance badly. Accordingly, the court gave up on him.

Graham forfeited his delayed adjudication and the court entered convictions for the armed burglary and attempted armed robbery charges that brought him before the court initially.¹²¹ The court sentenced Graham to life imprisonment for the armed burglary and fifteen years for the attempted armed robbery.¹²² In Florida, life imprisonment actually meant life imprisonment because parole had been abolished.¹²³ At age nineteen, therefore, Graham would have no second chances and instead be warehoused in jail for all of his adulthood for crimes committed when he was sixteen and seventeen.

3. A Judicial Nudge out of Incapacitation Stagnation

After cases such as *Ewing* and *Harmelin v. Michigan*¹²⁴ sounded the *de facto* death knell for noncapital proportionality review, Graham's challenge of his noncapital sentence was difficult indeed. And so was Justice Kennedy's task in distinguishing those deeply fractured cases in striking down Graham's sentence. *Harmelin*, for example, let stand a sentence of life without parole for cocaine possession.¹²⁵ Justice Kennedy distinguished those cases of individuated sentence review from Graham's categorical challenge to life imprisonment without parole for juveniles.¹²⁶ The majority opinion applied the categorical analysis usually reserved for death penalty cases for the first time in a noncapital case.¹²⁷

Even applying the lens of categorical proportionality review, the severity drift over the penal law landscape made the case more complicated. Thirty-seven states, the District of Columbia, and the federal system all permitted sentences of life without parole for

120. *Id.* at 392, 394.

121. *Graham*, 130 S. Ct. at 2020.

122. *Id.*

123. *Id.*

124. 501 U.S. 957 (1991).

125. *Id.* at 961, 996.

126. *Graham*, 130 S. Ct. at 2021–23.

127. *See id.* at 2046 (Thomas, J., dissenting) (noting that prior to this ruling, the Court had consistently recognized a special distinction between capital and noncapital sentences and declaring “ ‘Death is different’ no longer”).

juvenile non-homicide offenders under some circumstances.¹²⁸ Justice Kennedy acknowledged “that in terms of absolute numbers juvenile life without parole sentences for non-homicides are more common than the sentencing practices at issue in some of this Court’s other Eighth Amendment cases.”¹²⁹

Justice Kennedy made important distinctions, however, between *possibility* and *practice*, and between *intended*, *deliberated-over* penal severity and what arises at the confluence of trends in harshening sentences.¹³⁰ Placing weight on actual practice rather than possibility, Justice Kennedy noted only eleven jurisdictions had imposed life without parole on non-homicide juvenile offenders—and even then rarely.¹³¹ Twenty-six states and the District of Columbia had not imposed the penalty despite statutory authorization to do so.¹³²

Importantly, the Court distinguished sentences that were *possible* because of the confluence of get-tough measures such as transfer of juveniles to adult courts from penalties that “legislatures in those jurisdictions have *deliberately* concluded . . . would be appropriate.”¹³³ Justice Kennedy took pains to underscore that statutory eligibility for life imprisonment without parole did not indicate “the penalty has been endorsed through *deliberate, express, and full legislative consideration*.”¹³⁴ This analytical move made deliberation important again in a heated arena where full evaluation of the benefits and costs of ratcheting up penal severity had dramatically receded.

The other value richly woven into the majority opinion was the import of hope. Justice Kennedy explained that we are particularly concerned about imprisoning youthful offenders for life because “[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”¹³⁵ In his earlier decision in *Roper v. Simmons*,¹³⁶ invalidating the death penalty for juveniles, Justice Kennedy underscored that “a greater possibility exists that a minor’s character deficiencies will be reformed.”¹³⁷ Now in *Graham*, Justice Kennedy referred back to the psychology and neuroscience

128. *Id.* at 2023.

129. *Id.* at 2025.

130. *Id.* at 2023.

131. *Id.* at 2024.

132. *Id.*

133. *Id.* at 2025 (emphasis added).

134. *Id.* at 2026 (emphasis added).

135. *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

136. 543 U.S. 551 (2005).

137. *Id.* at 570.

data offered by *amici* in *Roper* showing that juvenile and adult minds are different, with the behavior-control part of the brain continuing to mature in late adolescence.¹³⁸

Life in prison without possibility of parole was special too, because of how it snuffed out hope. Justice Kennedy explained that life imprisonment without possibility of parole, like the death sentence, was irrevocable, extinguishing “basic liberties without giving hope of restoration” aside from the remote exception of executive clemency.¹³⁹ The sentence was a “‘denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.’”¹⁴⁰

Justice Kennedy reiterated that it is the legislature’s prerogative to choose among penological goals.¹⁴¹ But that did not mean the Court would abdicate scrutiny of the choice of penal purposes, which are relevant in the Eighth Amendment analysis.¹⁴² The opinion explained that the penalty’s forswearance of the rehabilitative ideal was relevant to the disproportionality analysis.¹⁴³ As for incapacitation, the prevalent penal approach of our times, the Court held: “Incapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.”¹⁴⁴ The Court imposed a categorical rule to give “all juvenile nonhomicide offenders a chance to demonstrate maturity and reform”—in other words, to carve out space and incentive for hope and redemption, at least for juveniles.¹⁴⁵

The recurrent motif of hope makes *Graham* an exemplar of how doctrine can cultivate and seed appreciation for the power of positive emotions and hope in the law. Penal law and theory has had a long and intimate engagement with negative emotions such as anger, fear,

138. *Graham*, 130 S. Ct. at 2026 (citing Brief for Am. Med. Ass’n et al. as Amici Curiae at 16–24, *Roper v. Simmons*, 543 U.S. 551 (2008) (No. 03-633)); Brief for Am. Psychological Ass’n et al. as Amici Curiae at 22–27, *Roper v. Simmons*, 543 U.S. 551 (2008) (No. 03-633).

139. *Graham*, 130 S. Ct. at 2027.

140. *Id.* (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)).

141. *Id.* at 2028.

142. *Id.*

143. *Id.* at 2030.

144. *Id.* at 2029.

145. *Id.* at 2032.

and dread as the levers and subjects of governance.¹⁴⁶ The import of cultivating positive emotions, however, is far less emphasized, particularly when it comes to positive emotions related to the offender, who, after all, is supposed to be punished.¹⁴⁷ *Graham's* attention to the import of hope is a salutary shift.¹⁴⁸

By making legislative deliberation, hope, and incentive to demonstrate reform relevant, *Graham* also represents a nudge out of incapacitation stagnation. The Court waited patiently after Justice Kennedy's speech deploring punitive harshness and after constricting Eighth Amendment noncapital proportionality review almost to the point of closure out of deference to the political process. The lessons of experience had been mounting, however. Despite the Court's patience, the nation was still stuck in a rut, caught in the quagmire of crime politics. In *Graham*, the Court finally intervened, while exercising care not to overstep its institutional role and competence. *Graham* supplied a nudge, by establishing values as salient guideposts rather than a straitjacket.¹⁴⁹

It is not the province of courts to set penal policy. It is the task of courts, however, to make values salient to the polity and to set forth an analytical framework that provides guidance to lawmakers, particularly when processual dysfunction leads to legislation that pushes the gray boundaries of constitutionality. A potent but unobtrusive way to nudge pathological politics out of a dangerous rut and implant healthier substantive and processual norms is to make such values relevant factors in assessing proportionality. Such a judicial nudge is a way for the Court to keep within its institutional role of construing law without legislating, in accordance with

146. See Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119, 120 (2006) (noting criminal law has long taken account of emotion by reflecting "theories of fear, grief, and remorse").

147. See Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319, 320–21, 378–80 (2007) (illuminating the need to examine the law's role in harnessing and cultivating positive emotions beyond the work on the use of negative emotions to shape behavior); cf. JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 126–27 (1988) (discussing punishment in the context of pain and suffering).

148. See Barbara L. Fredrickson, *The Role of Positive Emotions in Positive Psychology*, 56 AM. PSYCHOLOGIST 218, 218, 224 (2001) (exploring the role of positive emotions); see also Leslie S. Greenberg & Jeremy D. Safran, *Emotion in Psychotherapy*, 44 AM. PSYCHOLOGIST 19, 20 (1989) (explaining that experiential and humanistic therapy conceives of "emotion as an important motivator of change" and "an orientating system that provides the organism with adaptive information").

149. See *supra* notes 142–145 and accompanying text (analyzing how Justice Kennedy's opinion underscores the problems with snuffing out hope and eschewing altogether the rehabilitative ideal).

constitutional values, while giving the polity guidance to see the path out of a political mire. A nudge is also in keeping with our republican order that relies on the wisdom of select bodies entrusted to see beyond messy quagmires in which political actors may be stuck.

4. The Utility of Uncertainty

Graham has shaken up and reinvigorated Eighth Amendment noncapital proportionality review.¹⁵⁰ What *Graham* portends, however, is uncertain. Will *Graham* just stand for the limited notion that juveniles plus life imprisonment without possibility of parole, like death, is special too? If so, the decision's reach would be quite limited—though the impact on those given hope again would be substantial, of course. There are 129 juvenile offenders serving life sentences without possibility of parole—seventy-seven of them in Florida—making the sentence “exceedingly rare.”¹⁵¹

The dissenters in *Graham* certainly thought the majority opinion stood for more. As Justice Thomas forecast, “[n]o reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law’s third, fourth, fifth, or fiftieth most severe penalties as well.”¹⁵² But how much more—and whether the formerly bifurcated “death is different” proportionality analysis will just get trifurcated so that life in prison without parole for juveniles is different too—remains to be seen.

Indeed, having succeeded in delivering a rare majority decision in a noncapital proportionality case, the Court declined to take on the tough and even more polarizing case of Joe Harris Sullivan, sentenced to life in prison without possibility of parole for the rape of a seventy-two-year-old woman at age thirteen.¹⁵³ There are only eight people in the world serving life sentences without parole for crimes committed when thirteen—and only two among those committed a

150. Cf. *Graham*, 130 S. Ct. at 2045 n.1 (Thomas, J., dissenting) (noting the Court “radically departs from the framework . . . [noncapital proportionality review] precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone” and Justice Roberts’s concurrence “breathes new life into the case-by-case proportionality approach . . . from which the Court has steadily . . . retreated”).

151. Adam Liptak, *Justices Limit Life Sentences for Juveniles*, N.Y. TIMES, May 17, 2010, at A1.

152. *Graham*, 130 S. Ct. at 2046 (Thomas, J., dissenting).

153. See *Sullivan v. State*, 987 So. 2d 83 (Fla. Dist. Ct. App. 2008) (per curiam) (affirming the sentence), cert. granted, 129 S. Ct. 2157 (2009), cert. dismissed, 130 S. Ct. 2059 (2010) (per curiam); Adam Liptak, *Defining ‘Cruel and Unusual Punishment’ When the Offender is 13*, N.Y. TIMES, Feb. 2, 2009, at A12 (providing the facts of the case).

nonhomicide crime.¹⁵⁴ Both of those people, including Sullivan, were sentenced in Florida, and both are black.¹⁵⁵ The Court initially granted certiorari, but after *Graham*, dismissed certiorari as improvidently granted.¹⁵⁶

The very uncertainty as to *Graham*'s scope may be a gentler way to nudge officials toward policies and sentences that do not push the gray area of constitutionality while keeping within the Court's historically cautious role in checking penal choices. Uncertainty as to where the constitutional line extends may lead to greater deliberation informed by the standards and values underscored as guidelines. In the venerable debate over standards versus rules, Seana Valentine Shiffrin recently made an important salvo, arguing that the very vagueness of standards can be a virtue in inducing and developing moral deliberation and agency among citizens and democratic education as citizens ask themselves whether their conduct satisfies the standard.¹⁵⁷ Uncertainty over the broader implications of a decision that carves out a categorical rule-like prohibition but also enshrines wider values can have a similar salutary effect in inducing deliberation. Uncertainty over how far the decision may sweep induces deliberation over the principles enunciated in the decision and careful treading when it comes to policies that push into the gray zone around the uncertain line.

Uncertainty also has the virtue of leaving space for the more institutionally competent political actors to implement constitutional values. Lawrence Sager has argued that the Supreme Court may decline to actively enforce constitutional protections to their full boundaries because of concerns over institutional competence.¹⁵⁸ There is a dilemma in the under-enforcement theory, however. How can a right exist if it is not judicially enforced? One way for the Court to address the problem may be through ambiguity as to the implications of a judicial intervention and its full ramifications, instead highlighting general values as guides for future legislative action. In the face of ambiguity, decision makers exert greater caution and use the available guideposts, including values made salient by the

154. Liptak, *supra* note 151.

155. *Id.*

156. *Sullivan v. Florida*, 129 S. Ct. 2157 (2009) (granting certiorari), *cert. dismissed*, 130 S. Ct. 2059 (2010) (*per curiam*).

157. Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1224–27 (2010).

158. LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 93–95 (2004).

Court. The Court can then take an incremental, wait-and-see attitude to see if the political process is self-correcting. In this way, the Court stays within its institutional competence and role but still influences the vindication of constitutional values.

B. Reform by Prisoner Release Order

1. A Judicial Push When Wait and See Has Not Worked

If *Graham* represents a judicial nudge out of incapacitation stagnation, the 184-page decision and order of the three-judge court in *Coleman v. Schwarzenegger*¹⁵⁹ that the Supreme Court recently affirmed in *Brown v. Plata*¹⁶⁰ is more of a push. *Coleman* is the first decision to order prison population reduction over state objection absent consent decree since the enactment of the Prison Litigation Reform Act (“PLRA”) of 1995,¹⁶¹ which imposed high hurdles for prison population reduction orders in part because of a controversial prisoner reduction consent decree in Philadelphia alleged to have put dangerous people on the streets to reoffend.¹⁶² The case stems from two class action lawsuits alleging unconstitutional failure to provide adequate medical care (the *Plata* class action) and adequate mental health care (the *Coleman* class action).¹⁶³

The context of the cases is the “state of emergency” in California’s prisons, packed to 190% of intended capacity, overwhelming sewer, water, and electrical systems and sparking riots that put inmates and guards at “extreme peril.”¹⁶⁴ The state of emergency in California’s prisons is the consequence of fiercely

159. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820 (E.D. Cal. & N.D. Cal. Aug. 4, 2009), *appeal granted sub nom.*, *Schwarzenegger v. Plata*, 130 S. Ct. 3413 (2010).

160. 131 S. Ct. 1910 (2011).

161. Prison Litigation Reform Act, Pub. L. No. 104-134, § 03-804, 110 Stat. 1321-66, 1321-70 to -75 (1996) (codified in relevant part at 18 U.S.C. § 3626 (2006)).

