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Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge?

Vincent Schiraldi*

The Normalization of Imprisonment

The United States has just come through a period of unprecedented prison growth, the scale of which is difficult to overstate. America opened its first walled penitentiary in Philadelphia in 1829.¹ Between then and 1989, a 160-year period, we amassed approximately 1 million inmates in our nation's prisons and jails.² In just the next twelve years, we put another million prisoners behind bars.³

This has rendered the prison experience an alarmingly common life event for Americans, particularly African American and Latino males, and one that promises to be even more common for the next generation. The Justice Department reported some truly startling data this summer, to surprisingly little fanfare, perhaps revealing how the banality of evil has numbed Americans to our staggering incarceration rate. By year end 2001, 5.6 million Americans had served some time in prison, more than live in twenty-eight states and the District of Columbia.⁴ If incarceration rates stay at the 2001 level, and they have already increased beyond that, one out of every fif-

* The author would like to thank Laura Sager of Families Against Mandatory Minimums and Jason Ziedenberg of the Justice Policy Institute, for their advice and editorial suggestions.

1. Linda Dailey Paulson, *Eastern State Penitentiary*, in 2 *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 596-97 (David Levinson ed. 2002).

2. VINCENT SCHIRALDI & JASON ZIEDENBERG, *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM* (2002), available at <http://www.cjci.org/pubs/punishing.html>.

3. See BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, U.S. DEP'T OF JUSTICE, BULL. No. NCJ 198877, *PRISON AND JAIL INMATES AT MIDYEAR 2002* (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf>.

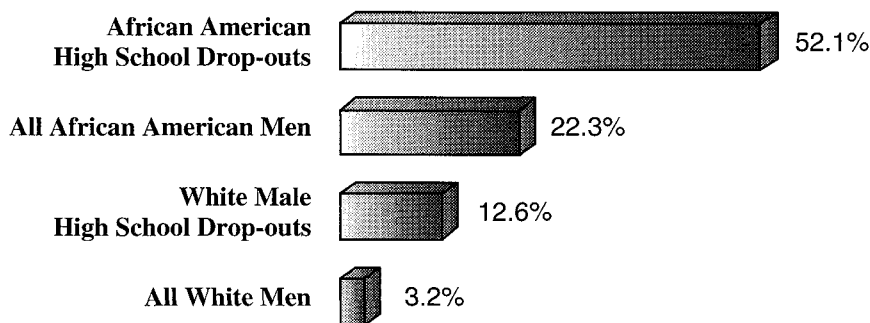
4. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, U.S. DEP'T OF JUSTICE, BULL. No. NCJ 197976, *PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001* 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

teen Americans born in 2001 will go to prison at some time during their life.⁵ That works out to be about two students in an average high school class, or about four or five participants in a conference of this size.

Of course, the likelihood of incarceration is not equally distributed across the population. African American and Latino males, the number one and two customers in our nation's prison supermarket, are being incarcerated at numbers that are truly abominable. Nearly one in three African American males and one in six Latino males born in 2001 (today's three-year-olds) are expected go to prison at some time during their life.⁶ One in seventeen white men is likely to land in prison, only slightly higher than the one in eighteen black women expected to serve prison time.⁷

According to a report I co-authored with Bruce Western of Princeton University and Jason Ziedenberg of the Justice Policy Institute, half of all African American male high school drop-outs are expected to serve time in prison by the their early thirties, as are one in eight white male dropouts.⁸ Nearly twice as many black men in their early thirties have been to prison (22%) as have obtained a bachelors degree (12%).⁹

Figure 1: Percentage of Men Born 1965-69 (age 30-34) with Prison Records (1999), By Race and Education.¹⁰



5. *See id.* at 7.

6. *See id.* at 8.

7. *See id.*

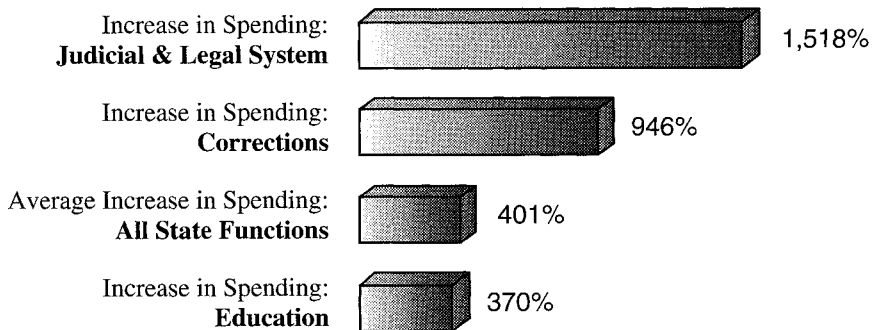
8. BRUCE WESTERN ET AL., EDUCATION AND INCARCERATION 7-8 (2003), available at <http://www.justicepolicy.org/downloads/EducationandIncarceration1.pdf>.

9. *Id.* at 9 fig.3.

10. *Id.* at 7.

In spite of these alarming statistics, for most of the past two decades, states have continued to funnel money and bodies into prisons and away from schools and colleges. “[F]rom 1977 to 1999, total state and local expenditures on corrections increased by 946%—about 2.5 times the increase in spending on all levels of education (370 %).”¹¹ Between 1985 and 2000, state corrections spending grew at six times the rate of higher education.¹² From 1980 to 2000, three times as many African American men were added to America’s prisons as to our universities.¹³ By the 1999-2000 school year there were more African American men of all ages in prison and jail (791,600) than were enrolled in higher education (603,000).¹⁴

Figure 2: Education or Incarceration? The Growth in Spending on Corrections was 2.5 times Greater than on Education.¹⁵



11. *Id.* at 4.

12. VINCENT SCHIRALDI & JASON ZIEDENBERG, *Cellblocks or Classrooms? The Funding of Higher Education and Corrections and Its Impact on African American Men* 2-4 & tbl.1 (2002), available at <http://www.justicepolicy.org/downloads/coc.pdf>.

