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Getting There: On Strategies for Implementing Criminal Justice Reform

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Getting There: On Strategies for Implementing Criminal Justice Reform

Susan N. Herman*

Criminal justice reform efforts sometimes seem improvisational. Scholars and activists have built a persuasive case that we need to reform the criminal justice system to reduce our reflexive dependency on mass incarceration and to root out bias against the poor, the mentally ill, and racial minorities. We know that actions like revising sentencing laws and eliminating cash bail are steps in the right direction. And so advocates around the country have been using any tools in grabbing distance to achieve those results: legislation, ballot initiatives, administrative or judicial regulations, or direct political action. Strategic discussion of how to prioritize and harmonize those approaches, or how best to build momentum among the states, however, is frequently held behind closed doors when it is held at all.

Opportunistic arguments for reform can sound inconsistent and undertheorized. Reformers sometimes strike populist notes, arguing as the occasion demands that legislatures should yield to the will of the people when public opinion supports change, that legislatures should adopt enlightened policy regardless of public opinion, and that courts should invalidate the choices of legislatures.

This essay will reflect on the toolbox of strategies for criminal justice reform, offering examples of recent successes in state legislative revision (Louisiana); in a ballot initiative where the state legislature rejected reform measures favored by the public (Oklahoma); in state and federal courts (challenges to debtors' prison practices, and

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continuing litigation to ensure that indigent defendants are represented by effective and adequately funded advocates); and in electoral campaigns (the recent District Attorney primary race in Philadelphia).

The essay begins by commenting on the preconditions for successful criminal justice reform campaigns, and concludes by reconciling arguments for a populist criminal justice system with the counter-majoritarian role of the courts. The role the Constitution assigns to the people in the application of criminal justice system is to check governmental overreaching but not governmental leniency. It should be the role of the courts to check irrational or unfair criminal justice policy regardless of whether that policy commands popular support. While the federal courts have declined to play that role, state courts, not limited by the constraints of federalism, can and should become an important part of the solution to our broken criminal justice system.

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INTRODUCTION

It's easy to say what the ideal American criminal justice system should look like.

It's a lot more difficult to get there.

Our ideal system would end our counterproductive addiction to mass incarceration, reducing the population of prisons and jails and utilizing more, alternative means of addressing addiction, poverty, and mental illness. It would address the unfair and disproportionate impact of the administration of criminal justice on the poor, on people of color, and on the mentally ill. And it would enable people leaving prison to successfully reenter society.

We have some good ideas about particular things to do to begin to achieve these goals. The American Civil Liberties Union (ACLU) started a Campaign for Smart Justice in 2010, which aims to reduce the prison population by fifty percent through strategies focusing on all phases of the criminal justice system. We can control the number of people in our prisons and jails by 1) reforming police practices to reduce the sheer number of arrests, 2) reforming money bail practices and eliminating de facto debtors' prisons, 3) addressing prosecutorial discretion and abuse, 4) eliminating excessive sentences, including mandatory minimums, 5) promoting alternatives to incarceration, 6) ameliorating unjust or short-sighted parole and probation practices, and 7) reducing barriers to successful reentry.¹ Attentive reforms in each of these areas can also help to cut the roots of bias.

So much has been written about each of these areas² that rather than reiterate *why* these are the right goals, this essay will address the

¹ See *Campaign for Smart Justice*, ACLU, <https://www.aclu.org/issues/mass-incarceration/smart-justice/campaign-smart-justice> (last visited Nov. 17, 2017).

² See generally Marc Mauer & Kate Epstein, *To Build a Better Criminal Justice System*, SENTENCING PROJECT (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/To-Build-a-Better-Criminal-Justice-System.pdf> (explaining the different barriers to criminal justice reform as well as the benefits of criminal justice reform itself); William Galston, *Criminal Justice Reform: Issues and Options for Our Next President*, BROOKINGS INST. (Oct. 14, 2016), <https://www.brookings.edu/research/criminal-justice-reform-issues-and-options-for-the-next-president/> (discussing the many problems in the current criminal justice system, such as the cost of incarceration and the overpopulation of prisons, as well as potential reform actions the federal government could take).

challenging but less frequently discussed question of *how* best to achieve these goals. What are the preconditions for success and how should we strategize and prioritize approaches to the various branches of federal, state, and local governments?

My goal here is to reflect on some recent successes and strategies, particularly in the areas of sentencing and bail reform. This essay focuses on the question of how changes were effectuated and by whom: the legislative, executive, or judicial branch of government at the federal, state, or local level, or even by the people themselves.

Part I outlines what seem to be necessary preconditions for success: bipartisan cooperation, appropriate attention to state and local initiatives, and educational efforts promoting supportive public opinion.

Part II discusses state efforts to reduce mass incarceration by legislative modification of sentencing and other policies, using Louisiana as a recent and informative example. Part II also examines other paths to state policy reform, describing a winning 2016 ballot initiative adopted in Oklahoma when state legislative reform appeared impossible, and a less encouraging experience in Alaska where 2016 reforms are already being reexamined. The essay then offers several examples of policy changes inspired by state executive branch officials, such as the Maryland Attorney General, and judicial administrators. Bail reform is one area in which policy change has been possible at the city level, including in Biloxi, Mississippi, and New Orleans, either by local legislative action or in settlement of litigation challenging previous bail practices. As Part II shows, supportive public opinion has been a critical part of the equation in reform campaigns.

Part III considers the role of litigation in reform efforts, especially where public support or political will is lacking. Supreme Court precedent has effectively precluded the federal courts from reviewing legislative sentencing schemes for cruelty or irrationality.³ The Court has also disfavored federal judicial review of racial profiling or racially discriminatory sentencing.⁴ This Part explains why the federal courts nevertheless have an essential role to play in raising the level of fairness in the administration of criminal justice, offering *Gideon v. Wainwright* as a positive example of federal court intervention. The Court interpreted the Sixth Amendment as mandating that states provide counsel for indigent criminal defendants because a number of states had

³ See *infra* text accompanying notes 108–11.

⁴ See *infra* text accompanying note 113.

persistently failed to shoulder that obligation on their own.⁵ Litigation continues to be necessary to implement *Gideon*'s decree, as entirely too many jurisdictions still do not provide adequate funding for indigent defense.⁶ Regardless of the posture of the federal courts, state courts have the opportunity to play a greater role in ensuring that both criminal justice policy and implementation are fair and non-discriminatory in their own states.⁷

Part IV looks at additional strategies for reducing incarceration rates by focusing on the role of prosecutors, who wield considerable power to expand or reduce the pipeline to prison even in the absence of legislative change. To constrain the power of prosecutors, we need to look beyond the legislatures and the courts to the people themselves. The people in each state or community can and should play a role in getting prosecutors to change ingrained practices leading to overly harsh or discriminatory treatment, or in using their electoral power to change the prosecutors themselves.

The conclusion comments on how the Constitution provides support for a populist criminal justice system nevertheless constrained by judicial review.

I. PRECONDITIONS FOR REFORM

Why do some reform efforts succeed while others sputter? The best recipe for change includes bipartisan support for reform efforts, focus on the most promising level of government, and mobilizing supportive public opinion.

A. Bipartisanship

To avoid gridlock in today's hyper-partisan legislatures, bipartisan support of reform measures is generally a necessity. Fortunately, bipartisanship is flourishing in many areas of the criminal justice reform agenda.

Recent scholarship has been hammering the point that our current state of mass incarceration is not, as the conventional wisdom might have had it, entirely attributable to tough on crime strategies associated with the Republican Party. Historians have complicated the

⁵ 372 U.S. 335 (1963) (requiring assignment of counsel for indigent criminal defendants). *See infra* Part II.B.

⁶ *See infra* text accompanying notes 117–28.

⁷ *See infra* text accompanying note 121.

politics of criminal justice reform by examining connections between mass incarceration and liberal programs like the War on Poverty,⁸ maintaining that it is overly simplistic to attribute the rise of incarceration to the War on Drugs,⁹ and noting the biracial origins of some policing and sentencing policies now seen as oppressive.¹⁰

Instead of responding to these revisionist histories by engaging in louder arguments about who is really at fault for the counterproductive policies of the past, we can use this contested history as an opportunity to forge greater agreement about directions for the future. If it is unclear who is to be blamed for where we are, no one need lose face by changing direction.

There is currently considerable agreement across the political aisle on much of the ACLU reform program outlined above. What might seem to be strange bedfellow alliances appear in sponsorship of reform bills and in civic organization coalitions.¹¹ The conservative group Right on Crime, for example, has co-sponsored both conferences and reform legislation with the ACLU. The group's website explains that reform is consistent with many fundamental conservative values:

⁸ See, e.g., ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 1–18, 63–95 (2016) (drawing connections between the two “wars”); NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 69–112 (2014) (addressing the involvement of liberals); James Forman, Jr., *Fortress America*, NATION (Sept. 27, 2016), <https://www.thenation.com/article/fortress-america/> (describing how 20th century liberals helped create mass incarceration).

⁹ See JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 5–6, 21–45 (2017) (arguing that the emphasis on drug offenders as the major component of incarceration is misplaced).

¹⁰ See, e.g., JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017) (analyzing support for war on crime policies of the 1970s by African-American leaders in urban centers); MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT (2015) (describing how support for New York's draconian drug laws united the “black silent majority” and conservative Republicans, while the white liberal establishment pushed in the opposite direction). See also MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015) (noting that a simplistic racial analysis is complicated by gender, class, etc.).

¹¹ See, e.g., John Malcolm & Susan Herman, *ACLU, Heritage Foundation Agree: Reform Forfeiture Laws*, DES MOINES REG. (Sept. 9, 2015), <http://www.desmoinesregister.com/story/opinion/columnists/2015/09/09/aclu-heritage-foundation-agree-reform-forfeiture-laws/71966978/> (noting that ACLU and Heritage, while disagreeing on other issues, agree about the need to reform asset forfeiture law).

As the number of laws increased and the prison population soared, conservatives chafed at the waste of human potential and increasing cost of the prison bureaucracy. They were frustrated that so little was being done to prepare inmates for their release, and they were appalled at the overcrowded conditions, violence and rape, and the lack of medical care, drug treatment and mental-health services. Conservatives joined with liberals in backing such important reforms as the Prison Rape Elimination Act, the Second Chance Act and the Fair Sentencing Act. . . . The endorsement of the reforms by these national conservative leaders encouraged Republican legislators to vote for the reforms, and it gave political “cover” to Democrats leery of being labeled soft on crime. . . .¹²

Indeed, the American Conservative Union Foundation, the Cato Institute, the Faith and Freedom Coalition, the Family Research Council, the Heritage Foundation, and the Institute for Justice, are all playing major roles in the conservative movement for reforms. The Koch brothers are investing substantially in criminal justice reform, including sentencing reform,¹³ reducing over-criminalization,¹⁴ and promoting “second chances.”¹⁵

These organizations, in combination with the efforts of the

¹² Pat Nolan, *Conservatives and Liberals Join Together for Criminal Justice Reforms*, RIGHT ON CRIME (Apr. 16, 2015), <http://rightoncrime.com/2015/04/conservatives-and-liberals-join-together-for-criminal-justice-reforms/>. Right on Crime is a project of the Texas Public Policy Foundation in cooperation with the American Conservative Union Foundation and the Prison Fellowship. See <http://rightoncrime.com/about/>.

¹³ “Too many people go to prison—often for far too long—for low-level, nonviolent crimes. People who break the law should be held accountable, but the punishment should fit the crime.” *Criminal Justice & Policing Reform*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/> (last visited Oct. 26, 2017).