162. See, e.g., Response to Motions to Dismiss or Affirm, Cal. State Republican Legislator Intervenor v. Plata, 131 S.Ct. 2929 (U.S. 2011) (No. 09-1232), 2010 WL 4494028 at *1 (noting “no similar order has been issued over an objection in the fourteen year history of the” PLRA). For an account of the controversial Philadelphia consent decree as stimulus, see, e.g., Norma Levy Shapiro, *Reflections on the Philadelphia Jails Consent Decree*, in CONSENT AND ITS DISCONTENTS: POLICY ISSUES IN CONSENT DECREES 91–96 (Andrew Rachlin ed., 2006); Anthony Shorris, *Preface to CONSENT AND ITS DISCONTENTS: POLICY ISSUES IN CONSENT DECREES*, at i (Andrew Rachlin ed., 2006).

163. *Coleman*, 2009 WL 2430820, at *10, *22.

164. See Jennifer Warren, *State Prison Crowding Emergency Declared*, L.A. TIMES, Oct. 5, 2006, at A1 (reporting on the emergency declaration).

tough-on-crime policies resulting in California spending “more on corrections than most countries in the world” but with “fewer public safety benefits.”¹⁶⁵ California pays more for prisons than higher education, shelling out \$8 billion a year to sustain its high rate of incarceration.¹⁶⁶ In a time of prolonged fiscal crisis, the state has fallen far behind in providing for the 750% surge in prisoners since the 1970s.¹⁶⁷ The state, mired in steep recession, cannot afford to build enough prisons to keep pace with its rate of incarceration.¹⁶⁸

Every day, large, fresh flows of prisoners are packed into overburdened criminogenic conditions where officials lack the resources to engage in effective sorting. Thus, a nonviolent person may be crowded in close conditions with high-risk, hardened violent offenders and forced to find ways to survive in brutalizing conditions.¹⁶⁹ The overcrowding crisis is graphically captured in photos posted on the California Department of Corrections and Rehabilitation website depicting prisoners crowded into “bad beds”—vast rows of double or triple bunks crammed into areas never intended to house prisoners such as gyms, classrooms, dayrooms, and other spaces formerly used for rehabilitative efforts.¹⁷⁰ A single toilet may be shared by as many as 54 prisoners, and as many as 200 prisoners may be packed into a gym.¹⁷¹

Conditions are so severe that, as the fact-finding *Plata* court reported, “it is an uncontested fact that, on average, an inmate in one of California’s prisons needlessly dies every six to seven days due to constitutional deficiencies.”¹⁷² Ill prisoners wait months and may die

165. LITTLE HOOVER COMM’N, *supra* note 72, at 14.

166. See Randal C. Archibold, *Driven to a Fiscal Brink, a State Throws Open the Doors to Its Prisons*, N.Y. TIMES, Mar. 24, 2010, at A14. California spends nearly 11% of its general budget on prisons, compared to 7.5% on higher education. Jennifer Steinhauer, *Schwarzenegger Seeks Shift from Prisons to Schools*, N.Y. TIMES, Jan. 7, 2010, at A21.

167. *Coleman*, 2009 WL 2430820, at *19.

168. Jack Dolan, *Lawmakers Express Frustration over Excessive Outlays for Prison Health*, L.A. TIMES, Jan. 27, 2011, at A1; Dashka Slater & Gary Rivlin, *California on the Brink*, NEWSWEEK, Sept. 5, 2011, at 26.

169. See *Coleman*, 2009 WL 2430820, at *40, *85–86 (noting that the prisoner classification system has broken down because of overcrowding and a quarter of prisoners are housed outside their classification levels rendering conditions criminogenic).

170. Warren, *supra* note 164 (describing state of emergency and “bad beds”); Cal. Dep’t of Corr. & Rehab., *Prison Overcrowding Images*, FLICKR, <http://www.flickr.com/photos/37381942@N04/sets/72157626788363216/> (last visited Feb. 20, 2012) (providing forty photos).

171. *Brown v. Plata*, 131 S. Ct. 1910, 1924 (2011).

172. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253, at *1 (E.D. Cal. Oct. 3, 2005). For discussion of later data from 2006 and 2007, see *Brown v. Plata*, 131 S. Ct. 1910, 1925 n.4 (2011).

or commit suicide while waiting for treatment.¹⁷³ For lack of mental health facility beds, mentally ill prisoners are held in de facto segregation for as much as six months or more, sometimes held in phone booth-sized cages.¹⁷⁴ Graphic and gut-wrenching accounts abound: an inmate was found nearly catatonic after being stored for almost twenty-four hours in a phone booth-sized cage standing in his own urine; prisoners suffering from excruciating abdominal or chest pain died while waiting hours or even weeks for treatment.¹⁷⁵ Suicide rates are nearly eighty percent higher in California's prisons than the national average in prisons.¹⁷⁶ According to the Special Master appointed to oversee the delivery of mental healthcare, 72.1% of the suicides were either foreseeable, preventable, or both.¹⁷⁷

Prisons lack even the bare minimum space to deliver adequate care. For example, medical "exams" are conducted in scraps of space too small for an actual physical exam.¹⁷⁸ The yearly influx of approximately 140,000 inmates also has overwhelmed the capacity of "reception centers," two of which are at 300% of design capacity, meaning newcomers have languished for long periods without even preliminary screening for medical and mental health needs.¹⁷⁹ Even when identified as being in need of treatment, severe staffing shortages and the dearth of space means that prisoners do not get adequate medical care in a timely fashion and mentally ill patients may wait months for a place in an appropriate facility to open up.¹⁸⁰

After finding Eighth Amendment violations, the district courts for the Eastern and Northern Districts of California have struggled for years with the noncompliance of prison mental and medical care with constitutional requirements.¹⁸¹ The Supreme Court has read the Eighth Amendment prohibition against cruel and unusual punishment to require the government "to provide medical care for those whom it is punishing by incarceration."¹⁸² The Eighth Amendment tolerates substantial overcrowding and prisoner-packing improvisations when prisons exceed design capacity such as "double

173. See *Plata*, 131 S. Ct. at 1933 (recounting prisoners' experiences).

174. *Id.*

175. *Id.* at 1924–25.

176. *Id.* at 1924.

177. *Id.* at 1924–25.

178. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820, at *36 (E.D. Cal. & N.D. Cal. Aug. 4, 2009).

179. *Id.* at *35.

180. *Id.* at *38.

181. *Id.* at *12.

182. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

celling” but there may not be “deprivations of essential food, medical care, or sanitation.”¹⁸³ “[D]eliberate indifference to serious medical needs” amounts to a constitutional violation.¹⁸⁴ Applying these constitutional standards to the *Coleman* class action alleging constitutionally inadequate healthcare, the district court appointed a special master in 1995 to remedy the violations.¹⁸⁵ In the *Plata* class action, the parties entered into a stipulation for injunctive relief in 2002 amounting to a comprehensive overhaul of the prison medical system with stipulated policies and procedures spanning approximately 800 pages.¹⁸⁶

Three years after the stipulation in *Plata*, the district court found, based on a six-day evidentiary hearing, that it was “beyond reasonable dispute” that California had failed to provide the stipulated relief to bring medical care to constitutionally required minimum standards.¹⁸⁷ Concluding “the California prison medical care system is broken beyond repair,” the district court put the California Department of Corrections and Rehabilitation medical system under federal receivership.¹⁸⁸ The Federal Receiver was given the task of “executive management of the California prison medical health care delivery system with the goals of restructuring day-to-day operations and developing, implementing, and validating a new, sustainable system that provides constitutionally adequate medical care” to prison inmates.¹⁸⁹

In both the *Coleman* and *Plata* class actions, the judicial appointment of an adjunct overseer proved insufficient because severe overcrowding impeded attempts to bring medical and mental healthcare to minimum constitutional requisites.¹⁹⁰ In 2007, the district courts jointly considered motions by the plaintiffs in both class actions for the convening of a three-judge court to issue more drastic orders to address overcrowding that could constitute “prisoner release orders” subject to heightened standards and procedures under

183. *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981).

184. *Estelle*, 429 U.S. at 106.

185. See *Coleman v. Wilson*, 912 F. Supp. 1282, 1323–24 (E.D. Cal. 1995) (adopting magistrate judge’s finding of constitutional violations with modifications and ordering the appointment of a special master to remedy constitutional violations).

186. See *Coleman*, 2009 WL 2430820, at *3–5 (giving the procedural history).

187. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2932253, at *1 (E.D. Cal. Oct. 3, 2005).

188. *Id.*

189. *Coleman*, 2009 WL 2430820, at *11 (internal citations omitted).

190. *Id.*

the PLRA.¹⁹¹ The PLRA defines potential “prisoner release order[s]” broadly to include “any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison.”¹⁹² The Act forbids courts from entering such orders unless:

- (i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and
- (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.¹⁹³

As a further hurdle, prisoner release orders must be issued by a three-judge court based on a finding “by clear and convincing evidence that—(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right.”¹⁹⁴

The district courts ordered the convening of a three-judge court to consider whether to issue prisoner release orders.¹⁹⁵ Among the judges appointed to the panel was Judge Stephen Reinhardt, the liberal lion of the Ninth Circuit who, as Judith Resnik recently put it, “is one of the high-visibility judges whose majority opinions are also seen as attracting the Court’s attention.”¹⁹⁶ In a move revelatory of the crisis and dangers posed by the overcrowding crisis, the California Correctional Peace Officers Association intervened to join the prisoners they guarded in asking for a prisoner reduction order because of the harmful consequences of overcrowding to the safety of staff as well as inmates.¹⁹⁷

The three-judge panel issued a detailed lengthy opinion finding that prison overcrowding was a “primary cause” of the constitutional deficiencies in medical and mental healthcare and no other remedies would address the problem as demonstrated by the failure of less

191. 18 U.S.C. § 3626(a)(3)(A)(i) (2006).

192. *Id.* § 3626(g)(4).

193. *Id.* § 3626(a)(3)(A).

194. *Id.* § 3626(a)(3)(E).

195. *Plata v. Schwarzenegger*, No. C01-1351, 2005 WL 2122657, at *3–6 (N.D. Cal. July 23, 2007).

196. Judith Resnik, *Reading Reinhardt: The Work of Constructing Legal Virtue* (Exempla Iustitiae), 120 YALE L.J. 539, 555 (2010).

197. See, e.g., Plaintiff Intervenor Cal. Corr. Peace Officers’ Ass’n Proposed Findings of Fact and Conclusions of Law at 2, *Coleman v. Schwarzenegger*, Nos. CIV CIV S90-0520 LKK JFM P, CIV C01-1351 TEH (E.D. Cal. & N.D. Cal. 2009).

intrusive approaches over a prolonged period of time.¹⁹⁸ The court further found that rather than improving safety, prison had become “criminogenic,” posing a threat to public safety by sending 123,000 prisoners each year back into society who were “often more dangerous than” before incarceration.¹⁹⁹ In the teeming prison pressure cooker, high-risk inmates cannot possibly rehabilitate and low-risk inmates, who are too often mixed in with the dangerous because of overburdened staff and resources, learn more dangerous behavior.²⁰⁰

Before entering a prisoner release order, a three-judge court must demonstrate it has given “substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.”²⁰¹ The three-judge court held that prisoner reduction could be ordered without compromising safety through such measures as expanding early release and good time credits for low- to moderate-risk inmates; implementing alternatives to incarceration for low-risk offenders with short sentences and technical parole violators; and employing evidence-based rehabilitative programs to lower the likelihood of reoffending.²⁰² The three-judge court ordered California to reduce its prison population from 190% of capacity to 137.5% of design capacity within two years, necessitating the release of between 38,000 and 46,000 prisoners.²⁰³

2. Demonstrating that Deference Does Not Mean Abdication

Shortly after the three-judge court issued the prisoner release order and refused to stay execution of the order, the Supreme Court granted appeal.²⁰⁴ While the tenor of questioning at oral argument does not always predict the ending lineup, particularly in the frequently fractured Eighth Amendment context, the oral argument in *Brown v. Plata* proved to offer insights into the outcome.

The Justices’ questions indicated that Justice Kennedy would be pivotal in determining a four to four split in views. Comments by

198. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820, at *33, *64 (E.D. Cal. & N.D. Cal. Aug. 4, 2009).

199. *Id.* at *86, *87 (internal citation omitted).

200. *Id.* at *86.

201. 18 U.S.C. § 3626(a)(1)(A) (2006).

202. *Coleman*, 2009 WL 2430820, at *87–105.

203. *Id.* at *84, *115; *see also* Order To Reduce Prison Population, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2010 WL 99000, at *3 (E.D. Cal. & N.D. Cal. Jan. 12, 2010) (ordering the release of prisoners), *appeal granted sub nom.*, *Schwarzenegger v. Plata*, 130 S. Ct. 3413, 3413 (2010) (deferring jurisdictional issues to a hearing on the merits).

204. *Schwarzenegger v. Plata*, 130 S. Ct. 3413, 3413 (2010).

Justices Ginsburg, Breyer, Sotomayor, and Kagan underscored the State's failure, despite two decades of judicial waiting, to cure what Justice Breyer called "a big human rights problem."²⁰⁵ The four justices underscored the findings of the courts below that the root cause of overcrowding needed to be addressed as a precondition to any progress on remedying the constitutional infirmities in provision of healthcare.²⁰⁶

Justice Scalia's questions suggested he was concerned that the three-judge court did not consider evidence as to whether unconstitutional conditions had been ameliorated between the evidentiary trial in August 2008 and the issuance of the prisoner release order a year later in August 2009.²⁰⁷ Justice Roberts's questioning also suggested a view that the order was judicial overreaching because some progress had been made.²⁰⁸ In the interim, the State neared a deal on building two new medical facilities to redress the prison healthcare problem.²⁰⁹ Ten months after the three-

205. See Transcript of Oral Argument at 27, *Schwarzenegger v. Plata*, 131 S. Ct. 1910 (2011) (No. 09-1233) [hereinafter Transcript] (statement of Breyer, J.) (describing crisis and delay as a "big human rights problem"); *id.* at 4 (statement of Ginsburg, J.) (noting "there were something like 70 orders from the district judge" and stating, "[H]ow much longer do we have to wait? Another 20 years?"); *id.* at 5 (statement of Sotomayor, J.) ("I don't see how you wait for an option that doesn't exist."); *id.* at 29 (statement of Kagan, J.) (giving weight to "judges who have been involved in these cases since the beginning, for 20 years in the *Plata* case, who thought: we've done everything we can").

206. See *id.* at 7 (statement of Ginsburg, J.) (noting "the receiver has said, the special master has said, we can't make any progress at all until there are fewer people"); *id.* at 9 (statement of Breyer, J.) (stating "it sounds as if overcrowding is a big, big cause of this problem, which is horrendous"); *id.* at 5 (statement of Sotomayor, J.) ("[T]he receiver has basically said, I've tried, and the small progress we've made has been reversed because the population keeps growing."); *id.* at 30 (statement of Kagan, J.) (giving weight to lower court findings that attempted solutions "won't go anywhere until we can address this root cause of the problem").