13. *See id.* at 12-13 tbl.6.

14. *See id.* at 10-11 tbl.5.

15. WESTERN ET AL, *supra* note 8, at 4; see also BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, BULL. NO. NCJ 191746, *JUSTICE EMPLOYMENT IN THE UNITED STATES, 1999 1* (2002) (to maintain consistency in reporting, the Bureau of Justice Statistics analysis of expenditure was not adjusted for inflation), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jeeus99.pdf>.

Fiscal Crisis and Shift in Public Opinion Open the Door to Reforms

The fiscal clash between prisons and education (and other social programs, for that matter) is coming to a head in state houses and governor's mansions around the country like never before. Faced with the largest shortfalls since World War II, policy makers are cautiously eyeing their corrections budgets for fiscal relief. According to the National Association of State Budget Officers (NASBO), the last time states faced budget shortfalls was during the early 1990s when corrections was a much smaller item on fiscal ledger.¹⁶ Even then, the budget shortfalls states were facing were mild by comparison to today's fiscal crisis; in 1991, for example, the last time NASBO reported a collective state budget gap, the shortfall was \$7.6 billion.¹⁷ By comparison, over the past two years, states have had to meet a collective \$200 million in budget gaps.¹⁸ Meanwhile, prison budgets now consume one out of every fourteen general fund dollars, rendering them a much more attractive target in budget negotiations.¹⁹

It would be a mistake to conclude that money is the sole factor encouraging policymakers to reexamine prison policies. Prisons and crime have lost much of their salience in the voters' eyes and attitudes about crime and punishment have shifted significantly since the height of punitiveness in 1994. According to a poll released last year by Hart Research Associates, that was commissioned by the Open Society Institute, public attitudes are now more favorable towards a balanced response to crime than a decade ago.²⁰ Hart found that 63% of respondents

16. NAT'L ASS'N OF STATE BUDGET OFFICERS, *THE FISCAL SURVEY OF STATES* 3 (2001), available at <http://www.nasbo.org/Publications/fiscsurv/fiscsurvdec2001>. pdf [hereinafter *FISCAL SURVEY OF STATES*].

17. See *id.* at 1.

18. Press Release, National Conference of State Legislators, *Three Years Later, State Budget Gaps' Linger: Total Gap Grows to \$200 Billion Since FY 2001* (Apr. 24, 2003), at <http://www.ncsl.org/programs/press/2003/030424.htm> (last visited Mar. 15, 2004).

19. See *FISCAL SURVEY OF STATES*, *supra* note 16, at 3.

20. See PETER D. HART RESEARCH ASSOCS., *CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM: SUMMARY OF FINDINGS* (2002), available at <http://www.prisonssucks.com/scans/CJI-Poll.pdf> (last visited Apr. 2, 2004) [hereinafter *CHANGING PUBLIC ATTITUDES*].

avored “reducing prison sentences for people convicted of non-violent crimes”²¹

Figure 3: Opinion Surveys Show Support for Alternatives to Prison²²

Changing Public Attitudes toward the Criminal Justice System²³

- “Given a choice of six budget areas that could be reduced to help states balance the budget, the public places spending on prisons (28%) at the top of their list, tied with transportation.”²⁴
- Nearly two-thirds (62%) of Americans believe we need to change the laws so that fewer nonviolent crimes are punishable by prison terms²⁵ and roughly the same percentage feel that drug abuse should be handled by treatment and counseling (63%) as opposed to prison (31%).²⁶
- The public favors dealing with the roots of crime over stricter sentencing by a two-to-one margin, 65% to 32%. This is a dramatic change from public attitudes in 1994, when 48% of Americans favored addressing the causes of crime and 42% preferred the punitive approach.²⁷

Crime and Punishment: Poll Finds Americans Forgiving of Nonviolent and First-Time Offenders²⁸

- Nine in ten Americans favor treatment programs for first-time drug offenders over prison.²⁹
- Three quarters of Americans say nonviolent offenders who commit up to three crimes (“three strikes”) should not face mandatory life-terms.³⁰

What Americans Say About Our Justice System³¹

- Eighty-eight percent of Americans said that people convicted of nonviolent crimes should be sentenced to community service instead of prison.³²
- To solve the problem of prison overcrowding, 76% support community service for nonviolent crimes and 64% favor more probation. Only 42% support building more prisons to deal with prison overcrowding.³³

Public support for prison population reduction proposals increased when such proposals were combined with treatment or

21. *Id.* at 12.

22. Press Release, Justice Policy Institute, States Reduce Incarceration, Change Sentencing Laws to Address Fiscal Crises 3 (Jan. 7, 2003), available at http://www.prisonworks.com/scans/jpi/cutting2_ntlstatespending.pdf.

23. CHANGING PUBLIC ATTITUDES, *supra* note 20.

24. *Id.* at 15.

25. *See id.* at 12.

26. *Id.* at 5.

27. *Id.* at 1.

28. Gary Langer, *Crime and Punishment: Poll Finds Americans Forgiving of Nonviolent and First-Time Offenders*, ABC NEWS, Mar. 7, 2002, at http://abcnews.go.com/sections/us/DailyNews/crime_punish_poll020307.html.

29. *Id.*

30. *Id.*

31. Dianne Hales, *National Survey About Our Criminal Justice System: What Americans Say About our Justice System*, PARADE MAG., Feb. 10, 2002, at 10.

32. *Id.* at 13.

