

ARTICLES

FREEDING MORGAN FREEMAN: EXPANDING BACK-END RELEASE AUTHORITY IN AMERICAN PRISONS

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I. INTRODUCTION

The title of this symposium—“Finality In Sentencing”—covers a smorgasbord of meaty topics. In this essay, I will nibble on three. First, a concern with “finality” could be a delicate euphemism for the view that the United States incarcerates too many people for too long, and that mechanisms for making prison sentences less “final” will allow the U.S. to make those sentences shorter, thus reducing the prison population. Alternatively, one might profess agnosticism about the overall size of the American prison population, but nonetheless be of the view that at least some appreciable fraction of inmates are serving more time than can reasonably be justified on either moral or utilitarian grounds, and therefore we ought to adopt mechanisms for identifying both individuals and categories of prisoners whose terms should be shortened. Finally, one might simply think it impossible, or at least unwise, to try to make “final” decisions—at least *good* final decisions—about how long someone should spend in prison at the beginning of the prison term, particularly if that term is supposed to be very long. Thus, one ought not make the initial, front-end, judicial sentencing decision “final,” but should instead create mechanisms for one or more later second looks.

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As it happens, I subscribe to a greater or lesser degree to all of these notions. I explore them briefly below and conclude that discretionary early-release mechanisms should be restored where they have been abandoned, and reinvigorated where they have languished. In particular, I suggest instituting a discretionary back-end release mechanism for some long-sentence federal drug prisoners and for long-sentence state prisoners more generally.

II. AMERICA'S OVER-INCARCERATION PROBLEM AND THE PLACE OF SECOND-LOOK MECHANISMS IN SOLVING IT

One thing is indisputable: the United States imprisons more of its people than any other country.¹ Our incarceration rate is the highest in the world² and is far higher than that of virtually every other developed country.³ The U.S. incarceration rate is more than triple that of Poland, the next highest member of the thirty countries in the Organization for Economic Cooperation and Development ("OECD").⁴ Likewise, the absolute number of people in American prisons and jails is immense, over 2.2 million in 2011,⁵ or about the same number held by China and the Russian Federation combined.⁶ The number of people not actually in custody but under correctional supervision by virtue of

1. *Entire World—Prison Population Rates per 100,000 of the national population*, INT'L CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited Sept. 13, 2013).

2. The United States incarcerates in prisons and jails 716 persons per 100,000 population, just edging out the Seychelles for highest incarceration rate. *Id.* However, the U.S. rate is notably greater than every other developed country of any size. For example, the rate of the Russian Federation is 479 per 100,000; South Africa is 289 per 100,000; Brazil is 274 per 100,000; Spain is 149 per 100,000; and the United Kingdom incarcerates only 100 persons per 100,000 population. *Id.*

3. *Id.*

4. JOHN SCHMITT ET AL., THE HIGH BUDGETARY COST OF INCARCERATION 3 fig.1 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

5. *Entire World—Prison Population Totals*, INT'L CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Sept. 13, 2013).

6. *Id.* The figure for China of 1,640,000 underrepresents the number of persons held by the Chinese government because it counts only sentenced prisoners and excludes those held in "detention centers." That said, even if one counts persons in detention centers, the total of Chinese prisoners in all forms of detention only just equals the number of American prisoners, even though China's population is four times the size of that of the United States. *China*, INT'L CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=91 (last visited Sept. 13, 2013).

being on probation, parole, house arrest, and the like is larger still—nearly seven million.⁷ The massive size of the U.S. prison and correctional population is a relatively recent development. From the 1920s until around 1973, the U.S. imprisonment rate held roughly constant⁸ but, in the latter year, both the incarceration rate and the absolute number of prisoners began a sustained and dramatic increase.⁹ Over roughly the last forty years, the number of sentenced felons in prisons, jails, halfway houses, or subject to other forms of correctional jurisdiction increased more than seven-fold,¹⁰ while the U.S. population grew by less than fifty percent.¹¹

The sheer size of the American prison population, its explosive and unprecedented growth, and its stark disproportionality to the practices of the rest of the developed world at the very least raise the question of whether we incarcerate too many people. To answer that question exhaustively would be a task far exceeding the limited scope of this essay, but a survey of the salient points related to our unusual penchant for imprisonment suggests that American practice is difficult to justify.

There are two fundamental yardsticks for measuring the adequacy of punishment—desert and crime control.¹² As to the first, the fact that the U.S. imprisons a higher percentage of its population for longer terms than any other country could be

7. LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUST. STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011 (NOV. 2012), <http://www.bjs.gov/content/pub/pdf/cpus11.pdf> (reporting 6.98 million persons incarcerated or under correctional supervision in the United States in FY 2011).

8. BUREAU OF JUST. STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE: STATE AND FEDERAL PRISONERS BY SEX (1925-2011) tbl.6.28.2011, <http://www.webcache.googleusercontent.com/search?q=cache:LkYofklyBi8J:www.albany.edu/sourcebook/pdf/t6282011.pdf+&cd=2&hl=en&ct=clnk&gl=us/http://www.albany.edu/sourcebook/pdf/t6282011.pdf> (last visited Sept. 14, 2013) [hereinafter SOURCEBOOK].

9. *Id.*; Franklin E. Zimring, *Penal Policy and Penal Legislation in Recent American Experience*, 58 STAN. L. REV. 323, 326–27 (2005) [hereinafter Zimring, *Penal Policy*].

10. From 1980 to 2011, the number of persons under correctional supervision in the United States for all grades of crime increased from just under two million to just under seven million. GLAZE & PARKS, *supra* note 7. From 1973 to 2011, the number of sentenced felons under the jurisdiction of state or federal penal authorities increased from 204,211 to 1,537,415. SOURCEBOOK, *supra* note 8.

11. Between 1973 and 2011, the U.S. population increased from 211 million to 311 million, or about forty-seven percent. *U.S. Population by Year*, MULTIPL.COM, <http://www.multip.com/united-states-population/table> (last visited Sept. 13, 2013).

12. *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

justified if America were home to more and worse thieves, thugs, killers, and peddlers of sin than all those other countries—that is, if it were objectively demonstrable that we harbor a far greater proportion of more malevolent evildoers than anywhere else on earth.¹³ This is plainly not the case. For example, while the United States reports a higher murder rate than any other large developed country, its rank of roughly 104th in the world nonetheless makes it a less homicide-prone locale than roughly one hundred other nations.¹⁴ Its reported rates of robbery, assault, burglary, and theft, while relatively high, are lower than many developed countries in Europe and elsewhere.¹⁵ The most that can be said is that, for most types of crime, U.S. criminality falls somewhere in the upper half of nations with similar political, economic, and law enforcement structures.¹⁶

13. *Intentional homicide count and rate per 100,000 population (1995-2011)*, UNITED NATIONS OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/data-and-analysis/homicide.html> (last visited Sept. 13, 2013).

14. According to the United Nations Office on Drugs and Crime, the U.S. homicide rate in 2010 was 4.8 per 100,000 residents, a rate quadruple or more than that of Western European countries like Great Britain, Ireland, France, Poland, and Germany. *Id.* On the other hand, nearly fifty countries report homicide rates at least double that of the United States. *Id.* Moreover, as dolorous as U.S. homicide numbers are, the U.S. homicide rate is roughly eleventh best out of thirty-eight countries in the Americas. *International Statistics on Crime and Justice*, EUROPEAN INST. FOR CRIME PREVENTION AND CONTROL 13 fig.4, http://www.unodc.org/documents/data-and-analysis/Crimestatistics/International_Statistics_on_Crime_and_Justice.pdf (last visited Oct. 4, 2013).

15. In 2008 (the most recent year with the most complete data), the U.S. robbery rate of 145.4 per 100,000 was among the top quartile in the world, but still lower than that of the Russian Federation, England and Wales, Portugal, Spain, Belgium, and France. *Robbery at the national level, number of police-recorded offences*, UNITED NATIONS OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/data-and-analysis/statistics/crime.html> (last visited Oct. 4, 2013). In 2008, the U.S. assault rate was ranked sixty-fourth highest in the world among countries reporting data, but lower than that of Israel, the Russian Federation, Finland, Ireland, Sweden, England and Wales, Scotland, Portugal, Belgium, France, and Germany. *Id.* And in 2008, the U.S. burglary rate of 730.8 per 100,000 was still lower than Denmark, Iceland, Sweden, England and Wales, Austria, Belgium, Netherlands, Switzerland, Australia, and New Zealand. *Burglary breaking and entering at the national level, number of police-recorded offences*, UNITED NATIONS OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/data-and-analysis/statistics/crime.html> (last visited Oct. 4, 2013). In 2008, the United States experienced 2159 thefts per 100,000 population, a rate lower than Denmark, Norway, Finland, Sweden, England & Wales, Scotland, Germany, Netherlands, Australia, and New Zealand. *Id.*

16. “Contrary to common perception, overall rates of volume crime—such as burglary, robbery and assault & threats—are not higher in the USA than in most parts of Western Europe.” JAN VAN DIJK, ET AL., CRIMINAL VICTIMISATION IN INTERNATIONAL PERSPECTIVE: KEY FINDINGS FROM THE 2004-2005 ICVS AND EU ICS 158 (2007). In any event, transnational statistical comparisons of crime rates are notoriously difficult because

Of course, questions of desert also have a normative component. Different societies view identical conduct through different moral lenses.¹⁷ It is neither surprising nor necessarily improper if different nations impose different levels of punishment for comparable behavior.¹⁸ Accordingly, the extraordinary rates of incarceration in the United States could be explained and in large measure justified if American moral sensibilities regarding crime and punishment were radically different than those of the rest of the world—more censorious of wrongdoing, more attentive to the injuries of victims, less sensitive to claims of individual worth by defendants, and less receptive to the possibility of rehabilitation.¹⁹ But it is not clear that Americans' views of appropriate punishments, by which I mean the views of the populace rather than the self-interested conduct of its elected representatives, are radically different than those of the inhabitants of other countries.²⁰ The data in this area suggests four important points. First, worldwide, there is a small, but positive

of differences in crime definition, the size and efficiency of law enforcement organizations, the sophistication and thoroughness of crime reporting mechanisms, the transparency of the data governments collect, and other factors. One particular result of these considerations is that U.S. rankings for robbery, assault, burglary, and theft as reported by UNODC almost certainly understate the relative safety of the United States because the position of a good many countries listed as having lower rates can only be attributed to faulty statistics. For example, in 2008, Egypt reported a total of only 747 robberies, or a rate of one robbery per 100,000 population. Given that this category includes not only armed robberies, but any forceful taking of property from a person, including purse-snatching, the reported statistic for Egypt is obviously a fanciful understatement. *Robbery at the national level, number of police-recorded offences*, UNITED NATIONS OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/data-and-analysis/statistics/crime.html> (last visited Oct. 4, 2013).

17. VAN DIJK, ET AL., *supra* note 16, at 19 (discussing survey results in which Anglophone country respondents chose to punish the act of stealing a color television differently than Nordic country respondents).

18. One might posit a supra-national standard of morality against which the criminal systems of all nations could be measured, but as yet no such standard exists.

19. See, e.g., Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1767–69 (discussing Yale Law Professor Dan Kahan's theory that punishment must be “degrading,’ ‘stigmatizing,’ ‘shameful,’ and ‘intrinsically repulsive’ if it is to win public support” in America and similar Western countries).

