

Decarceration's Blindspots

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Abstract

For over a decade, my research has focused on trying to answer one simple question: how did the United States, home to about 5% of the world's population, come to house nearly 25% of its prisoners?¹ We were not always the world's largest jailer; as recently as the 1970s, our incarceration rate was largely indistinguishable from those in other liberal democracies. Yet starting in the mid-1970s, as Figure 1 shows, that rate started to slowly—but steadily and relentlessly—grow, until by the late 2000s it rivaled and then surpassed even the rates seen in autocratic countries like Cuba and Belarus and Russia (as we see in Figure 2). No one nation has an incarceration rate as high as ours, and the rates in Europe are on the order of one tenth the magnitude. It is American exceptionalism at its worst.

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¹ International comparisons between prison populations can be found here: <http://www.prisonstudies.org/highest-to-lowest/prison-population-total> (select “Prison Population Total” in dropdown menu “1.”; select geographic location in dropdown menu “2.”) International comparisons likely understate our share of the world's prisoners. Given differences in how countries manage their criminal justice systems, international comparison combine post-conviction and pre-trial detention populations. In the US, that comes to about 2.2 million people: 1.5 million in prisons (post-conviction), and about 750,000 in jails (short post-trial convictions but also all pre-trial detainees). That 2.2 million is what gets us to 25% of the world total. But the 750,000 counts the number of people in jail on any one day, not the number of people who pass through jails in any year, which is much larger. Most people in jail are there briefly as they struggle to make bail or await a plea deal—so while there are 750,000 in jails on any one day, over 10 million pass through each year (see Table 1, Zhen Sheng, *Jail Inmates in 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. (Feb. 2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf>). There is no easily comparable international data, but it would not be surprising if we “churn” a lot more people through our jails than other countries.

Figure 1: US Incarceration Rate, 1925–2016²

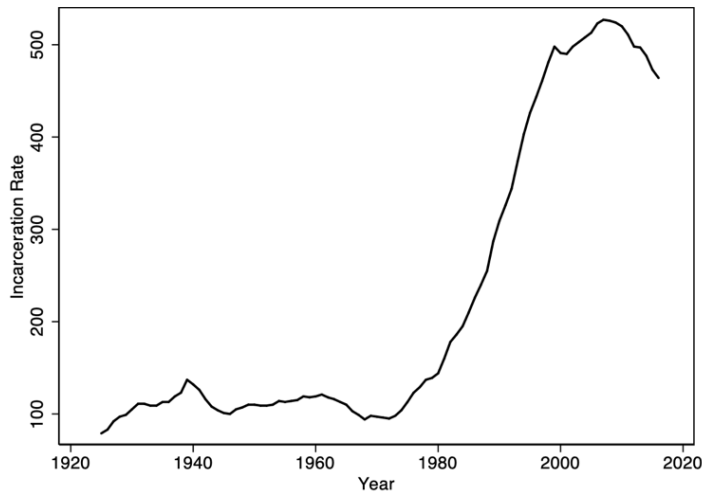
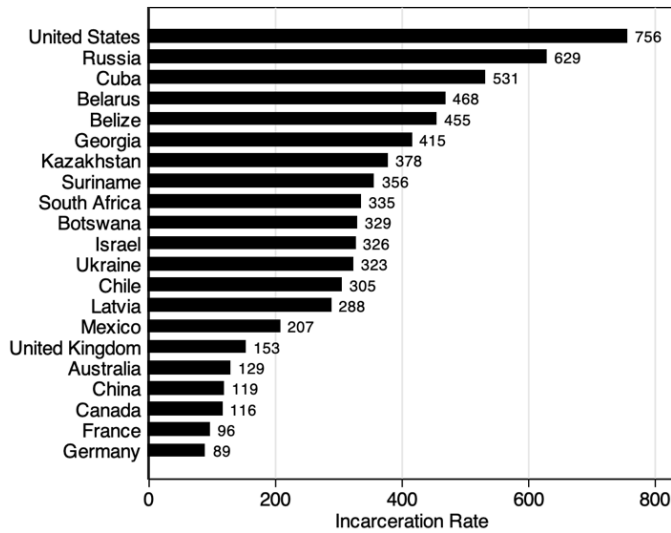


Figure 2: Select World Incarceration Rates, 2008³



Note: International comparisons always define the incarceration rate to include all those in state prisons and county jails, including those awaiting trial. While the US incarceration peaked in 2009, international data is available only for 2008 or 2011.

² Data for 1925–1977 from <https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf>, Table 3-7. Data for 1978–2016 from <https://www.bjs.gov/index.cfm?ty=nps>.

³ Data are from http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_9.pdf.

In 2010, however, something changed. For the first time in decades, the incarceration rate fell. And then fell again in 2011. And fell in five of the next six years.⁴ Perhaps the incarceration fever has broken, and we are starting to revert to our earlier unexceptionalism.

Perhaps.

While the declines since 2010 are something to celebrate, they are modest—and as we will see, modest in ways that should be worrying. To start, while prison populations rose in every state from the 1970s to 2010, the decline has been much more concentrated. Between 2010 and 2016, prison populations declined in only 26 states, while they rose, often to new all-time highs, in the remaining 24. Perhaps even more alarming, over 45% of the total decline has happened in just *one state*, California (prior to 2016, California had been responsible for over *half* the national decline).⁵

Moreover, even *within* those states that have seen declines, the declines have not been uniform (and likewise for those seeing increases). With only a few exceptions, it is not so much *states* that are declining, but urban and more-populated suburban *counties*. The differences between states that have seen declines and those that have not is often a question of whether the declines in high-population counties are big enough to offset the on-going increases in more rural counties.⁶

All told, since 2010 state prison populations have dropped by a total of about 6%, and by only 4% if we exclude California.⁷ These small gains are exactly that—gains—but they are nonetheless small ones, and disappointingly so. Scaling back our reliance on prisons is one of the few genuinely bipartisan issues in these polarized times, at the local, state, and even federal levels. Yet despite nearly a decade of concentrated reform efforts, bipartisan support, and aggressive spending and lobbying by non-profits and think tanks ranging from the ACLU on the left to

⁴ The data from 2009 to 2016 comes from the Bureau of Justice Statistics. See E. Ann Carson, *Prisoners in 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 11 (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>. The BJS has yet to report the 2017 prison population data, but the Vera Institute for Justice gathered that data on its own and found yet another decline. See Oliver Hinds, *People in Prison 2017*, VERA EVIDENCE BRIEF (May 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/people-in-prison-2017/legacy_downloads/people-in-prison-2017.pdf.

⁵ Between 2010 and 2016, the net decline in US prison populations was about 91,000, with California's dropping by 40,000, or 45% of the national drop. If we look just at the 26 states that declined from 2010 to 2016, their prison populations fell by 112,000 (a decline that was offset by the 21,000-prisoner rise in the other states); California's decline made up 36% of the drop in the declining states.

⁶ Josh Keller & Adam Pearce, *A Small Indiana County Sends More People to Prison than San Francisco and Durham, N.C. Combined. Why?*, N.Y. TIMES (Sep. 2, 2016), <https://www.nytimes.com/2016/09/02/upshot/new-geography-of-prisons.html>.

⁷ By the end of 2016, federal prisons had also dropped, by almost 30,000, since peaking in 2012. The Feds, however, hold under 13% of all inmates, and the dynamics of federal incarceration are radically different than in the states. My focus here will be just on the states.

the Charles Koch Foundation on the right, the declines in prison populations remain small, halting, and vulnerable to quick reversals.

Why is this? My core argument is easy to state: our current discussion of how to tackle prison population is ignoring three critical “whos”:

1. The prosecutor. Although no one is more responsible for the current scale of mass incarceration than the prosecutor, almost no reforms to date have targeted their power, and they remain mostly overlooked in popular reform discussion—although, promisingly, that has started to change over the past year or two.
2. The person convicted of violence. Almost all reforms focus solely on the “non-violent offender.” Some go further and increase the penalties on those convicted of violence while cutting those for the “non-violent.” But nearly 55% of all people in prison are in for violence,⁸ and even more have violent pasts. Any reform effort that refuses to focus on violent crimes will unavoidably have limited impact.
3. Public sector officials, such as correctional officer unions and state district attorney associations. There is no institution reformers rail against more than the private prison industry. But private prisons hold only about 9% of all prisoners, and almost all the money we spend on corrections goes to pay the wages for correctional officers in state-run public prisons.⁹ Through their unions, these officers are powerful political actors with strong incentives to undermine reform. Other public-sector groups, like prosecutors, also aggressively and effectively fight reform. Yet, again, these groups—especially the unions—remain mostly undiscussed and untouched.

Once we appreciate the importance of each of these groups, a different path for reform starts to emerge. It is, unsurprisingly, a difficult and politically fraught one, but one that has the potential for more significant change as well.