33. *Id.*

restitution requirements. Seventy-seven percent of respondents thought nonviolent drug offenders should be required to go to treatment rather than prison;³⁴ 75% approved of sentencing nonviolent offenders to probation instead of imprisonment;³⁵ 78% favored releasing low-risk prisoners early to participate in rehabilitative programming;³⁶ 75% thought that sentencing nonviolent offenders to supervised community service would save millions of taxpayers' dollars.³⁷ Twice as many members of the public favored rehabilitative programming (64%) over longer sentences (20%).³⁸ These findings cut across party lines as well. More than two-thirds of Republicans favored treatment and probation for nonviolent offenders and a majority of Republicans favored tougher approaches to the causes of crime, over the policies of the past.³⁹

The Hart findings represent a substantial shift in public opinion compared to the early 1990's. For example, while 54% of respondents to a Gallup poll taken in February 1992 thought that crime was higher than the year before, only 22% of respondents to Hart's December 2001 survey thought that crime was up. Likewise, 42% of respondents to an August 1994 Gallup poll thought that the best approach to crime control was increasing funding for law enforcement and prisons, versus only 29% who felt that way in December 2001.⁴⁰

This shift in thinking about corrections policy is popping up in some unexpected places. In a keynote address to the American Bar Association this summer, Justice Anthony Kennedy spoke passionately of the "inadequacies and injustices in our corrections system."⁴¹ Decrying the overrepresentation of young men of color in our prisons and the shift in funding from education to prisons, the conservative Ronald Reagan appointee declared, "Our resources are misspent, our punishments too se-

34. See CHANGING PUBLIC ATTITUDES, *supra* note 20, at 16.

35. *Id.* at 11.

36. See *id.* at 14.

37. See *id.* 12-13.

38. *Id.* at 3.

39. CHANGING PUBLIC ATTITUDES, *supra* note 20, at 2.

40. *Id.* at 2.

41. Associate Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (last visited Mar. 15, 2004).

vere, our sentences too long.”⁴² ABA President-elect Dennis Archer has made sentencing and corrections reform a major platform of his presidency.⁴³ That same summer, the National Education Association passed a resolution calling for a halt in the shift in funding from education to incarceration.⁴⁴ Reg Weaver, President of the National Education Association, recently said, “The unfortunate result is that we are more willing to build prisons than schools—less willing to educate than incarcerate.”⁴⁵

States Begin to Dig Out

Unlike federal legislators who tend to have a more distant relationship with prison issues and the costs associated with them, state officials have an immediate feedback loop on both the cost of prison policies and their salience with the voters. Not surprisingly, more than a handful of state elected officials have begun to take action to reduce prison populations, divert non-violent offenders from prison into treatment, abolish mandatory sentences and return sentencing discretion to judges, reform parole practices to accelerate releases and reduce returns to prison for technical violations and, generally, take a creative look at many of the policies passed during the more punitive and less fiscally austere 1990s. Having discussed the deep hole America has dug for itself through its prisons policies over the past two decades, the rest of this article will detail some of the ways states are digging out of that hole.

Since budgets began to tighten in 2000, more than a dozen states have experienced an annual reduction in their prison populations.⁴⁶ During the final six months of 2000, state prison

42. *Id.*

43. Vincent Schiraldi, *Finally, States Release Pressure on Prisons*, THE WASHINGTON POST, Nov. 30, 2003, at B3.

44. National Education Association, New Business Item 35, *Education Not Incarceration*, at <http://www.nea.org/annualmeeting/raaction/nbi.html> (June 6, 2003).

45. JUSTICE POLICY INSTITUTE, *Half of African American Male Dropouts and 1 in 10 White Male Dropouts Have Prison Records: As States Cut School Funds, Prisons Filled with People with Little Education*, available at <http://www.justicepolicy.org/article.php?id=242> (Aug. 28, 2003).

46. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 188207, PRISONERS IN 2000 2 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf>.

populations, taken as a whole, actually declined for the first time since 1972.⁴⁷ California, Florida, Georgia, Illinois, Massachusetts, Michigan, Mississippi, Ohio, Pennsylvania, Utah and Virginia have all closed prisons within the past three years.⁴⁸ Nebraska has a prison closure pending.⁴⁹ New York, Texas and Nevada have closed wings or portions of prisons.⁵⁰ While some of these prison population declines cannot readily be attached to any specific policy changes, perhaps because they are an artifact of declining crime rates, the remainder of this article will discuss three of the areas in which state reforms have clustered, followed by some cautionary tales and conclusions.

Mandatory Sentencing Repeals

Over the past three years, Connecticut, Delaware, Indiana, Louisiana, Maine, Michigan and North Dakota all either abolished or narrowed their mandatory sentencing laws.⁵¹

Until recently, Michigan had one of the nation's toughest schedules of mandatory sentencing laws. The prison population in Michigan had grown by 15,000 inmates during the 1990s, and the Department of Corrections' budget had increased from \$900 million to \$1.7 billion during that decade.⁵²

In 1997, Families Against Mandatory Minimums (FAMM), a national sentencing reform organization whose staff and members are mainly families of inmates imprisoned under mandatory sentencing laws, began a six-year effort to abolish Michigan's harsh system of mandatory sentencing for drug offenses. In 1998, FAMM won reform of Michigan's "650 Lifer" law, a law mandating life without the possibility of parole for first time sales in excess of 650 grams of certain drugs.⁵³

47. *Id.* at 1.

48. JUDITH GREENE, POSITIVE TRENDS IN STATE-LEVEL SENTENCING AND CORRECTIONS POLICY 10 (2003), available at http://www.famm.org/pdfs/82751_Positive%20Trends.pdf.

49. *See id.*

50. *See id.*

51. *See id.* at 14-15.

52. *See* CITIZENS ALLIANCE ON PRISONS AND PUBLIC SAFETY, PRISON EXPANSION IN MICHIGAN: A SHORT HISTORY 2-3 (2001), at, <http://www.capps-mi.org/pdffdocs/HISTORY.pdf> [hereinafter PRISON EXPANSION IN MICHIGAN].