20. VAN DIJK, ET AL., *supra* note 16, at 147, 149 tbl.32 (showing that the change over the years in the percentage of the American public who support imprisonment is similar to that of other countries); see also Mike Hough & Julian V. Roberts, *Sentencing Trends in Britain: Public Knowledge and Public Opinion*, 1 PUNISHMENT & SOC'Y 11 (1999) (finding that while the British public expresses a general view that judges are too lenient and sentences are too light, when presented with a particular case, respondents suggest a sentence no greater than that customarily imposed).

correlation between public attitudes about punishment in a country and the punitiveness of the sanctions actually imposed by that country.²¹ Second, although the American public is somewhat more disposed toward prison as a sanction than inhabitants of many developed countries, it is by no means the most punitive among developed countries and, in any event, tends to favor prison less than the people of underdeveloped countries.²² Third, in the early 2000s, the American public became less disposed to prison as a sanction and more lenient in its view of the length of prison sentences when imposed.²³ Fourth, and critically, the divergence between public opinion and actual imprisonment rates is far greater in the United States than in any other country; the actual imprisonment rates in the United States far exceed the levels public sentiment would predict.²⁴ In sum, the available evidence does not seem to support the proposition that America's markedly anomalous incarceration practices are fairly attributable to a uniquely draconian set of American beliefs about crime and punishment.

That said, one might explain America's turn to mass incarceration beginning in the early 1970s on utilitarian crime-control grounds, that is, as a rational response either to public frustration with endemic lawlessness or to a sudden outbreak of widespread criminality. However, even if the increasingly punitive character of U.S. penal law was in some degree triggered by public distress at an actual increase in crime, the nearly four-fold increase in the population of the American correctional system since 1980 can only be justified if the prison explosion has reduced crime, and done so in reasonable proportion to the human and fiscal costs of locking up so very many people.²⁵

It is undeniable that during the 1960s and 1970s, the period immediately preceding the country's turn to a policy of

21. VAN DIJK, ET AL., *supra* note 16, at 151.

22. *Id.* at 148 fig.31, 149 tbl.32.

23. *Id.* at 147, 149 tbl.32.

24. *Id.* at 150 fig.32, 151.

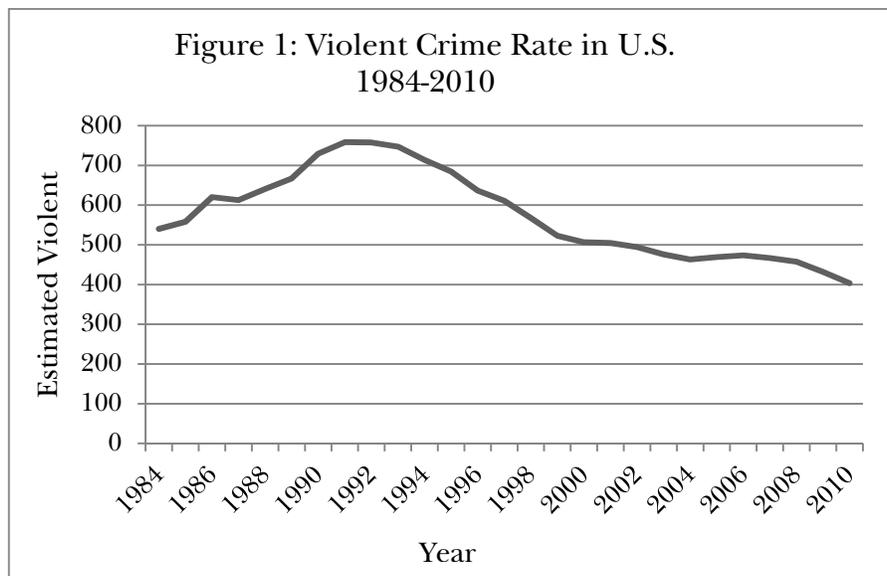
25. *See e.g.*, FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 51–52 (2007) (using the concept of diminishing returns to explain the delayed but eventually realized benefits of an increased prison population in the 1980s); Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319, 348 (1996) (stating that “the marginal costs of incarceration are at or below the accompanying social benefits of crime reduction” to support the argument that higher incarceration rates reduces crime).

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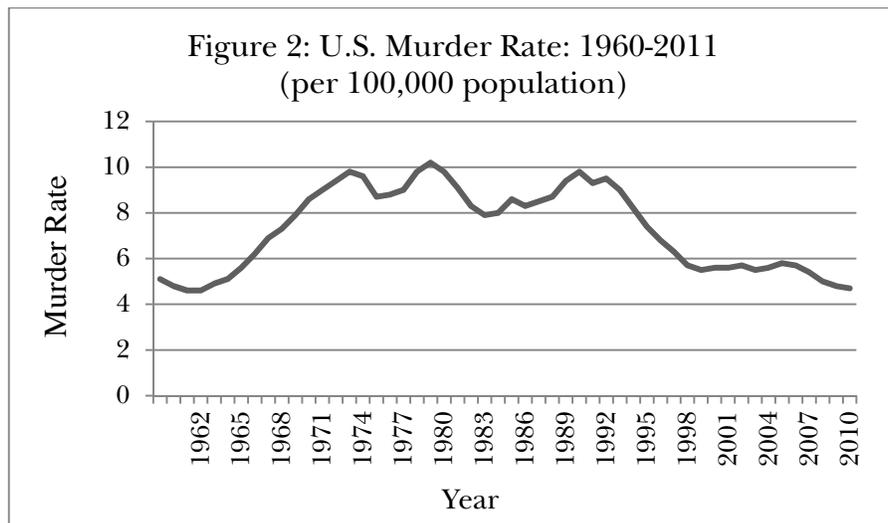
mass incarceration, the United States experienced a dramatic increase in crime rates, with the incidence of murder, robbery, rape, and aggravated assault doubling or tripling.²⁶ Crime rates bumped up and down at the newly elevated levels through the 1980s and into the early 1990s,²⁷ but as Figures 1 and 2 illustrate with respect to violent offenses, they then began a rapid and fairly steady decline that persisted until the last year or so.²⁸



26. See generally, Gary LaFree, *Declining Violent Crime Rates in the 1990s: Predicting Crime Booms and Busts*, 25 ANN. REV. SOC. 145, 146–47 (1999) (noting that from the early 1960s to the mid-1970s the U. S. murder rate increased by 113.04% and the robbery rate by 222.47%, while the rates for rape and aggravated assault “nearly tripled”).

27. *Id.* at 147 fig.1.

28. The data in Figure 1 and 2 are derived from UNIFORM CRIME REPORTING STATISTICS: DATABASE-DRIVEN, CUSTOMIZABLE ACCESS TO OFFICIAL UCR STATISTICS, <http://www.ucrdatatool.gov/Search/Crime/State/TrendsInOneVar.cfm> (last visited Oct. 4, 2013); see also LaFree, *supra* note 26, at 147.



Thus, one must acknowledge both that the national turn to stringent policies of incarceration followed a period during which crime undeniably increased and that, after the U.S. began imprisoning an ever-increasing number of its inhabitants, the crime rate in America dropped steadily for nearly twenty years.²⁹ Indeed, few scholars of the subject deny that the increase in incarceration rates and prison population has reduced crime.³⁰ The point most in dispute is the magnitude of the imprisonment effect in relation to other possible causal factors, such as demographics (particularly the rise and fall in the number of crime-prone youth),³¹ changes in the economy,³² changes in police staffing and tactics,³³ the rise and decline in crack cocaine

29. Of course, the crime drop lagged the onset of increasing prison rates by some years. Incarceration rates began rising markedly in the mid-1970s, but crime rates did not start their steep decline until the early 1990s. ZIMRING, *supra* note 25, at 46–52. Various explanations have been offered to explain the discontinuity, but none seems entirely satisfactory. *Id.* at 52–56.

30. See generally ZIMRING, *supra* note 25, at 48 (“Most criminologists . . . would be likely to credit incapacitation . . . as the mechanism that leads to imprisonment increases reducing crime.”); Levitt, *supra* note 25, at 321 (suggesting that despite some doubt “[i]ncreased prison populations can reduce crime through either deterrence . . . or incapacitation”); Ben Trachtenberg, *Incarceration Policy Strikes Out: Exploding Prison Population Compromises the U.S. Justice System*, 95 A.B.A. J. 66, 66 (2009) (stating that “[f]ew dispute the value of imprisonment in fighting crime”).

31. ZIMRING, *supra* note 25, at 56–62; LaFree, *supra* note 26, at 153.

32. ZIMRING, *supra* note 25, at 63–69; LaFree, *supra* note 26, at 148.

33. ZIMRING, *supra* note 25, at 76–80.

markets,³⁴ and abortion.³⁵ Perhaps the most comprehensive review of the literature reports that—depending on whether one considers county-level, state-level, and national statistics and on whether one takes account of simultaneity³⁶—the data shows that a 10% increase in incarceration rate will produce anywhere from a 0.11% to a 22% reduction in crime rate, with the best studies converging on a 2–4% decrease.³⁷ According to Franklin Zimring, one of the leading authorities on the topic, estimates of the effect of increased imprisonment on decreasing crime rates beginning in the early 1990s vary from a low of 10% of the decline to a high of 27% of the decline.³⁸ Whether a correlation on this order of magnitude represents a success or failure of criminal justice policy is in the eyes of the beholder. Certainly, a good many critics of U.S. prison policy have been at pains to deny or at least minimize the crime-control effects of mass incarceration.³⁹ But one cannot deny the obvious—if you lock up several million troublemakers, often for achingly long periods, they will not be out in the population making trouble, and, at least sometimes, they and those who know of their fate will be deterred from committing crime when out of prison. Crime should decline. And it has.

Nonetheless, one can believe that our recent infatuation with imprisonment has reduced crime somewhat, even a good deal, and still believe that we have gone overboard; that it is unnecessary to imprison people at rates several multiples higher than most of the developed world to control crime; and that the

34. *Id.* at 81–85; LaFree, *supra* note 26, at 153.

35. ZIMRING, *supra* note 25, at 85–95, 97–103.

36. Simultaneity is simply a fancy word for the fact that crime and incarceration influence each other.

37. DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 3–5 (2007), available at http://www.vera.org/sites/default/files/resources/downloads/veraincarc_vFW2.pdf.

38. ZIMRING, *supra* note 25, at 55.

39. See, e.g., *Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated: Hearing Before the H. Judiciary Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. 12–28 (2010) (testimony of Marc Mauer, Exec. Dir. of The Sentencing Project), available at <http://judiciary.house.gov/hearings/pdf/Mauer100609.pdf> (“It is important to note that these dramatic increases [in the size of the U.S. prison population] are largely a result of changes in policy, not crime rates.”); Oliver Yates Libaw, *Incarceration Rate, Crime Drop Link Disputed*, ABC NEWS (Sept. 28, 2000), <http://abcnews.go.com/US/story?id=95580&page=1> (quoting Marc Mauer, Director of The Sentencing Project research group, as “challenging the idea that more prisons necessarily mean less crime”).

costs of whatever crime reduction has been achieved are far too great both in public funds spent and human years eaten by the prison locust. This perspective is not only intuitively attractive, but is consistent with the social science consensus that only a modest fraction of the recent crime declines can be directly attributed to increased prison rates.⁴⁰ It draws particular support from at least one study showing that the crime-control effect of increasing incarceration is positive at relatively low overall rates of incarceration, but that the crime-control effect diminishes as incarceration rates increase until at high rates increasing incarceration actually increases crime.⁴¹ Moreover, the comparative experience of other western countries also supports the notion that the United States has overused incarceration.⁴² Of particular note is the recent history of Canada. Canada and the United States experienced remarkably parallel increases and decreases in crime between the late 1970s and the early 2000s.⁴³ While Canada started from lower base rates of crime and experienced both a smaller increase and a smaller subsequent decrease,⁴⁴ the trends in the two countries moved somewhat in lockstep.⁴⁵ Yet the Canadian crime decrease of the 1990s happened despite a decreasing rate of imprisonment.⁴⁶ At the end of the day, both moral intuition and the consensus of social science data converge in supporting the conclusion that our current levels of incarceration are unjustifiable, even if some notable increase over the levels prevalent in the 1960s may have been appropriate.⁴⁷

40. Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter*, 5 CRIMINOLOGY & PUB. POLY 245, 245–46 (2006).

