

ARTICLES

Clemency, Parole, Good-Time Credits, and Crowded Prisons *Reconsidering Early Release*

PAUL J. LARKIN, JR.*

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* Paul J. Larkin, Jr., B.A. 1977 Washington & Lee University; J.D. 1980 Stanford Law School; M.P.P. 2010 George Washington University; Senior Legal Fellow, The Heritage Foundation. The views I express in this article are my own, and should not be construed as representing any official position of The Heritage Foundation. I would like to thank Albert W. Alschuler, Daniel Dew, Paul Rosenzweig, and Gavriel Swerling for their valuable comments on an earlier draft of this paper. Dan Dew and Katie Beck provided valuable research assistance. Any errors are mine alone. © 2013, Paul J. Larkin, Jr.

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INTRODUCTION

Committing crime always has been a risky business. The principal risk has been getting caught. If convicted at a fair trial, a defendant may be sentenced to whatever penalty is authorized by law.¹ If the judge orders the offender to be imprisoned, the government may confine him at a prison of its choosing for the full term authorized by the relevant statute and judgment, which could be a very lengthy period indeed.²

But American prisons do not have a sign over the gateway saying “Abandon all hope, you who enter.”³ Historically, there were several mechanisms through which many prisoners could gain an early release, such as executive clemency, parole, and “good-time” (or good conduct) credits.⁴ No prisoner has a constitutional right to demand an early release via any of those devices,⁵ but the federal and state governments have found them to be useful tools for penological, fiscal, and humanitarian purposes.⁶

1. See, e.g., *Chapman v. United States*, 500 U.S. 453, 465 (1991); *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

2. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *Olim v. Wakinekona*, 461 U.S. 238 (1983); *Meachum*, 427 U.S. at 224; *Ex parte Karstendick*, 93 U.S. 396, 398–99 (1876). There is an exception for punishments that are cruel and unusual, but, outside of the unique context of capital punishment, that exception does not often apply. See, e.g., *Ewing v. California*, 538 U.S. 11 (2003) (rejecting an Eighth Amendment challenge to California’s “three-strikes” law); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (rejecting an Eighth Amendment challenge to life sentence for drug trafficking).

3. DANTE ALIGHIERI, *THE INFERNO* canto III, l. 9, at 12 (Stanley Lombardo trans., Hackett 2009).

4. See *infra* text accompanying notes 16–67.

5. See, e.g., *Swartout v. Cooke*, 131 S. Ct. 859, 862 (2011); *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 7 (1979); *Meachum*, 427 U.S. at 224.

6. See, e.g., *Barber v. Thomas*, 130 S. Ct. 2499 (2010) (good-time); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole); PETER B. HOFFMAN, *HISTORY OF THE FEDERAL PAROLE SYSTEM* (2003); JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003). Options similar to clemency, parole, and good-time credit are furloughs (viz., temporary release from confinement for a specific need, e.g., a family member’s funeral), participation in work-release programs (viz., release from confinement for the workday), residence in a halfway house (often used as a transition mechanism for prisoners in the last year or months of a sentence), and compassionate release or medical parole (e.g., early release for terminally ill prisoners). See, e.g., RONALD L. GOLDFARB & LINDA R. SINGER, *AFTER CONVICTION* 257–58 (1973); PETERSILIA, *supra*, at 98–101; William W. Berry, III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850 (2009). Those options are not generally available to prisoners, and they are far more limited in their periods of release than the ones discussed in the text. See, e.g., FED. BUREAU OF PRISONS, CHANGE NOTICE No. 5050.46, PROGRAM STATEMENT CONCERNING COMPASSIONATE RELEASE; PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. 3582(c)(1)(A) & 4205(g) (1998) (compassionate release is only for prisoners with extraordinary or extremely grave medical circumstances), http://www.bop.gov/policy/progstat/5050_046.pdf.

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Over the last thirty years, however, society has cut back on its use of early release. In fact, throughout that period, the operation of the criminal justice system can be described by imagining two of Einstein’s trains moving in parallel but opposite directions.⁷ On one track, we see a criminal justice system that has sent an increasingly large number of offenders to state and federal prisons. On the other track, we see those prisons returning a decreasingly small number of inmates to society through early release. The engine driving each train has been reliance on a punitive, incapacitative approach to sentencing. Legislatures, responding to public calls for a tougher stance on crime, have abandoned rehabilitation in favor of incapacitation as the principal justification for punishment. Hoping to allay the public’s fear of crime, legislatures have abolished discretionary sentencing and parole and, in their place, have adopted so-called “truth-in-sentencing” laws, along with stiff punishments and mandatory minimum sentences for recidivists, drug offenders, and armed criminals.⁸

The penological, fiscal, and humanitarian considerations noted above may soon demand that we reassess the utility of incapacitation as the primary rationale for imprisonment. State and federal correctional facilities have become swollen with prisoners.⁹ The cost of providing food, clothing, shelter, security, and medical care has increased considerably over the last thirty years, and shows no sign of abating. At some point, Congress and the states may find it impossible to continue to fund the current rate of expenditures.¹⁰ The massive payments required today to underwrite penological judgments made thirty years ago could offer a powerful incentive to reexamine how well those decisions have worked out and whether they still make sense today.

In that regard, consider the fact that states and the federal government have begun to outsource prisoners to privately-owned and operated facilities, an old

7. See ALBERT EINSTEIN, RELATIVITY: THE SPECIAL AND THE GENERAL THEORY (1916).

8. As one criminologist has noted:

Soaring crime rates, especially in the inner cities, are the most obvious part of the explanation [for the increase in imprisonment]. From 1960 to 1990, the overall U.S. crime rate increased more than fivefold, the frequency of violent crime nearly quadrupled, and the murder rate doubled. Drug use increased. The upsurge was widely blamed on lenient punishment, particularly for violent repeat offenders. Legislatures responded by passing “get tough” measures, including sentencing guidelines (which required prison sentences for some offenders who in the past might have been put on probation), so-called three-strikes-and-you’re-out laws (which mandated prison terms for repeat offenders), mandatory minimum sentences (forcing judges to impose fixed sentences regardless of mitigating factors), and truth-in-sentencing measures (requiring inmates to serve a greater proportion of their imposed sentence before becoming eligible for parole). These policy changes increased both the probability of going to prison if convicted and the length of prison terms.

Joan Petersilia, *Beyond the Prison Bubble*, 35 WILSON Q. 52, 52–53 (2011).

9. “The U.S. prison system has exploded in size and economic impact during the past three decades, due to a variety of factors including mandatory sentencing laws and tougher drug enforcement efforts.” SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., ECONOMIC ASPECTS OF PRISON GROWTH 15 (2010).

10. See H.R. REP. NO. 112-169, at 64 (2011) (“[D]espite a dramatic increase in corrections spending over the past two decades, re-incarceration rates for people released from prison are largely unchanged. This trend is both financially and socially unsustainable . . .”).

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practice,¹¹ yet one that might have been considered unthinkable only fifty years ago, on the ground that it improperly delegates a core government function to a private party.¹² The rationale ordinarily given is that private businesses can run an institution more efficiently than the government.¹³ Perhaps they are right.¹⁴ But if efficiency is to join incapacitation as one of the twin pillars of contemporary penological theory, the question arises whether we have reached the point of diminishing marginal returns for our entire correctional system.¹⁵ If so, if the marginal cost of incarcerating new prisoners outweighs the marginal social benefit of their confinement, then we will need to decide which pillar will give way. This article addresses that choice.

Part I starts by discussing the history and use of clemency, parole, and good-time credits as an integral part of the correctional process. That part goes on to outline the disappearance of executive clemency and the fall of parole and early release options, as a more punitive approach to punishment drowned the rehabilitative ideal that had served as the animating force of the criminal justice system in the twentieth century. Part II explains where we are today after thirty

11. See, e.g., *Richardson v. McKnight*, 521 U.S. 399, 404–07 (1997) (discussing the English and American history of the use of private prisons).

12. See, e.g., JAMES AUSTIN & GARRY COVENTRY, DEP'T OF JUSTICE, EMERGING ISSUES ON PRIVATIZED PRISONS 8–11 (Feb. 2001), <https://www.ncjrs.gov/pdffiles1/bja/181249.pdf>; Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1392–94 (2003); Alexander Volokh, *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1868, 1871 (2002). In 2005, private prisons were about 23% of adult correctional facilities, and in 2008 nearly 17% of federal prisoners were in such an institution. KIRCHHOFF, *supra* note 9, at 15. Several of the unique issues posed by use of private prisons have reached the Supreme Court. *Compare* *Minnecci v. Pollard*, 132 S. Ct. 617 (2012) (refusing to create an Eighth Amendment *Bivens* action against private individuals working at private prison), *and* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (refusing to create an Eighth Amendment *Bivens* action against the corporation running a private prison), *with* *Richardson v. McKnight*, 521 U.S. 399 (1997) (qualified immunity is not available for private prison guards).

13. See James F. Blumstein, *et al.*, *Do Government Agencies Respond to Market Pressures? Evidence from Private Prisons*, 15 VA. J. SOC. POL'Y & L. 446, 449 (2008); AUSTIN & COVENTRY, *supra* note 12, at 15–17; KIRCHHOFF, *supra* note 9.

14. And perhaps they are not. See Richard Opper, Jr., *Private Prisons Found to Offer Little in Cost Savings*, N.Y. TIMES, May 18, 2011, at A1, available at http://www.nytimes.com/2011/05/19/us/19prisons.html?_r=3&ref=us; AUSTIN & COVENTRY, *supra* note 12, at 22 (“There is no consensus among academics and professionals in the field concerning the potential cost savings that privately managed operators can provide The promises of 20-percent savings in operational costs have simply not materialized.”).

15. “There is growing concern among policymakers across the political spectrum that corrections policy may have reached a point of diminishing returns.” KIRCHHOFF, *supra* note 9, at 1. As University of Chicago economist Steven Levitt put it:

“We know that harsher punishments lead to less crime, but we also know that the millionth prisoner we lock up is a lot less dangerous to society than the first guy we lock up,” Dr. Levitt said. “In the mid-1990s I concluded that the social benefits approximately equaled the costs of incarceration. Today, my guess is that the costs outweigh the benefits at the margins. I think we should be shrinking the prison population by at least one-third.”

John Tierney, *Time and Punishment: For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES, Dec. 11, 2012, at A1, available at http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html?pagewanted=2&ntemail=1=y&_r=3&emc=tnt&pagewanted=all&.

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years of a more severe approach to sentencing. That part also presents the arguments for and against correctional reform. Finally, Part III address the utility of some form of early release, however labelled, to address the problems noted in Part II.

I. EARLY RELEASE MECHANISMS IN AMERICAN CRIMINAL LAW

A. Clemency

The clemency power likely has existed as long as there have been chief executives, monarchs, or tribal leaders.¹⁶ At common law, the King possessed the pardon power,¹⁷ and the common law in this regard served as a doctrinal basis for the adoption of clemency in this nation.¹⁸ The federal and state constitutions¹⁹ generally lodge the pardon power²⁰ (which includes the commutation power²¹) in the hands of the chief executive,²² whether a president or

16. The Code of Hammurabi included a clemency provision. JEFFREY P. CROUCH, *THE PRESIDENTIAL PARDON POWER* 10–11 (2009). Greek and Roman rulers exercised that power as well. *See id.*; *Matthew* 27:15–23 (Pontius Pilate released Barabbas as an exercise in clemency during Passover). Of course, those may not have been the earliest exercise of the clemency power. *See Genesis* 4:10–15 (After making Cain, “a fugitive and a wanderer on the earth[,] . . . the Lord put a mark on Cain, lest any who found him would attack him.”).

17. *See, e.g.*, NAOMI D. HURNAND, *THE KING’S PARDON FOR HOMICIDE* (1970). For a history of the common law and federal pardon power, see *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1226–33 (D.D.C. 1974), and WILLARD H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* (1941).

18. *See United States v. Wilson*, 32 U.S. 150, 160 (1833).

As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.

Id.

19. Interestingly, the Articles of Confederation did not contain a federal pardon power. CROUCH, *supra* note 16, at 14.

20. *See* U.S. Const. art. II, § 2, cl. 1; *see also, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (state clemency); *Conn. Bd. of Parsons v. Dumschat*, 452 U.S. 458 (1981) (same); *Biddle v. Perovich*, 274 U.S. 480, 486 (1926) (President’s pardon power); CROUCH, *supra* note 16; KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593 (2013).

21. *See* GOLDFARB & SINGER, *supra* note 6, at 343.

[P]resumably the [commutation] power is simply a lesser form of pardon. The power to commute sentences has been held to be implicit in the general; grant of the pardoning power in the states whose constitutions do not mention commutation and in the federal system Mostly, [commutation] is used to allow prisoners with terminal illnesses to die out of prison, to make prisoners eligible for parole and to avoid capital punishment.

Id. (footnote omitted). The clemency power can be exercised in any one (or more) of several different ways: pardon, commutation, remission of fines or forfeiture of goods or money, reprieve, and amnesty. CROUCH, *supra* note 16, at 20.

22. The Pardon Clause, U.S. Const. art. II, § 2, cl. 1, provides as follows: “The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.” For a discussion of whether Congress also has a clemency power, see CROUCH,

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governor.²³ The executive pardon power is virtually unlimited²⁴ and can be exercised for any reason that the President or governor deems just.²⁵ The executive can dispense clemency purely as an act of mercy,²⁶ or as a means of achieving another social goal by reducing the punishment that an offender otherwise would suffer.²⁷ Some clemency recipients—e.g., Jefferson Davis, Robert Stroud, known as the “Birdman of Alcatraz,” and Richard Nixon—are famous or infamous public figures. But they are in the minority. As one author put it, “[p]residents generally have exercised executive clemency to give average, anonymous Americans another chance.”²⁸

Throughout our history, presidents have exercised the pardon power for a host of reasons: e.g., to remedy a miscarriage of justice; to soften the rigors of an unduly severe punishment; to quell civil unrest; to grant immunity to a witness so that he can testify at trial, and so forth.²⁹ Some instances of executive clemency have been particularly noteworthy. George Washington granted am-

supra note 16, at 49–51. Congress always could repeal a criminal law and apply the repeal retroactively. *See, e.g.*, *Dorsey v. United States*, 132 S. Ct. 2321 (2012); *cf.* *United States v. Chambers*, 291 U.S. 217 (1934). That action would be tantamount to an exercise of clemency.

23. A majority of early state governments shared the pardon power between the governor and legislature. CROUCH, *supra* note 16, at 14.

24. The Supreme Court has not imposed a limit on the President’s clemency power. *See, e.g.*, *Schick v. Reed*, 419 U.S. 256 (1974) (upholding President Eisenhower’s decision to reduce a condemned prisoner’s death sentence to life imprisonment without parole despite the fact that the latter penalty was not authorized by Congress). Lower courts and commentators, however, have argued that several limitations may exist. *See Hoffa v. Saxbe*, 378 F. Supp. 1221 (D.D.C. 1974); CROUCH, *supra* note 16, at 35–36. For example, a president may not be able to grant clemency on the condition that a prisoner waive certain constitutional rights (e.g., requiring him to change religions) or if clemency requires an expenditure of funds in violation of the Appropriations Clause, U.S. Const. art. I, § 9, cl. 7 (payments from the treasury must be authorized by law).

25. *See, e.g.*, THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed. 2003) (“Humanity and good policy conspire to dictate that the benign prerogative of pardoning be as little as possible fettered or embarrassed.”); Joanna M. Huang, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 DUKE L.J. 131, 133 (2010) (“Executive clemency[’s] . . . flexible and broad nature allows the president and state governors to pardon or commute sentences at will . . .”).

26. *See, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280–81 (1998) (plurality opinion) (“the heart of executive clemency is . . . a matter of grace”); *United States v. Wilson*, 32 U.S. 150, 160 (1833) (“A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”).

27. *See, e.g.*, *Biddle v. Perovich*, 274 U.S. 480, 486 (1926) (“A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme.”).

28. CROUCH, *supra* note 16, at 127.

29. *See, e.g.*, CROUCH, *supra* note 16; Jonathan T. Menitove, Note, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL’Y REV. 447, 452 (2009); Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 50 (1998) (“[A]n executive pardon would allow the President to heal the country in times of civil unrest, thereby protecting national security.”); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 89 (2002) (“[P]ardons may be issued when justice would otherwise not be served either because the sentence was too harsh or because the person was wrongly convicted.”).