207. *Id.* at 38–39 (statement of Scalia, J.) (noting that the three-judge court "didn't take any evidence" as to whether unconstitutional deficiencies due to overcrowding continued to exist). Justice Scalia may also be swayed by a public safety argument. See *id.* at 54 (responding to the claim that early release for good time could accomplish prisoner reduction safely by saying, "[D]oesn't good time credits let—let out people who otherwise would not be out?").

208. See *id.* at 41 (statement of Roberts, C.J.) (noting that the intervenors had stated that the prison population had been reduced by 14,832 between 2006 and 2010).

209. See Michael Rothfield & Eric Bailey, *Principals Agree To Scale Back Inmate Healthcare*, L.A. TIMES, May 29, 2009, at A10 (noting deal was near for \$2 billion construction plan, but it was unclear whether state legislators would authorize borrowing for the plan).

judge court's prisoner release order, California broke new ground on a new \$906 million prison medical facility, expected to open in 2013.²¹⁰

Justice Alito strongly suggested that the order was overbroad—tackling prison overcrowding rather than merely mental and healthcare—and that the order was defective because it insufficiently accounted for public safety consequences.²¹¹ As is generally his custom, Justice Thomas did not ask questions during oral argument, but he had earlier expressed the view, in a dissent joined by Justice Scalia, that historically the Eighth Amendment was not conceived “as protecting inmates from harsh treatment” and “courts had no role in regulating prison life” because the Eighth Amendment is not “a National Code of Prison Regulation.”²¹²

That left Justice Kennedy, who seemed to agree with the need for the strong remedy of reduction because of the failure of less aggressive measures and the political branches to abate the violation. He told Carter Phillips, counsel for California, “at some point the court has to say: You’ve been given enough time; the constitutional violation still persists.”²¹³ His questions suggested that he was deliberating over whether the reduction should be slightly smaller than ordered by the district court, to 145% of capacity rather than 137.5% of capacity, and accomplished in a slightly longer time horizon of three years rather than two.²¹⁴ Most importantly, however, Justice Kennedy seemed in *Plata*, as in *Graham*, to be willing to intervene when the prolonged wait-and-see approach had not worked

210. Scott Smith, *Officials Break Ground on State Prison Project*, CONTRA COSTA TIMES (Cal.), Nov. 10, 2010, at A11, available at 2010 WLNR 23814850.

211. Transcript, *supra* note 205, at 41 (statement of Roberts, C.J.) (noting that the intervenors stated the prison population had been reduced by 14,832 between 2006 and 2010); *id.* at 44, 47 (statement of Alito, J.) (“But why order the release of around 40,000 prisoners, many of whom, perhaps the great majority of whom, are not going to be within a class in either of these lawsuits? Why order the release of all those people, rather than ordering the provision of the construction of facilities for medical care, facilities to treat mental illness, hiring of staff to treat mental illness? Why not go directly to the problem rather than address what seems to be a different issue altogether? . . . If—if I were a citizen of California, I would be concerned about the release of 40,000 prisoners.”).

212. *Hudson v. McMillian*, 503 U.S. 1, 19–20, 28 (Thomas, J., dissenting); see also, e.g., Linda Greenhouse, *Clarence Thomas, Silent But Sure*, N.Y. TIMES OPINIONATOR BLOG (Mar. 11, 2010, 9:37 PM), <http://opinionator.blogs.nytimes.com/2010/03/11/clarence-thomas-silent-but-sure/> (noting Justice Thomas’s general custom of silence and consistent Eighth Amendment stance).

213. Transcript, *supra* note 205, at 16 (statement of Kennedy, J.).

214. See *id.* at 75 (statement of Kennedy, J.); see also *id.* at 59 (statement of Kennedy, J.) (“There was substantial expert opinion that 145—145 percent would be sufficient. . . . [D]oesn’t the evidence indicate to you that at least 145 ought to be the beginning point, not 137.5?”).

to ensure that deference would not become abdication of the judicial role.

Ultimately, Justice Kennedy continued his pivotal role in the revival of the Eighth Amendment to redress the human toll of incapacitation stagnation. Justice Kennedy authored the decision for the Court upholding the prisoner release order in *Brown*.²¹⁵ His opinion was exquisitely attuned to the everyday miseries of people crammed beyond capacity, evocatively describing such cruelties as needless deaths after hours or weeks of excruciating pain waiting for treatment, phone booth-sized cages for storing prisoners waiting for treatment, and a prisoner assaulted in a teeming gym turned human warehouse whose dead body was not discovered for several hours.²¹⁶ The opinion was made all the more powerful by the inclusion of photos of the cages and of humans crammed into spaces never meant to hold so many bodies.²¹⁷

Justice Kennedy reminded a nation whose prisons had veered from the values of a civilized society—not by intent, perhaps, but nonetheless in result—that “[p]risoners retain the essence of human dignity inherent in all persons” and the Eighth Amendment reflects that principle.²¹⁸ Justice Kennedy explained that deference to the states and prison administrators could not mean abdication of the judicial check; “[i]f government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.”²¹⁹

Between the majority and the dissenters, a striking battle of imagery as well as differing visions of institutional roles unfolded. Justice Scalia’s dissent deplored structural reform injunctions in general and in particular the prisoner release order, which he termed “perhaps the most radical injunction issued by a court in our Nation’s history.”²²⁰ He wrote that the injunction “ignore[d] bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity.”²²¹ As a counterpart to the powerful imagery of human suffering throughout Justice Kennedy’s opinion for the Court, Justice Scalia retorted that only a tiny fraction of the plaintiff prisoners might actually individually suffer a torturous,

215. *Brown v. Plata*, 131 S. Ct. 1910, 1921 (2011).

216. *Id.* at 1924–26, 1934.

217. *Id.* at 1949–50.

218. *Id.* at 1928.

219. *Id.*

220. *Id.* at 1950 (Scalia, J., dissenting).

221. *Id.* at 1950–51.

lingering death, while many beneficiaries of the prisoner release order “will undoubtedly be fine physical specimens who have developed intimidating muscles pumping iron in the prison gym.”²²²

Justice Kennedy repeatedly underscored for the majority that the prisoner release order did not dictate the means by which unconstitutional conditions would be relieved.²²³ Like the three-judge court, Justice Kennedy gave the political branches suggestions—nudges rather than mandates—on how to meet the order in a manner protective of public safety such as “good-time credits and diverting of low-risk offenders and technical parole violators to community-based programs, that will mitigate the order’s impact.”²²⁴ Justice Scalia mocked these suggestions as judicial policy judgments about penology and recidivism masquerading as factual findings regarding how to mitigate the adverse impact on public safety.²²⁵ Justice Scalia deplored that the “*incompetent policy preferences*” of a few judges would “now govern the operation of California’s penal system.”²²⁶

The ominous specter intensifying the fierce debate was fear that the courts’ decisions would endanger the public. In another salvo in the battle of imagery, Justice Alito wrote in a dissent joined by Chief Justice Roberts that “[t]he three-judge court ordered the premature release of approximately 46,000 criminals—the equivalent of three Army divisions.”²²⁷ Justice Alito concluded starkly: “I fear that today’s decision, like prior prisoner release orders, will lead to a grim roster of victims. I hope that I am wrong. In a few years, we will see.”²²⁸

Trying to mitigate public safety concerns, Justice Kennedy suggested that the three-judge panel “consider whether it is appropriate to order the State to begin without delay to develop a system to identify prisoners who are unlikely to reoffend or who might otherwise be candidates for early release.”²²⁹ He also suggested to the State that it may wish to ask for an extension of time from the two years after entry of the order to five years.²³⁰

222. *Id.* at 1953.

223. *Id.* at 1943 (majority opinion).

224. *Id.*

225. *Id.* at 1954 (Scalia, J., dissenting).

226. *Id.* at 1955.

227. *Id.* at 1959 (Alito, J., dissenting).

228. *Id.* at 1968.

229. *Id.* at 1947 (majority opinion).

230. *Id.*

Time is a crucial part of the force of the remedy. At stake is whether California can continue in painful fashion in the incapacitation rut or if the courts' remedial decision will jolt it out. The three-judge panel's remedy of large-scale reduction in a short time would push the state to revive or expand measures of mercy such as good-time credits, diversion of low-risk offenders with short sentences and technical violators, and other sentencing reforms to meet the deadline. As Justice Kennedy noted, it is "all but certain that the State cannot complete sufficient construction to comply fully with the order" and thus "the prison population will have to be reduced to at least some extent" through options, including those rehabilitative measures suggested by the courts.²³¹ In contrast, a longer time horizon would potentially give the state the opportunity to drag out the problem while attempting to muster funds to build new facilities and shuttle prisoners out of state to contract prisons.²³² Realistically, delay does not mean substantial progress on reform—just more prolonged pain in a state forced to cut billions in basic services such as welfare, medical care for the poor and education to redress a \$26 billion deficit.²³³ By retaining the timeline—albeit with indications that California may move for a limited extension—the Court nudged the state toward sustainable change while balancing the need for time to devise orderly, considered reforms to mitigate safety concerns.

III. THE LEGISLATIVE EMERGENCY

The judicial awakening and dialogue are well-timed because the shifting political context of criminal justice reform renders a search for more sustainable solutions potentially palatable as well as pressing. California is hardly the only state experiencing penal law and policy in a state of profound flux and distress at a time of inability to pay for incapacitation. Across the nation, at least forty-two states and the District of Columbia are wrestling with how to fix budget

231. *Id.* at 1928.

232. *See, e.g.,* *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820, at *71 (E.D. Cal. & N.D. Cal. Aug. 4, 2009) (noting California's proposed alternative of transferring California inmates out of state and potential deleterious consequences of such action including removing prisoners far from the rehabilitative influence of family); Transcript, *supra* note 205, at 7-9 (statement of Carter J. Phillips, counsel for California) (noting prison construction efforts and arguing California should have more time to implement such measures).

233. Shane Goldmacher & Patrick McGreevy, *Billions in Cuts to Services OKd*, L.A. TIMES, Mar. 17, 2011, at A1.

deficits that total around \$103 billion.²³⁴ States with large budget shortfalls have resorted to desperate measures, with Arizona, for example, even recently selling its state capitol building and prisons and then leasing them back to raise short-term revenue.²³⁵ The prolonged recession and widespread budget crises are forcing a confrontation with the high costs of maintaining the world's highest per capita incarceration rate and a search for alternatives—or, at a minimum, release valves for the unbearable pressure.

The response has been varied.²³⁶ Some of the most prevalent types of responses sweeping the states are release-valve reforms using back-end sentence reductions to ease some of the pressure through the early release of prisoners.²³⁷ This trend has led to the revival and expansion of early release measures that had been curtailed or eliminated in many states during the severity ramp-up and decline of the rehabilitative ideal.²³⁸ At the same time, however, some states have made deep cuts to already curtailed programs of rehabilitation and supervision to ensure successful community reintegration.²³⁹ This Part examines these prevalent trends and how pressure-valve release-driven practice without orienting penal theory poses risks of danger to public safety and backlash.

A. Release-Valve Reforms

The fierce politics surrounding crime and punishment do not make penal reform easy. Strategies to ease the pressures of paying for prison while avoiding politically hot-button reforms range from the comical to the pathological. Wisconsin and Minnesota, for example, have pursued the course of “tiny, not-so-sexy” nips, instituting “Taco Tuesday,”—synchronizing meals across prisons—which apparently yields a cost savings of \$2 million per year by saving ten cents per

234. MCNICHOL ET AL., *supra* note 68, at 6; *see also* Jack Chang, *Brown's Countdown, Day 7: California Not Alone in Tackling Huge Budget Gaps*, SACRAMENTO BEE, Jan. 16, 2011, 2011 WLNR 938094 (reporting that all but ten states are wrestling with a total of \$140 billion in budgetary shortfalls).

235. Nicholas Riccardi, *States Still Facing Tough Questions About Budgets*, BALT. SUN, Dec. 8, 2010, at 10A, *available at* 2010 WLNR 24409988.

236. For examples of states pioneering some salutary shifts toward evidence-based rehabilitative efforts to reduce recidivism and prison inflow rates and to find sustainable alternatives to incarceration, *see infra* Part IV.A–B.

237. *See* Davey, *supra* note 1 (describing wave of early release measures).

238. *See* Joan Petersilia, *Parole and Prisoner Re-Entry into the United States*, 26 CRIME & JUST. 479, 479–80, 494–96 (1999) (describing the rollback); Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes?: Sentencing and Corrections Reforms in 2003*, 16 FED. SENT'G REP. 294, 297–300 (2004) (surveying potential shift and revival).

239. *See infra* Part III.B.2.

meal.²⁴⁰ On the pathological end, California planned to address its massive budget deficit by cutting \$811 million from prison medical care even after the extensive findings of the *Coleman* three-judge court about the unconstitutionally poor and dangerous state of affairs in prison healthcare.²⁴¹

In search of viable ways to cut more as budget crises have deepened, states have deployed a wave of “back-end” sentence reductions to find short-term relief from the fiscal pressures of an incarceration society by shaving off a little time on some sentences.²⁴² About half of the states have adjusted early release and parole programs and sentencing laws or have plans to do so.²⁴³ The broad-based, shallow nature of the cuts means that each individual prisoner realizes very little in terms of sentence reduction but the aggregate cuts give the short-term fiscal relief that legislators need when a fiscal crisis arises during a legislative budget cycle.²⁴⁴ Because no criminal penalties are officially reduced and each individual prisoner is released a seemingly trivial amount of time earlier, back-end reductions help legislators release some budgetary pressure with a lessened risk of incurring the charge that they are “soft on crime” or “go easy” on certain kinds of crimes. Back-end sentence-mitigating measures are therefore making a comeback, not necessarily because penal law and policy are embracing the old principles of incentives for rehabilitation and mercy where warranted,²⁴⁵ but rather as a result of political utility and budgetary pressure release without a commitment to any particular penal theory.

240. Jason Stein, *‘Taco Tuesdays’ Part of Plan to Save State Millions*, WIS. ST. J., Jan. 10, 2010, at D1, available at 2010 WLNR 678453.

241. Shane Goldmacher, *State’s First 2010 Budget Cuts Advance*, L.A. TIMES, Feb. 11, 2010, at AA4.

242. For a collection of recent measures across the states to relieve fiscal year 2011 budget pressures, see, e.g., NAT’L CONF. OF STATE LEGISLATURES, STATE MEASURES TO CLOSE BUDGET GAPS (2011), <http://www.ncsl.org/issues-research/budget-tax/state-measures-to-close-budget-gaps.aspx> (click “criminal justice” and choose fiscal year to generate list of recent reforms). For a history of earlier pressure-easing budget reforms during the post-September 11, 2001 downturn, see, e.g., RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 4–8 (2002), available at http://www.sentencingproject.org/doc/publications/inc_statesentencingpolicy/pdf (listing reforms).