⁸ According to the BJS, almost 55% of those in prison have been convicted of a violent crime. See source cited *supra* note 2, Table 12. Even more, however, are surely in prison *because of* violence, even if they have not been *convicted* of it, such as people who are initially arrested for a violent crime but plead guilty to a drug offense. Reforms that make it harder to send someone to prison for drug crimes may yield disappointing returns if prosecutors have been using the drug cases as easy plea devices and respond by insisting on pleas to violence or other non-drug crimes.

⁹ *Supra* note 2, Table 17.

I. THE MAN BEHIND THE CURTAIN: THE POWER OF THE PROSECUTOR

During the 2016 Presidential campaign, Hillary Clinton proposed an “end to end” criminal justice reform policy.¹⁰ Her proposal focused on changing police practices and parole procedures, two common targets of reform policies. Yet the proposal was not so much “end to end” as “end and end,” focusing on the beginning (the police) and the end (parole) but jumping right over the middle: the prosecutor, who actually wields a tremendous amount of power.

What is telling about Clinton’s omission is not how surprising it is, but rather how *expected*. Over the past few years, there has been a growing emphasis on the need to elect reform-minded prosecutors,¹¹ but people were only just starting to pay attention to the power of prosecutors around then. Even now, there is little attention paid to prosecutors beyond emphasizing the need to elect more progressive district attorneys—a vital goal, but one that is insufficient on its own.

The critical role that prosecutors have played in driving mass incarceration is easy to demonstrate.¹² Between 1994 and 2008,¹³ serious violent crime fell by almost 25%, and serious property crime by nearly 20%.¹⁴ Not surprisingly, arrests fell during this time as well, with arrests for serious violent and property crimes falling by over 20%, and for violent crimes, serious property crimes, and non-marijuana drug offenses by 10%.¹⁵ So fewer and fewer people were entering the criminal justice system over the 1990s and 2000s, as crime fell.

¹⁰ Annie Karnie, *Clinton promises “End to End” Criminal Justice Reform in Pitch to Black Voters*, POLITICO (Oct. 2, 2016, 3:12 PM), <https://www.politico.com/story/2016/10/hillary-clinton-charlotte-speech-criminal-justice-reform-229023>.

¹¹ See, e.g., *The Power of Prosecutors*, ACLU, <https://www.aclu.org/issues/smart-justice/power-prosecutors> (last visited Oct. 18, 2018).

¹² John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (Jan. 23, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884674; see also John F. Pfaff, *Prosecutors Matter: A Response to Bellin’s Review of Locked In*, 116 MICH. L. REV. 165, <http://michiganlawreview.org/wp-content/uploads/2018/08/116MLROnline165-Pfaff.pdf>.

¹³ The dates used here reflect the data that was available on prosecutorial behavior, but they capture an informative moment in time: by 1994, crime rates had been declining since peaking in 1991, so the results here help us understand the role prosecutors played in driving up prison populations in a time of falling crime. *Uniform Crime Reporting Statistics Estimated Crime in the United States*, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., <https://bjs.gov/ucrdata/Search/Crime/State/StatebyState.cfm> (choose “United States-Total” from column a, choose “number of violent crimes” and “number of property crimes” from column b, and select 1991 to 2008 from column c).

¹⁴ *Id.*

¹⁵ Arrest data available at: *Arrest Data Analysis Tool*, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=datool&url=/arrests/index.cfm#> (choose the “National Estimates” tab, then the “Annual Tables” tab, then select each year from 1994–2008 individually from the first column, and then select “offense by age” in the second column, then click “generate results”). The share of marijuana arrests: *Percent Distribution of Arrests for Drug Abuse Violations*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (Oct. 19, 2018 12:46 PM), <https://www.albany.edu/sourcebook/pdf/t4292012.pdf>. Almost no marijuana arrests, which are quite

Yet strikingly, in a study of thirty-four states, I found that while arrests fell the number of felony cases filed in state courts rose by over 30%.¹⁶ As a result, the probability that an arrest would result in felony charges appears to nearly double.¹⁷ Once that felony charge was filed, the probability that that case would result in admission to prison held generally flat, and—contrary to so much of the debate we have about prison growth—the amount of time spent in prison remained relatively constant, and low.

That last point likely needs some explanation. We are often told that prison sentences are getting longer and longer. And while it is true that the *official* sanctions may have gotten tougher over time, the amount of time *actually spent* in prison has remained fairly constant (with one notable exception I will discuss in a moment). A 2012 study by the Pew Center on the States, for example, reported that between 1990 and 2009, time served for a violent crime rose by 37%, for a property crime by 24%, and for a drug crime by 36%.¹⁸ Yet that comes to only about an extra six months for property and drug crimes and sixteen months for violent crimes—certainly not irrelevant, but also certainly not changes big enough to drive the growth in prisons over that time.

With one important exception: murder. A recent study by the Urban Institute showed that a growing number of people were spending exceptionally long terms in prison (on the order of 10, 15, or 20 years), and that over 90% of them had been convicted of violence.¹⁹ In fact, it appears that a majority of those serving long sentences have often been convicted of just one offense: homicide. Looking just at California, I found that over 57% of those in for at least 15 years had been convicted of homicide, and over 85% of those in for at least 25.²⁰ As a result of these growing sentences, we now have nearly 200,000 people in prison *just* for murder or manslaughter, which is almost the size of the *entire prison population* in

numerous, result in prison admissions, which is why I exclude them. See John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 178 (2015).

¹⁶ JOHN F. PFAFF, THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 72 (2017).

¹⁷ In subsequent work, I generated similar results using data from a different dataset on case filings, which provides additional support for these findings. See John F. Pfaff, *Prosecutors Matter: A Response to Bellin's Review of Locked In*, 116 MICH. L. REV. 165, 173 (2018).

¹⁸ THE PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 3 (2012), https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf.

¹⁹ *The Unequal Burden of Long Prison Terms*, THE URBAN INST., (Oct. 19, 2018, 11:48 AM), <https://apps.urban.org/features/long-prison-terms/demographics.html>.

²⁰ John Pfaff (@JohnFPfaff), Twitter (Jul. 20, 2017, 8:01 AM), <https://twitter.com/JohnFPfaff/status/888051281381687296>.

1970.²¹ As I will discuss in the next section, this raises serious political challenges for those pushing for steep cuts to our prison populations.

Putting aside homicide, however, time spent in prison has not grown and the number of arrests has fallen. The only significant change is in the risk of facing a felony charge—a decision that is completely within the control of the prosecutor. Over the course of the 1990s and 2000s, as crime fell, prosecutors—or at least prosecutors' offices—became increasingly more aggressive, and this growing assertiveness was perhaps the single most important factor driving up prison populations during that time.²²

These trends raise the obvious question of what changed in district attorneys' offices to make them harsher even as crime fell.²³ Unfortunately, we run into an all-too-common problem in criminal justice here: a distinct lack of data.²⁴ But there are a few plausible theories that emerge from what few numbers we do have, each of which likely explains at least some of what we see.

Perhaps the most important explanation is also the least dramatic: staffing. We don't have much data on prosecutors' offices, but we do have three snapshots, from national surveys taken in 1970, 1990, and 2007.²⁵ A fascinating pattern emerges. From 1970 to 1990, as reported crime rose significantly, the number of assistant prosecutors rose by about three thousand, from 17,000 to 20,000. From 1990 to 2007, however, as crime fell across the country and serious felonies fell by about 25%, the total number of assistant prosecutors rose by about *ten thousand*, from 20,000 to 30,000. We added three times as many prosecutors as crime fell as we did when it rose.

Now, to be clear, this rise in staffing was a predominantly urban phenomenon. In 2007 (the last year with data), prosecutors' offices in counties with at least one million people had median attorney staff sizes of 165, and those in counties with populations between 250,000 and one million had median attorney staff sizes of

²¹ E. Ann Carson, *Prisoners in 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. Table 13 (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>; *Prisoners in 1925–81*, 1982 U.S. DEP'T OF JUST. (Dec. 1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf>.

²² It is possible that prosecutors became more aggressive over the 1970s and 1980s as well. Unfortunately, our data for the time before the 1990s is simply too thin to say much.

²³ This is the right way to frame the causal question. Some might say I am telling the story backwards—the decline in crime *came from* that rising toughness, and so there is nothing confusing here. The data on prison and crime, however, makes it clear that by the 1990s, and especially the 2000s, the marginal impact of sending more people to prison was getting close to zero. See e.g., Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J. L. & ECON. 275, 302–303 (2012).

²⁴ See John Pfaff, *How Zombie Crime Stats, Phantom Stats and Frankenstats Paint a Misleading Picture On Crime*, THE APPEAL (Mar. 1, 2018), <https://theappeal.org/how-zombie-crime-stats-phantom-stats-and-frankenstats-paint-a-misleading-picture-on-crime-fddb2c2070cd/>.

²⁵ See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 129 (2017).