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Fn30 nesty to participants in the Whiskey Rebellion. Abraham Lincoln granted amnesty to those who rebelled against the union. Jimmy Carter granted amnesty to Vietnam War draft evaders. And Gerald Ford pardoned Richard Nixon for his role in the Watergate cover-up.³⁰ Recently, however, the pardon power has fallen into desuetude. Presidents and governors have used it less frequently, Fn31 albeit sometimes for good reasons.³¹ But it also has been used unwisely, which Fn32 has tarnished its value.³²

One explanation for the drop in the number of pardons is its visibility. Only the President or a governor can grant clemency, which focuses its exercise on a politically accountable official. “Parole took some political heat off the governor” by reducing demand for clemency and by letting political appointees make Fn33 parole release decisions.³³ For that reason and others, parole became the predominant early release procedure in the twentieth century.

B. Parole

Parole is a mechanism for releasing a prisoner before the completion of his sentence, but with a proviso: He can remain free only if he keeps his nose clean.³⁴ Parole was born late in the nineteenth century into the then-nascent Fn34 movement to use the correctional process as a means of rehabilitating offenders for their hoped-for eventual return to society as law-abiding citizens.³⁵ The Fn35 underlying theory was that the correctional process should be devoted to rehabilitating offenders, with each actor playing a different assigned role.³⁶ Fn36

The process worked as follows: Trial judges came first. In a manner resem-

30. Rosenzweig, *supra* note 20, at 598.

31. See, e.g., CROUCH, *supra* note 16, at 60–64; Margaret C. Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1169 (2010); Rosenzweig, *supra* note 20.

32. See *infra* note 204.

33. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 162 (1993); PETERSILIA, *supra* note 6, at 61.

34. See *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (“The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.”); *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938) (Parole is “a means of restoring offenders who are good social risks to society; to afford the unfortunate another opportunity by clemency—under guidance and control of the [Parole] Board.”) (footnote omitted); U.S. DEP’T OF JUSTICE, 4 ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES 4 (1939) (defining parole as “the release of an offender from a penal or correctional institution, after he has served a portion of his sentence, under the continued custody of the State and under conditions that permit his reincarceration in the event of misbehavior”).

35. For a history of the theory and practice of parole, see FRIEDMAN, *supra* note 33, at 161–62, 406–09; GOLDFARB & SINGER, *supra* note 6, at 257–58. See also HOFFMAN, *supra* note 6, at 1, 5–34; DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 79–108 (rev. ed. 1990); Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 151, 166–67 (Norval Morris & David J. Rothman eds., 1998).

36. See *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”) (footnote omitted); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 34–40 (2001); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* 37–39 (2006).

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Fn37/38 bling a medical model,³⁷ judges diagnosed the offender's particular condition³⁸
 Fn39 based on all the available evidence,³⁹ and turned him over to the custody of the
 correctional system, where the actual work of rehabilitation would take place.
 To give correctional officials ample time for their treatment to work, legislatures
 would pass laws authorizing a broad sentencing range, a span of years that gave
 Fn40 correctional specialists a long period of time—in theory, for the prisoner's
 remaining years—to reform his ways.⁴⁰ Judges committed an offender to the
 custody of the warden under an indeterminate sentence that gave correctional
 officials ample opportunity to attempt rehabilitation. Ultimately, a parole board
 Fn41 would decide if and when the prisoner had been reformed and could be
 released.⁴¹ Once released, a parolee would be subject to numerous restrictions
 Fn42 on what he could do, as well as subject to the supervision of a parole officer.⁴²
 The parole officer would meet with and monitor the parolee's conduct, and
 could initiate the process of returning the offender to prison for violating the
 Fn43 conditions of his parole.⁴³

The rehabilitative ideal was the penal philosophy underlying the correctional
 process for most of the twentieth century, and indeterminate sentences and
 Fn44 parole were the pillars of the system.⁴⁴ Every state and the federal government

37. See Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 455 (1928); Rotman, *supra* note 35, at 159 (“Just as no legislature would tell a doctor when to discharge a patient from a hospital as cured, so no legislature should tell a warden or any other prison official when to discharge an inmate as cured.”).

38. See, e.g., *Koon v. United States*, 518 U.S. 81, 113 (1996) (“It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”); *Grayson v. United States*, 438 U.S. 41, 47 (1978).

39. The judge needed a complete medical history, so a probation officer would prepare a report detailing the offender's life history. Any and all evidence was deemed relevant and necessary. See, e.g., 18 U.S.C. § 3577 (2006) (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”); *Williams v. New York*, 337 U.S. 241, 247 (1949).

40. See, e.g., Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 21 (1899). For example, a statute might authorize a sentence of “No more than five years' imprisonment” or “No less than 3, but no more than 10 years' imprisonment.”

41. Parole officials enjoyed almost absolute discretion over release decisions. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 363–64 (1989). The theory was that the ability to earn an early release via parole would encourage inmates to reform themselves, and the absolute discretion granted to parole boards was necessary to make the scientific decision when a prisoner had been rehabilitated and to maintain institutional control and discipline. PETERSILIA, *supra* note 6, at 60.

42. Parole statutes or boards historically imposed a variety of conditions on a parolee, such as regularly seeing his parole officer, maintaining employment, supporting his family and dependants, not breaking the law, avoiding drugs and alcohol use, and the like. More recent conditions include participation in drug testing, restitution, and community service. See PETERSILIA, *supra* note 6, at 79, 82–83.

43. See generally *Morrissey v. Brewer*, 408 U.S. 471 (1972) (discussing due process restrictions on parole revocation procedures).

44. See, e.g., GARLAND, *supra* note 36, at 55–60, 92; GOTTSCHALK, *supra* note 36, at 37–38; DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 54–58 (1980); Rotman, *supra* note 35, at 151, 158–59, 170–71.

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had a parole process in place by 1942.⁴⁵ As always, every player in the system griped about how it worked in his or her own bailiwick.⁴⁶ On balance, however, everyone valued the availability of parole and took advantage of that opportunity quite often.⁴⁷ Over time, parole became not just “an ad hoc exercise of clemency,” but was “an integral part of the penological system.”⁴⁸

All that changed in the last quarter of the twentieth century.⁴⁹ Against the background of social foment generated by the Civil Rights Movement, the Vietnam War, Watergate, and a severe recession, an escalating crime rate⁵⁰ alarmed the public, which demanded that stiffer measures be taken.⁵¹ At the

45. See PETERSILIA, *supra* note 6, at 2–3, 131. Congress passed the first federal parole law in 1910. See Federal Parole Act of 1910, ch. 387, 36 Stat. 819, 819–21; HOFFMAN, *supra* note 6, at 1, 5–34. In the federal system, parole was available to any prisoner serving a term of one year or longer after he had completed one-third of his sentence. HOFFMAN, *supra* note 6, at 6; L.C. White, *The Federal Parole Law*, 12 A.B.A. J. 51, 51 (1926) (White was the Superintendent of Federal Prisons). The Federal Parole Act 1910 authorized separate parole boards at each prison. See Federal Parole Act of 1910, ch. 387, § 2, 36 Stat. 819, 819. In 1948, Congress consolidated the separate parole boards into one board and later revised that board when creating the U.S. Parole Commission. See Act of June 25, 1948, ch. 645 § 4201, 62 Stat. 683, 854; Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219 (1976) (codified at 18 U.S.C. § 4201–18) (repealed 1984); S. REP. NO. 94-648, at 23–26 (1976) (Conf. Rep.); U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 391 (1980).

46. Judges believed that parole boards interfered with their sentencing prerogative, and the police complained that parole boards did not notify them when prisoners were returned to the community. Yet, wardens supported parole because it encouraged good behavior, district attorneys found that parole made plea bargaining easier, legislators endorsed parole because early release of prisoners avoided the need to raise taxes to underwrite additional prison space. See Rotman, *supra* note 35, at 163.

47. In 1977, 72% of all prisoners released from custody were paroled, the largest number in the twentieth century. Throughout the 1960s, that number was even higher in some states, exceeding 95% in Washington, New Hampshire, and California. PETERSILIA, *supra* note 6, at 58–59, 62.

48. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

49. See, e.g., Francis T. Cullen, *Rehabilitation and Treatment Programs*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 253, 253–54 (James Q. Wilson & Joan Petersilia eds., 2002); FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 33–34 (2012); FRIEDMAN, *supra* note 33, at 305–09; GARLAND, *supra* note 36, at 55–60; GOTTSCHALK, *supra* note 36, at 37–39; JEREMY TRAVIS, BUT THEY ALL COME BACK 17–20 (2005).

50. As the Justice Department recently summarized:

Between 1960 and the early 1990s, violent crime in the United States increased dramatically. According to the Federal Bureau of Investigation’s Uniform Crime Reports, the number of violent crimes in the United States rose from 288,460 in 1960 to 1,932,274 in 1992. The number of murders rose from 9,110 in 1960 to 23,760 in 1992. The number of rapes rose from 17,190 in 1960 to 109,062 in 1992; robberies from 107,840 in 1960 to 672,478 in 1992; and aggravated assaults from 154,320 in 1960 to 1,126,974 in 1992. According to the Bureau of Justice Statistics’ National Victimization Survey, 10,015,769 Americans were victims of violent crime in 1992, up from 7,827,356 in 1973 (the first year of the survey).

Letter from Lanny Breuer, Ass’t Att. Gen., & Jonathan Wroblewski, Dir., Office of Pol’y and Legis., to the Hon. Patti B. Saris, Chair, U.S. Sent. Comm’n (July 23, 2012) (footnotes omitted), http://www.usssc.gov/Meetings_and_Rulemaking/Public_Comment/20120815/DOJ_Annual%20Letter_priorities_comment.pdf [hereinafter DOJ Letter].

51. See, e.g., Petersilia, *supra* note 8, at 52. The public also had some powerful allies. See generally, DAVID FOGEL, WE ARE THE LIVING PROOF (1975); ANDREW V. HIRSCH, DOING JUSTICE; THE CHOICE OF PUNISHMENTS (1976); JAMES Q. WILSON, THINKING ABOUT CRIME 178–81 (1985); CULLEN & JONSON, *supra* note 49, at 33; PETERSILIA, *supra* note 6, at 64–65.

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same time, critics assaulted parole from the left, highlighting numerous perceived flaws in the administration of the parole laws, as well as in the underlying rehabilitative idea.⁵² Parole got caught in the crossfire.

Politicians responded with more severe sentencing laws.⁵³ By the turn of this century, only sixteen states had left untouched the parole board's discretionary release authority, and another sixteen had abolished parole altogether.⁵⁴ Twenty-seven states and the District of Columbia adopted so-called "truth-in-sentencing laws," which require an offender to be imprisoned for at least 85 percent of his sentence.⁵⁵ Approximately half of the states and the federal government had recidivist sentencing laws in one form or another that amped up the punishment, sometimes to life imprisonment, for repeat offenders.⁵⁶ Finally, the entire nation had adopted statutes imposing mandatory minimum sentences for firearms offenses, drug crimes, or other felonies.⁵⁷ The transformation from a medically oriented system to a punitive one was complete.

52. See generally, FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1981); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* 3–4 (1976); NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 24–43 (1974); JESSICA MITFORD, *KIND AND USUAL PUNISHMENT: THE PRISONER BUSINESS* (1973); MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1972); AM. FRIENDS SERV. COMM., *STRUGGLE FOR JUSTICE: A REPORT ON CRIME & PUNISHMENT IN AMERICA* (1971); DANIEL GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* (1969); ROTHMAN, *supra* note 35, at 159–201. For a concise statement of those flaws, see *infra* Part IV.B.

53. See, e.g., TODD R. CLEAR, *IMPRISONING COMMUNITIES* 50–53 (2007); CULLEN & JONSON, *supra* note 49, at 33; PETERSILIA, *supra* note 6, at 68. Congress and the states responded to the demand for tougher enforcement of the criminal laws in other ways too. See, e.g., Aimee's Law, 42 U.S.C. § 13713 (2006) (potentially reducing federal funding for states without "truth in sentencing laws"—i.e., laws requiring offenders to serve at least 85% of their sentence); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 2038, 2042 (1994) (10% reduction in federal funds for noncompliant states) (codified at 42 U.S.C. § 14071) (repealed 2006); Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093, 3093-94 (registered sex offenders must notify the FBI when they move to a new state) (codified at 42 U.S.C. §§ 14072–73) (repealed 2006); *Smith v. Doe*, 538 U.S. 84, 85 (2003) (rejecting ex post facto challenge to Alaska sex offender registration law); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 1–2 (2003) (rejecting due process challenge to Connecticut sex offender registration statute).

54. See, e.g., PETERSILIA, *supra* note 6, at 65, 66–67 (status of parole release laws in the states in 2002).

55. See, e.g., *id.* at 68.

56. See *id.*; *Ewing v. California*, 538 U.S. 11 (2003); FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* (2001).

57. See, e.g., Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (authorizing life imprisonment for repeat child sex offenders) (codified as amended at 18 U.S.C. § 3559(e) (2006)); Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. § 3559(c) (authorizing life imprisonment for offenders previously convicted of two or more violent felonies); Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State between Liberty and Recommitment*, in *PRISONER REENTRY AND CRIME IN AMERICA* 50, 53–55 (Jeremy Travis & Christy Visher eds., 2005); PETERSILIA, *supra* note 6, at 68. Another example is the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. Congress fixed mandatory minimum sentences corresponding to the weight of a "mixture or substance containing a detectable amount of" various controlled substances, in whatever form or purity they were found. See 21 U.S.C. § 841(b)(1)(A)(i)-(viii), (B)(i)-(viii) (2006); H.R. REP. NO. 99-845, Pt. 1, at 11–12, 17 (1986); *Chapman v. United States*, 500 U.S. 453, 461 (1991).

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C. Good-Time

Good-time laws predate parole. Originally known as “commutation laws,” these laws sought to help the warden maintain prison discipline by offering an inmate a limited amount of time off his sentence in return for “good behavior.”⁵⁸ New York adopted the first good-time law in 1817, and 44 other states followed by the end of the century.⁵⁹ The federal government enacted its first good-time law in 1875.⁶⁰ It offered prisoners 5 days of credit toward release for good conduct.⁶¹

In theory, good-time credit laws gave wardens a tool for encouraging prisoners to avoid unruly behavior by holding out the prospect of credit towards an earlier release.⁶² In practice, however, good-time statutes “were applied . . . perfunctorily, so that earning good time became automatic. Thus discipline was exercised by withholding good-time credit for gross misconduct, instead of by using early release as a reward.”⁶³ The carrot thereby became an entitlement in a prisoner’s eyes, which, when revoked, became an even more punitive stick.

For most of the twentieth century, a prisoner in the federal system was eligible for a graduated scale of good-time credit per month depending on the length of his sentence, whether he was employed in a prison industry or camp, and whether he had performed an “exceptionally meritorious service” or a duty “of outstanding importance in connection with institutional operations.”⁶⁴ The Bureau of Prisons could deny a prisoner good time credit if he committed a crime or violated a disciplinary rule (although the Attorney General could restore lost good time).⁶⁵ Congress revised the good-time system in 1984. Today, a prisoner earns up to fifty-four days of credit for each year unless the Bureau of Prisons finds that he has not satisfactorily complied with disciplinary rules.⁶⁶ The Bureau of Prisons also may grant a nonviolent offender additional credit if he completes a substance abuse program.⁶⁷

II. THE STATE OF CORRECTIONS TODAY

The punitive approach to crime, which began in the 1970s, may have been a reasonable response to the fact and fear of a rising crime rate, particularly with respect to violent crimes. The fundamental duty of every state is to provide the

58. GOLDFARB & SINGER, *supra* note 6, at 262; *see, e.g.*, Barber v. Thomas, 130 S. Ct. 2499, 2500 (2010); McGinnis v. Royster, 410 U.S. 263, 263 (1973).

59. GOLDFARB & SINGER, *supra* note 6, at 262.

60. Act of March 3, 1875, ch. 145, 18 Stat. 479, 480.

61. *Id.*; 18 U.S.C. § 4161 (1982) (repealed 1984). Congress later increased the maximum available good time credit to fifty-four days. *See* 18 U.S.C. § 3624(b) (2006); *infra* note 66.

62. KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 17 (1998); *see, e.g.*, ROTHMAN, *supra* note 35, at 251.

63. GOLDFARB & SINGER, *supra* note 6, at 262.

64. *See* 18 U.S.C. §§ 4161–62 (1982) (repealed).

65. *See id.*; S. REP. NO. 98-225, at 147 (1983).

66. *See* 18 U.S.C. § 3624(b) (2006); 28 C.F.R. §§ 523.20, 541.13 (2011).

67. *See* 18 U.S.C. § 3621(e)(2).

