

# Bring It On: The Future of Penal Reform, the Carceral State, and American Politics\*

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Fifteen years ago, mass imprisonment was largely an invisible issue in the United States. Since then, criticism of the country's extraordinary incarceration rate has become widespread across the political spectrum. The huge prison buildup of the past four decades has few ardent defenders at present. But reforms to reduce the number of people in jail and prison have been remarkably modest so far.

Meanwhile, a tenacious carceral state has sprouted in the shadows of mass imprisonment and has been extending its reach far beyond the prison gate. It includes not only the country's vast archipelago of jails and prisons, but also the far-reaching and growing range of penal punishments and controls that lie in the never-never land between the prison gate and full citizenship. As it sunders families and communities, and radically reworks conceptions of democracy, rights, and citizenship, the carceral state poses a formidable political and social challenge.

The reach of the carceral state today is truly breathtaking. It extends well beyond the estimated 2.2 million people sitting in jail or prison today in the United States.<sup>1</sup> It encompasses the more than 8 million people—or 1 in 23 adults—who are under some form of state control: including jail, prison, probation, parole, community sanctions, drug courts, immigrant detention, and other forms of government supervision.<sup>2</sup> It also includes the millions of people who are booked into jail each year—nearly twelve million—and the estimated 7.5 percent of all adults who are felons or ex-felons.<sup>3</sup>

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<sup>1</sup> LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013 3 (2014) [hereinafter 2013 CORRECTIONAL POPULATIONS REPORT], available at <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

<sup>2</sup> State supervision ranges widely between the fifty states, from a high of one in thirteen adults in Georgia to a low of one in eighty-eight in New Hampshire. PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 10 (2009).

<sup>3</sup> There are an estimated 11.6 million jail admissions each year. TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2012 – STATISTICAL TABLES 4 (2013), available at <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>. But surprisingly, no

The carceral state directly shapes—and in some cases deforms—the lives of tens of millions of people who have never served a day in jail or prison or been arrested. An estimated eight million minors—or one in ten children—have had an incarcerated parent. Nearly two million minor children (under age 18) currently have a mother or father serving time behind bars.<sup>4</sup> Millions of people reside in neighborhoods and communities that have been depopulated and upended as so many of their young men and women have been sent away to prison during what should be the prime of their lives.

The problem of the carceral state is no longer confined to the prison cell, prison yard, or to poor urban communities and minority groups—if it ever was. The U.S. penal system has grown so extensive that it has begun to metastasize. It has altered how key governing institutions, public services, and benefits operate everything from elections to schools to public housing. The carceral state also has begun to distort essential demographic, political, and socioeconomic databases, leading to misleading findings about trends in vital areas like economic growth, political participation, unemployment, poverty, and public health.<sup>5</sup>

The carceral state has been radically remaking conceptions of citizenship as it creates a large and permanent group of political, economic, and social outcasts. As a result of criminal convictions, millions have been condemned to “civil death,” having been denied core civil liberties and social benefits. An estimated six million people have been disenfranchised either temporarily or permanently because of a criminal conviction. This is about 2.5 percent of the total U.S. voting age population, or 1 in 40 adults.<sup>6</sup> Millions of Americans have been denied public benefits like student loans, food stamps, and public housing because of their criminal records. Likewise, owing to a prior run-in with the law, many people are ineligible to receive state licenses for a range of occupations—from hairdressing to palm reading to nursing. Many incarcerated mothers and fathers are at risk of having their parental rights severed, sometimes after they have been behind bars for as little as 15 months.<sup>7</sup>

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official national statistics are collected on the number of people jailed annually (which is quite different from the number of annual admissions, since many people cycle in and out of jail).

<sup>4</sup> THE ECONOMIC MOBILITY PROJECT & THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECTS ON ECONOMIC MOBILITY 18 (2010), available at [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2010/CollateralCosts1.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/CollateralCosts1.pdf). Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, 50 J. OFFENDER REHAB. 18, 186 (2011); PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4 (2010).

<sup>5</sup> See generally BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS (2012).

<sup>6</sup> CHRISTOPHER UGGEN, SARAH SHANNON & JEFF MANZA, THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (2012), available at [http://sentencingproject.org/doc/publications/fd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf).

<sup>7</sup> The 1997 Adoption and Safe Families Act puts strict time limits on reunification efforts for children separated from their parents and encourages states to terminate parental rights if

For those seeking to dismantle the carceral state, the key challenge is not trying to determine what specific sentencing and other reforms would slash the number of people in jail and prison. The real challenge is figuring out how to create a political environment that is more receptive to such reforms and how to make the far-reaching consequences of the carceral state into a leading political and public policy issue.<sup>8</sup>

The carceral state is deeply entangled in the political, economic, and social fabric of the United States. But in plotting a way out, we must guard against succumbing to “dystopian despair.”<sup>9</sup> We need to resist the belief that the only way to raze the carceral state is to tackle the “root causes” of crime—massive unemployment, massive poverty, and unconscionable levels of social and economic inequality stratified by race, ethnicity, and gender. Ameliorating the deeper structural problems that foster such high levels of inequality in U.S. society is an admirable goal. But if the aim is to slash the country’s incarceration rate and undo its harmful collateral consequences over the next few years, not the next few decades, the root causes approach to progressive penal reform, however well intentioned, is shortsighted.

Four decades ago, the United States had many of the same structural problems it has today—though not to the same degree—but it did not have such an expansive penal system. Since then, the United States has embarked on a war on drugs and a broader war on crime characterized by penal policies unprecedented in modern U.S. history and unheard of or disdained in other advanced industrialized countries. Experts on crime and punishment now generally agree that changes in public polices—not dramatic changes in criminal behavior—propelled the decades-long prison boom in the United States.<sup>10</sup> In short, it was about the time, not about the crime. The focus on structural problems overshadows the fact that numerous people are serving time today for nonviolent offenses, many of which are property or petty drug offenses that would not warrant a sentence in many other countries. Many others are serving savagely long sentences for violent offenses even though they no longer pose serious threats to public safety.

If we designate structural problems the centerpiece of any plan to dismantle the carceral state, we are essentially accepting that the extensive U.S. penal system is here to stay for a very long time. After all, structural problems call for

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reunification does not occur within a certain specified time frame. About half of the states have enacted reunification statutes that apply to the children of imprisoned parents. Candace Kruttschnitt, *The Paradox of Women’s Imprisonment*, 139 DÆDALUS 32, 35 (2010); VERNETTA D. YOUNG & REBECCA REVIERE, WOMEN BEHIND BARS: GENDER AND RACE IN U.S. PRISONS 111–12 (2006).

<sup>8</sup> See generally Marc Mauer, *Sentencing Reform: Amid Mass Incarcerations—Guarded Optimism*, 26 CRIM. JUST. 27 (2011).

<sup>9</sup> Adam Gopnick, *The Caging of America: Why Do We Lock Up So Many People?*, THE NEW YORKER, Jan. 30, 2012, at 21, available at <http://www.newyorker.com/magazine/2012/01/30/the-caging-of-america>.

<sup>10</sup> See COMMITTEE ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION ET AL., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES chs. 3–5 (2014) (Jeremy Travis, Bruce Western & Steve Redburn, eds.).

comprehensive, often expensive, long-term solutions and commitments. Long-term fixes are problematic not just because they take a long time, but also because they are harder to sustain from one change of administration to the next (especially in the United States, which lacks a respected, expert, and politically insulated civil service). Furthermore, as elaborated below, a focus on structural problems conflates two problems that are actually quite distinct—the problem of mass incarceration and the problem of crime.

Major decarcerations that have occurred in other places and at other times came about primarily as a result of comprehensive changes in penal policy, rather than by mounting a sustained attack on structural problems and the root causes of crime.<sup>11</sup> The package of penal policies based on the 3-R model that prevails in elite policy circles today—that is, reentry, justice reinvestment, and reducing recidivism—is not up to the task. It has created a lot of motion but no major movement in razing the carceral state or considerably reducing the incarceration rate.<sup>12</sup>

The changes needed in penal policy in order to slash the country's incarceration rate are no mystery. While reentry should be a priority, we cannot focus only on those who are being released. We need to reduce the number of people who are sent to jail or prison and to decrease in sentence lengths and time served. In short, we need comprehensive sentencing reform guided by the principle that prison should be reserved primarily for people who pose grave threats to society.<sup>13</sup> Many leading policy makers are still acting as though “they can reduce the size of the prison population without directly taking on the rate and length of sentences.”<sup>14</sup> They have deliberately pursued a strategy based on no fundamental changes in sentencing laws. That has begun to change.<sup>15</sup> But the

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<sup>11</sup> Rosemary Gartner, Anthony N. Doob & Franklin E. Zimring, *The Past as Prologue? Decarceration in California Then and Now*, 10 CRIMINOLOGY & PUBLIC POL'Y, 291, 291–92 (2011); Tapio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in PUNISHMENT AND PENAL SYSTEMS IN WESTERN COUNTRIES 146 (Michael Tonry & Richard Frase eds., 2001); Claudius Messner & Vincenzo Ruggiero, *Germany: The Penal System Between Past and Future*, in WESTERN EUROPEAN PENAL SYSTEMS: A CRITICAL ANATOMY 128 (Vincenzo Ruggiero, Mick Ryan & Joe Sim eds., 1995); John Graham, *Decarceration in the Federal Republic of Germany: How Practitioners are Succeeding Where Policy-Makers Have Failed*, 30 BRIT. J. CRIMINOLOGY 150, 166–69 (1990).

<sup>12</sup> For more on the limits of the 3-R strategy, see MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* chs. 4–5 (2015).

<sup>13</sup> For a detailed analysis of the need for comprehensive sentencing reform, see generally MICHAEL TONRY, *PUNISHING RACE: A CONTINUING AMERICAN DILEMMA* (2011).

<sup>14</sup> Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 313 (2009). See also TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* ch. 7 (2014).

<sup>15</sup> Compare the comments of Marc Levin of the Texas Public Policy Foundation in Terry Carter, *Prison Break: Budget Crises Drive Reform, But Private Jails Press On*, ABA JOURNAL (Oct. 1, 2012, 9:50 AM), available at <http://www.abajournal.com/magazine/article/prison>

limited sentencing reforms enacted so far have been directed almost exclusively at the non, non, nons—that is, the nonserious, nonviolent, non-sex related offenders.<sup>16</sup> And many state officials and policy makers have fiercely resisted applying these modest reforms retroactively to people already serving time.

Comprehensive sentencing reform directed at reducing the time served for a wider range of offenders is necessary. But it is not enough. The country's high incarceration rate is just one facet of the problem of the carceral state. Another is that too many people are serving time in U.S. jails, prisons, and detention centers that are abusive and degrading. These facilities need to be opened up to independent oversight to ensure that all prisoners and detainees are housed in safe, healthy environments that are respectful of human dignity. But we also need to begin laying the political groundwork for a constitutional amendment that enshrines respect for human dignity in the U.S. Constitution, as Jonathan Simon implores. The Eighth Amendment has proved to be scant protection against the degrading and abusive practices and conditions that prevail in too many U.S. jails and prisons.<sup>17</sup>

Comprehensive sentencing reform also will not rectify the enormous harm caused by the prison beyond the prison and the stark and pernicious gradations of citizenship that the carceral state has created. The widespread practice of condemning people with criminal records to “civil death” must be halted. Most of the barriers to receiving critical public services, such as public housing, student loans, and welfare, and to participating in civic life, including voting and jury duty, must be eliminated. Employment and licensing restrictions levied on ex-offenders should be narrowly tailored and reserved for very specific instances of compelling public safety concerns. The criminalization of immigration policy must end, and the creeping merger of the law enforcement and immigration enforcement systems needs to be reversed.<sup>18</sup>

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\_break\_budget\_crises\_drive\_reform\_but\_private\_jails\_press\_on/, with his testimony in 2013 and 2014 criticizing mandatory minimums and calling for specific changes to reduce the proliferation of new laws and penalty enhancements in Texas in *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the Senate Judiciary Comm.* (2013) (Statement of Marc Levin) and *Levin: Create New Barriers in House Rules to New Crimes, Penalty Enhancements*, GRITS FOR BREAKFAST (Oct. 8, 2014), <http://gritsforbreakfast.blogspot.com/2014/10/levin-create-new-barriers-in-house.html>.

<sup>16</sup> See, e.g., Cara Sullivan, *ALEC Passes Model Policy to Encourage Smarter Sentencing*, AMERICAN LEGISLATOR (Oct. 1, 2013), <http://www.americanlegislator.org/alec-passes-model-policy-encourage-smarter-sentencing/>; PAUL RYAN, BUDGET COMM. OF THE U.S. HOUSE OF REPS., EXPANDING OPPORTUNITY IN AMERICA: A DISCUSSION DRAFT FROM THE HOUSE BUDGET COMMITTEE 54–60 (2014).

<sup>17</sup> Jonathan Simon, Professor of Law at UC Berkeley, Remarks at The Coming Decarceration Panel at the Annual Meeting of the American Association of Law Schools (Jan. 4, 2014) (notes taken by author during the panel); see also JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014).

<sup>18</sup> For more on the carceral state and the criminalization of immigration enforcement policy, see GOTTSCHALK, *supra* note 12, at ch. 10.

Major reforms in penal policy and law enforcement are necessary to slash the incarceration rate and begin dismantling the carceral state. In pursuing such reforms, we need to be clear that this will not resolve the crime crisis that persists in the United States despite the record crime drop of the past two decades. National crime rates are at nearly their lowest levels in half a century, but crime in poor communities—especially poor urban neighborhoods that are predominantly African-American—remains a major social problem.

The crime crisis is directly related to deeper structural problems in ways that the crisis of the carceral state is not. The only legitimate long-term solution to this crime crisis is to alleviate the root causes of vast and growing inequalities in the United States. It goes without saying that this is going to take a long time and will require a major political struggle. But in the meantime, there is no compelling public safety justification for keeping so many people from poor communities locked up.

If we are serious about dismantling the carceral state the necessary policy changes are fairly straightforward, but the politics are not. As Glenn Loury and Bruce Western note, the “most challenging policy problems are not merely technical.”<sup>19</sup> Issues of crime and punishment are so vexing because they are inextricably bound up with judgments about morality, how social benefits and burdens should be allocated, the proper reach of the government, and what kind of democratic society the United States is, was, and will be.<sup>20</sup> And all of these issues are to varying degrees tarnished by the patina of the country’s troubled racial history.

### I. WHAT DOESN’T WORK

What is persistently missing in much of the current debate over mass incarceration and penal reform is any kind of inspiring, long-term vision against which the necessary short-term goals and strategic compromises can be measured.<sup>21</sup> In plotting an escape from the carceral state, we need to “distinguish between mere surface scratches on a policy that is otherwise intact and deep fissures in the core of the policy itself” that might mark the beginning of the end of the carceral state.<sup>22</sup>

The total number of people in U.S. jails and prisons has largely stabilized since the onset of the Great Recession, but no major contraction appears in sight.

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<sup>19</sup> Glenn C. Loury & Bruce Western, *The Challenge of Mass Incarceration in America*, 139 *DÆDALUS*, 5, 5–7, (2010).

<sup>20</sup> IAN LOADER & RICHARD SPARKS, PUBLIC CRIMINOLOGY? 108 (2011).

<sup>21</sup> I am borrowing here from Strolovitch’s description of what constitutes a utopian vision. DARA Z. STROLOVITCH, AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS 234–36 (2007).

<sup>22</sup> Cheryl Marie Webster & Anthony N. Doob, *America in a Larger World: The Future of the Penal Harm Movement*, 7 *CRIMINOLOGY & PUB. POL’Y* 473, 483 (2008).

In 2009, the total incarcerated population fell in the United States for the first time since the early 1970s. It has continued to drop each year, but the rate of decrease has slowed considerably. Between 2009 and 2013, the total number of people in prison and jail fell by just 3.4 percent, or about 77,000 people.<sup>23</sup> California, which has been under enormous political and legal pressure to reduce its prison population thanks to the 2011 *Brown v. Plata* decision, accounts for more than forty percent of this drop.<sup>24</sup> The number of inmates in state prisons has continued to grow in about half of the states, while declining slightly in the other half.<sup>25</sup> In 2013, the federal prison population, which has increased more than eightfold since 1980, fell by less than 1 percent. This was the first decrease in more than three decades. That drop was more than offset in 2013 by a rise in the state prison population for the first time since 2009.<sup>26</sup> Marc Mauer of *The Sentencing Project* calculated that if declines in the prison population continue at a rate of about 1.8% a year, the biggest year-to-year drop registered since the boom began, it will take until 2101—or nearly nine decades—for the prison population to return to its 1980 level.<sup>27</sup> Declines in the jail population have been steeper. Since peaking in 2008, the total number of people in jail fell by nearly seven percent as of 2013.<sup>28</sup>

The fallout from the Great Recession and the 2008 financial crisis provided an opportunity to redirect U.S. penal policy that opponents of the prison boom should continue to exploit. But framing the problem of the carceral state as primarily an economic one will not sustain the political momentum needed over the long haul to drastically reduce the prison population and will have other negative

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<sup>23</sup> Calculated from 2013 CORRECTIONAL POPULATIONS REPORT *supra* note 1 at 2 tbl.1 (2014) and LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009 2 tbl.1 (2010) [hereinafter, 2009 CORRECTIONAL POPULATIONS REPORT], available at <http://www.bjs.gov/content/pub/pdf/cpus09.pdf>.