53. *See* Press Release, Families Against Mandatory Minimums, Historic Michigan 'Smart on Crime' Sentencing Reforms Save State Taxpayers \$41 Million in 2003; States Grappling to Control Costs, Are Looking at Michigan Reforms as a

FAMM also won retroactive parole eligibility for almost 200 prisoners who had been sentenced to life without the possibility of parole.⁵⁴ At the time, the “650 Lifer” law was the toughest drug law in the nation.⁵⁵

On December 25, 2002, Michigan’s Republican Governor John Engler signed into law Public Acts 665, 666 and 670, passed by the state’s Republican-controlled House and Senate.⁵⁶ The new laws eliminate most of Michigan’s mandatory sentences, turn discretion over consecutive sentencing back to judges and abolish lifetime probationary sentences.⁵⁷ The reforms were backed by a diverse coalition led by FAMM that included the Prosecuting Attorneys Association of Michigan, the Michigan Association of Drug Court Professionals, the Michigan Catholic Conference, Michigan’s Children, the NAACP (Detroit Branch), and the Citizens Alliance on Prisons and Public Safety.⁵⁸ Republican Representative Mike Kowall, chair of the Assembly Judiciary Committee, told the *Christian Science Monitor*:

Make no mistake about it, I have no problem with putting people in jail. I consider myself to the right of Attila the Hun. This just gets back to commonsense approaches to crime rather than just locking them up and throwing away the key. I tell my colleagues throughout the US: Don’t be afraid of taking on these issues for fear of being chastised as soft on crime. It never came up, and I was in a heated primary.⁵⁹

The *Detroit Free Press* estimates that the mandatory sentencing reforms will save the state \$41 million this year.⁶⁰ The three bill package also included retroactive reforms that could eventually affect up to 1,200 prisoners.⁶¹ In addition, 3,200 in-

Model (Feb. 24, 2003), available at http://www.famm.org/si_sent_by_state_michigan.htm [hereinafter Historic Michigan].

54. *Id.*

55. *Id.*

56. *Id.*

57. See FAMILIES AGAINST MANDATORY MINIMUMS, *Michigan, FAMM’s Guide to Michigan Sentencing Reforms*, at http://www.famm.org/si_sent_by_state_michigan_reform_guide_02_03.htm (last visited Apr. 2, 2004).

58. Historic Michigan, *supra* note 53.

59. Alexandra Marks, *Christian Science Monitor*, DETROIT FREE PRESS, Jan. 21, 2003, at 3.

60. *Id.*

61. *Id.*

dividuals serving lifetime probation sentences became immediately eligible for discharge from probation.⁶²

One of those is Karen Shook who was a working mother of three with no prior felony convictions when she was arrested and sentenced to between twenty and forty years in prison. Shook made four sales of cocaine to undercover officers.⁶³ The first three amounted to a total of twenty-eight grams, just more than one ounce.⁶⁴ The fourth sale was of seventy grams, slightly less than three ounces, placing her in the mandatory sentencing range.⁶⁵ Because she was so heavily addicted to cocaine at the time, the undercover officer testifying at her trial described her as an “easy mark.”⁶⁶ Had she been arrested for the first sale, she would have been eligible for drug court and treatment.⁶⁷ As it was, absent the recent mandatory sentencing law repeals, she would not have been eligible for parole until 2013.⁶⁸ After serving six years in state prison, Ms. Shook was paroled after the mandatory sentencing law was repealed by the governor and legislature.⁶⁹

Deflating Sentences and Funding Treatment Instead of Incarceration

In addition to abolishing mandatory sentences and returning sentencing discretion to judges, many states are engaging in sentencing law changes that reduce prison populations and divert nonviolent and drug offenders from prison into treatment.

Washington State had experienced sharp increases in its prison populations for more than a decade before policymakers decided to enact reforms that have curbed prison growth. Washington was the first state to adopt a “Three Strikes and

62. *Id.*

63. FAMILIES AGAINST MANDATORY MINIMUMS, *Historic Michigan ‘Smart on Crime’ Sentencing Reforms Save State Taxpayers \$41 Million in 2003; States Grappling to Control Costs, Are Looking at Michigan Reforms as a Model* (Feb. 24, 2003), at http://www.famm.org/si_sent_by_state_michigan.htm.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *See* FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 63.

69. *Id.*

You're Out" law in 1993,⁷⁰ followed by a "Hard Time for Armed Crime" initiative that passed two years later.⁷¹ As a result, from 1994 to 2002, Washington's prisons grew by 60% from 10,833 to 16,062.⁷²

In 2002, when Washington Governor Gary Locke asked state department heads to submit 15% budget cuts, Secretary of Corrections Joseph Lehman submitted a package of sentencing reform proposals that reduced the use of incarceration for low level offenders and funded community based alternatives to incarceration at a substantial savings.⁷³ Lehman's proposals diverted low-end nonviolent offenders into treatment, shortened sentences for more serious drug offenders, and either reduced or eliminated post release supervision for nonviolent offenders.⁷⁴ King County Prosecutor Norm Maleng came on in support of Lehman's package, as did the King County Bar Association, the State Bar Association, the State Medical Association and the State Pharmacy Association.⁷⁵ Grass roots support was organized by the Washington Criminal Justice Resource Network. The state estimates that the package, which was approved by large majorities of both houses in May and signed into law by Governor Locke, will save the state \$100 million in corrections costs over a two year period, while adding \$8 million to the state's Criminal Justice Treatment Fund.⁷⁶

70. NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION (1997), available at <http://www.ncjrs.org/pdffiles/165369.pdf>

71. Bruce Rushton, *Legislature '95: 'Hard Time' Initiative Becomes Law / Senate Oks Longer Jail Terms for Armed Crime*, THE MORNING NEWS TRIB., Apr. 21, 1995, at B1.

72. Compare BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 151654, PRISONERS IN 1994 3 tbl.2 (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pi94.pdf>, with BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 200248, PRISONERS IN 2002 3 tbl.3 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf> [hereinafter PRISONERS IN 2002].