46; these are the offices that had the capacity to expand.²⁶ In counties with populations under 10,000—which make up almost 60% of the counties—median attorney staff size is three. These offices were never going to see substantial increases in staffing. Yet we see a different important change in how these counties staffed their offices. Between 1974 and 2007, the percentage of counties with a full-time prosecutor rose from 44% to 85%, a change that was surely concentrated in these smaller, less-urban counties.²⁷

So from the 1970s to the 2000s, urban prosecutors' offices ramped up hiring, and less-urban offices professionalized. As a result of these developments, we see an intriguing trend in prosecutorial behavior. We do not have comprehensive metrics of prosecutorial productivity, but every rough proxy I have looked at—crimes per prosecutor, arrests per prosecutor, and prison admissions per prosecutor—all tell the same story: the *individual assistant prosecutor* in 2007 does *not* appear to be any more aggressive than one in 1990, or often even than one in 1974. There are just *so many more* of them by 2007, and despite the drop in crime they continue to find cases to prosecute. We still arrest about 11 million people every year, and we admit about 600,000 to prison each year, as well.²⁸ Any assistant prosecutor will be able to find a case to charge if he needs to, and we simply have more and more such prosecutors who need to find cases.

Staffing and professionalization are not the only causes of increased harshness, however. Take the persistent underfunding—in both absolute and relative terms—of indigent defense. About 80% of all those facing prison or jail time qualify for some sort of state-funded lawyer.²⁹ Yet in 2007–2008 (again, the last years for which we have reliable data), state and county governments spent about \$5.8 billion per year on prosecutors but only \$4.5 billion on indigent defense.³⁰ And

²⁶ Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007—Statistical Tables*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 3 (Dec. 2011), <https://www.bjs.gov/content/pub/pdf/psc07st.pdf>.

²⁷ Places like Brooklyn or Chicago or Los Angeles had full-time prosecutors before the 1970s. Data for 1974 from John M. Dawson, *Prosecutors in State Courts, 1990*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 3 (Mar. 1992), <https://www.bjs.gov/content/pub/pdf/psc90.pdf>; and from 2007 from Perry and Banks, *supra* note 26, at 2.

²⁸ E. Ann Carson, *Prisoners in 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 11, Table 8 (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

²⁹ A shocking aspect of indigent defense in the United States is that forty-three states charge indigent defendants for their lawyers. Emma Anderson, Alyson Hurt & Joseph Shapiro, *State-By-State Court Fees*, N.P.R. (May 19, 2014), <https://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>. One particularly egregious example is South Dakota, which charges defendants \$92 per hour for their state lawyer—and requires payment even if the defendant is acquitted. Most strikingly, the state makes failure to pay a *crime*, which means that defense attorneys who have successfully defended their clients find themselves forced to defend them once again against charges of failing to pay. Mark Walker, *In S.D., Right to an Attorney Comes with a Price*, ARGUS LEADER (Mar. 4, 2016), <https://www.argusleader.com/story/news/2016/03/04/sd-right-attorney-comes-price/81205714/>.

³⁰ Perry and Banks, *supra* note 26, at 2; Holly R. Stevens et al., *State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008*, THE AMERICAN BAR ASSOCIATION 7 (Dec. 2011),

this understates the disparity, because prosecutor offices have free access to investigators and labs (via, say, the police and sheriffs) that defense attorneys have to pay for. A study in North Carolina found that while the nominal budgets for prosecutors and public defenders were roughly the same, the prosecutors' budgets were effectively triple that of the public defenders once all the free services prosecutors received but defenders did not were accounted for.³¹

Tougher sentencing laws may matter here too, even if it is true that people (outside of those convicted of murder) are not *servicing* all that much more time now than in earlier years. Despite what *Law & Order* seems to imply, almost no cases go to trial; about 95% of all guilty verdicts are the product of plea bargains.³² And tougher sentencing laws should make plea bargaining easier. While before the threat was “take this 3 year deal or face 5 years,” now it is “take this 3 year deal or face 10 years,” or “20 years,” or “life.” The prosecutor might demand 3 years in every case, but he can get an agreement faster the bigger the threat he can make.³³

Another important factor—one that did not *cause* prison expansion, since it predates the mass incarceration, but one which clearly exacerbated and amplified the other causes—is what I call the “prosecutorial moral hazard” problem.³⁴ Prosecutors are county officials, and their budgets come from the county. The same is generally true for jails (where people are held pre-trial and for short terms if convicted of a misdemeanor) and probation offices. Prisons, on the other hand, are paid for by the *state*. This creates a clear incentive for prosecutors to send people to prison instead of jail or probation: to be *harsher*, even when leniency may be more appropriate. Pushing for a felony conviction allows a prosecutor to look tougher on crime—still usually an effective political stance—at no fiscal cost. In fact, leniency is *costlier*, since the county has to pick up the tab for jails or probation. We directly incentivize severity over leniency.

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf.

³¹ N.C. OFFICE OF INDIGENT DEFENSE SERVICES, NORTH CAROLINA'S CRIMINAL JUSTICE SYSTEM: A COMPARISON OF PROSECUTION AND INDIGENT DEFENSE RESOURCES 1 (Apr. 2011), <http://www.ncids.org/reports%20&%20data/latest%20releases/prosecutionofindigentdefense.pdf>.

³² The statistic is often stated as “95% of all cases result in a plea.” This is not entirely correct. For those cases that reach the goes-to-trial stage, about 95% end in a plea. But about 30% of all felony arrests never reach that phase, as judges and prosecutors either drop the charges or divert the defendant. Thomas H. Cohen & Tracy Kyckelhahn, *Felony Defendants in Large Urban Counties, 2006*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 10 (July 15, 2010), <https://www.bjs.gov/content/pub/pdf/fdluc06.pdf>.

³³ William Stuntz makes an important point that we don't really know what prosecutors are trying to maximize, but it isn't necessarily or even likely to be “longer sentences.” This could explain why time served hasn't moved that much with tougher sentencing laws: prosecutors play a major role in determining how much time is spent in prison, and so any impact of tougher statutory punishments is mediated by whatever it is that they are trying to accomplish (which we do not fully understand). William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2569 (2004), <https://www.jstor.org/stable/pdf/4093405.pdf>.

³⁴ John F. Pfaff, *The Perverse Incentives of Punishment*, THE APPEAL (May 18, 2018), <https://theappeal.org/the-perverse-incentives-of-punishment-7c1e32b18d07/>.

It is important to note that all these explanations make it clear that the issue is prosecutorial *discretion*: none of these *compels* prosecutors to be harsher, even if all of them make it easier for them to be so. This central role of discretion poses some serious challenges. To start, mass incarceration will not be undone by one major federal law or even by fifty new state reforms. It will never be possible to fully cabin prosecutorial discretion from “above.”³⁵ To end mass incarceration, people will need to go office to office across the nation’s 2,330 district attorney offices and either convince the prosecutors to use their discretion better, or to vote out tough DAs and replace them with “smart on crime” ones. There is no quick one-stop fix. That said, offices with populations of over one million handle 25% of the cases, despite being only 1% of all offices, and those with populations over 250,000 manage almost 60% of all cases while making up about 11% of all offices. So, significant reforms in just a small number of offices will have an outsized impact on national results.³⁶

Perhaps even more problematically, we don’t have a great idea of what it takes to effectively regulate prosecutorial behavior. The primary emphasis so far has been to elect reform-minded prosecutors to run the offices, with the hopes that they will produce better, more just policies. There have been some notable successes lately, especially in more liberal, urban counties, but we still have little data on how well reform-minded DAs will change the behavior of large offices with entrenched interests that may still resist reform, and rural communities still seem to embrace tough-on-crime attitudes.³⁷ Beyond that, though, there is simply very little written, and very little being done, to regulate prosecutorial discretion. Perhaps the one other successful effort was California’s sprawling and complex Realignment effort, which in part mitigated the county-state prison moral hazard problem by making counties responsible for incarcerating people convicted of a wide range of felony offenses. The long-run success of California’s plan is still unclear, but it has resulted in significant declines—the sharpest in the nation—with minimal impacts on crime.³⁸

These days, however, there is also a benefit to the localized nature of prosecutors: they are relatively immune to the rhetoric coming out of DC. Prosecutors are county officials and care about county politics. The tough-on-crime rhetoric used by President Donald Trump and his first Attorney General, Jeff Sessions, certainly has not made reform efforts any easier, but as a general matter it seems to have had little impact on reform-minded counties. And no federal law

³⁵ There are, however, still steps we can take. I believe that we need to start developing guidelines that regulate who prosecutors can charge and what they can charge them with. *See, e.g.*, John F. Pfaff, *Prosecutorial Guidelines*, 3 REFORMING CRIM. JUST. 101, 101–120 (2017).

³⁶ Perry and Banks, *supra* note 26, Tables 1 and 4.

³⁷ Keller & Pearce, *supra* note 6.