243. Davey, *supra* note 1.

244. See Elizabeth Napier Dewar, Comment, *The Inadequacy of Fiscal Constraints as a Substitute for Proportionality Review*, 114 YALE L.J. 1177, 1182 (2005).

245. See, e.g., Nora V. Demleitner, *Good Conduct Time: How Much and for Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777, 779, 782 (2009) (explaining that good-time credits provide incentives to rehabilitate).

Budgetary pressures are the common and prevalent justification for the sentence reduction and early release measures.²⁴⁶ Citing budgetary pressures makes reforms more politically palatable, changing the social meaning of reforms from being soft on prisoners to responding to severe budget crises. Because of severe budgetary constraints, legislators can say they are enacting early release and sentence reform measures because fiscal crises are forcing them to pursue such measures.²⁴⁷ Connecticut legislator Mike Lawlor, for example, capitalized on the meaning shift occasioned by the budget crisis to champion rehabilitative alternatives to prison and prison population reductions, stating “People have to be willing to explain it and get beyond the usual sort of philosophical battles—tough on crime, soft on crime. This is just sort of a fiscal reality not a philosophical choice.”²⁴⁸

Examples of expanded early release programs and powers are myriad. In 2008, Pennsylvania passed the Recidivism Risk Reduction Act,²⁴⁹ which allows for a reduction of up to a quarter of the sentence of a nonviolent offender as an incentive to attend rehabilitative programs and in an effort to save \$71.5 million in five years.²⁵⁰ At the time, severe overcrowding was forcing the state to construct four new prisons at \$200 million each.²⁵¹ “[I]n a sea change from politically popular tough-on-crime calls that have dominated the statehouse since the 1980s,” the sentence-reducing reforms had “widespread backing: from the Department of Corrections and the Board of Probation and Parole, to district attorneys, state troopers and police officers, to the Pennsylvania Prison Society.”²⁵²

In April 2009, New York amended its Correction Law to give counties the authority to establish “local conditional release

246. *State Budget Cuts May Lead to Inmate Releases*, MSNBC (Apr. 3, 2008, 1:34 PM), http://www.msnbc.msn.com/id/23939378/ns/us_news-crime_and_courts/ (quoting state officials as defending proposals because of the need to respond to budgetary emergencies and lack of money for expanding prisons). Some lawmakers and corrections officials, however, such as Michigan Department of Corrections Director Patricia L. Caruso, say their main motivation is to reform a broken system. Davey, *supra* note 1 (quoting Caruso’s view).

247. Cf. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 947–57 (1996) (describing how the compulsion of law can change the social meaning of conduct and render behavior once socially infeasible possible).

248. Cadue, *supra* note 1.

249. 61 PA. CONS. STAT. ANN. §§ 4504–4506 (West 2008).

250. *Id.*; Riley Yates, *Release Plan for Convicts Starts Slow*, PITTSBURGH POST-GAZETTE, Sept. 26, 2010, at A14, available at 2010 WLNR 19119656.

251. Yates, *supra* note 250.

252. *Id.*

commissions” to review applicants for early release and relieve the burdens on county jail.²⁵³ In August 2009, Colorado officials launched early release initiatives intended to save the state \$19 million and to help fill a \$318 million budgetary shortfall.²⁵⁴ In September 2009, former Illinois Department of Corrections Director Michael Randle implemented an ultimately short-lived reform dubbed “the Meritorious Good Time (“MGT”)-Push” that allowed prisoners to start accumulating “good time” credit for early release upon entry into jail rather than waiting until the prisoner serves sixty days in state prison to shorten the time for eligibility.²⁵⁵

Trying to save money by shortening jail time to help address a \$1.3 billion budget deficit, Kentucky passed a provision in its 2009–2010 budget bill that gives credit for time spent on parole before technical parole violations return individuals to prison.²⁵⁶ In Michigan, former Governor Jennifer Granholm commuted 133 sentences and expanded the state’s parole board to hear more parole cases and speed up the early release process.²⁵⁷ To save the prison system about \$130 million in fiscal year 2011, Granholm also proposed the reinstatement of good-time credits toward early release, a policy the state phased out between 1978 and 1998 during the get-tough era.²⁵⁸

The budget crisis is also prompting proposals for bolder and larger reductions in sentences and faster earlier release than the

253. See N.Y. CORRECT. LAW §§ 270–273 (Consol. 2009) (conferring powers, defining standards, and establishing procedures); see also, e.g., Denise A. Raymo, *Early Release Option Raised*, PRESS-REPUBLICAN (N.Y.), Feb. 19, 2011, available at 2011 WLNR 3325215 (detailing a county’s exploration of whether to exercise the power to relieve overcrowding in county jail).

254. Kirk Mitchell, *The Faces of Early Parole: First Ten Felons Set Free in a State Plan To Save Millions Have Records of Assault, Escape and Rioting*, DENV. POST, Oct. 15, 2009, at A1, available at http://www.denverpost.com/ci_13564285.

255. See MALCOLM C. YOUNG, SETTING THE RECORD STRAIGHT: THE TRUTH ABOUT “EARLY RELEASE” FROM ILLINOIS PRISONS 3–5 (2010) (giving the details of the history of reform); Andy Grimm, *Inmates Surge to Record High*, CHI. TRIB., Nov. 23, 2010, at 4 (giving a brief history). For a discussion of the denouement of the program, see *infra* Part IV.B.

256. Stephenie Steitzer, *Ky. Supreme Court Rules Early Releases Proper*, COURIER-J. (Ky.), Nov. 26, 2009, at A1, available at 2009 WLNR 24094014 (describing the jail-time-reducing proposal that passed); *State Budget Cuts May Lead to Inmate Releases*, *supra* note 246 (explaining that Kentucky’s legislation will save the state \$50 million).

257. Davey, *supra* note 1.

258. Dawson Bell, *Plan for Early Release in Granholm’s Budget To Face Steep Opposition*, DETROIT FREE PRESS (Feb. 16, 2010), <http://www.wzzm13.com/news/story.aspx?storyid=118547>. The move carried political consequences, however. For a discussion, see *infra* Part IV.B.

shallow-cut approach taken in less severe and prolonged economic downturns. Mississippi, for example, amended its law requiring a prisoner to serve 85% of his sentence before becoming eligible for early release to give the Parole Board discretion to release an inmate after service of 25% of the sentence.²⁵⁹ Mississippi also passed a law permitting “drug offenders to be placed on house arrest at a possible savings of about \$5 million” to the state.²⁶⁰ Washington is considering enacting a 50% time-off credit for good behavior for the lowest-risk categories of prisoners to help lighten the prisoner load.²⁶¹

Some states are also considering “medical parole”—letting out the sickest inmates to save on healthcare costs. California recently enacted a bill allowing the release of comatose and physically incapacitated inmates.²⁶² Facing a budget shortfall, Texas is also debating proposals to release and deport ill, nonviolent, foreign-born inmates for an estimated \$54 million a year in savings.²⁶³

Couching early release for the expensively ill as budget-saving measures changes the meaning of such reforms and makes it more politically palatable. In contrast, “compassionate release” for the elderly and generally infirm does not sell as well because it is couched as a measure of mercy and risks being perceived as “soft” on the criminal, as demonstrated by the fierce opposition in California to “compassionate-release” legislation allowing early release of elderly prisoners who do not pose a public safety risk.²⁶⁴ Opponents of early release for the elderly have successfully blocked legislation in other

259. Jimmie E. Gates, *Inmates Get Early Release*, CLARION-LEDGER (Miss.), Nov. 29, 2009, 2009 WLNR 24110992.

260. *Id.*

261. WASH. REV. CODE ANN. § 9.94A.728(1)(b) (West 2010); *see also* Josh Farley, *Will the State Bring Back Half-Off Sentences for Good Behavior?*, KITSAP SUN (Wash.) (Oct. 9, 2010), <http://www.kitsapsun.com/news/2010/oct/09/will-the-state-bring-back-half-off-sentences-for/> (discussing budgetary impetus for legislation).

262. *See* Jack Dolan, *State Prison Health Costs Under Fire*, L.A. TIMES, Jan. 27, 2011, at A1 (noting that the current bill is unlikely to significantly affect healthcare costs for California). The Federal Receiver overseeing the prisons argued the program should be expanded to apply to more than just “people who are literally hooked up to machines, in comas, that sort of thing” in order to cut costs by 30%. *Id.*

263. Mike Ward, *Texas May Free Some Inmates To Save Money*, HOUS. CHRON., Feb. 17, 2011, at B3.

264. *See, e.g.*, Michael Vitiello, Op-Ed., *Courts Have Forced State's Hand on Prison Crowding*, SACRAMENTO BEE (Dec. 5, 2010), <http://www.ongo.com/v/121128/-1/FFFB4FF622D0F9D0/viewpoints-courts-have-forced-states-hand-on-prison-crowding> (discussing opposition and difficult passage of the modest reform).

states including Louisiana by arguing that growing old in jail is part of the punishment for the crime.²⁶⁵

B. Risks

We are in an unstable moment for penal law and policy reform. Release-valve reforms pose high risks for regression as well as the potential for progress past old political mires. There is a looming risk of potential backlash if public safety is perceived as being jeopardized by the hasty culling of prisoners for early release. Misaimed slashes at needed reentry programs heighten the risk of backsliding.

1. Public Safety and Backlash

Public officials pursuing early release, sentence reduction, and alternatives to incarceration reforms proceed gingerly with the knowledge that public backlash looms if a prisoner on release commits a lurid crime.²⁶⁶ Backlash can destroy political careers and send policy in a sharp pendulum swing backwards, potentially to the point of even greater severity shift and more policies that add to the incarceration budgetary burden.

The recent and extremely short-lived attempt at a modest early release measure that sparked fierce accusations and political repercussions in Illinois offers a prime example and cautionary tale. To relieve the intense pressures on the state budget and “standing-room-only” overcrowding in prisons, in September 2009, former Illinois Department of Corrections Director Michael Randle implemented MGT-Push that allowed prisoners to start accumulating “good time” credit for early release upon entry into jail rather than waiting until after the prisoner has served sixty days in state prison, which may be long after entry into a county jail.²⁶⁷ A mere three months into the program, an Associated Press news report accused the Department of Corrections and Illinois Governor Pat Quinn of “a

265. See, e.g., Michelle Millhollon, *Medical Expenses for Elderly Inmates Are Costly to State*, ADVOCATE (La.), Aug. 8, 2010, 2010 WLNR 15922402 (discussing opposition in Louisiana to early release for the elderly on several grounds, including that growing old in jail is part of the punishment for the crime).

266. See, e.g., Carroll, *supra* note 73 (noting that if even one prisoner under Colorado Governor Bill Ritter’s early release program “goes berserk” as did a prisoner released early by former Arkansas Governor Mike Huckabee, then “Ritter will pay a political price no matter how carefully the parole board screened [the prisoner]”).

267. See generally, e.g., YOUNG, *supra* note 255 (giving a history of the reform); Patrick Yeagle, *Report: Early Prisoner Release Not a Scandal*, ILL. TIMES (Nov. 4, 2010), <http://www.illinoistimes.com/Springfield/article-7966-report-early-prisoner-release-not-a-scandal.html> (citing Young’s report).

secret change in policy” of releasing more than 850 prisoners early to save money.²⁶⁸

The political and policy repercussions were swift. For his enterprising effort to better manage public resources, Randle was punished by the de facto demise of what had appeared to be a promising career in Illinois and ousted from office.²⁶⁹ In a fiercely contested and close gubernatorial race, Governor Quinn faced accusations that the MGT-Push program had led to the “secret” early release of “hardened criminals” who had gone on to commit more “crimes such as domestic battery, assault, and murder.”²⁷⁰ Perhaps most damaging to the public at large and the public fisc, as a result of inflammatory and false accusations, not only did the state abandon MGT-Push’s modest calculation reform, which had only released 1,745 prisoners an average of thirty-six days early, but the state altogether dismantled its thirty-year-old program of early release.²⁷¹ As a result, the number of prisoners with which Illinois must struggle to manage in a time of intense budgetary strain surged “to an all-time high of 48,760” in February 2011.²⁷²

Risks of horrific reoffending by someone released early are not merely imagined, of course—they can materialize in headline-grabbing tragedy. It only takes one heart- and gut-wrenching tragedy to brand the public imagination and jolt penal law and policy. Cognitively, we tend to overestimate the probability of risk when we reason from a salient event because we neglect the denominators—the overall frequency of events—in favor of focusing on the salient

268. John O’Connor, *AP Report: Illinois Prisons Shave Terms, Secretly Release Inmates*, ST. J.-REG. (Ill.) (Dec. 13, 2009), <http://www.sj-r.com/archive/x1479444730/AP-report-Illinois-prisons-shave-terms-secretly-release-inmates> (reprinting the Associated Press news report).

269. See, e.g., Edith Brady-Lunny, *Fallout from Controversial Program Crowds Prisons*, PANTAGRAPH (Ill.) (Feb. 20, 2011), http://www.pantagraph.com/news/local/article_065f6b74-3b7f-11e0-b378-001cc4c002e0.html (describing the effective demise of Randle’s political career); Editorial, *Prison Chief Is Victim of Political Games*, CHI. SUN-TIMES, Sept. 3, 2010, 2010 WLNR 17577938 (describing political backlash and accusations of “early release” to save money, leading to demise and deploring axing of Randle as the real scandal).

270. Ray Long et al., *Truth-Squading the Governor Race*, CHI. TRIB., Oct. 29, 2010, at 6 (discrediting these allegations); see also Op-Ed., *Scary ‘Early Release’ Tales Untrue*, CHI. SUN-TIMES (Oct. 28, 2010), <http://www.suntimes.com/opinions/2247801-474/release-prison-program-quinn-early.html> (citing the report by Young, *supra* note 255, as a basis for undermining these criticisms).

271. Brady-Lunny, *supra* note 269; see also Long et al., *supra* note 270 (noting a modest reduction of an average of thirty-six days from MGT-Push program).