<sup>24</sup> In 2013, California had a total prison and jail population of nearly 219,000, a drop of around 33,000 inmates since 2009. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 6 tbl.6; 2013 CORRECTIONAL POPULATIONS REPORT, *supra* note 23, at 11 app. tbl. 1; TODD D. MINTON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, JAIL INMATES AT MIDYEAR 2012: STATISTICAL TABLES 2 (2013), available at <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>.

<sup>25</sup> *More Than Half of States Cut Imprisonment Rates from 2006 to 2011*, THE PEW CHARITABLE TRUSTS (Mar. 8, 2013), <http://www.pewtrusts.org/en/about/news-room/press-releases/2013/03/08/us-prison-count-continues-to-drop>; E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013 4 (2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

<sup>26</sup> See CARSON, *supra* note 25; CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 12 app. tbl.2 [hereinafter 2012 CORRECTIONAL POPULATIONS REPORT].

<sup>27</sup> The 1.8% decline was for 2012. Marc Mauer & Nazgol Ghandnoosh, *Can We Wait 88 Years to End Mass Incarceration?*, HUFF. POST (Dec. 20, 2013, 3:40 AM), [http://www.huffingtonpost.com/marc-mauer/88-years-mass-incarceration\\_b\\_4474132.html](http://www.huffingtonpost.com/marc-mauer/88-years-mass-incarceration_b_4474132.html).

<sup>28</sup> TODD D. MINTON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2013: STATISTICAL TABLES, 6 tbl.1 (2013), available at <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>.

consequences.<sup>29</sup> It denies the reality that punishment in any society is never a purely rational act. Punishment is a means to regulate deviance. But it is also an expressive act “in which society talks to itself about its own moral identity,” explains Philip Smith, channeling Durkheim.<sup>30</sup>

Successful decarceration will cost money. The people reentering society after prison need significant educational, vocational, housing, health, and economic support to ensure that the communities they are returning to are not further destabilized by waves of former prisoners. It is more expensive to process young people in the juvenile court system rather than to transfer them to adult court.<sup>31</sup> If we are serious about alternatives to incarceration, then community-based mental health and substance abuse programs will need major cash infusions so that the penal system is no longer the primary line of defense to address these major public health problems.

A penal reform agenda delineated primarily by evidence-based research about “what works” will inevitably yield an agenda that is highly constrained and politically vulnerable. “What works” has a poor track record when it comes to engineering important shifts not just in penal policy, but all kinds of public policy.<sup>32</sup> In fact, a major preoccupation of scholars of public policy is seeking to explain why good scientific evidence often loses out in the contest against bad public policy. Just look at the tragedy of climate change. The fixation on emphasizing technocratic, expert-driven solutions to the problem of the carceral state denies the fundamental role that politics, emotion, and culture play in meting out punishment and in defining good and bad penal policy. Appeals to science are incapable of articulating a “public ideal around which reform can be mobili[z]ed.”<sup>33</sup>

Furthermore, as Todd Clear emphasized in his 2009 presidential address to the American Society of Criminology, the “evidence-based policy paradigm is, at its core, extraordinarily conservative.” The “what works” model is based on a narrowly constructed understanding of what counts as evidence—program evaluations based on the gold standard of multiple randomized trials. Such a narrow construction of evidence resting on what has already been shown to work fosters a “kind of slavery of the present.” It also contributes to a denigration of

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<sup>29</sup> See GOTTSCHALK, *supra* note 12, at ch. 2.

<sup>30</sup> PHILIP SMITH, PUNISHMENT AND CULTURE 16 (2008).

<sup>31</sup> Mosi Secret, *States Prosecute Fewer Teenagers in Adult Courts*, N.Y. TIMES, Mar. 6, 2011, at A1, available at <http://www.nytimes.com/2011/03/06/nyregion/06juvenile.html>.

<sup>32</sup> Roger Hood, *Criminology and Penal Policy: The Vital Role of Empirical Research*, in IDEOLOGY, CRIME AND CRIMINAL JUSTICE: A SYMPOSIUM IN HONOR OF SIR LEON RADZINOWICZ 153–57 (Anthony Bottoms & Michael Tonry eds., Willan 2002); Michael Tonry & David A. Green, *Criminology and Public Policy in the USA and UK*, in THE CRIMINOLOGICAL FOUNDATIONS OF PENAL POLICY: ESSAYS IN HONOUR OF ROGER HOOD 485–525 (Lucia Zedner & Andrew Ashworth eds., 2003).

<sup>33</sup> Adrian Cherney, *Beyond Technicism: Broadening the ‘What Works’ Paradigm in Crime Prevention*, 4 CRIME PREVENTION & COMMUNITY SAFETY, 49, 53 (2002).



other kinds of knowing and evidence that are not the result of controlled experiments, including policy studies and qualitative work.<sup>34</sup>

A penal reform agenda defined primarily by attacking racial bias and racial disparities in the criminal justice system, especially the war on drugs, racial profiling, and stop-and-frisk, will also not bring about the demise of the carceral state.<sup>35</sup> Even if every drug offender were released today, the United States would still have a sky-high incarceration rate. Furthermore, a movement to challenge the carceral state centered on black-white disparities in the criminal justice system ignores how the carceral state has been extending its reach to other marginalized groups, including immigrants, poor whites, and people charged with sex offenses.<sup>36</sup> The racial disparities issue cannot be understood separately from key features of the wider political and economic context in which the carceral state was built. These include the ascendance of neoliberalism, growing economic inequalities among blacks, and the emergence of a new generation of post-racial African-American leaders.<sup>37</sup>

The causes of extreme levels of racial disparity in the U.S. penal system (including the war on drugs, racial profiling, pernicious racial and ethnic stereotypes, and the savagely long sentences meted out for offenses that African Americans disproportionately commit) “are unjust and objectionable in themselves,” as Michael Tonry argues. But it is the severity of sentences, not the disparities in sentences, “that does the most damage.”<sup>38</sup> Tonry calculates that if imprisonment rates were reduced to their levels in 1980, the black imprisonment rate would fall by two-thirds, and 700,000 fewer blacks would be in prison even though racial disparities in imprisonment would remain unchanged at about 5 to 1.<sup>39</sup>

For penal reformers troubled by the racial injustices of the criminal justice system, it is politically more challenging to put calls for across-the-board cuts in sentence lengths ahead of attacking policies that are so nakedly discriminatory, such as racial profiling, stop-and-frisk, and the war on drugs. It also is politically more challenging to formulate a nuanced argument in defense of people who committed serious or violent offenses and are serving such lengthy sentences even though they no longer pose serious threats to society.<sup>40</sup> Steven Raphael and

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<sup>34</sup> Todd R. Clear, *Policy and Evidence: The Challenge to the American Society of Criminology: 2009 Presidential Address to the American Society of Criminology*, 48 *CRIMINOLOGY* 1, 6–7 (2010).

<sup>35</sup> See GOTTSCHALK, *supra* note 12, at ch. 2.

<sup>36</sup> See *id.* at chs. 6, 9, and 10.

<sup>37</sup> See generally GOTTSCHALK *supra* note 12.

<sup>38</sup> TONRY, *supra* note 13, at 145.

<sup>39</sup> *Id.* at 16–17.

<sup>40</sup> There is a precedent for this. The leading opponents of the death penalty made an important strategic decision in the mid-1960s. They shifted from challenging capital punishment primarily on a case-by-case basis on procedural grounds, many of them related to race, to launching a broad challenge to the constitutionality of the death penalty even though black defendants bore a

Michael Stoll calculate that rolling back punishments for violent offenses to their 1984 levels would have reduced the state imprisonment rate in 2004 from about 500 per 100,000 residents to about 350 per 100,000 residents, or a decrease of thirty percent.<sup>41</sup>

## II. SENTENCING REFORM

Prisons and jails exacerbate many social ills that contribute to crime and poverty and are unlikely to significantly rehabilitate anyone. The findings of two centuries of research on mandatory sentences are compelling. Mandatory sentences do not serve as major deterrents to crime but do contribute to wide unwarranted disparities in punishment, especially racial disparities.<sup>42</sup> We need to repeal mandatory minimums, truth-in-sentencing, and habitual offender laws, including three-strike statutes. We need to rein in sex offender registration, notification, and civil commitment laws. We also need to reinvigorate the parole process and insulate it from politics to ensure that every offender is entitled to a meaningful parole review, including everyone serving a life sentences. Furthermore, the bail bond system must be overhauled so that ability to pay is no longer the deciding factor in whether or not someone languishes in jail until his or her case is settled.<sup>43</sup>

Momentum has been growing for sentencing reform, though much of it has been focused on the non, non, nons. In May 2013, Congress created a bipartisan task force to pare down the criminal code with an eye toward reducing the number of people in federal prisons and reversing the encroachment of federal law enforcement into areas traditionally handled by the states. The following month, Pew released a report highlighting how increases in time served have been a major contributor to the rise in incarceration rates.<sup>44</sup> The report called for some modest

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disproportionate burden of the death penalty. See MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* 208–12 (2006).

<sup>41</sup> STEVEN RAPHAEL & MICHAEL A. STOLL, *WHY ARE SO MANY AMERICANS IN PRISON?* 80–81 (2013).

<sup>42</sup> See generally Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *CRIME & JUST.* 65 (2009); Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 *CRIME & DELINQ.* 56 (2011).

<sup>43</sup> See also MELISSA NEAL, JUSTICE POLICY INSTITUTE, *BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL* (2012), available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf>; SPIKE BRADFORD, JUSTICE POLICY INSTITUTE, *FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE* (2012), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/\\_for\\_better\\_or\\_for\\_profit\\_.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf).

<sup>44</sup> According to the Pew report, offenders released from state prison in 2009 served on average three years, which is 9 months or 36 percent longer than offenders released in 1990. These average figures mask great variations between the states. THE PEW CENTER ON THE STATES, *TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS* 3 (2012), available at [http://www.cdcr.ca.gov/realignment/docs/Report-Prison\\_Time\\_Served.pdf](http://www.cdcr.ca.gov/realignment/docs/Report-Prison_Time_Served.pdf).

sentencing reforms directed primarily at nonviolent offenders. Months later, Senator Rand Paul (R-KY) created a sensation at a Senate hearing when he likened the war on drugs to Jim Crow and characterized low-level drug offenders as victims.<sup>45</sup> In January 2014, the Democrat-controlled Senate Judiciary Committee approved the Smarter Sentencing Act by a 13-to-5 vote with the support of Tea Partiers on the committee but not establishment Republicans. The measure would cut some drug-related mandatory minimums in half, but the penalties still remain stiff—two, five, and ten years—and would not be applied retroactively. However, the act would modify the 2010 Fair Sentencing Act to make it somewhat retroactive. In a major shift, the U. S. Sentencing Commission agreed in July 2014 to make recent changes in the guidelines for drug offenses retroactive. Nearly 50,000 federal drug offenders now serving time will be eligible for reduced sentences thanks to this change (as long as Congress does not void the commission's decision, which is not expected).<sup>46</sup> But they would not necessarily be released since they would not have any legal right to receive legal aid to seek sentence reductions under the new guidelines.<sup>47</sup>

Modest sentencing reforms have faced considerable political opposition. The Smarter Sentencing Act enacted by the Judiciary Committee was a greatly watered down version of the original legislation. In a fruitless eleventh-hour effort to win wider Republican support, legislators inserted some new mandatory minimums for sexual abuse, domestic terrorism, and domestic violence, to the dismay of some penal reformers, including the National Task Force to End Sexual and Domestic Violence.<sup>48</sup> In May 2014, dozens of former leaders in the Department of Justice [DOJ], the Drug Enforcement Agency [DEA], and U.S. Attorney's Offices sent a letter to Senate leaders Harry Reid (D-NV) and Mitch McConnell (R-KY) urging

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<sup>45</sup> Jacob Sullum, *Rand Paul: 'I Am Here to Ask That We Begin the End of Mandatory Minimum Sentencing,'* FORBES (Sept. 18, 2013, 1:31 PM), <http://www.forbes.com/sites/jacobsullum/2013/09/18/rand-paul-i-am-here-to-ask-that-we-begin-the-end-of-mandatory-minimum-sentencing/>.

<sup>46</sup> Jerry Markon & Rachel Weiner, *Thousands of Felons Could Have Drug Sentences Lessened*, WASH. POST (July 18, 2014), [http://www.washingtonpost.com/politics/thousands-of-felons-could-have-drug-sentences-lessened/2014/07/18/4876209e-0eb1-11e4-8341-b8072b1e7348\\_story.html](http://www.washingtonpost.com/politics/thousands-of-felons-could-have-drug-sentences-lessened/2014/07/18/4876209e-0eb1-11e4-8341-b8072b1e7348_story.html).

<sup>47</sup> Most lower federal courts have held that federal inmates do not have a constitutional right to defense counsel to reduce their sentences. Douglas A. Berman, *How Many of the Nearly 50,000 Federal Prisoners Need a Lawyer to Help with Drug Sentence Reduction Efforts? How Many Will Get a Lawyer?*, SENT'G L. & POL'Y (July 21, 2014), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2014/07/how-many-of-the-nearly-50000-federal-prisoners-really-need-a-lawyer-to-help-with-drug-sentence-reduc.html](http://sentencing.typepad.com/sentencing_law_and_policy/2014/07/how-many-of-the-nearly-50000-federal-prisoners-really-need-a-lawyer-to-help-with-drug-sentence-reduc.html).

<sup>48</sup> Steven Nelson, *New Mandatory Minimums Added to Bill Seeking to Reduce Stiff Drug Penalties*, U.S. NEWS & WORLD REPORT (Jan. 30, 2014, 6:42 P.M.), <http://www.usnews.com/news/articles/2014/01/30/new-mandatory-minimums-added-to-bill-seeking-to-reduce-stiff-drug-penalties>.

them to defeat the Smarter Sentencing Act.<sup>49</sup> Federal prosecutors openly revolted against Attorney General Eric Holder's support of the Smarter Sentencing Act.

In contrast, the National Association of Assistant United States Attorneys (NAAUSA), which represents the Department of Justice's 5,300 federal prosecutors, mounted an aggressive public campaign in defense of mandatory minimums and called on other leading law enforcement groups to join them. NAAUSA also opposed the U.S. Sentencing Commission's recent moves to reduce penalties for drug offenses.<sup>50</sup> Maverick Senator Rand Paul has been promoting a much more ambitious package of criminal reform measures, but so far no Republican senator has endorsed his legislation. Senator Cory Booker (D-NJ) is a co-sponsor of part of Paul's reform package.<sup>51</sup>

### III. YES YOU CAN

Comprehensive sentencing reform by definition requires statutory changes. The political logjam in Washington and many state capitals is a convenient foil to excuse why so little progress has been made in slashing the country's incarceration rate and ameliorating the collateral consequences of the carceral state. It justifies the pursuit of small-bore solutions like the 3-Rs that are premised on splitting the difference without making any real difference in addressing the country's enormous and growing political, social, and economic inequalities, of which the carceral state is the starkest example.

Claims of legislative gridlock direct attention away from many non-legislative means available to begin razing the carceral state. The carceral state was not built by punitive legislation alone. It also required, particularly in its formative years, a shift in the sensibilities of government officials and law enforcement officers on the frontlines of the criminal justice system. Police officers, parole and probation agents, judges, corrections officials, attorneys general, local district attorneys, and federal prosecutors began to exercise their discretion in a more punitive direction as they read the new cues coming from law-and-order politicians.

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<sup>49</sup> Letter from William P. Barr et al. to Senators Harry Reid and Mitch McConnell "Re: Federal Criminal Sentencing Reform" (May 12, 2014), *available at* <http://www.crimeandconsequences.com/crimblog/2014/05/former-top-doj-leaders-oppose.html>.

<sup>50</sup> Letter from Robert Gay Guthrie, President, NAAUSA, to Senators Patrick Leahy and Charles Grassley "Re: Mandatory Minimum Legislation" (Jan. 31, 2014), *available at* <http://www.naausea.org/2013/images/docs/MandMinSentencingLegOppose013114.pdf>; Letter from Robert Gay Guthrie, President, NAAUSA, to Reynaldo Tariche, President, FBI Agents Ass'n, "Re: Save Federal Mandatory Minimum Sentences" (Jan. 2, 2014), *available at* <http://www.naausea.org/2013/images/docs/Oppose-MandatoryMins.pdf>; *see also* Markon & Weiner, *supra* note 46.