³⁸ Magnus Loftstrom & Steven Raphael, *Incarceration and Crime: Evidence from California’s Public Safety Realignment Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 196, 196–220 (2016); Jony Sundt et al., *Is Downsizing Prisons Dangerous? The Effect of California’s Realignment Act on Public Safety*, 15 AM. SOC’Y CRIMINOLOGY 315 (2016).

can really change how these county officials behave or the incentives they face. There are costs to decentralization, but there are immunological benefits as well.

II. THE THIRD RAIL OF CRIMINAL JUSTICE REFORM: VIOLENT OFFENSES

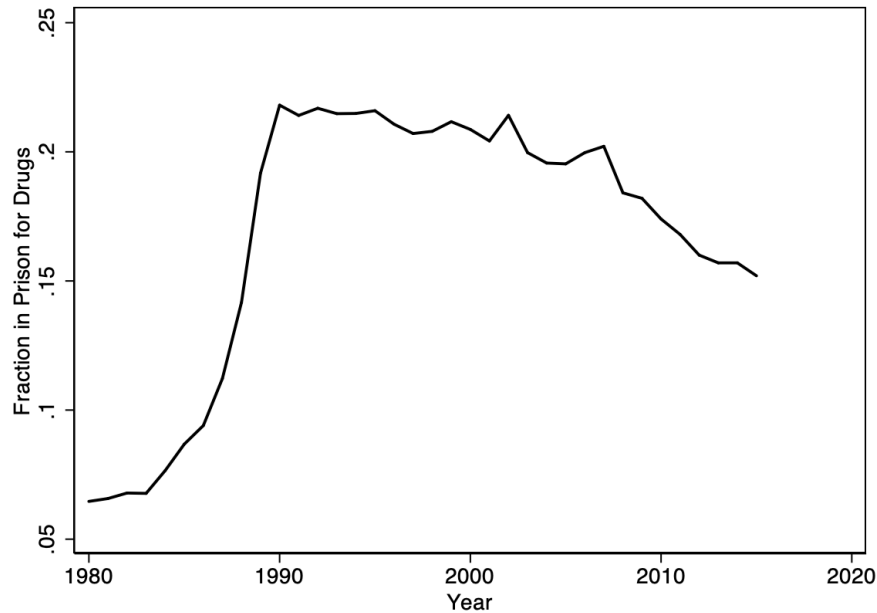
One of the most widely held beliefs about mass incarceration is that it is driven by locking people up for drug violations. The conventional wisdom is that we send waves of “low-level, non-violent” drug offenders to prison, and that they serve preposterously long sentences once they get there. And it’s surely the case that too many people are in prison for drug offenses, and often for too long. But centering the “War on Drugs” as the main driver of prison growth is incorrect, and it has real costs.

Here is the problem. As of the end of 2015, about 15% of all people in state prisons are there for drugs, down from a high of about 20% in 1991, as shown in Figure 3.³⁹ In a poll it conducted in 2016, however, Vox found that a solid majority of respondents thought that more than *half* of all people in prison had been locked up for drugs.⁴⁰ It is true that nearly half of all people in the federal system have been convicted of a drug crime, but the Feds hold only about 10% of all prisoners; combining the feds and the states yields 20% in for drugs, still less than half what people think.

³⁹ E. Ann Carson, *Prisoners in 2016*, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT. (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

⁴⁰ German Lopez, *Want to End Mass Incarceration? This Poll Should Worry You.*, VOX (Sept. 7, 2016, 11:30 AM), <https://www.vox.com/2016/9/7/12814504/mass-incarceration-poll>.

Figure 3: Fraction of State Prisons Incarcerated on Drug Charges: 1980–2015



And that 15% number overstates the number who are “truly” in prison for drugs. Prison data classifies an inmate by the most serious offense for which he was *convicted*, not for which he was charged or arrested. So if someone is arrested for aggravated assault but the police find cocaine on him during the arrest, it is possible that the prosecutor will drop the aggravated assault charge in exchange for a plea to the drug offense. In this case, that defendant will show up in prison data as a “non-violent” drug case, even though the conduct that brought him into contact with the police is violent—violence that might explain why the prosecutor demanded prison time for the drug violation in the first place. So at least some number of those 15% in prison on drugs were arrested and possibly even charged with a violent or property crime that was later dropped as part of a plea deal. It is impossible to say how big that number is, but indirect evidence suggests that it may not be small. One study, using data from 1997, found that only about 6% of state inmates were “unambiguously low-level” (although non- “low-level” does not necessarily imply violent), and my own work suggests that the fraction of those in prison for marijuana—the paradigmatic “low-level” drug case—is around 1%, and those in for marijuana *possession* is around 0.1%.⁴¹

⁴¹ Eric L. Sevigny & Jonathan P. Caulkins, *Kingpins or Mules: An Analysis of Drug Offenders Incarcerated in Federal and State Prisons*, 3 *CRIMINOLOGY & PUB. POL’Y* 401 (2004); John F. Pfaff, Symposium, *The War on Drugs and Prison Growth: Limited Legislative Options*, 52 *HARV. J. ON LEGIS.* 173, 173–220 (2015). Sevigny and Caulkins define “unambiguously low level” as

It's true, as Figure 3 shows, that the total number of people in prison for drugs, as well as their share of the prison population, rose over the 1980s. But note that when drug's share peaked in 1991, over three-fourths of all people in prison were there for a *non-drug* offense. By the time total prison populations peaked in 2009, not only had the share of people in prison for drugs fallen, but the total number had been declining more or less since 2002, from about 265,000 to 243,000, and it has continued to decline through 2015, when it fell below 200,000.⁴²

What has driven prison growth, especially in recent years, are not drug offenses but violence. A majority of people in state prisons have been convicted of a violent crime, a majority of the growth in prison populations has come from locking up more people for violence, almost all the people serving long terms are people convicted of violence, and violent crimes explain nearly half the increase in admissions to prisons since 1990 as well.⁴³

Table 1 breaks down the growth in prison populations across the four types of offenses—violent, property, drug, and public order/other. Overall, between 1980 and 2009, we added 1.1 million people to our prison populations, a staggering number on its own. Of those 1.1 million, 223,000, or 21%, were for drugs, while 551,000, or 51%, were for violence. By 2009, 53% of those in prison were held for violence; by the end of 2015, it was 55%.⁴⁴

someone with no more than one prior conviction, and no prior convictions for violence or guns; obviously different definitions of “low level” will yield different results. About 25% of those with drug convictions in the data had a current or prior conviction for violence as well (Figure 1).

⁴² Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., Table 12 (Oct. 2005), <https://www.bjs.gov/content/pub/pdf/p04.pdf>; Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2010*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., Table 16B (Dec. 2011), <https://www.bjs.gov/content/pub/pdf/p10.pdf>; E. Ann Carson, *Prisoners in 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., Table 13 (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>. Note that the number in prison for drugs briefly spiked in 2006 to over 265,000, but that was a one-year anomaly. See William J. Sabol et al., *Prisoners in 2008*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., Table 15 (Dec. 2009), <https://www.bjs.gov/content/pub/pdf/p08.pdf>.

⁴³ See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017); Ryan King et al., *A Matter of Time: Demographics* (July 2017), <https://apps.urban.org/features/long-prison-terms/demographics.html>; John Pfaff (@JohnFPfaff), TWITTER (Oct. 6, 2017, 7:02 AM), <https://twitter.com/JohnFPfaff/status/916302758113955840>.

⁴⁴ Paul Guerino et al., *Prisoners in 2010*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., Table 17B (Dec. 2011), <https://www.bjs.gov/content/pub/pdf/p10.pdf>; E. Ann Carson, *Prisoners in 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., Table 12 (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

Table 1: Composition of Inmates in State Prisons⁴⁵

	1980	1990	2009	Percent Contribution, 1980–1990	Percent Contribution, 1990–2009
Total	294,000	681,400	1,362,000		
Violence	173,300	316,600	724,300	36%	60%
Property	89,300	173,700	261,200	22%	13%
Drugs	19,000	148,600	242,200	33%	14%
Other	12,400	45,500	134,500	9%	13%

Now, one reason for people convicted of violence make up such a large share of those in prison is because they tend to serve longer sentences—which means that looking at the total population count may understate the extent to which drug cases contribute to the number of people “churning” through prison. In other words, people convicted of drug offenses may make up a much bigger percent of those entering and leaving prison than those who are there on any one day.⁴⁶ Table 2 provides the data for admissions, and an even more striking story emerges.

Table 2: Comparison of Admissions to State Prisons⁴⁷

	1980	1990	2011	Percent Contribution, 1980–1990	Percent Contribution, 1990–2011
All Admits	131,215	323,069	398,709		
Violence	63,245	87,228	119,612	13%	42%
Property	52,617	102,412	109,644	26%	10%
Drugs	9,000	103,800	99,278	49%	-6%
Other	5,248	26,168	66,983	11%	67%

From 1980 to 1990, as violent and other crime rates rose, drugs play a major role in pushing up admissions, though even then making up only a third of the increase. But from 1990 onwards, as violent crime *falls*, the share of those

⁴⁵ Data is discussed in Pfaff, *supra* note 43, at Table 1.2.