73. See CTR. ON JUVENILE AND CRIMINAL JUSTICE, CUTTING CORRECTLY: NEW PRISON POLICIES FOR TIME OF FISCAL CRISIS 21-22 (2001), available at http://www.cjcj.org/pdf/cut_cor.pdf [hereinafter NEW PRISON POLICIES]; see also Brad Shannon, *Inmates Could Get Early Release: Locke Prison Plan Faces Little Challenge*, THE OLYMPIAN, Dec. 21, 2002, at A1.

74. Shannon, *supra* note 73.

75. NEW PRISON POLICIES, *supra* note 73, at 22.

76. See Shannon, *supra* note 73.

From 1980 to 2000, California's prison population grew eight-fold from 20,000 to 160,000 inmates; the number of persons imprisoned for drug offenses alone grew 25-fold.⁷⁷ During that time period, the state built twenty-one new prisons and only one state university.⁷⁸ By 1996, funding for state prisons had outstripped funding for the state's vaunted system of public universities, once the jewel of California's government and the engine that drove the state's economic prosperity.⁷⁹ That same year, there were five times as many African American men in California's prisons as in its universities.⁸⁰ Today, as part of the state's budget shortfall, the cost of paying for the \$5 billion dollar corrections system has forced some of the biggest double digit tuition increases students have ever faced in that state.⁸¹

In the mid-1990s, these policies appeared wildly popular. In 1994, following the kidnapping and brutal murder of twelve-year-old Polly Klaas, 72% of voters supported the passage of the nation's toughest "Three Strikes and You're Out" initiative.⁸² The law with the catchy baseball name was expected to add 80,000 prisoners, most of them nonviolent offenders, to California's prisons which, at the time, held 125,473 inmates.⁸³

But by the end of the millennium, Californians were growing weary of the fiscal burden of their prison system and the unrelenting news stories decrying prison conditions and telling of defendants receiving life sentences for stealing a slice of pizza or a piece of chocolate cake. As Governor Gray Davis proposed increasing the budget for corrections while K-12 and higher education took substantial reductions (as part of the budget com-

77. PHILLIP BEATTY ET AL., POOR PRESCRIPTION: THE COSTS OF IMPRISONING DRUG OFFENDERS IN THE UNITED STATES (2000), available at <http://www.cjcj.org/pubs/poor/pp.html>.

78. DAN MACALLAIR ET AL., CLASS DISMISSED: HIGHER EDUCATION VS. CORRECTIONS DURING THE WILSON YEARS 3 (1998), available at <http://prisonsucks.com/scans/jpi/classdis.pdf>.

79. VINCENT SCHIRALDI & TARA JEN AMBROSIO, TRADING CLASSROOMS FOR CELLBLOCKS: A NATIONAL PERSPECTIVE (1997), available at <http://www.cjcj.org/pubs/higher/higherdc.html>.

80. DAN MACALLAIR ET AL., *supra* note 73, at 4.

81. *Id.* at 3.

82. See Gina Holland, *Three-Strikes Law Comes to Bat*, TULSA WORLD, Nov. 11, 2002, at A22.

83. SCOTT EHLERS ET AL., STILL STRIKING OUT: TEN YEARS OF CALIFORNIA'S THREE STRIKES 5 (2004), available at http://www.soros.org/initiatives/justice/articles_publications/publications/still_striking_20040305/threestrikes_press.pdf.

promise, corrections saw a minuscule decrease this year in its appropriations), polls by the non-partisan Public Policy Institute of California showed that prisons were the only area where a significant majority of state residents (56%) supported a reduction in spending.⁸⁴

In 2000, California voters went to the polls and overwhelmingly passed Proposition 36, also known as the Substance Abuse and Crime Prevention Act of 2000.⁸⁵

Under Proposition 36, petty drug offenders are now being sent to community-based treatment in lieu of incarceration in a jail or prison, and most probationers and parolees who violate a drug-related condition of community release, get treatment rather than re-incarceration.⁸⁶ The California Legislative Analyst's Office projected that implementation of Proposition 36 would save \$100-\$150 million annually in prison costs, avoid construction of at least one new prison, divert as many as 36,000 new prisoners and probation and parole violators to treatment programs annually, and fund a \$120 million "treatment superfund" to provide drug treatment for those diverted from imprisonment.⁸⁷

Over 44,000 offenders chose to enter treatment programs in lieu of incarceration under the law in its first year, more than were originally anticipated.⁸⁸ Of those, 69% entered treatment, a "show" rate that compares favorably with drug users referred to treatment by criminal justice agencies, according to the UCLA evaluation of the first year of Proposition 36's implemen-

84. Mark Baldassare, *Public Policy Institute of California Statewide Survey*, Public Policy Institute of California, available at <http://www.ppic.org/main/publication.asp?i=500> (last visited Mar. 15, 2004).

85. Daniel Abrahamson & Jaffer Abbasin, *SACPA's Sophomore Year: The Second Annual Review of Proposition 36 in California's Courts*, 54 CAL. CRIM. DEF. PRAC. REP. 517 (2003), available at http://www.drugpolicy.org/docUploads/abrahamson_sophomore.pdf.

86. *Id.* at 524.