¹⁴ “Thousands of seemingly ordinary activities, like shipping lobsters in the wrong kind of container and shampooing hair without a license, are classified as crimes. We shouldn’t criminalize so many things, and jail should be reserved for people who are truly dangerous.” *Id.*

¹⁵ “Thousands of laws erect barriers for those with a criminal record to getting jobs and rejoining their communities with dignity, increasing the likelihood of recidivism.” *Id.*

ACLU and its other allies, have generated tremendous energy. This has led to some significant progress in many states, lowering the prison population by about five percent since 2009¹⁶ and promising further reductions in the near future. But as in any coalition, there will inevitably be differences as well as agreement among the participants.¹⁷ As will be discussed, effecting further reduction of the prison population may be more challenging, especially with respect to people convicted of a crime involving violence.¹⁸

B. Level of Government

A second precondition for criminal justice reform in our era is maintaining appropriate focus on state and local reform rather than expecting a national cure or even leadership from the federal government. In Congress, modest federal sentencing and policy reforms that once seemed promising have become stalled in legislative gridlock. A tremendous amount of bipartisan coalition work went into crafting and lobbying for the Sentencing Reform and Corrections Act of 2017, which aims to reduce sentences for low-level, nonviolent offenders in the federal system.¹⁹ This legislation, sponsored by Judiciary Committee Chairman Charles Grassley and cosponsored by a bipartisan group of Senators, seemed likely to pass before the 2016 elections. But of course not all members of Congress agreed with the Act's provisions, and the

¹⁶ See Abigail Geiger, *U.S. Private Prison Population Has Declined in Recent Years*, PEW RESEARCH CTR. (Apr. 11, 2017), <http://www.pewresearch.org/fact-tank/2017/04/11/u-s-private-prison-population-has-declined-in-recent-years/>.

¹⁷ See, e.g., Alex Sarch, *How to Solve the Biggest Issue Holding up Criminal Justice Reform*, POLITICO (May 16, 2016), <http://www.politico.com/agenda/story/2016/05/criminal-justice-reform-mens-rea-middle-ground-000120> (explaining how although both political parties agree that one area of the criminal justice system, *mens rea*, needs reform, they have struggled to agree on the particulars).

¹⁸ See *infra* text accompanying notes 43, 88.

¹⁹ See Karoun Demirjian, *Bipartisan Senate Group Unveils Latest Attempt at Sentencing Overhaul*, WASH. POST (Oct. 4, 2017), https://www.washingtonpost.com/powerpost/bipartisan-senate-group-unveils-latest-attempt-at-sentencing-reform/2017/10/04/71d5ccea-a94b-11e7-850e-2bdd1236be5d_story.html?utm_term=.97d8e939f3ab (discussing how members of the Senate Judiciary Committee have worked for five years on the specifics of the criminal justice reform bill introduced in October 2017); see also Bill Keller, *Will 2017 be the Year of Criminal Justice Reform?*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/opinion/will-2017-be-the-year-of-criminal-justice-reform.html> (discussing the factors that could make 2017 a productive year for criminal justice reform).

partisan politics of Congress have since turned toxic. In February 2017, the current U.S. Attorney General, Jeff Sessions, opposed passage of the Act,²⁰ having previously expressed ardent support for precisely the mass incarceration/war on drugs policies the reform movement seeks to get past.²¹ This Act may yet become law and serve as a positive example, but at this point Congress would be following the states rather than taking the lead. And in any event, the federal prison population is only a small fraction of the population of state and local prisons and jails.²²

The federal government could play a different kind of positive role by supporting state and local reform, as proposed in another piece of pending federal legislation, the Pretrial Integrity and Safety Act, introduced in October by Representatives Ted Lieu (D-CA) and Carlos Curbelo (R-FL), joined by Sheila Jackson Lee (D-TX) and Mia Love (R-UT). This companion to the pending Senate bail reform bill (with identical language) previously introduced by Senators Kamala Harris (D-CA) and Rand Paul (R-KY)²³ would provide grants to states that are working to eliminate their money bail systems. The Justice Reinvestment initiative, a similar approach, was successfully employed in an earlier federal-state, private-public collaboration that used federal grants to promote reform at the state and local levels.²⁴ Most of the states have modified their sentencing practices in recent years and reduced their prison populations, often as result of this initiative.²⁵

Although the states are the principal venue for reform of

²⁰ Letter from Jeff Sessions, Att’y Gen. of U.S., to Charles Grassley, Chairman, Comm. of the Judiciary of the U.S. Senate (Feb. 14, 2018), <https://www.politico.com/f/?id=00000161-966d-da6b-ade9-fefd38e20001>.

²¹ See Rebecca R. Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html>.

²² See E. Ann Carlson & Elizabeth Anderson, *Prisoners in 2015*, BUREAU OF JUSTICE STATISTICS (Dec. 2016), <https://www.bjs.gov/content/pub/pdf/p15.pdf>; see also Matt Ferner, *Americans are Sick of the ‘Tough on Crime’ Era*, HUFFINGTON POST (Feb. 12, 2016), http://www.huffingtonpost.com/entry/federal-justice-reform-poll_us_56be1a95e4b08ffac124f71e (discussing polling showing support for reforms to the federal prison system, which only houses one tenth of the country’s inmates).

²³ Pretrial Integrity and Safety Act of 2017, S.1593, 115th Cong. (2017); see also Pretrial Integrity and Safety Act of 2017, H.R.4019, 115th Cong. (2017)

²⁴ See *infra* Part II.

²⁵ See *infra* text accompanying notes 32–51.

criminalization and sentencing policies, certain issues lend themselves to even more localized attention. Cities and other units of local government have been taking the lead on reform of bail practices, for example,²⁶ showing that strategies for reform also need to take account of the political organization of each state's subdivisions in deciding whether reform can best be achieved at the state, county, or city/village level.

C. Public Opinion

Another critical precondition for successful reform efforts is fertile public opinion. There is some good news on this front. Polling shows that the public throughout the country has become increasingly receptive to some forms of change.²⁷ Majorities of voters across the country have been willing to rethink ostensibly “tough-on-crime,” lengthy sentences and favor alternatives to incarceration—at least with respect to nonviolent crime.²⁸ A growing majority has favored alternatives to prison, including drug courts and treatment options, for low-level drug offenses.²⁹

But here too, the conditions leading to modest success so far may not bode well for a broader range of potential future reforms. Whether the public's receptivity to reconsidering criminal justice policy can extend to other areas, including sentencing or parole reform for

²⁶ See *infra* text accompanying notes 98.

²⁷ See PFAFF, *supra* note 9, at 161–62 (asserting that “tough on crime” attitudes are beginning to falter).

²⁸ See *Attitudes Toward Approaches to Lowering the Crime Rate in the United States*, GALLUP POLL (Dec. 21, 2010), [http://news.gallup.com/poll/196394/americans-divided-priorities-criminal-justice-system.aspx](http://www.albany.edu/sourcebook/pdf/t2282; 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds, ACLU (Nov. 16, 2017), https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds; Justin McCarthy, Americans Divided on Priorities for Criminal Justice System, GALLUP, INC. (Oct. 14, 2016), (finding that Republicans prioritize strengthening law and order through greater enforcement while Democrats emphasize court and police reforms to reduce bias against minorities), <a href=); *National Survey Key Findings – Federal Sentencing & Prisons*, THE MELLMAN GRP. (Feb. 10, 2016), http://www.pewtrusts.org/~media/assets/2016/02/national_survey_key_findings_federal_sentencing_prisons.pdf (presenting polls showing support for reducing sentences for federal drug offenders).

²⁹ See *America's New Drug Policy Landscape*, PEW RESEARCH CTR. (Apr. 2, 2014), <http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/> (noting that two-thirds of those polled supported treatment rather than harsh sentences for drug offenders).

those charged with offenses involving violence, is an important open question.

Public opinion about criminal justice continues to be distorted by erroneous beliefs about crime rates. Fifty-seven percent of those polled in late 2016 believed that crime rates have increased since 2008, despite the fact that Federal Bureau of Investigation (FBI) and Bureau of Justice Statistics reports show that crime rates in general sharply declined during that period.³⁰

One of the most significant questions for the future of criminal justice reform is whether public opinion will continue to move toward acceptance of data-driven solutions, or whether exaggerated fear of violent crime will stymie further reduction of the prison population. Another key question is whether racial bias in the criminal justice system will remain a polarizing issue.³¹

II. LAW REFORM MODELS—PRIORITIZING APPROACHES

State legislatures, which enact criminal laws and formulate sentencing policy, have generally been the focus of campaigns to reduce the prison population. The legislative model of reform makes sense where a state's criminal justice policy itself overreaches—like excessive mandatory minimum sentencing laws. But legislative politics are complex and sometimes even measures favored by a majority of voters fail to be adopted.

Alternatives in this situation include using a ballot initiative and going directly to the people, or seeking administrative reform from executive, judicial, or local officials with power to change policy—albeit sometimes in a more limited manner or geographic area.

It is also worth noting how often success in a particular state has been fueled by a nation-wide campaign.

A. Legislative Reform

1. *Louisiana—Justice Reinvestment and Successful State Legislative Reform*

The Justice Reinvestment initiative played a major role, directly or indirectly, in at least thirty-three states reforming their incarceration

³⁰ John Gramlich, *Voters Perception of Crime Continue to Conflict with Reality*, PEW RESEARCH CTR. (Nov. 16, 2016), <http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/>.

³¹ See *infra* text accompanying notes 52–59.

policies.³² Launched in 2007, this public-private partnership has included the United States Justice Department's Bureau of Justice Assistance, the Pew Charitable Trusts, the Council of State Governments Justice Center, the Crime and Justice Institute, the Vera Institute of Justice, and other organizations.³³

The central concept is to reduce a state's incarceration costs and reinvest some portion of the saved resources in programs designed to reduce the need for incarceration—like creating alternatives to incarceration and drug courts. Participating states have created an inter-branch, bipartisan task force to examine ideas for data-driven policy changes. Reform efforts, often euphemistically described as “comprehensive,” focus on sentencing policy, sometimes on conditions governing release from prison, supervision of parolees or probationers, and sometimes on oversight laws to measure the progress of reform.³⁴ The legislature is then asked to enact the reform proposals.³⁵

Louisiana, one of the most recent states to have adopted some sentencing and other reforms, is a good example of the mechanics and rhetoric of modestly successful change.

First, politically diverse reform coalitions made the case that reform of Louisiana's incarceration policies, beyond some changes the state had previously adopted in 2011, was financially and logically essential.³⁶ The campaign emphasized that:

- Louisiana had the highest incarceration rate in the world,

³² *33 States Reform Criminal Justice Policies Through Justice Reinvestment*, PEW CHARITABLE TRS. (Dec. 2, 2016), http://www.pewtrusts.org/~media/assets/2016/12/33_states_reform_criminal_justice_policies_through_justice_reinvestment; *see also Justice Reinvestment Initiative*, OFFICE OF JUSTICE PROGRAMS, https://www.bja.gov/Programs/jri_background.html (last visited Oct. 23, 2017).

³³ *See id.*

³⁴ *See id.*

³⁵ The Justice Reinvestment concept has not escaped criticism. *See* GOTTSCHALK, *supra* note 10, at 98–116 (criticizing the reinvestment concept as myopic and impotent to fight the tenacity of the carceral state).