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order necessary for civil society to exist. The actual incidence of crime is one, but not the only, corrosive feature that society must remedy. Society must calm the fear that crime stirs in people, or else it will eat away at the community. Fear of crime leads people to barricade themselves in their homes, which not only cheapens their societal and personal lives, but also abandons public parks and walkways to the small minority of people who prey on others.⁶⁸

At the same time, there are numerous rivals for limited public funds. A dollar spent in the correctional system cannot be spent in the health care system. Government must decide how to spend public funds for the greatest overall return. If the marginal dollar of additional correctional expenditures does not generate an equal return in crime control, perhaps that dollar should go elsewhere. Principles of retribution, deterrence, incapacitation, and education may be the most influential factors in correctional theory, but fiscal considerations matter too, especially in the day-to-day management of a prison system. Politics has been called the science of the possible, and any politician will tell you that nothing is possible without money. We therefore need to ask what our incarceration dollars have bought us.

A. *The Cost of Large-Scale Incarceration*

The punitive approach to sentencing, followed since the 1970s, has led to a vast expansion in the size and cost of the correctional systems, which some critics have labelled the “carceral state.”⁶⁹ For most of the twentieth century the imprisonment rate was 100 per 100,000 citizens.⁷⁰ As of 2007, however, the rate was 724 per 100,000, more than seven times as much.⁷¹ Most of that increase has come in the last 30 years.⁷² In 1940, the federal system was home to 24,360 prisoners. Forty years later, that number was 24,252. At the end of 2012, it was 218,292.⁷³ In 1990, there were 708,393 state prisoners, while in 2009 that number was 1,405,622.⁷⁴ That increase was not uniform across all categories of crime. From 1980 to 1997, the number of offenders imprisoned for violent crimes increased 82 percent; the number for non-violent crimes (excluding drug

68. See CLEAR, *supra* note 53, at 93.

69. GOTTSCHALK, *supra* note 36, at 201; see BARBARA MIKULSKI, COMMERCE AND JUSTICE, AND SCIENCE, AND RELATED AGENCIES APPROPRIATIONS BILL, 2011, S. REP. NO. 111-229, at 69 (2010) (“The Federal prison population has grown explosively over the last 20 years.”); ALAN B. MOLLOHAN, COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS BILL, 2010, H.R. REP. NO. 111-149, at 68 (2009).

70. CLEAR, *supra* note 53, at 5.

71. *Id.*

72. H.R. REP. NO. 110-919, at 57 (2008) (“The Federal prison population has grown explosively over the last 20 years. Rising from roughly 25,000 prisoners in 1980, the population is estimated to be 207,000 by the end of fiscal year 2008 and more than 213,000 by the end of fiscal year 2009.”); see JOAN PETERSILIA, REFORMING PROBATION AND PAROLE: IN THE 21ST CENTURY 3, 13 (2002).

73. *Weekly Population Report*, FED. BUREAU OF PRISONS (Dec. 28, 2012), available at http://www.bop.gov/locations/weekly_report.jsp (last visited Dec. 31, 2012).

74. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S 218 (2011), <http://www.census.gov/prod/2011pubs/12statab/law.pdf>.

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offenses) went up 207 percent; and the number for drug offenses, 1,040 percent.⁷⁵ As of 2010, there were more than 2.2 million Americans in federal, state, and local jails and prisons.⁷⁶

Some laws have contributed more than others to the population increase. Consider so-called “three strikes” laws.⁷⁷ For more than a century, states have had on the statute books recidivist or habitual criminal punishments—viz., laws that could impose life imprisonment for a third felony conviction.⁷⁸ Nonetheless, prosecutors did not regularly use those weapons against repeat offenders, except perhaps as a Sword of Damocles in plea-bargaining.⁷⁹ Beginning in the 1990s, however, the public attitude toward habitual criminals grew far more punitive, populism replaced expertise as the driving force in criminal justice policymaking, and the public embraced recidivist laws as a means of keeping serious, violent criminals off the streets.⁸⁰

Take California as an example. In October 1993, Richard Allen Davis, a two-time offender released early on parole, assaulted and murdered twelve-year-old Polly Klaus. That crime spurred the state to adopt one of the nation’s most punitive habitual criminal laws, one that mandated a sentence of twenty-five years to life imprisonment for every third conviction.⁸¹ The result is that

75. Joan Petersilia, *From Cell to Society: Who is Returning Home?*, in PRISONER REENTRY AND CRIME IN AMERICA, *supra* note 57, at 15, 21. There is widespread agreement that the increased number of drug prosecutions and the stiff penalties imposed under the controlled substances laws are the cause of most of the post-1980 increase in imprisonment. *See id.*; CLEAR, *supra* note 53, at 36.

76. LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATION IN THE UNITED STATES 7 (2011); Rosenzweig, *supra* note 20, at 101.

77. *See, e.g.*, ZIMRING, HAWKINS & KAMIN, *supra* note 56. Federal law imposes mandatory minimum sentences for various drug possession offenses. More than one quarter of federal court convictions in Fiscal Year 2010 were for crimes with a mandatory minimum penalty, and thirty-two percent of that number were for drug offenses. U.S. SENT’G COMM’N, REPORT TO CONGRESS ON MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM app. tbls. D-3, D-4 (2011). For a discussion of the effect of those laws on corrections, *see id.* at xxv–xlix.

78. *See, e.g.*, NORVAL MORRIS, THE HABITUAL CRIMINAL (1951); ZIMRING, HAWKINS & KAMIN, *supra* note 56, at ix, 4, 17. The Supreme Court consistently rejected constitutional challenges to such laws long ago. *See, e.g.*, Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895). The renaissance of recidivist laws in the late twentieth century led offenders to renew constitutional challenges to those statutes, and, once again, they uniformly lost. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003) (rejecting challenge resting on the Eighth Amendment Cruel and Unusual Punishments Clause).

79. Recidivist laws serve as an effective tool for “persuading” a two-time loser to plead guilty to a lesser charge, rather than face having the book thrown at him. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978).

80. ZIMRING, HAWKINS & KAMIN, *supra* note 56, at 4–6, 12–16. Historically, criminal justice policy was made in a “top-down” manner because elected officials and the public trusted the judgment of professionals in the system. When the public lost trust in criminal justice professionals, those professionals lost the support of political and social elites. Populism and policy-by-plebiscite took over. *See* GARLAND, *supra* note 36, at 13–14, 47–51; NICOLA LACEY, THE PRISONER’S DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES 3–54 (2008).

81. *See, e.g.*, Ewing v. California, 538 U.S. 11, 15–17 (2003); CAL. PENAL CODE §§ 667, 1170.12 (West 2012). A defendant with one prior “serious” or “violent” felony conviction receives twice the term of imprisonment otherwise provided for a second felony conviction. §§ 667(e)(1), 1170.12(c)(1). A defendant with two or more prior “serious” or “violent” felony convictions must receive “an

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California now has a bumper crop of prisoners sentenced under its “three strikes” law, which has led to extreme prison overcrowding.⁸² Reviewing the history and effect of California’s law, some experts have argued that, by and large, the three-strikes law is inefficient because it confines far too many repeat offenders than necessary to incapacitate serious offenders and preserve scarce correctional resources.⁸³

An increase in the size of the prison population has meant a corresponding increase in expenses.⁸⁴ The cost of operating the nation’s prisons increased from \$5 billion in 1976 to \$9 billion in 1982 and then jumped to \$31 billion in 2002.⁸⁵ That number escalates to almost \$50–60 billion by including jail, probation, and parole expenditures.⁸⁶ In 1980, the average annual cost for confining an offender in federal prison was \$13,841⁸⁷ and in a state prison was

indeterminate term of life imprisonment” with a twenty-five-year minimum period of confinement. §§ 667(e)(2)(A), 1170.12(c)(2)(A).

82. See, e.g., Brown v. Plata, 131 S. Ct. 1910, 1924 (2011) (“The degree of overcrowding in California’s prisons is exceptional. California’s prisons are designed to house a population just under 80,000, but at the time of the three-judge court’s decision the population was almost double that. The State’s prisons had operated at around 200% of design capacity at least 11 years.”).

83. See ZIMRING, HAWKINS & KAMIN, *supra* note 56, at 4.

Norval Morris’s study of offenders sentenced under the English habitual-felon statute showed that most of these certified habitual felons usually committed crimes of minor social consequences and were distinguished from other criminals principally by their vulnerability to swift detection. Life terms for many of these petty thieves seemed like a progressive tax on stupidity.

Id. In November 2012, the California electorate voted to modify the three-strikes law so that life imprisonment is mandated only if the third crime is “serious or violent.” See Edward Ngai, *On the ballot: Calif. Amends three-strike law, upholds death penalty*, THE STANFORD DAILY (Nov. 7, 2012), <http://www.stanforddaily.com/2012/11/07/ca-ballot-propositions-face-mixed-reception/>.

84. See ACLU, *AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY* (2012), http://www.aclu.org/files/assets/elderlyprisonreport_20120613_1.pdf.

According to data from the Bureau of Justice Statistics, state and local criminal justice spending (including law enforcement, criminal prosecution, courts, and corrections) rose from approximately \$32.6 billion to \$186.2 billion between 1982 and 2006. Analysis of state budget trends by the National Association of State Budget Officers (NASBO) shows overall state spending on all categories of programs (including corrections, law enforcement and criminal justice programs) continued to rise until 2009, when the recent recession began to affect states’ budgets. Similarly, federal justice system expenditures steadily increased from \$4.5 billion in 1982 to \$41 billion in 2006. The Department of Justice’s outlays rose from approximately \$2.3 billion in 1982 to approximately \$30 billion today.

DOJ Letter, *supra* note 50, at 2 (footnotes omitted).

85. See 42 U.S.C. § 17501(b)(4) (2006); H.R. REP. NO. 110-140, at 2 (2007); PETERSILIA, *supra* note 6, at 4. The cost of confining elderly prisoners, roughly \$69,000 per year, exceeds by a factor of three the average annual cost for younger inmates, \$22,000, yet the risk of recidivism for most elderly prisoners is quite small. PETERSILIA, *supra* note 6, at 18, 24.

86. PETERSILIA, *supra* note 6, at 4

87. In 1980, the federal inmate population was 24,640, and federal prison operating expenditures were \$319,274,000. See U.S. GEN. ACCOUNTING OFFICE, *FEDERAL AND STATE PRISONS: INMATE POPULATIONS, COSTS, AND PROJECTION MODELS* 24, 30, 31 (1996) <http://www.gao.gov/archive/1997/gg97015.pdf> [hereinafter GAO: FEDERAL AND STATE PRISONS].

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between \$6,917 and \$10,814.⁸⁸ By 2010, the average annual cost for each federal prisoner was \$28,284, while the cost was even higher for state inmates, \$31,286.⁸⁹ To confine an elderly prisoner—i.e., one 55 or older—it costs \$66,000 each year, potentially rising to \$104,000 for the severely ill.⁹⁰ The corrections budget can crowd out the other funds necessary to operate the criminal justice system.⁹¹ It therefore is not surprising that “[c]orrections spending, as a share of state budgets, rose faster than health care, education, and

88. The GAO reported that there were 305,458 state prisoners in 1980. *See* GAO: FEDERAL AND STATE PRISONS, *supra* note 87. With a total operating cost in 1980 of \$2,787,369,000 and capital costs of \$515,854,000, *see* U.S. CENSUS BUREAU, *supra* note 74, at 30–31, the per prisoner cost would be \$10,814 per year under the GAO’s headcount.

89. *Newly Available: Costs of Incarceration and Supervision in FY 2010, U.S. Courts*, THIRD BRANCH NEWS (June 23, 2011), http://www.uscourts.gov/News/NewsView/11-06-23/Newly_Available_Costs_of_Incarceration_and_Supervision_in_FY_2010.aspx; *see* CHRISTIAN HENRICHSON & RUTH DELANEY, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9–10, 14 n.9 (2012) (citing data from 40 states). That 2012 Vera Institute study found that per inmate costs ranged from \$14,603 in Kentucky to \$60,076 in New York. *See* HENRICHSON & DELANEY, *supra*, at 9–10.

90. *See, e.g.*, CARRIE ABNER, COUNCIL OF STATE GOV’TS, GRAYING PRISONS: STATES FACE CHALLENGES OF AN AGING INMATE POPULATION 10 (2006), <http://www.csg.org/knowledgecenter/docs/sn0611GrayingPrisons.pdf>; INIMAI CHETIAR, KEEPING LOW-RISK ELDERLY PRISONERS BEHIND BARS IS A BUDGET BUSTER (2012), available at http://www.americanprogress.org/issues/2012/06/elderly_prisoner.html; Petersilia, *supra* note 75, at 18; PETERSILIA, *supra* note 6, at 24.

91. *See, e.g.*, FRANK R. WOLF, COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS BILL, 2012, H.R. REP. NO. 112-169, at 58 (2011);

The [Appropriations] Committee believes it is imperative that experts at BOP and outside the government fully understand the drivers of population, costs and recidivism so that overcrowding, costs and recidivism can be addressed. The Committee encourages BOP to undertake a comprehensive analysis of its policies and determine the reforms and best practices that will help reduce spending and recidivism.

Id.;

The [Appropriations] Committee must provide an increase of more than \$350,000,000 above fiscal year 2011 to safely guard the nation’s growing Federal prison inmate and detention populations. While these activities are not considered mandatory for budget purposes, they are not truly discretionary in that the Committee has an obligation to adequately fund them regardless of budgetary constraints. Given the limited flexibility of the Federal prison and detention budget requests, and unless the inmate populations experience unforeseen decreases, the day approaches fast when Federal prisons and detention demands swallow the Justice Department’s budgetary resources Given these urgent challenges within current budgetary constraints, the Committee was forced to reduce activities for which it has historically provided increases. The Committee’s recommendation regrettably cuts nearly all other Federal law enforcement agencies—including the Federal Bureau of Investigation [FBI], Drug Enforcement Administration [DEA], Bureau of Alcohol, Tobacco, Firearms and Explosives [ATF], U.S. Marshals Service, and U.S. Attorneys—by up to 2 percent from fiscal year 2011 enacted levels. State and local grant programs are cut by over \$482,000,000, or by 17 percent, compared with fiscal year 2011 levels. Over 20 grant programs are eliminated and the surviving programs face substantial reductions [T]he Committee is gravely concerned that the current upward trend in prison inmate population is unsustainable and, if unchecked, will eventually engulf the Justice Department’s budgetary resources.

BARBARA MIKULSKI, DEPARTMENT OF COMMERCE AND JUSTICE, AND SCIENCE, AND RELATED AGENCIES APPROPRIATIONS BILL, 2012, S. REP. NO. 112-78, at 62 (2011).

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natural resources spending from 1986 to 2001.”⁹²

A significant part of that increase is due to inmate medical care,⁹³ which has become particularly expensive.⁹⁴ Health care now constitutes approximately 20 percent of the correctional budget in states nationwide, with the percentage in California being 26 percent.⁹⁵ Studies conducted from 1997–2001 show that U.S. spending on health care for prisoners rose 27 percent to approximately \$3.5 billion.⁹⁶ From 1992 to 2000, the simple daily cost of health care to the incarcerated rose a steep 31.5 percent.⁹⁷

More recent data shows that the trend of skyrocketing health care costs has not abated. For example, Wisconsin conducted a ten-year study from 1999 to

92. KIRCHHOFF, *supra* note 9, at 9 (footnote omitted); see HENRICHSON & DELANEY, *supra* note 89, at 2 (“States’ corrections spending—including prisons as well as probation and parole—has nearly quadrupled over the past two decades, making it the fastest growing budget item after Medicaid.”) (footnote omitted).

93. The legal standard is ordinarily phrased in the negative—that is, the government cannot be deliberately indifferent to a prisoner’s legitimate medical needs. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Estelle v. Gamble*, 429 U.S. 97 (1977). Prisoners cannot demand that they receive the same medical care that wealthy private parties could afford. *See, e.g.*, *United States v. DeCologero*, 821 F.2d 39, 42 (1st Cir. 1987) (“Persons forfeit a variety of freedoms in consequence of proven criminality. And, though it is plain that an inmate deserves adequate medical care, he cannot insist that his institutional host provide him with the most sophisticated care that money can buy.”). The courts generally have held that the federal prison system can provide even seriously ill prisoners with the medical care that they need. *See United States v. Hilton*, 946 F.2d 955 (1st Cir. 1991); *United States v. Studley*, 907 F.2d 254 (1st Cir. 1990); *United States v. Depew*, 751 F. Supp. 1195, 1199 (E.D. Va. 1990); Marjorie Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 813–14 (1994).

94. *See* ABNER, *supra* note 90;

The financial burden for states in providing adequate health care for older prisoners is staggering. In 1997, the Texas Criminal Justice Policy Council reported that health care for elderly inmates ran \$14.80 per day, nearly three times the health care costs for younger prisoners. While a younger prisoner costs approximately \$22,000 to house annually, states pay an average of \$67,000 per year for older inmates.