<sup>51</sup> Paul's package includes ending mandatory minimums, expunging nonviolent felonies from criminal records, reclassifying some felonies as misdemeanors, eliminating the sentencing disparity between crack and powder cocaine, and restoring voting rights to people convicted of a nonviolent felony. Ryan Lizza, *The Revenge of Rand Paul*, *NEW YORKER*, Oct. 6, 2014, at 44.

Many observers attribute U.S. punitiveness to the exceptional politicization of prosecutors and judges, who are elected or otherwise chosen in a partisan manner. However, this politicization can cut both ways. Prosecutors and judges have tended to use their discretion over the past three to four decades to lean in a more punitive direction. But that wide discretion also gives them great latitude to shift now and embrace alternatives to incarceration, as some district attorneys and judges have done.<sup>52</sup>

The widely misunderstood implementation of the draconian Rockefeller drug laws in 1973 is a good case in point.<sup>53</sup> At first, the Rockefeller laws had only a very modest impact on New York State's incarceration rate. This was due to the "selective pragmatic enforcement" by police, prosecutors, and judges, who initially viewed the new drug laws as wasteful and misguided. That changed in the late 1970s and early 1980s as Mayor Ed Koch of New York City and his new police commissioner embraced the "politics of disorder and fear" and sought to "retake the streets." Shortly thereafter, Democratic governor Hugh Carey promised major funding for new prison construction, and the state unveiled new joint state-local initiatives to target drug trafficking. Thanks to these political shifts, prison commitments for drug violations began to soar in the early 1980s as police, prosecutors, and judges in New York State belatedly embraced the Rockefeller laws and became willing recruits in the war on drugs. A decade later, some key law enforcement officials in New York State began to pull back from the war on drugs, and prison commitments for drug offenses began to fall. This was many years before the Rockefeller drug laws were largely repealed in 2009.

For all the talk about how mandatory minimums and mandatory guidelines built the carceral state, individuals serving on the frontlines of the criminal justice system retain considerable discretion to choose a less punitive path. Rick Raemisch's blistering 2014 *New York Times* op-ed about the night he spent in solitary confinement as executive director of the Colorado Department of Corrections is a rare and noteworthy example of a bold individual challenge to the ingrained, taken-for-granted punitive sensibilities of the carceral state written by someone who is part of the system.<sup>54</sup> The President and state governors have

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<sup>52</sup> For example, Charles Hynes, the longtime district attorney of Kings County in Brooklyn, New York, pioneered programs that offer defendants drug treatment as an alternative to prison, expand services for victims of domestic violence, and help former inmates re-enter society. His initiatives were a model for broader state-level reform in New York and nationally. See Charles J. Hynes, *ComALERT: A Prosecutor's Collaborative Model for Ensuring a Successful Transition from Prison to the Community*, 1 J. CT. INNOVATION 123 (2008).

<sup>53</sup> See David F. Weiman & Christopher Weiss, *The Origins of Mass Incarceration in New York State: The Rockefeller Drug Laws and the Local War on Drugs*, in DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM 73, 73-89 (Steven Raphael & Michael A. Stoll eds., 2009).

<sup>54</sup> Rick Raemisch, *My Night in Solitary*, N.Y. TIMES, Feb. 20, 2014, at A25, available at <http://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html>; see also Aviva Stahl, *New York City's New Corrections Chief, Known for Solitary Confinement Reforms, Faces Steep Challenge*

enormous discretion to grant executive clemency. So far, they have been largely unwilling to wield these powers to start righting the wrongs of the carceral state. The presidents and state governors have failed to even make a statement declaring that the war on drugs and the war on crime are over.<sup>55</sup> The Department of Justice could put an end to overcrowding in federal penitentiaries by calling a halt to the federal war on drugs. After all, the federal government “generally has no fundamental ‘crime fighting’ obligation to prosecute drug offenses in its jurisdiction” since “virtually every state has a body of criminal law devoted to drug offenses—from infractions to major felonies.”<sup>56</sup>

Federal judges retain broad sentencing discretion. In more than seventy percent of federal cases, the statute does not impose a mandatory minimum.<sup>57</sup> The 2005 *Booker* and 2007 *Gall* decisions affirmed that federal judges have considerable leeway to depart from the mandatory sentencing guidelines.<sup>58</sup> The 2011 *Pepper* decision affirmed that the courts are permitted to draw on a wide range of information at sentencing, and that “the punishment should fit the offender and not merely the crime.”<sup>59</sup>

#### IV. THE FEDERAL BUREAU OF PRISONS

All the attention on the tough federal sentencing guidelines and the overzealousness of presidents and members of Congress, to prosecute the war on drugs and the war on crime, has created the impression that the federal Bureau of Prisons [BOP] is largely a passive spectator in the carceral crisis. For all of its law-and-order zeal in the 1980s and 1990s, Congress nonetheless endowed the BOP with considerable discretionary powers to pursue early release of federal inmates. So far, the BOP has been generally unwilling to wield these powers. Without any changes in the federal sentencing guidelines or creation of new programs, the BOP could “eliminate thousands of years of unnecessary incarceration through full implementation of existing ameliorative statutes.”<sup>60</sup>

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on *Rikers Island*, SOLITARY WATCH (Apr. 22, 2014), <http://solitarywatch.com/2014/04/22/new-corrections-chief-new-york-city-known-solitary-confinement-reforms-faces-steep-challenges-rikers-island/>.

<sup>55</sup> GOTTSCHALK, *supra* note 12, at 186–91.

<sup>56</sup> Mona Lynch, *Theorizing the Role of the ‘War on Drugs’ in U.S. Punishment*, 16 THEORETICAL CRIMINOLOGY 175, 180 (2012).

<sup>57</sup> Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 449 (2013).

<sup>58</sup> See *Gall v. United States*, 552 U.S. 38 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

<sup>59</sup> See *Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011) (internal citation omitted); Traum, *supra* note 57, at 448. Traum persuasively argues that sentencing courts are permitted to consider—and should consider—relevant information about the harmful collateral consequences of mass incarceration not only for individual defendants but also for their families and communities when determining what punishment is suitable and fair.

<sup>60</sup> Stephen R. Sady & Lynn Deffebach, *Second Look Resentencing Under 18 U.S.C. § 3582(c) as an Example of Bureau of Prisons Policies That Result in Over-Incarceration*, 21 FED. SENT’G REP. 167, 167 (2009), available at <http://or.fd.org/ReferenceFiles/ABACommission.pdf>.

Instead, the BOP, which is under the authority of the DOJ, has continued to promulgate dire projections about the need for more prison beds as it has gone hat in hand to Congress year after year for more money to expand the federal prison system.

The BOP and many state departments of corrections have important compassionate release policies and laws on the books that would permit them to release infirm and elderly inmates. In 2013, the DOJ's Inspector General issued a piercing report on the BOP's mismanagement of compassionate release cases. Months later, the Justice Department indicated it would revamp its policies so that more federal inmates would qualify for timely compassionate release.<sup>61</sup>

The BOP has mostly ignored the little known, but potentially powerful, "second look" provision of the Sentencing Reform Act of 1984. This measure permits a sentencing judge to reduce a sentence if the court finds extraordinary and compelling circumstances. Under the statute, the BOP plays a key gatekeeper function. It is responsible for filing a motion to the court for reconsideration of a sentence. The legislative history of this provision suggests that Congress sought to recognize a wide range of circumstances that would qualify for resentencing. Over the years, the BOP has interpreted this statute very narrowly to apply only in cases of imminent death and has filed only a handful of resentencing motions. In roughly a quarter of the cases, the federal inmate died before the court had ruled on the motion.<sup>62</sup> In 2007, the U.S. Sentencing Commission adopted a new rule that set out no limit on what constitutes "extraordinary and compelling circumstances," but little changed at the BOP.<sup>63</sup> To the dismay of penal reform advocates and some members of Congress, the BOP has made scant use of several other important options at its disposal to reduce the time served for federal inmates.<sup>64</sup>

#### V. THE "REAL LAWMAKERS"

William Stuntz once characterized prosecutors as the "real lawmakers" of the criminal justice system because the penal code grants them such enormous leeway

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<sup>61</sup> Charlie Savage, *More Releases of Ailing Prisoners Are Urged*, N.Y. TIMES, May 2, 2013, at A17; Josh Gerstein, *DOJ Pulls Bush-era Early Release Rules*, POLITICO (Dec. 14, 2013, 12:25 PM), <http://www.politico.com/blogs/under-the-radar/2013/12/doj-pulls-bushera-early-release-rules-178834.html>.

<sup>62</sup> With nearly 200,000 inmates in the federal system, the BOP approved on average less than two dozen motions each year between 2000 and 2008. Sady & Deffebach, *supra* note 60.

<sup>63</sup> *Id.*

<sup>64</sup> These include underutilization of the Residential Drug Abuse Program (RDAP), enacted by Congress in 1994, and of community corrections options; and stingy and arguably incorrect formulas for calculating good time credits and computing release dates. *Id.*; see also Letter from AdvoCare et al. to Senators Barbara Mikulski and Kay Bailey Hutchison (Apr. 17, 2012), available at, [http://sentencingproject.org/doc/publications/inc\\_Senate\\_appropriations\\_%20ltr\\_FY2013.pdf](http://sentencingproject.org/doc/publications/inc_Senate_appropriations_%20ltr_FY2013.pdf); Brandon Sample & Derek Gilna, *BOP's RDAP Program Unevenly Administered and Unnecessarily Costly*, PRISON LEGAL NEWS, Aug. 15, 2012, at 28.

in charging decisions.<sup>65</sup> As the violent crime rate started falling in the early 1990s, changes in prosecutorial behavior were one of the most important contributors to the ongoing rise in the state prison population. Much of the growth was not the result of judicial decisions to increase the use of prison sentences. Rather, it was due to an increase in the number of violent offenses (and, to a lesser extent, property cases) brought forward successfully for prosecution and to an increase in the time served by violent offenders.<sup>66</sup>

To reduce the imprisonment rate, prosecutors will have to be cajoled or pressured into embracing a commitment to sending fewer people to prison and to reducing sentence lengths. In some cases, binding legislation may be necessary to force prosecutors to relinquish some of their discretionary powers. Additionally, such legislation needs to make their activities and decisions more accountable and transparent to the public. But, all paths to progressive penal reform do not have to run through state legislatures.

Attorneys general and district attorneys have enormous authority to set “the tone and culture of the office” and to determine the direction in which prosecutors working under them exercise their discretion in individual cases.<sup>67</sup> As a consequence, “the differences from one prosecutor’s office to the next—even operating in the same jurisdiction—can be stunning.”<sup>68</sup> National trends obscure “the profound variations in incarceration rates across states, cities, and especially local communities within cities.”<sup>69</sup>

U.S. prosecutors are arguably the most powerful officials in the U.S. criminal justice system and the least understood and least transparent.<sup>70</sup> Historically, U.S. prosecutors have had enormous power relative to prosecutors in other

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<sup>65</sup> William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001); see also Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 932–33 (2006).

<sup>66</sup> William Sabol, Implications of Criminal Justice System Adaptation for Prison Population Growth and Corrections Policy, Paper presented at Symposium on Crime and Justice: The Past and Future of Empirical Sentencing Research 20 (2010), [http://www.albany.edu/scj/documents/Sabol\\_ManagingPopulations.pdf](http://www.albany.edu/scj/documents/Sabol_ManagingPopulations.pdf).

<sup>67</sup> ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 97 (2007).

<sup>68</sup> Shawn D. Bushway & Brian Forst, Discretion, Rule of Law, and Rationality, Paper presented at Symposium on Crime and Justice: The Past and Future of Empirical Sentencing Research 17 (2010) [http://www.albany.edu/scj/documents/Forst-Bushway\\_Discretion\\_000.pdf](http://www.albany.edu/scj/documents/Forst-Bushway_Discretion_000.pdf). For recommendations on how to improve prosecutorial accountability, see DAVIS, *supra* note 67, at ch. 10 and John Wesley Hall, *A Fairer and More Democratic Federal Grand Jury System*, 20 FED. SENT’G REP. 334, 334–36 (2008).

<sup>69</sup> Robert J. Sampson & Charles Loeffler, *Punishment’s Place: The Local Concentration of Mass Incarceration* 139 DÆDALUS 20, 20 (2010).

<sup>70</sup> See DAVIS, *supra* note 67, at 5; Brian Forst, *Prosecution*, in CRIME & PUBLIC POLICY 437 (James Q. Wilson & Joan Petersilia eds., 2011).



industrialized democracies.<sup>71</sup> As states and the federal government revamped their sentencing structures in the 1980s and 1990s to curtail the discretion of judges (and, in some cases, the police), even more discretionary and other powers flowed to prosecutors. With the proliferation of mandatory minimum sentences and other get-tough policies, and the contraction of legal resources for public defenders, the already-enormous charging and plea-bargaining powers of U.S. prosecutors expanded even further.<sup>72</sup> Several landmark court cases challenging prosecutors' wide prerogatives were decided in their favor and further enhanced their powers.<sup>73</sup>

Prosecutors not only got tougher but also created powerful local, state, and national organizations to represent their interests and coordinate their political activities.<sup>74</sup> Furthermore, they forged close alliances with other law enforcement groups and helped create a conservative victim's rights movement premised on a zero-sum vision of justice that pitted victims against offenders.<sup>75</sup> Recently, statewide associations of district attorneys allied closely with other law enforcement organizations and with victims' rights organizations have been leading opponents of sentencing and other penal reforms aimed at reducing the incarcerated population.<sup>76</sup>

So far, U.S. prosecutors "have escaped the kind of scrutiny and accountability that we demand of public officials in a democratic society."<sup>77</sup> While police forces have become substantially more transparent and publicly accountable over the past several decades, prosecutors' offices are actually far less transparent today than

<sup>71</sup> JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* (1980); Abraham S. Goldstein, *History of the Public Prosecutor*, in *ENCYCLOPEDIA OF CRIME & JUSTICE* 1286 (Sanford H. Kadish, ed., 1983); GOTTSCHALK, *supra* note 40, at 91–98.

<sup>72</sup> In late 2013, Human Rights Watch released a scorching report on how federal prosecutors coerce defendants to plead guilty in federal drug cases by charging or threatening to charge them with offenses that carry stiff mandatory minimums. HUM. RTS. WATCH, *AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY* 114–17 (2013), available at [http://www.hrw.org/sites/default/files/reports/us1213\\_ForUpload\\_0\\_0.pdf](http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0.pdf).

<sup>73</sup> These decisions, among other things, upheld prosecutors' immunity from civil lawsuits, their wide latitude in jury selection, and the "nearly impossible standards for obtaining the necessary discovery to seek judicial review of some forms of prosecutorial misconduct." DAVIS, *supra* note 67, at 127–29.

<sup>74</sup> For example, the Texas District and County Attorneys Association was a critical player in propelling the Texas prison boom, and many of its officers have been influential in the National Association of Prosecutor Coordinators. Michael C. Campbell, *Politics, Prisons, and Law Enforcement: An Examination of the Emergence of "Law and Order" Politics in Texas*, 45 *LAW & SOC'Y REV.* 631, 655 (2011).

<sup>75</sup> See GOTTSCHALK, *supra* note 40, at chs. 4–6.

<sup>76</sup> See, e.g., Associated Press, *Alabama DAs, Victims Group Oppose New Sentencing Guidelines*, WKRG.COM (Aug. 10, 2013, 12:55 P.M.) <http://www.wkrg.com/story/23100067/das-victims-group-oppose-sentencing-guidelines>. In the case of penal reform in Illinois, see Steve Bogira, *Pat Quinn, Political Prisoner: A Case Study in How Electoral Politics Stymies Real Reform*, CHICAGO READER (Oct. 28, 2010), <http://www.chicagoreader.com/chicago/pat-quinn-rich-whitney-illinois-governor-election/Content?oid=2625950>.