³⁶ *Report and Recommendations*, LA. JUSTICE REINVESTMENT TASK FORCE 62 (Mar. 16, 2017), https://www.lasc.org/documents/LA_Task_Force_Report_2017_FINAL.pdf (“Louisiana’s prison population dropped 9 percent from its peak between 2012 and 2015. This drop was driven . . . by retroactive reforms . . . passed in 2010, as well as . . . when Louisiana first launched a Justice Reinvestment process in 2011 and 2012. . . . In 2016, the impact of these reforms began to wane, and reductions in the population slowed.”).

incarcerating five times as many people as Iran, thirteen times as many as China, and twenty times as many as Germany;

- Louisiana's imprisonment rate had more than quadrupled in the last forty years despite the crime index falling by more than forty percent over the past two decades;
- Because of this high imprisonment rate, Louisiana ended up spending more than \$625 million per year on corrections.
- If Louisiana's incarceration rate were the same as Oklahoma's (the second highest in the United States), Louisiana taxpayers would have saved nearly forty-nine million dollars in 2014.³⁷

A carefully composed inter-branch bipartisan task force, called the Louisiana Justice Reinvestment Task Force, examined practices in Texas, Georgia, Alabama, and other states that had previously adopted data-driven policy changes. After this study, the Task Force Report recommended that Louisiana lawmakers adopt a number of reforms, including reducing penalties for low-level drug and property crimes and expanding alternatives to prison.³⁸

The task force report sounds themes common to successful justice reinvestment efforts in other states: smart ("data-driven" or "evidence-based") reform would save the taxpayers money ("Louisiana's taxpayers are not getting a good public safety return on investment") but without endangering the public ("Focus prison beds on those who pose a serious threat to public safety"). Justice Reinvestment was envisioned as setting in motion a positive cycle of events: freeing up prison beds would free up financial resources, strategic reinvestment of some of those resources would improve public safety by reducing recidivism, and the decrease in crime would in turn contain prison expansion.³⁹ The Task Force predicted that if the proposed reforms were adopted, there would be an overall reduction in the Louisiana prison population of thirteen percent by 2027.⁴⁰

³⁷ LOUISIANANS FOR PRISON ALTERNATIVES, <https://www.prisonreformla.com/> (last visited Oct. 26, 2017).

³⁸ *Report and Recommendations*, *supra* note 36.

³⁹ *See 33 States Reform Criminal Justice Policies Through Justice Reinvestment*, *supra* note 32. The states listed in the report as adopting some reforms are, starting in 2007 and continuing through 2016, Texas, Nevada, Kansas, Vermont, Rhode Island, Connecticut, Pennsylvania, Arizona, Wisconsin, Illinois, Michigan, New Hampshire, South Carolina, Ohio, North Carolina, Louisiana, Alabama, Kentucky, Arkansas, Oklahoma, Hawaii, Georgia, Delaware, Montana, West Virginia, South Dakota, Oregon, Mississippi, Idaho, Nebraska, Utah, Maryland, and Alaska.

⁴⁰ *Report and Recommendations*, *supra* note 36.

Expert studies on what works were touted as an appropriate benchmark. On the economic front, the report announced that over half of the projected savings—\$154 million over ten years—would be reinvested in “research-based programs that reduce recidivism and services that support victims of crime.”⁴¹

Rhetoric played a role too. Some parts of the Task Force report were written in a curiously indirect manner, perhaps in an attempt to avoid raising the specter of hordes of people marching out of the prisons: the reforms “would avert the projected growth in the number of prisoners in Louisiana and bend the prison population downward.”⁴² And the report frequently reiterated that proposed sentencing reforms to reduce prison terms targeted low-level, non-violent offenders.

Nevertheless, the Louisiana District Attorneys Association posted a disclaimer at the very beginning of the report, immediately following the table of contents: “The Louisiana District Attorneys Association (LDAA) is committed to working within the goals of HCR 82 that include focusing prison space on serious and violent offenders. Therefore, any policy recommendations contained in the Justice Reinvestment Task Force Report that go beyond nonviolent and non-serious offenders the LDAA opposes.”⁴³

In 2017, conditions in Louisiana were fairly conducive to reform, despite partial resistance from the district attorneys’ association. Coalitions formed. “Louisianans for Prison Alternatives” (founded by the ACLU of Louisiana, Southern Poverty Law Center, and Voice of the Experience) worked with conservative groups including Right on Crime⁴⁴ plus bipartisan groups, business organizations, and lawmakers, to educate the public and to lobby for change.⁴⁵

It is hard to say what impact these particular efforts actually had on public opinion, but polls showed that Louisianans did strongly

⁴¹ *Id.* at 7.

⁴² *Id.* at 8.

⁴³ *Id.*

⁴⁴ Elain Ellerbe, *Louisiana Justice Reinvestment Task Force Recommendations for Criminal Justice Reform Released Today*, RIGHT ON CRIME (Mar. 16, 2017), <http://rightoncrime.com/2017/03/louisiana-justice-reinvestment-task-force-recommendations-for-criminal-justice-reform-released-today/>.

⁴⁵ See LOUISIANANS FOR PRISON ALTERNATIVES, *supra* note 37. The coalition mobilized over six-hundred supporters to drive or bus to Baton Rouge on a humid day in April, and generated hundreds of cards and letters and thousands of emails and telephone calls. Sample message: “Getting tough on crime wasted money and didn’t make us any safer. Get the facts.” *Id.*

support “evidence-based programs that reduce reoffending over longer prison sentences.”⁴⁶ This support, combined with precedents set in other conservative states like Texas and Georgia, helped to convince the Louisiana legislature to adopt a “comprehensive” package of criminal justice reforms without getting caught up in the procedural red tape or anti-reform backlash that thwarted legislative efforts in some other states.⁴⁷ Louisiana Governor John Bel Edwards signed the legislation.⁴⁸ It was indeed politically possible in Louisiana to persuade politicians not to fear endorsing policies that were not conventionally tough on crime.

Local jurisdictions instituted their own reforms, adding to the state’s efforts. In January 2017, the New Orleans City Council unanimously passed a municipal bail reform ordinance eliminating money bail for most municipal charges.⁴⁹ A coalition was behind this effort as well: the Orleans Parish Prison Reform Coalition, which included ACLU advocates. Baton Rouge is now a target for similar bail reforms.

Similar positive stories can be told about legislative reform in other highly conservative states. Mississippi, for example, enacted a sweeping criminal justice reform measure in 2014. House Bill 585 reduced the state’s prison population by about ten percent (approximately 1900 people) and reduced the prison budget by two

⁴⁶ Adam Gelb & Andrew Page, *Voters in Louisiana and Oklahoma Strongly Favor Alternatives to Incarceration*, PEW CHARITABLE TRS. (June 28, 2017), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2017/06/28/voters-in-louisiana-and-oklahoma-strongly-favor-alternatives-to-incarceration> (“Majorities supported ending mandatory minimums, lessening penalties for low-level drug offenses, increasing the fairness of fines and fees, and prioritizing reduced reoffending over long prison sentences. Three in 4 Louisiana voters, including majorities of Republicans, Democrats, and independents, backed a proposal to stop imprisoning people for most parole and probation violations and to instead impose sanctions, such as community service. More than half of Louisiana’s prison admissions each year are for such supervision failures, and non-prison sanctions could prevent many of those admissions, easing the strain on facilities and making better use of public safety resources.”).

⁴⁷ See *infra* Part I.B, text accompanying notes 75–77 (addressing vested interests of Oklahoma prosecutors); see also *infra* Part I.C, text accompanying note 96 (addressing vested interests of Maryland bail bondsmen).

⁴⁸ Rebekah Allen, *Gov. Edwards Signs Criminal Justice Overhaul into Law, in What Some Laud as Historic Achievement*, THE ADVOCATE (June 15, 2017), http://www.theadvocate.com/baton_rouge/news/politics/legislature/article_168c6d6e-5089-11e7-a0d6-7f67135f59a4.html.

⁴⁹ *Municipal Bail Reform*, ORLEANS PARISH PRISON REFORM COALITION, <https://opprcnola.org/bail> (last visited Oct. 26, 2017).

hundred million dollars over ten years.⁵⁰ Mississippi legislators continued to consider bills to build on HB 585, including additional parole and reentry reforms.⁵¹

These successes are heartening. The people of Louisiana, Mississippi, and Texas were interested in evidence about what actually works to reduce crime and moved beyond the vaunted tough-on-crime strategies of the past. Of course, with the public being told that they could simultaneously save money, reduce the prison population, reduce crime, and better support crime victims, the choices before them may not have seemed all that difficult.

But there is also reason to be circumspect about the Louisiana experience. First, reducing the prison population by approximately ten percent is nowhere near the fifty percent reduction for which the ACLU has called. Perhaps a forecasted ten percent reduction in prison population can grow incrementally if money continues to be pared off the corrections budget and reinvested in alternatives to incarceration. But dramatic reductions in incarceration ultimately will need to encompass violent offenders as well, and both the Task Force and District Attorneys Association seemed to assume that Louisianans would not tolerate that result. Reducing prison sentences for low-level non-violent offenders is the low-hanging fruit.

Another disappointing feature of the Louisiana task force report is that it steers clear of issues relating to race. In seventy-six pages, the report simply does not mention the demographics of Louisiana prisons or the connections between racial bias and incarceration rates. This is not because Louisiana has no problem on that front. The prison population in Louisiana is 66.4% African American and 33.2% white;⁵² the population of the state is 63.2% white and 32.6% African

⁵⁰ Gov. Phil Bryant signs criminal justice reform bill spearheaded by Pascagoula Sen. Brice Wiggins, GULFLIVE.COM (Mar. 31, 2014), http://blog.gulflive.com/mississippi-press-news/2014/03/gov_phil_bryant_signs_criminal.html (note careful balanced language).

⁵¹ Arielle Dreher, *Reforming Criminal Justice: Is Mississippi Making Progress?*, JACKSON FREE PRESS (Feb. 1, 2017), <http://www.jacksonfreepress.com/news/2017/feb/01/reforming-criminal-justice-mississippi-making-prog/> (describing how state prison populations, as well as parole applications and approvals, have changed since the implementation of HB585).

⁵² LA DEP'T OF PUB. SAFETY & CORRS., DEMOGRAPHIC PROFILES OF ADULT PRISON POPULATION (2017).

American.⁵³ African Americans are approximately four times as likely to be incarcerated in Louisiana as white people.⁵⁴

Reduction in a state's overall prison population does not necessarily cure the racial disproportion of who is incarcerated. In New Jersey, for example, reform efforts led to an overall reduction in the state's prison population of 9.5% over three years,⁵⁵ but the most recent figures show that African Americans in New Jersey are nevertheless about twelve times as likely as white people to be incarcerated.⁵⁶

It is troubling to consider why the carefully crafted messaging of the Louisiana Task Force scrupulously avoided the issue of race. Rather than offering the deplorable racial bias in Louisiana's criminal justice system as an additional powerful justification for reform, the Task Force chose not to mention that aspect of the problem. Was this because the authors believed that Louisianans would be apathetic about racial injustice, or because they believed that talking about race would be counterproductive?

One study on communications efforts regarding criminal justice reform concluded that:

[C]ertain messages are more effective than others at increasing public support for eliminating incarceration for nonviolent offenses. I found that emphasizing the high financial costs of incarceration, the ineffectiveness of prison as a crime reduction tool, and the massive

⁵³ *QuickFacts Louisiana*, U.S. CENSUS BUREAU (July 1, 2016), <https://www.census.gov/quickfacts/LA>.

⁵⁴ According to the Sentencing Project, based on Bureau of Justice Statistics figures, the rate of incarceration is 438 per 100,000 for white people in Louisiana, and 1740 per 100,000 for African American people. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> at 5.