87. Vincent Schiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 41 FED. SENTENCING REP. 1 (2002).

88. DOUGLAS LONGSHORE ET AL., EVALUATION OF THE SUBSTANCE ABUSE AND CRIME PREVENTION ACT OF 2002 REPORT 9 (2003), available at <http://www.cadpaac.org/Final%20SACPA%20Annual%20Report%20Year%20June%20242.pdf>.

tation.⁸⁹ The Drug Policy Alliance estimated in July 2003, that Proposition 36 had saved the state \$279 million since 2000.⁹⁰

Arizona's Proposition 200 works similarly. This 1996 drug law initiative "was supported by a phalanx of conservatives, including former U.S. Sen. [and Republican Party Presidential nominee] Barry Goldwater."⁹¹ An assessment conducted under the auspices of the Arizona Supreme Court reports high treatment success rates (61% successfully complied with the requirements of their treatment program).⁹² Nearly seven million dollars was saved during fiscal year 1999, by diversion of Arizona drug offenders from incarceration.⁹³

Colorado, Kansas and Texas have all legislatively passed similar reforms. Texas' efforts brought together the ACLU of Texas, the Texas NAACP, the Texas Inmate Family Association, the Texas League of United Latin America Citizens, the Houston Ministers Against Crime, the NAACP Voter Education Fund, the National Council of La Raza and the Justice Policy Institute in a coalition that advocated a series of policy reforms during the 2003 legislative session.⁹⁴ Legislation to divert 2,500 offenders convicted of possession of less than a gram of cocaine from prison into treatment passed both Republican-controlled houses of the Texas legislature with a handful of no votes.⁹⁵ It is estimated that the reform will save \$30 million over the next biennium.⁹⁶

In an opinion piece he co-authored with the chair of the state's Legislative Black Caucus, the bill's author, conservative Representative Ray Allen, wrote "[p]risons alone don't create the kind of comprehensive approach to crime control that helps

89. *Id.* at 9.

90. Josh Richman, *Drug Treatment Law Gets High Marks*, THE OAKLAND TRIBUNE, July 17, 2003, at 2.

91. Vincent Schiraldi & Judith Greene, Editorial, *Law Enforcement Ripe for Cutting Prison Budgets: If More Nonviolent Offenders Are Diverted Away from Jail, Then Some Prisons Can Be Closed*, THE LOS ANGELES TIMES, Feb. 10, 2002, at M2; see ARIZ. REV. STAT. § 13-901.02 (1997).

92. ARIZ. SUPREME COURT, ADMIN. OFFICE OF THE COURTS, ADULT SERV. DIV., DRUG TREATMENT AND EDUCATION FUND: LEGISLATIVE REPORT 3 (1999), available at <http://csdp.org/research/dteftoday.pdf>.

93. *Id.*

94. GREENE, *supra* note 48, at 6.

95. *Id.*

96. *Id.*

to keep Texans safe The two legislative proposals offer Texans the best of both worlds: They save money and yield better public safety.”⁹⁷

Reforming Parole Practices Yields Impressive Results

In addition to sentencing law reform, governors, parole boards and corrections officials have enacted parole reforms that have resulted in substantial reductions to their prison populations.

The 1990’s were witness to a larger growth in America’s prison system than any other decade in our nation’s history. During that most punishing of decades, Texas’ prison growth stood out amongst all others, with the Lone Star State contributing one-fifth of growth to America’s prisons from 1990 to 1999.⁹⁸ By 1999, one out of every twenty Texans was under the control of the Texas Department of Criminal Justice,⁹⁹ a level of social policy impact that could only have been dreamt of during the headier days of Lyndon Johnson’s Great Society programs. Texas ended the 1990’s with a larger prison population than any other state, and with the second highest incarceration rate in the country.¹⁰⁰

While there were many factors contributing to the growth of Texas’ prisons during the 1990’s, changes in parole practices had to be counted amongst the most prevalent of those. In 1991, the Texas Parole Board was approving 80% of the prisoners who came before it for release; by 2000, that rate had dropped to 20%.¹⁰¹ That year, faced with a choice of new prison construction or parole reform, Texas chose reform.

In 2000, the Texas Parole Board, under new Governor Rick Perry (R), began making more systematic use of their release powers while simultaneously reducing the number of parolees

97. Ray Allen, Editorial, *Prison Not Always the Answer*, DALLAS MORNING NEWS, May 29, 2003, at A17. (significantly, Ray Allen chairs the corrections committee of the conservative American Legislative Education Counsel, which has consistently promoted longer sentences and tougher approach to crime).

98. DANA KAPLAN ET AL., TEXAS TOUGH? AN ANALYSIS OF INCARCERATION AND CRIME TRENDS IN THE LONE STAR STATE (2000), available at <http://www.cjcg.org/pubs/texas/texas.html>.

99. *Id.*

100. *Id.*

101. Schiraldi and Greene, *supra* note 87, at 334.

returned for technical violations. By September 2000, release rates climbed to the upper twenties.¹⁰² When the state created a network of intermediate sanctions in lieu of parole revocation, the monthly number of parole revocations fell from 1,062 to 781.¹⁰³ While these may sound like minor adjustments, they resulted in a decline in the Texas prison population from 151,000 in September 2001 to 143,000 by December 2002.¹⁰⁴ Not only would Texas not need to build any new prisons, but there was suddenly a prison vacancy rate of 6,000 beds.¹⁰⁵

In like fashion, Ohio officials created a parole guidelines system that resulted in an increase in parole releases for nonviolent offenders, coupled with a network of alternatives to parole revocation.¹⁰⁶ These new guidelines were put into practice in 1998 and by 1999, almost twice as many inmates were paroled (6,150) as were released in 1995 (3,224).¹⁰⁷

Since 1998, Ohio has stood out in contrast to the steady growth of state prison populations in the Midwest. Against the region's average growth rate of 3.8%, by the end of 2000, Ohio enjoyed a 5.7% decline in its prison population.¹⁰⁸

Parole reforms should not be forgotten in the attempt to reign in mushrooming prison populations. Between 1990 and 1998, new commitments to state prisons nationally rose by 7.5%, while parole revocations rose by 54%.¹⁰⁹ California alone spent nearly \$1 billion in 1999 incarcerating parole violators.¹¹⁰

According to criminologist James Austin, PhD, one of the advantages of parole reforms is that they can be implemented quickly, without the need for lengthy legislative battles.¹¹¹ While this is certainly a strength in these cash strapped times,

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Schiraldi and Greene, *supra* note 87, at 334.