⁴⁶ Think of it this way: imagine that each year on January 1st we admit two people to prison, one who will serve a year-long sentence until December 31st (a “violent crime”), and another who will serve six months, until June 30th (a “drug crime”). Then, on July 1st another “drug crime” defendant is admitted for six months until December 31st. If we count the prison population on December 31st—that’s how the BJS does it—drug offenders make up half the prison population. But that number is only two-thirds of those admitted that year; we simply can’t see the others admitted because they are released before the December 31st count.

⁴⁷ Data is discussed at John Pfaff (@JohnFPfaff), TWITTER (OCT. 6, 2017 6:59 AM), <https://twitter.com/JohnFPfaff/status/916302758113955840>.

admitted for drugs actually *declines*, while the share admitted for violent and “public order” offenses grows sharply. And note that many public order crimes involve dangerous actions, such as weapons possession and DUI.

These trends are surprising, since one would expect that drug cases would play a larger role in driving admissions as violent and property crimes fell, since fewer violent and property crimes would leave police and prosecutors with more time to target more-discretionary drug cases. Yet we see the opposite. This suggests that at least some share of drug admissions in the 1980s were pretextual attacks on violence, although the data makes it impossible to say how much. So even for admissions, and even during the period when drug admissions mattered the most, the central story is one of violence.

Whenever I make this observation, I face two immediate responses, one from the Left and the other from the Right, both of which merit discussion, but neither of which really undermines the basic point here. From the Left, people are quick to (correctly) point out the narrow definition of “drug related inmate” I use here. A murder committed during a drug deal gone bad, a drug deal that would not have resulted in violence if the drug market weren’t illegal? That’s a “violent” crime, not a “drug” crime, even though it is (seemingly) caused by prohibition. Someone who has to steal to fund a drug habit, a habit that would be cheaper and thus more affordable if the drug market weren’t illegal? That’s a “property” crime, not a “drug crime,” even though it too is ultimately the product of the War on Drugs. Once I assign these crimes to the War on Drugs, the argument goes, its “share” of the prison population should grow significantly.

The concern about classification is a valid one, and it is always important to think carefully about how we count crimes and how we define them—when we talk about a “drug offense,” what are we counting and what are we omitting?—and how those choices shape the narratives we tell. In the end, however, in the absence of the War on Drugs, our prison population would probably be much closer to what it actually is today than those who raise this issue likely expect.

Take drug-related violence. It is true that prohibition leads to violence, since disputes over drug-related restraint of trade or trademark violation cannot be resolved in court. Yet in her book *Ghettoside*,⁴⁸ Los Angeles Times journalist Jill Leovy points out that prohibition is often a sufficient, *but not necessary*, cause of violence: in the absence of prohibition, much of the violence would likely still occur, just for different reasons. Leovy points to a series of studies in anthropology and history showing that whenever and wherever we find large numbers of young men who lack upward social mobility and the government fails to prevent violence, they themselves turn to violence. It’s as true in 19th Century Tsarist Russia as it is in 21st Century South Central Los Angeles, where *Ghettoside* is centered. After all, in today’s Los Angeles, there is a large number of young men, especially young men of color, who lack upward mobility, thanks to

⁴⁸ JILL LEOVY, *GHETTOSIDE: A TRUE STORY OF MURDER IN AMERICA* 41 (Spiegel & Grau, 2015).

the multitude of barriers that poverty and racism put in their way, from underfunded schools to difficulty obtaining jobs in the primary labor market. And the state does not do a good job of preventing violence: Leovy's records demonstrate that while the clearance rate for homicides (the percent of homicides that result in an arrest) is about two-thirds for Los Angeles County in general, that rate falls to about *one-third* if the victim is a Black man.

The lack of opportunity and the police refusal or inability to enforce homicide laws are a recipe for violence. If drugs were legal, and thus disputes over drugs did not require lethal responses, the all-encompassing instability and pressure these young men find themselves in would still lead to elevated rates of homicide and violence. That's not to say that prohibition is *irrelevant*; if nothing else, the sharp spike in homicides in the late 1980s, especially among young Black men, is clearly linked to the rise of crack (and thus crack prohibition).⁴⁹ Yet some fraction, perhaps a significant fraction, of "drug-related" homicides and other acts of violence would persist even in the wake of legalization, and certainly of decriminalization.

The story with prohibition and property crimes follows a similar path. Since prohibition clearly leads to prices being higher than they otherwise would be,⁵⁰ some users are forced to turn to property crimes to finance a more-expensive-than-it-otherwise-would-be habit. The end of the War on Drugs would likely lead to some decline in prices, and thus reduced financial strain on such users. On the other hand, cheaper drugs with less social stigma attached to them would be used by more people,⁵¹ and some of those people will ultimately abuse drugs and turn to property crime as a result. Disentangling these offsetting effects is hard, since we have no real data on how the American public would respond to such a seismic policy shift as legalization. If I had to guess, I'd say that legalization would likely reduce crime, but in complex ways and to a degree much less than many of legalization's advocates hope.⁵²

⁴⁹ ALEXIA COOPER & ERICA L. SMITH, U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980–2008 16 (Morgan Young & Jill Thomas eds., 2011).

⁵⁰ It is common to hear people argue that prohibition has had no impact on the price of drugs, since drug prices have generally fallen over the years. This is the wrong way to think about the issue. The correct question is a counter-factual: how much *more* would they have fallen but for legalization. The sudden collapse of marijuana prices in states that legalize—prices could fall by as much as 25% per year—indicates that prohibition certainly elevates prices and legalization thus reduces them. See Keith Humphreys, *So, Something Interesting Happens to Weed After It's Legal*, WASH. POST (May 4, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/05/04/the-price-of-legal-pot-is-collapsing>.

⁵¹ The response of drug use to decriminalization or legalization depends on the type of drug. See OFFICE OF NATIONAL DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, IMPROVING THE MEASUREMENT OF DRUG-RELATED CRIME Appendix A, (2013).

⁵² Though we often talk of "legalizing" drugs, there are actually many pathways away from the war on drugs model, with varying degrees of regulatory oversight. See, e.g., JONATHAN P. CAULKINS, ET AL., RAND CORPORATION, CONSIDERING MARIJUANA LEGALIZATION 49 (2015).

The criticism from the Right is much more succinct: if prisons are increasingly full of “violent people,” then isn’t that simply . . . good? Isn’t the very *goal* of prisons to keep us safe, and locking up people convicted of violence, the argument goes, does just that. The reply is equally succinct: not really.

Prison is a blunt, ineffective way of dealing with crime, even violent crime. Deterrence is driven mostly by the fear of immediate detection and arrest, not by the fear of a long(ish) sentence possibly imposed at some point in the future.⁵³ Moreover, while prison incapacitates and thus prevents crime while the person is locked up, it also increases the risk of reoffending upon release, to the point that it appears to cancel out a lot of any incapacitation effect.⁵⁴ There are far more options for reducing and controlling crime than prisons, most of which work more efficiently and at lower social cost. This does not mean that everyone should embrace the idea of completely abolishing prisons—there may be some people who pose enough of a risk that incapacitation still makes sense, at least for some period of time— but as a general matter we lock up far more people in prison than public safety remotely requires.

Moreover, not only are the benefits of prison lower than many think, but its costs are vastly greater than most assume. When people talk about the “costs of prisons,” they are usually referring to the \$50 billion or so state governments spend to fund the prison system. But given that about two-thirds of that spending goes to the wages and benefits of correctional officers and staff,⁵⁵ much of that \$50 billion is more a governmental transfer than a true cost, and a transfer that often raises difficult distributional questions.⁵⁶

The costs that should really concern us, and which we measure poorly, if at all, are the profound social harms that prison imposes that on inmates, their families, and their communities.⁵⁷ People in prison are physically and sexually assaulted. Prison is a vector of disease, it increases the risk of HIV transmission, and it both causes and exacerbates mental health problems. People released from prison earn

⁵³ See, e.g., Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83, 83–87, (2013); Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 27–28 (2017); DAVID ROODMAN, OPEN PHILANTHROPY PROJECT, THE IMPACTS OF INCARCERATION ON CRIME 130 (Sept. 2017).

⁵⁴ MICHAEL MUELLER-SMITH, THE CRIMINAL AND LABOR MARKET IMPACTS OF INCARCERATION 36 (2015), <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>; see also Roodman, *supra* note 53.

⁵⁵ CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUST., PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010–2015 9 (2017).

⁵⁶ See, JOHN M. EASON, BIG HOUSE ON THE PRAIRIE: RISE OF THE RURAL GHETTO AND PRISON PROLIFERATION Ch. 1 (2017), which points out that especially in the South, rural towns with prisons have larger minority populations than towns without, suggesting that some prison spending ends up supporting disproportionately minority rural communities, but in a way that imposes serious costs on more-urban minority communities.