Id.

Security problems reinforce and augment those increased medical costs. Weak or elderly prisoners are more susceptible to victimization by younger inmates. Even if that does not occur, the fear of assault increases the stress felt by elderly prisoners, which furthers weakens their medical condition. *Id.* One way to lessen the risk of harm to elderly prisoners is to house them in separate facilities, but that has its own costs, both direct (e.g., construction and maintenance costs) and indirect (e.g., salary and fringe benefit costs for additional prison guards).

95. *See California’s Annual Costs to Incarcerate an Inmate in Prison*, CAL. LEG. ANALYST’S OFFICE, http://www.lao.ca.gov/laoapp/laomenus/sections/crim_justice/6_cj_inmatecost.aspx?catid=3, (last visited Jan. 10, 2013); HENRICHSON & DELANEY, *supra* note 89.

96. NAT’L INST. OF CORR., U.S. DEP’T. OF JUSTICE, CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES 11 (2004), <http://static.nicic.gov/Library/018735.pdf>.

97. *Id.*

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2009 and found that the state corrections budget leapt a whopping 71 percent.⁹⁸ From data collected and current statistics, the Wisconsin Department of Corrections predicts a \$2.5 billion increase in cost to deal with the looming population issues.⁹⁹ A study considering data from 1982 to 2006 shows the same increase seen in more recent studies.¹⁰⁰ The study found a 418 percent increase in the cost of caring for prisoners 55 or older, with total spending rising 660 percent.¹⁰¹ Those cost increases also are greatest among elderly prisoners. The average cost of an elderly or ill prisoner is triple the costs of health care for a younger prisoner.¹⁰² In sum, the increase in arrests and long prison terms for drug traffickers, violent felons, and habitual criminals means that the number of elderly, infirm, and dying prisoners will increase, and, with it, the cost of their care.¹⁰³

B. The Benefits of Large-Scale Incarceration

Determining the cost of our incapacitation-based policy is relatively easy; just tally up the bills.¹⁰⁴ When it comes to the benefits of this policy, we want to know whether the increase in the prison population has led to a drop in crime; if so, by how much; and, if so, of what types. Measuring those benefits is a difficult undertaking.

One reason is that multiple factors are involved.¹⁰⁵ Legislatures increased

98. Gregory J. O'Meara, *Compassion and the Public Interest: Wisconsin's New Compassionate Release Legislation*, 23 FED. SENT'G REP. 33, 33 (2010). Not only did overall cost increase, but the total population in Wisconsin prisons rose fourteen percent in the seven years between 2000 and 2007. *Id.*

99. *Id.*

100. Brie A. Williams, *et al.*, *Balancing Punishment and Compassion for Seriously Ill Prisoners*, 155 ANNALS OF INTERNAL MED. 122, 123 (2011).

101. *Id.*

102. *Id.*

103. See ABNER, *supra* note 90, at 9 ("Elderly inmates represent the fastest growing segment of federal and state prisoners. . . . Experts say the growth of the elder inmate population is expected to continue."); *id.* at 10 (number of federal and state inmates fifty or more years old has increased from 41,486 in 1992 to 113,358 in 2001); *id.* at 11 (the daily average health care cost for each federal and state prisoner has increased from \$5.04 in 1991 to \$7.39 in 2000); INST. OF CORRECTIONS, *supra* note 96, at 11 (charting escalating average health care costs per inmate from 1991–2000).

104. Actually, it's not that easy. Some costs are immediate (e.g., food for a prisoner); some are intermediate-range (e.g., a parolee's inability to find a job); some are long-term (e.g., the cost of re-imprisoning a parolee who returns to drug dealing because he cannot find legitimate work); and others are very long term (e.g., the cost of imprisoning the parolee's son, who turned to crime due to his father's absence). Those are just the vertical costs—viz., the costs to the state from dealing with one person. The next step is to multiply those costs by the total number of prisoners. The final step is to measure the horizontal costs—viz., the costs that imprisoning one person inflicts on third parties, such as the cheapening of the quality of life in a neighborhood. The calculations involved are far from easy because of the line-drawing problem and double-counting risks involved (viz., attributing harms to multiple offenders). Somewhere in that calculus belongs the cost of human suffering by prisoners, their families, and anyone else who cares about them. It is difficult to put a dollar value on human misery.

105. See, e.g., Alfred Blumstein & Joel Wallman, *The Recent Rise and Fall of American Violence*, in THE CRIME DROP IN AMERICA 1062 (Alfred Blumstein & Joel Wallman, eds., rev. ed. 2006); FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 197–99 (2008).

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sentences, but they also increased the size of police departments,¹⁰⁶ which may have contributed to (or overshadowed) the effect of sentence enhancements on the crime rate.¹⁰⁷ Changes in the strategies the police use to fight crime also are pertinent to this inquiry.¹⁰⁸ And to some extent, the inquiry is problematic because it requires identifying, counting, and classifying non-events: crimes that did not occur to persons not victimized.

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Nonetheless, penologists seem to agree that our incapacitation policy has reduced the crime rate¹⁰⁹ they just disagree over how much.¹¹⁰ But they also

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106. Following the enactment of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, the federal government created the Office of Community Oriented Policing Services, colloquially known as the COPS Program, which was designed to help underwrite the cost of adding 100,000 new police officers nationwide. State and local police departments increased the number of officers by 50,000–60,000 in the 1990s, roughly a 14% increase. New York City alone increased the number of police officers by 33–45%. See, e.g., Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPS. 163, 173 (2004); ZIMRING, *supra* note 5, at 149–52; *COPS History (1994–The Present)*, CMTY. ORIENTED POLICING SERVS. OFFICE, <http://www.cops.usdoj.gov/Default.asp?Item=44> (last visited Jan. 10, 2013).

107. As Steven Levitt has explained:

The increase in police can thus explain somewhere between one-fifth and one-tenth of the overall decline in crime. Whether this investment in police has been a cost-effective approach to reducing crime is a different question. As noted above, annual expenditures on police are approximately \$60 billion, so the cost of the 14 percent increase in police (assuming marginal cost is equal to average cost, which is likely to be a reasonable approximation) is \$8.4 billion a year. The benefits of crime reduction are more difficult to quantify. The most commonly used estimates of the cost of crime to victims . . . place[] the costs of crime at roughly \$500 billion annually in the early 1990s. Given the sharp declines in crime, today’s estimates would likely be substantially lower—perhaps \$400 billion in current dollars. If the increase in police reduced crime by 5–6 percent, then the corresponding benefit of crime reduction is \$20–25 billion, well above the estimated cost. Thus, at least to a crude, first approximation, the investment in police appears to have been attractive from a cost-benefit perspective.

Levitt, *supra* note 6, at 177; see also *id.* at 173, 176–77.

108. For example, in the 1990s, New York City made several important changes to the tactics and management of its police department. The department adopted the “Broken Windows” or “Order Maintenance” theory of policing, which uses aggressive street patrol and relies on misdemeanor arrests to improve the quality of community life and to deter more serious crimes. The department also used the data acquired from those arrests to create and manage police assignment. See, e.g., WILLIAM BRATTON, *THE TURNAROUND* (1998); FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE* (2011); ZIMRING, *supra* note 5, at 149–52. Other strategies were so-called “Community Policing,” which sought to decentralize decision-making and form partnerships with communities and their leaders, “Focused Policing,” which concentrated police efforts on repeat offenders or particular crimes, and “Problem Oriented Policing,” which sought to identify and respond to problems that lead to specific offenses. See John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA*, *supra* note 105, at 217.

109. Compare Petersilia, *supra* note 8, at 52 (imprisonment accounted for about 25% of the 1990s crime reduction), with ZIMRING, *supra* note 5, at 55 (“A best guess of the impact of post-1990 changes in incarceration rates on post-1990 declines in the crime rate would range from 10% of the decline at the low end to 27% of the decline at the high end . . .”), and William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA*, *supra* note 105, at 123 (27%); Levitt, *supra* note 6, at 173, 177; CULLEN & JONSON, *supra* note 49, at 121–26 (discussing studies); John J. Dilulio, Jr., *Arresting Idea*, 74 POL’Y REV. 12 (1995); John J. Donohue, III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL.

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point out that someday we will reach (some say, already have reached) the point of diminishing returns. Once there, greater use of imprisonment squanders premium tax dollars.¹¹¹ Even worse, it can *increase* the crime rate.¹¹² The incarceration of large numbers of (principally) male adults decimates a neighborhood. It disrupts family and social life, as fathers carom back and forth between prison and the community, or leave it for extended periods, and it weakens the informal social controls that are a community's first line of defense against illegal or unruly behavior.¹¹³ Knowing when we have approached or reached that tipping point, needless to say, is a challenge. But no one seems to doubt that it exists.

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STUD. 1 (1998); MARK A.R. KLEIMAN, *WHEN BRUTE FORCE FAILS* 14–15, 80–85 (2009). Levitt is more confident of the relationship:

[T]he increase in incarceration over the 1990s can account for a reduction in crime of approximately 12 percent for [homicide and violent crime] and 8 percent for property crime, or about one-third of the observed decline in crime. Annual expenditures on incarceration total roughly \$50 billion annually. Combining this spending figure with the cost of crime to victims and elasticities noted above, expenditures on prisons appear to have benefits that outweigh the direct costs of housing prisoners, subject to three important caveats. First, a dollar spent on prisons yields an estimated crime reduction that is 20 percent less than a dollar spent on police, suggesting that on the margin, substitution toward increased police might be the efficient policy. Second, it seems quite plausible that substantial indirect costs are associated with the current scale of imprisonment, such as the adverse societal implications of imprisoning such a large fraction of young African American males. Finally, given the wide divergence in the frequency and severity of offending across criminals, sharply declining marginal benefits of incarceration are a possibility. In other words, the two-millionth criminal imprisoned is likely to impose a much smaller crime burden on society than the first prisoner. Although the elasticity of crime with respect to imprisonment builds in some declining marginal returns, the actual drop off may be much greater. We do not have good evidence on this point. These caveats suggest that further increases in imprisonment may be less attractive than the naïve cost benefit analysis would suggest.

Levitt, *supra* note 6, at 178–79.

110. Criminologists have offered several reasons why the effect of incapacitation is not as large as hoped: (1) offenders are not rational cost-benefit actors and irrationally discount the likelihood and severity of future punishment; (2) offenders often work in teams, which survive the imprisonment of any member; (3) new offenders replace imprisoned ones; (4) once released prisoners return to their old ways in part due to the limited market opportunities open to them; (5) most crimes are committed by offenders in the teens and early twenties, before the criminal justice system treats them as serious felons; (6) most prisoners are not caught and incarcerated until they are on the downslope of the criminal careers; (7) only a small cohort of criminals commit most offenses, so the expansion of the prison population largely confines the wrong offenders; and (8) labelling a person as an “ex-con” has a criminogenic effect. See CULLEN & JONSON, *supra* note 49, at 120–26; CLEAR, *supra* note 53, at 35–46.

111. See, e.g., CULLEN & JONSON, *supra* note 49, at 125–26; KLEIMAN, *supra* note 9, at 15; ZIMRING, *supra* note 105, at 51–52; FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION* 51 (1995).

112. See, e.g., CLEAR, *supra* note 53, at 125–26.

113. *Id.*; Tierney, *supra* note 15 (“Some social scientists argue that the incarceration rate is now so high that the net effect is ‘crimogenic’: creating more crime over the long term by harming the social fabric in communities and permanently damaging the economic prospects of prisoners as well as their families.”); see also *infra* text accompanying notes 134–40.

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C. The Intended and Unintended Consequences of the Punitive Approach to Sentencing

There always are unintended consequences of legal and public policy decisions. Sometimes those consequences result from “known unknowns,” other times from “unknown unknowns.”¹¹⁴ Abolition of parole may provide an example of each one.

In the former category was the knowledge that the prison population would increase, even though the amount of that increase may have been uncertain. Also likely in that category was the knowledge that many of the prisoners confined under the new, more punitive philosophy may have aged out of their “crime prone” years, because age and recidivism are inversely related.¹¹⁵ But parole abolition also may have generated “unknown unknowns.” The most ironic example is the fact that fewer ex-prisoners are now subject to post-release supervision than when parole was in effect. In 1977, 88 percent of prisoners released from incarceration were granted discretionary parole, and only 4 percent of prisoners were released because they had “maxed out”—that is, had completed their sentence. By 1999, however, only 24 percent of released inmates were granted discretionary parole, 41 percent were released due to mandatory parole systems, and the number of inmates released because they had maxed out increased to 18 percent.¹¹⁶ The result is that inmates granted discretionary release on parole today are those offenders *least* in need of supervision, whereas prisoners released because they no longer can be confined are those in *greatest* need of supervision. “In the long run no one is more dangerous than a criminal who has no incentive to straighten himself out while in prison and who returns to society without a restructured and supervised release plan.”¹¹⁷ From a public safety perspective, Joan Petersilia has argued that outcome is perverse. In her words, “[a]bolishing parole was a politically expedient way to appease the public which wrongly equated parole with letting inmates out early No-parole systems sound tough but remove a critical gatekeeping role, which can protect victims and communities.”¹¹⁸ Accordingly, “[a]s ironic as it may seem, it is in the interest of public safety that discretionary parole systems should be reinstated.”¹¹⁹

There is no national consensus yet about that conclusion. Academics, penologists, and prison reformers argue that our turn in the 1980s and 1990s toward overly punitive responses to crime could well come back to haunt us. They maintain that we cannot incarcerate ourselves out of crime (which was declining in any event) at a cost in prisoner construction and maintenance, as well as lost

114. See Donald Rumsfeld, U.S. Sec’y of Defense, White House Press Conference, (Feb. 12, 2002), available at <http://www.youtube.com/watch?v=GiPe1OiKQuk&feature=related>.

115. Petersilia, *supra* note 75, at 18.

116. *Id.* at 6, 13.

117. *Id.* at 18.

118. *Id.* at 17–18.

119. See *id.* at 6.

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human capital and accumulated human misery that we are or should be willing to pay.¹²⁰ A summary of their arguments follows.

1. The Criticisms of Reliance on Incapacitation

Many correctional facilities offer different types of programs that could benefit a released prisoner.¹²¹ Funding for those programs often is hard to come by,¹²² however, and there ordinarily are long waiting lists for them.¹²³ A large number of prisoners (albeit, some by their own choice) never participate in any of those programs. Today, on their way out of prison, inmates receive \$25–200 in cash, a bus ticket back to their neighborhood, and (maybe) an additional small sum in the form of a housing voucher.¹²⁴ When they return to the community, they will find legal and practical barriers to reintegration that would challenge someone who is part Horatio Alger and part U.S. Marine.¹²⁵

A felony conviction can serve as a basis for a divorce and loss of parental rights, so prisoners may have no family who wants them back.¹²⁶ Public housing projects may be closed to them by virtue of their conviction.¹²⁷ A large number of prisoners lack a high school diploma or a GED.¹²⁸ Education costs money, and Congress has taken away the few scholarship funds previously available, making the possibility of avoiding reoffending through schooling a dead end.¹²⁹ Every employment application asks if they have been convicted of a crime, and employers won't hire ex-cons because they are seen as untrust-

120. Jeremy Travis maintains that we also do not have a penological theory to substitute for rehabilitation. See TRAVIS, *supra* note 49, at xx. The academy may not yet have a consensus about what is the best theory, but the available objective evidence establishes that we have been relying on an incapacitation approach to punishment for the last thirty years.

121. One author notes that 97% of state and federal correctional facilities have inmate-counselling programs, 90% have drug and alcohol counselling, 80% have secondary education programs, and 54% have vocational training programs. Petersilia, *supra* note 75, at 38–41.

122. CLEAR, *supra* note 53, at 53 (“[E]liminating parole changed the incentive structure for providing rehabilitation programs and eventually became a basis for closing them down”); PETERSILIA, *supra* note 6, at 93 (“[H]istory shows that we have never invested much in prison rehabilitation.”).

123. Petersilia, *supra* note 75, at 41.

124. See Christine M. Hummert, *Middle of the Road*, 32 J. LEGAL MED. 295, 295 (2011); PETERSILIA, *supra* note 6, at 192–93.

125. See PETERSILIA, *supra* note 6, at 105–37 (discussing the legal and practical barriers faced by released offenders); CLEAR, *supra* note 53, at 58–59.

126. See PETERSILIA, *supra* note 6, at 126–27.

127. See Anti-Drug Abuse Act of 1988, § 5122, 102 Stat. 4301 (codified at 42 U.S.C. § 1437d(l)(6)) (2006) (“Each public housing agency shall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy”); U.S. Dep’t of Housing and Urban Dev. v. Rucker, 535 U.S. 125, 125 (2002).