41. *Id.* (contending that the crime-control effect of incarceration is positive at low rates of incarceration, but becomes negative at high rates of incarceration); see also Geert Dohnt, *Evidence from Cocaine and Marijuana Minimum Mandatory Sentencing* 1, 3–4 (John Jay College of Criminal Justice, Working Paper No. 2012-03), available at [http://www.jjay.cuny.edu/departments/economics/Geert-03\(1\).pdf](http://www.jjay.cuny.edu/departments/economics/Geert-03(1).pdf).

42. Michael Tonry, *Why Are U.S. Incarceration Rates So High?*, 45 CRIME & DELINQUENCY 419, 419–22 (1999) (noting that although America's imprisonment rates are "unprecedented" as compared to other Western democracies, high incarceration does yield crime reduction in the United States).

43. ZIMRING, *supra* note 25, at 107–34.

44. *Id.*

45. *Id.*

46. *Id.* at 121 fig.5.17.

47. Levitt, *supra* note 25, at 348.

Somewhat to the surprise even of those who have been most attentive to America's long prison expansion, in the last few years, the force of the arguments against mass incarceration seem to have finally gained traction.⁴⁸ The overall U.S. prison population peaked in 2009 and has now declined modestly in three consecutive years from a high of 1,615,487 inmates in 2009 to 1,571,013 in 2012.⁴⁹ That said, the recent declines have been driven primarily by events in California and Texas, which together accounted for seventy-five percent of the 2012 decrease in prison population.⁵⁰ Moreover, although the population of state prisoners has been inching downward since 2009, the federal prison population continues to grow.⁵¹ Thus, even though the long climb in U.S. prison numbers seems finally to have crested, the American incarceration rate remains near its stratospheric peak.⁵²

So if the big problem—the problem we really want to fix—is simply that, despite modest retrenchment, we still have too many people in prison, could we solve or at least ameliorate that problem by adopting back-end release mechanisms in jurisdictions that now lack them or by modifying such mechanisms in jurisdictions that already have them? The simple answer is yes. One could certainly reduce prison populations by changing prison release structures.⁵³ But the particulars of how that might be achieved prove to be fairly complex and highly dependent on the differing architectures of individual state and federal systems and on the composition of existing prison populations.⁵⁴ To understand these nuances, one must understand the different

48. JAMES F. AUSTIN ET AL., ENDING MASS INCARCERATION: CHARTING A NEW JUSTICE REINVESTMENT 2–3 (2013), available at http://www.sentencingproject.org/doc/publications/sen_Charting%20a%20New%20Justice%20Reinvestment.pdf (noting that an “unusually favorable climate to challenge mass incarceration” provides a unique opportunity for reform).

49. E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUST. STATISTICS, PRISONERS IN 2012 – ADVANCE COUNTS 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

50. The total U.S. prison population dropped by 27,770 inmates in 2012. *Id.* California accounted for 15,035 of this number, while Texas accounted for 5852. *Id.* at 2. For information on events in California, in particular the California Public Safety Realignment, see *id.* at 4.

51. *Id.* at 2 tbl.1.

52. *Id.* at 6.

53. Zimring, *Penal Policy*, *supra* note 9, at 336–37.

54. *Id.* at 337.

currents that, over thirty-five years, filled American prisons to bursting.

From the early 1970s until about 1985, prison populations rose steadily, apparently without an empirically provable relation to changes in the statutory structures of criminal law enforcement.⁵⁵ Each year, more people were convicted of felonies and incarcerated than in the year before,⁵⁶ but this trend does not seem to be statistically attributable to the sorts of formal changes which came into play later, such as statutory expansions of criminal liability, enhancements in statutory punishments, restrictions on judicial exercises of sentencing lenity, or alterations in back-end release mechanisms.⁵⁷ Having been both a federal and state prosecutor in this period, my recollection is that there was a growing impatience, both in the public and among government officials, with the persistence of comparatively high crime rates and with the seeming ineffectuality of the rehabilitative model of corrections that had dominated the first three-quarters of the twentieth century.⁵⁸ The upshot was that police arrested, prosecutors charged, and courts convicted more felons each year.⁵⁹ At least in Colorado, where I was a deputy district attorney, the legislature was beginning to experiment with now familiar innovations like structuring judicial sentencing discretion,⁶⁰ increasing presumptive sentences,⁶¹ and imposing mandatory

55. *Id.* 330–31.

56. *Id.* at 327 fig.1, 331.

57. *Id.* at 331.

58. Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 686–89 (1996).

59. Zimring, *Penal Policy*, *supra* note 9, at 327–28.

60. During my years as a deputy district attorney in Denver, Colorado, the state had a three-tiered sentencing structure in which each crime of conviction was statutorily associated with a presumptive middle range and a high and low departure range. The sentencing judge was obliged to sentence the defendant in the middle range absent findings of exceptional aggravating or mitigating factors that would justify a sentence above or below the presumptive middle range. COLO. REV. STAT. § 18-1.3-401(6) (2012). This simple, sensible system was later found unconstitutional in the wake of *Blakely v. Washington*, 542 U.S. 296, 313–14 (2004). However, the Colorado Supreme Court found that if “properly applied, COLO. REV. STAT. 18-1.3-401(6) is constitutional,” because under the statute, an aggravated sentence may be based on “constitutionally authorized facts.” *Lopez v. People*, 113 P.3d 713, 719–28 (Colo. 2005).

61. In 1985, the Colorado legislature amended the criminal code to double the length of presumptive sentences for all categories of crimes. COLO. REV. STAT. § 18-1-105(1)(a) (1986) (current version at COLO. REV. STAT. § 18-1.3-401 (2012)).

sentence enhancements on repeat offenders⁶² and those who used weapons.⁶³ This increased the term of incarceration for many prisoners and upped the overall prison population.⁶⁴ Likewise, frustration with parole authorities' exercise of back-end release authority was rising, imposing some pressure on parole boards to be stingier in their decisionmaking.⁶⁵ While the effect of these shifting attitudes and incremental statutory changes may be impossible to isolate statistically, they operated on a steadily increasing entering cohort of felony defendants to push up prison populations from the 1970s through the mid-1980s.

Professor Zimring identifies 1986–1993 as a second phase of the prison expansion, this one driven by the so-called “war on drugs.”⁶⁶ He contends that new drug statutes enacted at both the federal and state levels calling for higher penalties for drug crimes, combined with larger allocations of police and prosecutorial resources to drug offenses, placed a far larger number of inmates in prison for drug offenses than had previously been the case, and that the resulting wave of drug offenders perpetuated the ongoing rise in incarceration rates.⁶⁷ The Bureau of Justice Statistics estimates that the percentage of state inmates incarcerated for drug offenses increased from 8.6% in 1986 to

62. For example, COLO. REV. STAT. § 16-13-101 (1986) (repealed 2001), now COLO. REV. STAT. § 18-1.3-801, mandated a life sentence to one convicted of a fourth felony. The legislature also defined “life” as forty calendar years without the possibility of parole. COLO. REV. STAT. § 18-1.3-801(1)(c) (2012).

63. For the current version of this provision, see COLO. REV. STAT. § 18-1.3-406(7) (2012). For a similar Oregon law, see OR. REV. STAT. §161.610 (2011).

64. The cumulative effect of the increased sentences was to raise Colorado's incarceration rate from 103 prisoners per 100,000 population in 1985 to 256 per 100,000 in 1992. RATE (PER 100,000 RESIDENT POPULATION) OF SENTENCED PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DEC. 31, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1993, at 601 tbl.6.30 (1994). In 1993, the Colorado legislature reduced the maximum length of presumptive sentences for the four lowest categories of felonies by about twenty-five percent. COLO. REV. STAT. § 18-1-1-05(1)(a)(V) (1986) (current version at COLO. REV. STAT. § 18-1.3-401(1)(V)(A) (2012)). In 1994, the legislature reduced habitual criminal sentences. COLO. REV. STAT. § 16-13-101 (1994) (current version at COLO. REV. STAT. § 18-1.3-801(1)(V)(A) (2012)).

65. My impressions of the spirit of those times is reinforced by the recollections of my brother, Herbert D. Bowman, who served as a Deputy District Attorney in San Diego, California, in the 1990s. His experience of the California parole system was that the parole board released scarcely anyone, even in some cases where the prosecution requested it.

66. Zimring, *Penal Policy*, *supra* note 9, at 331–32.

67. *Id.*

22% in 1993.⁶⁸ In the federal system, the fraction of prisoners serving time for drug offenses leapt from 25% in 1980 to 60% in 1993.⁶⁹ Moreover, the federal system was growing at an even faster rate than state systems,⁷⁰ making the new federal emphasis on drug prosecutions an even bigger factor in overall prison population growth.⁷¹ It is important to emphasize that the mere passage of more stringent drug statutes would not have led to large increases in the population of inmates convicted of drug crimes absent a concomitant commitment of police and prosecutorial resources to investigate and charge these offenses.⁷² Across the country, state and federal governments made that commitment and the prisons filled with an ever-larger fraction of drug defendants.⁷³ All that being said, Professor Zimring's drug war-based account provides only a partial explanation of prison expansion from 1986 until the early 1990s.⁷⁴ As I noted back in 1995: "If there had been no state drug prisoners in either 1986 or 1991, the state prison population would still have risen by 144,854, or thirty-five percent during that five-year period."⁷⁵

In the early 1990s, the percentage of state inmates held for drug crimes stabilized and by the end of the decade began a

68. ALLEN J. BECK & DARREL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1994, at 1 (Aug. 1995), *available at* <http://www.bjs.gov/content/pub/pdf/Pi94.pdf>; BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES, 1991, at 4 (Mar. 1993), *available at* <http://www.prisonpolicy.org/scans/bjs/sospi91.pdf>.

69. BECK & GILLIARD, *supra* note 68, at 1.

70. *Id.* at 4.

71. The federal prison population has been increasing as a proportion of the overall U.S. prison population for over thirty years. In 1980, federal prisons held 24,252 prisoners, or 7.7% of the national total. FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1980, at 519 tbl.6.57 (2003), *available at* <http://www.albany.edu/sourcebook/pdf/t657.pdf>; FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985, at 531 tbl.6.29 (1986), *available at* <http://www.albany.edu/sourcebook/pdf/t629.pdf>. By 1993, the federal prison population tripled to 80,815, or 8.9% of the national total. BUREAU OF JUST. STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.6.28.2011 *State and Federal prisoners, by sex, 1925-2011*, *available at* <http://www.albany.edu/sourcebook/pdf/t6132011.pdf>. The proportion of federal prisoners in the national prison population crept steadily upwards. For example, in 2000, federal prisons held 133,921 inmates, or 10.2% of the national population. *Id.* Thereafter, the federal proportion grew again; in 2011, federal prisons held 206,004 prisoners, or 13.8% of the national total. *Id.*

72. Zimring, *Penal Policy*, *supra* note 9, at 331–32.

73. *Id.* at 332.

74. *Id.* at 331–32.