⁵⁵ See S.P. Sullivan, *How N.J. Became a Nationwide Leader in Reducing Prison Population*, NJ.COM (Oct. 31, 2015), http://www.nj.com/politics/index.ssf/2015/10/nj_cutting_prison_populations_faster_than_most_sta.html.

⁵⁶ *The Sentencing Project*, *supra* note 54 (white people in New Jersey incarcerated at a rate of 94 per 100,000; African Americans at a rate of 1140 per 100,000); S.P. Sullivan, *Racial Disparity in N.J. Prison rates Highest in U.S., Report Finds*, NJ.COM (June 14, 2016), http://www.nj.com/politics/index.ssf/2016/06/nj_has_12_times_more_black_prisoners_than_white_on.html.

growth in the use of incarceration caused by harsher sentencing (not more crime) were most effective. By contrast, emphasizing racial disparities in incarceration, the harm done to children, and the mental health, substance abuse, and childhood challenges common among people in prison—while important points—were no more effective in increasing support for criminal justice reform than providing no message at all.⁵⁷

While it is disappointing if the public does not find reducing racial bias to be a motivation for reform, it may be a positive development if attention to race does not undermine otherwise promising reforms.

Race has long bedeviled sentencing policy. Reactions to the crack epidemic of the 1980s and 1990s seemed inextricably tied to the fact that crack, unlike powder cocaine, tended to be used by African Americans.⁵⁸ What was considered appropriate punishment for a crack offense was draconian in itself and one hundred times as severe as punishment for a comparable cocaine offense.⁵⁹

⁵⁷ Aaron Gottlieb, *Criminal Justice Reform during the Trump Administration*, HUFFINGTON POST (May 22, 2017), http://www.huffingtonpost.com/entry/criminal-justice-reform-during-the-trump-administration_us_592310eae4b07617ae4cbe37; see also Russell Berman, *A Poll-Tested Message for Criminal-Justice Reform*, ATLANTIC (Feb. 18, 2016), <https://www.theatlantic.com/politics/archive/2016/02/the-complicated-politics-of-criminal-justice-reform/463284/> (discussing data that shows criminal justice reform messaging is more effective in swing states when discussing issues of government spending and waste).

⁵⁸ For example, when Congress passed the Crack Cocaine Amendment in 2007, roughly 86% of prisoners with crack cocaine convictions who qualified for a reduced sentence were African American. See Glenn Schmitt et al., *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive*, U.S. SENTENCING COMM'N (Oct. 3, 2007), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/impact-analysis-crack-amendment/20071003_Impact_Analysis.pdf.

⁵⁹ The United States Sentencing Commission later found that federal sentencing ranges for convictions involving crack cocaine, one hundred times sentences authorized for the same quantity of non-crack cocaine, led to severe and unjustified racial disparities in sentencing. See *The Crack Sentencing Disparity and the Road to 1:1*, U.S. SENTENCING COMM'N, https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2009/016b_Road_to_1_to_1.pdf (last visited Mar. 4, 2018). Congress reacted to these findings, passing a Fair Sentencing Act in 2010, S. 17, 111th Cong. (2010), but did not achieve parity in sentencing, settling for reducing the 100:1

The current opioid epidemic may provide an opportunity to extricate the debate over drug policy from issues of race and racism that have plagued previous efforts to reform drug sentencing. The face of the opioid epidemic is white.⁶⁰ If we are now willing to adopt more humane drug policies, that change of attitude could be taken as both progress on the criminal justice front and a sad commentary on our lack of progress in confronting racial bias.

Will general apathy toward concerns about racial bias and mental illness, combined with exaggerated fear of violent crime, limit the horizon of the next round of legislative reform? Or can the public learn to appreciate these concerns as well?⁶¹

2. *Oklahoma—“Leave the People’s Voice Alone”: Unsuccessful Legislative Reform and a Ballot Initiative*

Oklahoma, another deeply conservative state, had the second-highest overall incarceration rate in the country and the highest incarceration rate for women.⁶² In 2016, its prisons were at 119% of capacity.⁶³

Republican Speaker of the Oklahoma House of Representatives, Kris Steele, tried to persuade the state legislature to adopt meaningful measures to reduce the prison population without success.⁶⁴ So he

ratio to 18:1. *See Fair Sentencing Act*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/topic/fair-sentencing-act> (last visited Mar. 4, 2018).

⁶⁰ *Why Is the Opioid Epidemic Overwhelmingly White?*, NPR (Nov. 4, 2017, 5:43 PM), <https://www.npr.org/2017/11/04/562137082/why-is-the-opioid-epidemic-overwhelmingly-white>.

⁶¹ Although statistics show strong public support for addressing substance abuse and mental health in criminal justice reform, a large number of respondents are still apathetic. *See Americans Support Expanding Addiction Treatment*, LEGAL ACTION CENTER (Nov. 2015), <https://lac.org/wp-content/uploads/2016/03/Survey-top.png>; *see also Concern Too Many Non-Violent Drug Offenders are Imprisoned*, LEGAL ACTION CENTER (Nov. 2015), <https://lac.org/wp-content/uploads/2016/03/Survey-bottom.png>.

⁶² OKLAHOMANS FOR CRIMINAL JUSTICE REFORM, <https://okjusticereform.org> (last visited Mar. 19, 2018).

⁶³ Brian Hardzinski, *Fallin Presents Budget, Unveils Teacher Pay Raise and Correction Reform*, KGOU-FM (Feb. 2, 2016) <http://kosu.org/post/fallin-presents-budget-unveils-teacher-pay-raise-and-corrections-reforms>.

⁶⁴ *See* Graham Lee Brewer, *Is Criminal Justice Reform on the table for the 2015 Legislative Session?*, NEWSOK (Nov. 24, 2014), <http://newsok.com/article/5369665> (explaining how Oklahoma’s adherence to a

agreed to become chair of an ACLU-led effort to take the issue of reform directly to the people of Oklahoma. This broad-based coalition, Oklahomans for Criminal Justice Reform,⁶⁵ proposed two ballot initiatives. The first initiative, Proposition 780, reclassified certain low-level crimes, like drug possession and low-level property offenses, as misdemeanors instead of felonies, resulting in reducing the number of people in the prisons by reducing the length of sentences. The second initiative, Proposition 781, provided that the cost savings triggered by the decreased corrections spending were to be invested in addressing the root causes of crime through rehabilitation programs to treat drug addiction and mental health conditions and through education and job training programs to help low-level offenders turn their lives around, find employment on release, and avoid going back to prison⁶⁶—basically the Justice Reinvestment platform.

The publicity for the Oklahoma initiatives, like the Louisiana Task Force Report, sounded both pragmatic and financial themes,⁶⁷ also emphasizing that the offenders targeted were nonviolent. Polls showed that a strong majority of prospective Oklahoma voters favored sentencing reform for nonviolent offenders.⁶⁸ Interestingly, seventy-seven percent of Oklahomans said they knew someone who was or had been in jail, prison, or another type of correctional facility,⁶⁹ perhaps giving these otherwise abstract issues a sympathetic human face. With a

“tough on crime” approach creates a difficult political climate for criminal justice reform to succeed).

⁶⁵ OKLAHOMANS FOR JUSTICE REFORM, *supra* note 62. Oklahomans for Criminal Justice Reform included Oklahoma Council of Public Affairs, Right on Crime, the Oklahoma Policy Institute, the Tulsa Regional Chamber, the Greater Oklahoma City Chamber of Commerce, ReMerge, the Oklahoma Women’s Coalition, the ACLU, and Women in Recovery.

⁶⁶ *See State Questions 780 and 781: Criminal Justice Reform*, OKLA. POL’Y INST. (Sept. 12, 2016), <https://okpolicy.org/state-questions-780-781-criminal-justice-reform/>.

⁶⁷ *Launch Announcement*, *supra* note 62 (stating that Oklahoma’s incarceration policy “costs taxpayers nearly \$500 million annually and drains significant resources away from investments that can do more to enhance public safety. As the state’s prison population continues growing—increasing by 12 percent between 2009 and 2014—so does its price tag, which has increased by 172 percent in the past two decades.”).

⁶⁸ *Poll Results Show Strong Support for Reform*, OKLAHOMANS FOR CRIMINAL JUSTICE REFORM (Apr. 24, 2017), <https://okjusticereform.org/updates/poll-results-show-strong-support-reform/>.

⁶⁹ *See* OKLAHOMANS FOR JUSTICE REFORM, *supra* note 62.

professional communications effort in place,⁷⁰ the coalition gathered 230,586 signatures, far more than the number needed to get the initiatives on the ballot.⁷¹ In November 2016, both initiatives passed easily, with support of about fifty-seven percent of voters.⁷²

But when the legislature convened in February 2017, several bills had already been filed to repeal the reform measures, a possibility because the initiatives did not amend the state constitution and were thus open to legislative modification.⁷³ The legislators who opposed the reform measures were clearly outside the bipartisan consensus of most Oklahoma voters but protested that the people had not understood for what they were voting. The voters did not appreciate this condescension. State Senator Ralph Shortey, a supporter of repeal efforts, confronted two hundred angry constituents at what was described as a raucous town hall meeting in Oklahoma City. “Do your job!” one constituent yelled at Shortey. “Leave the people’s voice alone!” According to a reporter present, the room broke into applause.⁷⁴

Much of the counter-pressure urging legislators to support repeal or modification measures was generated by the Oklahoma District Attorneys Association. Unlike the Oklahoma voters, most prosecutors in the state criticized or opposed the referenda. Steele, chair of the pro-referendum campaign, remarked, “They are good at scaring and pressuring and manipulating lawmakers into passing policies that

⁷⁰ *Launch Announcement*, *supra* note 62 (“Oklahoma locks up too many of our citizens for low-level offenses. We can do better. Let’s work together to ensure that our criminal justice system is smarter, makes our communities safer, and gives us the return on our taxpayer dollars that we deserve.”).

⁷¹ *We Just Turned in Our Signatures*, OKLAHOMANS FOR CRIMINAL JUSTICE REFORM (June 3, 2016), <https://okjusticereform.org/updates/reached-big-milestone/>.

⁷² Kimberly Querry, *Oklahoma Voters Pass Criminal Justice Reform State Questions*, OK NEWS 4 (Nov. 8, 2016), <http://kfor.com/2016/11/08/oklahoma-voters-pass-criminal-justice-reform-state-questions/>.

⁷³ Rachel Hubbard, *Oklahoma Lawmakers File Bills to Repeal Criminal Justice Reforms*, NPR (Feb. 7, 2017, 6:16 PM), <http://www.npr.org/2017/02/07/513904322/oklahoma-lawmakers-file-bills-to-repeal-criminal-justice-reforms>.