107. *Id.*

108. *Id.*

109. Fox Butterfield, *Getting Out: A Special Report*, NY TIMES, Nov. 29, 2000, at A1.

110. LEGISLATIVE ANALYST'S OFFICE, REFORMING CALIFORNIA'S ADULT PAROLE SYSTEM (1998), available at http://www.lao.ca.gov/analysis_1998/crim_justice_crosscutting_anl98.html#_1_1.

111. See generally JAMES AUSTIN & JOHN IRWIN, IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE (3d ed. 2000).

that strength could become a weakness when the economy improves. Because they do not require the public will-building it takes to achieve the legislative and public consensus required for the passage of a bill, for example, parole reforms can be ethereal, gradually entropying to more punitive measures when the fiscal heat is off.

Cautionary Tales

As states move in the direction of tempering their prison policies and actually reducing prison populations, there are already some cautionary tales that bear attending to. After decades of non-stop vitriol about the need to lock 'em up and throw away the key, the public is going to need some educating in order to accept prison population reductions. America's incarcerated populations are often a troubled lot, requiring assistance in the areas of housing, job development and drug treatment, to name a few, if they are to successfully transition back into the community upon release or be safely diverted from incarceration. The Hart Research Associates poll¹¹² found that support for diverting nonviolent offenders jumps significantly when respondents are told that releases will be in treatment or under supervision.¹¹³

Late last year, Kentucky's Governor Gary Patton decided to commute the sentences of 600 prisoners serving time for non-violent sentences who were within three months of their parole as a cost savings device.¹¹⁴ As chair of National Governors Association, Governor Patton had an opportunity to use a national stage to provide sound policy solutions and solid leadership for other governors who are struggling with the fiscal crises and burgeoning corrections budgets. Instead, the Governor told the *New York Times* "a percentage of them are going to recommit a crime, and some of them are going to be worse than the crimes they are in for. I have to do what I have to do within the revenue that we have."¹¹⁵

112. See *supra* notes 20-21 and accompanying text.

113. CHANGING PUBLIC ATTITUDES, *supra* note 20, at 12.

114. Fox Butterfield, *Inmates Go Free to Reduce Deficits*, N.Y. TIMES, Dec. 19, 2002, at A1.

115. *Id.*

As a seasoned politician and president of the National Governors Association, he ought to have known better, and should have helped his constituents understand that these offenders were the state's least violent prisoners who were all within days of release anyway. Additionally, if part of the savings from the early release program were used to fund sensible reentry programs, Kentuckians could have at least seen some tangible public safety benefits accruing from the policy.

This failure of both public policy and public relations quickly took a heavy toll. When two of the early release inmates were re-arrested for rape and kidnapping, the program was abruptly halted.¹¹⁶ Following this debacle, Kentucky policymakers will doubtless be more reticent to reduce their state's prison population than they were before.

The state of Alabama now stands poised upon a similar precipice. If there was ever a state in need of prison reform, it is Alabama. The state's prison population of 28,440 is twice its 14,000-prison design capacity.¹¹⁷ This year, the Southern Center for Human Rights sued Alabama over conditions in the state's Tutwiler Women's prison, a facility built for 545 women that, at the time of the law suit, held over 1,200 women.¹¹⁸ Yet, Alabama has the lowest per capita spending on education of any state and an incarceration rate that is 24% higher than the national average—no mean feat as the US has the highest incarceration rate in the world.¹¹⁹

In September, Alabama's voters handed their conservative Republican Governor Bob Riley a resounding defeat at the polls when they rejected his ballot initiative that would have raised

116. See Shannon Tan, *Lawmakers Torn Over Prison Funds Several Seek Alternatives to Jailing Criminals*, THE INDIANAPOLIS STAR, Feb. 24, 2003, at B1.

117. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 203947, PRISON AND JAIL INMATES AT MIDYEAR 2003 3 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf>; see also TIMOTHY ROCHE, REPORT ON OBSERVATIONS AND OPTIONS FOR RELIEVING OVERCROWDING AMONG ALABAMA FEMALE PRISONERS 8 (2003), at www.schr.org/prisonsjails/press%20releases/RocheReportFinal.rtf.

118. ALABAMA DEP'T OF CORR., JANUARY 2003 MONTHLY STATISTICAL REPORT 3 (2003), available at <http://www.doc.state.al.us/docs/MonthlyRpts/2003-01.pdf>; see also *Laube v. Campbell*, 255 F. Supp. 2d 1301 (M.D. Ala. 2003).

119. JASON ZIEDENBERG, *Deep Impact: Quantifying the Effect of Prison Expansion in the South* 24 (2003), available at www.justicepolicy.org/downloads/deepimpactfinal.pdf.

taxes, and therefore revenue, by \$1.2 billion.¹²⁰ The governor quickly called a special session of the legislature to discuss budget cuts, recommending that 5,000 to 6,000 offenders be released from the state's prisons, just to keep the prison budget at the status quo level.¹²¹

This is the kind of proposal that quickly conjures up visions of anarchy and mayhem in the minds of the citizenry. Indeed, Alabama's Attorney General Bill Pryor responded to the Governor's proposals by saying "My advice would be for people to do what they can lawfully to protect their homes and families. Some will buy security systems. Some will engage in other behavior. People should be careful in protecting their homes and families."¹²²

But Alabama can make necessity the mother of invention, like so many other states have done. Two-thirds of the intake into Alabama's prisons are non-violent offenders; four in ten are minimum security inmates. Four thousand inmates entail such low risk that they are allowed to go to work during the day, returning to prison at night.¹²³ Clearly, inmates who would rightly receive probation or short jail terms in most states are being sent to prison in Alabama, often for very long terms. The following excerpt from a report prepared by plaintiff's counsel on the Tutwiler lawsuit gives a poignant description of one young woman incarcerated in Alabama's Tutwiler prison whose originating property offense occurred when she was fifteen-years-old:

In 1996 at the age of 15 DD was charged with Burglary III and theft of property for allegedly helping pick the lock to a building that was subsequently burglarized. She remained in the community without any intervening arrests, living with her parents, attending an alternative public school and working as a secretary. She was not convicted of the offenses until 2000. She received a 5 year suspended prison term.