272. Brady-Lunny, *supra* note 269.

numerator, the horror story come true.²⁷³ Probability neglect particularly occurs when strong emotions such as fear, anger, and sadness are elicited by a highly salient event.²⁷⁴

The home invasion, rape, robbery, and murder of the Petit family in Cheshire, Connecticut by two repeat offenders released early on parole is a recent and tragic example.²⁷⁵ The rapists and killers were Joshua Komisarjevsky and Steven J. Hayes, who both had long histories of burglaries.²⁷⁶ For their most recent crimes before the Petit burglary and killings, Hayes was sentenced to five years and released after three; Komisarjevsky was sentenced to nine years and released after five.²⁷⁷

Komisarjevsky and Hayes committed the kind of lurid horrific crime that is the worst nightmare of the public and of politicians contemplating early release. They clubbed the family's father, Dr. William A. Petit, Jr., over the head and forced mother Jennifer Hawke-Petit to withdraw money from the family bank account.²⁷⁸ Back at the family residence less than fifteen minutes later, the men raped her and her eleven-year-old daughter, poured gasoline over her and both her daughters, and set the house on fire.²⁷⁹ Only William Petit escaped, bleeding and bound, unable to rescue his wife and daughters dying a horrific death while bound and covered with gasoline inside the inferno.²⁸⁰

The Petit tragedy became a powerful basis for critiquing Connecticut's early release program. As the *New York Times* recounted:

The criminal justice system failed to treat Mr. Hayes and Mr. Komisarjevsky as serious offenders despite long histories of recidivism, repeatedly setting them free on parole. The suspects never capitalized on those chances to turn their lives around,

273. For an explanation of denominator neglect when it comes to salient numerators, see Valerie F. Reyna, *How People Make Decisions That Involve Risk: A Dual-Process Approach*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 60, 64 (2004).

274. See CASS R. SUNSTEIN, THE LAWS OF FEAR 69 (2005) (explaining the phenomenon as a reason why laws and policies may focus intensely and be impacted greatly by low-probability but highly salient and emotionally charged risks).

275. See Manny Fernandez & Alison Leigh Cowan, *When Horror Came to a Connecticut Family*, N.Y. TIMES, Aug. 7, 2007, at A1 (chronicling the events that transpired).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

instead apparently forming a new criminal alliance after meeting at a drug treatment center in Hartford.²⁸¹

And as Dr. Petit's father said, briefly and powerfully, "There's no question about it: The system didn't work . . . It's too late now."²⁸² Further inflaming matters for a public still reeling from the tragedy, a few months after the Petit murders, a "parolee stole a car at knifepoint in Hartford, then fled to New York, where he was shot and wounded by police."²⁸³

In the aftermath, Connecticut sharply reversed course. In 2007, Governor Rell curtailed parole eligibility and altogether eliminated the prospect of parole for violent offenders.²⁸⁴ Prison populations surged in Connecticut, straining a budget already under pressure from the economic downturn.²⁸⁵ In another policy pendulum swing, legislators again reversed course in 2009 and reinstated early release for prisoners because of the large yearly savings such a release would provide.²⁸⁶

The effects of tragedy can linger long after, influencing law, policy, and litigation positions. For example, Pennsylvania was among eighteen states that united to file a brief opposing the *Coleman-Plata* prisoner release order, recounting Philadelphia's experience with a prisoner released early pursuant to a prison conditions consent decree who went on to kill a young police officer.²⁸⁷ To take another example, Maurice Clemmons murdered four police officers execution style in Washington, after former Governor Mike Huckabee of Arkansas commuted his 108-year sentence.²⁸⁸ Though Huckabee's controversial practice of commuting sentences is different than penal reforms to relieve budgetary pressures being contemplated by other states, the Clemmons cautionary tale has nonetheless made it harder

281. *Id.*

282. *Id.*

283. Mark Pazniokas et al., *Rell Halts Some Paroles, Will Deny Privilege to Violent Offenders*, HARTFORD COURANT, Sept. 22, 2007, available at 2007 WLNR 18736140.

284. *Id.*

285. See, e.g., Cadue, *supra* note 1.

286. See *Release Program Reinstated*, HARTFORD COURANT, Dec. 5, 2009, at B4, available at 2009 WLNR 24682815 (noting that the state would "save about \$4 million a year").

287. Brief for the States of La., Ala., Alaska, Ark., Colo., Del., Ill., Mass., Mich., Miss., N.M., Ohio, Okla., Pa., S.C., Tenn., Tex., & Va. as Amici Curiae in Support of Appellants at 27-30, *Schwarzenegger v. Plata*, No. 09-1233, 2010 WL 3501185, *appeal granted* 130 S. Ct. 3413 (U.S. 2010).

288. See, e.g., Carroll, *supra* note 73 (demonstrating reluctance with the early release of prisoners).

for officials in budget-strapped states like Colorado and Wisconsin to pursue early release measures, even under much more carefully prescribed criteria.²⁸⁹

2. Misaimed Slashes

In view of the high political risk, reforms face severe obstacles and risks of backsliding. In Michigan, former Governor Jennifer Granholm's proposal to revive good-time credits faced steep opposition from tough-on-crime crusaders who had successfully secured elimination of good-time credits during the 1970s through the 1990s using the strategy of depicting dire visions of criminals released early endangering the public safety.²⁹⁰ Newly elected Michigan Governor Rick Snyder is undoing the parole reforms that Granholm instituted in 2009 to relieve budgetary pressures by releasing "prisoners who had served 120% of their minimum sentence early unless they had posed a 'very high' risk of reoffending."²⁹¹ In his successful bid for office, Snyder had "caricatured Granholm as soft on crime."²⁹²

To take another example, Oregon's Legislative Emergency Board recently approved a release of \$15 million out of the state's emergency funds, despite having one of the worst budgetary outlooks in the nation, rather than allow early release of prisoners.²⁹³ Oregon had in 2009 tried to save \$6 million by expanding an early release program, but the reform was short-lived, ending in February 2010 after a campaign by "anticrime" groups imagined lurid scenarios of inmates released early attacking and hurting others.²⁹⁴

The need to relieve budgetary pressures in less politically hot-button ways has led to slashes in rehabilitation and reintegration programs for prisoners, such as substance abuse treatment, inmate education, and mental health treatment. Colorado, for example, recently cut \$1.9 million in funding for prisoner treatment programs for substance abuse and mental health problems to address its

289. *Id.*

290. See Bell, *supra* note 258 (mentioning a few of these dangerous criminal stories); Dawson Bell, *Plan To Restore Good-Time Credits Fails 1st Test*, DETROIT FREE PRESS, May 17, 2010, 2010 WLNR 5566973.

291. Op-Ed., *Undoing State Parole Reforms Could Cost State in Long Run*, DETROIT FREE PRESS (Feb. 9, 2011), <http://pqasb.pqarchiver.com/freep/access/2261402891.html?FMT=ABS&date=Feb+09%2C+2011>.

292. *Id.*

293. Peter Wong, *Legislative Leaders Pledge Emergency Funds for Prisons*, STATESMAN J. (Or.), Sept. 24, 2010, 2010 WLNR 19127556.

294. See Davey, *supra* note 1 (giving the history of Oregon's early release reforms).

budgetary woes after an expanded early release program to save money got off to a rocky and controversial start; few inmates were actually released.²⁹⁵ Kansas offers another example of a state that has turned to cutting therapeutic programs that ameliorate reoffending and recycling of people back into the system. As a short-term stopgap to address the budget crisis, Kansas cut its substance abuse treatment programs—despite the fact that as many as 80% of inmates in the Kansas system have substance abuse problems and 40% can be considered addicts.²⁹⁶ Kansas also terminated its community residential programs for the mentally ill that had helped the mentally ill transition back to the regular population and stay on their medications, thereby posing less of a risk of harm to others and themselves.²⁹⁷

Kansas is already witnessing the impact of its \$1 million reduction in community corrections programs in the form of people bouncing back into the prison system because they have not been properly prepared for reentry into the population. Kansas Representative Colloton summed up the perverse consequences of the cuts:

By cutting the parole officers, we've made our communities less safe. By cutting the programs, the likelihood of recidivism has increased. The problem is—if you eliminate these programs entirely rather than reduce them, then trying to start them up again and get the whole program going is very, very difficult.²⁹⁸

Budget cuts are impacting important rehabilitative efforts and paradigms such as the juvenile justice system and even drug courts, which have garnered high praise, with some dissent,²⁹⁹ for efficacy as an alternative to incarceration and for preventing reoffending. In North Carolina, officials are considering collapsing the Department of Juvenile Justice and Delinquency Prevention with the Department of Correction, Crime Control, and Public Safety that governs adult criminals.³⁰⁰ This has prompted strong concern because juvenile

295. See Patrick Malone, *Besides Gashes, Lots of Cuts in Budget*, PUEBLO CHIEFTAIN (Colo.) (Feb. 20, 2011), http://www.chieftain.com/news/local/besides-gashes-lots-of-cuts-in-budget/article_11b5c958-3cb2-11e0-9691-001cc4c002e0.html (describing the budget cuts); Mitchell, *supra* note 254 (describing the controversy and caution in release).

296. Cadue, *supra* note 1.

297. *Id.*

298. *Id.*

299. See *infra* notes 348–56 and accompanying text.

300. Sarah Preston, *Selling Juveniles Short*, GREENSBORO NEWS & REC., Dec. 26, 2010, 2010 WLNR 25533617.

justice, unlike the adult corrections system, is one of the last few strongholds of the rehabilitative ideal focused on helping juveniles rehabilitate and reintegrate successfully in the community.³⁰¹ To take another example, Kentucky is phasing out its family and drug court to address a \$7 million deficit as part of short-term cost-cutting measures with long-term consequences.³⁰² This approach compounds concern because it eliminates an increasingly popular and more efficacious rehabilitative alternative to incarceration in the juvenile context, where American ideals most strongly value rehabilitation and where subjects are most amenable to change.

Cutting programs necessary to help ameliorate the major problem of recidivism and aid in community reintegration creates short-term budgetary relief at substantial long-term cost. Prisoners are more likely to reoffend when their problems are unaddressed.³⁰³ Budget slashes for mental health and substance abuse community programs outside prison, as well as in prison, means that people are unlikely to get help on the outside either, and are therefore more likely to recidivate.³⁰⁴ Since 2009, services for the mentally ill have been slashed by a collective \$2 billion across the nation, reducing more than 4,000 inpatient beds and leaving many patients without the treatment and medication that helped control symptoms.³⁰⁵ Moreover, once experienced personnel and infrastructure are cut, it is costly and difficult to revive programs and get them running again at the same level of efficacy.³⁰⁶ Dangers are aggravated when cuts for basic rehabilitative measures and treatment to ease budgetary shortfalls are combined with early release because people are released unprepared to reintegrate successfully in the community.³⁰⁷

301. For a leading account of this orientation of juvenile justice, see ZIMRING, *supra* note 75, at 35–48.

302. See Brenna Angel, *Amid Budget Woes, Ky. Cuts Juvenile Drug Court*, NPR (Jan. 28, 2011), <http://www.npr.org/2011/01/28/133316504/amid-budget-woes-ky-cuts-juvenile-drug-court> (advocating that “drug courts work” and illustrating their positive effects).

303. See Cadue, *supra* note 1 (“If we haven’t [rehabilitated them] to make them so they’re less likely to commit crimes again, then we haven’t done our jobs.”).

304. See, e.g., Steven Leifman, Op-Ed., *No Time for Drastic Cuts*, MIAMI HERALD, Feb. 18, 2011, at 17A (chronicling problems and costs associated with mental health issues in prisons); Ashley Powers, *Cuts in Psychiatric Care on Rise*, L.A. TIMES, Jan. 20, 2011, at A1 (discussing the large budget cuts various states have made and their impact).

305. Powers, *supra* note 304.

306. See Cadue, *supra* note 1.

307. Recognizing the danger, some legislators balked at supporting early release while funding is also being cut for reintegration and rehabilitation programs. See, e.g., Joe Piasecki, *Portantino Announces Prison Reform Bill*, LA CAÑADA VALLEY SUN (Cal.) (Feb. 4, 2011), <http://www.lacanadaonline.com/news/tn-vsl-0204-prisons,0,1389939.story>

The increased likelihood of unsuccessful reintegration of prisoners heightens the risk of potential backlash and more sharp swings in penal law and policy.

IV. TOWARD A SUSTAINABLE TRANSFORMATION

Despite these cautions, the picture is far from bleak. Bright spots and potential exemplars of the way forward are emerging amid the fomentation of penal law and policy reforms in the laboratory of the states, from expanding access to rehabilitative veteran's and drug courts to diversion to mental health programs and proactive supervised release.³⁰⁸ The key to a sustainable and healthy transformation of penal law and policy is reform guided by longer-range principles. Release-valve reforms are often practice in need of theory, prompted by an emergency-response mindset driven by budgetary concerns as a successor to the emergency-response myopia that fueled penal severity ramp ups. But as conservatives and liberals alike face up to the costs of maintaining an carceral society, more deliberative approaches and the contours of a penal theory to guide the way forward can also be forged. This Part explores the promise of what the Article terms rehabilitative pragmatism and penal impact analysis in criminal legislation and politics to orient sustainable reform.

A. *Rehabilitation Pragmatism*

As states search for solutions, rehabilitation is getting a revival, though not as the old rehabilitative ideal defined in terms of the offender's interests in rehabilitation. Rather, the goals are saving money and serving collective interests. The changes in law and politics point the way toward a possible shift to rehabilitation pragmatism. Rehabilitation pragmatism is cautious and selective, attentive to the need for evidence of efficacy, cost effectiveness, and success, lest reforms falter and we backslide into the default of incapacitation stagnation and enacting legislation that expressively vents frustration rather than constructively ameliorates problems. Rehabilitation pragmatism renders cloistered experts implementing rehabilitative programs accountable through a demand for transparency and evidence of efficacy in reducing recidivism and promoting reintegration. This evidence-based approach diminishes

(noting California State Assemblyman Anthony Portantino has repeatedly reiterated the dangers).

308. See *infra* Part IV.A.1–2.

the opacity and seemingly unfettered discretion besieged by critics on the left and right during the heyday of the rehabilitative ideal.³⁰⁹

Rehabilitation pragmatism is not the starry-eyed and egalitarian hope for reclamation of every soul of the rehabilitative ideal. Program beneficiaries will be selected for suitability and chances of success. Rehabilitative pragmatism will be data-driven in selecting its beneficiaries; held accountable for its costs through demand for evidence of success; and derive its bipartisan support from the notion of cost savings and empirical support for efficacy.

Limitation on access, in turn, poses challenges of potential disparities in who becomes a beneficiary of sentence-mitigating programs and who is left out that must be addressed. This Part argues that in the turn to demanding evidence of efficacy, performance measures and the concept of efficacy must also take into account the distribution of benefits and burdens across groups. To address disparities rather than ignore them, programming must also have culturally conscious components to take into account community-prevalent burdens that render particular groups vulnerable.