⁷⁴ See Bill Miston, *Oklahoma Senator Ralph Shortey Submits Resignation Letter After Being Charged with Engaging in Child Prostitution*, OKLA. NEWS 4 (Mar. 27, 2017), <http://kfor.com/2017/03/22/oklahoma-senator-ralph-shortey-submits-resignation-letter-after-being-charged-with-felonies-involving-child-prostitution/>. Shortey resigned from office the following month for other reasons. *Id.*

ultimately benefit their position.”⁷⁵

It is particularly interesting that prosecutors who opposed implementation of the ballot measures sometimes did so regardless of the views of the voters in their own districts. Voters in Oklahoma County, which includes Oklahoma City, supported the initiatives by almost seventy percent of the vote; but their District Attorney, David Prater, opposed the measures.⁷⁶ Prater insisted, despite contrary evidence, that the threat of lengthy prison sentences is a necessary incentive for drug addicts to change their behavior. In Tulsa, sixty-five percent of voters supported the reforms; opposing Tulsa County District Attorney Steve Kunzweiler erroneously maintained that Proposition 780 would make Oklahoma “the most liberal drug possession state in the union.”⁷⁷

But the people’s voice did prevail. Also in February 2017, while the district attorneys were fighting the ballot initiative round of reform, a Task Force assembled by Oklahoma Governor Mary Fallin recommended that the state take measures to drastically reduce its prison population. Officials projected that, without reform, Oklahoma’s overall prison population would increase twenty-five percent in the next ten years at a cost to the taxpayers of \$1.9 billion.⁷⁸

Rather than rolling back the ballot measure reforms, the Oklahoma legislature took up bills for a second round of reform—to sentencing and parole policies.⁷⁹ But the Oklahoma legislative process

⁷⁵ Rory Fleming & Casey Tolan, *Oklahomans Voted to Make the State’s Criminal Justice System Less Barbaric*, SLATE (Mar. 10, 2017), http://www.slate.com/articles/news_and_politics/trials_and_error/2017/03/oklahomans_want_a_less_barbaric_criminal_justice_system_the_state_does_not.html.

⁷⁶ *See id.*

⁷⁷ *Id.* (as the reporter noted, Kunzweiler seemed to overlook the fact that other states have decriminalized or legalized marijuana); *see also* Andrew Freeman, *Criminal justice Reform Laws Roll out in Oklahoma*, NEWS12 (July 6, 2017), <http://www.kxii.com/content/news/Criminal-justice-reform-laws-roll-out-in-Oklahoma-433017953.html> (addressing district attorney opposition to the initiative reforms, prior to roll-out).

⁷⁸ Randy Ellis, *Governor’s Task Force calls for decreasing sentences for drug crimes*, NEWSOK (Feb. 2, 2017), <http://newsok.com/article/5536636>.

⁷⁹ *Round 2: Rally for Criminal Justice Reform*, OKLAHOMANS FOR CRIMINAL JUSTICE REFORM (May 4, 2017), <https://okjusticereform.org/updates/round-2-rally-criminal-justice-reform/>.

once again stifled efforts at reform.⁸⁰ Scott Biggs, a state representative from Chickasha who is considered primarily responsible for boxing up the new proposals in committee, drew fire for opposing the will of the people. His response was that although some of his constituents did support criminal justice reform, he believed they would draw the line at keeping violent offenders out of prison just to help reduce the inmate population and cut costs.⁸¹ He proposed further discussions on how to hold the line dividing violent and nonviolent offenders.

Some additional policy reform efforts at the local level succeeded in reducing the poverty-to-prison pipeline. Oklahoma City instituted indigency hearings for those who cannot pay fines, and own-recognition release bonds for people who do not pose a threat to public safety.⁸² The Oklahoma City Council created an Oklahoma County Criminal Justice Advisory Council, a cooperative venture between Oklahoma City, Oklahoma County, Edmond, and Midwest City, to consider recommendations of a Vera Institute report.⁸³ “With U.S. Attorney General Jeff Sessions planning to visit the state in October to discuss criminal justice reform with the Oklahoma Sheriffs’ Association,” the Right on Crime website observed, “the coalition has an opportunity to showcase their reforms and show that reductions in jail population while increasing public safety and reducing the burden on taxpayers is possible.”⁸⁴

⁸⁰ Janelle Stecklein, *Oklahoma Criminal Justice Reform Bills Locked up in Committee, Proponents Say*, CNHI STATE REP. (June 5, 2017), http://www.cnhi.com/featured_stories/oklahoma-criminal-justice-reform-bills-locked-up-in-committee-proponents/article_4bcf5e3e-4a1f-11e7-971c-f3d2d85ee446.html.

⁸¹ *Id.*

⁸² Andrew Speno, *A New Era in Criminal Justice for Oklahoma City*, RIGHT ON CRIME (Oct. 2, 2017), <http://rightoncrime.com/2017/10/a-new-era-in-criminal-justice-for-oklahoma-city/>.

⁸³ Nomin Ujjiyediin, *Oklahoma County Law Enforcement, Judicial System to Collaborate on Criminal Justice Council*, KGOU (Aug. 30, 2017), <http://kgou.org/post/oklahoma-county-law-enforcement-judicial-system-collaborate-criminal-justice-council>. The report was issued in collaboration with the Oklahoma County Criminal Justice Reform Task Force. To reduce the county jail admissions and recidivism rates, the report recommended improving data collection and analysis to understand the jail’s population, avoiding booking people for low-level offenses, and improving addiction and mental health treatment, among other measures. *Id.*

⁸⁴ Andrew Speno, *Follow Oklahoma County’s Lead on Criminal Justice*, RIGHT ON CRIME (Sept. 8, 2017), <http://rightoncrime.com/2017/09/follow-oklahoma-countys-lead-on-criminal-justice/>.

Polls show that a supermajority of Oklahomans continues to be very supportive of expanding the use of alternatives to prison for nonviolent crimes and allowing individuals to reduce their probation or parole time through good behavior.⁸⁵ Support is resoundingly bipartisan (eighty-one percent of Republicans, eighty-five percent of independents, and eighty-eight percent of Democrats approve) and extends to both urban and rural areas.⁸⁶ But the pace of state-wide legislative reform in Oklahoma is still sputtering, and local reform is dramatically uneven through the state.

The progress made in Oklahoma is good news, but, here too, there is a low ceiling on the impact of policies aimed at diverting drug offenders. The prediction was that the initiatives will end up reducing the state's annual prison admissions by twenty to twenty-five percent.⁸⁷ Drug offenses constituted thirty-one percent of prison admissions in Oklahoma.⁸⁸ How much further can the state go in reducing incarceration without including those convicted of offenses involving violence?

Oklahoma also provides a lesson in the potential force of public participation. Once persuaded that sentencing reform was desirable, Oklahomans had to overcome two kinds of distortion in their state's political process. First, state legislators did not seem to reflect the views of their constituents. The people of Oklahoma took direct action to see their will done instead of waiting for the next election cycle and voting in different representatives. Ideally, the legislators should have heard and heeded that message, as the Louisiana legislature did. Second, prosecutors, who are also the people's elected representatives, were more inclined to follow their accustomed, tough-on-crime practices than

⁸⁵ Adam Gelb & Andrew Page, *Voters in Louisiana and Oklahoma Strongly Favor Alternatives to Incarceration*, PEW CHARITABLE TRS. (June 28, 2017), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2017/06/28/voters-in-louisiana-and-oklahoma-strongly-favor-alternatives-to-incarceration>.

⁸⁶ *Id.*

⁸⁷ See Fleming & Tolan, *supra* note 75.

⁸⁸ See OKLA. JUSTICE TASK FORCE, FINAL REPORT 10, 20 (2017), [http://s3.amazonaws.com/content.newsok.com/documents/OJRTFFinalReport%20\(1\).pdf](http://s3.amazonaws.com/content.newsok.com/documents/OJRTFFinalReport%20(1).pdf) (showing that forty-two percent of female inmates are admitted for drug crimes alone, and thirty-one percent of prison admissions are on drug offenses); see also Jonathan Small & Trent England, *Oklahoma's Prison Crisis: The Enormous Cost of Doing Nothing*, OKLA. COUNCIL OF PUB. AFFAIRS (Feb. 1, 2017), <http://www.ocpathink.org/article/oklahomas-prison-crisis-the-enormous-cost-of-doing-nothing> (showing that seventy-five percent of Oklahoma's inmates were sentenced for nonviolent offenses).

to follow public opinion, even when that opinion was informed by evidence that the policies of the past do not work. Part IV explores how the public can use electoral politics to change the behavior of prosecutors or the prosecutors themselves. This same electoral strategy can apply to legislators.

3. *Alaska: Legislative Reform and Backlash*

Alaska was another criminal justice reform success story. A commission proposed reforms to reduce the prison population by revising sentencing for low-level offenders.⁸⁹ The state legislature adopted “extensively vetted” reforms which Governor Bill Walker signed into law in July 2016.⁹⁰

However, half a year later, before the bill’s reforms had become fully effective, many of its provisions were being challenged. Members of the commission itself questioned whether some of the reforms were operating as intended, citing an uptick in crime.⁹¹ The most vocal critics seemed to include law enforcement officials who may not have been committed to the changes the public voted for and many whose opinion may have been based on misapprehensions about the legislation itself.⁹² Alaska Governor Walker is now supporting increasing some of the penalties that had been decreased.⁹³

Alaska will not be the only place where people who support or oppose reform legislation will be debating what happened after the fact: whether the reforms failed, or whether lack of understanding of the reforms and their consequences boosted a call for retrenchment. A number of studies have suggested that reduction in prison population

⁸⁹ See ALASKA CRIM. JUSTICE COMM’N, JUSTICE REINVESTMENT REPORT 18 (2015), <http://www.ajc.state.ak.us/alaska-criminal-justice-commission>.

⁹⁰ See Jerzy Shedlock, *Alaska Governor Walker Signs Crime Reform Bill into Law*, ALASKA DISPATCH NEWS (July 11, 2016), <https://www.adn.com/politics/2016/07/11/alaska-gov-walker-signs-crime-reform-bill-into-law/>.

⁹¹ See Zaz Hollander, *Alaska’s Sweeping New Crime Law Already Under Pressure for Change*, ALASKA DISPATCH NEWS (Jan. 25, 2017), <https://www.adn.com/alaska-news/crime-courts/2017/01/25/alaskas-sweeping-new-crime-law-already-under-pressure-for-change/>.

⁹² See *id.*

⁹³ See Nathaniel Herz, *Governor Wants Alaska Legislature to Toughen Criminal Justice During Special Session*, ALASKA DISPATCH NEWS (Sept. 15, 2017), <https://www.adn.com/alaska-news/crime-courts/2017/09/15/governor-wants-alaska-legislature-to-toughen-criminal-justice-during-special-session/>.

does not, as a general matter, correlate with an increase in crime, and might even have the opposite effect.⁹⁴ Whether Alaska is in some manner an exception or a negation of those studies remains an issue. Alaska's experience shows that legislative reform can be a long and multi-chapter story.

B. Executive and Judicial Policy at the State and Local Levels

Examples of successful state and local law reform have also emerged from policymaking venues other than the state legislative or referendum process.

For example, in Maryland, bail reform began with the state's Attorney General, was instituted by the courts, and then rescued from legislative repeal. After Attorney General Brian Frosh issued an opinion calling into question the constitutionality of bail practices in Maryland's pretrial system, the state judiciary enacted a rule deprioritizing the use of cash bail.⁹⁵ In a different example of vested interests trying to preserve their own prerogatives—and, in this case, profits—the bail bond industry fought aggressively to have the legislature reverse this reform.⁹⁶ But with the efforts of the Coalition for a Safe and Just Maryland (which included the ACLU), that effort was defeated.⁹⁷ As in Alaska, reform efforts turned out to be labor intensive as changes in the new policy came under attack even after the battle seemed to be over.

Policies regarding bail reform are frequently set at the local

⁹⁴ See, e.g., Lauren-Brooke Eisen & Inimai Chettiar, BRENNAN CTR. FOR JUSTICE, *THE REVERSE MASS INCARCERATION ACT 7* (2015), <https://www.brennancenter.org/publication/reverse-mass-incarceration-act> (showing a decrease in crime rate in jurisdictions with reduced prison populations).

⁹⁵ See Ovetta Wiggins & Ann E. Marimow, *Maryland's Highest Court Overhauls the State's Cash-Based Bail System*, WASH. POST (Feb. 7, 2017), https://www.washingtonpost.com/local/md-politics/maryland-highest-court-overhauls-the-states-cash-based-bail-system/2017/02/07/36188114-ed78-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.49f1d745a228.