75. Frank O. Bowman, III, *Playing "21" With Narcotics Enforcement: A Reply to Professor Carrington*, 52 WASH. & LEE L. REV. 937, 972 (1995).

decline that has continued.⁷⁶ For example, between 2001 and 2008, the percentage of state prisoners held for drug offenses dropped from 20% to 18.4%,⁷⁷ and by 2011 fell further to 17%.⁷⁸ Nonetheless, the national prison population continued to rise.⁷⁹ Professor Zimring identifies the years after 1993 as a third phase of the national prison expansion, one he sees as driven, not by drug cases, but by generally applicable statutory changes in penal laws, particularly at the state level.⁸⁰ In a nutshell, he maintains that the continued prison expansion from the mid-1990s forward resulted from federal legislation providing encouragement and funding to states for increasing their sentence lengths and prison capacity, passage of state “three-strikes” laws and similar measures imposing very lengthy, and often mandatory, minimum sentences on repeat offenders, and—of particular importance to a discussion of back-end release—the widespread adoption of “truth in sentencing” statutes which mandated that defendants serve a greater portion of the sentence imposed by the judge than had previously been required.⁸¹ One effect of these measures was to increase the average time served by inmates.⁸² And, critically for the discussion of back-end release, state prison populations have in the last decade or so become increasingly dominated not by drug

76. Compare WILLIAM J. SABOL, HEATHER C. WEST & PAIGE M. HARRISON, BUREAU OF JUST. STATISTICS BULL., PRISONERS IN 2006, at 24 app. tbl.9 (Dec. 2007), available at <http://www.bjs.gov/content/pub/pdf/p06.pdf>, with WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, BUREAU OF JUST. STATISTICS BULL., PRISONERS IN 2008, at 6 tbl.7 (Dec. 2009), available at <http://www.bjs.gov/content/pub/pdf/p08.pdf>, and HEATHER C. WEST, WILLIAM J. SABOL & SARAH J. GREENMAN, BUREAU OF JUST. STATISTICS BULL., PRISONERS IN 2009, at 30 app. tbl.16c (Dec. 2010), available at <http://www.bjs.gov/content/pub/pdf/p09.pdf>.

77. Compare PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUST. STATISTICS BULL., PRISONERS IN 2001, at 13 tbl.18 (July 2002), available at <http://www.bjs.gov/content/pub/pdf/p01.pdf>, with HEATHER C. WEST, WILLIAM J. SABOL & SARAH J. GREENMAN, BUREAU OF JUST. STATISTICS BULL., PRISONERS IN 2009, at 32 app. tbl.17c (Dec. 2010), available at <http://www.bjs.gov/content/pub/pdf/p09.pdf>.

78. E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUST. STATISTICS BULL., PRISONERS IN 2011, at 9 (Dec. 2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

79. *Id.* at 10 tbls.10 & 11.

80. Zimring, *Penal Policy*, *supra* note 9, at 333.

81. *Id.*

82. *E.g.*, ALLEN J. BECK & J. MUMOLA, BUREAU OF JUST. STATISTICS BULL., PRISONERS IN 1998, at 12 (Aug. 1999), available at <http://www.bjs.gov/content/pub/pdf/p98.pdf> (explaining that from 1990 to 1997, the average time served by state inmates increased from twenty-two to twenty-seven months).

criminals, but by those convicted of violent crime.⁸³ From 2000 to 2008, almost sixty percent of the increase in state prison populations was in violent offenders.⁸⁴ By 2011, fifty-three percent of all state prisoners were serving time for violent offenses.⁸⁵

Added to Professor Zimring's state-level account are the effects of two federal laws: the Sentencing Reform Act of 1984 ("SRA")⁸⁶ and the Anti-Drug Abuse Act of 1986.⁸⁷ The SRA created the United States Sentencing Commission,⁸⁸ which drafted the Federal Sentencing Guidelines that went into effect in November 1987.⁸⁹ The guidelines system brought determinate sentencing to the federal courts by reducing the discretion of sentencing judges,⁹⁰ abolishing parole,⁹¹ requiring that prisoners serve eighty-five percent of their stated sentences (in contrast to the former system under which release commonly came after roughly one-half of the stated sentence),⁹² and reducing the fraction of convicted defendants eligible for probation.⁹³ The Anti-Drug Abuse Act created a schedule of stringent quantity-based mandatory minimum sentences for narcotics offenses.⁹⁴ These mandatory minimums not only created sentencing floors below which judges could not drop,⁹⁵ but influenced the structure of the

83. CARSON & SABOL, *supra* note 78, at 10.

84. WEST, SABOL & GREENMAN, *supra* note 76, at 10 tbl.7.

85. CARSON & SABOL, *supra* note 78, at 10.

86. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified at 18 U.S.C. § 3551 (1988 & Supp. V 1993)).

87. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (1986)).

88. Sentencing Reform Act §§ 991-998.

89. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (1987) (amended 2004).

90. *Id.*

91. *Id.*

92. See NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 8 (2013), available at <http://www.fas.org/sgp/crs/misc/R42937.pdf>. In 1986, two years prior to implementation of the SRA, the proportion of the sentence imposed that federal prisoners actually served was fifty-eight percent. WILLIAM J. SABOL & JOHN MCGREADY, BUREAU OF JUSTICE STATISTICS, TIME SERVED IN PRISON BY FEDERAL OFFENDERS 1986-87, NCJ 171682 (1999), available at <http://www.bjs.gov/content/pub/pdf/tspfo97.pdf>.

93. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. B, introductory cmt. 1.1 (1987) (amended 2004).

94. Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 801 (1986)).

95. Judges can sentence below a mandatory minimum sentence in limited circumstances, primarily in situations in which a defendant has cooperated with the

federal sentencing guidelines in a way that produced higher sentences even for drug defendants not directly subject to a mandatory minimum.⁹⁶ The combination of the Guidelines and federal drug mandatory minimums pushed the number of federal drug prisoners steadily upward beginning in 1987 and continuing throughout the 1990s and 2000s, adding more than 80,000 additional inmates serving time for drug offenses.⁹⁷ However, the Guidelines system also dramatically increased the number of non-drug federal prisoners by over 70,000 through the same period.⁹⁸ Increases in drug and non-drug inmates drove the total federal prison population from under 50,000 in 1987 to nearly 219,000 in 2012.⁹⁹ In sum, the federal system does not quite fit the Zimring model of a 1986–1993 drug war prison increase followed by a sentencing statute-driven prison increase. Rather, the federal surge in both drug and non-drug prisoners was driven from the outset by statutory changes designed to reduce judicial sentencing discretion and to make federal sentences more severe.

In considering the causes and possible solutions for America's prison explosion, there is a natural tendency to focus, as we have done so far, on the events at the beginning of a prisoner's term—arrest, decision to prosecute, conviction, the rules and institutional interactions that produce a judicial declaration of a number of months or years of servitude denominated as “the sentence.”¹⁰⁰ But the teeming multitudes now behind prison gates are also largely attributable to marked changes in the way state

government in the prosecution of others and the government moves for a sentence reduction on that ground. 18 U.S.C. § 3553(e) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5, pt. K1.1 (1987) (amended 2004).

96. The quantity-based drug mandatory minimums affected the sentences even of those not directly subject to them because the U.S. Sentencing Commission used the mandatory minimum levels as benchmarks around which it structured its drug sentencing guidelines grid. The result was higher guideline ranges across the board. *See* JAMES, *supra* note 92, at 8.

97. *See* THE SENTENCING PROJECT, THE EXPANDING FEDERAL PRISON POPULATION 2 (Mar. 2011), available at http://www.asca.net/system/assets/attachments/2811/inc_FederalPrisonFactsheet_March20112.pdf?1304452236 (showing an increase of sentenced federal drug prisoners from 9,491 or 34% of the federal prison population in 1985 to 95,205 or 51% of the federal prison population in 2009).

98. *Id.* (showing that the number of federal non-drug prisoners rose from 18,132 in 1985 to 92,681 in 2009).

99. JAMES, *supra* note 92, at 3 fig.1.

100. *See* Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 17 (1999).

and federal governments determine when, and under what conditions, a prisoner should be freed. These back-end decisions are of two basic types: first, the release decision which determines what proportion of the stated “sentence” a prisoner will actually spend locked up;¹⁰¹ and second, parole revocation and recommitment decisions which determine whether a prisoner who has been conditionally released, but who has violated a condition of his release, will be returned to custody.¹⁰² This paper does not consider the latter class of decisions, even though the evidence suggests that it has contributed largely to the American prison population explosion.¹⁰³

Consider release decisions. Not that long ago, prisoners customarily served only about half or less of the sentence announced by the judge on sentencing day.¹⁰⁴ Virtually all jurisdictions provided for near-automatic reductions in the nominal sentence based on “good time” accrued for good institutional behavior.¹⁰⁵ Also, all American jurisdictions had “parole” or something like it—that is, a mechanism for some administrative body to award further discretionary sentence reductions, usually based on the judgment that an inmate had become sufficiently rehabilitated to re-enter society.¹⁰⁶

101. *Id.* at 34–36.

102. *Id.* at 36–39.

103. From 1985 to 1997, the percentage of new prison admissions who were parole violators increased from 23.4% to 34.5%. PAUL M. DITTON ET AL., BUREAU OF JUST. STATISTICS, SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 4 (1999) *available at* <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>. In the 2000s, some one-third of all prison admissions were for violation of parole. CARSON & SABOL, *supra* note 78, at 5 tbl.3.

104. *See* SABOL & MCGREADY, *supra* note 92, at 1.

105. *Id.* at 7.

106. DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 56 (1959) (noting that in 1959 every state except Vermont had a statutory provision for both adult and juvenile parole); *The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections 65–66*, in CHARLES L. NEWMAN, ED., SOURCEBOOK ON PROBATION, PAROLE AND PARDONS 334 (Newman ed., 3d ed. 1968) (“In the adult field, every state has an identifiable and separate parole authority, although in four states the power of these authorities is limited to recommending a disposition to the governor.”); Vincent O’Leary and Kathleen J. Hanrahan, *Parole Systems in the United States*, in NATIONAL PAROLE INSTITUTES AND PAROLE POLICY SEMINARS 13–15 (3d ed. 1976) (listing the adult felony parole authorities for all fifty states and the federal government in 1976).

But good time and parole fell out of favor.¹⁰⁷ Some felt parole board decisions were arbitrary and potentially biased.¹⁰⁸ Others thought that nobody was really capable of assessing rehabilitation.¹⁰⁹ Some saw in parole nothing more than an excuse to coddle criminals.¹¹⁰ Others found it unseemly—somehow dishonest—that a judge would solemnly sentence a defendant to ten years, when everybody in the courtroom knew he would really do five or even less.¹¹¹ Hence “truth in sentencing”—a catchphrase for the idea that the time prisoners actually serve should correspond closely to the sentence initially imposed—was born.¹¹² The truth-in-sentencing concept coincided with a national move away from the judge-dominated, rehabilitation-oriented indeterminate sentencing prevalent during the first three-quarters of the twentieth century¹¹³ and toward varying forms of structured, determinate sentencing.¹¹⁴ In its most complete form, the structured sentencing paradigm that emerged in the 1980s imposes rules restricting front-end judicial sentencing discretion, eliminates or severely constrains back-end parole release authority, and writes into law a truth-in-sentencing requirement that virtually all inmates would be obliged to serve a high percentage of the judge-imposed sentence.¹¹⁵ Few jurisdictions adopted this model in its entirety, but most adopted some of its components.¹¹⁶ Saliently, some forty-two states adopted truth-in-sentencing laws requiring all those convicted of some or all felonies to serve a specified minimum fraction (most commonly eighty-five percent) of their sentences.¹¹⁷ The cumulative effect of yearly accretions of

107. See Barbara S. Barrett, *Sentencing Guidelines: Recommendations for Sentencing Reform*, 57 MO. L. REV. 1077, 1100 (1992).

108. *Id.* at 1079.

109. *Id.* at 1080.

110. Bowman, *supra* note 58, at 688.

111. *Id.*

112. See Barrett, *supra* note 107, at 1078.

113. Bowman, *supra* note 58, at 681.

114. *Id.*

115. WILLIAM SABOL ET AL., URBAN INST. JUST. POLICY. CTR., INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS I, 47 (2002).