<sup>77</sup> DAVIS, *supra* note 67, at 15.

decades ago.<sup>78</sup> Most of their decisions are “totally discretionary and virtually unreviewable.”<sup>79</sup>

By changing their behavior, prosecutors could have a profound impact on lowering incarceration rates and reducing racial disparities in sentences even without any statutory changes. For example, district attorneys could shift the standard for charging from “Probable Cause” to “likelihood of conviction.” Or they could make a policy decision not to prosecute certain low-level offenders, as the Milwaukee district attorney did in the case of first-time offenders caught with drug paraphernalia.<sup>80</sup>

New research suggests that federal prosecutors, not federal judges, are the most persistent source of racial disparities in sentencing. Sonja Starr and Marit Rehavi found that, all things being equal, federal prosecutors were nearly twice as likely to charge African-American men with an offense carrying a mandatory minimum sentence as white men.<sup>81</sup> With the help of a promising Vera Institute program, prosecutors in Milwaukee and in Mecklenburg, North Carolina, were able to reduce unwarranted racial disparities in their criminal justice systems by altering their seemingly race-neutral charging and plea-bargaining decisions.<sup>82</sup> Cyrus Vance, Jr., the Manhattan district attorney, permitted the Vera Institute to conduct a comprehensive two-year study of his office in order to identify the sources of persistent racial disparities in processing criminal cases and to devise remedies for unwarranted racial disparities.<sup>83</sup>

What incentives do prosecutors have to behave less punitively now? As prisons and jails eat up more state, municipal, and county budgets, prosecutors face the prospect of shrinking revenues to run their offices. But, more importantly, politics is all about forcing incentives to change. So far, district attorneys and other prosecutors have faced little political pressure to change. A 2014 report by

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<sup>78</sup> For example, in the early 1990s, the Bureau of Justice Statistics stopped collecting and reporting “aggregate information about arrest rejections and case dismissals, pleas and trials” in jurisdictions across the United States. Shawn D. Bushway & Brian Forst, *Studying Discretion in the Processes that Generate Criminal Justice Sanctions*, 30 JUST. Q. 199, 217 (2013).

<sup>79</sup> DAVIS, *supra* note 67, at 5.

<sup>80</sup> TANYA E. COKE, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *CRIMINAL JUSTICE IN THE 21ST CENTURY: ELIMINATING RACIAL AND ETHNIC DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM: CONFERENCE REPORT 12* (2012), available at <https://www.nacdl.org/reports/eliminatedisparity/>.

<sup>81</sup> Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 28 (2013). For a rebuttal from the U.S. Sentencing Commission, see Glenn R. Schmitt et al., *Why Judges Matter at Sentencing: A Reply to Starr and Rehavi*, 123 YALE L.J. ONLINE 251 (2013), <http://www.yalelawjournal.org/forum/why-judges-matter-at-sentencing-a-reply-to-starr-and-rehavi>.

<sup>82</sup> See generally Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821 (2013).

<sup>83</sup> BESIKI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, THE VERA INSTITUTE, *RACE AND PROSECUTION IN MANHATTAN* 2–3 (2014), available at <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf>.

the Brennan Center for Justice, which Attorney General Eric Holder warmly praised, called for changing the incentives for prosecutors by, among other things, basing their budgets on how well they meet the twin goals of reducing crime and reducing mass incarceration.<sup>84</sup>

When he was president of the National Association for the Advancement of Colored People (NAACP), Benjamin Jealous designated mass incarceration as the leading civil rights challenge of this generation.<sup>85</sup> If that is so, then getting deeply involved in electoral contests for local district attorneys, and otherwise putting political pressure on them, should be a top priority for civil rights and other groups committed to dismantling the carceral state. If the aim is to shift penal policy in a less punitive direction, these local electoral contests are arguably as important—or even more important—than mobilizing for the quadrennial presidential elections.

Maverick district attorneys, who were launched into office in major urban areas with the backing of broad penal reform coalitions, have served as important beachheads to engineer wider statewide shifts in penal policy. The upset victory of David Soales in Albany’s 2004 race for district attorney was a “watershed event” in the fight to reform the strict drug laws of the Rockefeller era in New York State.<sup>86</sup> His electoral victory, coming on the heels of the decade-old “Drop the Rock” campaign, paved the way for the beginning of the end of the Rockefeller drug laws.

George Gascón, San Francisco’s District Attorney and a former police chief, was a major sponsor of Proposition 47, a modest but important penal reform ballot initiative that nearly 60 percent of California voters backed in the November 2014 election. He joined the former police chief of San Diego to work on behalf of this measure, which converts several lower-level, nonviolent felonies into misdemeanors and subject them to reduced sanctions. The changes would apply retroactively, lightening the penalties for thousands of people incarcerated in California.<sup>87</sup> Most other district attorneys and many police chiefs in California

<sup>84</sup> See BROOKE EISEN, NICOLE FORTIER & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, FEDERAL PROSECUTION FOR THE 21ST CENTURY (2014), available at <http://www.brennancenter.org/sites/default/files/publications/FederalProsecutionForThe21stCentury.pdf>; Eric H. Holder, Jr., U.S. Att’y Gen., Keynote Address: Shifting Law Enforcement Goals to Reduce Mass Incarceration (Sept. 23, 2014) (transcript available at <http://www.brennancenter.org/analysis/keynote-address-shifting-law-enforcement-goals-to-reduce-mass-incarceration>).

<sup>85</sup> Adam Serwer, *The Other Black President*, THE AMERICAN PROSPECT (Feb. 16, 2009), <http://prospect.org/article/other-black-president>.

<sup>86</sup> JUDITH GREENE & MARC MAUER, THE SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 22–23 (2010), available at [http://www.sentencingproject.org/doc/publications/inc\\_DownscalingPrisons2010.pdf](http://www.sentencingproject.org/doc/publications/inc_DownscalingPrisons2010.pdf).

<sup>87</sup> Erik Eckholm, *California Voters to Decide on Sending Fewer Criminals to Prison*, N.Y. TIMES, Oct. 6, 2014, at A14; *California Proposition 47, Reduced Penalties for Some Crimes Initiative (2014)*, BALLOTEDIA, ([http://ballotpedia.org/California\\_Proposition\\_47,\\_Reduced\\_Penalties\\_for\\_Some\\_Crimes\\_Initiative\\_\(2014\)](http://ballotpedia.org/California_Proposition_47,_Reduced_Penalties_for_Some_Crimes_Initiative_(2014))) (last visited Jan. 21, 2015) [hereinafter *Reduced Penalties*].

vehemently opposed this 2014 ballot measure to reduce the penalties for low-level theft and drug crimes.<sup>88</sup>

The focus cannot be solely on electoral politics, however. Reform groups need to exert ongoing pressure on district attorneys to make their actions more transparent and publicly accountable. For example, a reform coalition launched Seth Williams, Philadelphia's first African-American district attorney, into office to succeed longtime district attorney Lynne Abraham. A self-proclaimed "tough cookie," Abraham had garnered a national reputation as "the deadliest D.A." for her aggressive use of capital punishment.<sup>89</sup> But since taking office in 2010, Williams has faced remarkably little political pushback as he has moved in a law-and-order direction.<sup>90</sup>

Five years into his tenure, Attorney General Eric Holder finally appeared ready to assert some of his vast discretion to challenge the carceral state. He created front-page news in August 2013 when he announced at the annual meeting of the American Bar Association that he had ordered federal prosecutors to omit specifying the quantities of illegal drugs in indictments for certain low-level drug offenders. By making this shift, prosecutors would avoid triggering the strict federal mandatory minimum penalties based on drug quantities. Although this announcement created a stir, its practical consequences might turn out to be quite minimal. The pool of federal defendants who would qualify for the new policies was drawn quite narrowly.<sup>91</sup> Furthermore, federal prosecutors retain enormous leeway on how to charge these cases.<sup>92</sup> A potentially more consequential change, which received less attention, was Holder's announcement that the Justice Department was instituting new policies designed to leave more crimes for local and state courts and prosecutors to dispose of, rather than have the federal government step in. Furthermore, Holder used his ABA speech as an opportunity to launch a broader rhetorical assault on mass incarceration and the racial

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<sup>88</sup> Eckholm, *supra* note 87; REDUCED PENALTIES, *supra* note 87.

<sup>89</sup> Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES (July 16, 1995), <http://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html>.

<sup>90</sup> Upon assuming office, Williams endorsed some laudable reforms, like the decriminalization of marijuana. But he has since proven to be a strong supporter of capital punishment, controversial stop-and-frisk policies, tougher penalties for people caught carrying a gun, and the imposition of sky-high bails in gun-related cases, which have contributed to an increase in the number of inmates clogging Philadelphia's jails.

<sup>91</sup> It included only "certain low-level, nonviolent drug offenders who have no ties to large-scale organizations, gangs, or cartels." Eric H. Holder, Jr., U.S. Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) (transcript available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>).

<sup>92</sup> Some criminal defense lawyers and prosecutors commented that remarkably people would be affected by the change. *See, e.g.*, Scott H. Greenfield, *Reality Check: Barely a Ripple, But a Ripple*, SIMPLE JUSTICE BLOG (Aug. 14, 2013), <http://blog.simplejustice.us/2013/08/14/reality-check-barely-a-ripple-but-a-ripple/>.

disparities that run through the criminal justice system. He conceded that the system “is in too many respects broken.”<sup>93</sup>

In short, comprehensive sentencing reform will not be enough on its own to reverse the prison boom because the criminal justice system is highly adaptive. To make major and lasting cuts, the penal sensibilities and penal culture of all components of the criminal justice system—police, prosecutors, judges, corrections administrators, parole and probation officers—will have to change. They need to buy into the goal of major reductions in the prison and jail population and to coordinate their behavior to achieve that end. Without that coordination, attempts to reduce the incarcerated population will remain a complex and often futile game of Whack-a-Mole. Single-minded attention on “reforming” any one or two pieces of the criminal justice system to reduce the number of people in jail and prison will not necessarily have the desired result because the system is highly adaptive.

Prosecutors remain the preeminent players in this game. By changing their actions and sensibilities, individual district attorneys, especially in large urban areas, have the potential to be important catalysts. They can help to facilitate the system-wide coordination and change in penal culture that is so critical to slashing the number of people in U.S. jails and prisons. But so far, these district attorneys have faced little political pressure to behave otherwise even though many of their constituents have been disproportionately harmed by the carceral state.

## VI. REALIGNMENT AND POLITICAL PUSHBACK IN CALIFORNIA

Recent developments in California are a bracing reminder of how the path toward decarceration remains steep and politically tortuous. In the acrimonious May 2011 *Brown v. Plata* decision, a sharply divided Supreme Court ruled 5 to 4 that the overcrowded conditions in California prisons were unconstitutional.<sup>94</sup> Specifically, the justices held that inadequate medical and mental health care was responsible for one inmate dying each week due to neglect. The Court ruled that the state needed to reduce the prison population to 137.5 percent of design capacity within two years. Anticipating the Court’s decision, Governor Jerry Brown signed the Public Safety Realignment Act into law weeks earlier. Law enforcement officials, the correctional officers’ union, and key legislators negotiated that measure behind the scenes with the Brown administration without any input from the wider public or incarcerated men, women, and their advocates.<sup>95</sup>

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<sup>93</sup> Holder, *supra* note 91.

<sup>94</sup> *Brown v. Plata*, 131 S. Ct. 1910 (2011). In his dissent, Justice Antonin Scalia called the decision a “judicial travesty” and “perhaps the most radical injunction issued by a court in our Nation’s history.” *Id.* at 1950–51 (2011) (Scalia, J., dissenting).

<sup>95</sup> Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 184 (2013).

Realignment in California seeks to divert many of the non, non, nons from state prisons and the state parole system to county jails and locally supervised community sanctions (such as probation and mandated substance abuse treatment). It bestows block grants on counties to implement realignment with virtually no strings attached, little state oversight, and no evaluations. While counties have used some of the new state money to develop innovative alternatives to incarceration, many counties have responded by investing heavily in jail expansion and by bolstering law enforcement budgets. They have eschewed using the billions of new state dollars allocated for realignment to invest in mental health and substance abuse treatment and other social services for offenders diverted out of the state prison system.<sup>96</sup> This is not so surprising, since the legislation mandated the creation of Community Corrections Partnerships to be composed primarily of law enforcement officials.<sup>97</sup>

California appears on its way to substantiating Heather Schoenfeld's claim about the paradox of prison conditions litigation: if you litigate it, they very well may build it.<sup>98</sup> As of July 2012, the state had approved applications from 21 counties to build over 10,000 new jail beds at a cost of \$1.2 billion. The state had plans for an additional \$500 million in jail construction programs. If all this construction is carried out, the total number of jail beds will increase by over 17,000—a far cry from any decarceration. As one observer noted, “Prison building, essentially, has gone local.”<sup>99</sup>

Although the state prison population fell substantially in the years immediately after realignment was first implemented, California's jail population continued to rise. About one-third of the inmates that were realigned from California's prisons ended up in county jails.<sup>100</sup> Parolees with technical violations were returned to jail, not prison, and certain non, non, nons were diverted to local jails. The large decline in California's state prison population is responsible for a

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<sup>96</sup> See Joan Petersilia & Jessica Greenlick Snyder, *Looking Past The Hype: 10 Questions Everyone Should Ask About California's Prison Realignment*, 5 CAL. J. POL. & POL'Y 266, 266–67, 272, 274 (2013); Joan Petersilia, *California Prison Downsizing and Its Impact on Local Criminal Justice Systems*, 8 HARV. L. & POL'Y REV. 327, 335, 350 (2014); ACLU OF CAL., CALIFORNIA PRISON REALIGNMENT ONE-YEAR ANNIVERSARY: AN AMERICAN CIVIL LIBERTIES ASSESSMENT, 1–2 (Sept. 27, 2012), available at [https://www.aclunc.org/docs/criminal\\_justice/realignment\\_packet.pdf](https://www.aclunc.org/docs/criminal_justice/realignment_packet.pdf).

<sup>97</sup> The legislation required each county to establish a Community Corrections Partnership headed by the chief probation officer and including the district attorney, the police chief, the sheriff, a representative from the superior court, the public defender, and social services. Petersilia & Snyder, *supra* note 96, at 274.

<sup>98</sup> Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731, 731 (2010).

<sup>99</sup> Pamela A. MacLean, *Prison Realignment: Now What?*, CAL. LAW. (Aug. 2012), <http://www.callawyer.com/Clstory.cfm?eid=923950>.

<sup>100</sup> RAPHAEL & STOLL, *supra* note 41, at 254.

large portion of the recent nationwide drop in the nation's total state prison population, as discussed earlier.<sup>101</sup>

County jails have a well-deserved reputation as the “worst blight in American corrections.”<sup>102</sup> Many jails in California were already seriously overcrowded before realignment came along.<sup>103</sup> Designed and intended to house short-term, transient populations, jails do not have the medical facilities, programs, and security resources to meet the needs of inmates serving sentences counted in years, not months or weeks.<sup>104</sup> Security and other problems in California jails are mounting as long-term, high-security inmates are serving their time alongside the run-of-the-mill, low-level defendants who predominate in county jails.<sup>105</sup> The Prison Law Office has already filed class action lawsuits in Fresno and Riverside counties, charging violations of inmates' Eight Amendment protections.<sup>106</sup> Civil rights lawyers and prisoner rights advocates do not have the resources to monitor effectively the conditions in the more than 150 jails scattered throughout California's 58 counties, let alone sue them all.

In 2013, the number of state prison inmates increased by one percent in California, the first uptick since the state prison population peaked in 2007.<sup>107</sup> Late that year, the California Department of Corrections and Rehabilitation projected that the state prison population would grow by more than 10,000 inmates over the next five years. State officials announced plans to house thousands of inmates in private out-of-state facilities, increase the capacity of the California prison system, and institute new parole programs to meet the expected demand for more prison beds. As of early 2014, about 9,000 California inmates were already serving their sentences in private prisons run by the Corrections Corporation of America (CCA)

<sup>101</sup> GLAZE & HERBERMAN, *supra* note 1, at 1.

<sup>102</sup> Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1686 n.434 (2003). Jails tend to be more chaotic and dangerous places than prisons due to more transient populations, inadequate resources to separate prisoners by security risk, fewer programs, and more inmate idleness. *Id.* at 1686.

<sup>103</sup> As of 2014, 37 of California's 58 county jail systems were operating under self-imposed or court-ordered population caps. See Petersilia, *supra* note 96, at 350.

<sup>104</sup> In some Los Angeles jails, inmates only get three hours per week outside of their cells—even less than inmates confined to supermax facilities. See Paige St. John, *Long-term Inmates—and Prison Culture—Move Into County Jails*, L.A. TIMES (Sept. 8, 2013), <http://articles.latimes.com/2013/sep/08/local/la-me-ff-long-haul-inmates-20130909>. As of September 2013, county jails in California housed nearly 1,300 inmates sentenced to five years or more. *Id.*

<sup>105</sup> The California Department of Corrections and Rehabilitation reports that inmate-on-inmate and inmate-on-staff assaults in state prisons have declined dramatically as realignment has eased overcrowding in state prisons. But local sheriffs report a disturbing rise in inmate-on-inmate assaults in local jails as more would-be state prisoners are realigned to overcrowded local jails with inadequate rehabilitation and other programs. Petersilia, *supra* note 96, at 349.

<sup>106</sup> *Id.* at 350.