⁹⁶ See Michael Dresser, *Frosh Warns that Bond Industry-Supported Bail Bill Undoes Maryland Court's Rule*, BALT. SUN (Mar. 14, 2017), <http://www.baltimoresun.com/news/maryland/politics/bs-md-bail-reform-20170314-story.html> (explaining that rival ACLU-supported bill to further move away from dependence on cash bail also lost).

⁹⁷ See Caryn York & Larry Stafford, *One Small Step Forward on Bail Reform in Md.*, BALT. SUN (June 29, 2017), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-op-0703-bail-rule-july-20170629-story.html>.

level, as shown by the experiences of New Orleans and Oklahoma City,⁹⁸ compounding the notion that the politics of criminal justice need to be local. Experience with bail reform also shows that litigation can be essential to spur change.

Imprisoning people pretrial because they cannot afford to pay bail is only one example of the unfair connection between poverty and incarceration. Lack of ability to pay fines can lead directly to incarceration, a modern-day equivalent of debtors' prisons, creating a vicious cycle where incarceration then exacerbates the prisoner's financial problems. Here too, litigation can be a lever for change.

For example, the ACLU brought a lawsuit on behalf of Biloxi, Mississippi, residents Qumotria Kennedy and Joseph Anderson, alleging that their Fourth and Fourteenth Amendment rights had been violated when they were jailed for inability to pay fines.⁹⁹ Kennedy was locked up for five nights following her arrest on a warrant for failure to pay traffic fines.¹⁰⁰ She was not provided a court hearing on her ability to pay, informed of her right to request counsel, or appointed counsel.¹⁰¹ She was ultimately fired from her part-time cleaning job because she missed work while jailed for not paying her fines.¹⁰² Joseph Anderson, who has a disability, was at home when police arrested him on a warrant charging him with failure to pay a traffic fine.¹⁰³ He was jailed for seven nights before finally being brought before the Biloxi Municipal Court.¹⁰⁴ Both Anderson and Kennedy were told that they could avoid jail only if they paid the full amount of their fines and fees in cash.¹⁰⁵

The City of Biloxi entered into a settlement making it a model for eliminating debtors' prison practices. The City agreed to a number of reforms: issuing bench cards to guide judges in conducting ability-to-pay hearings and assessing legal alternatives to incarceration; ending the use of private probation companies; hiring a full-time public defender;

⁹⁸ See *supra* text accompanying note 49 (New Orleans), note 82 (Oklahoma City). See also Lisa Hagen, *In Unanimous Vote, Atlanta City Council Approves Cash Bail Reform*, WABE (Feb. 6, 2018), <https://www.wabe.org/unanimous-vote-atlanta-city-council-approves-cash-bail-reform/>.

⁹⁹ Class Action Complaint at 6, *Kennedy v. City of Biloxi*, No. 1:15-CV-00348-HSO-JCG, 2016 WL 4425862 (S.D. Miss. Mar. 7, 2016).

¹⁰⁰ *Id.* at 23.

¹⁰¹ *Id.* at 24–25.

¹⁰² *Id.* at 26.

¹⁰³ *Id.* at 27, 29.

¹⁰⁴ *Id.* at 30.

¹⁰⁵ *Kennedy*, 2016 WL 4425862 at 23, 29.

and prohibiting imposition of fees for people who enter payment plans or who are required to perform community service.¹⁰⁶ Advocates are now working to take reforms based on the Biloxi template state-wide. But it is notable that it took a lawsuit to get the city to embrace thoughtful solutions.

Even this small collection of stories shows that achieving policy reform requires a different blueprint for every state. One size does not fit all, even if national campaigns like Justice Reinvestment can introduce the same themes and core reforms to multiple states. National organizations play an important role in identifying which states to prioritize, which reforms to prioritize, and which branch of government at which level to address first. As in a game of dominoes, how much can be achieved depends on choosing the right place to start.

So far, the bottom line condition for persuading elected officials to change criminal justice policy has seemed to be public opinion. Further progress will depend on whether reformers can create conditions for further public education about how a smart and fair criminal justice system should work. This is not so much a challenge for law as it is for marketing.¹⁰⁷

III. THE JUDICIAL MODEL

Although criminal justice policy ideally will be of the people, by the people, and for the people, there are nevertheless times when the counter-majoritarian courts are needed to counteract popular will or popular apathy in order to ensure the fairness of criminal justice policy or administration.

A. Judicial Review of Deprivations of Freedom

The federal courts are unlikely to play any meaningful role in reviewing criminalization and sentencing policies for fairness or rationality. The Supreme Court has applied only the most deferential

¹⁰⁶ See Stipulated Settlement Agreement and Retention of Jurisdiction at 3–21, *Kennedy v. City of Biloxi*, No. 1:15-CV-00348-HSO-JCG, 2016 WL 4425862 (S.D. Miss. Mar. 7, 2016), <https://www.aclu.org/legal-document/kennedy-v-city-biloxi-stipulated-settlement-agreement-exhibits-b>.

¹⁰⁷ See Nan D. Hunter, *Varieties of Constitutional Experience: Direct Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1668, 1700 (2017) (discussing how communications professionals developed a marketing campaign reframing the issues around same-sex marriage and changing public opinion, with the result that direct democracy began to work for rather than against marriage equality).

level of judicial review to state or federal criminal justice policies or practices that cost people years of freedom, regardless of how irrational, cruel, or counterproductive those policies might be. The Court has deferred to state sentencing policy in cases challenging mandatory imposition of life imprisonment without any possibility of parole for drug possession offenses¹⁰⁸ or for minor theft offenses (including sentences imposed under three-strikes laws),¹⁰⁹ finding that even draconian deprivation of freedom for minor offenses does not constitute cruel and unusual punishment under the Eighth Amendment.

Irrationality is not a basis for federal judicial review of sentencing policy. In *Chapman v. United States*,¹¹⁰ for example, the Court upheld a federal sentencing guideline providing a penalty for possessing a quantity of LSD on a sugar cube that was many times greater than the penalty for possessing the same quantity of LSD on a piece of blotter paper.¹¹¹ It was the combined weight of drug and carrier that mattered under the guidelines, not the weight of the controlled substance itself. The Court was interested only in whether the lawmakers had intended this bizarre result and not whether that sentencing scheme irrationally deprives some hapless individuals of extra years of freedom merely because they substituted a sugar cube for a piece of blotter paper.

Although the federal courts have taken a hands-off approach in this area, state courts could, and perhaps should, take a more active role in reviewing whether state sentencing law needlessly deprives individuals of years of freedom under policies that do not appreciably further any legitimate public interest.

Neither the federalism concerns underpinning the Supreme Court's reluctance to review state policy decisions nor the Court's

¹⁰⁸ See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (holding that life sentence without the possibility of parole for the possession of 672 grams of cocaine was not cruel and unusual within the meaning of the Eighth Amendment).

¹⁰⁹ See *Lockyer v. Andrade*, 538 U.S. 63 (2003) (holding that sentence of life imprisonment for stealing videotapes worth \$150, a third conviction, was not cruel and unusual within the meaning of the Eighth Amendment); see also *Ewing v. California*, 538 U.S. 11 (2003) (holding that third strike sentence of life imprisonment for theft offense was not unconstitutional).

¹¹⁰ *Chapman v. United States*, 500 U.S. 453 (1991).

¹¹¹ See *id.* at 458 n.2. If 100 doses of LSD were sold on sugar cubes, the sentence would range from 188–235 months; if the same dosage were sold on blotter paper, the sentence range would be 63–78 months; if the same dosage were sold in its pure liquid form, the range would be 10–16 months.

cramped interpretations of the meaning of cruel and unusual punishment, denial of equal protection, and denial of due process need constrain the state courts. Reformers should think creatively about the potential of state constitutional provisions and invite state courts to play an active role in reviewing their states' criminal law and sentencing policies as well as criminal procedure. Sherry Colb, for example, has argued that courts should regard freedom from incarceration as a fundamental right, worthy of more than minimal judicial solicitude.¹¹² Recognizing the importance of the individual interest at stake, state courts could find that excessive state sentences deprive individuals of the fundamental right to years of freedom without actually furthering the state's interest in preserving public safety or other proper aims of criminal law.

B. Unconstitutional Practices

The Supreme Court has also led the federal courts to turn a blind eye to racially disproportionate practices in the administration of criminal justice, including racial profiling and discriminatory sentencing.¹¹³ Here, too, state courts should accept the responsibility of addressing inequality in their states' administration of criminal justice when legislatures and public opinion are inattentive.

There have, of course, been important exceptions to the Supreme Court's laissez-faire attitude to state criminal justice. Prior to the Supreme Court's decision in *Gideon v. Wainwright*,¹¹⁴ many states had undertaken to appoint counsel to indigent defendants facing a felony charge, but a number of other states, including Florida, had not. In *Gideon*, the Court found that the Sixth Amendment requires the state to provide an attorney for indigent felony defendants as a matter of fundamental fairness. *Gideon*'s mandate was subsequently expanded to apply to misdemeanor prosecutions resulting in incarceration.¹¹⁵

¹¹² Sherry F. Colb, *Freedom from Incarceration: Why Is this Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994).

¹¹³ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (declining to find racial disparities in imposition of Georgia death penalty to constitute a denial of equal protection of the law).

¹¹⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding that Sixth Amendment right to counsel, including a right to assigned counsel for the indigent, applies to state as well as federal felony prosecutions).

¹¹⁵ *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979) (finding that assigned counsel is required in cases where sentence of incarceration is imposed).

The rule in *Gideon* was clear and not at all unpopular.¹¹⁶ But in many states, the political will still does not seem to exist to allocate adequate funds for the criminal defense function. Inadequate support for defense counsel is a critical problem, as approximately eighty percent of criminal defendants cannot afford to hire defense attorneys.¹¹⁷

In the half century since *Gideon*, litigation has been necessary in more than a dozen states to enforce the states' obligation to provide minimally adequate counsel to indigent defendants.¹¹⁸ Without adequate financial resources, public defenders and court-appointed attorneys stagger under unreasonable caseloads, cannot engage appropriate experts, and sometimes cannot make a living.¹¹⁹ State spending on prosecutions has frequently dramatically outpaced expenditures on required defense attorneys.¹²⁰ Louisiana, for example, was forty-third in per capita defense funding while it was the number one incarcerator in

¹¹⁶ See Yale Kamisar, *The Gideon Case 25 Years Later*, N.Y. TIMES (Mar. 16, 1988), <http://www.nytimes.com/1988/03/16/opinion/the-gideon-case-25-years-later.html> (observing that the *Gideon* decision was one of the most popular decisions handed down by the Supreme Court).

¹¹⁷ Michael W. Macleod-Ball & Kanya Bennett, *ACLU Letter to SJC re: Indigent Defense Hearing*, ACLU (May 23, 2015), <https://www.aclu.org/letter/aclu-letter-sjc-re-indigent-defense-hearing>.

¹¹⁸ See Vidhya Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* 38–54 (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2008), https://www.clearinghouse.net/chDocs/resources/caseStudy_VidhyaKReddy_1224854933.pdf; see also Darryl Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 910–11, 911 n.18 (2010) (listing litigation in fifteen states: Alabama, Arizona, Connecticut, Florida, Illinois, Kentucky, Louisiana, Massachusetts, Michigan, New Mexico, New York, Pennsylvania, Tennessee, Washington, and West Virginia).