⁵⁷ PFAFF, *supra* note 16, at 119–122; see also John Pfaff, *The Incalculable Cost of Mass Incarceration*, THE APPEAL (Sep. 20, 2018), <https://theappeal.org/the-incalculable-costs-of-mass-incarceration/>.

less per hour, work fewer hours, and thus contribute less to their families and communities. Families of those locked up experience significant social stigma and personal shame, not to mention the emotional costs of having a loved one locked away in miserable conditions. They also suffer financial hardship, not just from the lost income of the person in prison, but from exorbitant fees to make collect phone calls as well as the costs of visiting family members in far-flung prisons (transportation, hotels, foregone wages). Children who grow up with a parent in prison may be at greater risk of engaging in criminal behavior and ending up in prison themselves. Regardless, they experience the loss that comes from not having a parent around.

The effects can even be community-wide. One study in Washington, D.C., pointed out that so many men were in prison in high-crime, high-enforcement neighborhoods that it actually altered the dynamics of dating and marriage; marriage “markets” function best when the gender ratio is close to 50-50, but in some D.C. neighborhoods the scope of incarceration pushed that ratio to 60 (women)-40 (men). The concentrated “mass” nature of mass incarceration also exacerbates the financial weakness of entire communities, which find themselves tainted by a “criminogenic” stigma.

These costs are vast, but they are by and large ignored—and it is important to understand why. Just like incarceration, these costs are concentrated heavily in poor urban communities of color. They are simply not experienced by those with the most powerful political voices, and this leads to an important disconnect between costs and benefits that operates along stark lines of race and class. Wealthier, whiter people experience the benefits of tougher enforcement decisions, because it makes the cities where they work and (less so) live—or at least the *parts* where they work and live—safer, or at least feel safer. But these same people don’t experience the costs, because it is not their father or brother or uncle or sister or son or daughter or nephew who is being stopped, detained, arrested, charged, convicted, or incarcerated. These wealthier, whiter people likely do not even know anyone who has been through the system, certainly not in any systemic way. So they feel the benefits, but none of these social costs—costs that we in turn do not measure or discuss—so they cannot even understand them in the abstract, much less through lived experience. This is an Economics 101 failure: any time someone feels the benefits of a policy but not its costs, they will demand too much of it. And these voters do, and have.⁵⁸

Even just an incomplete and cursory glance at these broader social costs strongly suggests that they wipe out most, if not all, of the gains from prison.⁵⁹ Even if we accept the studies showing that 25% to 30% of the drop in crime in the

⁵⁸ See John F. Pfaff, *Criminal Punishment and the Politics of Place*, 43 *FORDHAM URB. L. J.* 571, (2018), for a longer discussion of these racial politics of geography.

⁵⁹ ROODMAN, *supra* note 53.

early 1990s was due to rising prison populations,⁶⁰ incorporating social costs into the analysis indicates that it was an inefficient way to accomplish this, like stopping an infection in one's finger by amputating the arm rather than taking an antibiotic. In other words, that a majority of people in prison are there for violence should not be taken as a defense of prison, even by those who strongly emphasize crime reduction and being tough on crime. There are far better ways to address violence than through increased incarceration—better policing, better non-police street interventions, increased public health spending on drug treatment, increased public health spending on mental health treatment, empowering and funding local community organizations to tackle local problems.⁶¹

At this point, I commonly hear “okay, even if the War on Drugs is not *central* to prison growth, no one wants to release people convicted of violence, so we should still try to cut back the number of people in prison for drugs.” And by and large I agree—with an important caveat. We will never be able to cut back on prisons without eventually changing how we punish violence, so we have to make sure any push for leniency in drug cases doesn't make future reforms for violent crimes harder. Unfortunately, this exact dynamic often appears to be at play.

Recall the Vox survey from above that found that most people thought about 50% (not 15%) of all people in prison were there on drug convictions. That same survey had an even more alarming result. The survey asked “Should we reduce prison sentences for people who committed a violent crime and have a low risk of committing another crime?,” and a majority of all respondents—55% of liberals, 62% of moderates, and 68% of conservatives—said no.⁶² This is a very real cost of emphasizing the “low-level, non-violent drug offender” to the near-exclusion of all other causes. People believe our prisons are full of such “easy” cases and that we can therefore achieve major reductions without having to ask any hard questions about how we handle violence. But we can't. If we don't start having serious, honest debates about violence, there is a hard floor to how far we can reduce prison population, and it is at a level that many reformers will surely find too high, and which is surely too high from a public safety perspective as well.

New York State provides a useful cautionary tale. New York has had one of the longest sustained decarcerations in the United States: it had slightly under 51,000 people in prison in 2016, a decline of over 22,000 from its peak of almost

⁶⁰ See, eg., 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. 186 (2004).

⁶¹ John Pfaff, *Why Today's Criminal Justice Reform Efforts Won't End Mass Incarceration*, AMERICA THE JESUIT REVIEW (Dec. 21, 2018), <https://www.americamagazine.org/politics-society/2018/12/21/why-todays-criminal-justice-reform-efforts-wont-end-mass-incarceration>.

⁶² German Lopez, *Want to End Mass Incarceration? This Poll Should Worry You*, Vox (Sep. 7, 2016, 11:30 AM), <https://www.vox.com/2016/9/7/12814504/mass-incarceration-poll>.

73,000 in 1999.⁶³ It is a remarkable and commendable decline. But it is also a trend that might soon be ending. New York's decline has been driven almost entirely by cutting back the number in prison for drugs and property crimes. Between 1999 and 2016, the number of people in prison for drugs fell by 17,000 (from 23,000 to 6,000) and the number in for other non-violent crimes by about 4,000 (from 11,000 to 7,000).⁶⁴ Which means that the number in for violent crimes barely budged, from 35,000 in 1999 to 34,000 in 2016—and this despite significant drops in violent crime in New York State, and especially in New York City.

New York State lays bare the limits of an everything-but-violence focused policy. If New York released every person in state prison serving time for a non-violent offense, it would still have a prison population more than 50% higher than the 20,500 people in prison in 1978, despite a violent crime rate that is *one-half* what it was in that year.

And to be clear, New York is not alone in this respect; national numbers tell a very similar story. In 1970, state prisons held a total of 175,000 people, for all crimes.⁶⁵ As of the end of 2015, state prisons hold over 175,000 *just for murder and manslaughter*, and over 700,000 people just for violent crimes.⁶⁶ Without changing how we handle violent offenses, there is a hard floor below which our prison populations simply cannot go—and it is a floor much higher than many think.

It is inarguably true that most people in prison for drug charges could surely be better managed outside of prison, if they must be under the control of the criminal justice system at all. Scaling back the War on Drugs is a good thing, and decarcerating drug cases—not just those cases with a drug-based conviction, but many non-drug cases where drug abuse is a major cause of the offense—will surely be a net social positive. But we must be careful not to accomplish this by “trading away” reform for violence, which too often seems to be the case. States often “purchase” reforms for non-violent offenses by increasing sanctions for

⁶³ *Corrections Statistical Analysis Tool (CSAT)—Prisoners*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=nps> (last visited Oct. 18, 2018). New Jersey also started declining in 1999, and by 2016 had reduced its prison populations by nearly 12,000, from over 31,000 to just under 20,000. In percent terms, New Jersey dropped more than New York (~35%, vs. ~30% for New York), but that's because of New Jersey's smaller starting base rate.

⁶⁴ JAMES AUSTIN & MICHAEL JACOBSON, *HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE?* 14 (2013), https://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf; KIM DWORAKOWSKI, *NEW YORK STATE CORRECTIONS AND COMMUNITY SUPERVISION, UNDER CUSTODY REPORT: PROFILE OF UNDER CUSTODY POPULATION* (2016), http://www.doocs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf.

⁶⁵ PATRICK A. LANGAN, U.S. DEPT. OF JUST. BUREAU OF JUST. STAT, *HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86* 11 (1988), <https://www.ncjrs.gov/pdffiles1/digitization/111098ncjrs.pdf>.

⁶⁶ E. Anne Carson, *Prisoners in 2016*, U.S. DEPT. OF JUST. BUREAU OF JUST. STAT. 19 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

violence in exchange. The public and politicians remain committed to the idea that prison is the “right” place for violence, and our on-going emphasis on low-level drug cases often reinforces that view, even if unintentionally.

We need to move past viewing prisons as the “right” place for people who commit violent acts. Shifting away from prisons will likely make us *safer* and communities that struggle with violence *healthier*.

III. THE PROBLEMATIC POLITICS OF PUNISHMENT

The final concern I want to consider is the excessive attention reformers and critics pay to private prisons. Like with drug offenses, the focus is understandable—there is something viscerally unappealing to many about the idea of making financial profits off locking people up in cages. Yet also like with drug offenses, private prisons provide an easy target that often distracts us from far more important, but also far more complicated, problems.