116. *Id.* at 1.

117. *Id.* at 3 (noting that the widespread adoption of truth-in-sentencing provisions is often attributed to a 1994 federal statute which provided financial incentives to states that adopted truth-in-sentencing laws, requiring all those convicted of specified violent

new prisoners obliged to do so much of their time behind bars has contributed to the engorgement of many state prison systems.¹¹⁸ For example, in Florida, *all* felony prisoners sentenced after Oct. 1, 1995, regardless of their offense of conviction, must serve 85% of their sentences, and by 2012, 98.6% of Florida inmates had been sentenced under the 85% law.¹¹⁹ Between 1990 and 2009, the number of prisoners under the jurisdiction of the Florida correctional system increased from 44,387 to 103,915.¹²⁰

Structured sentencing reforms that erase or restrict parole-release authority and mandate service of a high minimum percentage of a prisoner's state sentence self-evidently result in systems with less back-end flexibility. But they need not have produced tremendous increases in prison population. If legislatures had adjusted front-end sentences downward to match the sentence lengths inmates were really serving before the new laws, or given judges the latitude to do so, the effect on prison populations would have been small. But often that did not happen. Structured sentencing provisions were often only one component of a wider program consciously designed to increase criminal punishment.¹²¹ Legislatures either declined to adjust front-end sentencing levels downward to account for the lengthened terms mandated by truth-in-sentencing measures or even raised front-end levels by increasing presumptive sentences, adopting more mandatory minimum sentences and repeat offender enhancements and the like.¹²² Even judges who retained much of their old discretionary sentencing authority often seem to have persisted in imposing more or less the same sentence lengths

felonies to serve at least eighty-five percent of their sentences.); *but see id.* at 7 (noting the federal law "had relatively minor influence on state truth-in sentencing policies").

118. *Id.* at 12–13.

119. *Doing Time: Most Florida Inmates Serving More than 85% of their Sentences*, BUREAU OF RESEARCH AND DATA ANALYSIS, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/pub/timeserv/doing/DoingTime2013.pdf> (last visited Oct. 4, 2013).

120. *Statistical Abstract of the United States: 2012 Law Enforcement, Courts, and Prisons*, U.S. CENSUS BUREAU 217 tbl.347, <http://www.census.gov/prod/2011pubs/12statab/law.pdf> (last visited Oct. 4, 2013). Beginning in 2011, the Florida prison population decreased for the first time in decades. Ashley Lopez, *Florida's Prison Population Declines for First Time in 28 Years*, FL. CENTER FOR INVESTIGATIVE REPORTING BLOG (Aug. 3, 2012), <http://www.fcir.org/2012/08/03/floridas-prison-population-declines-for-the-first-time-in-28-years>. As of August 2012, the population stood at 100,272. *Quick Facts*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/oth/Quickfacts.html> (last visited Oct. 4, 2013).

121. SABOL ET AL., *supra* note 115, at 7.

122. *Id.*

they always had, even though the real time served by defendants might nearly double.¹²³ For example, if an old-law judge pronounced a sentence of ten years, that customarily meant that the defendant would serve perhaps four or five.¹²⁴ Whereas, if a judge in a truth-in-sentencing jurisdiction pronounced a ten-year sentence, the defendant would serve more than eight.¹²⁵ The most extreme example of this phenomenon was the federal system, which combined the complete elimination of parole, an eighty-five percent truth-in-sentencing rule, and a restrictive guidelines system in which sentencing ranges initially pegged to pre-guidelines levels were nudged steadily upward year after year for many offenses.¹²⁶ But less extreme variants of the same story played out across the country.¹²⁷

Hence, in theory, one could now achieve an immediate and quite dramatic decrease in prison populations simply by repealing truth-in-sentencing laws and reinstating more liberal good time provisions and discretionary back-end release mechanisms like parole. The problem, of course, is that a universal and explicit national rejection of truth in sentencing with the expressed aim of dramatically cutting prison populations seems somewhat unlikely.¹²⁸ A proposal that would, particularly if made retroactive, cut the time served by virtually all felons by perhaps half is a hard sell to elected officials.¹²⁹ Such officials owe their careers to voters. It is a striking fact that throughout the past fifteen or more years of steadily declining crime, the American public has persistently entertained the opinion that crime is getting worse.¹³⁰ That said, a significant, if incremental and

123. *Id.* at 12.

124. See Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980–1998*, 12 FED. SENT'G REP. 12, 13 (1999).

125. See *id.*

126. See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines*, 105 COLUM. L. REV. 1315 (2005) (describing the one-way upward ratchet effect of the design of the federal guidelines system).

127. SABOL ET AL., *supra* note 115, at 6.

128. See *id.* at 6–7.

129. Hofer & Semisch, *supra* note 124.

130. Lydia Saad, *Most Americans Believe Crime In U.S. Is Worsening*, GALLUP, <http://www.gallup.com/poll/150464/americans-believe-crime-worsening.aspx> (last visited Oct 4, 2013). This is not an exclusively American phenomenon. For example, surveys of British opinion showed strong majorities believing that crime was increasing when in fact the reverse was true. Hough & Roberts, *supra* note 20, at 21.

carefully targeted, reinvigoration of back-end discretionary release mechanisms is quite possible. Skepticism about the utility of mass incarceration as an anticrime measure has spread across the political spectrum and is now shared by a number of unimpeachably conservative voices.¹³¹ The gradual shift in opinion among conservative elites combined with the fiscal imperatives of an era of severe state budgetary constraint has already produced a retrenchment in some states, and this movement may well have room for still more back-end structural reform.¹³²

III. THE PARAMETERS OF A TARGETED REVIVAL OF BACK-END RELEASE MECHANISMS

If back-end release programs should be revived, how should the revival proceed? Should the revival be targeted at particular types of crime? At particular classes of offenders? Would it be most likely to succeed in the federal system or in those states that have abandoned or severely curtailed back-end discretionary release? The preferable shape of any revival of back-end release mechanisms and the jurisdictions in which it would have the best chance of successful adoption depend on what such a reform is intended to achieve. If the only objective is to reduce sentences regardless of all other considerations, then the only important design questions would be narrow calculations of political plausibility.¹³³ If, however, the objective is not merely to reduce prison populations, but to do so in a way broadly consistent with foundational notions of desert and promotion of crime control, one must consider not only what will fly in the current political climate, but what will work to improve the criminal justice system.¹³⁴

131. For example, there is now an active conservative crime policy group called “Right on Crime” endorsed by such Republican luminaries as Grover Norquist and Jeb Bush that espouses reduction in incarceration rates. *What Conservatives Are Saying*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/what-conservatives-are-saying> (last visited Sept. 5, 2013); see also *What’s Gone Wrong*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-criminal-justice-challenge/whats-gone-wrong> (last visited Sept. 5, 2013).

132. *State Initiatives: Connecticut*, RIGHT ON CRIME, <http://www.rightoncrime.com/reform-in-action/state-initiatives/connecticut> (last visited Sept. 5, 2013); see also *State Initiatives: Vermont*, RIGHT ON CRIME, <http://www.rightoncrime.com/reform-in-action/state-initiatives/vermont> (last visited Sept. 5, 2013).

133. Bowman, *supra* note 126, at 1332, 1341–45.

134. *Id.*

A. Revival of the Medical Model of Indeterminate Sentencing Would Be An Error

In that vein, I am skeptical of any effort to revive the old system, in which parole was but one part of a theoretically integrated medical model in which both the judge deciding the front-end sentence and the prison and parole officials awarding good time and deciding on the parole release date were all supposed to be working toward the same end—rehabilitation.¹³⁵ I do not say that rehabilitation is impossible, or that it should not be among the relevant considerations in front and back-end sentencing decisions. But, the old system in which prison and parole officials claimed the ability to make fine-grained determinations of rehabilitative progress for virtually all prison inmates rested on an insupportable intellectual conceit, made still more difficult of realization by the resource constraints almost inevitable in the operation of a politically supportable correctional system.

B. Discretionary Parole Release for Short-Stay Prisoners Seems Undesirable

Likewise, I see little utility in applying a parole release mechanism to relatively short sentences— say five years or less. In such cases, good time credits should certainly be available, both to provide inmates incentives for self-control and self-improvement and to afford the prison system an important tool for institutional control.¹³⁶ But, highly individualized discretionary parole release mechanisms seem unlikely to provide a benefit commensurate with the political and fiscal cost of creating and operating them.¹³⁷ In the first place, except for defendants who present such a danger to the community that protracted incapacitation is in order or defendants whose crime of conviction was so heinous that retributive justice demands a lengthy term, short but definite prison terms are widely accepted as most likely to achieve penal objectives.¹³⁸ In any event, a short prison sentence is already the

135. See Bowman, *supra* note 58, at 684 n.15.

136. *Id.* at 690 n.43.

137. *Id.* at 700–01 n.79, 714–15, 738, 738 n.214.

138. VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 8–9 (Nov. 2010), available at <http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf>.

product of a front-end determination by a judge based on all the then-available data on the prisoner. If a subsequent discretionary mitigation of the sentence is to be more than a thinly disguised form of automatic good time credit, it must be the product of a rational, individualized judgment based on new information about the inmate arising from his behavior in, and response to, prison, including the deprivation of freedom and whatever rehabilitative programming he is afforded.¹³⁹ For short-term prisoners, the shortness of their stay and the sheer number of them present immense barriers to collecting and evaluating enough information to make meaningful individualized assessments of personal rehabilitative progress. Personal growth takes time. Assessing it takes even more. By the time most short-stay prisoners have been inside long enough to experience whatever epiphany prison might offer and to convince their keepers that the epiphany has occurred, their sentences will be over or nearly so. Moreover, generating meaningful, professional, and individualized assessments of rehabilitative progress for every short-time inmate would be a monumental task even with infinite resources; given the fiscal realities of American penal systems, it is a fantasy.

Thus, if one's real objective is to secure a broad-based reduction of sentences for defendants exposed to, or inmates now serving, terms at the short-to-medium end of the current spectrum, it may be more sensible to: (1) seek legislative action to eliminate or reduce the incidence of mandatory minimum sentences for some selected offenses; (2) urge adoption of more liberal safety valves for low-seriousness offenders subject to mandatory minimums;¹⁴⁰ (3) seek more liberal good time

139. AMY L. SOLOMON ET AL., URBAN INSTITUTE, DOES PAROLE WORK? ANALYZING THE IMPACT OF POSTPRISON SUPERVISION ON REARREST OUTCOMES 1, 1-2 (2005), *available at* http://www.urban.org/UploadedPDF/311156_Does_Parole_Work.pdf.

140. For example, since 1994, federal law has contained a so-called "safety valve" permitting judges to sentence certain first-time drug defendants below an otherwise applicable mandatory minimum sentence. 18 U.S.C. § 3553(f) (2008). Senator Patrick Leahy and Senator Rand Paul have introduced a more sweeping safety valve statute that would effectively neuter the entire web of federal mandatory minimum sentences by conferring on federal district judges the authority to sentence any defendant below an otherwise applicable mandatory minimum sentence based on the extremely general provisions contained in 18 U.S.C. § 3553(a). *See* FAMILIES AGAINST MANDATORY MINIMUMS, THE PAUL-LEAHY "JUSTICE SAFETY VALVE ACT OF 2013" S. 619 (2013), *available at* <http://www.famm.org/Repository/Files/Justice%20Safety%20Valve%20Act%20Primer%20S.%20619.pdf> (describing provisions of the S. 619).

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provisions; and (4) urge that such measures be made retroactive if passed.