128. Petersilia, *supra* note 75, at 24.

129. PETERSILIA, *supra* note 6, at 33–34. One-third of state prisoners and 26% of federal prisoners were unemployed in the month before they committed the crime that lead to their incarceration. Petersilia, *supra* note 75, at 26.

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Fn130 worthy.¹³⁰ The parolee who tries to lie his way out of that question will find that employers often can check an applicant's criminal history on the Internet and that a parole officer can "violate" him for fibbing on the form.¹³¹ And many sources of welfare have been placed out of bounds, on the theory that law-abiding citizens should not be made to pay for the upkeep of outlaws.¹³² Left to live on the streets, in a shelter,¹³³ or on the couch of whatever former friend or associate will put up with him, forced to choose between begging for handouts and returning to crime, and having to decide whether to accept being thrown away by society or taking out his anger on the very system that he sees as oppressing him, a parolee may conclude (or rationalize) that he has no second chance, no alternative, and so try to get by with the new "skills" that he learned and associates that he made in Fagin's School for Pickpockets.¹³⁴

Fn134 Only a fool would believe that there would be no adverse consequences from piling on penalty after penalty atop the incarceration already punishing an offender. The unavoidable result is "death by a thousand little cuts."¹³⁵ Even if incapacitation of offenders reduces the crime rate for most types of offenses,¹³⁶ and there is a dispute over the extent to which it does,¹³⁷ the long term effect of large-scale incarceration and a confinement-parole-confinement cycle can be quite harmful. Actions have consequences, intended and unintended, on identified and unidentified targets, such as the children of those we imprison. It is unlikely that advocates for increasingly punitive criminal sanctions anticipated the potentially crippling intergenerational effect that such penalties could have

130. See Harry J. Holzer, Stephen Raphael & Michael A. Stoll, *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and their Determinants*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 207, 228–29, 236 (Mary Patillo, David Weiman & Bruce Western eds., 2004); PETERSILIA, *supra* note 6, at 112–20, 127–29. There are some programs that seek to place ex-offenders in jobs that give them a chance to start over. The Texas RIO (Reintegration of Offenders) Program, the New York City Center for Employment Opportunities, the Chicago Safer Foundation, and the Seattle Pioneer Human Services project are some of those programs. But there are not many programs, and the ones that exist lack capacity for everyone who needs assistance. *Id.* at 196–97.

131. See CLEAR, *supra* note 53, at 53; PETERSILIA, *supra* note 6, at 106–12.

132. See PETERSILIA, *supra* note 6, at 124–26.

133. See CLEAR, *supra* note 53, at 73.

134. See CHARLES DICKENS, *OLIVER TWIST* (1838). "[P]rison is, in the words of a British Home Secretary, 'an expensive way of making bad people worse.'" Shadd Maruna & Hans Toch, *The Impact of Imprisonment on the Desistance Process*, in *PRISONER REENTRY AND CRIME IN AMERICA*, *supra* note 57, at 139, 150; see also *id.* at 152–56 (discussing the theories that prisons serve as "schools of crime" and are criminogenic); CLEAR, *supra* note 53, at 47; Joan Petersilia, *Community Corrections*, in *CRIME: PUBLIC POLICIES FOR CRIME CONTROL*, *supra* note 49, at 483, 495 ("[B]ecause prisons are violent and dangerous places, new inmates seek protection and connections. Many find both in gangs. Inevitably, gang loyalties are exported to the neighborhoods when inmates are released."); Petersilia, *supra* note 75, at 42. Even in the 19th century, prisons were subject to the charge that they were "seminaries for vice." ROTHMAN, *supra* note 35, at 251.

135. CLEAR, *supra* note 53, at 94.

136. Some have argued that there is an inexhaustible supply of individuals willing to engage in small-scale drug sales in impoverished communities. See *id.* at 54–55.

137. See *supra* notes 107–10 and accompanying text.

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on the children of offenders. Those effects, however, are real and can be devastating.¹³⁸ A healthy family is the foundation upon which any ordered society rests.¹³⁹ Children forced to grow up without one or both parents, and sometimes without entire cohorts of positive adult community role models, are more likely to pursue crime themselves, thereby perpetuating this evil cycle.¹⁴⁰

In sum, consider these observations from Jeremy Travis, President of the John Jay College of Criminal Justice in New York City. They summarize well the arguments against heavy reliance on incapacitation:

We should try to imagine the impact that our incarceration policies will have, over the next generation, on the communities in which incarceration rates are highest—on family life, adolescent development, labor markets, family stability, intergenerational transfer of wealth, voting patterns, and civic participation.

We know the answers to some of these questions, and the answers are deeply disturbing. We know that time in prison reduces one’s lifetime earnings by 10–30% . . . so our rapid expansion of prisons has depressed the earnings power of whole neighborhoods where most of the men have done time. We know that prison places substantial financial burdens on extended families—they must make up for lost income, pay for collect phone calls from prison, and take long trips to prison to visit their family members We know that minority-voting power is diminished, especially in those 10 states that deny felons the right to vote for life. In some of those states, up to a quarter of African-American men cannot vote for the rest of their lives We know that high rates of incarceration result in “gender imbalance” . . . such that in high incarceration neighborhoods there are fewer than 62 men for

138. “Children of incarcerated parents are five times more likely to serve time in prison than are children whose parents are not incarcerated . . . [P]arole [also] certainly impacts the larger community. As a greater number of parolees cycle in and out of inner-city neighborhoods, the social characteristics of those neighborhoods—and their ability to exert informal social controls to reduce crime—diminish.” Petersilia, *supra* note 134, at 494; CLEAR, *supra* note 53, at 510; Jeremy Travis & Christy Visser, *Viewing Crime and Public Safety Through the Reentry Lens*, in PRISONER REENTRY AND CRIME IN AMERICA, *supra* note 57, at 1, 3, 8.

139. As one commentator has explained:

Families are the building blocks of a healthy society, and family functioning is the key ingredient in child development. Adults in the family socialize their children about the normative rules and behavioral expectations of society. Family members connect one another—especially children—to net works of social support that become the foundation for later social capital as adults. Families are the central mechanism of informal social controls to shape behavior. And the interpersonal dynamics of families are the source of later psychological and emotional health (or maladjustment. There is no single institution that carries more importance in the well-being of children than the family, and the prospects for healthy social relations in adulthood rely heavily on the existence of a vibrant family life.

CLEAR, *supra* note 53, at 95.

140. Criminologists refer to this phenomenon as the “Defiance Hypothesis.” It states that an increase in the penalty for crime will cause a corresponding increase in the crime rate if the law is seen as biased or unfair. Persons subject to the law will defy it, not obey it, regardless of the enhanced punishment. *Id.* at 23.

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every 100 women. We don't know the impact of the "gender imbalance" upon dating patterns, family formation, and the male identity. We know that when the rate of incarceration in a community rises above 1.5%, it seems to produce more, not less crime . . . We know that very high rates of arrest and incarceration can make going to prison seem normal and even normative, a rite of passage and a pathway to respect. We know that in high incarceration neighborhoods . . . every year one in eight men between the ages 18 and 45 is arrested and sent to prison or jail . . . Finally, we have every reason to suspect that our criminal justice policies are undermining respect for the law, as we witness the growth of a "stop snitching" culture in communities of color that punishes young people who cooperate with the police.¹⁴¹

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2. The Case for Incapacitation

Defenders of our current incapacitative approach, however, also have a reasonable argument. At the outset, they point out that punishment is necessary if the law is to have any teeth. The criminal law must punish in order to make its threats credible.¹⁴² Rehabilitation is a longstanding rationale for punishment, but it has never been the sole legitimate one.¹⁴³ Retribution, deterrence, education are bona fide justifications,¹⁴⁴ and so, too, is incapacitation.¹⁴⁵ In fact, incapacitation is superior to rehabilitation as a rationale since it does not require unattainable prescience about what an offender will do after release.

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It also is a mistake to say that we never gave rehabilitation a fair shot at success. We tried it for seventy years, and it failed. We need to learn from our mistakes.¹⁴⁶ Indeed, it is the very definition of insanity to continue doing what

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141. Jeremy Travis, *Race, Crime and Justice: A Fresh Look at Old Questions*, Orison S. Marden Lecture delivered to the New York Bar Association (March 19, 2008), http://www.jjay.cuny.edu/extra/speeches/racecrime_justice.pdf.

142. As Oliver Wendell Holmes once wrote: "If I were having a philosophical talk with a man I was going to have hanged . . . I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises." Matthew Haist, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*, 99 J. CRIM. L. & CRIMINOLOGY 789, 797 (2009) (quoting Letter from Oliver Wendell Holmes, Jr., to Harold J. Laski (Dec. 17, 1925), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1925, at 806 (Mark D. Howe ed., 1953)).

143. See, e.g., *Powell v. Texas*, 392 U.S. 514, 530 (1968) (plurality opinion) ("[The] Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects . . .").

144. For discussions of the different justifications for punishment, see *Mistretta v. United States*, 488 U.S. 361, 363-70 (1989) (canvassing the history of federal sentencing law); H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY* 231-35 (1968); WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 23-31 (2d ed. 2010); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 35-70 (1968).

145. See, e.g., *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion) ("[T]he Constitution does not mandate adoption of any one penological theory. A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.") (citations and internal quotation marks omitted).

146. See, e.g., DAVID FARABEE, *RETHINKING REHABILITATION* (2005).

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hasn't worked while hoping for a different outcome.

It also is wrong to claim that punitive responses to crime are feckless or do not serve equally important alternative societal goals. They isolate hooligans, deter future criminal or unruly behavior, protect innocent victims against future crimes, enhance neighborhood quality of life, publicly condemn reprehensible conduct, and mark particularly heinous behavior as out-of-bounds regardless of the cost. If nothing else, incapacitation prevents a proved offender from victimizing innocent parties for some period, and that reduction in crime benefits those people who otherwise would have become crime victims and others in the community who can enjoy an improved quality of life.¹⁴⁷

The idea that incarceration harms the innocent families of inmates is nothing new.¹⁴⁸ It is a conceit to believe that only today do we know the misery involved. Imprisonment always separated offenders from their spouses and children. That distance always created the stress that can lead to divorce and broken families. Those outcomes always have been an unfortunate but unavoidable consequence of incarceration as long as jails have been around, and confinement of convicted offenders has deep roots both in our history¹⁴⁹ and in the ancient world.¹⁵⁰ Indeed, the whole point of imprisonment is to make life uncomfortable in order to deter individuals from winding up there and injuring themselves and their families in the process.¹⁵¹ In short, the contemporary finding that “having one’s parent go to prison is not a positive life experience” for children¹⁵² has been a universally understood fact of life as long as there have been parents, children, and prisons.

Yes, the punishment imposed on offenders endures even after their release. There is no doubt that “going to prison is not good for long-term employment prospects.”¹⁵³ But it is not a new discovery that a person with a felony record, once colloquially known as an “ex-con,” will have a difficult time finding work in a variety of professions.¹⁵⁴ Nor is that a potential employer’s fault. A firm’s failure to conduct a background check on a parolee could expose the company

147. See, e.g., CULLEN & JONSON, *supra* note 49, at 1, 125–26; KIRCHHOFF, *supra* note 9, at 11 (“[E]arly parole policies have backfired in states like Connecticut and Washington after recently released prisoners committed violent crimes when back on the streets.”).

148. Cf. CLEAR, *supra* note 53, at 97 (“[T]he negative psychological, behavioral, and circumstantial impact on children from the removal of a parent for incarceration is similar in form, though not always in degree, to that produced by removal owing to divorce or death.”).

149. One mechanism used by the British Crown to provide inhabitants for the colonies in America was to offer inmates the opportunity to exchange confinement for a fixed period of indentured servitude in America. GOLDFARB & SINGER, *supra* note 6, at 257–58.

150. See Edward M. Peters, *Prison Before the Prison: The Ancient and Medieval Worlds*, in THE OXFORD HISTORY OF THE PRISON, *supra* note 35, at 3 (advancing that the Greeks and Romans used imprisonment).

151. “If the prison does not underbid the slum in human misery, the slum will empty and the prison will fill.” GEORGE BERNARD SHAW, THE CRIME OF IMPRISONMENT 286 (1946).

152. CLEAR, *supra* note 53, at 100.

153. *Id.*

154. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (presidential pardon granted to allow an attorney to resume the practice of law by lifting the disability of having fought for the Confederacy).

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to tort liability if he assaults someone while at work.¹⁵⁵ And do we really expect that schools and day care centers must hire convicted child molesters, or believe that financial institutions act immorally by rejecting applications from embezzlers?

Excluding former prisoners from public housing projects is a harsh rule for them. But it may be the only way to rid such projects of the violence and fear that comes with criminals living in close quarters with innocent families. And it may be necessary to avoid the risk that former inmates could become role models for adolescents in families trying to escape from their predicament.¹⁵⁶

As for drug offenses: a major cause of the increase in imprisonment has come in the area of drug convictions.¹⁵⁷ But it is a mistake to infer from that fact the conclusion that society has made a mistake in pursuing and imprisoning such offenders. Plea bargaining is a ubiquitous part of our criminal justice system today¹⁵⁸—it would be no exaggeration to say that it *is* the criminal justice system today¹⁵⁹—and the offense to which a defendant pleads guilty often is not the crime that he committed. In the case of guilty pleas in drug cases the differences between the offense charged and the offense of conviction could be quite important. A glance at contemporary newspaper headlines shows that

155. Employers who fail to perform criminal background checks of job applicants can be sued, and some have been found liable, for negligence. *See, e.g.*, Harry J. Holzer, Stephen Raphael & Michael A. Stoll, *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in *IMPRISONING AMERICA*, *supra* note 130, at 207, 228–29. Interestingly, the ability of companies to conduct criminal background checks for job applicants has an *adverse* effect on the class of minority applicants *with* felony records, because employers generally will not hire felons, but has a *positive* effect on minority applicants *without* felony records. A company's failure to conduct such an inquiry ironically could reduce the likelihood that a racial minority will be hired. *See, e.g., id.*; Hans A. von Spakowsky, *The Dangerous Impact of Barring Criminal Background Checks: Congress Needs to Overrule the EEOC's New Employment 'Guidelines.'* THE HERITAGE FOUND. 1 (May 31, 2012), https://vo.heritage.org/2012/pdf/DanaInfo=thf_media.s3.amazonaws.com+lm81.pdf.

156. Consider this story:

In the face of community disruptions, some families isolate themselves from neighbours. In a series of interviews in the South Bronx, Andres Rengifo has observed that many residents seek to withdraw from their impoverished neighborhoods. One housing project resident, a single mother with four children (one of whom was attending Yale University and two of whom were in the prestigious Bronx High School of Science public school) said that although she had lived in the projects for seven years, “this place is a dump. I don’t talk to anyone. I don’t know anyone. That’s how we made it here.”

CLEAR, *supra* note 53, at 103 (internal citation omitted).

157. *See, e.g., supra* note 75 and accompanying text; CLEAR, *supra* note 53, at 54–55; KIRCHHOFF, *supra* note 9, at 15; BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 45–48 (2006).

158. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).

159. *See id.* (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992) (“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea-bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.”)); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

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many drug dealers are extremely violent¹⁶⁰; they terrorize local communities¹⁶¹ and innocent third parties can suffer as a result.¹⁶² If it is easier to prosecute drug offenders for possession crimes, or to threaten to use murder or racketeering charges in order to persuade an offender to plead guilty to a simple possession crime, prosecutors will choose that option if the sentence is satisfactory. We therefore should not be surprised to see a large number of drug offenders in prison on guilty pleas to possession counts. On the contrary, we should expect to see that result often.

Defenders of the status quo also will point to the need for severe punishments in order to protect innocent third parties. Crime deterred is harm that they don't suffer, and the less crime and personal suffering there is in the neighborhood, the more enjoyable community life will be. Here, the multiplier effect noted above stemming from the imprisonment of individuals—viz., imprisonment injures the families, friends, and neighbors of inmates—comes out in favor of enforcing the law. After all, unless a neighborhood is an outlaw hideout like the Hole-in-the-Wall, there will be far more residents who are victims of crime than perpetrators.¹⁶³ Enforcement of the criminal law protects them and is an essen-

160. See, e.g., Howard Campbell, *Jamaican drug lord sentenced in NY to 23 years*, ASSOC. PRESS (June 8, 2012), <http://bigstory.ap.org/article/jamaican-drug-lord-sentenced-ny-23-years> (“Most startling was his account of how Coke ordered his men to kill a deadbeat drug dealer nicknamed “Tall Man” by tying him up and dismembering him with a chain saw.”); Jennifer Peltz, *Ramarley Graham’s brother convicted in gun case*, ABC LOCAL (June 19, 2012), http://abclocal.go.com/wabc/story?section=news/local/new_york&id=8708044. (“Three months before Ramarley Graham was shot in his Bronx apartment by an officer who said he thought Graham was reaching for a gun, his twin half-brothers Hodean and Kadean Graham were charged with forming part of a destructive gang of gun-toting toughs in central Harlem.”).