<sup>107</sup> See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013 4 (Sept. 2014), available at <http://www.bjs.gov/content/pub/pdf/p13.pdf>; MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, STATE OF CALIFORNIA, CAL FACTS: 2013 53–55 (Jan. 2, 2013), available at [http://www.lao.ca.gov/reports/2013/calfacts/calfacts\\_010213.pdf](http://www.lao.ca.gov/reports/2013/calfacts/calfacts_010213.pdf).

far from home in Arizona, Mississippi, and Oklahoma.<sup>108</sup> Even with the thousands of additional beds planned, California is expected to increasingly exceed the population cap that was affirmed by the Supreme Court. By 2017, the total jail and prison population might actually be 5,100 higher than it was at the time of the *Brown v. Plata* decision in 2011, according to some calculations.<sup>109</sup>

Governor Brown has a mixed record on sentencing and other reforms to reduce the state's incarcerated population. In October 2013, he vetoed a bill that would have permitted prosecutors or judges to charge simple drug possession as a misdemeanor instead of a felony, to the surprise and disappointment of the bill's sponsors. A year later, he signed a measure that ensures that people found guilty of certain crack cocaine offenses will no longer receive stiffer sanctions than people convicted of comparable powder cocaine violations.<sup>110</sup> Brown did not take a position on Proposition 47, the 2014 ballot measure to reduce sanctions for lower-level, nonviolent offenses.<sup>111</sup> However, unlike his predecessors in California and governors in other states, Brown has been much more willing to parole people serving life sentences. Since 2009, over 1,700 lifers have been released in California, which is more than twice the total number of lifers paroled in the Golden States in the previous two decades.<sup>112</sup>

Realignment was drafted with the interests of law enforcement officials uppermost in mind. But many of them, especially prosecutors, remain disillusioned and opposed to key elements of the legislation.<sup>113</sup> Only a single Republican voted for the realignment bill. Opponents have sought to make realignment a major electoral issue and have blamed some recent blips in California's crime rates on realignment. It is hard to rebut these claims. Even though realignment is the "biggest penal experiment in modern history," the state provided no funding to evaluate its effects on public safety, the criminal justice

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<sup>108</sup> See Paige St. John, *Population of Prisons to Increase*, L.A. TIMES (Jan. 10, 2014), <http://articles.latimes.com/2014/jan/10/local/la-me-ff-prisons-20140110>; Associated Press, *California Prisoners Could Be Moved Out of State Due to Overcrowding*, KPBS (Jan. 8, 2014), <http://kpbs.org/news/2014/jan/08/california-prisoners-could-be-moved-out-state-due-/>.

<sup>109</sup> The jail population is projected to increase by more than 50 percent between 2011, when realignment began, and 2017. See Petersilia & Snyder, *supra* note 96, at 305 fig. 4.

<sup>110</sup> Phillip Smith, *Jerry Brown Vetoes California "Defelonization" Bill*, DRUG WAR CHRONICLE (Oct. 15, 2013, 7:10 PM), <http://stopthedrugwar.org/chronicle/805>; Saki Knafo, *California Takes Overdue Stand Against Failed Drug Laws*, HUFF. POST (Sept. 29, 2014), [http://www.huffingtonpost.com/2014/09/29/california-fair-sentencing-act\\_n\\_5902772.html](http://www.huffingtonpost.com/2014/09/29/california-fair-sentencing-act_n_5902772.html).

<sup>111</sup> Eckholm, *supra* note 87.

<sup>112</sup> See Scott Shafer, *Record Numbers of State's Lifer Inmates Granted Parole*, CAL. REPORT (May 16, 2014), <http://audio.californiareport.org/archive/R201405160850/a>.

<sup>113</sup> JOAN PETERSILIA ET AL., VOICES FROM THE FIELD: HOW CALIFORNIA STAKEHOLDERS VIEW PUBLIC SAFETY REALIGNMENT 10 (Nov. 2013) (Draft for Review and Comments), available at <http://www.law.stanford.edu/sites/default/files/child-page/443444/doc/slspublic/VOICES%20from%20the%20field-Petersilia-110813.pdf>. Three-term former Los Angeles County district attorney Steve Cooley called realignment a "public safety nightmare." See Petersilia & Snyder, *supra* note 96, at 344.



system, and the size of the incarcerated population.<sup>114</sup> It also did not include any money for public information programs to educate citizens about the aims, rationale, and progress of realignment.<sup>115</sup>

For all the talk about a new bipartisan era that leans toward less punishment not more, the ghosts of the law-and-order era have not been vanquished. Abel Maldonado, a gubernatorial hopeful, backed a brash campaign in May 2013 to repeal realignment. Republican legislative leaders launched a media campaign accusing Maldonado and other Democrats of undermining bipartisan legislation enacted in 2007 that called for building more prisons and local jails to alleviate overcrowding.<sup>116</sup> The state's correctional officers' union has moderated its virulently anti-prisoner and pro-prison growth rhetoric and staked out some apparently progressive positions on penal reform, but many of its actions "indicate continued opposition to serious change."<sup>117</sup> In early 2014, three former governors, including Democrat Gray Davis, announced they would be spearheading a new ballot initiative to foreshorten the appeals process for people on death row so as to expedite executions. The measure also calls for returning death row inmates to the general inmate population, where it would be less expensive to house them as they get conveyed along a faster track to their lethal injection.<sup>118</sup>

## VII. THE POLITICS OF DISMANTLING THE CARCERAL STATE

Developments in penal policy and practice are rarely the result of a single factor but rather of a wide variety of forces that interact with one another. These forces reflect and reproduce key features of a country's specific history, culture, polity, and institutions. This reality makes the political task of dismantling the carceral state all the more daunting.

Employing a wider historical and political lens to analyze the problem of the carceral state and the political possibilities for dismantling it is highly revealing. It

<sup>114</sup> See Petersilia & Snyder, *supra* note 96, at 266.

<sup>115</sup> DEAN MISCZYNSKI, PUB. POL'Y INST. CAL., CORRECTIONS REALIGNMENT: ONE YEAR LATER 27 (Aug. 2012), available at [http://www.ppic.org/content/pubs/report/R\\_812DMR.pdf](http://www.ppic.org/content/pubs/report/R_812DMR.pdf).

<sup>116</sup> See Phil Willon, *Abel Maldonado Takes on Jerry Brown, Prison Realignment*, L.A. TIMES (May 25, 2013), <http://articles.latimes.com/2013/may/25/local/la-me-maldonado-prisons20130526>; see also Dan Walters, *Can Crime Again Be Big Issue in California?*, MODESTO BEE (May 12, 2013, 2:39 PM), <http://www.modbee.com/news/politics-government/dan-walters/article3151390.html>.

<sup>117</sup> See Joshua Page, *Prison Officers, Crime Victims, and the Prospects of Sentencing Reform*, CAL. PROGRESS REPORT (Mar. 22, 2011), <http://californiaprogressreport.com/site/prison-officers-crime-victims-and-prospects-sentencing-reform>.

<sup>118</sup> Supporters of the measure ended up pushing back the target date to place it on the ballot from 2014 to 2016. Maura Dolan, *3 Former California Governors Back Proposed Death Penalty Initiative*, L.A. TIMES (February 12, 2014, 8:00 PM), <http://www.latimes.com/local/lanow/la-me-in-california-death-penalty-initiative-20140212,0,7551552.story#axzz2uAavEbVc>; see also *Calif. Death-Penalty Reform Initiative Pushed to 2016*, KCRA.COM (May 10, 2014, 4:15 PM), <http://www.kcra.com/news/local-news/news-sacramento/calif-deathpenalty-reform-initiative-pushed-to-2016/25914676>.

is a striking reminder that some of the most successful penal reform movements in the United States over the last century and a half raised penetrating questions about economic and social justice. These movements did not act in isolation but were buoyed by contemporaneous political and social movements. The push to abolish the convict-leasing system that gripped the South for more than half a century drew some of its lifeblood from the Populist, Progressive, and feminist movements of the late 19th and early 20th centuries.<sup>119</sup> A century ago, the exploitation of penal labor in Northern prison factories run by private entrepreneurs was central to wider political debates as the nation grappled with the wrenching economic and political upheavals brought on by industrialization and urbanization. How inmates were treated in these prison factories came to be seen as a crucial barometer of economic and social justice in the wider society.<sup>120</sup> In the 1960s and 1970s, the prisoners' rights and the Civil Rights Movement were deeply entangled with one another and drew important support from other political and social movements, including the labor movement.<sup>121</sup>

The most relevant historical example may be the movement to deinstitutionalize the mentally ill in the second half of the 20<sup>th</sup> century. Deinstitutionalization was a rare instance in which states chose to shutter a vast archipelago of public institutions that they had invested heavily in for many years. That shutdown involved a protracted political drama that played out for decades and that did not have an entirely happy ending.<sup>122</sup>

Rising anxiety among state officials about the escalating costs of state mental institutions in the late 1940s did not on its own empty state asylums. Leadership at the federal level was critical to spurring deinstitutionalization. Another vital factor was the shift in the training, worldview, and identity of the psychiatric profession as the American Psychiatric Association split over the question of institutional care versus the community mental health model. The emergence of major new and inter-connected social movements (including the civil rights movement and the senior citizens movement) also was pivotal in pushing policy makers to embrace deinstitutionalization of the mentally ill. So was the growing journalistic and popular attention to the dire conditions in state mental hospitals. The final critical factor was the reconception of the mental health issue to include not just

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<sup>119</sup> ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* chs. 4–5 (1996); DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* ch. 4 (1996).

<sup>120</sup> REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941*, ch. 4 (2008).

<sup>121</sup> See GOTTSCHALK, *supra* note 40, at ch. 7; Robert Chase, *Civil Rights on the Cell Block: Race, Reform, and Violence in Texas Prisons and the Nation, 1945–1990* ch. 4 (2009) (unpublished Ph.D. dissertation, University of Maryland) (on file with University of Michigan Library).

<sup>122</sup> For more on the deinstitutionalization case and decarceration, see Marie Gottschalk, *The Great Recession and the Great Confinement: The Economic Crisis and the Future of Penal Reform*, in *CONTEMPORARY ISSUES IN CRIMINOLOGICAL THEORY AND RESEARCH: THE ROLE OF SOCIAL INSTITUTIONS* 343, 356–60 (Richard Rosenfeld, Kenna Quinet & Crystal Garcia eds., 2011).

individuals and their individual diseases but also mental health as a barometer for the health of the whole community.<sup>123</sup>

Mental institutions were a huge and growing drain on state budgets for years, yet deinstitutionalization progressed very slowly. It was not until the 1990s—three decades after deinstitutionalization started—that whole institutions began to close in significant numbers. It took just as long for political leaders and the public to acknowledge that successful integration requires more than adequate medical treatment, and that the mentally ill needed access to good housing and jobs as well.<sup>124</sup> Deinstitutionalization was not an unqualified victory. With the closing of state mental hospitals and the contraction of federal money for treatment, services, and housing, jails and prisons unfortunately became the mental institutions of last resort for many seriously ill people. Cutbacks in mental health funds together with cuts in federal money for public housing and other services led to streams of apparently deranged people living on the streets. This outcome fueled a backlash against deinstitutionalization and community mental health. It overshadowed the fact that many mentally ill people made successful transitions to community life.<sup>125</sup>

#### VIII. THE INVISIBILITY OF THE CARCERAL STATE

Although important parallels exist, there are some key differences between the deinstitutionalization case and the problem of the carceral state. Engineering major cuts to the country's incarcerated population is likely to be an even greater political challenge than deinstitutionalizing the mentally ill. One key difference is that the problems of state asylums were far more visible to the wider public.

Prisons were not always the foreign, invisible worlds that they are today for most Americans. Here I mean real prisons, not the prisons imagined by Hollywood and prime-time television. The prisons of popular culture have created a “troubling distance between the punisher and punished,” as Michelle Brown explains. They foster spectacle but not a “critical self-awareness of the role of law and institutions in the production of pain and violence.”<sup>126</sup>

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<sup>123</sup> See GERALD N. GROB, *THE MAD AMONG US: A HISTORY OF THE CARE OF AMERICA'S MENTALLY ILL* ch. 8 (1994); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* chs. 10–11 (Little, Brown, and Co., 1990); STEVEN M. GILLON, “THAT’S NOT WHAT WE MEANT TO DO”: REFORM AND ITS UNINTENDED CONSEQUENCES IN TWENTIETH-CENTURY AMERICA ch. 2 (2000); E. FULLER TORREY, *OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS* chs. 6, 9 (1997).

<sup>124</sup> CHRIS KOYANAGI, *THE HENRY J. KAISER FAMILY FOUNDATION, LEARNING FROM HISTORY: DEINSTITUTIONALIZATION OF PEOPLE WITH MENTAL ILLNESS AS PRECURSOR TO LONG-TERM CARE REFORM 7–9* (2007), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/7684.pdf>.

<sup>125</sup> See GROB, *supra* note 123, at 308–09.

<sup>126</sup> Michelle Brown, *Penal Spectatorship and the Culture of Punishment*, in *WHY PRISON?* 108, 108, 122–23 (David Scott ed., 2013).

Once upon a time, famous prisons like Sing Sing hosted thousands of visitors each year, including average citizens as well as celebrities like Babe Ruth and the Populist firebrand William Jennings Bryan. Inmates themselves also once played pivotal roles in making the prison a leading public issue. The escapes, strikes, mutinies, and riots of leased convicts, and their angry and mournful letters and memoirs helped bring about the end of the brutal practice of convict leasing and to eventually improve conditions on state-run penal farms.<sup>127</sup> The strikes and protests of inmates in Northern prison factories in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries were catalysts for the enactment of state and federal legislation restricting the use of penal labor.<sup>128</sup> The growing number of self-mutilations by convicts on state-run penal farms in the 1940s eventually made it impossible for state officials and enterprising journalists to ignore the abhorrent conditions that provoked these bloody and desperate acts of protest.<sup>129</sup>

Protests and riots no longer pose the political problems they once did for state officials and prison administrators. This is due partly to the development of tear gas and other anti-riot equipment beginning in the 1930s and of new management techniques (most notably the extensive use of super-maximum [supermax] prisons and cells that so severely isolate and punish inmates).<sup>130</sup> Today the barriers to mobilizing and protesting from within are extraordinarily high. As such, the massive 2010 strike by Georgia inmates protesting prison conditions and the huge 2011-13 hunger strikes waged against supermax facilities in California are all the more remarkable.

Decades ago, the popular press and a vibrant prison press extensively covered penal issues and served as important prods to reform. Due to cutbacks and restructuring in the news business over the past three decades, investigative pieces documenting abuses in all kinds of institutions, including prisons, nursing homes, and hospitals, are rarer today. That may change with the recent founding of the Marshall Project. This is a new nonprofit news venture dedicated to covering the criminal justice system in the United States that Bill Keller, the former executive editor of *The New York Times*, has helped launch.<sup>131</sup>

Another challenge is that corrections administrators and other state officials have been erecting ever-higher barriers for journalists attempting to cover what happens behind prison walls, including complete bans on face-to-face interviews

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<sup>127</sup> See generally PERKINSON, *supra* note 119; OSHINSKY, *supra* note 119.

<sup>128</sup> See MCLENNAN, *supra* note 120, at ch. 4.

<sup>129</sup> Convicts would cut off a limb or pack a self-inflicted wound with lye or inject themselves with kerosene to get some relief from backbreaking field labor and to protest their horrid living and working conditions. After 21 prisoners maimed themselves in 1935 at one penal farm in Texas by chopping off their lower legs, the top administrator told the guards, "As long as they want to . . . chop themselves . . . I say give them more axes." PERKINSON, *supra* note 119, at 214.

<sup>130</sup> See generally Alan Eladio Gómez, *Resisting Living Death at Marion Federal Penitentiary, 1972*, 96 RADICAL HIST. REV. 58 (2006); see also MCLENNAN, *supra* note 120, at ch. 10.

<sup>131</sup> Bill Keller, *A Letter from our Editor*, THE MARSHALL PROJECT (Nov. 15, 2014), <https://www.themarshallproject.org/about#editor>.

with inmates in some states.<sup>132</sup> The once vibrant in-house penal press is nearly extinct, thanks to a series of unfavorable court decisions since the mid-1970s. These decisions have whittled away First Amendment rights for prison journalists and have granted penal authorities enormous latitude to censor what publications inmates are allowed to read.<sup>133</sup> (An inmate in the federal supermax prison in Florence, Colorado, even had to go to court to fight for the right to read Barack Obama's two best-selling books. Prison authorities had deemed that the president's books were "potentially detrimental to national security.")<sup>134</sup>

Compared to prisoners today, the mentally ill and their legal advocates had considerable access to the courts in the 1960s and 1970s to press their civil rights claims and expose the dire conditions in state mental hospitals. Thanks to the Prison Litigation Reform Act, the Antiterrorism and Effective Death Penalty Act, and a string of unfavorable court decisions, prisoners and their legal advocates have had greater difficulty using the courts to pursue civil rights claims and to document and expose the conditions in U.S. jails and prisons.<sup>135</sup> The milestone *Brown v. Plata* decision may be the exception that proves the rule. It took more than 15 years for this case to reach the Supreme Court. After the Court rendered its decision, California officials continued to wage a legal war of attrition to undermine it.