C. Classes of Cases Suitable for Revived Back-End Release Programs

Where parole or other true second-look mechanisms have more appeal is in the case of inmates serving long sentences. Of course, what should count as a “long sentence” for this purpose is terribly difficult to determine. From an inmate’s perspective, any term exceeding a few weeks or months is likely to seem long. However, the sort of back-end release program advocated here is aimed at prisoners who have been inside long enough for the system to gather meaningful information about background, attitude, and behavior over an extended period. Long enough that society’s interest in retributive justice will have been in significant measure served. And long enough for whatever maturation process that a term in prison can bring to be observable. On nothing better than intuition, I would define a long sentence as one of at least five years, and perhaps rather more, perhaps on the order of ten years. However one defines the category, it makes sense to take a second look at long sentences, particularly for certain classes of such cases.

i. Back-End Release in Federal Drug Cases

A great many people are serving very long terms for narcotics crimes.¹⁴¹ As it happens, I spent a good part of my professional life as a prosecutor helping convict such people and put them away, and I think almost all of them deserved punishment. But I also think two other things. First, because of

141. For example, in FY 2011, the mean sentence imposed on a federal crack cocaine defendant was 104 months (8.6 years) and the median sentence was eighty-four months (seven years). U.S. SENTENCING COMM’N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.J (2012), *available at* http://www.isb.usc.gov/content/pentahocdf/RenderXCDF?solution=Sourcebook&path=&template=mantle&action=figure_xx.xcdf&table_number=Figure_J (last visited Sept. 3, 2013). The median sentence for a federal methamphetamine defendant was ninety-five months (7.9 years), while the mean sentence was seventy-five months (6.25 years). *Id.* About forty-seven percent of all current federal inmates were sentenced for drug offenses and more than forty percent of all federal inmates are serving terms in excess of ten years. *Quick Facts About the Bureau of Prisons*, FEDERAL BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp> (last updated July 27, 2013).

several decades of legislative overreaction to a real but overstated social problem, even traffickers who deserve punishment are often imprisoned far longer than can be justified on grounds of deterrence or just deserts.¹⁴² Second, the tide of public—and political—opinion is shifting at least incrementally away from a purely criminal justice approach to substance abuse generally and away from draconian drug sentences.¹⁴³ The most obvious evidence of the societal shift is, of course, the small but growing number of states that have decriminalized¹⁴⁴ or overtly legalized the possession and use of marijuana, either for medical purposes¹⁴⁵ or recreation.¹⁴⁶ But even in the case of other “hard” drugs, notably including cocaine, sentiment favoring more treatment and less prison is spreading,¹⁴⁷ and—quite impressively—seems to span the otherwise unbridgeable partisan divide of current politics.¹⁴⁸ For example, in August 2013, Attorney General Eric Holder promulgated a new Justice Department charging policy that discourages federal prosecutors from including in indictments allegations of drug amounts that would trigger mandatory minimum sentences for nonviolent, relatively low level offenders.¹⁴⁹ Remarkably, this memorandum did not lead to a torrent of abuse from law-and-order conservatives, but instead produced a low-key bipartisan hum of agreement and a number of equally bipartisan legislative proposals for further moderation of

142. Bowman, *supra* note 75, at 973 n.147.

143. *Id.* at 970 n.132, 970–71, 985–86.

144. Sixteen states have decriminalized possession of personal use quantities of marijuana, meaning that possession of such quantities is treated either as no offense at all or as no worse than a minor traffic violation. *States that have Decriminalized*, NORML, <http://www.norml.org/aboutmarijuana/item/states-that-have-decriminalized> (last visited Sept. 3, 2013).

145. Twenty states and the District of Columbia have passed statutes authorizing the medical use of marijuana. *20 Legal Medical Marijuana States*, PROCON.ORG, tbl.1, <http://www.medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Oct. 4, 2013).

146. Colorado and Washington have legalized the possession and use of marijuana for recreational purposes. *Legalization*, NORML, <http://www.norml.org/legal/legalization> (last visited Sept. 3, 2013).

147. See Bowman, *supra* note 58, at 684 n.19, 692 n.53.

148. *Id.* at 692 n.53.

149. Memorandum to the United States Attorneys and Assistant Attorney General for the Criminal Division (Aug. 12, 2013), *available at* <http://www.big.assets.huffingtonpost.com/HolderMandatoryMinimumsMemo.pdf>.

drug sentences.¹⁵⁰ A loose coalition of libertarian, fiscal, and religious conservatives seems increasingly open to reduced incarceration of drug defendants,¹⁵¹ and simultaneously seems to be moderating reflexive opposition to expansion of discretionary back-end release and reintegration efforts.¹⁵²

A reinvention or reinvigoration of parole release mechanisms directed at drug offenders generally, and particularly those serving relatively long sentences, would serve two ends: (1) mitigate the effects of a long period of drug policy overreaction on those already sentenced who thus may not benefit from the current impetus to moderate the sentences of those yet to be sentenced,¹⁵³ and (2) provide a mechanism for doing so that does not require politicians to expressly repudiate their prior sentencing directives.¹⁵⁴ Such measures allow cautious public figures to say, in effect, “We’re not surrendering in the war on drug trafficking. We’re not even lowering drug sentences generally. Oh, no. We are simply providing for a sensible second look at long sentences imposed on persons who may have been rehabilitated and who are thus costing the taxpayers a lot of money to no good end.”

Back-end release mechanisms targeted at drug offenders could certainly fit the policy objectives of states, but would be even more suitable for the federal system. Violent criminals are a small

150. See, e.g., *Attorney General Holder Expands Major Reform of Mandatory Minimum Drug Laws*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/news/2013/09/attorney-general-holder-expands-major-reform-mandatory-minimum-drug-laws> (last visited Oct. 29, 2013) (describing three pieces of liberalizing legislation with bipartisan sponsorship: The Safety Valve Act, co-sponsored by Sens. Patrick Leahy (D-VT) and Rand Paul (R-KY), the Smarter Sentencing Act, co-sponsored by Sens. Richard Durbin (D-IL) and Mike Lee (R-UT), and the Public Safety Enhancement Act, co-sponsored by Congressmen Jason Chaffetz (R-UT) and Bobby Scott (D-VA)).

151. See *Priority Issues: Substance Abuse*, RIGHT ON CRIME.COM, <http://www.rightoncrime.com/priority-issues/substance-abuse> (last visited Sept. 3, 2013). However, it should be noted that this group limits its calls for lenity primarily to drug users, as opposed to drug sellers. See also *Theories of Punishment and Mandatory Minimum Sentences: Hearing Before the U.S. Sentencing Comm’n*, THE HERITAGE FOUNDATION (May 27, 2010) (testimony of David B. Muhlhausen Ph.D., Research Fellow for The Heritage Foundation), <http://www.heritage.org/research/testimony/theories-of-punishment-and-mandatory-minimum-sentences> (questioning the utility of some mandatory minimum sentences and the advisability of then-existing crack cocaine penalties).

152. See *Priority Issues: Parole and Re-Entry*, RIGHT ON CRIME.COM, <http://www.rightoncrime.com/priority-issues/parole-and-re-entry> (last visited Sept. 3, 2013).

153. Bowman, *supra* note 75, at 973 n.149.

154. *Id.* at 972.

fraction of federal inmates—only 7.2% are serving time for conviction of a violent crime.¹⁵⁵ Even counting the 16.3% sentenced for possessory weapons violations, explosives, or arson, fewer than a quarter of federal prisoners are incarcerated for actual or even potential violence.¹⁵⁶ The majority of federal prisoners are drug offenders (46.8%) and immigration violators (11.8%).¹⁵⁷ Due to the severity of federal drug laws and the prevalence of tough mandatory minimums, it is among drug defendants one finds the largest number of federal prisoners doing really long terms.¹⁵⁸ Not only does offering second looks to federal drug offenders make a good deal of policy sense, but it ought to be easier than making the same pitch for violent felons. To be sure, federal sentencing policy has long been impervious to rational argument and federal policy makers have been especially prone to grandstanding in the narcotics field.¹⁵⁹ Still, the budget cutting fervor now gripping the capital might provide cover for changes that had until now seemed impossible.

Establishing a second-look mechanism for long-sentence drug offenders in the federal system would be simplified because the federal system has a long-dormant resource that could be pressed into the service of such an initiative. The Federal Parole Commission, which was supposed to wither away after the enactment of the SRA, remains in existence,¹⁶⁰ wraithlike to be sure, but an existing legal and administrative entity with long experience, a long (if fading) institutional memory, and an existing set of rules and procedures governing the process of evaluating federal prisoners for release.¹⁶¹

Recent proposals for initiating or reviving back-end discretionary release often place the decision in the hands of the

155. *Quick Facts About the Bureau of Prisons*, FEDERAL BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp> (last visited Oct. 4, 2013) (reporting that 4.1% of federal prisoners are serving time for robbery; 3% are serving sentences for homicide, aggravated assault, or kidnapping).

156. *Id.*

157. *Id.*

158. FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 140, at 2.

159. *Id.*

160. Peter B. Hoffman, *History of the Federal Parole System*, U.S. PAROLE COMM'N 3, <http://www.justice.gov/uspc/history.htm> (last visited Sept. 6, 2013).

161. U.S. PAROLE COMM'N, FY 2013 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 3 (2012), *available at* <http://www.justice.gov/jmd/2013justification/pdf/fy13-uspc-justification.pdf>.

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judiciary,¹⁶² but this allocation of responsibility seems unsound, particularly in the federal case. There are no existing judicial standards for determining eligibility for back-end release and there is no obvious locus within the judiciary to develop such standards. Some might suggest the U.S. Probation and Pre-Trial Services System, but that organization is already overworked, not expert in long-term correctional treatment, and situated in a different branch of government than the Bureau of Prisons, which holds the inmates and the bulk of the post-sentencing information relevant to release decisions. Leaving the matter to the unguided discretion of individual judges seems a very questionable proceeding, pregnant with the possibility—nay certainty—of flagrant disparities of treatment. Perhaps even more importantly, federal judicial officers are already heavily overburdened and there is no apparent disposition on the part of Congress to increase their numbers. If a back-end discretionary release mechanism were to be available to any more than a tiny fraction of the more than 90,000 current federal drug inmates, the caseload impact on judges would be substantial. It is simply implausible to expect that judges could devote any more than cursory attention to individual cases, which would mean in practice that virtually all individual decisions would be either the products of individual judicial caprice or a rubber-stamp ratification of a recommendation by whatever official, whether a probation officer or someone from the Bureau of Prisons, was ultimately charged with evaluating prisoners for release.