161. See, e.g., Aaron Edwards, *Block in East Harlem Celebrates Defeat of Drug Gang*, N.Y. TIMES (June 24, 2012), <http://www.nytimes.com/2012/06/25/nyregion/east-harlem-party-celebrates-drug-gangs-defeat.html> (article about a Harlem community that was dominated by a phencyclidine (PCP) drug ring until a sting operation; quotes from residents about how they didn’t feel safe with the gang there); Ray Rivera, *In Newburgh, Gangs and Violence Reign*, N.Y. TIMES (May 11, 2010), <http://www.nytimes.com/2010/05/12/nyregion/12newburgh.html?pagewanted=all> (article about a community, an hour north of New York City, that has been dominated by drug and gang related violence).

162. See, e.g., Shoshanna Walter, *Behind Oakland Toddler’s Death, a Drug Dealer’s Story*, N.Y. TIMES (Sept. 9, 2011), <http://www.nytimes.com/2011/09/09/us/09boakland.html?pagewanted=all> (“The shooting might have been dismissed as another episode of drug-related violence, except that one bullet also struck 3-year-old Carlos Nava in the neck. He bled to death on the sidewalk”). Some things don’t change. See, e.g., Arnold H. Lubasch, *12 Indicted On Violence In Drug Ring*, N.Y. TIMES (Jan. 24, 1992), <http://www.nytimes.com/1992/01/24/nyregion/12-indicted-on-violence-in-drug-ring.html> (drug dealers terrorized local area).

163. See, e.g., WESTERN, *supra* note 157, at 11–12 (“Even at the height of the prison boom, in the early 2000s, less than 1% of the U.S. population was behind bars. These tiny incarceration rates should not be surprising: prisons and jails are criminal justice institutions. Their constituents are the small number of criminals who break the law, not the vast majority of law abiding citizens.”). The most famous proof of that proposition is the study by Marvin Wolfgang, Robert Figlio, and Thorsten Sellin concluding that a very small proportion of people commit a large percentage of crime, especially serious crimes. See MARVIN WOLFGANG, ROBERT FIGLIO, & THORSTEN SELLIN, *DELINQUENCY IN A BIRTH COHORT* (1972); see generally CULLEN & JONSON, *supra* note 49, at 111–12; WILSON, *supra* note 51, at 224.

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Fn164 tial ingredient of an ordered society.¹⁶⁴

A troubling issue for the criminal justice system is the large number of racial minorities imprisoned from poor minority communities. The law enforcement policies that have created this situation, however, are designed and carried out, not as part of a racist plot, but to improve the lot of the innocent members of the very same communities.¹⁶⁵

[D]espite the widely held belief to the contrary, blacks are not singled out for stricter or more frequent prosecution. Nor do they receive longer sentences once criminal history and other sentencing factors are taken into account. In short, for ordinary violent and property crimes, the answer to the question, “Is racial bias in the criminal justice system the principal reason that proportionally so many more blacks than white are in prison,” is no.¹⁶⁶

164. See, e.g., CLEAR, *supra* note 53, at 83–84 (informal social controls are more powerful than formalized regulation via the criminal law); WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990). Supporters of the “Broken Windows” theory of policing—viz., the theory that aggressive police enforcement of low-level street crimes both reduces the crime rate and enhances public safety—recognize the importance to a community of both the fact and perception of physical safety. See, e.g., George L. Kelling, *How New York Became Safe: The Full Story*, CITY J. (July 17, 2009), www.city-journal.org/2009/nytom_ny-crime-decline.html; GEORGE L. KELLING, “BROKEN WINDOWS” AND POLICE DISCRETION (1999); GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER & REDUCING CRIME IN OUR COMMUNITIES* (1996); George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/>; Kees Keizer, Siegwart Lindenberg & Linda Steg, *The Spreading of Disorder*, 322 SCIENCE 1681 (2008).

165. Petersilia, *supra* note 75, at 20.

There are a number of reasons for the overrepresentation of racial minorities in prison, including overt discrimination, policies that have different racial effects, and racial differences in committing the kinds of crime that lead to imprisonment. However measured, rates of criminal offending among black Americans for many crime categories are much higher than comparable rates of offending among whites Especially for the crimes of homicide and armed robbery, black rates of offending have been 8 and 10 times the white rate Blumstein . . . found that, except for drug crimes and some property crimes, differential black imprisonment rates are explained almost entirely by differential rates of offending.

Id.

166. AMY WAX, *RACE, WRONGS, AND REMEDIES: GROUP JUSTICE IN THE 21ST CENTURY* 91 (2009); see KLEIMAN, *supra* note 9, at 22 (describing the “[c]rime to job loss to poverty to crime . . . positive feedback loop” found in “high-crime . . . low-opportunity neighborhoods”). The type of offense, however, is relevant to this issue:

Several studies have shown that blacks are roughly seven times more likely to be imprisoned for murder than white men, but are also seven times more likely to be arrested for murder and to be murdered than whites. High rates of homicide among black men fully explain the parallel high rates of imprisonment for murder. However, for less serious offenses, race differences are not well explained by high crime rates. Black men are much more likely than whites to be arrested for a drug offense, and to go to prison if arrested, even though they are no more likely to use drugs than whites. Criminologists estimate that about 80 percent of the black-white difference in imprisonment rates is due simply to the high involvement of black men in crime. This number has likely declined with growth in the share of drug offenders in prison.

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Even in the case of drug offenses, the racial disparity is not due to racist law enforcement ideology, but to the relative ease of investigating drug trafficking in open-air drug markets in minority communities¹⁶⁷ and the unpleasant reality that law enforcement officials are rewarded for the number of arrests they make or convictions they obtain.¹⁶⁸ Law enforcement practices that focus on the ease of apprehending concentrated law violators and that do so for the purpose of alleviating the harms that criminal activity, including open-air drug trafficking, cause to a community, are legitimate, non-racial justifications, despite the disproportionate effect that law enforcement has on racial and ethnic minorities.¹⁶⁹ In fact, the failure to enforce the criminal laws in high crime areas—particularly, inner-city minority urban communities—would render law enforcement subject to the charge that it was denying the law-abiding members of those communities the equal protection of the law.¹⁷⁰ Surely, the law is not such “a ass—a idiot” that law enforcement officers are damned if they do and damned if they don’t.¹⁷¹

WESTERN, *supra* note 157, at 50 (footnote omitted).

167. As one expert has noted:

Drug use is widely distributed in the population, but any sensible observer would have known that these changes in penal practices [i.e., the post-1980 increase in the drug offense penalties] would affect people of color disproportionately to their number in the drug using population. Drug *markets* are concentrated in poor, urban areas. Street-level drug distribution is an occupation dominated by poor African-American (and to a lesser extent in some regions, Hispanics) males who live in areas where other legitimate labor-market choices are limited. While it is commonly speculated that drug cartels have racial and ethnic diversity at the top, it is beyond speculation that most visible street-level distributors are dominantly young men of color. Enforcement practices that concentrate undercover work on apprehending street dealers in impoverished neighborhoods, where open-air drug markets tend to operate, further guarantee that those arrested on drug-distribution charges will be disproportionately young men of color who live and work their trade in the poorest locations. The highly elastic nature of the employment market in drugs—every time a young black man is arrested and sent to prison for drug crime, a new recruit can be found to take his place—guarantees a nearly inexhaustible supply of prison candidates.”

CLEAR, *supra* note 53, at 54–55 (emphasis in original).

168. See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970) (police departments reward arrests, not convictions); Gene Healy, *There Goes the Neighborhood: The Bush-Ashcroft Plan to “Help” Localities Fight Gun Crime*, in GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING 93, 105–06 (Gene Healy ed., 2004) (“Statistics on arrests and convictions are the Justice Department’s bread and butter.”).

169. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (rejecting equal protection challenge to crack cocaine drug enforcement practices that lead to racially disproportionate results); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting challenge to capital punishment charging decisions). Whether those same law enforcement practices are a sound policy is an entirely different question.

170. The best discussion of underenforcement of the criminal law as a violation of equal protection can be found in Randall Kennedy’s work. See RANDALL L. KENNEDY, *RACE, CRIME, AND THE LAW* (1997); Randall L. Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

171. CHARLES DICKENS, *OLIVER TWIST* 489 (Macmillan 1970) (1838) (“‘If the law supposes that,’ said Mr. Bumble, . . . ‘the law is a ass—a idiot.’”).

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III. THE CASE FOR REVISITING EARLY RELEASE

So far, critics and supporters of incapacitation have wrestled themselves to a draw. If so, the question arises whether something can and will change the status quo. Is the time ripe for a change? I think so.

Some public policy theorists have argued that political change comes about when three “streams” come together: (1) the problem stream—viz., the existence of a problem large enough in breadth and depth that ignoring it or hoping that it will go away is too costly to endure (e.g., illegal immigration); (2) the policy stream—viz., the refinement of (sometimes conflicting) recommended solutions to that problem (e.g., greater border protection vs. amnesty); and (3) the political stream—viz., the occurrence of an event (e.g., election of a President) that jars the public and political forces into action.¹⁷² Part II discussed the problems we have today. Part I discussed some of the mechanisms historically used to address such problems. This part will address some of the political factors that might coalesce to prompt public policymakers to respond to those problems. There are, in fact, a number of such factors that could nudge policymakers into reconsidering the utility and desirability of early release.

A. *The Inevitable Return of Prisoners to the Community*

According to Jeremy Travis, Dean of the John Jay College of Criminal Justice, “the iron law of imprisonment” is that, “[e]xcept for those few individuals who die in prison, every person we send to prison returns to live with us.”¹⁷³ As of the end of 2010, there were approximately 6.5 million people under supervision by the criminal justice system, with approximately 1.6 million of them in custody in federal or state prisons or local jails. Perhaps 95 percent of those prisoners eventually will be released from custody. Only a small fraction of inmates serving a death or life sentence will die while imprisoned.¹⁷⁴ If so, the argument goes, it makes little sense to forego any attempt to educate, train, detoxify, or reform them while they are in custody or to supervise their efforts to reintegrate into society when they are free.¹⁷⁵

Prisoners who lack education, skills, support from family, friends, or community, and maybe even a driver’s license, Social Security card, or birth certificate, have few opportunities to make an honest living once released from custody and

172. See, e.g., JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 1995). For an illustration of that theory at work, see Paul J. Larkin, Jr., *John Kingdon’s “Three Streams” Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J. L. & POL. 25 (2012).

173. TRAVIS, *supra* note 49, at xvii.

174. See S. REP. NO. 110-397 (2008) (“According to the U.S. Department of Justice, Bureau of Justice Statistics, an estimated 95 percent of all State prisoners will be released”); PETERSILIA, *supra* note 6, at v, 3; TRAVIS, *supra* note 49, at xvii.

175. More than 40% of first time offenders have a history of drug use. Petersilia, *supra* note 75, at 29.

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therefore are likely to recidivate.¹⁷⁶ Prisons are expensive,¹⁷⁷ more so than in-prison rehabilitation programs, so rehabilitation, if possible, or non-prison confinement, if workable, may not just be morally laudable, but also economically sensible. Former Chief Justice of the Supreme Court Warren Burger, who was hardly known as being “soft on crime,” made that point, remarking that a correctional policy focused entirely on incapacitation is “folly,” “wrong,” “expensive,” and “stupid.”¹⁷⁸

B. *The Continuing Hope for Rehabilitation*

Despite our current punitive approach to crime, it would be a mistake to believe that society has buried the rehabilitative ideal.¹⁷⁹ It is true that Congress prohibited district courts from considering the possibility of rehabilitation when deciding whether and for how long to imprison an offender.¹⁸⁰ But Congress permitted sentencing courts to consider rehabilitation in other contexts, such as when deciding whether to impose probation or supervised release.¹⁸¹ Congress also has granted the Federal Bureau of Prisons plenary authority to decide what in-custody educational, vocational, or substance abuse treatment programs are best for each prisoner.¹⁸² If Congress had believed that those programs were useless, it would have ordered them discontinued.

Moreover, criticisms advanced against rehabilitation were voiced widely, but not universally. Defenders, then and now, argued that critics of the efficacy of rehabilitation had overstated their case,¹⁸³ that rehabilitation had never been

176. See 42 U.S.C. § 17501 (2006); H.R. REP. NO. 110-140 (2007); PETERSILIA, *supra* note 6, at 4.

177. See DOJ Letter, *supra* note 50, at 2; *supra* text accompanying notes 84–89.

178. “We must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short-term benefits—winning battles while losing the war. It is wrong. It is expensive. It is stupid.” PETERSILIA, *supra*, note 6, at 93 (quoting former U.S. Supreme Court Chief Justice Warren Burger) (internal quotation marks and citations omitted).

179. It also may be a mistake to believe that society ever accepted it without reservation. See *id.* at 61 (“[P]arole-as-rehabilitation was never taken very seriously, and from its inception prison administrators used it parole primarily to manage prison crowding and reduce inmate violence.”).

180. See, e.g., 18 U.S.C. § 3582(a) (2006) (a district court may not consider the possibility of rehabilitation when deciding whether to imprison an offender or for how long to incarcerate him); 28 U.S.C. § 994(k) (the U.S. Sentencing Commission may not consider rehabilitation when promulgating guidelines); *Tapia v. United States*, 131 S. Ct. 2382, 2388-92 (2011); *Mistretta v. United States*, 488 U.S. 361, 367 (1989).

181. See, e.g., 18 U.S.C. § 3563(a)(4) (domestic violence offender rehabilitation program is a mandatory condition of probation); 18 U.S.C. § 3563(b)(9) (medical, psychiatric, or substance abuse treatment is a discretionary condition of probation); 18 U.S.C. § 3583(d) (domestic violence offender rehabilitation program is a mandatory condition of supervised release); *Tapia*, 131 S. Ct. at 2390.

182. See, e.g., 18 U.S.C. § 3621(e) (substance abuse treatment); 18 U.S.C. § 3621(f) (sex offender treatment); *Tapia*, 131 S. Ct. at 2390–91.

183. In the 1970s, several studies concluded that prior efforts at prisoner rehabilitation had been a failure. See, e.g., DOUGLAS LIPTON, ROBERT MARTINSON & JUDITH WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975); Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974) (concluding that there was no reliable evidence that rehabilitation had worked or could work); *THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS* (Lee Sechrest, Susan White & Elizabeth Brown, eds., 1979)

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given a fair chance to succeed because of insufficient funding for personnel (e.g., parole officers)¹⁸⁴ and programs (e.g., drug treatment, job training),¹⁸⁵ and that flaws in the system could and should be fixed before the entire rehabilitative ideal is tossed overboard.¹⁸⁶ Underlying that position is a fundamental, longstanding belief in the possibility of redemption and a desire to give everyone a second chance.¹⁸⁷ F. Scott Fitzgerald once said that “[t]here are no second acts in American lives.”¹⁸⁸ Maybe, but perhaps there’s room.

Some recent public policy choices give effect to those ideals. There has been a heightened interest in prisoner “re-entry” programs—a new term perhaps adopted in order to avoid the very negative connotations that the old term “parole” still has in some quarters—and that interest has generated some new legislative victories for critics of punitive approaches to criminal justice.¹⁸⁹ For example, in his 2004 State of the Union Speech, President George Bush urged the Congress to give inmates a second chance,¹⁹⁰ and a few years later Congress enacted the Second Chance Act of 2007, authorizing grant programs for re-entry

(agreeing with Martinson); WILSON, *supra* note 51, at 189–90, 193, 247 nn. 18–20 (citing studies concluding that rehabilitative efforts had been unsuccessful and arguing that the purpose of the correctional system should be “to isolate and to punish, not to reform,” because we do “not know how to do much else”); *see generally* S. REP. NO. 98-225, 38–40 & n.16 (1983); *Mistretta v. United States*, 488 U.S. 361, 363–64, 366–67 (1989); CULLEN & JONSON, *supra* note 49, at 33. Robert Martinson, one of the leading researchers, backpedalled somewhat a few years later, *see* Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979), but his initial views continued to hold sway over public opinion, *see* CULLEN & JONSON, *supra* note 49, at 33. Other nations, such as Great Britain, Canada, and Australia, however, also questioned the effectiveness of rehabilitation. GOTTSCHALK, *supra* note 36, at 38.