One cannot help but wonder whether the wider public turned its gaze away from prisons not just because corrections officials developed more sophisticated technologies and legal weapons to quell prison protests and render life behind the walls invisible. One of the big stories from the 1930s onward is how the country's

<sup>132</sup> With the strong support of the state's correctional officers' union, Governor Pete Wilson of California pushed through trendsetting legislation in 1995 to ban all journalists from interviewing any prisoners. Geri Lynn Green, *The Quixotic Dilemma: California's Immutable Culture of Incarceration*, 30 PACE L. REV. 1453, 1470 (2010); see also Jessica Pupovac, *The Battle to Open Prisons to Journalists*, CRIME REP. (Jan. 2, 2013, 7:34 AM), <http://www.thecrimereport.org/news/inside-criminal-justice/2013-01-the-battle-to-open-prisons-to-journalists>.

<sup>133</sup> See JAMES MCGRATH MORRIS, *JAILHOUSE JOURNALISM: THE FOURTH ESTATE BEHIND BARS* 179–86 (Transaction Publishers, 2002) (1998); Leah Caldwell, *The Decline and Fall of the Prison Press*, PRISON LEGAL NEWS, June 15, 2006, at 20, available at <https://www.prisonlegalnews.org/news/2006/jun/15/the-decline-and-fall-of-the-prison-press/>.

<sup>134</sup> Ed Pilkington, *Supermax Prison Blocked Obama Books Requested by Detainee*, GUARDIAN (July 10, 2009, 1:07 PM), <http://www.guardian.co.uk/world/2009/jul/10/barack-obama-books-blocked-prison>. Contrary to claims made in court papers, a BOP spokesperson contends the bureau reversed course and permitted the inmate to read the books. Associated Press, *Al-Qaida Inmate Gets Access to Obama's Books*, NBCNEWS.COM (July 10, 2009, 5:40 PM), [http://www.msnbc.msn.com/id/31854575/ns/us\\_news-security/t/al-qaida-inmate-gets-access-obama-books/#.UAQvNa6ttFo](http://www.msnbc.msn.com/id/31854575/ns/us_news-security/t/al-qaida-inmate-gets-access-obama-books/#.UAQvNa6ttFo).

<sup>135</sup> See generally Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139 (2008); HUM. RTS. WATCH, *NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES* (2009), available at <http://www.hrw.org/sites/default/files/reports/us0609web.pdf>.

prison population went from being predominantly white to being predominantly black and brown. This likely helps explain why the general public no longer identified with people on the inside, especially once law-and-order politicians decided to turn black into a synonym for violence and crime. Young minority men were a far less sympathetic population than the troubled young white women and elderly patients with dementia who filled state asylums years ago.<sup>136</sup>

The slave narratives of the antebellum period, which graphically rendered the physical pain that slaves suffered and made it widely visible, helped to propel the abolitionist cause.<sup>137</sup> Today, what happens in prison stays mostly in prison, making it harder to draw connections in the public mind between justice on the inside and justice on the outside. The ability to identify with an offender—or not—is a key predictor of why people differ in their levels of punitiveness.<sup>138</sup> The invisibility of the millions of people behind bars has made it extremely difficult to alter the negative portrait that members of the general public have of people who have been convicted of a crime. They are simply prisoners and criminals. As such, they often are denied their humanity and denied any right to democratic accountability, much as slaves were in the United States.

#### IX. PUBLIC OPINION AND PENAL REFORM

Although public opinion probably poses a greater hurdle to penal reform than it did to mental health reform, it is easy to overestimate how high this hurdle is. Politicians and policy makers seriously misperceive public opinion on penal matters, mistakenly seeing the public as inherently punitive. Legislators remain deeply reluctant to shift public policy toward greater leniency, even in the face of evidence that public opinion on crime and punishment can be quite malleable and that support for hard-line policies has been falling. National surveys suggest considerable decreases since the early-to-mid 1990s in key indicators of public punitiveness, including public fear of crime, that the courts are too lenient, support for the death penalty, and designation of crime as a top priority.<sup>139</sup>

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<sup>136</sup> Between 1950 and 1980, 80 to nearly 90 percent of the patients in state asylums were white and nearly half of them were women. Steven Raphael and Michael A. Stoll conclude that deinstitutionalization of the mentally ill contributed to the rise in incarceration rates but was not the major engine. RAPHAEL & STOLL, *supra* note 41, at 134 tbl.5.5, 156.

<sup>137</sup> Elizabeth B. Clark, “*The Sacred Rights of the Weak*”: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America, 82 J. AM. HIST. 463, 463–65, 470–71 (1995).

<sup>138</sup> James D. Unnever & Francis T. Cullen, *Empathetic Identification and Punitiveness: A Middle-Range Theory of Individual Differences*, 13 THEORETICAL CRIMINOLOGY 283, 287–88 (2009).

<sup>139</sup> Kenneth E. Fernandez, *Crime Policy in the New Millennium: The End of the ‘Tough on Crime’ Era?*, Paper Presented at the State Politics and Policy Conference, Dartmouth College, Hanover, NH (June 24, 2011) (on file with author); PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, DEFICIT REDUCTION RISES ON PUBLIC’S AGENDA FOR OBAMA’S SECOND TERM (2013), <http://www.people-press.org/2013/01/24/deficit-reduction-rises-on-publics-agenda-for-obamas-second-term/>.

Public opinion looks more intractable and punitive than it is, partly due to the shortcomings of survey research in this area.<sup>140</sup> Qualitative gauges of public opinion (such as focus groups) and surveys that permit respondents to rank their policy preferences indicate that Americans have much more nuanced views of spending on criminal justice than the popular media or public policy debates suggest.<sup>141</sup>

Public opinion about crime and punishment is highly racialized, with considerable gaps between whites and blacks on key issues. Whites tend to associate crime and violence with being African-American and are more likely than blacks to support harsh penal policies.<sup>142</sup> This racialization of public opinion on crime and punishment should not be viewed as an implacable obstacle to dismantling the carceral state. Yes, public opinion on crime and punishment is highly racialized today. But when in U.S. history has it not been? Furthermore, whites and blacks do not have monolithic views on criminal justice matters. Views vary considerably among whites and among blacks. Simplistic polls that ask whether one favors more or less punitive policies do not capture this complexity of views.<sup>143</sup>

#### X. POLITICAL QUIESCENCE AND RESISTANCE

Debates about crime, punishment, and law-and-order have been deeply entangled in wider political battles and electoral strategies in ways that the mental health issue never was. Republicans waged the rebirth of the modern Republican

<sup>140</sup> For example, national surveys seldom include questions to gauge the “relative support for progressive crime control policies” and “rarely allow respondents to prioritize which method of crime control they most prefer”—such as greater investment in the police or in early childhood education. James D. Unnever, *Race, Crime, and Public Opinion*, in THE OXFORD HANDBOOK OF ETHNICITY, CRIME, AND IMMIGRATION 70, 84 (Sandra M. Bucerius & Michael Tonry eds., 2013). For a brief overview of research on the relationship between early childhood education and crime reduction and the crime-reducing impact of other tailored social programs and policies, see MARK A. R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 121–35 (2009).

<sup>141</sup> See, e.g., Mark A. Cohen, Roland T. Rust & Sara Steen, *Prevention, Crime Control or Cash? Public Preferences Towards Criminal Justice Spending Priorities*, 23 JUST. Q. 317, 317 (2006); HARRIS SOKOLOFF & CHRIS SATULLO, THE PENN PROJECT FOR CIVIC ENGAGEMENT, THE CITY BUDGET: TIGHT TIMES, TOUGH CHOICES 5, 13 (2009), available at <http://www.whyy.org/news/itsourcity/CityBudgetReport.pdf>; MARK DICAMILLO & MERVIN FIELD, THE FIELD POLL, PARADOXICAL VIEWS ABOUT THE STATE DEFICIT 1 (2008), available at <http://www.field.com/fieldpollonline/subscribers/RIs2275.pdf>; BEN TULCHIN, COREY O’NEIL & ISAAC HALE, TULCHIN RESEARCH, NEW CALIFORNIA STATEWIDE POLL FINDS STRONG SUPPORT FOR ALTERNATIVES TO JAIL FOR NON-VIOLENT OFFENDERS, STRONG OPPOSITION TO BUILDING MORE JAILS 1–4 (2012), available at <http://www.tulchinresearch.com/wp-content/uploads/2012/09/ACLU-225-H-Statewide-Public-Memo-9-12-final.pdf>

<sup>142</sup> NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 3–4 (2014), available at [http://sentencingproject.org/doc/publications/rd\\_Race\\_and\\_Punishment.pdf](http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf).

<sup>143</sup> For a review of these research findings, see GOTTSCHALK, *supra* note 12, at 154–56.

Party on the Southern strategy, which invoked law-and-order appeals to stoke racial anxieties and animosities. Democrat Bill Clinton staked his campaign for the White House on a kinder, gentler version of the Southern strategy to woo the so-called Reagan Democrats back to the party. Given that the crime and punishment issue has been a pillar for repositioning the major political parties, political openings to shift penal policy in a less punitive direction are fraught with risk and are hard to sustain. The opportunity for the emergence of the penal equivalent of a Robert Felix to put into motion a federal plan to spur a major decarceration of state prisons is less likely.<sup>144</sup>

The Southern strategy, the racialization of public opinion on crime and punishment, and the entrenched history of racial intransigence in the United States cannot on their own explain why the carceral state has not faced more opposition from the groups most harmed by it. As discussed throughout this article, the carceral state cannot be understood separately from the wider political, economic, and social context in which it was constructed. The rise of the carceral state coincided with what Michael Dawson has characterized as a “dangerous decline” in the black public sphere and black civil society since the 1970s.<sup>145</sup> A variety of factors are to blame: internal dissension, state repression, the ascendancy of neoliberalism, growing income and other inequalities between blacks, and the emergence of African-American neighborhoods of extreme and concentrated poverty and crime.<sup>146</sup> Residents of these poor neighborhoods are much more likely to view the problems in their communities as insolvable and to mistrust groups that have been key coalition partners in previous political movements, including unions, the working class, and the middle class.<sup>147</sup> These developments help explain their relative political quiescence in the face of the enormous injustices of the carceral state.

Moreover, major national organizations committed to social and economic justice are vexed with subtle biases that keep them from mobilizing on behalf of the most marginalized groups in the United States, including offenders and ex-offenders.<sup>148</sup> These organizations have failed to embrace “affirmative advocacy” to ensure that the plight of the most disadvantaged groups are more central to their mission.<sup>149</sup> This would include changing how decisions are made and ensuring greater representation for members of these groups on their staffs and boards. It

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<sup>144</sup> As director of the Division of Mental Health of the U.S. Public Health Service in the 1940s, Robert Felix shrewdly maneuvered to end federal passivity on mental health. He was an indispensable catalyst for the development of a succession of pieces of federal legislation that deinstitutionalized much of the mentally ill population. GROB, *supra* note 123, at 211.

<sup>145</sup> MICHAEL C. DAWSON, NOT IN OUR LIFETIMES: THE FUTURE OF BLACK POLITICS 167 (2011).

<sup>146</sup> See GOTTSCHALK, *supra* note 12, at chs. 6–7.

<sup>147</sup> Cathy J. Cohen & Michael C. Dawson, *Neighborhood Poverty and African-American Politics*, 87 AM. POL. SCI. REV. 286, 291 (1993).

<sup>148</sup> See CATHERINE M. PADEN, CIVIL RIGHTS ADVOCACY ON BEHALF OF THE POOR 2–3 (2011); STROLOVITCH, *supra* note 21, at 234–36; GOTTSCHALK, *supra* note 12, at ch. 7.

<sup>149</sup> STROLOVITCH, *supra* note 21, at 10.



also would entail developing stronger ties to local and state advocacy groups so that these groups serve as “democratic checks” on national organizations and as vehicles for more progressive ideas to “trickle up.”<sup>150</sup>

These national organizations will not lead the way out of the carceral state without pressure from a more radical flank. Without that, they are unlikely to develop a penal reform vision that extends much beyond the 3R’s and the Right on Crime coalition. As Dawson notes, the three most successful periods of black political mobilization—Reconstruction, the Progressive era, and the combined civil rights and Black Power era—“were all marked by innovative initiatives within black civil society, a growing and robust black public sphere,” and an active radical flank.<sup>151</sup> These movements did not single-mindedly focus on the problem of racial disparities and inequities but sought to forge a broader political agenda centered on racial, social, and economic justice.

All the focus on the 3-Rs and the Right on Crime coalition has overshadowed the growing political ferment at the grass-roots level against the carceral state. It remains an open question whether all this ferment will coalesce into a broader movement to challenge not only the carceral state but also other growing inequities in the United States, including the unequal distribution of crime. New groups have been forming at the state and local levels to battle various aspects of the carceral state, including felon disenfranchisement, supermax prisons, the abuse of transgender prisoners, exorbitant telephone rates for inmates, the shackling of pregnant women during labor, and employment discrimination against former offenders.<sup>152</sup> A new wave of prisoner and ex-prisoner-led groups—what some dub the “formerly incarcerated peoples’ movement”—has been coalescing to fight the carceral state despite the enormous obstacles to political action that they face.<sup>153</sup>

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<sup>150</sup> *Id.* at 227–29.

<sup>151</sup> DAWSON, *supra* note 145, at 166.

<sup>152</sup> JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* ch. 7 (2011); Toshio Meronek, *Trans Prisoners Fight Abuse*, IN THESE TIMES (Nov. 10, 2012), [http://inthesetimes.com/article/13990/trans\\_prisoners\\_fight\\_abuse](http://inthesetimes.com/article/13990/trans_prisoners_fight_abuse); Derek Gilna, *Transgender Prisoner’s Lawsuit Sparks BOP Policy Change*, PRISON LEGAL NEWS, Dec. 2012, at 18, available at <http://www.prisonlawblog.com/blog/2013/7/24/transgender-prisoners-lawsuit-sparks-bop-policy-change#.VNfxDMtH4g=>; Victoria Law & Tina Reynolds, *Birthing Behind Bars: A Campaign for Reproductive Justice in Prisons*, PRISON LEGAL NEWS, Sept. 2012, at 14–15, available at <https://www.prisonlegalnews.org/news/2012/sep/15/birthing-behind-bars-a-campaign-for-reproductive-justice-in-prisons/>; John E. Dannenberg & Alex Friedmann, *FCC Order Heralds Hope for Reform of Prison Phone Industry*, PRISON LEGAL NEWS, Dec. 15, 2013, at 1, available at <https://www.prisonlegalnews.org/news/2013/dec/15/fcc-order-heralds-hope-for-reform-of-prison-phone-industry/>.

<sup>153</sup> Toshio Meronek & Martha Wallner, *No Longer a Prisoner of the Past*, IN THESE TIMES (Aug. 13, 2013), [http://inthesetimes.com/article/15440/no\\_longer\\_a\\_prisoner\\_of\\_the\\_past](http://inthesetimes.com/article/15440/no_longer_a_prisoner_of_the_past); For more on the hurdles to political mobilization that ex-offenders face, see GOTTSCHALK, *supra* note 12, at 161.

A major shift may also be afoot among Christian fundamentalists, who have long been associated with the rise of retributive justice. David Green suggests that we may be at the cusp of a new era of penal optimism as evangelical Protestants take up the cause of penal reform and rally under the banner of the Bible's calls for compassion and forgiveness. Leading Christian fundamentalists like Chuck Colson, who established Prison Fellowship in 1975 and died in 2012, and Pat Nolan, president of Justice Fellowship, have had strong links to the Right on Crime group. But the shift among Christian fundamentalists on the crime and punishment question appears to run much deeper than these elite-level connections.<sup>154</sup>

Since the publication of *The New Jim Crow*, Michelle Alexander has become an outspoken advocate of forging a much wider political movement to challenge the carceral state that goes beyond the race-centered approach she appeared to be endorsing in her best-selling book. She has called for a movement that shakes "the foundations of our economic and social order" in order to ensure that a new system of racial and social control will not be erected in place of the carceral state. In reflecting on the 50<sup>th</sup> anniversary of the March on Washington, Alexander declared in 2013 that Martin Luther King "did not play politics to see what crumbs a fundamentally corrupt system might toss to the beggars for justice."<sup>155</sup>

#### XI. THE CARCERAL STATE AND CRIME

The record drop in crime rates since the early 1990s in the United States is a major achievement that has received enormous attention. Less noted, is that crime is distributed in highly unequal ways, and that unacceptably high rates of violent crime persist in certain urban neighborhoods.<sup>156</sup> Ignoring these disquieting facts is like heralding the record highs of the U.S. stock market or recent gains in U.S. per capita income without considering trends in income distribution or poverty rates. No other major city except Los Angeles has a homicide rate that comes close to New York City's relatively low rate of 4 per 100,000.<sup>157</sup> Most cities have homicide rates that are at least twice as large as New York's rate and, in many

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<sup>154</sup> Colson, a top aide of President Richard Nixon, established the Prison Fellowship in 1975 shortly after completing a federal sentence on Watergate-related charges. Justice Fellowship is the advocacy arm of Prison Fellowship. See David A. Green, *Penal Optimism and Second Chance: The Legacies of American Protestantism and the Prospects for Penal Reform*, 15 PUNISHMENT & SOC'Y 123, 128–29, 139 (2013).