It only takes a few numbers to appreciate that we overstate the importance of private prisons. Only about 7% of prisoners in the states are held in private prisons (and 9% if we include the Feds); as of 2016, at least twenty-one states did not use private prisons at all, and in another eight states under 5% of all prisoners were in private facilities.⁶⁷ All told, over half of all people in private prisons were confined in just five states (Texas, Florida, Georgia, Oklahoma, and Arizona), and there is no evidence that states that relied more heavily on private prisons saw exceptionally fast growth prior to 2010.⁶⁸

Those who talk about private prisons *are* correct that there are powerful political forces lobbying intensely for tougher criminal sanctions and waging aggressive campaigns against reforms. But those forces are far more in the public sector, which holds over 90% of all state inmates, than in the private. In other words, we need to talk less about private prison firms, and far more about correctional officer unions, the political profit of “prison gerrymandering,” and the power of district attorney and police unions and lobbyists. These groups, collectively if not individually, have far more political clout, yet they remain almost entirely undiscussed, and almost untouched by reforms. This is an untenable situation.

Take correctional officials. One recent study revealed that approximately two-thirds of the \$50 billion we spend on prisons each year goes to salary and benefits for correctional officers and other staff, and that is excluding personnel benefits that are accounted for in other parts of the state budget.⁶⁹ That’s \$30

⁶⁷ *Id.* at 22.

⁶⁸ John F. Pfaff, *The Complicated Economics of Prison Reform*, 114 MICH. L. REV. 951, 969, 972 (2016). It does appear that states with large numbers of private prisons saw slower declines starting in 2010, but it is impossible to know how much of that is due to private prisons versus the underlying (conservative) politics of states that tend to rely on private prisons in the first place.

⁶⁹ MAI & RAM, *supra* note 55. Some pension funds for correctional officers, for example, may be accounted for in a state’s general pension fund, not in the state’s DOC budget. Vera estimated that

billion at a minimum. For comparison, the major private prisons earned about \$5 billion in revenue in 2015, and only about \$300 million to \$600 million in profit.⁷⁰ If we think of wages as how staff “profit,” then the private sector’s profit is only at most 2% of the public’s, and that likely *understates* the gap when we are thinking about state spending.⁷¹

Policies that fail to account for the power of correctional officer unions will often falter. Consider again New York. Despite its long-running decarceration, the state struggled to close facilities and cut back on staffing—and given that two-thirds of spending goes to wages and benefits, there are no real financial savings from decarceration without staff reductions. The challenge was resistance from the correctional officer unions and the legislators with prisons in their districts, who understandably saw the closing of prisons as a threat to their jobs or the jobs of their constituents. In the end, the state was able to start closing prisons only after the governor offered \$50 million in tax and other incentives to districts with prisons—only, that is, after the governor took into account the concerns and fears of the union members and their representatives.⁷²

Politicians with prisons in their districts have reasons to thwart reform beyond just protecting (usually) well-paying jobs. Perhaps the most pernicious reason is “prison gerrymandering.” When drawing up maps to determine local, state, and federal legislative districts, state legislators face a puzzle: where do prisoners “live”? Do they “live” in the prison, or in the community in which they initially lived? In forty-six states—in all but California, Delaware, Maryland, and New York—they live in the prison. Importantly, in all but two of those forty-six states—in all but Maine and Vermont—people cannot vote while in prison.⁷³

This creates a powerful political distortion for both individual politicians and state-level political parties. Individually, legislators in districts with prisons may need to keep prison populations high to avoid losing their jobs. All districts need to have roughly the same number of people, and there are legislators throughout the country whose districts would have too few people if the state stopped counting

rolling these expenditures back into states’ DOC budgets would increase the size of correctional spending by about 14%. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, WHAT INCARCERATION COSTS TAXPAYERS 6, 8 (2012).

⁷⁰ Martha C. White, *Locked-In Profits: The U.S. Prison Industry, By the Numbers*, NBC NEWS (Nov. 2, 2015, 5:28 PM), <https://www.nbcnews.com/business/business-news/locked-in-profits-u-s-prison-industry-numbers-n455976>; <https://www.prisonpolicy.org/reports/money.html>.

⁷¹ The private revenue number includes revenues from both the states and the federal government. The Feds provide about 20% of all private prisoners nationwide, and they also heavily rely on private facilities for immigration detention. Carson, *supra* note 4, at 22.

⁷² *Governor Cuomo Announces Closure of Seven State Prison Facilities*, NEW YORK STATE: PRESSROOM (Jun. 30, 2011), <https://www.governor.ny.gov/news/governor-cuomo-announces-closure-seven-state-prison-facilities>.

⁷³ Pfaff, *supra* note 58, at 587–88.

prisoners as “living” there.⁷⁴ Even legislators who don’t face the risk of redistricting have little to no incentive to push through policies that make their populations officially “smaller.”

At the state level, these individual risks take on a more specific bias. Prisons are increasingly located in rural areas, and rural areas are increasingly conservative. Prisoners, on the other hand, come disproportionately from cities and are themselves disproportionately people of color—and therefore more likely to vote Democratic. Thus “prison gerrymandering” reallocates people from Democratic districts to Republican ones, and does so while *denying those people the right to vote*. It is, quite bluntly, a five-fifths compromise: the prisoners count a full people for the district’s power, but have zero say in who is elected.⁷⁵

This creates a clear partisan bias. Any move away from counting prisoners will weaken Republican representation, as will any significant decrease in the number of people incarcerated. One study from Pennsylvania found that abolishing prison gerrymandering would likely move about five seats back into Philadelphia and Pittsburgh, and thus likely shift them from Republican to Democratic control.⁷⁶ Tellingly, the four states that abolished the prison gerrymander made the change during Democratic “trifectas”—when the Democrats controlled both chambers of the legislature and the governor’s mansion.⁷⁷ Little is likely to change in the near future, since few states have Democratic trifectas at this point, and the Republican-led Census Bureau has made it clear it is not changing its default policy of counting inmates as living in prisons for the 2020 Census.

In addition to correctional officers and legislators, another group that poses a serious political impediment to reform is state district attorney associations, in liberal and conservative states alike. Louisiana, for example, recently passed an expansive criminal justice reform bill, which accomplished a lot but nonetheless was significantly watered down in the final few weeks in response to strong resistance from the Louisiana District Attorney’s Association.⁷⁸ Similarly, New York State’s recently successful effort to adopt the nation’s first commission to review prosecutorial misconduct consistently faced resistance from the state

⁷⁴ Peter Wagner & Elena Lavarreda, *Prison Gerrymandering Project, Importing Constituents: Prisoners and Political Clout in Pennsylvania*, PRISON POLICY INSTITUTE (June 26, 2009), <https://www.prisonersofthecensus.org/pennsylvania/importing.html>.

⁷⁵ Pfaff, *supra* note 58, at 589.

⁷⁶ Brianna Remster & Rory Kramer, *Shifting Power: The Impact of Incarceration on Political Representation*, DU BOIS REV. 1, 21, 23, 25–27 (forthcoming 2019), <https://osf.io/preprints/socarxiv/egd72>.

⁷⁷ Pfaff, *supra* note 58, at 590.

⁷⁸ Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, THE NATION (Oct. 18, 2017), <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/>.

prosecutors' association; once the governor signed the law, the prosecutors then moved to challenge its constitutionality.⁷⁹

That there are strong vested interests fighting reform should not surprise us. What makes these groups particularly dangerous, however, is the skewed politics of punishment: severity is politically easy, while leniency is always politically risky. This asymmetry makes it easy for groups like correctional officer unions and district attorney associations to undermine reforms, because the deck is strongly stacked in their favor. This imbalance is so strong, and so well-known, that it has a name—the “Willie Horton Effect.”

William Horton was an inmate in Massachusetts serving time for felony murder in the 1970s and 1980s. At that time, Massachusetts, like almost all other states, had a furlough program that allowed inmates to go home for weekends or even longer to maintain ties to families. In 1986, Horton absconded from his furlough, and a year later he committed a vicious assault and rape in Maryland. His story was then used in a virulently racist television ad run against Massachusetts's Democratic governor, Michael Dukakis, when he ran for President in 1988.⁸⁰

Although the actual impact of the Horton ad on the 1988 returns is often oversold,⁸¹ the broader lesson politicians took away from the case was that leniency was always risky. After all, here is a detail about that Massachusetts furlough program that is almost never raised when talking about the Horton case or the Horton Effect: *over 99% of those released came back without incident.*⁸² The program was almost always successful, yet it took only one failure to create serious political risk.

Excessive punitiveness, however, faces no such similar risk. While the costs of excessive leniency are easy and emotional for a political opponent to capitalize on—a grieving family, a sinister-looking mug-shot of a specific offender—those of severity are abstract and statistical. An empirical model might be able to show that a particular group of people in prison poses little risk and is being unnecessarily detained, but it is impossible to point to a specific defendant, and a statistical table of risk profiles cannot remotely compete politically with a victim's family.