Although no system is likely to be perfect, revitalizing the existing machinery of the Parole Commission seems both efficient and sensible. Given the concurrence of liberal and libertarian sentiment against long mandatory drug sentences and the general preoccupation with matters budgetary, it does not seem implausible that Congress might charge the Parole Commission with identifying a set of current and future federal prisoners incarcerated for drug crimes who would, at some specified point in their sentences, become eligible for consideration for early release. Such a directive might, at least initially, focus on first-time or nonviolent drug offenders subject to mandatory minimum sentences or sentences greater than a specified length, perhaps

162. *See, e.g.*, MODEL PENAL CODE: SENTENCING § 305.6 Tentative Draft No. 2, at 122–23 (Mar. 25, 2011).

ten years. Inmates in the statutorily specified class would not necessarily be released, but would become eligible for individualized consideration by the Parole Commission.

ii. A Second Look for Old Lags

The second class of cases we ought to consider for back-end discretionary release is a little harder to define. Perhaps “old dudes who have been in a long time.” There are two good justifications for taking a second look at cases like this. The first is what I call the Morgan Freeman Imperative (you wondered how I was going to get him in here). Those who have seen *The Shawshank Redemption* will remember that Morgan Freeman is “Red,” an old convict serving life who is repeatedly denied parole, until, at last, it is granted after he makes a memorable speech to the parole board.¹⁶³ When asked if he is rehabilitated and regrets his crime, he replies:

There’s not a day goes by I don’t feel regret. Not because I’m in here, or because you think I should. I look back on the way I was then: a young, stupid kid who committed that terrible crime. I want to talk to him. I want to try and talk some sense to him, tell him the way things are. But I can’t. That kid’s long gone and this old man is all that’s left. I got to live with that.¹⁶⁴

The older I get, the truer this speech seems to me. Partly because I am myself now closer to being an old man than a young one, I see how much the years have changed me and those people I knew when young. None of us are who we were. And that sense of the mutability of human nature is heightened by the experience of raising children, particularly young men. As you watch a son grow, you are in a constant state of wonder at how much he changes from year to year, and as he becomes a teenager and young adult, in a constant state of fear that his maleness will drive him to do some stupid thing that will blight his life before time has a chance

163. THE SHAWSHANK REDEMPTION (Columbia Pictures 1994).

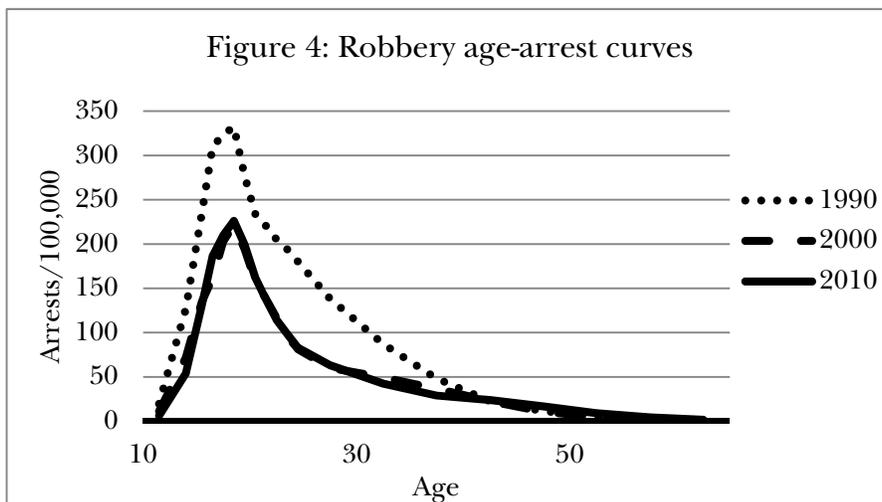
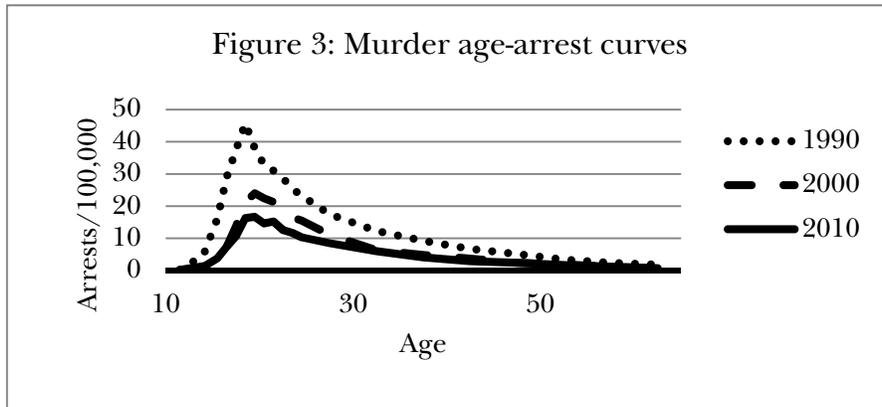
164. *Id.* For quotes, visit *The Shawshank Redemption*, IMDB.COM, <http://www.imdb.com/title/tt0111161/quotes> (last visited Sept. 23, 2013).

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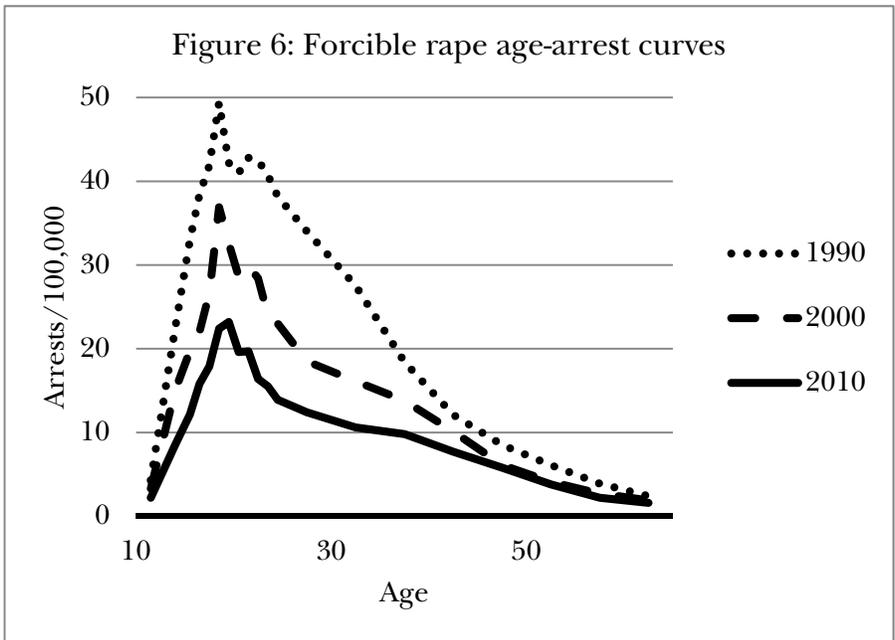
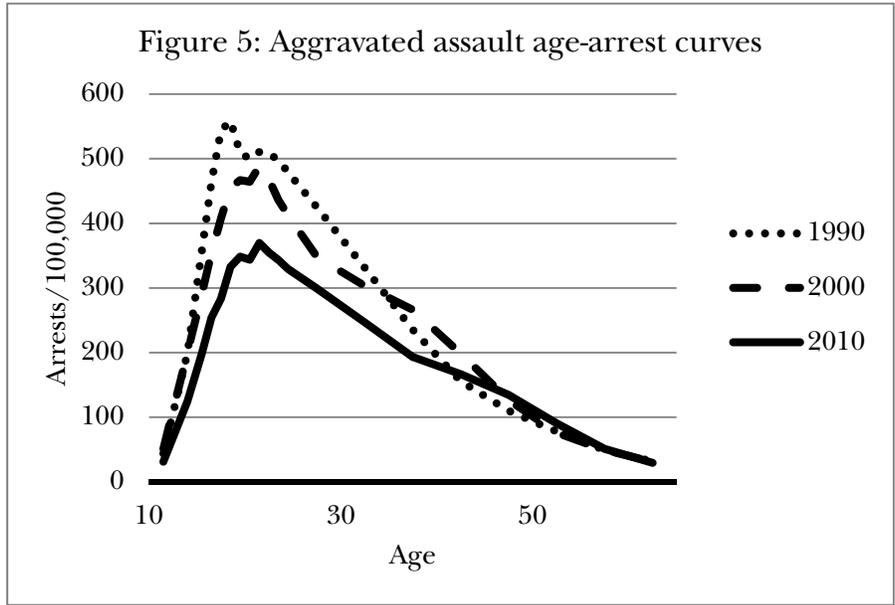
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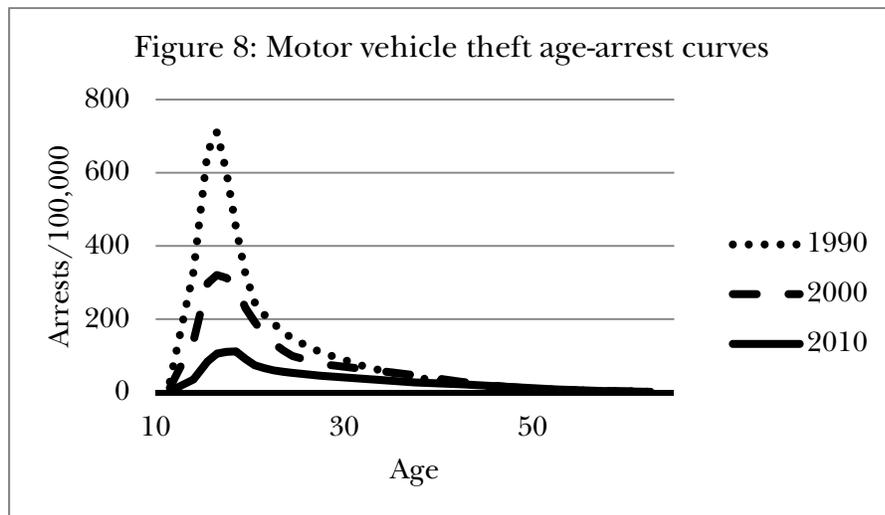
to bring him better sense. Moreover, it turns out that the common sense conviction that people tend to get wiser, or at least more mellow and thus less dangerous, as they age is supported by crime statistics.¹⁶⁵ As the following figures show, crime is a young person's game.¹⁶⁶

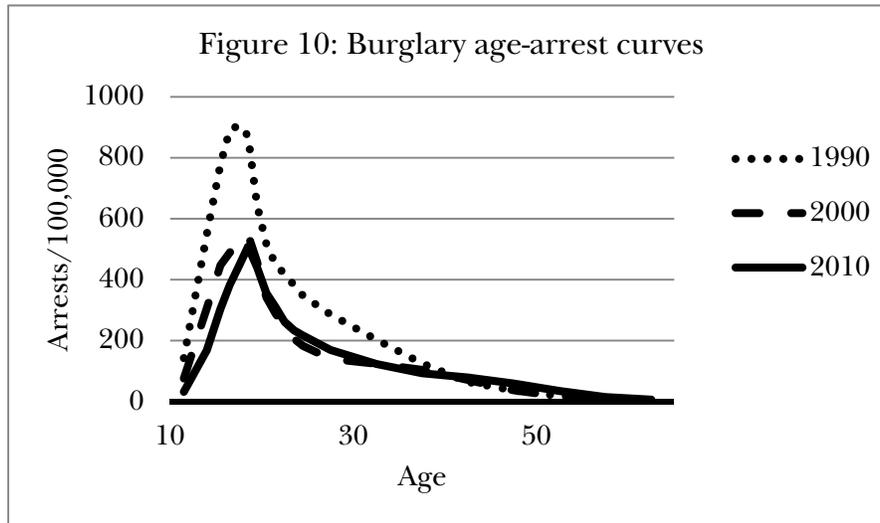


165. See CRAIG A. PERKINS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: AGE PATTERNS OF VICTIMS OF SERIOUS VIOLENT CRIME (1997), available at <http://www.bjs.gov/content/pub/pdf/apvsv.pdf>.

166. Figures 3 through 10 were recreated with data from the Bureau of Justice Statistics. HOWARD N. SNYDER, BUREAU OF JUST. STATISTICS, PATTERNS & TRENDS, ARREST IN THE UNITED STATES, 1990-2010, figs.4, 12, 16, 7, 36, 32, 44, & 24 (OCT. 2012), available at <http://www.bjs.gov/content/pub/pdf/aus9010.pdf>.







In every crime category, the probability of committing the crime peaks around the age of twenty and declines precipitously thereafter until, by the age of forty or forty-five, even the seemingly incorrigible bad guys have generally abandoned the hood life.¹⁶⁷ Yet, by 2011, fully thirty-nine percent of state and federal prisoners were age forty or older, and more than one in four was over forty-five.¹⁶⁸ And the percentage of older prisoners is growing far faster than prison populations generally. As Human Rights Watch reported in 2010: “Between 1995 and 2010, the number of state and federal prisoners age 55 or older nearly quadrupled (increasing 282 percent), while the number of all prisoners grew by less than half (increasing 42 percent).”¹⁶⁹ “There are now 124,400 prisoners age 55 or older.”¹⁷⁰ In short, to the extent that imprisonment is justified on public safety grounds, it is impossible to avoid the conclusion that the United States is holding a large and growing number of persons who present a low and progressively decreasing public safety risk.