184. The ideal caseload for a parole officer is thirty-five prisoners. *See* PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 402 (1968). The average caseload, however, is between sixty-six and eighty, which allows time for only one fifteen-minute in-person meeting every two months. *See* Alfred Blumstein & Allen J. Beck, *supra* note 57, at 52; PETERSILIA, *supra* note 6, at 84.

185. “Their poor public image leaves probation and parole agencies woefully underfunded, and unable to compete effectively for scarce public funds. Nationally, probation and parole receive about fifteen percent of state and local government expenditures, even though they supervise seventy percent of correctional clients . . .” Petersilia, *supra* note 75, at 487.

186. *See* GOTTSCHALK, *supra* note 36, at 39; PETERSILIA, *supra* note 6, at 3–6, 93.

187. “[T]he belief that a core function of prisons should be rehabilitation is woven deeply into the nation’s cultural fabric. This belief in reforming offenders may become frayed at times, but it is durable enough to avoid becoming fully unravelled.” CULLEN & JONSON, *supra* note 49, at 29.

188. Robert McCrum, *Great Scott! Fitzgerald is enjoying a third act*, *THE GUARDIAN* (Feb. 4, 2012), <http://www.guardian.co.uk/books/2012/feb/05/scott-fitzgerald-gatsby-mccrum>.

189. In 2003, the federal government established the Serious and Violent Offender Re-entry Initiative (SVORI), a collaborative effort to improve prisoner reintegration into the community by underwriting creation of large, multi-site state and local prisoner re-entry initiatives. *See* H.R. REP. NO. 110-140, 3 (2007). For a study, prepared for the National Institute of Justice and recently published, that thoroughly discusses the SVORI, *see* PAMELA K. LATTIMORE ET AL., *NAT’L INST. OF JUSTICE, PRISONER REENTRY SERVICES: WHAT WORKED FOR SVORI EVALUATION PARTICIPANTS?* (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238214.pdf>.

190. “America is the land of [the] second chance, and when the gates of the prison open, the path ahead should lead to a better life.” George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* <http://georgewbushwhitehouse.archives.gov/news/releases/2004/01/20040120-7.html>.

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of offenders into the community.¹⁹¹ States and governors have directed their representative organizations to address the problem of prisoner re-entry.¹⁹² New research, defenders maintain, shows that various types of in-prison services—such as basic adult education programs, vocational and technical training, GED classes, cognitive-behavioral drug or alcohol treatment, life skills training (e.g., managing a checking account)—have shown success at reducing recidivism,¹⁹³ and they cost far less than the expenses of incarceration.¹⁹⁴ New tools—e.g., electronic and GPS monitoring, the “now ubiquitous drug testing,”¹⁹⁵ etc.—also exist to help parole officers more efficiently supervise parolees,¹⁹⁶ and new approaches to parole supervision—e.g., “neighborhood parole”—are being considered in order to increase community involvement with parolees and law enforcement.¹⁹⁷ The bottom line is that even if rehabilitation could no longer be

191. Pub. L. No. 110-199, 122 Stat. 657 (2008) (codified at 42 U.S.C. §§ 17501–55); see S. REP. NO. 111-229, at 70 (2010) (“The Second Chance Act . . . imposed new requirements on BOP to facilitate the successful reentry of offenders back into their communities and reduce the rate of recidivism. Among those requirements are the establishment of recidivism reduction goals and increased collaboration with State, tribal, local, community, and faith-based organizations to improve the reentry of prisoners.”); H.R. REP. NO. 111-149, at 71 (2009) (“The Second Chance Act clarified that BOP has the authority to place offenders in community corrections, including residential reentry centers (RRCs), for up to 12 months to facilitate their successful reentry and reduce recidivism. In addition, the Act directed BOP to provide incentives, such as increased time in community corrections, to encourage prisoners to fully participate in skills development programs. The Second Chance Act also makes clear that community corrections may include a period of home confinement for up to the shorter of 10 percent of an offender’s term of imprisonment or six months.”); S. REP. NO. 110-397, at 72–73 (2008) (appropriations recommendation for Second Chance Act); H.R. REP. NO. 110-919, at 110 (2008) (same); H.R. REP. NO. 110-140, at 1 (2007) (committee report accompanying House version of the act).

192. The Council on State Governments has created a Reentry Policy Council. The National Governors Association has established a Reentry Policy Academy. And the Urban Institute has adopted a Reentry Roundtable. Travis & Visser, *supra* note 138, at 1–2.

193. There is some, albeit limited, evidence that participation in prison programs decreases recidivism. See Cullen, *supra* note 46, at 259–276, 287; MICHAEL JACOBSON, *DOWNSIZING PRISONS* 180 (2005) (listing academic skills training, vocational skills training, cognitive skills programs, and drug treatment and sex-offender intervention programs); Petersilia, *supra* note 134, at 500–02 (drug treatment programs); *id.* at 502–04 (work programs such as Texas’s RIO (Re-Integration of Offenders) Program, New York City’s Center for Employment Opportunities, and Chicago’s Safer Foundation); Richard Rosenfeld et al., *The Contribution of Ex-Prisoners to Crime Rates*, in *CRIME: PUBLIC POLICIES FOR CRIME CONTROL*, *supra* note 57, at 80, 92. It is a mistake to conclude, however, that a program is effective only if it reduces 50–90% of the recidivism rate. A reduction of just 5–20% can be valuable and cost-effective. See H.R. REP. NO. 110-140, at 3–4 (2007).

194. See H.R. REP. NO. 112-169, at 64 (2011) (“[C]ase studies of innovative, evidence-based practices provide a strong indication that” the unchanged, high reincarceration rates for released offenders in the past twenty years “can be reversed . . .”); H.R. REP. NO. 110-140, at 5 (2007); PETERSILIA, *supra* note 6, at 4–5.

195. Blumstein & Beck, *supra* note 57, at 55.

196. PETERSILIA, *supra* note 6, at 77. The Supreme Court recently held that the surreptitious placement of a GPS tracking device on the defendant’s vehicle constituted a search, requiring probable cause and a warrant (or an exception to the warrant requirement). See *United States v. Jones*, 132 S. Ct. 945 (2012). That decision is of no help to parolees, however, because they can be subjected to a search simply by virtue of their parole status alone, even without a reasonable suspicion of criminal activity. See *Samson v. California*, 547 U.S. 843 (2006).

197. Petersilia, *supra* note 134, at 506.

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accepted as the sine qua non legitimate rationale for punishment, it could be accepted back into the fold that now includes only incapacitation and deterrence. If so, some form of early release would be a familiar mechanism for accomplishing those goals.

IV. EARLY RELEASE OPTIONS

As discussed above, executive clemency, parole, and good-time credits are the mechanisms that the criminal justice system has traditionally used to afford prisoners an early release. At one time or another, and for one reason or another, the criminal justice system has largely forsaken reliance on those tools. If legislatures find themselves forced by economics to readdress the correctional process, the tools that politicians and administrators have used in the past could be brought out of the garage, dusted off, and started up. If nothing else, actors in the political branches and correctional processes may use those devices as short-term solutions until something better comes along.

The question then becomes, which one or ones? My guess is that we will not see a resurgence in the use of executive clemency or parole (or some new variant of them), but that we may see greater use of good-time credit laws.

A. *The Unlikely Political Reawakening of Clemency*

Start with the executive clemency process. Clemency is the easiest mechanism to use to restart the prisoner release process. The federal and state constitutions vest that power in presidents and governors, so no legislation is needed. Administrative mechanisms already exist to process clemency applications, so no agency needs to be created and staffed to handle this task.¹⁹⁸ The question, then, is whether we will see presidents and governors revitalize the clemency process.

That outcome is unlikely. There are several reasons why presidents and governors used clemency more frequently in the eighteenth and nineteenth centuries than they did in the twentieth century, especially the last fifty years. Improvements in the mechanisms of the criminal justice system made it largely unnecessary for the president to review individual cases to release prisoners incarcerated due to a miscarriage of justice.¹⁹⁹ Adoption of parole and sentenc-

198. In the federal system, clemency applications are first reviewed by the Office of the Pardon Attorney at the Department of Justice, which forwards recommendations to the White House. See 28 C.F.R. §§ 0.35, 1.1 to 1.11 (2011); *Office of the Pardon Attorney*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/pardon/> (last visited Oct. 25 2012). Of course, the staffing for that office would need to be increased if it became the only mechanism for prisoner release decisions, but that eventuality is quite unlikely, for the reasons given below in the text. For a discussion of the problems with that process, see Love, *supra* note 31.

199. At common law, a defendant charged with a felony was not entitled to be represented by counsel. See *Powell v. Alabama*, 287 U.S. 45, 60 (1932); FRIEDMAN, *supra* note 33, at 27. Today, the state cannot sentence a defendant to a term of imprisonment unless he has been afforded the right to obtain counsel or, if he is indigent, to have one appointed for him. See *Argersinger v. Hamlin*, 407 U.S.

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ing guidelines generally reduced the need for the chief executive to intervene in the case of a prisoner burdened with an unduly severe sentence. The result was that the executive could generally rely on the modern criminal justice system to accurately separate the innocent from the guilty and to tamp down punishments that were two or more standard deviations from the norm. To that extent, just as a drop in emergency room visits may reflect improved community medical care, the decline in the frequency of the exercise of executive clemency may be evidence of an overall improvement in the criminal justice system.

There also are other, less noble reasons why we should not expect chief executives to exercise their clemency powers more frequently in the future than they have in the recent past. The visibility of the president's or governor's clemency decision makes it a politically risky event. On the one hand, a chief executive generally gains no "political boost" from the exercise of clemency.²⁰⁰ On the other hand, he exposes himself to a serious risk of adverse consequences if he makes a mistake and releases someone who commits a horrific crime or whose release generates public outrage. That risk is especially potent given today's 24/7/365 news cycle.²⁰¹ In fact, one of the rationales for adoption of parole was to shift the responsibility, and therefore the potential blame, from the chief executive to the parole board. Parole release decisions took the heat off the governor and dropped it into the parole board's lap.²⁰² Because governors often appointed parole board members, the governor was also able to indirectly lessen the risk that boards would make release decisions that were out of sync with the governor's policy and political beliefs.²⁰³

Atop that, unfortunately some executives have used the pardon power for ignoble reasons. Some state governors have used clemency for profit, and President Bill Clinton used it promiscuously as he walked out the door.²⁰⁴ In fact, Clinton's improper exercise of clemency probably has poisoned the well

25, 37 (1972). There is virtually no aspect of the criminal trial process that is not regulated by one or more provisions of the Constitution. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 50–51 (2004) (the Sixth Amendment Confrontation Clause guarantees a defendant the right to be confronted with the witnesses against him and therefore limits use at trial of out-of-court statements); Apprendi v. New Jersey, 530 U.S. 466, 483–84 (2000) (the Sixth Amendment Jury Trial Clause guarantees a defendant the right to have the jury make all findings necessary for a sentence to be imposed in excess of the statutory maximum); Brady v. Maryland, 373 U.S. 83, 87 (1963) (Due Process Clause requires disclosure to the defense of exculpatory information in the prosecutor's possession upon request). Finally, criminal justice systems today include an appellate process that provides at least one layer of oversight for the trial or plea-bargaining processes. The Constitution does not guarantee a defendant the right of appeal, *see* McKane v. Durston, 153 U.S. 684, 686–88 (1894), but every state has an appellate system, and the Constitution plays a role (albeit limited) in regulating access to it. *See, e.g.*, Halbert v. Michigan, 545 U.S. 605, 610 (2005) (holding that an indigent defendant has a right to appointed counsel on his first appeal).

200. CROUCH, *supra* note 16, at 145.

201. *See id.* at 4–5.

202. *See* FRIEDMAN, *supra* note 33, at 162; PETERSILIA, *supra* note 6, at 61.

203. *See* FRIEDMAN, *supra* note 33, at 162; PETERSILIA, *supra* note 6, at 61.

204. *See, e.g.*, CROUCH, *supra* note 16, at 114–17; Albert W. Alschuler, *Bill Clinton's Parting Pardon Party*, 100 J. CRIM. L. & CRIMINOLOGY 1131 (2010). Former President Jimmy Carter said that Clinton's

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for presidents and governors alike for some time to come, a particularly unfortunate consequence given the value of clemency in the criminal justice system. The result is that executive clemency will likely not come back to play a major role in prisoner release decisions.

B. *The Unlikely Political Resurrection of Parole*

It is also unlikely that parole will resurface in the form widely used in the twentieth century.²⁰⁵ Both the right and the left landed numerous, crippling blows to the original, romantic theory and practice of parole. Parole was too lenient for offenders and too discriminatory. Parole was ineffective at stemming crime and at rehabilitating prisoners. Parole placed trial judges and parole boards at odds, as each one tried to outguess the other regarding when a prisoner should be considered for release. Parole asked the impossible of correctional officials, because no one could satisfactorily predict when (if at all) an inmate had been rehabilitated, and of prisoners, because maintaining stable relationships in the community was an impossible task for someone hundreds (or more) miles from home. Parole was dishonest because it encouraged prisoners and parole boards to follow a script at release hearings and because it was used to ease prison overcrowding, not to further rehabilitation. And parole was illegitimate because it allowed only a narrow class of offenders—i.e., ones with community ties and good acting skills—to obtain release. Returning parole to its predominant place in corrections would require legislators to admit that they made a mistake in abandoning parole or to confess that they are rebirthing a policy previously thrown away. Newer legislators could do so by blaming their predecessors, but politicians who are long in the tooth may not have that excuse. At a minimum, policymakers would feel the need to devise a new moniker for parole—e.g., a “limited custodial opportunity”—or to steal an existing trademark—e.g., “supervised release”—in order to make it sellable to the public.

But hope springs eternal.²⁰⁶ Several experts have encouraged “reinventing”

decision to pardon the financial fugitive Marc Rich was “disgraceful.” CROUCH, *supra* note 16, at 114 (internal quotation marks omitted) (citation omitted).

205. In a forthcoming article, I will explain that the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), had the ironic and unintended effect of bringing the federal parole laws back to life. The reason is that Congress’ decision to repeal the parole statutes when it adopted a sentencing guidelines system in 1984 was contingent upon the constitutionality of a *mandatory* guidelines system, and the Supreme Court’s decision in *Booker* held a mandatory guidelines system unconstitutional. See Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. (2013) (forthcoming). If I am right in that regard, then the federal parole system has been reborn by operation of law, and there is no need for Congress to decide whether to readopt a parole system. Parole could be used once again to release prisoners who no longer need to be punished or to deal with prison overcrowding. If I am proved wrong about that effect of the *Booker* decision, however, then the issue arises whether Congress should re-enact a parole system. For the reasons given below in the text, I find it unlikely that the political process will choose that route.

206. “Hope springs eternal in the human breast: Man never is, but always to be blest.” ALEXANDER POPE, AN ESSAY ON MAN ep. 1 (1734), available at <http://www.gutenberg.org/files/2428/2428-h/2428-h.htm>.

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parole.²⁰⁷ Michael Jacobson, President of the Vera Institute and former Commissioner of the New York City Departments of Correction and Probation, believes that society can make parole work, but needs to front load the system. Risk assessment should be used to decide whether and when to release prisoners. Parole resources are most needed and beneficial in the first year of an offender's release. Critical are the elimination of structural barriers to successful reintegration, such as restrictions on licenses to enter certain professions (e.g., barbers), and elimination of the eligibility restrictions on access to funding for college education programs.²⁰⁸ Like Jacobson, Mark Kleiman, Professor of Law and Public Policy at UCLA, recommends targeting resources at the most likely reoffenders, as well as increasing the certainty and celerity of punishment by holding expedited parole revocation proceedings when a parolee violates a release condition.²⁰⁹ Joan Petersilia, a faculty member at the Stanford Law School, has offered similar proposals.²¹⁰

The likelihood that legislators will resurrect parole, however, is minimal. The principal reason why is that time has not erased the well-known criticisms levied against parole in the twentieth century and found persuasive by the federal and most state governments. Legislators prefer to endorse new solutions to old problems because it gives them the opportunity to appear visionary and to form their own, new coalitions to endorse their initiatives. If legislators sought to bring back parole, they would be seen as unimaginative for using someone else's idea, and they could be labelled as simple-minded for thinking that no one would remember why society rejected parole thirty years ago. Even offering to beef up the supervision over parolees at the front end of the process would not stave off those adverse reactions. The response from the right would be that enhanced supervision cannot be accomplished without an expensive increase in

207. See, e.g., JACOBSON, *supra* note 193, at 158–72; Petersilia, *supra* note 134, at 497–507.

208. See JACOBSON, *supra* note 193, at 166–72, 292.

209. See KLEIMAN, *supra* note 109.

210. Based on her review of the literature and her own experience, Petersilia concludes that there may be “an emerging consensus about what needs to be done.” It involves at least five steps:

1. Identify the most dangerous and violent offenders, for whom surveillance through human and technological means is a top priority.
2. Deliver quality treatment (particularly for substance abuse) and job training programs to the subgroup of offenders for whom research shows it could be most beneficial.
3. Create the ability to identify and respond quickly to probation and parole violations, particularly those involving drug use.
4. Establish an array of credible intermediate sanction programs to divert true technical violators away from expensive prison cells.
5. Commit to a community-centered approach to offender supervision and management, which means getting officers out of their offices and having them work interactively with victims, law enforcement, offenders, and families.