¹¹⁹ See Oliver Laughlan, *Justice Denied: The Human Toll of America's Public Defender Crisis*, GUARDIAN (Sept. 7 2016), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system>.

¹²⁰ See Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/?utm_term=.a9fd1af7e720 (discussing how state spending on incarceration has outpaced all other state spending except Medicaid); see also Erinn Herberman & Tracey Kyckelhahn, *State Government Indigent Defense Expenditures, FY 2008–2012 –Updated*, BUREAU OF JUSTICE STATISTICS (July 2014), <https://www.bjs.gov/content/pub/pdf/sgide0812.pdf>.

the country.¹²¹ Oklahoma, when it was the fourth highest incarcerator, was thirty-eighth in criminal defense expenditures.¹²² Some states have tried to fix the problem of lack of parity through legislation. For example, some statutes require that prosecutors and court-appointed defense attorneys be paid comparable salaries.¹²³

But even these efforts have not always been successful in achieving parity. While incarceration policy is generally set at the state level, almost half the states require local governments to bear the responsibility of funding indigent defense.¹²⁴ This causes spending disparities within states and sometimes leaves impoverished state subdivisions in a financially impossible situation. Congress was asked to address this multi-state problem through federal legislation in 2015, but nothing came of the proposed legislation.¹²⁵

The ACLU and its affiliates have been involved in dozens of time-consuming, resource-draining lawsuits trying to compel states or their subdivisions to provide adequate levels of defense funding.¹²⁶ In

¹²¹ See Brown, *supra* note 114, at 919–20. These stark numbers can be somewhat misleading, as many other variables other than funding can affect the adequacy of defense counsel, but the disparity is nevertheless significant.

¹²² *Id.* at 920; see also Ryan Gentzler, *Cuts to Indigent Defense System Have Left Our Justice System Deeply Unbalanced*, OKLA. POL'Y INST. (May 3, 2016), <https://okpolicy.org/cuts-indigent-defense-system-left-justice-system-deeply-unbalanced/> (discussing how funding for indigent defense in Oklahoma has remained flat for fifteen years).

¹²³ See, e.g., Marta Mudri, *Judicial Impact Statement: Indigent Defense*, OHIO JUDICIAL CONF. 3 (Sept. 11, 2013), <http://www.ohiojudges.org/Document.ashx?DocGuid=c3cf7170-a70b-4738-8395-1397c9bc3901>.

¹²⁴ See Tanya Greene, *(Zealous, Properly-Resourced Defense) Lawyers for All!*, ACLU (Mar. 19, 2013), <https://www.aclu.org/blog/criminal-law-reform/zealous-properly-resourced-defense-lawyers-all>; see also Sarah Breitenbach, *Right to an Attorney? Not Always in Some States*, PEW CHARITABLE TRS. (Apr. 11, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/04/11/right-to-an-attorney-not-always-in-some-states>.

¹²⁵ See Carl Hulse, *Why the Senate Couldn't Pass a Crime Bill that Both Parties Backed*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html>.

¹²⁶ See, e.g., *Flora v. City of Luzerne*, 776 F.3d 169 (3d Cir. 2015) (alleging gross and chronic underfunding of Pennsylvania county public defender's office); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *rehearing denied*, 896 F.2d 479 (11th Cir. 1989) (en banc), *cert. denied*, 495 US 957 (1990) (first case to allow certification of a class challenging inadequacy of indigent defense funding, in

some cases litigation has led to a settlement; in others, federal courts have had to impose solutions. Only occasionally are state courts willing to play a role in ensuring that the state's obligation is met. For example, in a groundbreaking 1993 case, the Louisiana Supreme Court found that the state's indigent defense funding practices violated the Louisiana state constitution.¹²⁷ Here too, it would be a welcome development for state courts to undertake greater responsibility and ensure that their states are complying with *Gideon*, as well as other elements of fair criminal procedure. The courts can be part of a dialogue inspiring policymakers to rethink their practices. As one litigator commented about an indigent defense funding lawsuit, "the constant pressure of the lawsuit itself, as well as the chance that the judiciary might fashion a remedy, helped legislators understand the value of designing their own reform template."¹²⁸

Georgia); Class Action Complaint at 3–4, 14, *Burks, et al. v. Scott City*, Mississippi, 3:2014cv00745 (S.D. Miss. 2017) (describing how people who couldn't afford bail were routinely held in jail for as long as a year without appointed counsel or an indictment); *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (finding that public defense system of Mt. Vernon and Burlington deprived indigent persons facing misdemeanor charges of their fundamental right to assistance of counsel); ACLU, *ACLU of Utah and Holland & Hart LLP Announce Lawsuit Against State of Utah Over Indigent Defense* (June 21, 2016), <https://www.aclu.org/news/aclu-utah-and-holland-hart-llp-announce-lawsuit-against-state-utah-over-indigent-defense>; ACLU, *Federal Court Finds Public Defense System Violates Constitutional Rights of Indigent Defendants* (Dec. 5, 2013), <https://www.aclu.org/news/federal-court-finds-public-defense-system-violates-constitutional-rights-indigent-defendants> (towns in Washington state); ACLU, *ACLU Hails Montana's Public Defense Bill as Leading National Trend* (June 8, 2005), <https://www.aclu.org/news/aclu-hails-montanas-public-defense-bill-leading-national-trend> (describing settlement in wake of class action lawsuit) (2005); Tanya Greene, *Victory! Michigan Turns the Corner on Public Defense Reform*, ACLU (July 1, 2013), <https://www.aclu.org/blog/criminal-law-reform/victory-michigan-turns-corner-public-defense-reform>; Simon McCormack, *Long-Awaited Public Defense Reform Comes to New York State*, ACLU (May 9, 2017), <https://www.aclu.org/blog/mass-incarceration/smart-justice/long-awaited-public-defense-reform-comes-new-york-state> (settlement of *Hurrell-Harring v. State*, 15 N.Y.3d 8 (2010), challenging New York's public defense system for failure to provide adequate funding, resources, and oversight to the public defense system).

¹²⁷ *State v. Peart*, 621 So. 2d 780, 783 (La. 1993).

¹²⁸ Greene, *supra* note 124.

Litigation can be an essential lever for affecting change in other areas, as well. The new model practices in Biloxi, Mississippi, as one example,¹²⁹ started with a lawsuit—which was then settled through institution of a set of reforms that might not have been politically feasible without the pendency of a lawsuit.

On the whole, while the federal courts do have a significant role to play on some issues, it is clearly too much to expect that they will lead the way to the ideal criminal justice system of the future. The state courts may be another matter, at least in some states. Reformers need to evaluate choice of courts state-by-state and, ideally, develop a coordinated approach to prioritizing which state courts should be asked to be the first domino.

IV. THE POPULAR PARTICIPATION MODEL

Policy reform on issues like criminalization and sentencing ranges can control the overall size of the pipeline into prison. But it does not address problems and disparities in the administration of criminal justice, which can distort the size and demographics of the prison population. Once criminal law has been adopted at the appropriate level, it must be applied by police, prosecutors, judges, and other executive agencies (including parole boards), all of which are afforded considerable discretion. At each of these phases, discretion provides opportunities to expand or reduce the number of people in the pipeline, as well as opportunities to propagate or reduce discrimination.

Police discretion determines how many people are arrested. Law enforcement agencies, by changing their arrest practices, could significantly reduce the size of the pipeline to prison. In his provocative recent book, Alex Vitale suggests that we need to fundamentally reexamine our ideas about the nature and goals of policing itself,¹³⁰ going beyond a focus on whether a particular jurisdiction's policing is arbitrary or discriminatory in practice. In Vitale's view, it is not a matter of accident but of design that policing as an institution reinforces race and class inequalities.¹³¹ Might increasingly informed public opinion create the conditions for a serious reexamination of not only arrest but of policing practices in some number of localities?

Police discretion also determines which particular people will be

¹²⁹ See *supra*, text accompanying notes 99–106.

¹³⁰ ALEX VITALE, *THE END OF POLICING* (2017).

¹³¹ *Id.* at 28–30.

arrested and placed on the path to prison. We know with all too much certainty that police discretion is, to varying extents, applied in a racially discriminatory manner.¹³² A wide variety of approaches to controlling abuse or bias in policing has been attempted or suggested, ranging from reforming overbroad stop and frisk policies,¹³³ to focusing on community policing,¹³⁴ to diversifying law enforcement personnel.¹³⁵ For decades, experts have argued about the extent to which the public should play a direct role in holding law enforcement accountable through civilian complaint review boards.¹³⁶ Contemporary scholars argue that the people also have a powerful informal role to play in monitoring police conduct through community “copwatching.”¹³⁷

¹³² See, e.g., ACLU, *THE WAR ON MARIJUANA IN BLACK AND WHITE* (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white> (stating that, nationally, black people are 3.73 times as likely to be arrested for the same marijuana offense as white people, despite roughly equal marijuana use); PFAFF, *supra* note 9, at 45–49.

¹³³ See, e.g., *Floyd v. City of New York*, 770 F.3d 1051 (2d Cir. 2014).

¹³⁴ See, e.g., OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, *ABOUT COPS*, <https://cops.usdoj.gov/about> (explaining that the Department of Justice has created its own community policing initiative, COPS, to promote community policing practices nationwide); see also Charlie Beck and Connie Rice, *How Community Policing Can Work*, N.Y. TIMES (Aug. 12, 2016), <https://www.nytimes.com/2016/08/12/opinion/how-community-policing-can-work.html>.

¹³⁵ Jen Fifield, *Can Diverse Police Departments Ease Community Tension?*, PBS (Aug. 22, 2016), <https://www.pbs.org/newshour/nation/can-diverse-police-departments-ease-community-tension>; see also WOMEN IN FEDERAL LAW ENFORCEMENT, *Transforming Law Enforcement by Changing the Face of Policing* (Sept. 2016), <http://www.wifl.org/pdf/TransformLawEnforcementbyChangingFaceofPolicing-WIFLEFinal9272016.pdf>.

¹³⁶ See James R. Hudson, *Police Review Boards and Police Accountability*, LAW AND CONTEMP. PROBLEMS (1971), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3349&context=lcp> (explaining the need for and potential problems with police review boards after they were first established in New York City and Philadelphia); see also Peter Finn, *Citizen Review of Police: Approaches and Implementation*, NAT’L INST. OF JUSTICE (Mar. 2001), <https://www.ncjrs.gov/pdffiles1/nij/184430.pdf> (exploring the pros and cons of various types of police oversight systems); Priyanka Boghani, *Is Civilian Oversight the Answer to Distrust of Police?*, FRONTLINE (July 13, 2016), <https://www.pbs.org/wgbh/frontline/article/is-civilian-oversight-the-answer-to-distrust-of-police/> (discussing the need for more police oversight boards in the aftermath of multiple police-involved shootings).

¹³⁷ See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) (discussing community observation of police).

Of the many important questions concerning how to achieve appropriate oversight and accountability of law enforcement, prosecutors, judges, parole boards, etc., the one I want to focus on here is popular participation in prosecution and adjudication of crimes. What might an educated public accomplish through involvement in the criminal justice system going beyond traditional legislative means?

A. We, the People

Just as communities can play a role in oversight of the police, formally or informally, they can also involve themselves in ameliorating the destabilizing impact of bail¹³⁸ and in observing trials and other phases of criminal adjudications.¹³⁹ People can use these observations as a basis for influencing not only policy but personnel: whom to appoint or elect to positions like sheriff, prosecutor, judge, or parole board member.

Although not specific to all of these areas, there is strong historical precedent for valuing the role of the people in implementing criminal justice: the United States Constitution's provision for substantial and direct popular participation in the prosecution and adjudication of criminal cases.