⁷⁹ Joaquin Sapien, *Bill Proposes Greater Accountability for New York Prosecutors Who Break the Law*, PROPUBLICA (Aug. 16, 2018, 2:58 PM), <https://www.propublica.org/article/bill-proposes-greater-accountability-for-new-york-prosecutors-who-break-the-law>; Jesse McKinley, *A New Panel Can Investigate Prosecutors. They Plan to Sue to Block It.*, N.Y. TIMES (Aug. 23, 2018), <https://www.nytimes.com/2018/08/23/nyregion/cuomo-prosecutors-oversight-commission.html>.

⁸⁰ See, e.g., Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015, 6:37 PM), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited>.

⁸¹ John Sides, *It's Time to Stop the Endless Hype of the 'Willie Horton' Ad*, WASH. POST. (Jan. 6, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/06/its-time-to-stop-the-endless-hype-of-the-willie-horton-ad/?utm_term=.fa7556521dbb.

⁸² James Alan Fox, *The Facts on Furloughs*, CRISTIAN SCIENCE MONITOR (Sep. 28, 1988), <https://www.csmonitor.com/1988/0928/efur.html>.

Successes are invisible and irrelevant; failures are salient and dangerous. So those campaigning against reform have a strong political advantage—an advantage that other, underappreciated defects in our criminal justice system's design only magnify. Take the “prison moral hazard” problem discussed above. The Horton Effect already gives prosecutors a strong incentive to impose excessively-harsh sentences on defendants, but then budgetary schisms amplify this problem. Prosecutors are county officials, and most of their budget comes from the county. Probation and jails, which handle people convicted of lesser misdemeanor charges, are also funded by the county, while the prisons which admit those convicted of more-serious felony charges are paid for by the state. This creates a clear moral hazard problem, since being harsher—demanding the felony conviction, not the misdemeanor one—not only minimizes Horton risk, but it is actually *fiscally cheaper*.

Yet with only one (notable) exception, states have taken few if any steps to rein in the political power of groups that oppose reform, or to correct any of the “structural” defects like the state prison-county prosecutor moral hazard problem. Tellingly, the one state that has directly confronted the moral hazard problem is California, and California is responsible for nearly *half* the prison population drop for the entire country. Outside of California, however, reform efforts have focused on capitalizing on favorable conditions (low and falling crime alongside high prison populations) to push as many favorable reforms as they can through the same broken system that gave us mass incarceration in the first place. It is a strategy that will work in the short run but has serious long-run risks. As long as the underlying political defects that drove mass incarceration remain in place, we always face the risk that a change in crime rates could bring reforms to halt, if not cause prison populations to start trending upwards once again, towards even-newer highs.

IV. CONCLUSION

We are nearly a decade into this serious push to scale back prisons, and there are some concerning signs on the horizon. Outside of only a few states, declines in prison population have been barely modest at best, and nearly half of all states haven't seen a decline at all. The gains that have been made continue to face sustained opposition from politically powerful criminal justice groups. And in a few states, we are already starting to see reforms get reversed. In response to rising violence in Baltimore, the Maryland legislature opted to expand mandatory minimums for gun crimes; the Illinois Legislature did the same in response to problems in Chicago.⁸³ More significantly, Alaska responded to a rise in crime

⁸³ Rachel Chason, *Maryland Lawmakers Reject Wide-Ranging Crime Bill, Pass More Modest Measures*, WASH. POST (April 7, 2018), https://www.washingtonpost.com/local/md-politics/maryland-lawmakers-reject-wide-ranging-crime-bill-pass-more-modest-measures/2018/04/07/db35bd2e-39ee-11e8-9c0a-85d477d9a226_story.html?utm_term=.8c3f12c00093; Cole Lauterbach, *New Illinois Gun Law*

that was driven primarily by weakened economic conditions and the opioid crisis by overturning a comprehensive reform bill passed the year before, even invalidating provisions that had not yet gone into effect (and thus could not explain the rise in crime).⁸⁴ And in a modern-day updating of the Horton Effect, a single murder by a single parolee in Arkansas in 2013 completely wiped out the gains made by a reform bill passed the year before. While the prison population in Arkansas dropped by about nine percent in 2012, parole and probation reacted so strongly to the murder committed in 2013 by Darryl Dennis that total prison populations rose by a staggering 17% by the end of that year. And from New York to Louisiana to California, prosecutor and police lobbyists have continued to attack reform efforts repeatedly.

Yet there are reasons to be optimistic. Prosecutors, for example, are increasingly facing scrutiny. New York State recently became the first state in the country to create a commission to look into prosecutorial misconduct, and it had already given the State Attorney General the authority to investigate all police-involved killings out of concerns that local prosecutors could not always be trusted.⁸⁵ Prosecutor policies are being publicized more widely, and prosecutor elections are becoming more competitive, with reform-minded prosecutors starting to win races across the country.⁸⁶

We have started to pay attention to violence as well. Few states have changed how they punish crimes of violence, although there have been some successes: In 2014, Mississippi cut back the minimum sentence for a person convicted of violence (from 85% of the sentence to 50%), and California recently amended its felony-murder rule to limit its reach.⁸⁷ Perhaps more important, the conversation about violence is shifting, as more and more people acknowledge that releasing drug offenders alone will not be enough. Most promisingly, the new District

Cracks Down on Repeat Offenders, ILLINOIS NEWS NETWORK (Jan. 1, 2018), https://www.ilnews.org/news/state_politics/new-illinois-gun-law-cracks-down-on-repeat-offenders/article_5a03f7ee-ea5b-11e7-af50-abb40b48406.html.

⁸⁴ Alan Greenblatt, *After Reforming Criminal Justice, Alaska Has Second Thoughts*, GOVERNING (Feb. 2018), <http://www.governing.com/topics/public-justice-safety/gov-alaska-criminal-justice-increasing-crime-rates.html>.

⁸⁵ McKinley, *supra* note 79; Rachel Silberstein, *How Cuomo's Special Prosecutor Order is Playing Out, 19 Months Later*, GOTHAM GAZETTE (Feb. 27, 2017) <http://www.gothamgazette.com/state/6778-while-cuomo-s-special-prosecutor-order-continues-calls-for-permanency-remain>.

⁸⁶ See, e.g., MEET YOUR DA, <https://meetyourda.org/> (last visited Oct. 19, 2018); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009); Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCIENCE MONITOR (July 17, 2017), <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor>.

⁸⁷ PRACTITIONER GUIDE TO HB 585, MISSISSIPPI CORRECTION AND CRIMINAL JUSTICE TASK FORCE, https://www.coxwelllaw.com/files/ms_practitioner_guide.pdf; Melody Gutierrez, *Bill to Overturn California's Murder-Accomplice Rule Gets Assembly Approval*, SAN FRANCISCO CHRONICLE (Aug. 29, 2018, 10:58 PM), <https://www.sfchronicle.com/news/article/Bill-to-overturn-California-s-murder-accomplice-13192861.php>.

Attorney for Suffolk County, Massachusetts (Boston) has said that reformers need to talk more openly about changing how we punish violence, and a leading victims'-rights group has made a similar point in the context of juvenile cases.⁸⁸ Progress is slow—I'd say that violence has gone from the 3rd rail of reform to the 2.75th rail—but there is still progress.

There has been less attention paid to the system's deeper, structural defects, with one important exception. California responded to federal court orders that it reduce its unconstitutionally overcrowded prison population by adopting a complicated proposal known as "Realignment," one aspect of which was to make counties responsible for the incarceration costs of a wide array of felony convictions, thus mitigating the budgetary moral hazard problem that exists everywhere else. As noted above, nearly half the nation's overall decline in prisons has just been the state of California. So while few states have tackled this moral hazard issue—and, to be clear, Realignment was about more than just this—the one state that did has seen significant returns.

At this point in time, it is impossible to know if the decline in prisons from 2010 to 2017 is the start of a fundamental shift away from mass incarceration, a leveling off at still-nearly-historic-highs, or perhaps even the lull before an even-worse storm. The successes we have seen so far are commendable, but they remain quite tentative and vulnerable. There are bigger, bolder steps we can, and should, take to fundamentally change the central role of prison and punishment in our criminal justice system. We have seen some halting moves in those directions recently; I hope we will see even more of them in the years ahead.

⁸⁸ *Candidate Name: Rachael Rollins, WHAT A DIFFERENCE A DA MAKES*, https://dadifference.org/wp-content/uploads/2018/07/DaDifference_Questionnaire_RachaelRollins.pdf. (last visited Oct. 19, 2018); Art Levine, *Crime Victims Join Advocates to Urge Community Alternatives for Even Violent Offenders*, JUVENILE JUSTICE INFORMATION EXCHANGE (Sep. 5, 2018), <https://jjie.org/2018/09/05/crime-victims-join-advocates-to-urge-community-alternatives-for-even-violent-offenders/>.