1. A Cost-Conscious, Data-Driven Selective Approach

Colorado, typically viewed as a moderate state, and Texas, the epitome of a tough-on-crime state, offer intriguing examples of criminal justice reform made possible by the social meaning shift in viewing harshness-mitigating measures as cost savings. Consider Colorado's successfully enacted House Bill 1352,³¹⁰ which had wide bipartisan sponsorship.³¹¹ The bill lowers the penalties for a range of drug crimes and directs that part of the cost savings will be used for treatment programs, reflecting the view of prosecutors and defense attorneys and Republicans and Democrats alike that offenders should get more rehabilitation rather than jail.³¹² The orientation shift of Colorado's narcotics laws is reflected in the bill's revision to the

309. For an account of the rehabilitative ideal, see *supra* Part I. For a summary of critiques of the past, see George F. Cole, *A Return to Punishment*, N.Y. TIMES, Feb. 19, 1978, at CN20 (noting critiques of not only efficacy but "the pervasiveness of the discretion required by the treatment model" that delegated immense power to cloistered experts).

310. Act of May 25, 2010, ch. 259, 2010 Colo. Sess. Laws 1162.

311. See *id.*; see also Debi Brazzale, *HB10-1352: Lawmakers Unite Behind New Approach to Drug Offenders*, STATE BILL NEWS (Colo.) (Feb. 24, 2010), <http://www.statebillnews.com/2010/02/hb10-1352-lawmakers-unite-behind-new-approach-to-drug-offenders/> (reporting that Democrats and Republicans have united in support of the bill).

312. Jessica Fender, *More Rehab, Less Jail in Drug-Reform*, DENV. POST, Feb. 24, 2010, at B1, available at http://www.denverpost.com/ci_14459351.

legislative declaration prefacing Colorado's narcotics laws. The bill now interjects two key provisions reflecting the change in penal theory and approach. As amended, the statement of penal purposes now provides:

(b) Successful, community-based substance abuse treatment and education programs, in conjunction with mental health treatment as necessary, provide effective tools in the effort to reduce drug usage and criminal behavior in communities. Therapeutic intervention and ongoing individualized treatment plans prepared through the use of meaningful and proven assessment tools and evaluations offer a potential alternative to incarceration in appropriate circumstances and should be utilized accordingly.

(c) Savings recognized from reductions in incarceration rates should be dedicated toward funding community-based treatment options and other mechanisms that are accessible to all of the state's counties for the implementation and continuation of such programs.³¹³

The legislation reduces the offense of possessing between eight and twelve ounces of marijuana—a former felony punishable by up to six years in prison—to a misdemeanor punishable by up to eighteen months in prison.³¹⁴ Possession of between one and two ounces of marijuana is converted from a crime punishable by up to eighteen months in prison to a fine-only offense.³¹⁵ The sentences are also substantially scaled back for a variety of other simple possession crimes involving drugs such as cocaine, heroin, and methamphetamine.³¹⁶

The power of rehabilitation pragmatism to bridge worldviews and enable action is demonstrated by the call to action by one of the Republican sponsors of the bill, Representative Mike Waller, who is also a former prosecutor. Waller explained, "It's time to switch our focus from being tough on crime to being smart on crime This bill is about how we can get the best bang for our public-safety

313. COLO. REV. STAT. §§ 18-18-401(b)–(c) (2011).

314. § 18-18-406(4)(b).

315. § 18-18-406(3)(a).

316. See § 18-18-203(2)(a)(XI) (classifying heroin as schedule I); § 18-18-204 (2)(a)(IV) (classifying cocaine as schedule I); § 18-18-403.5 (classifying possession of four grams or less of a schedule I or II controlled substance as a class 6 felony and possession of more than two grams of methamphetamine as a class 4 felony).

dollars.”³¹⁷ Encapsulating the turn away from incapacitation stagnation that has reached conservatives as well as liberals, Waller explained, “I’m convinced that warehousing people who are addicts doesn’t do anything to solve the problem.”³¹⁸ Notably, the reasons given for rehabilitation are framed in terms of collective concerns rather than the concern for the individual under the old rehabilitative ideal. This redefinition of the interests at stake has helped criminal law reform and the politics of crime and punishment progress beyond the roadblocks of the past.³¹⁹

Texas offers another intriguing example of how exploring alternatives to incarceration can gain bipartisan appeal as a measure to reduce budgetary pressures.³²⁰ Texas’s “tough-on-crime” reputation has given it the political cover and credibility to be a leader in criminal law reform that mitigates penal harshness in a politically palatable way couched in the more neutral idiom of relieving budgetary pressures.³²¹

In 2006, inmate projections indicated Texas needed to add 17,000 prison beds at a cost of \$2 billion.³²² To begin tackling the issue, Texas Governor Rick Perry was about to advocate building three new prisons, costing an estimated \$560 million, when instead Representative Jerry Madden proposed investing in a package of alternatives to incarceration and rehabilitative approaches at a much lower cost of \$240 million.³²³ The approach included such measures as diversion to mental health and drug treatment programs rather than prison; proactive probation and parole supervision to prevent violations; creating short-term jails for people serving less than two years; and crime prevention through early intervention, such as helping low-income mothers.³²⁴ Madden, a West Point graduate, had no worries about appearing Texas-style tough and communicated that

317. See Brazzale, *supra* note 311.

318. Jeffrey Wolfe, *Lawmakers Propose Changes to Drug Sentencing*, 9NEWS.COM (Feb. 23, 2010), <http://www.9news.com/news/local/story.aspx?storyid=133332&catid=346>.

319. See *supra* Part I.

320. See Cadue, *supra* note 1 (discussing the support in both the state’s Senate and House, as well as the Governor’s office).

321. See *id.* (discussing the Texas reforms); Richard Fausset, *Prison Reforms No Longer Taboo for Conservatives*, L.A. TIMES, Jan. 29, 2011, at 1 (discussing how criminal justice reform has been made palatable to Texas conservatives through cost savings).

322. Mike Klein, *Thinking Outside the Cell: Texas Innovates To Correct Course in Prison System*, GA. PUB. POL’Y FOUND. (Apr. 20, 2010), <http://www.gppf.org/article.asp?RT=&p=pub/GovernmentReform/Edcorrections100420.htm>.

323. *Id.*

324. See Cadue, *supra* note 1 (mentioning the reforms); Klein, *supra* note 322 (mentioning Madden’s recommendations).

calm to the governor, saying, “[t]here is nobody who thinks Texas is soft on crime. . . . You’re not soft on crime by doing something that’s smart.”³²⁵

By 2010, Madden could say with justifiable pride that rather than having to bear the burden of increasing incarceration by 17,000, the latest projections indicate “we don’t need to build any more for the next three, four or five years.”³²⁶ Rather than the crippling dramatic population increase, “Texas [has] reduced its adult prison population by 1,257 inmates” and kept juveniles under twenty-one from criminogenic adult prisons.³²⁷ Targeted rehabilitation appeals across worldviews to conservatives as well because of the potential for cutting long-run costs and the pragmatic logic of seeking cost-effective solutions. As Madden put it:

There are three types of prisoners. There are prisoners who will always come back when you let them out, those who will never come back when you let them out and those in the middle who we call the swingers. They may or may not come back. It depends on what we do for them.³²⁸

Madden’s plainspoken logic encapsulates the new rehabilitative pragmatism. We are well past the time of starry-eyed and egalitarian hope for the redemption of all. The rationale of rehabilitation is being redefined away from the interest of the prisoner in redemption, an ideal that has lost its political and moral power to stitch together a broad-based social consensus because of fractures in worldviews of what we should value normatively. Instead rehabilitative pragmatism is centered on the public interest in safety and reducing costs in the most cost-effective manner.³²⁹ Rehabilitation pragmatism is cautious and selective, with a greater reliance on scientific data in selecting participants who are more apt to succeed and most in need of intervention in a system that must practice triage because of chronic overload.

Rehabilitative pragmatism as a penal philosophy orients policy toward the practice of “evidence-based rehabilitation.” A subset of evidence-based practice, evidence-based rehabilitation calls for

325. Klein, *supra* note 322.

326. Cadue, *supra* note 1.

327. Klein, *supra* note 322.

328. *Id.*

329. See Jessica S. Henry, *The Second Chance Act of 2007*, 45 CRIM. L. BULL. 416, 419 (2009) (“Rehabilitation, with an eye to reentry, has been repackaged, not as a way to improve the individual offender for his or her own sake, but rather as a way to improve public safety for all of society.”).

structuring rehabilitative programs to generate measurable outcomes and renders opaque expert judgment calls more transparent and readily evaluated through a demand for evidence of efficacy.³³⁰ An emphasis on evidence of efficacy is a more widely appealing idiom in a time of ascendant scientism that has supplanted normative, moral, or religious ideals that formerly helped give the rehabilitative ideal added appeal. Evidence-based rehabilitation is “harder-edged” than the rehabilitative ideal and “characterized by cost-benefit assessment, meta-analysis, offender ‘accountability,’ dangerousness screens, intermediate sanctions, coerced treatment, and an overriding emphasis on public safety.”³³¹ The data-driven aspect of “evidence-based” reforms is also spreading to other criminal reform contexts, such as sentencing.³³²

In the search for more sustainable solutions to incapacitation and carceral domination, evidence-based approaches are catching on. On the state level, California, which has the highest recidivism rates in the nation, at seventy percent,³³³ offers a prime example. Leading criminologist and California penal reformer Joan Petersilia has advocated evidence-based rehabilitation and backed the call by indicating that “[w]ell-run, well-targeted educational and vocational programs, substance abuse treatment, cognitive behavioral therapies, and reentry partnerships can reduce recidivism by 5–30 percent.”³³⁴ In 2007, Governor Arnold Schwarzenegger signed into law California’s Public Safety and Offender Rehabilitation Services Act of 2007, which has the stated aim of “[p]roviding sustainable funding for improved, evidence-based probation supervision practices and capacities” to improve recidivism rates in California.³³⁵ The law defines evidence-based practices and programs as those “demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or postrelease supervision.”³³⁶

330. For analysis in the medical context, see Mary Law & Joy MacDermid, *Introduction to Evidence-Based Practice*, in EVIDENCE-BASED REHABILITATION: A GUIDE TO PRACTICE 3, 7–11, 64 (Mary Law & Joy MacDermid eds., 2d ed. 2008).

331. Richard Rosenfeld, *Recidivism and Its Discontents*, 7 CRIMINOLOGY & PUB. POL’Y 311, 311–12 (2008).

332. See Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives To Reduce Recidivism*, 82 IND. L.J. 1307, 1308–09 (2007) (describing effort to incorporate “evidence-based practices” in sentencing).

333. Archibold, *supra* note 166.

334. Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 212 (2008).

335. CAL. PENAL CODE § 1228(d) (West 2011).

336. § 1229(d).

On the federal level, the Second Chance Act of 2007³³⁷ also reflects the turn to evidence-based rehabilitation. The goal of the Second Chance Act is to provide funding to the states as an incentive to formulate long-range, evidence-based plans for reducing recidivism.³³⁸ Reflecting the data-focused orientation of evidence-based rehabilitation, the Second Chance Act of 2007 requires grant applicants to provide “evidence-based methodology and outcome measures” for an evaluation of the program.³³⁹

Rehabilitative pragmatism as an orienting penal theory and its evidence-based emphasis in practice also offer guidance on how to select who benefits from rehabilitative programs and alternatives to incarceration. For example, the 2007 California law prescribes a logic model that begins with risk screening for selecting candidates for rehabilitative programs.³⁴⁰ The logic model is predicated on research indicating “that to achieve positive outcomes, correctional agencies must provide rehabilitative programs to the right inmates, at the right time, and in a manner consistent with evidence-based programming design.”³⁴¹ A related approach is the use of risk assessment instruments to steer discretion in determining who is eligible for parole and early release. This approach is also being incorporated into state practice. For example, by changing its parole eligibility and risk assessment procedures in 2008, Mississippi was able to release 3,076 prisoners early, with a median sentence reduction of thirteen months and a low recidivism rate because of improved risk assessment.³⁴²

Rehabilitation pragmatism as the successor penal theory has the advantage of mustering bipartisan support because it is suffused with meanings that can appeal to conservatives and liberals.³⁴³ Telling the public that rehabilitation can work, and providing data on how the

337. Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified as amended in scattered sections of 18 and 42 U.S.C.).

338. §§ 3, 111, 212, 122 Stat. at 658, 669–71, 680–83.

339. § 101(d)(3).

340. CAL. PENAL CODE § 1229(c)(2).

341. CAL. DEP’T CORR. & REHAB., EVIDENCE-BASED REHABILITATION REFORM PROJECT 3 (2009).

342. JFA INST., REFORMING MISSISSIPPI’S PRISON SYSTEM 4–5 (2010), *available at* <http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Initiatives/PSPP/MDOCPaper.pdf?n=8407>.

343. Deliberation and progress on polarizing and fiercely contested issues is better facilitated when law and policy are infused with a surfeit of meanings that appeal to and affirm people of multiple and divergent worldviews, an approach Dan Kahan calls “expressive overdetermination.” Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 145–48 (2007).

shared interest in safety and reform is served, is more effective in building coalitions to facilitate progress than preaching from a particular normative worldview.³⁴⁴ The powerful potential of rehabilitation pragmatism is demonstrated by the very recent call among conservatives for bipartisan examination of rehabilitative programs as an alternative to the crippling fiscal and human costs of maintaining high rates of incarceration.³⁴⁵

2. Ameliorating Potential Disparate Impact

The first hurdles to surmount in criminal justice reform are political and judicial inertia. Our historical moment is helping elevate us past these obstacles. But we must proceed with caution and care over a second challenge. In the move to rehabilitative pragmatism and evidence-based practice and program assessment, we must have the courage to confront a longstanding challenge in criminal justice: inequity, particularly racial disproportionality, in who bears the burden of penal severity and who benefits from measures of mercy. Success cannot be defined only in terms of generic program group and control group comparisons. Performance measures must be attentive as to which groups are rendered eligible for rehabilitative programming and sentence-mitigating benefits, and which groups may be disproportionately left out. Programming must be designed with differential cultures across groups in mind to ameliorate disparities.

The risk of inequities in burdens and benefits across groups posed by selective rehabilitative innovations is demonstrated by drug courts. Though drug courts began as a tactic to relieve some of the pressures of high drug caseloads overburdening the courts through accelerated processing, the contemporary form of drug courts began spreading when it became anchored in rehabilitative goals and approaches.³⁴⁶ Criminal justice actors, including judges, act alternately as cheerleaders and “tough love” providers toward overcoming the problem and reducing the risk of recidivism.³⁴⁷ Drug courts reflect the

344. Cf. Mary D. Fan, *Post-Racial Proxies: Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 905, 939–42 (2011) (exploring the virtues of approaches that illuminate interest convergence to build coalitions and navigate fiercely polarized politics).

345. See *supra* note 3.

346. See Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1461 (2000) (giving a history of drug courts in the United States).

347. Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts: Empirical Success*, 52 S.D. L. REV. 288, 291 (2007).

selective orientation of rehabilitation pragmatism through screening criteria for potential beneficiaries. Typically, candidates must not be facing ancillary nondrug charges or have prior violent felony convictions, and many jurisdictions exclude those facing drug distribution rather than drug possession charges.³⁴⁸

Though there have been disputes about efficacy,³⁴⁹ recent studies indicate that drug courts are more efficacious compared to traditional incarceration in breaking the cycle of criminality spurred by addiction and reducing recidivism.³⁵⁰ Drug courts also save taxpayers money in the long run despite potentially higher start-up costs. California, which has about twelve percent of the nation's drug courts, commissioned a study that found the state realized a combined net benefit of over \$9 million a year through the efforts of nine drug courts.³⁵¹ The savings came from the cheaper cost per person diverted to drug courts as well as outcome benefits from reducing recidivism.³⁵² The New Jersey Supreme Court has also lauded the success of drug courts in reducing recidivism and saving the state money, noting that "[t]he average cost per year to house an inmate in state prison is \$34,218 compared to \$17,266 to give that same offender the rehabilitative services of Drug Court, including six months of inpatient treatment."³⁵³ Though not a perfect instrument—as no penal instrument is in reality—and in need of refinement, drug courts have been widely lauded as a better alternative to the status quo and default of prison.³⁵⁴

348. See Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 469–77, 479 (2009).

349. See, e.g., Hoffman, *supra* note 346, at 1497–98 (critiquing scant evidence of efficacy as of the time of writing in 2000).

350. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 45 (2005), available at <http://www.gao.gov/new.items/d05219.pdf> (finding a re-arrest reduction of 10% to 30% in a review of several programs); Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO L. REV. 443, 463 (2006); Michael Rempel, Dana Fox-Kralstein & Amanda Cissner, *Drug Courts: An Effective Treatment Alternative*, 19 CRIM. JUST. 34, 35 (2004). But see Scott W. Henggeler et. al., *Juvenile Drug Court: Enhancing Outcomes by Incorporating Evidence-Based Treatment*, 74 J. CONSULTING & CLINICAL PSYCHOL. 42, 53 (2006) (finding the use of drug courts did not show evidence of reduction in re-arrest rates despite observed reductions in antisocial behavior or increased use of evidence-based practices).

351. ADMIN. OFFICE OF THE COURTS (CAL.), CALIFORNIA DRUG COURT COST ANALYSIS STUDY 1–2, 4 (2003).

352. *Id.*

353. *State v. Meyer*, 930 A.2d 428, 433 (N.J. 2007).

354. See, e.g., Kimberly Y.W. Holst, *A Good Score? Examining Twenty Years of Drug Courts in the United States and Abroad*, 45 VAL. U. L. REV. 73, 104–06 (2010) (assessing

Concerns have arisen, however, over the risk of racial disproportionality in who gets selected for the benefit and who succeeds in actually securing the benefit—and who does not and is subject to the hammer of harsher incarceration terms.³⁵⁵ Empirical studies of various drug court programs have been mixed as to whether there is racial disparity in who benefits from drug court programs.³⁵⁶ Barriers to entry and programming pose a risk of racial disproportionality because social and economic disadvantages and structural inequities impact the likelihood of having a disqualifying conviction and whether one will succeed in addiction treatment.³⁵⁷

Empirical studies into the reasons for disparities shed light on how the dangers of aggravating racial disparities may be mitigated. For example, a study found that the nearly twofold disparity in success rates between blacks and whites in ten Missouri drug courts is in part because “African-Americans were more likely to use cocaine, a drug associated with high relapse rates” and programs were not providing the specialized treatment needed for cocaine addiction.³⁵⁸ Another recent study also attributed disparate post-program

critiques and benefits of drug courts and concluding drug courts are far superior and more socially desirable than the costly default of incarceration); J. Scott Sanford & Bruce A. Arrigo, *Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 239, 240–45, 252–55 (2005) (collecting and analyzing an array of empirical studies of efficacy).

355. See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. Rev. 783, 785, 803–04 (2008) (collecting critiques of drug courts); O'Hear, *supra* note 348, at 460–77, 480–82 (noting risk of aggravating racial disparities); cf. Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1568–69 (2004) (contending that there may be a risk of coercion of the socioeconomically disadvantaged into drug courts).

356. Compare, e.g., Randall T. Brown, Megan Zuelsdorff & Michele Gassman, *Treatment Retention Among African Americans in the Dane County Drug Treatment Court*, 48 J. OFFENDER REHAB. 336, 337 (2009) (noting how smaller studies within individual treatment centers did not find a difference in completion rates by ethnicity, but a larger study found that Blacks had a much greater post-treatment recidivism rate than Whites and other minorities), with Anne Dannerbeck et al., *Understanding and Responding to Racial Differences in Drug Court Outcomes*, 5 J. ETHNICITY SUBSTANCE ABUSE 1, 2, 10, 17–18 (2006) (finding based on study of ten Missouri drug courts that African Americans are nearly half as likely as whites to complete the drug court program in part because of African Americans were more likely to use cocaine, a drug with high relapse rates), and Michael Rempel & Christine Depies DeStefano, *Predictors of Engagement in Court-Mandated Treatment: Findings at the Brooklyn Treatment Court, 1996–2000*, in DRUG COURTS IN OPERATION: CURRENT RESEARCH 87, 91 (James J. Hennessy & Nathaniel J. Pallone eds., 2001) (discussing mixed findings).

357. Bowers, *supra* note 355, at 805; O'Hear, *supra* note 348, at 480–82.

358. Dannerbeck et al., *supra* note 356, at 17–18.

recidivism rates to potentially disparate rates of cocaine use and pointed to the need for specific programs.³⁵⁹

Empirical work on disparities suggests a need to take into account cultural differences between communities in two ways. First, programs need to take into account research findings that “African-Americans often use drugs for relief from oppressive social problems over which they have no control” and address alternative ways of coping.³⁶⁰ Second, programs also need to be better attuned to the stigma surrounding the addiction as mental disease model in the African-American community and change the confrontational approach and social meaning of treatment.³⁶¹

Cultural context is important for rehabilitative programming in general, across a range of offenses. Rehabilitative programming in the criminal justice system can draw lessons from advances in approaches taken in the public health context, which deploys community-tailored, culturally attuned outreach for groups disproportionately suffering from health impairments.³⁶² The accumulated experience of public health interventions demonstrates that context is important to enhancing efficacy. Meanings and motivations may differ across communities, and the messages need to be tailored to address different meanings and experiences because of societal, structural,

359. Brown et al., *supra* note 356, at 337–38, 341–42.

360. Dannerbeck et al., *supra* note 356, at 18.

361. *Id.*

362. See, e.g., S.F. DEP’T OF PUB. HEALTH COMM. BEHAVIORAL SERVS., PEER TO PEER OUTREACH PROGRAM FOR AFRICAN AMERICAN MENTAL HEALTH CONSUMERS 3–4 (2007) (discussing how cultural incompatibility and stigma impairs the delivery of mental health care to African Americans and how to ameliorate overrepresentation in emergency settings through culturally sensitive outreach); THE ADVISORY BD., COMMUNITY OUTREACH PROGRAMS TARGETED AT SPECIFIC PATIENT POPULATIONS: ORIGINAL INQUIRY BRIEF 1–18 (2005) (advocating for tailoring public health community outreach programs and services to minority and indigent populations and examining such programs); Sheryl Kataoka, Douglas K. Novins & Catherine DeCarlo Santiago, *The Practice of Evidence-Based Treatments in Ethnic Minority Youth*, 19 CHILD & ADOLESCENT PSYCHIATRY CLINICS AM. 775–78, 785 (2010) (emphasizing the import of taking into account cultural and community factors to enhance the efficacy of delivery of evidence-based mental health treatments to minority youths, who have substantial unmet needs); Yoku Shaw-Taylor, *Culturally and Linguistically Appropriate Health Care for Racial or Ethnic Minorities: Analysis of the US Office of Minority Health’s Recommended Standards*, 62 HEALTH POL’Y 211, 211–15 (2002) (discussing the U.S. Department of Health and Human Services (“DHHS”) Office of Minority Health’s standards on culturally and linguistically appropriate services in health care to better address the needs of cultural, racial, and ethnic minorities); Laura B. Wilson & Sharon P. Simson, *Planning Minority Health Programs To Eliminate Health Status Disparity*, 14 EVALUATION & PROGRAM PLAN. 211, 211–13, 218 (1991) (arguing that cultural awareness is needed to mitigate substantial health disparities between minority and majority populations).

and cultural context to maximize buy-in and efficacy.³⁶³ Disadvantaged communities of color suffer the burdens of the absence of male figures in the community because of high incarceration rates, alternate models of esteem for outlaws and outsiders because of marginalization, impaired employment prospects, and other structural challenges.³⁶⁴ Such structural factors should be taken into account in designing effective programs.

Some states have experimented with efforts to take culture into account to improve rehabilitative program efficacy. After the Sentencing Project reported that Iowa incarcerated African Americans at the highest disproportion compared to Caucasians, at a 13.6 times greater rate, two correctional districts in Iowa in 2009 implemented culturally responsive re-entry programming for African Americans to better address the issue.³⁶⁵ Iowa has reported encouraging preliminary data suggesting lower recidivism rates for African Americans in the culturally responsive program compared to a control group of similar race, sex, age, crime type, and preprogram risk score.³⁶⁶

To take another example, Casper, Wyoming is home to a residential substance abuse treatment program for American Indians referred by the Bureau of Indian Affairs for treatment as an alternate sentencing option for misdemeanants.³⁶⁷ The aim is to deliver “‘effective and culturally sensitive treatment services to American Indians, who have the highest prevalence of substance abuse and dependence among the racial and ethnic groups in the United States,’” the program’s director has explained.³⁶⁸ The program incorporates American Indian staff and program materials, as well as

363. See, e.g., Kataoka et al., *supra* note 362, at 782 (discussing the importance of taking preliminary community outreach steps to ensure programmatic cultural sensitivity and, thereby, increase success of interventions).

364. Cf. Sandra D. Lane et al., Editorial, *Structural Violence and Racial Disparity in HIV Transmission*, 15 J. HEALTH CARE FOR POOR & UNDERSERVED 319–26 (2004) (examining how societal patterns of disproportionate incarceration of people of color, a low male-to-female ratio because men of color die younger and are incarcerated in severe disproportion, residential segregation, circumscribed access to health services, and other macro factors structurally lead to disproportionate burdens in community health).

365. IOWA DEP’T OF CORR., ONE-STOP REENTRY REDUCES DISPROPORTIONATE REPRESENTATION 1 (2011), <http://www.doc.state.ia.us/Research/Jan11OneStopReentry.pdf>.

366. IOWA DEP’T OF CORR., ONE-STOP REENTRY: THROUGH OCTOBER 31, 2010, at 2–3 (2010), http://www.firstdcs.com/OneStopReentryStats2010_10.pdf. A larger sample size is needed, however, to better evaluate statistical significance. *Id.*

367. *Casper Re-Entry Center Expands Services with Bureau of Indian Affairs Treatment Program*, CMTY. EDUC. CTRS. (Jan. 15, 2009), http://www.cecintl.com/news_2009_03.html.

368. *Id.*

emphasizes respecting, understanding, and incorporating American Indian values.³⁶⁹

Moving from the laboratories of the states to international examples, we can also draw insights from Australian attempts to ameliorate disparities in imprisonment among Aborigines. Australian criminologists trying to redress disparities have argued “it is essential to take into account the historical context and social and cultural frameworks” and how the meanings of messages may differ across communities.³⁷⁰ Cultural tailoring does not mean segregation or othering as a high-risk group.³⁷¹ Rather it means offering complementary programs that affirm and recognize community meanings to maximize buy-in and efficacy rather than taking an ill-fitting, one-size-fits-all approach.³⁷²

Disparities in eligibility can also be addressed by having the courage, in compelling cases, to expand access to rehabilitative programming. Violent offenders may have potentially treatable traumas desperately in need of redress for sustainable change. The risks may be greater, but so are the potential benefits of addressing the root problem rather than recycling violent offenders through the system and paying the high costs of their incarceration. A recent salient success story illustrates. Police, prosecutors, and a forward-thinking judge collaborated to divert Sergeant Brad Eifert to Veteran’s Court though he faced potential life sentences for trying to commit “suicide by cop” by firing near officers—serious charges that ordinarily would render him ineligible for diversion.³⁷³ Believing that Eifert was yet another veteran falling into the increasing problem of veterans aiming to kill themselves rather than officers, authorities collaborated so that Eifert could finally get treatment for the root

369. *Id.*

370. Peter Mals et al., *Adapting Violence Rehabilitation Programs for the Australian Aboriginal Offender*, 30 J. OFFENDER REHABILITATION 121, 122–23, 131–34 (2000) (advising that anger management programs for violent offenders need to take into account Aboriginal context and group-specific meanings and be more culturally tailored); see also Kevin Howells et al., *Developing Programs for Violent Offenders*, 2 LEGAL & CRIMINOLOGICAL PSYCHOL. 117, 123–28 (1997) (assessing rehabilitative programming and advising of the import of assessing different needs between groups to ensure that content and format of rehabilitative programming is attuned to the group context).

371. Cf. Mals et al., *supra* note 370, at 129–32 (discussing concerns that taking cultural context into account does not reduce segregation).

372. Cf., e.g., *id.* (discussing how using community members to teach and to spread the word about therapeutic programs may enhance buy-in and how efficacy is impaired if the community is not engaged).

373. See Erica Goode, *Coming Together To Fight for a Troubled Veteran*, N.Y. TIMES, July 18, 2011, at A1 (chronicling Eifert’s story).

cause of his violent behavior after returning from combat duty in Iraq.³⁷⁴ Admittedly, altering program eligibility is a more controversial approach than creating better and more efficacious programming sensitive to racial context. Such eligibility-impacting measures must underscore shared interests in the larger payoff of addressing treatable traumas.

The larger lesson to take from the drug court example is that evidence-based practice needs to be racial-disparity sensitive and race and culture conscious in program design and caution needs to be tempered with compassion and courage. It is not enough to have evidence of efficacy and cost-effectiveness without further asking the questions of whether there is disproportionality in who benefits and who is burdened and why. This approach ameliorates some of the risks of aggravating inequity posed by the selective approach of rehabilitative pragmatism. Empirical evidence-based practice that investigates racial impact can illuminate ways to improve program design in order to minimize the risk of disparities and ensure that groups that historically have been disproportionately harmed by penal severity can also share in the benefit of the turn toward rehabilitation pragmatism.