<sup>155</sup> Michelle Alexander, *Breaking My Silence*, THE NATION, Sept. 23, 2013, at 6, available at <http://www.thenation.com/article/176030/breaking-my-silence>.

<sup>156</sup> See generally KAREN F. PARKER, UNEQUAL CRIME DECLINE: THEORIZING RACE, URBAN INEQUALITY, AND CRIMINAL VIOLENCE (2008).

<sup>157</sup> FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 2013 TBL.8, available at [http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-8/table-8-state-cuts/table\\_8\\_offenses\\_known\\_to\\_law\\_enforcement\\_new\\_york\\_by\\_city\\_2013.xls](http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-8/table-8-state-cuts/table_8_offenses_known_to_law_enforcement_new_york_by_city_2013.xls). The rate for Los Angeles is about 6.5 per 100,000. *Id.*

cases, several times or even dozens of times higher.<sup>158</sup> The high levels of violence that persist in the United States are quite exceptional when compared to levels of violence in other developed countries. They raise disquieting “questions about the authority and the legitimacy of the state and the possibility of state failure.”<sup>159</sup>

Since the early 1990s, the homicide victimization rate for African-Americans has fallen by more than half, but it remains extraordinarily high. Extremely high rates of violent crime persist in some urban neighborhoods.<sup>160</sup> The homicide rate in Chicago’s affluent Hyde Park, home to Barack Obama, is 3 per 100,000. But the rate in neighboring Washington Park, which is overwhelmingly poor and 98 percent African-American, is 78 per 100,000.<sup>161</sup> The homicide victimization rate for young black men involved in criminally active groups in a high crime neighborhood on Chicago’s west side is 3,000 per 100,000 or about 600 times the national rate. Put another way, this is three times the risk of stepping on a landmine in Afghanistan, a real war zone.<sup>162</sup>

The average rate of criminal violence for black neighborhoods is five times that for white neighborhoods; for minority areas, it is three and a half times that of white neighborhoods.<sup>163</sup> The homicide victimization rate for blacks is about six times the rate for whites.<sup>164</sup> Blacks constitute just 13 percent of the population but half of all homicide victims.<sup>165</sup> Despite the great crime drop, over 78,000 black males were homicide victims between 2000 and 2010. (This figure exceeds the total number of U.S. military deaths during the Vietnam War by about 25 percent.<sup>166</sup> And for every black male who died of gun violence, almost another

<sup>158</sup> At the top of the list are small cities like Gary, Indiana, (69 per 100,000), Fort Lee, New Jersey (78 per 100,000) and New Orleans, Louisiana (41 per 100,000). *Id.*

<sup>159</sup> Lisa L. Miller, *Mass Incarceration as State Failure*, Presentation of Paper at the Annual Meetings of the American Political Science Association, Washington, D.C. 6 (Aug. 30, 2014) (on file with author).

<sup>160</sup> The homicide rate for African-Americans fell from about 42 per 100,000 in 1990 to 17 per 100,000 in 2011. ERICA L. SMITH & ALEXIA COOPER, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *HOMICIDE IN THE U.S. KNOWN TO LAW ENFORCEMENT*, 2011 4–5 (2013), available at <http://www.bjs.gov/content/pub/pdf/hus11.pdf>; see also RANDOLPH ROTH, *AMERICAN HOMICIDE* 441 fig.9.1 (2012).

<sup>161</sup> David A. Weiner, Bryon F. Lutz & Jens Ludwig, *The Effects of School Desegregation on Crime* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 1530, 2009), available at <http://www.nber.org/papers/w16664.pdf>.

<sup>162</sup> Andrew V. Papachristos, *Murderers, Victims Share Social Ties*, CHICAGO SUN TIMES (Apr. 15, 2011), <http://www.suntimes.com/news/otherviews/2877760-452/homicide-network-social-risk-victims.html>.

<sup>163</sup> RUTH D. PETERSON, LAUREN J. KRIVO & JOHN HAGAN, *DIVERGENT SOCIAL WORLDS: NEIGHBORHOOD CRIME AND THE RACIAL-SPATIAL DIVIDE* 17 (2010).

<sup>164</sup> SMITH & COOPER, *supra* note 160, at 1.

<sup>165</sup> Ruth D. Peterson, *The Central Place of Race in Crime and Justice: The American Society of Criminology’s 2011 Sutherland Address*, 50 *CRIMINOLOGY* 303, 306–07 (2012).

<sup>166</sup> See *Murder in America*, FUTURE JOURNALISM PROJECT MEDIA LAB, <http://tumblr.thefjp.org/post/30332670020/murder-in-america-by-the-wall-street-journal> (last visited May 16, 2015); *Statistical Information about Fatal Casualties of the Vietnam War*, NAT’L ARCHIVES,

three others suffered non-fatal injuries.)<sup>167</sup> Leaving aside homicide, the violent victimization rate for black girls and young black women is, in many ways, comparable to that of their male counterparts.<sup>168</sup>

Violent crime is highly stratified by race and class, but it is difficult—perhaps impossible—to determine which factor is more important. With the rise in the number of people living in residentially segregated neighborhoods of concentrated poverty, the deleterious effects of growing up and living in such neighborhoods are now well documented.<sup>169</sup> It is extremely hard—perhaps impossible—to disentangle the race effects from the class effects in violence because there are virtually no white neighborhoods as poor as the poorest black neighborhoods.<sup>170</sup> The “worst” urban neighborhoods in which whites reside are considerably better off than those of the average African-American community, and the most advantaged black neighborhoods are no better off than the typical white neighborhood.<sup>171</sup>

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<http://www.archives.gov/research/military/vietnam-war/casualty-statistics.html#category> (last visited Mar. 28, 2015).

<sup>167</sup> Over 76,000 black males died by firearms between 2001 and 2011. See *Fatal Injury Reports, National and Regional, 1999–2013*, CENTERS FOR DISEASE CONTROL AND PREVENTION, available at [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_us.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html) (last visited May 14, 2015) (the report was produced by selecting “firearm” as the cause of injury, setting the date range as “2001 to 2011,” setting the race as “Black,” and the sex as “Males.”). *Nonfatal Injury Reports*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/injury/wisqars/nonfatal.html> (last visited Mar. 28, 2015) (the report was produced by selecting “firearm” as the cause of injury, “Males” as the sex, “2001 to 2011” as the date range, and then selecting “Race/Ethnicity” under the “Sort by category” option.).

<sup>168</sup> JODY MILLER, *GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE* 8 (2008); JANET L. LAURITSEN, U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *HOW FAMILIES AND COMMUNITIES INFLUENCE VICTIMIZATION* (2003), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/201629.pdf>.

<sup>169</sup> For an overview of this work see Patricia L. McCall, Kenneth C. Land & Karen F. Parker, *An Empirical Assessment of What We Know About Structural Covariates of Homicide Rates: A Return to a Classic 20 Years Later*, 14 *HOMICIDE STUD.* 219, 226–28 (2010); Mathew R. Lee, *Concentrated Poverty, Race, and Homicide*, 41 *SOC. Q.* 189, 189–206 (2000).

<sup>170</sup> As Robert J. Sampson and William Julius Wilson explain:

[R]egardless of whether a black juvenile is raised in an intact or single-parent family, or a rich or poor home, he or she will not likely grow up in a community context similar to that of whites with regard to family structure and income. Reductionist interpretations of race and social class camouflage this key point.

Robert J. Sampson & William J. Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in *CRIME AND INEQ.* 44 (John Hagan & Ruth Peterson eds., 1995).

<sup>171</sup> In not one city with more than 100,000 people do blacks reside in conditions equal to whites on key economic and social indicators, like rates of poverty, joblessness, and family disruption. Robert J. Sampson, *Urban Black Violence: The Effect of Male Joblessness and Family Disruption* 93 *AM. J. SOC’Y* 348, 354 (1987). Peterson and Krivo found that a mere 31 of over 3,000 white neighborhoods in their sample could be classified as extremely disadvantaged compared to more than half of African American, Latino, and other minority neighborhoods. See PETERSON & KRIVO, *supra* note 163, at 62. Only 3 percent of black and Latino areas and 6 percent of minority areas “are privileged enough that they have no extreme disadvantages” compared to 89 percent of white areas. *Id.* at 62.

## XII. CRIME AND ROOT CAUSES

The findings of decades of research on what explains variations in violent crime, especially homicide rates, are remarkably robust. Certain structural factors consistently predict higher rates of homicide: larger and denser populations, geographic location in the South, a higher proportion of divorced males, and higher rates of poverty and income inequality. Two other key structural factors that are related to income inequality—residential segregation and pervasive economic discrimination against certain groups—are likely consequential as well.<sup>172</sup> Over time, the relative weight of these factors has shifted, with structural economic factors related to poverty and income inequality now accounting for a greater proportion of the variance.<sup>173</sup> Differences in policing resources and strategies also likely explain variations in rates of violent crime, though experts do not agree on just how much to credit the police for sustained drops in rates of homicide and violent crime.<sup>174</sup>

If the United States is serious about addressing these high levels of concentrated violence then it has to be serious about addressing the country's high levels of inequality and concentrated poverty. The only way out is to develop a new social and economic agenda that designates the alleviation of the unconscionably high rates of hunger, poverty, and joblessness that vex these communities a top priority, not a public policy afterthought. This would necessitate an infusion of resources and new policies and programs to address persistent residential segregation, inadequate investments in good housing, and disparate access to equitable residential loans and quality public education.<sup>175</sup> It also would entail a renewed commitment to government intervention to bring down the unemployment rate and to foster the revitalization of organized labor and collective bargaining. All the handwringing and fatalism today about the

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<sup>172</sup> See Steven F. Messner, *Economic Discrimination and Societal Homicide Rates: Further Evidence on the Cost Inequality*, 54 AM. SOC. REV. 597 (1989); PARKER, *supra* note 156, at 117–18.

<sup>173</sup> See McCall, Land & Parker, *supra* note 169, at 219.

<sup>174</sup> FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* ch. 6 (2012); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13, 20–21 (2011); Michael Tonry, *Less Imprisonment Is No Doubt a Good Thing: More Policing is Not*, 10 CRIMINOLOGY & PUB. POL'Y 137 (2011); Elliot Currie, *On the Pitfalls of Spurious Prudence*, 10 CRIMINOLOGY & PUB. POL'Y 109 (2011).

<sup>175</sup> See PETERSON & KRIVO, *supra* note 163, at 123; Lawrence D. Bobo and Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment*, in *DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY* 322 (Hazel Rose Markus & Paula M.L. Moya eds., 2010). On the importance of residential lending in particular in alleviating violence and property crime, see generally GREGORY D. SQUIRES & CHARLES E. KUBRIN, *PRIVILEGED PLACES: RACE, RESIDENCE, AND THE STRUCTURE OF OPPORTUNITY* (2008); Darlene F. Saporu et al., *Differential Benefits? Crime and Community Investments in Racially Distinct Neighborhoods*, 1 RACE & JUST. 79 (2011).

government's purported impotency when it comes to creating jobs obscures the fact that expansion of the public sector beginning in the 1960s was a key factor in the sizable reductions in the poverty rate for blacks.<sup>176</sup>

Penal and social policies have long been two sides of the same coin in governing social marginality. Increasingly, penal policy has become the policy of first resort to address the massive economic and social dislocations of the last half-century and the related crime problem.<sup>177</sup> The main emphasis has been on the need for more police and new policing strategies to enhance public safety, most notably COMSTAT and "hot spots" policing. This has fomented a technicist approach that "depoliticizes crime prevention, by reducing it to the purely neutral scientific task of identifying 'best practice.'"<sup>178</sup> Such an approach is inattentive to the important political and symbolic dimensions of crime prevention and penal policy more generally.

Policing enthusiasts contend that policing strategies based on the proven deterrent effects of swift and certain apprehension and punishment are the key to lowering crime rates.<sup>179</sup> They have a point. It is "surely . . . better to prevent people from committing crime through a visible police presence than to wait for them to commit it and then put them behind bars," concedes Elliott Currie. But it "is one thing to prevent crime by improving social conditions or by making people more capable and productive," explains Currie. It is another thing altogether to prevent crime "by frightening unproductive, desperate, and alienated people with the threat of arrest and incarceration if they break the law."<sup>180</sup>

In recent decades, the resources available to many police departments and law enforcement agencies escalated.<sup>181</sup> This occurred largely without a commensurate increase in police accountability to the communities they serve. Police and their

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<sup>176</sup> See Michael Hout, *Occupational Mobility of Black Men: 1962 to 1973*, 49 AM. SOC. REV. 308, 311, 316 (1984); Michael B. Katz, Mark J. Stern, & Jamie J. Fader, *The New African American Inequality*, 92 J. AM. HIST. 75, 86–87 (2005).

<sup>177</sup> Notably, by the mid-1990s, states with less generous social welfare programs had considerably higher incarceration rates. Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC'Y 43, 50–51 (2001)

<sup>178</sup> Cherney, *supra* note 33, at 52.

<sup>179</sup> See Durlauf & Nagin, *supra* note 174, at 38.

<sup>180</sup> Currie, *supra* note 173, at 113–14.

<sup>181</sup> Between 1980 and 2006, spending per capita on police quadrupled, a rise that was well above the inflation rate. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, 11 tbl.1.7 (2005), available at <https://www.ncjrs.gov/pdffiles1/Digitization/208756NCJRS.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2006, tbl.1.8, available at <http://www.albany.edu/sourcebook/pdf/t182006.pdf>. However, with the Great Recession, some cities, especially smaller ones, slashed their police forces. See generally *44 Percent Cite Increases in Crime Due to Economic Crisis: 63 Percent of Local Police Departments Are Facing Budget Cuts, PERF Survey Shows*, 23 SUBJECT TO DEBATE, Jan. 2009 at 6, available at [http://www.policeforum.org/assets/docs/Subject\\_to\\_Debate/Debate2009/debate\\_2009\\_jan.pdf](http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2009/debate_2009_jan.pdf).

political benefactors have stridently resisted creating independent civilian review boards with real teeth to monitor and discipline their activities. Many prosecutors have been loath to aggressively pursue charges of police brutality and other criminal activities by police officers. Thanks to lucrative and highly permissive forfeiture laws and other measures, police departments have expanded their paramilitary operations, their anti-drug task forces, and other controversial operations.<sup>182</sup> The police have also been the main foot soldiers in the war on drugs and in carrying out massive stop-and-frisk campaigns in certain neighborhoods. Additionally, they have become important players in the local enforcement of federal immigration policies in some communities.<sup>183</sup> As a consequence, the police are widely viewed in many inner-city neighborhoods and elsewhere in the country as an occupying army unaccountable to the local citizens. The uproar following the death of Michael Brown, an unarmed black teenager shot to death by a white police officer in Ferguson, Missouri, in August 2014 brought national and international attention to this issue.

Crime prevention policies have followed strikingly different trajectories in Europe compared to the United States. In Europe, they have been inextricably “bound up with concerns about social exclusion and urban renewal in disadvantaged communities.”<sup>184</sup> The countries of the European Union have many more police per capita than the United States, but they also have more expansive social welfare programs that seek to reduce crime by ameliorating poverty and inequality.<sup>185</sup>

For decades, conservatives have brazenly dismissed the claim that social welfare spending reduces crime. Indeed, many have argued the exact reverse. Although the relationship between crime and spending on social welfare has been a hotly debated topic, research in this area is surprisingly sparse.<sup>186</sup> The limited research available suggests that certain types of social welfare spending and programs reduce crime.<sup>187</sup> What we do know conclusively is that states and countries that spend more on social welfare tend to have lower incarceration rates; moreover, high rates of inequality are associated with higher rates of imprisonment and crime.<sup>188</sup>

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<sup>182</sup> See GOTTSCHALK, *supra* note 12, at ch. 2.

<sup>183</sup> *Id.* at ch. 10.

<sup>184</sup> Cherney, *supra* note 33, at 52.

<sup>185</sup> ELLIOTT CURRIE, *THE ROOTS OF DANGER: VIOLENT CRIME IN GLOBAL PERSPECTIVE* 80–85 (2009).

<sup>186</sup> Ryan S. Johnson, Shawn Kantor & Price V. Fishback, *Striking at the Roots of Crime: The Impact of Social Welfare Spending on Crime During the Great Depression*, 53 J.L. & ECON. 715 (2010).

<sup>187</sup> *Id.* at 733–34.