Petersilia, *supra* note 134, at 498.

Those experts and others recommend expanding opportunities for offenders to participate in substance abuse programs. See, e.g., JACOBSON, *supra* note 193, at 180; Petersilia, *supra* note 134, at 500–02. Such programs would be valuable regardless of whether and, if so, how parole comes back to life.

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supervision resources (e.g., an increased number of parole officers). The response from the left would be that recent attempts at intensive parole resulted in a greater-than-otherwise incidence of parole revocations, not an increase in success stories. Why?—Because the parole process has become focused on oversight of parolees to ensure that they do not embarrass parole officials for releasing them, not on assisting parolees in starting over.²¹¹ Accordingly, it seems unlikely that parole's supporters would be able to generate the critical mass necessary to change public policy.

C. *The Possible Creation of a Hybrid System*

Even though neither clemency nor parole is likely to re-emerge as the principal vehicle for deciding whether and when to release prisoners, it is possible that a hybrid form of those two institutions could emerge instead. For example, some scholars have proposed revising the federal clemency process in order to revitalize its use in a manner that avoids the political debacles that occurred when Clinton issued his last-minute pardons and fix some of the structural problems with the process that exist today.²¹²

The current federal clemency process places the responsibility for screening applications largely in the hands of the Justice Department, particularly a small office known as the Office of the Pardon Attorney.²¹³ FBI agents investigate every clemency request, and the Pardon Attorney and his staff review the results and make a clemency recommendation to the Deputy Attorney General, who decides whether to forward that recommendation to the President via the Office of the White House Counsel.

An obvious problem with the current process is the inherent conflict of interest created by using the Justice Department as the gatekeeper for clemency requests. It is unreasonable to expect that an adversary can offer an entirely dispassionate appraisal of a party's repentance. Even if the department could do so, granting the department a veto over a clemency application certainly does not satisfy the requirement that justice not only must be done, but also must appear to be accomplished. Having prosecuted a clemency applicant, the Justice Department is in a good position to offer an opinion regarding the character of the applicant, but it should not be empowered to kill a clemency application in the cradle.

One alternative is to create an independent commission that considers every clemency application. The members of the commission could be drawn from the ranks of senior or retired federal judges, former Justice Department officials, defense counsel, and members of the general public. The commission could use

211. See, e.g., CLEAR, *supra* note 53, at 183–84 (describing the failure of California's Intensive Parole Supervision field experiment).

212. See, e.g., Rosenzweig, *supra* note 20.

213. For a description of the workings of the federal clemency process, see Love, *supra* note 31; Rosenzweig, *supra* note 20.

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former or current FBI agents to conduct the necessary investigation. The commission could be empowered to send its recommendations, whether thumbs up or thumbs down, to the President via the White House Counsel. The Justice Department would be able to offer an opinion on the clemency application, but would not have the veto power that it currently enjoys. Congress also could decide that, if the commission decides in favor of a sentence commutation, the commission should be authorized to file a motion in the trial court asking the court to reduce the prisoner's sentence. In this way, the commission would afford a prisoner the opportunity for an independent "second look" at his sentence, a function that parole boards historically provided.

Current federal law has a somewhat comparable mechanism. The Sentencing Reform Act of 1984²¹⁴ grants district courts authority, on motion by the federal Bureau of Prisons, to reduce a prisoner's sentence before he has completed his prison term (even to "time served" so that he can be released immediately) in limited circumstances—namely, if "extraordinary and compelling reasons warrant such a reduction."²¹⁵ Congress believed that this provision would operate as a "safety valve" for use in cases such as those known as "compassionate release," that is, the early release of a prisoner suffering from a terminal illness.²¹⁶ A precondition in every case, however, is that the Bureau of Prisons must file a motion with the district court seeking a reduction in the offender's sentence. Without that motion, a district court lacks authority to reduce a prisoner's sentence, regardless of his circumstances.²¹⁷ If Congress decided to create a commission to give each prisoner a "second look" at his sentence,

214. Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

215. See 18 U.S.C. § 3582(c)(1)(A)(i) (2006).

216. S. REP. NO. 98-225, at 121 (1983). The provision would enable a district court to shorten a prisoner's term of confinement, "regardless of the length of [the prisoner's] sentence," in the "unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner." *Id.* The Bureau of Prisons has narrowly interpreted its statutory authority. See FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, CHANGE NOTICE NO. 5050.46, PROGRAM STATEMENT CONCERNING COMPASSIONATE RELEASE; PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. 3582(c)(1)(A) & 4205(g) (1998), http://www.bop.gov/policy/progstat/5050_046.pdf (indicating that prisoners can receive compassionate release only for extraordinary or extremely grave medical circumstances); William W. Berry III, *Extraordinary and Compelling: A Re-Examination of the Justifications for Compassionate Release*, 68 MD. L. REV. 850, 852–53 (2009). By contrast, the U.S. Sentencing Commission has concluded that there are additional circumstances in which it is appropriate to release an offender before he has completed his prison term. In addition to having a terminal illness, a prisoner should be considered for compassionate release under the Commission's policy statements if any of the following additional factors is present: the prisoner is so physically incapacitated that he cannot engage in self-care; the only family member able to care for a minor child has died or become physically incapacitated; and there is another "extraordinary and compelling" reason for compassionate release. U.S. SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.13 cmt. (2008).

217. See *Fernandez v. United States*, 941 F.2d 1488, 1493 (11th Cir. 1991); *Turner v. U.S. Parole Comm'n*, 810 F.2d 612, 618 (7th Cir. 1987); Marjorie Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners—Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 816 (1994) ("There is a federal statutory provision for compassionate release, but it is a tool for the Bureau of Prisons to use and not an alternative available to the prisoner himself.").

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Congress should consider granting that commission the authority to file a motion in the trial court on its own, without the prior approval of the Bureau of Prisons. Otherwise, the Justice Department, the parent agency for the Bureau of Prisons, again will hold a veto power over clemency applications.

D. The Possible Expansion of Good-Time Credit

By contrast, there may be an opportunity to expand the use of good-time credits. The academy has never displayed the same scorn for good-time laws as for parole, and policymakers would not feel that they are repeating a mistake if they decided to increase the availability of credit for prisoners. More importantly, good-time laws never have been as politically volatile with the electorate, and have never generated the same visceral, adverse reaction from the public as have the parole laws. Perhaps that is because good-time credit laws were never justified as a pillar of the rehabilitative process, and so did not collapse when public acceptance of the rehabilitative ideal eroded. Perhaps that is because the availability of good-time credit was universally accepted as a necessary tool for wardens to prevent institutions from becoming a Hobbesian state of nature. Perhaps that is because a warden's decision to revoke good-time credit is retrospective in nature and based on objective events—e.g., an in-prison assault—rather than, as in the case of parole, prospective in nature and resting on a subjective prediction about human nature—viz., an offender's rehabilitation.²¹⁸ And, perhaps, that is because the effect of a good-time credit decision—viz., whether to award or revoke 10–54 days' credit per year toward early release—pales by comparison with parole decisions—viz., whether to shave two-thirds or more off of a prisoner's sentence. Factors such as these may explain why the good-time laws have survived relatively unscathed throughout the turbulent period from the 1960s to the present.²¹⁹

Of course, a warden's good-time decision could always be subjected to the same criticisms levied against a parole board's release decisions. Prisoners denied good-time credits surely will argue that the warden's decisions are just as arbitrary and discriminatory as a parole board's. More fundamentally, parole's critics could maintain that using good-time laws rather than parole to modify a prisoner's sentence was simply a disguise for the predictions of rehabilitation and future dangerousness that underlie parole release decisions. The claim that good-time laws can work better than parole laws at deciding when to release a prisoner, many will argue, is just a charade. Since no politician likes to be called a charlatan, those arguments need a strong response.

218. The current feature in the federal good-time statutes that good-time credits vest once awarded certainly strengthens that possibility.

219. For example, Congress retained the good-time provisions of existing federal law when it revised the sentencing process and repealed parole in 1984 in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). See *Barber v. Thomas*, 130 S. Ct. 2499, 2504 (2010); *Mistretta v. United States*, 488 U.S. 361 (1989).

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There is reason, however, to be optimistic. Start with the fact that good-time laws significantly predate the birth of parole and never have been the subject of the type of intensive, sustained criticism that ultimately withered parole.²²⁰ In the eyes of the public, good-time laws have earned a presumption of respectability that parole lacks today. Moreover, the decision to award (or revoke) good-time credit is materially different from a parole decision. When deciding whether to award (or revoke) good-time credit, a warden analyzes past conduct within a defined period (e.g., a year), a far more objective task than predicting a likely course of events over an indefinite future. A prisoner must *earn* good-time credit toward release for *past good conduct*; he does not receive it based on a prediction that he will go and sin no more. It is easier for a politician to sell the public on a policy that permits early release only if the prisoner has earned that opportunity.²²¹ It would not be difficult to characterize an expanded good-time credit program as an example of precisely the type of “second chance” that America stands for and that everyone should receive. Indeed, public officials could sell an expanded good-time program to those who still urge reliance on rehabilitation as the primacy justification for punishment as a way to enable prisoners to prove their rehabilitation. A warden also would be in a better position than a parole board to judge the prisoner’s behavior, since a warden works at the prison and is a career official, not a political appointee. Furthermore, while increasing the amount of good time available at the back end of the process may have the same effect as lowering the statutory sentences at the front end, it does so without a guarantee of a lesser punishment. Finally, if we add in the fact that the amount of good-time credit available would be significantly less than what parole offered, it would be more difficult for an opponent to maintain that advocates for a revised good-time system are just painting an attractive portrait of a homely ancestor. Arguments such as those could give legislators a shield against the “soft-on-crime” blowback that could occur or to the charge that they are retreating to a position already proved indefensible. That is, if legislators see penological, fiscal, or humanitarian value in an expanded good-time policy, those arguments could give legislators the political cover they need.

How, then, to revise the good-time system? One approach would be to increase the potential credit from, for example, the current 54 days per year available to federal prisoners to 90 or 120 days, an increase from approximately one-sixth to one-quarter or one-third of each year’s sentence. Goodtime would

220. See *supra* text accompanying notes 49–52, 58–67.

221. As noted above, it often has been the case that good-time credits were awarded automatically. If so, the legislature or superintendent of prisons may need to revise the statutes or regulations governing a revised good-time program to place the burden of proof on the prisoner to receive, not on the warden to revoke it. Doing so raises no legal problem because a prisoner has no constitutional right to good-time credits or any other form of early release. See, e.g., *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

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still function as it always has—viz., as a reward for responsible in-prison behavior; only the amount of credit available would differ. Of course, the more that a revised good-time credit system comes to resemble parole, despite the substantial differences between the retrospective good-time credit analysis and the prospective parole release decision, the more likely the public would see the new system as “parole lite.” If so, politicians may well abandon this revised good-time system in order to choke off potential criticism from the electorate. A revised good-time system, therefore, would need to operate as it traditionally has, as a reward for past good behavior rather than as a new mechanism for deciding when a prisoner can safely re-enter the community.

The Department of Justice supports two proposals to revise the good-time system.²²² One proposal would increase from 47 to 54 the baseline number of good-time days that any prisoner could earn for good in-prison behavior. The other proposal would allow a prisoner who successfully completes a recidivism-reduction program to receive up to an additional days off his sentence. Each proposal would trade on the broad societal acceptance of a good-time system and therefore would be politically sellable.

Those proposals appear reasonable at first blush, but they do present three questions or risks. First, they may be perceived as a backhand way of reintroducing parole. Second, they require legislators and the public to accept the propositions that successful in-prison rehabilitation programs do exist, will be adequately funded, will be widely available, and can work in a goodly number of cases. Third, they appear to offer a prisoner multiple independent opportunities to receive good-time credit in order to simply maximize the credit that he can receive.²²³

The Justice Department’s proposal appears to try to deflect the first criticism by capping the total amount of good time available at no more than one-third of a prisoner’s sentence. That may be a reasonable response if the limit applies to every opportunity for good-time credit. As for the second criticism, the Justice Department claims that some programs have a proven track record.²²⁴ Their availability, however, is contingent on funding, which, in turn, will likely be forthcoming only if these programs can be proved successful on a large-scale basis. That prospect remains to be seen. Finally, creating multiple programs for the award of good-time credit bears a family resemblance to Congress’s tendency to pass multiple criminal statutes covering the same conduct and is

222. See Lanny Breuer, Assistant Attorney General, Remarks at the National District Attorneys Association Summer Conference (July 23, 2012), available at <http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-120723.html> (summarizing the proposals); H.R. REP. No. 112-169, at 58 (2011), <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt169/pdf/CRPT-112hrpt169.pdf>.

223. In the last Congress, the Senate considered but did not pass a bill to reauthorize the Second Chance Act that would have amended the federal good-time statute, 18 U.S.C. § 3161 (2012), to achieve those results. See The Second Chance Reauthorization Act of 2011, S. 1231, § 4, 112th Cong. (2011).

224. See Breuer, *supra* note 222.

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subject to the same criticism: namely, it multiplies and distorts the societal judgment regarding the appropriate sanction for the seriousness of an offender's conduct. Finally, the Department's proposal would be helped by empirical proof that there is a sound penological justification for the increase from the current one-sixth maximum to the proposed one-third maximum and that this benefit will not lead to an increase in the crime rate.

A final issue is the need to ensure that the good-time laws are properly drafted. Legislators may need to tinker with the good-time system to ensure that a prisoner receives credit only when he proves an entitlement to it. The good-time system generally has operated by presuming that a prisoner should receive credit for a year's conduct, rather than requiring him to prove that he has earned it.²²⁵ The terms of relevant correctional statutes, regulations, or policies may create such a presumption as a matter of law and require the warden to prove that a prisoner is not entitled to credit (or that he can revoke the credit).²²⁶ That approach is inconsistent with the best argument for expanding good-time credit: namely, a prisoner must *earn* any time off his sentence. But if legislators and correctional officials buy the argument that good-time laws work better than clemency or parole laws at adjusting the length of a prisoner's term, it is easy to change the rules to fit that theory. Endorsing the principle might be difficult, but implementing it is a piece of cake.

CONCLUSION

Unintended consequences pose unanticipated challenges. Some day we will need to ask whether we have arrived at a point where an overly punitive approach to corrections is hurting as many innocent parties as helping, and whether we are generating more criminals than we are locking up. We may decide that we have gone full circle and have returned to the place where we started. If so, we will have the chance to decide whether we are engaged in a war of attrition that we cannot win at a price that we are willing to pay and, if so, to rethink our correctional system.

In the alternative, we may decide as a society that we are willing to bear increased correctional costs as the price for enforcing the law. We may conclude that, whether we resort to incapacitative or retributive rationales, the current rate of imprisonment is not only defensible but also desirable for a host of reasons. It creates an environment that objectively is, or subjectively feels, safer than what we witnessed in past eras. We value more highly than did our predecessors the lives not lost, the property not damaged, and the communal well being not jeopardized by vandals running free. We believe that society has a duty to enforce the law in order to express its condemnation of certain illegal conduct, regardless of the cost. We are unwilling to decrease to a filament the range of

225. See, e.g., GOLDFARB & SINGER, *supra* note 6, at 262.

226. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 221–24 (2005); *Sandin v. Conner*, 515 U.S. 472 (1995).

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crimes that demand imprisonment. And we are unwilling to force upon the innocent the risk of errors that we may make in drawing the line between crimes that warrant confinement and offenses that can be disposed of via some other punishment.

Whatever we decide, the public is entitled to an honest assessment of the correctional system as it is working today. If we decide not to alter it, at least we have made the responsible choice to tighten our belts or increase our revenues in order to pay for the amount of imprisonment that the criminal law demands. But if we find change necessary or desirable, we should ask ourselves whether a revised good-time program better accommodates competing societal interests than what we are doing now.

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