167. *Id.*

168. CARSON & SABOL, *supra* note 78, at 7 tbl.7.

169. HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 6 (2012), available at http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0_0.pdf.

170. *Id.*

Still, even after forty, not everyone quits. The lines on the graphs in Figures 3–10 swing pretty low, but they do not drop to zero until they get to people who, like Morgan Freeman’s character, really are old men.¹⁷¹ So unless we want to afford a release opportunity to only the truly geriatric, we will be making judgments about a population some of whom are and will remain a risk to reoffend. The question is how to separate the older-and-wiser Morgan Freemans from those who are genuinely incorrigible or at least present such a high risk of serious misconduct that they should be held as long as the law permits.

This leads to the second justification for a second look at long sentences. Front-end sentencing decisions in serious cases customarily produce long sentences. In some such cases, the length of a sentence is driven by purely retributive, just deserts considerations. For example, those who commit premeditated murder are thought to deserve very long sentences.¹⁷² Kantian notions of desert require severe punishment as a moral matter.¹⁷³ Society demands that it be imposed. And society may fairly judge that the mere fact of the commission of the offense requires that the defendant suffer the full measure of prescribed punishment, regardless of whether he is likely to reoffend or reforms his character and conduct while in prison. In such a case, the judge is not asked to make a predictive judgment about whether the defendant is likely to be rehabilitated either spiritually or behaviorally.

But except with absolutely horrific crime, discretionary front-end sentencing inevitably involves some predictive elements. Is this defendant irredeemable, or might time moderate his impulses and reform his behavior? If rehabilitation is at least possible, what are the odds of achieving it? How long might it take? What conditions of confinement would best promote it? How should considerations of retributive justice be weighed with predictive crime control considerations to set sentence length?

171. *Id.*

172. See e.g., Thom Brooks, *Hegel and the Unified Theory of Punishment*, in *HEGEL’S PHILOSOPHY OF RIGHT* 103–23 (Thom Brooks ed., 2012); IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE: PART I OF THE METAPHYSICS OF MORALS* (John Ladd trans., 2d ed. 1999). For an overview of the role of Hegel and Kant in theories of retributive justice, see Edmund L. Pincoffs, *The Classical Debate*, in *THE RATIONALE OF LEGAL PUNISHMENT* 9–17 (1966).

173. See KANT, *supra* note 172, at 137–44.

Even if we want judges to consider these sorts of things, I question how useful the exercise is when undertaken exclusively at the beginning of a long sentence. The hard truth is that even the best, most attentive, sensitive judges are going to be lousy predictors of what someone, anyone, will be like ten, fifteen, or twenty years from now. The charts above describe a general trend. But it is not given to human beings to divine the future of particular persons with any certainty. The proponents of so-called evidence-based sentencing may plausibly claim to be able to use social science data to make better predictions about the future conduct of persons sharing certain characteristics than would be possible without the data.¹⁷⁴ But not even they have the hubris to guarantee the course of particular human lives decades hence. Nonetheless, it is reasonable to think that we can make a *better* judgment about how a decade or more of incarceration will shape an inmate's character if that judgment is made after all or most of the decade has passed. Hence, a second, backward, look is likely to be better at assessing how much time an inmate should serve than a single, front-end, completely predictive look.

Even if one believes that a second look would be a good thing, there remains the very tough question of whether reinstating parole where it has been abandoned or reinvigorating it where it remains would be politically doable. You may want to free Morgan Freeman. But you may also, and quite fairly, fear unleashing Willie Horton. For those too young to remember, during the 1988 presidential campaign, Democrat Michael Dukakis was derailed in part due to an infamous set of ads featuring convicted murderer Willie Horton, who had been released on a weekend prison furlough program supported by then-Massachusetts governor Dukakis and who subsequently committed a brutal rape and other crimes.¹⁷⁵ Of course, that was a furlough program,¹⁷⁶ not parole, but the point is the same.

Any second-look, parole-type program lives in the shadow of two lessons of the Willie Horton incident. First, not every old

174. See, e.g., Richard E. Redding, *Evidence-Based Sentencing: The Science of Sentencing Policy and Practice*, 1 CHAP. J. CRIM. JUST. 1, 2–3 (2009).

175. See *George Bush and Willie Horton*, N.Y. TIMES, Nov. 4, 1988, <http://www.nytimes.com/1988/11/04/opinion/george-bush-and-willie-horton.html>; *Top Ten Campaign Ads: Willie Horton*, TIME, Sept. 22, 2008, http://www.time.com/time/specials/packages/article/0,28804,1842516_1842514_1842557,00.html.

176. See N.Y. TIMES, *supra* note 175.

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con is Morgan Freeman. The prisons hold a good many unregenerate reprobates, and if you release any of them before their maximum sentence, some of them will reoffend and injure the innocent. Second, politicians will be irresistibly tempted to make hay of those incidents when they inevitably occur.

Hence, at least as a political matter, a supporter of reintroducing or reinvigorating parole would want to design the revived system in a way that minimizes the Willie Horton risk.¹⁷⁷ This perhaps cynical consideration suggests that, in theory, it might be easier to create a second look system that affected large numbers of prisoners in the federal system than in many state systems.¹⁷⁸ Why? Simply because of the differing character of the long-sentence inmate populations in state and federal prisons.

177. Michael Kinsley, *Willie Horton's Revenge*, BLOOMBERG (Jun. 17, 2012), <http://www.bloomberg.com/news/2012-06-17/willie-orton-s-revenge.html>.

178. Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, CRIM. JUST., Summer 2006, at 16.

Table 1: Composition of State and Federal Prison Populations by Crime of Conviction ¹⁷⁹	
State Prison Populations – 2010	Federal Prison Population – 2010
<ul style="list-style-type: none"> • 53% of state prisoners sentenced for violent crime <ul style="list-style-type: none"> – 14% for murder or manslaughter – 13.6% for robbery – 12% for sex assault, including rape – 10.8% for assault • 17% of prisoners sentenced for drug crime • 18% of prisoners sentenced for property crime • 10.5% of prisoners sentenced for public order crimes like drunk driving, violations of court order 	<ul style="list-style-type: none"> • 7.5% of federal prisoners sentenced for violent crime <ul style="list-style-type: none"> – 1.5% for murder or manslaughter – 4% for robbery – 2% other violent crime • 48% of prisoners sentenced for drug crime • 11.2% of prisoners sentenced for immigration offenses • 15% of prisoners sentenced for weapons violations • 5.4% of prisoners sentenced for property crime

As Table 1 illustrates, despite the common wisdom that state prisons are jammed to overflowing with nonviolent drug offenders and petty thieves, the majority of state prison inmates are serving time for violent crime.¹⁸⁰ In recent years, it has been increases in the presence of violent offenders that have driven state prison populations upward.¹⁸¹ Moreover, in state systems, it is

179. The data in Table 1 is drawn from tbls.10 & 11 of the Bureau of Justice Statistics' report, PRISONERS IN 2011. See E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUST. STAT., PRISONERS IN 2011, at 10 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

180. See HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUST. STAT., PRISONERS IN 2009, at 7 (2011), available at <http://www.bjs.gov/content/pub/pdf/p09.pdf> (noting that sixty percent of growth in state prison population from 2000 to 2008 was due to violent offenders).

181. *Id.*

the violent criminals who are most likely to be serving the really long sentences for which a second look would be most helpful.¹⁸² For example, roughly one in every ten state prison inmates is now serving a life sentence,¹⁸³ and two-thirds of these were incarcerated for homicide.¹⁸⁴ Among those serving life, nearly a third of them have no possibility of parole.¹⁸⁵ Additionally, the already impressive fraction of prison lifers does not include those sentenced to terms of years that approach or exceed normal human life expectancies,¹⁸⁶ such as a thirty-year-old prisoner sentenced to forty or more years in prison. Even among prisoners not serving actual or effective life sentences, a great many are serving ten, fifteen, or twenty-year sentences that will bar their release until late middle age or beyond.¹⁸⁷ Hence, to reintroduce or reinvigorate second-look parole mechanisms for long-sentence inmates in states that have abandoned or devalued such programs is to offer relief primarily to murderers, rapists, robbers, violent rowdies and chronic recidivists—with the concomitant risk that they will abuse the opportunity and kill, rape, rob, or assault again. That is a tough political sell.

Therefore, to broaden back-end release initiatives in the states beyond drug defendants would require focusing public attention, not on the crime the inmate committed, but on the age of the offender and the length of time he must serve before eligibility for consideration for discretionary release. Several general considerations suggest themselves.

First, a politically saleable proposal might have to exclude some types of criminal offenses. In particular, it might be very

182. *Id.* at 8.

183. See ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 6 (2009), available at http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf (reporting that in 2008, 140,610 people, or 9.5% of all prisoners, were serving life terms).

184. Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, <http://www.nytimes.com/2005/10/02/national/02life.web.html?pagewanted=all>.

185. See NELLIS & KING, *supra* note 183, at 13 (reporting that in 2008, 29% of those serving life terms were ineligible for parole).

186. *Id.* at 2.

187. *Quick Facts About the Bureau of Prisons*, FED. BUREAU OF PRISONS, <http://www.bop.gov/news/quick.jsp#3> (last visited Oct. 4, 2013) (estimating that nearly 40% of the federal prison population was sentenced ten or more years, with 20.3% sentenced ten to fifteen years, 9.3% sentenced fifteen to twenty years, and 9.9% sentenced more than twenty years but not for life).

difficult to sanction early release of homicide defendants, or at least those who personally killed the victim and were found guilty of entertaining a mental state other than negligence or recklessness.¹⁸⁸ Likewise, a good many sex crimes might have to be excluded, however suitable such defendants might be on purely objective grounds.¹⁸⁹

Second, among the population of prisoners not excluded by virtue of their offense of conviction, eligibility rules should be crafted with a close eye on the actuarial realities of recidivism, or, to speak more plainly, with the objective of releasing prisoners as quickly as possible once they have reached their late forties or early fifties and thus present a much-reduced risk to the public.

Third, principles of desert must be honored. Those convicted of very serious crimes should be obliged to serve significant terms, even if the offense occurred relatively late in life.

Fourth, a back-end discretionary release system, particularly one operated by an executive branch administrative body, must give reasonable deference to the legislative judgments embodied in statutes governing initial sentence lengths and also to the front-end sentencing authority of judges. For those serving the long terms that are the primary focus of this section, this means that they should get a second chance, but also that that chance will commonly be deferred until society's legitimate demands are met.

IV. CONCLUSION

This Article has surveyed the broad outlines of the argument for a revived system of discretionary back-end release from American prisons. I do not suggest that progress in this direction is likely to be rapid or that balancing the sometimes competing concerns raised by the issue will be simple, but I am convinced that a thoughtful parole release revival is desirable . . . and, for the first time in a long time, politically plausible.

188. See NELLIS & KING, *supra* note 183, at 2.

189. See, e.g., CENTER FOR SEX OFFENDER MANAGEMENT, EXPLORING PUBLIC AWARENESS AND ATTITUDES ABOUT SEX OFFENDER MANAGEMENT: FINDINGS FROM A NATIONAL PUBLIC OPINION POLL 2 (2010), available at <http://www.csom.org/pubs/CSOM-Exploring%20Public%20Awareness.pdf> (finding that public demands for stringent sanctions and long prison terms are influenced by a mistaken perception of high recidivism rates).