<sup>188</sup> John R. Sutton, *The Political Economy of Imprisonment in Affluent Western Democracies, 1960–1990*, 69 AM. SOC. REV. 170, (2004); David Downes & Kirstine Hansen, *Welfare and Punishment in Comparative Context*, in *PERSPECTIVES ON PUNISHMENT: THE CONTOURS OF CONTROL* 133 (Sarah Armstrong & Lesley McAra eds., 2006); Tapio Lappi-Seppälä, *Trust, Welfare, and*

The unequal distribution of crime and the persistence of extraordinarily high levels of violent crime in certain urban neighborhoods is a major inequality that needs to be addressed. However, as discussed earlier, in addressing the crime problem, we must be careful not to conflate it with the problem of the carceral state. The United States needs a visionary agenda aimed at ameliorating the root causes of crime and other persistent and gaping inequalities in high-crime communities. In the meantime, there is no excuse for keeping so many of the residents of these communities locked up or otherwise ensnared in the carceral state.

### XIII. BRING IT ON POLITICS

The distorted narrative of the urban crisis in the 1970s—especially New York City’s fiscal crisis—was a vital “crucible for galvanizing new right intellectual activism” aimed at delegitimizing the remnants of the New Deal and Great Society, forging a “drop dead” urban policy, and facilitating the punitive turn.<sup>189</sup> In the aftermath of the Great Recession, cities may once again be poised to be the crucibles for the next big turn in politics and public policy in ways that have enormous implications not only for the carceral state but also for the future direction of U.S. social and economic policies. The optimists see the 2013 election of Bill de Blasio as the mayor of New York’s “two cities” as a bellwether of a broader left-hand turn away from neoliberalism and heavy-handed law enforcement tactics.<sup>190</sup> The pessimists look to Detroit, Stockton, Central Falls, and other cities forced into bankruptcy where nothing is sacred—not the pensions of public workers or the priceless art collection of the Detroit Institute of Arts.

The incipient movements to challenge the carceral state and other inequalities in the United States certainly cannot ignore developments in electoral and party politics entirely. However, they cannot bet their future on politicians and the two main political parties. Establishing vibrant and independent institutions and organizations such as unions, women’s groups, community and immigrant centers, and an alternative press was key to mounting successful challenges to gaping political and economic inequalities in the past and will continue to be key in the future.<sup>191</sup>

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*Political Culture: Explaining Differences in National Penal Policies*, 37 CRIME & JUST. 313, 314 (2008).

<sup>189</sup> Alice O’Connor, *The Privatized City: The Manhattan Institute, the Urban Crisis, and the Conservative Counterrevolution in New York*, 34 J. URB. HIST. 333, 334 (2008). The reference to “drop dead” urban policy is a takeoff on the infamous New York *Daily News* headline in October 1975 after President Gerald Ford nixed a bailout plan for the city: “Ford to City: Drop Dead.” *Id.* at 346–47.

<sup>190</sup> See, e.g., Michelle Goldberg, *Power to the City: The Progressive Case for Going Local*, THE NATION, Apr. 21, 2014, at 12.

<sup>191</sup> Michael Kazin, *Whatever Happened to the American Left?*, N.Y. TIMES, Sept. 25, 2011, at SR4; see generally MICHAEL KAZIN, AMERICAN DREAMERS: HOW THE LEFT CHANGED A NATION (2011). On the importance of community-based organizations in the recent political mobilization of



The sobering reality is that “true criminal justice ultimately awaits true social justice,” as Francis Cullen and Karen Gilbert once said.<sup>192</sup> Vast and growing economic inequalities rooted in vast and growing political inequalities are the preeminent problem facing the United States today. They are the touchstone of many of the major issues that vex the country—from mass incarceration to mass unemployment to climate change to the economic recovery of Wall Street but not Main Street and Martin Luther King Street. In the face of the enormous political chasm between the 99 percent and the 1 percent, a strategy of elite-led, bipartisan deal cutting premised on calls for “shared sacrifice” leaves this grossly inequitable economic and political fabric intact. As such, the 99 percent are caught in the vise of small-bore policies from their supposed friends and allies while their opponents encircle them with scorched-earth politics.

Faced with an economic meltdown widely understood to be the result of breathtaking malfeasance by the financial sector and its political patrons, President Obama and his key advisers first singled out health care costs and the deficit as the leading threats to the country’s long-term economic health. Characterizing the country’s economic problems this way was politically costly. It fostered an exaggerated faith in the possibilities to forge productive coalitions with elite political and economic interests. At the same time, it diminished interest in cultivating a wider political and social movement to press for far-reaching changes in issues ranging from mass unemployment to mass incarceration.

The Obama administration and much of the leadership of the Democratic Party have taken extreme care not to upset these basic interests. As a consequence, they squandered an exceptional political moment. Likewise, the financial crisis and the Great Recession were one of those rare moments when many members of the business sector were “stripped naked as leaders and strategists,” in the words of Simon Johnson, former chief economist at the International Monetary Fund. The Great Depression was another such instance.<sup>193</sup>

President Franklin D. Roosevelt [FDR] came into office at an exceptional moment in 1933. Four years into the Depression, the Hoover administration was thoroughly discredited, as was the business sector. FDR recognized that the country was ready for a clean break with the past as he symbolically and substantively cultivated that sentiment. The break did not come from FDR alone. Massive numbers of Americans mobilized in unions, women’s organizations,

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Latino immigrants and the incomplete incorporation of immigrants and African-Americans into party politics, see generally ZOLTAN L. HAJNAL & TAEKU LEE, *WHY AMERICANS DON’T JOIN THE PARTY: RACE, IMMIGRATION, AND THE FAILURE (OF POLITICAL PARTIES) TO ENGAGE THE ELECTORATE* (2011); Janelle Wong, *Two Steps Forward: The Slow and Steady March Toward Political Mobilization*, 4 DU BOIS REV. 457 (2007).

<sup>192</sup> FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* 110 (2d ed. 2013).

<sup>193</sup> Simon Johnson, *The Quiet Coup*, THE ATLANTIC (May 1, 2009, 12:00 PM), [http://www.theatlantic.com/magazine/archive/2009/05/the-quiet-coup/307364/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2009/05/the-quiet-coup/307364/?single_page=true); see also STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* ch. 7 (1997).

veterans' groups, senior citizen associations, and civil right organizations to ensure that the country changed course.

During the Depression, President Roosevelt was forced to broaden the public understanding of crime to include corporate crime. The Senate's riveting Pecora hearings during the waning days of the Hoover administration and the opening months of the Roosevelt presidency turned a scorching public spotlight on the malfeasance of the corporate sector and its complicity in sparking the Depression. As he put the House of Morgan and other bankers on trial, Ferdinand Pecora, chief counsel of the Senate Banking Committee, helped popularize during the age of Al Capone a term no longer heard today—the "bankster." These hearings compelled Roosevelt to support stricter regulation of the financial sector that he might not have otherwise.<sup>194</sup>

One cannot talk about crime in the streets today without talking about crime in the suites. Over the past four decades, the growing public obsession with getting tougher on street crime has coincided with the retreat of the state in regulating corporate malfeasance—everything from hedge funds to credit default swaps to workplace safety. Keeping the focus on street crime was a convenient strategy to shift public attention and resources from crime in the suites to crime in the streets.<sup>195</sup>

As billionaire financier Warren Buffet quipped in 2006 shortly before the Great Recession descended, "There's class warfare, all right, but it's my class, the rich class, that's making war, and we're winning."<sup>196</sup> The signs of victory are everywhere. Income inequality rivals the Gilded Age. The labor movement is on life support. The economic recovery from the Great Recession has been highly uneven.<sup>197</sup> Corporate profits have climbed to their highest share of the economy in seven decades while workers' wages have plummeted to their tiniest share over the same period.<sup>198</sup> Wealth has become even more concentrated than income.<sup>199</sup> The

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<sup>194</sup>JOHN HAGAN, WHO ARE THE CRIMINALS? THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN 176–80, 212 (2011).

<sup>195</sup> See generally *id.*; MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP (2014); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS, Jan. 9, 2014, at 4, 6, 8.

<sup>196</sup> Ben Stein, *In Class Warfare, Guess Which Class Is Winning*, N.Y. TIMES (Nov. 26, 2006), <http://www.nytimes.com/2006/11/26/business/yourmoney/26every.html>,

<sup>197</sup> For the top 1 percent, incomes grew by nearly 12 percent in 2010—compared to just 0.2 percent for the bottom 99 percent. Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Updated with 2009 and 2010 estimates)* 1 (Mar. 2, 2012) (unpublished manuscript), available at <http://elsa.berkeley.edu/~saez/saez-UStopincomes-2010.pdf>.

<sup>198</sup> Wages now make up 44 percent of GDP, down from 53 percent in 1970 and their lowest share of GDP since World War II. Reductions in wages and benefits were responsible for about three-quarters of the increase in corporate profits between 2000 and 2007, according to the calculations of Michael Cembalest, JPMorgan's chief investment officer. Harold Meyerson, *If Labor Dies, What's Next?*, AM. PROSPECT, Sept./Oct. 2012, at 21.

<sup>199</sup> The top 1 percent in the United States now owns 35 percent of the country's wealth. LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 380 (12th ed. 2012).

United States today has the largest proportion of low-wage workers of any advanced industrialized country.<sup>200</sup> In 2011, the official poverty rate was 15 percent, a steep increase from 12 percent a decade ago.<sup>201</sup>

President Obama's persistent calls during his first term for a politics that rises above politics, premised on "shared sacrifice," denied this reality and was politically demobilizing. It thwarted the emergence of a compelling alternative political vision on which new coalitions and movements could be forged to challenge fundamental inequities, including mass imprisonment and the growing tentacles of the carceral state. As political scientist E. E. Schattschneider once said, "The definition of the alternatives is the supreme instrument of power."<sup>202</sup> If the political and economic agenda needs to be fundamentally changed and not just tinkered with, we should expect more "bring it on" politics, not less.

Barack Obama is not suited to such politics by temperament or by experience. He rose up in the Democratic Party by cultivating powerful political and economic patrons in Chicago and elsewhere. He made calls for "a politics that transcends politics" somehow sound transformative as he has pursued small bore solutions. But the problems run deeper than Obama's personality or the constrained political space he reportedly occupies as the country's first African-American president.<sup>203</sup>

The political intransigence lavishly on display in the Republican Party that has repeatedly brought Congress to a caustic standstill obscures how a major segment of the Democratic Party is loath to mount any major challenge to the entrenched financial and political interests that have captured American politics today. For all the bluster about political polarization, the debate over what to do

<sup>200</sup> Low-wage workers are those who receive less than two-thirds of the median wage. One-quarter of all U.S. workers fall into that category, earning no more than about \$17,600 per year. Meyerson, *supra* note 198, at 22.

<sup>201</sup> After declining in the 1990s, the number of people living in neighborhoods of extreme poverty in which at least 40 percent of their residents are below the federal poverty line rose by about one-third in the first decade of the 21st century. ELIZABETH KNEEBONE, CAREY NADEAU & ALAN BERUBE, BROOKINGS INSTITUTE, *THE RE-EMERGENCE OF CONCENTRATED POVERTY: METROPOLITAN TRENDS IN THE 2000s*, 1 (2011), [http://www.brookings.edu/~media/research/files/papers/2011/11/03%20poverty%20kneebone%20nadeau%20berube/1103\\_poverty\\_kneebone\\_nadeau\\_berube.pdf](http://www.brookings.edu/~media/research/files/papers/2011/11/03%20poverty%20kneebone%20nadeau%20berube/1103_poverty_kneebone_nadeau_berube.pdf); *see also* Arloc Sherman, *Deep Poverty on the Rise*, CENTER ON BUDGET AND POLICY PRIORITIES (Sept. 22, 2011, 4:01 PM), <http://www.offthechartsblog.org/deep-poverty-on-the-rise/>; CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011 13 fig.4* (2012), <http://www.census.gov/prod/2012pubs/p60-243.pdf>; Alicia Parlapiano, *50 Years of Poverty*, N.Y. TIMES (Jan. 4, 2014), [http://www.nytimes.com/interactive/2014/01/04/business/50-years-of-poverty.html?\\_r=0](http://www.nytimes.com/interactive/2014/01/04/business/50-years-of-poverty.html?_r=0).

<sup>202</sup> E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 68 (1960).

<sup>203</sup> Some claim that the vituperation directed at President Obama today is no more intense than what archconservatives directed at John F. Kennedy and Lyndon Johnson. *See* Rick Perlstein, *The Grand Old Tea Party: Why Today's Wacko Birds Are Just Like Yesterday's Wingnuts*, THE NATION, Nov. 25, 2013, at 14, 14–15, 17–19.

about the economy, the social safety net, and the regulation of the financial sector—like the elite discussions over what to do about mass incarceration—oscillate within a very narrow range defined by neoliberalism and austerity policies.<sup>204</sup> President Obama has boasted repeatedly that the federal budget for discretionary spending on domestic programs has shrunk under his watch to the smallest share of the economy since Dwight Eisenhower was president.<sup>205</sup> Leading Democrats continue to reward Republican intransigence with more concessions. In 2011, Newt Gingrich succinctly summed up the Republican recipe for success: “I don’t think you go to the middle. You bring the middle to you.”<sup>206</sup>

The focus on the fratricide within the Republican Party as the establishment faces off against the Tea Party has obscured the deep tensions between the Wall Street wing and the Democratic wing of the Democratic Party. Buying into austerity politics means buying into the false idea that profligate spending by states and municipalities was at the root of the budget crises for state and local governments.<sup>207</sup> The primary cause was actually a perilous drop in the main sources of revenue for local and state governments—property, income, and sales taxes—as the housing bubble burst and the economy contracted thanks to Wall Street’s malfeasance.<sup>208</sup> These budgetary shortfalls have been used as a pretext to dismantle key government functions and services or to hive them off to the private sector—everything from schools to health care to prisons.

A number of progressives have sought to appear politically responsible by railing against the deficit and endorsing calls for fiscal constraint. Where they differ from other neoliberals is that they want to make the rich pay a fairer share to bring the deficit down. With some notable exceptions, progressives have generally been slow to mount an aggressive defense of expanding fiscal policy at a time

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<sup>204</sup> For a succinct analysis of just how narrow that debate was in the 2012 presidential campaign, see Sherle R. Schwenninger, *The Missing Economic Debate: Instead of Addressing Real Problems, Obama and Romney Are Focusing on Deficit Reduction*, THE NATION, Oct. 29, 2012, at 29, 29–31. On the death by 10,000 cuts of the Dodd-Frank Wall Street Reform and Consumer Protection Act after Obama signed it in July 2010, see Gary Rivlin, *Wall Street Fires Back*, THE NATION, May 20, 2013, at 11.

<sup>205</sup> President Barack Obama, Remarks by the President on Unveiling of the Budget in Baltimore, Maryland (Feb. 14, 2011) (transcript available at <http://www.whitehouse.gov/the-press-office/2011/02/14/remarks-president-unveiling-budget-baltimore-maryland>).

<sup>206</sup> Interview by Sean Hannity with former House Speaker Newt Gingrich, (Dec. 1, 2011), available at [http://www.realclearpolitics.com/video/2011/12/01/gingrich\\_dont\\_go\\_to\\_the\\_middle\\_bring\\_the\\_middle\\_to\\_you.html](http://www.realclearpolitics.com/video/2011/12/01/gingrich_dont_go_to_the_middle_bring_the_middle_to_you.html)

<sup>207</sup> This is a view widely promulgated by the American Legislative Exchange Council (ALEC) and other conservative groups. Contrary to these claims, state and local spending as a proportion of total personal income “has remained remarkably stable for decades without having ever produced anything close to the severe budget crisis tied to the 2008–2009 recession.” Robert Pollin & Jeff Thompson, *State and Municipal Alternatives to Austerity*, 20 NEW LABOR F. 22, 23–24 (2011).

<sup>208</sup> At the same time, government expenses were growing because more people were losing their jobs and were forced to turn to the state for unemployment, Medicaid, and other benefits to tide them over. *Id.* at 24.

when the private sector lacks the will or the capacity to invest in ways that reduce mass employment and that foster enlightened social and economic policies.<sup>209</sup>

The Tea Party's histrionics have allowed the Democratic Party to postpone its own day of reckoning. "As long as a majority of the GOP is hell-bent on breaking bad," the Democratic Party can position itself as the "pragmatic, compromise-seeking adult technocrats."<sup>210</sup> This may be a winning political strategy for the short term. It is wholly inadequate, however, to address the enormous problems that the country faces. It is incapable of galvanizing wide swaths of the public to participate in convulsive politics from below to force the dismantling of the carceral state and the amelioration of other gaping inequalities.

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<sup>209</sup> William Mitchell, *Beyond Austerity: Deficit Mania Is Built on a Series of Destructive Myths*, THE NATION, Apr. 4, 2011, at 11.

<sup>210</sup> Richard Kim, *Ted Cruz, Role Model?*, THE NATION, Nov. 11, 2013, at 10, 10.