B. Penal Impact Analysis in Crafting Criminal and Sentencing Law

The shift in the social meaning of penal reform has also enabled another type of reform to emerge in the laboratory of the states that cuts to the core of the problem that scholars have long deplored under the broad heading of overcriminalization.³⁷⁵ Part of the overcriminalization problem is the inflation of penal severity over the decades as a way for legislators to express that they are tough on crime without having to bear the full costs of allocating sufficient resources to enforce expanding criminal codes.³⁷⁶ Political points are scored on the front end while on the back end criminal justice actors—from overburdened defense attorneys, to prosecutors, to prison officials—must struggle to bear the burden. The interest of legislators in looking tough through ratcheting up criminal law can intersect with prosecutors trying to manage the burden of the explosion of criminal laws because harsher penalties give prosecutors

374. *Id.*

375. See *infra* note 379 and accompanying text.

376. Stuntz, *Pathological Politics*, *supra* note 7, at 523–26.

more leverage to secure guilty pleas to triage the flow of cases.³⁷⁷ The result is enactment of laws that pose severe budgetary burdens without sufficient consideration of fiscal impact.

These alignments and the resulting accretion of an abundance of criminal laws and penal harshness have severely burdened the criminal justice and correctional systems. As the Little Hoover Commission investigating California's prisons crisis put it, "laws passed with no thought to their cumulative impact" have put the system in a "tailspin."³⁷⁸ Statutes ossify because no legislator wants to take the initiative to cut back criminal law because of the risk of looking soft on crime.³⁷⁹

As states are forced by severe budgetary shortfalls to confront costs, however, a few states have remarkably begun to tackle the root overcriminalization problem and the inflation of sentence severity in criminal law framing. Budgetary crisis has opened political space, will, and ability to tackle and redress overcriminalization and revise definitions of crime and punishment by changing the social meaning of such legislative action. Here again, legislators have political cover to engage in reforms once politically infeasible such as reducing prescribed punishments and converting former felonies to misdemeanors because they can explain the reforms are due to fiscal compulsion and the need to save taxpayers money rather than being soft on crime.³⁸⁰

In this shift to more thoughtful, forward-looking lawmaking, the time is ripe to also adopt fiscal and community impact analysis for criminal legislation as a reality check for the get-tough ratchet of the politics of crime. Explicit consideration of cost savings and the fiscal and community impact of criminal laws can ameliorate the consequences of enacting laws on the front end without consideration of the back end resource strain. Budget consciousness in criminal

377. See, e.g., Fan, *supra* note 48, at 27–28, 39–56 (discussing pressures on prosecutors from the politics of crime); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 725–26 (2005) (describing confluence of interests); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 142–43 (2008) (explaining "the practical disappearance of mens rea and the definition of criminal acts" through the arsenal of criminal laws to charge); Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 644–47 (2005) (discussing confluence of interest of legislators in avoiding looking soft on crime and prosecutorial interest in leverage).

378. LITTLE HOOVER COMM'N, *supra* note 72, at i–ii.

379. See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773–75 (2005).

380. For a discussion of how social meaning changes the ambit for action and reform, see *supra* notes 246–48 and accompanying text.

justice reform can create the political conditions for reforms to the process of criminal lawmaking so that legislators consider fiscal and community impact, rather than shift the costs to overburdened criminal justice actors down the line.

We can draw lessons from reforms in the United Kingdom on assessing the fiscal impact of regulations that impact business. In the United Kingdom, a recently established Cabinet Committee has the task of “stress-test[ing] regulatory proposals” by projecting fiscal burdens.³⁸¹ To ensure fiscal responsibility, regulators have the task of ensuring, in part, that “any new regulatory cost is compensated by cuts to the costs of old laws, and that the cut in regulatory cost must be greater than the cost of the new regulation.”³⁸² Businesses have the power to be the first movers in introducing reforms to the lawmaking process.

Criminal justice lawmaking, in dire need of an approach where lawmakers on the front end consider the fiscal and human costs of get-tough politics, can be influenced by inroads in lawmaking reforms first introduced by powerful actors in other legislative contexts. In the criminal justice context, while we may not cut old crimes to make way for new crimes, projecting fiscal burdens of new legislation creates a reality check and a brake on the powerful drive to criminalize. Beyond fiscal projections, an even bolder approach would be to require legislators contemplating creating new crimes to consider reforms to older laws such as cutting back steep penalties or weeding out obsolescent penal legislation to balance costs.

Consideration of fiscal costs can also pave the way for consideration of community and human costs. Here again, the reorientation of reform cannot neglect the need to address racial disparities that arise from the design of criminal law and penalties. The promise of a race-conscious approach to penal reform is demonstrated by the bipartisan support for amending the crack cocaine sentencing laws to reduce the notorious 100:1 disparity in the sentencing for crack cocaine, which disproportionately plagues communities of color.³⁸³ The Fair Sentencing Act of 2010 reduced the

381. DEP'T FOR BUS. INNOVATION & SKILLS, *Cutting Red Tape Committee Meets for the First Time*, NEWS DISTRIBUTION SERVICE FOR GOV'T & THE PUB. SECTOR (July 1, 2010, 10:38 AM), <http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=414183&NewsAreaID=2>.

382. *Id.*

383. See, e.g., Kara Gotsch, *Bipartisan Justice, Special Report: Mass Incarceration in America*, AMERICAN PROSPECT, Jan.–Feb. 2011, at A22, available at <http://www.nxtbook>

disparity from 100:1 to 18:1 by raising the quantity of crack that triggers five- and ten-year mandatory minimum sentences.³⁸⁴ Clearing the political hurdle of deadlock on criminal law reform opens the opportunity to ameliorate the ways in which criminal law structures and aggravates racial disparities in who bears the burden of punitive severity.

C. The Judicial Role in the Penal Law and Policy Foment

The role of the courts in intervening in penal law and policy must be viewed in light of the transformations in the politics of crime and punishment analyzed in the preceding sections. When politics are stuck and unconstrained excess and extreme severity drift leads to human rights violations that affront even minimum baseline Eighth Amendment standards, courts must intervene out of necessity to vindicate human rights.³⁸⁵ As Erwin Chemerinsky has argued, courts cannot abdicate their role altogether, particularly in the prisoner context, because the courts may be “the only entity with the will to enforce the Constitution” given the politics of crime.³⁸⁶

But judicial intervention and supervision should be the last resort rather than the first instinct because courts are clumsy overseers of penal law and policy with limited power to ensure and enforce implementation. In determining whether to intervene, the likelihood of redress by the political branches should be a relevant factor.

There are three major difficulties in the institutional competency of courts to oversee penal law and policy reform. The first is distortion in the nature and focus of judicially led reform because of the source of the judicial power to intervene. Because judicial power to oversee prisons depends on whether there has been a constitutional violation, which in turn is shaped by the blind spots and areas of focus in constitutional law doctrine, judicial oversight can lead to oddities, irregularities, and distortions in reform. California,

.com/nxtbooks/americanprospect/20110102specialreport/#/22 (tracing the shift to bipartisan support); see also, e.g., Ian Haney López, *Is the “Post” in Post-Racial the “Blind” in Color-Blind?*, 32 CARDOZO L. REV. 807, 817–18 (2011) (“The hundred-to-one sentencing disparity between crack and powder cocaine has emerged as the quintessential example of how the war on crime, conjoined to race, especially targeted blacks.”).

384. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C.).

385. For a recent example of such intervention, see *Brown v. Plata*, 131 S. Ct. 1910, 1922–23 (2011) (affirming a three-judge district court order for California to reduce the overcrowding problems in its prisons, which the court found to be the primary cause of the constitutional violations at issue).

386. Chemerinsky, *supra* note 47, at 311–12.

for example, has poured money into building medical facilities rather than redressing other areas of glaring problems, such as failure to house prisoners—healthy or ill—by classification, aggravating the criminogenic context of prison and the brutalities that nonviolent offenders may face.³⁸⁷ Plaintiffs are in the odd posture of trying to squeeze the massive and glaring problems of severe overcrowding into the small box of inadequate provision of medical care, which is just a subset and symptom of the problem that does not quite capture the generally experienced harms of all inmates. This stems from the Eighth Amendment doctrine's high tolerance for overcrowding generally, but also from doctrinal concern that a minimally adequate level of medical care must be provided.³⁸⁸

Second, there are structural separation-of-powers reasons counseling against judicial policy directives as a matter of principle that have prudential implications. The Supreme Court has repeatedly reiterated that penal choices are a question for the political branches rather than a court—particularly a federal court not subject to democratic election.³⁸⁹ Penal law, policy, and theory reflect normative, moral, and prudential judgments about competing alternatives that courts are particularly unsuited to make for the people. When courts do intervene, as in the case of California detailed in Part III.A, hostility and frustration over having an entity such as a federal receiver directing policy and state spending can harden resistance.

The resistance aggravates the third reason why courts are awkwardly suited to intervene in penal law and policy: the gross inefficiencies and transaction costs of courts or judicially appointed actors trying to direct political action. These problems are evident in California, which has spent \$82 million on blueprints for ambitious medical facilities advocated by the Federal Receiver that have been largely scrapped because of inability to secure political will to implement them.³⁹⁰ Because of the inefficiencies stemming from the tussle between political and judicially appointed actors, California

387. See *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-1351 TEH, 2009 WL 2430820, at *40, *85–86 (E.D. Cal. & N.D. Cal. Aug. 4, 2009) (discussing the criminogenic consequences of breakdown of classification system).

388. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (holding the Eighth Amendment prohibition against cruel and unusual punishment is not affronted by prison overcrowding at over capacity and improvisations such as “double ceiling” so long as there are no “deprivations of essential food, medical care, or sanitation”).

389. E.g., *Ewing v. California*, 538 U.S. 11, 23–25 (2003); *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980).

390. Dolan, *supra* note 262.

now spends substantially more on healthcare per prisoner than other states, yet it has had less success ameliorating serious problems in the provision of minimally adequate care.³⁹¹ The disconnect between judicially appointed overseers and the political process and the power to order without power to ensure implementation leads to waste as preparations are for naught.

Because of these three major difficulties, judicial supervision of penal policy is a penalty default that courts and states alike wish to avoid. A penalty default approach sets default terms in a manner to incentivize the better-situated party to act because the default in the event of inaction is a suboptimal outcome that neither party prefers.³⁹² Doctrine that gives a colorable threat of intrusive judicial intervention in the event of inaction would provide incentive for political action to avoid the penalty default. Judicial guidance can also magnify values underlying constitutional commitments that may be muted in the fractious din of the politics of crime.

The very penalty default nature of judicial intervention can be used to steer state action. This is why courts cannot bow out altogether from the role of policing penal choices: there would be no incentive for action to remedy deficits that may undermine constitutional rights and basic human rights, as well as harm the collective interest in managing human and fiscal costs. Judicial intervention can also constitute general deterrence for other jurisdictions and avert the need for judicial intervention elsewhere.

The power of the penalty default and a credible threat backed by judicial willingness to actually intervene is demonstrated by how the convening of the three-judge court jolted California into action.³⁹³ The prisoner release order of the three-judge court set California in motion, building new prison healthcare facilities to avoid another form of penalty default, the release of prisoners. In addition to breaking ground on a new facility outside Stockton to house approximately 1,700 mentally and physically ill inmates three months

391. *See id.*

392. The concept was formulated in the context of contracts as an incentive to get a more knowledgeable party to disclose information that would make for a more optimal outcome, but has been extended to myriad other contexts in logic. Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 597 (2006); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 90, 97-101 (1989).

393. For a discussion on the action by this three-judge court, see *supra* Part II.

after the prisoner release order, California is also preparing to convert three juvenile detention centers into medical facilities.³⁹⁴

The reform with the most potential for a jolt out of incapacitation stagnation, however, is not the building of more facilities, even if they are mental and healthcare facilities. Rather, the most striking aspects of California's proposed prisoner reduction plan filed pursuant to the court order to reduce prisoners are (1) statewide implementation of the Parole Violation Decision-Making Instrument, which uses "scientific research to make evidenced-based decisions to send low risk offenders to appropriate programs and high risk offenders back to prisons"; (2) new legislation encouraging "completion of rehabilitative programs"; (3) legislative initiatives offering fiscal incentives for community corrections program that "keep low-level offenders local rather than returning them to prison"; and (4) parole reentry court legislation "that allows for intensive monitoring for parole violators in the community rather than returning them to prison."³⁹⁵ The judicial nudge has helped give states guidance out of the mire and provided political cover for exploring legislation that is pragmatic and rehabilitative.

Sometimes, the faster pace of political reaction may moot judicial intervention, which proceeds at a more deliberate pace. This may be the most desirable outcome because it secures action without costly and clumsy judicial intervention. But particularly in the context of the fierce and pathological politics of crime and punishment, it is important to distinguish between a remedy for a constitutional problem and a simple prolonging and obscuring of the pain and unsustainability of a practice. Borrowing money and overextending an already severely distended deficit to build four prison medical facilities as a stopgap is not the same as a solution. The very pursuit of such stopgaps shows why the courts cannot afford to bow out of giving normative guidance and why an occasional nudge—or even a push—to pathological penal law and policies as occurred in *Graham v. Florida* and *Brown v. Plata* are needed.

394. Dolan, *supra* note 262; Scott Smith, *Officials Break Ground on State Prison Project*, CONTRA COSTA TIMES (Cal.), Nov. 10, 2010, at A11, available at 2010 WLNR 23814850.

395. Defendants' Population Reduction Plan, *Coleman v. Schwarzenegger*, Nos. 2:90-cv-00520 LKK JFM P, C01-1351 THE (E.D. Cal. & N.D. Cal. Sept. 18, 2009) in *Schwarzenegger v. Plata*, No. 09-1233, Jurisdictional Statement Appendix, Appendix F, Ex. A, at 315a–316a (Oct. 5, 2009).

CONCLUSION

We are at an important historical juncture because of a perfect storm of severe budgetary shortfalls and courts awakening to the role of checking penal severity. The steep human and fiscal costs of incarceration have changed the social meaning of mitigating penal harshness. After years of dormancy, the Supreme Court has awakened to the role of nudging—and even pushing—us out of incapacitation stagnation when we desire a way out of the political mire and its human and fiscal consequences but cannot see the way forward. This period of transition is ripe with potential for reform as well as dangers for backlash and backsliding. The way forward toward sustainable penal law and policy reform is to foster and develop practices guided by rehabilitation pragmatism and penal impact analysis, data-driven approaches with the potential to bridge partisan worldviews.

Clearing the threshold hurdle of the pathological politics of crime that have kept us mired in incapacitation stagnation is not enough. We must also take care that our rehabilitation pragmatism and its selective approach does not aggravate the problem of racial disparities in criminal justice through disparities in who benefits from measures of mercy and who remains warehoused away. Evidence-based reform calls for inquiry not just into general efficacy and cost effectiveness but an assessment of whether programs suffer from racial disparities in beneficiaries and why. This can pave the way for alternatives to incarceration and more efficacious rehabilitative programs that are culturally tailored to better serve groups that are disproportionately incarcerated. The social meaning change that is lowering political obstacles can also open the door to deeper criminal law reforms that tackle structural disparities in who bears the burden of penal severity.