120. David Halbfinger, *With Tax Plan Rejected Alabama Braces for Cuts*, N.Y. TIMES, Sept. 11, 2003, at A1.

121. Mike Sherman, *First Cuts May Free Inmates*, MONTGOMERY ADVERTISER, Sept. 12, 2003, at A1.

122. *Id.*

123. See generally ROCHE, *supra* note 117, at 3.

Nine months into her probation DD missed a reporting meeting with her probation officer. A warrant was issued and when she was arrested on the warrant she tested positive for marijuana. Her probation was violated and she was sent to Tutwiler in January 2001. She went to Birmingham Work Release on 2-16-01. She worked at restaurant on the serving line while at work release. According to DD, a male corrections officer began harassing her sexually. "He grabbed me all over and pressured me for sex." DD alerted authorities but the sexual harassment continued. Feeling that she had no choice, DD left work release on 4-5-01 and remained out until 1-8-03. She was three months pregnant when she was arrested but lost the pregnancy due to a miscarriage while in the Jefferson Co Jail.

During these intervening months DD reportedly worked at a fast-food restaurant, and participated in an alternative high school program and remained arrest free. On the escape charge she received a 10 year split with one year to serve concurrent to the probation violation time. Her End of Sentence (EOS) date is 7-7-04. She has a parole hearing scheduled for March 2004. She cannot be reconsidered for work release for three years and is ineligible for SIR due to her escape charge. DD is six months infraction free and due to get her GED next month. Due to limited bed space at Tutwiler, DD is housed in the medical dorm with 73 other women.¹²⁴

The good news for Alabama is that it has had a network of community corrections programs in operation since the 1990's that it can now build upon to safely and effectively absorb inmates diverted from imprisonment. Working with the Edna McConnell Clark Foundation, Alabama policymakers passed community corrections legislation in 1991 and created the legal and administrative infrastructure for halfway houses, drug treatment programs, intensive supervision, case management and a range of sensible community options into which appropriate offenders can and should be diverted in lieu of incarceration.¹²⁵ But like so many other good ideas, Alabama's legislature and governors have consistently underfunded the state's community corrections network, to the point where only

124. *Id.* at 24.

125. See Alabama Community Punishment and Corrections Act, ALA. CODE § 15-18-170 to 186 (2004).

one-third of Alabama's counties now have operating community corrections programs.¹²⁶

Alabama's predicament is analogous to the bind facing many states around the country, if a bit more extreme. Budget belts are tightening so much that it is tempting to capture all of the funds generated from prison population reductions to stave off cuts to other state services. But releasing inmates with no support services is unpopular with the public, and risks endangering public safety. How states do or don't rise to this occasion could affect prison growth or contraction for years to come. The message from Kentucky and Alabama is that, while cost savings can accrue by dismantling part of America's massive incarceration machine, digging out won't be free.

Conclusion—Helping Turn the Corner on America's Imprisonment Binge

In the Justice Department's prison surveys, there is room for both hope and concern. Prison populations declined in 10 states between 2000 and 2001.¹²⁷ But the following year, America's incarcerated population increased by 3.7%, three times the rate of growth of the previous year.¹²⁸ Clearly, while we can see the corner on reversing America's destructive imprisonment binge, we have not yet turned it.

126. See Stan Bailey, *Prison Experts List Ways to Reduce Female Inmates*, BIRMINGHAM NEWS, Sept. 24, 2003, available at http://www.schr.org/prisonsjails/newspaper%20articles/Tutwiler%20articles/news_tutwiler30bham.htm.

127. See *infra* fig.4.

128. PRISONERS IN 2002, *supra* note 72, at 2.

Figure 4: 10 States Reduced Prison Populations 2000 - 2001¹²⁹

	Prison Population Drop	Annual Per Inmate Cost of
State	12/31/00-12/31/01	Incarceration
MA	120	\$36,131
NJ	1,642	\$28,000
NY	2,665	\$32,000
RI	45	\$36,566
IL	933	\$19,543
OH	552	\$22,045
OK	401	\$18,091
TX	4,649	\$14,837
CA	3,557	\$26,690
UT	294	\$22,000

Researchers and advocates now have an important role to play in advancing the cause of prison reform. In many states, population reduction proposals are occurring without input or encouragement from political “outsiders.”

In some cases, that can result in reforms that are more show than substance. When Louisiana and Alabama passed bills amending their mandatory sentencing laws and creating corrections-controlled committees to determine releases, both states hoped it would ease prison overcrowding.¹³⁰ But by shifting the political risk onto corrections’ shoulders, legislators doomed their initiatives to failure. When Louisiana officials modified their mandatory sentencing scheme and created a risk review panel, policymakers estimated that it would reduce the prison population by 400 and save the state \$60 million.¹³¹ But by April 2003, only 16 inmates had been granted release.¹³² Likewise, Alabama’s risk review panel was challenged by the state’s prosecutors and has yet to release anyone.¹³³

If you are unaware of what it going on in your state legislature, you should become aware; it is almost a certainty that

129. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULL. NO. NCJ 195189, PRISONERS IN 2001 3 tbl.3 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf>.

130. GREENE, *supra* note 48, at 15-16.

131. *Id.* at 16.

132. *Id.*

133. *Id.*

some legislator or committee is considering ways to reduce your state's prison population. Become involved in the citizen's group that is advocating for reform; they can almost certainly use the advice and knowledge of academics and practitioners as they prepare to lobby for prison depopulation.

Finally, the reform efforts described in this paper provide a fertile laboratory for those looking to research the relative merits of diverse approaches to prison alternatives. Such research can be helpful for future legislators as they grapple with effective approaches to reducing the world's largest prison population.