Both Article III and the Sixth Amendment provide that all federal criminal trials shall be by jury,¹⁴⁰ and the Fifth Amendment provides that no person can be "held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."¹⁴¹ The people, through their service on grand and petit juries, were intended to serve as one of two decision-makers in criminal prosecutions (with judges as the other). As with many of the Constitution's schemes, jury decision-making is a one-way ratchet: the people have the power to ameliorate the impact of harsh legislative or prosecutorial decisions by declining to indict, by acquittal on the facts, or even by nullification of the law. The people as jurors do not, however, have the power to make the law harsher than

¹³⁸ Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017) (discussing community participation in funding bail).

¹³⁹ U.S. CONST. amend. VI (enumerating the right to a speedy and public trial).

¹⁴⁰ U.S. CONST. art. III § 2, cl. 3 ("The Trial of all Crimes . . . shall be by jury"); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.").

¹⁴¹ U.S. CONST. amend. V (providing exceptions for military trials).

policymakers, police, and prosecutors have done.

Today, of course, jury trials are rare,¹⁴² and the Supreme Court held long ago that the right to grand jury indictment does not force the states to allow democratic participation in indictment decisions.¹⁴³ Few people take part in the criminal justice system in the direct manner the Constitution envisioned: by serving as jurors or grand jurors in particular cases.

But the Sixth Amendment right of public participation is not moribund. It may be that the mere possibility of facing a jury has an impact on prosecutorial decisions, as prosecutors are likely to offer a more attractive plea bargain in a case where conviction seems doubtful. And because of the Sixth Amendment right to a public trial, members of the public can nevertheless play a significant role in observing trials as well as other phases of criminal adjudications, and then seeking accountability for conduct of which they disapprove.¹⁴⁴

It is also noteworthy that in the exceptional line of cases where the Supreme Court did intervene in sentencing policy decisions, one of the Court's primary rationales was to preserve the power of juries. In *Apprendi v. New Jersey*,¹⁴⁵ the Court invalidated a state scheme allowing judges to enhance a sentence based on facts found at a sentencing hearing rather than at trial. One of the Court's principal explanations for its holding was that the right to trial by jury should be taken to mean that the jury must have the opportunity to determine the facts on which sentencing will be based.¹⁴⁶ *Apprendi*'s revolutionary holding¹⁴⁷ was then applied to upend both state¹⁴⁸ and federal¹⁴⁹ sentencing guidelines schemes.

The Supreme Court Justices could not have been operating on

¹⁴² U.S. BUREAU OF JUSTICE STATISTICS, CRIMINAL CASES (July 13, 2017), <https://www.bjs.gov/index.cfm?ty=tp&tid=23> (showing that over ninety-five percent of felony convictions are obtained through plea bargains).

¹⁴³ *Hurtado v. California*, 110 U.S. 516 (1884).

¹⁴⁴ SUSAN N. HERMAN, THE RIGHT TO A SPEEDY AND PUBLIC TRIAL 18–30 (2006); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

¹⁴⁵ *Apprendi v. New Jersey*, 530 U.S. 466, 490–92 (2000).

¹⁴⁶ *Id.* at 476–77, 490. See also Scalia, J., concurring, *id.* at 498–99 (discussing the central significance of the right to trial by jury).

¹⁴⁷ See Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002).

¹⁴⁸ See *Blakely v. Washington*, 542 U.S. 296 (2004).

¹⁴⁹ See *United States v. Booker*, 543 U.S. 220 (2005).

the assumption that jury trials are the norm, but they nevertheless took the Constitution's provision of a role for the people seriously enough to be willing to upset legislatively adopted state and federal sentencing guidelines schemes. The spirit of the Constitution's citizen participation provisions remains alive, even if the form of participation may have changed.

B. The People's Lawyer

One of the most effective ways for members of the public to have an impact on the administration of criminal prosecution is to pay closer attention to the election of prosecutors. The experience in Oklahoma described above shows that prosecutors can develop vested interests in how criminal law should be administered, interests not always consistent with their constituents' views.¹⁵⁰

While prosecutorial power can be a problem, it can also be an opportunity to reduce the prison population beyond what can be accomplished in the legislatures. Prosecutors have a remarkable amount of control over the caliber of the pipeline to prison, exercising an enormous amount of unchecked discretion in deciding whom to charge with what crimes, and what plea bargains to offer.¹⁵¹ This remarkable level of unconstrained and unreviewable discretion is exercised behind closed doors, with little transparency. This leaves prosecutors free to thwart the will of their constituents. John Pfaff reports that during the 1990s and 2000s, even as both the crime rate and arrest rate fell, the number of felony case filings in state court increased because of discretionary prosecutorial decisions.¹⁵² In states where sentencing ranges have been reduced for a particular offense, some prosecutors have set out to vitiate reforms by adding a different charge with a longer sentencing range.¹⁵³

A few states have considered or adopted proposals for statutory or other approaches to constrain prosecutorial discretion. New Jersey, for example, created plea bargaining guidelines.¹⁵⁴ But in most

¹⁵⁰ *Supra*, text accompanying notes 72–77 (Okla.); *see also supra*, text accompanying note 43 (prosecutors' disclaimer in Louisiana task force report).

¹⁵¹ *See* PFAFF, *supra* note 9, at 127–59.

¹⁵² *Id.* at 127.

¹⁵³ *Id.*

¹⁵⁴ Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to->

jurisdictions, the legislatures have failed to assert any sort of control over their prosecutors.¹⁵⁵

The Supreme Court has not welcomed constitutional challenges to prosecutorial abuse of power. In *Connick v. Thompson*, for example, the Supreme Court found that the District Attorney in New Orleans could not be held responsible for the misconduct of his employees in concealing exculpatory evidence.¹⁵⁶ Litigation may nevertheless be a worthwhile strategy for holding prosecutors accountable for misconduct in some instances. For example, the ACLU filed a case against current New Orleans District Attorney Leon Cannizzaro for repeated attempts to coerce unwilling crime victims and prospective witnesses to testify by serving them with fake “subpoenas.”¹⁵⁷ State courts could and should provide more oversight of their prosecutors than the federal courts have been willing to consider. But lawsuits against prosecutors are not likely to be a sufficient strategy to change a culture.

A more promising approach is using the electoral process as a vehicle for influencing public opinion and prosecutorial conduct. In forty-six states, prosecutors are elected, frequently in uncontested races.¹⁵⁸ Perhaps the best means of ensuring that prosecutors are not disregarding the people’s voice is simply to choose prosecutors more knowledgeably.

The ACLU has urged people to become involved with prosecutorial elections: to question candidates for prosecutor about their positions on criminal justice issues, to ask candidates to commit themselves to positions on issues like bail reform, and to campaign for candidates whose policies would move the jurisdiction in the desired direction. Candidates are likely to respond to public opinion; and public opinion will influence the choice of candidates.

justice-reform/483252/ (describing how New Jersey issues plea bargaining guidelines to govern prosecutorial decisions).

¹⁵⁵ See, e.g., Arnold I. Burns, Warren L. Dennis & Amybeth Garcia-Bokor, *Curbing Prosecutorial Excess: A Job for the Courts & Congress*, NAT’L ASS’N OF CRIM. DEF. ATT’YS (July 1998), <https://www.nacdl.org/CHAMPION/ARTICLES/98jul01.htm>.

¹⁵⁶ See *Connick v. Thompson*, 563 U.S. 51, 62–63 (2011) (finding prosecutor not liable for wrongful conviction).

¹⁵⁷ Anna Arceneaux, *New Orleans District Attorney Leon Cannizzaro Breaks the Law to Enforce It. We’re Holding Him Accountable.*, ACLU (Oct. 17, 2017), <https://www.aclu.org/blog/mass-incarceration/smart-justice/new-orleans-district-attorney-leon-cannizzaro-breaks-law>.

¹⁵⁸ PFAFF, *supra* note 9, at 128–29; see also Lantigua-Williams, *supra* note 154.

An ACLU coalition tried this approach in Philadelphia, a city with a long tradition of electing tough-on-crime officials, from former Mayor and Police Commissioner Frank Rizzo to former District Attorney Lynne Abraham (who served from 1991 to 2010 and was known as “America’s Deadliest DA”).¹⁵⁹ For the Democratic primary for District Attorney in 2016, a coalition including Philadelphia Coalition for a Just District Attorney, Color of Change, Safety and Justice PAC, and the Working Families Party encouraged voters to shine a spotlight on criminal justice issues. Philadelphia members of the ACLU alone knocked on 26,000 doors; fifty-one canvassers who were formerly incarcerated were trained to discuss criminal justice issues in a non-partisan way; and criminal justice issues played a prominent role in election season debates. The candidate who won the primary and then election for Philadelphia DA, Larry Krasner, is a civil rights lawyer whose platform featured his dedication to ending mass incarceration, a platform that resonated with Philadelphia voters. Encouragingly, the more Philadelphia voters learned and talked about criminal justice issues, the more they wanted a prosecutor who was committed to reform.

The electoral model will not yield uniform solutions around the country, only the solutions local public opinion will bear.¹⁶⁰ It *will* feature public participation as a desirable element in setting criminal justice policy rather than deference to professionals to set and implement their own policies out of the public’s view. This approach can be extended to other elected officials, including police commissioners, judges, and mayors. And a public spotlight on particular issues can influence the choice and choices of appointed officials as well.

CONCLUSION

In the old Buddhist saying, paths are many. Criminal justice reformers indeed have many paths from which to choose. The introduction listed seven different parts of the criminal justice system where changes in policy or practice could significantly reduce prison

¹⁵⁹ Udi Ofer, *Want to Roll Back Trump’s Tough on Crime Playbook? Then We Must Elect Candidates Committed to Criminal Justice Reform.*, ACLU (Oct. 11, 2017), <https://www.aclu.org/blog/mass-incarceration/smart-justice/want-roll-back-trumps-tough-crime-playbook-then-we-must-elect>.

¹⁶⁰ See PFAFF, *supra* note 9, at 14–15 (discussing checkerboard nature of this kind of reform).

population.¹⁶¹ Any one of these could be a starting point. Part II gave examples of various paths to reform by elected officials in federal, state, or local legislatures, as well as administrative or judicial policymakers. These efforts were frequently able to succeed where elected officials were reassured that their constituents wanted reform.

But sometimes, as shown by the Oklahoma ballot initiatives and the Philadelphia District Attorney race, the people are more reform-minded than their elected representatives. Where that is true, the people's will should prevail. In the vision of the Constitution, the people, acting as jurors and as spectators, have the prerogative to ameliorate the harsh impact of criminal law but not to make the law harsher. The arc of the Constitution's criminal justice provisions bends toward mercy and the right of all individuals to be treated with dignity. The same balance of values should apply where the people seek to influence the underlying criminal law itself. If the people in a particular jurisdiction prefer to adopt strategies other than extensive deprivations of freedom, like drug treatment programs instead of mandatory minimum sentences, it is arrogant of legislators to insist on maintaining ineffective mass incarceration policies in the name of protecting those people.

But where public opinion lags behind what we know to be smart justice, either due to misinformation (like the persistent misperception that crime rates are rising) or lack of empathy (like failure to care about racially biased policies or practices, or failure to provide adequate funding for indigent defense representation), elected officials should not take current polls as setting a ceiling for potential reform. The encouraging lesson of criminal justice reform efforts to date is that education about the realities of the criminal justice system can change minds. The true art of politics is knowing when to lead and when to follow public opinion.

¹⁶¹ *See supra*, text accompanying note 1.